

Digital Markets and India: Demystifying the Draft DCB

Event Report

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By **Abhineet Nayyar and Isha Suri** (in alphabetical order)

The Centre for Internet and Society, India



This document summarises the proceedings of the Roundtable on the draft Digital Competition Bill (DCB) [hereinafter referred to as ‘the Roundtable’]. The Roundtable was conducted online on April 1, 2024, and included representation from academia, law, civil society, and policy organisations. The primary objective of the Roundtable was to discuss the recent report published by the Committee on Digital Competition Law (CDCL) in March 2024 along with the draft of the DCB.

The Roundtable began with a brief presentation by Abhineet Nayyar (Centre for Internet and Society - CIS) providing an overview of the various important themes identified by CIS during the course of their research. This introduction was followed by Roundtable discussions moderated by Isha Suri (CIS), focusing on important areas identified by CIS for the course of this discussion.

This summary seeks to crystallise the learnings that emanated from this Roundtable to inform the discourse and contribute to the ongoing public consultation for the draft DCB, due by April 15, 2024.

I. *Ex-ante* or *ex-post*

The initial parts of the discussion focused on the shift from a largely *ex-post* model to an *ex-ante* model to competition regulation in India. It was briefly summarised during the discussion that while the extant Competition Act of 2002 relied on *ex-post* methods to recognise anti-competitive practices, the proposed DCB adopts an *ex-ante* approach similar to what has been adopted or is being deliberated in other jurisdictions. Few participants highlighted the benefits and costs of switching from the former to the latter and highlighted specific learnings for digital markets in India, while some were sceptical of this shift towards an *ex-ante* model, given its potentially detrimental impact on MSMEs and lack of enforcement capacity in India.

The discussion began with the participants highlighting the gaps in the extant *ex-post* regulatory framework, including delayed enforcement and disposal of appeals, and its under-reliance on private enforcement techniques that increase the ecosystem’s dependence on CCI as a central node. Simultaneously, however, several participants also warned against potential issues in the *ex-ante* approach proposed under the draft DCB. While some of these concerns related to the general ineffectiveness of *ex-ante* regulations – as highlighted, for example, in data protection and broadcasting – many participants deliberated on specific sections of the draft DCB. It was also pointed out that telecom regulation does have *ex-ante* provisions to address competition concerns within the sector. One participant, for instance, highlighted the proposed bill’s wide scope and the risk it poses for an under-resourced regulatory regime.

Overall, the group emphasised the need to carefully consider the particulars of the *ex-ante* approach proposed under the draft DCB. While there was a broader consensus that this approach may address some issues with digital markets particularly, the discussion brought to the fore many concerns with how this approach is currently being articulated. In addition to the bill’s wide scope, the Roundtable also discussed the necessity for an impact assessment study to understand its effects better. Other concerns regarding the proposed

threshold values and the draft DCB's focus on 'contestable' markets were also tabled during the discussion.

II. Building Regulatory Capacity

The participants discussed existing regulatory capacity in light of the proposed *ex-ante* approach under the draft DCB. Several participants highlighted factors that currently inhibit CCI's capacity, the foremost of them being the Commission's reliance on enforcement by bureaucrats with time-bound deputations affecting continuity and sustained capacity. In the absence of professional capacity, particularly in digital markets, the wide scope proposed by the draft DCB is only likely to further test CCI's ability to deliver on its mandate. Moreover, in discussing how to build CCI's professional capacity, a participant also highlighted the risk of regulatory capture by the private sector if one were to follow a 'revolving door' approach.

Participants then delved into potential solutions for CCI's constrained capacity. In addition to staffing the Commission with subject matter experts, a participant also stated that given the political economy, it may be prudent to design the regulatory ecosystem to work around the problem of legacy issues of lack of professional capacity and independence. The participants also briefly discussed the role of impact assessment in resolving this problem, specifically by including the effect of the draft DCB on CCI's already strained capacity.

III. Proposed Threshold Values

Deliberations began with the rationale for the Threshold Values (TVs) proposed by the draft DCB. Several participants shared their reservations about the bill's reliance on international standards, especially for metrics such as market capitalisation and global turnover. Some also identified certain areas where the proposed bill seeks to identify TVs that are more relevant to the Indian market. For example, a participant highlighted that the draft DCB, in Section 3(4) chooses to identify and calculate business users and end users for each of the core digital services separately.

