

COMMENTS BY CUTS INTERNATIONAL ON DRAFT DIGITAL COMPETITION BILL, 2024

Background

Ministry of Corporate Affairs published report of the Committee on Digital Competition Law, including draft Digital Competition Bill (**Bill**), in March 2024 and has sought comments from stakeholders.

CUTS International and CUTS Institute for Regulation and Competition have engaged in issues related to digital economy regulation on a regular basis. With regard to the Bill, a study on “Digital Competition Bill 2024 and its Potential Impact on Consumers in India¹” was carried.

PART A: OVERALL COMMENTS

1. Digital economy in India is rapidly growing and is expected to account for 20 percent of India’s GDP by 2026. Indian digital enterprises, startups and MSEs (micro and small enterprises) are the drivers of this growth. Indian economy is in growth phase, that means statutory mandate ought to be promotional whereas the Bill proposes to bring in restrictions on all SSDEs, including Indian digital firms. Therefore, the question of timing is important. Considering the current digital economic growth in India (specific to Indian start-ups and Indian digital enterprises), the government may consider if it is the right time to bring the ex-ante law? It is to be pondered over that if ex-ante guards in the industry were imposed 5 years ago whether the country would have experienced the UPI development.
2. Normative basis behind ex-ante law needs to be explained to provide a consistent explanation to the regulatory prescriptions in the Bill.
3. The proposed Digital Competition Bill is likely to overlap with Information Technology Act, 2000, Digital Personal Data Protection Act, 2023, Competition Act, 2002, etc. It will also share some common threads along with the proposed Digital India Act. The Bill mentions policy overlaps, it does not provide any roadmap to address the regulatory overlaps with other regulations.

Inter-governmental regulatory mechanism to set guardrails of various regulations can be initiated to address the challenges arising out of the regulatory overlap.

¹ https://circ.in/pdf/Digital_competition_bill_2024_and_its_potential_impact_on_consumers_in_india.pdf

4. Consumers play a crucial role in digital economy and it is important to note the impact of the Bill on consumers. According to a study conducted by CUIS, the provision of the proposed Bill may yield adverse impact on the user experience of using the applications².
5. Potential impact of ex-ante law on start-ups also needs to be evaluated. During the stakeholder consultations, it was brought out that startups ability to access markets including export markets rests on digital platforms. Similarly, their ability to have cost-effective customer acquisition may be adversely impacted due to excessive restrictions. Start-ups may not have effective alternative avenues to scale in a cost-effective manner without access to platforms. These challenges need to be factored in before adopting an ex-ante law.

In a not-so-mature market, these regulatory overlaps coupled with lack of regulatory capacity may enhance the cost of doing business, reduce the attractiveness of investment climate at a macro level.

At firm level, a firm's ability to curate new products or develop a new business model will be adversely impacted.

6. Potential impact of ex-ante law on investment needs to be evaluated. The investment in Indian digital enterprises and start-ups demand stability of regulatory and strict regulation might discourage investors.
7. The Bill is influenced by the EU's Digital Markets Act. However, India's initial success of digital public infrastructure (DPI) has found inadequate consideration. In fact, India's DPI or digital public infrastructure is a good example which demonstrates that digital markets can be made "contestable" without an ex-ante law. Thus, at this stage, greater efforts are required to realise to gains which could be potentially made through DPIs, rather than limiting the gains made via platforms.
8. The potential of the recently introduced "Settlement and Commitment" regime by the government has not been tested and exploited fully. Ultimately, even in the proposed Bill, remedies or compliance will emerge out of regular interactions between CCI and SSDEs. Therefore, it is recommended to allow the full play of this new regime during the next 3 years. The funds collected by the regulator under the settlement and commitment framework should be deposited in a Consumer Welfare Fund, to be used to strengthen credible civil society and grassroot organisations. These organisations can act as eyes and ears of the government and aid in early identification of harms and taking corrective actions.

² https://circ.in/pdf/Digital_competition_bill_2024_and_its_potential_impact_on_consumers_in_india.pdf

9. The design of ex-ante law is expected to demand considerable enhancement in regulatory capacity. For the successful implementation of the ex-ante law, proportionate enhancement in budgetary support to the regulator needs to be ensured.

PART B: SECTION-SPECIFIC COMMENTS

CHAPTER 1	PRELIMINARY	COMMENTS
Section 1	<p>Short title/ Commencement</p> <p>Extends to whole of India and extends to acts outside India having an effect on obligation and conduct requirements.</p> <p>Commencement: Came into force on such date as Central Government may by notification appoint.</p>	-
Section 2	<p>Definitions In this Act, unless the context otherwise requires:</p> <p>(1) “Act” means the Digital Competition Act, [2024];</p> <p>(2) “Associate digital enterprise” means an enterprise designated as such under sub-section (9) of Section 4; 152</p> <p>(3) “Business user” means any natural or legal person supplying or providing goods or services, including through Core Digital Services;</p> <p>(4) “Commission” means the Competition Commission of India established under sub-section (1) of Section 7 of the Competition Act;</p> <p>(5) “Competition Act” means the Competition Act, 2002 (12 of 2003) as amended from time to time;</p> <p>(6) “Core Digital Service” (look at DMA, DMCC) means any service specified in Schedule I of the Act;</p>	<p>Following definitions can be inserted preferably aligning the new law with the existing laws.</p> <ol style="list-style-type: none"> 1. Data 2. Algorithms

	<p>(7) “Director General” shall have the same meaning assigned to it under the Competition Act;</p> <p>(8) “End user” means any natural or legal person using Core Digital Services other than as a business user;</p> <p>(9) “Enterprise” means a person or department of the Government, including units, divisions, subsidiaries, who or which is, or has been, engaged in any economic activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space; Explanation.— For the purposes of this clause, —</p> <p>(a) “activity” includes profession or occupation; (b) “article” includes a new article and “service” includes a new service; (c) “unit” or “division”, in relation to an enterprise, includes (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the</p>	
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	<p>provision of any service; (iii) any place of business of the enterprise. 153</p> <p>(10) “Group” shall have the same meaning as assigned to it under the Competition Act;</p> <p>(11) “Person” shall have the same meaning as assigned to it under the Competition Act;</p> <p>(12) “Prescribed” means prescribed by rules made under this Act;</p> <p>(13) “Regulations” means the regulations made by the Commission under Section 49;</p> <p>(14) “Related party” shall have the same meaning as assigned to it in Section 2