In addition to discussing the rationale behind TVs, many participants also suggested avenues for potential improvement. For instance, one of the participants recommended the identification of threshold values for each of the core digital services, as opposed to the current service-agnostic thresholds. It was posited that the expedited timeline of three months may have constrained the committee from recommending nuanced thresholds suited for Indian contexts since that would require market studies or commissioned (independent) research for evidence gathering and analysis.

Some participants were optimistic that the currently open consultation process may leave room for further negotiation on the prescribed TVs. This includes, among other things, identifying more representative calculation methods for arriving at appropriate values and incorporating global best practices.

IV. Remedies and Penalties

The participants sought to ascertain the effectiveness of penalties in the form of fines as a tool for deterring abusive conduct by dominant entities in general, and digital behemoths, more specifically. On one hand, some participants highlighted the lack of evidence to support the assumption that currently imposed fines deter such abuse in the market. For instance, one of the participants referred to a recent incident where the Dutch competition regulator imposed a €5 million fine for every week Apple failed to comply with an antitrust decision by the regulator. In the end, Apple had accumulated fines worth €50 million, instead of allowing dating app providers to use alternative modes of payment, ostensibly indicating how companies perceive penalties as yet another operating cost.¹

On the other hand, a few participants also underlined the need to look at ‘penalties’ as a part of a larger toolkit and not as a standalone deterrent. In this context, the draft DCB’s focus on settlements and commitments, and criminal penalisation were also highlighted by some attendees; while others pointed out the need for an institutional redesign – for example, by reviewing the current appellate process, or by potentially reintroducing the Competition Appellate Tribunal (COMPAT).

Additionally, the question of penalties led to a discussion on the calculation of the quantum of fines and the process followed therein. Stressing the need for more elaborate penalisation guidelines, one participant questioned CDCL’s choice of capping penalties at 10% of the enterprise’s global turnover, especially for industries that have comparatively higher profit margins. It was also pointed out that there is no empirical evidence suggesting the efficacy of the 10% cap, as a sufficient amount.

The discussion also briefly delved into the issue of structural remedies as a tool for correcting harms in digital markets, given the presence of strong network effects and winner-take-all outcomes. Even though there was not a deep dive into the issue of structural remedies, per se, a participant indicated that certain obligations under the DCB, such as the one on tying and bundling comprise a form of structural reform.

V. Digital Mergers and Acquisitions

Unlike the Competition Act 2002, the draft DCB explicitly excludes combination review from its scope, instead relying on the 2023 amendment to the Act. It was pointed out during the discussion that recent amendments in the merger review process such as the inclusion of deal value thresholds should check anticompetitive mergers. However, as highlighted by a few participants during the Roundtable – even though the amendment would potentially enable CCI to investigate digital M&As, the Commission would still have to rely on theories of harm established under the extant Act, which largely examines price-based effects of mergers. For instance, one participant highlighted the role of price-based assessments informing CCI’s working in many merger review cases and pointed out the limitations of these assessments in examining combinations in the digital market.

¹ <https://www.reuters.com/technology/dutch-regulator-rejects-apples-objections-against-fines-2023-10-02/>

On the other hand, many obligations identified and elaborated under the proposed DCB are, in fact, better suited to support CCI's regulation of such digital M&As. Another participant pointed out that while sections 3 and 4 of the extant Act can still, theoretically, allow CCI to borrow from the draft bill, the proposed regulatory landscape does not ensure this synergy between the two pieces of legislation.

VI. Gaps in the Consultation Process

Finally, the discussion highlighted the consultation process adopted by the CDCL during the drafting of this bill. While there was a general agreement that the process was not very representative, different participants brought up diverse perspectives. One participant, for instance, underlined the importance of including MSMEs in the drafting process, given their deep reliance on digital tools and technologies. Other attendees also echoed this viewpoint, highlighting that although the CDCL incorporated inputs from BigTech companies and industry associations, the perspectives of consumers, technology experts, and platform workers were missing from the list of stakeholders consulted during the process.

There was cautious optimism in the room that subsequent drafts of the Bill might address some of these concerns by including a diverse set of stakeholders and incorporating a bottom-up consultative process.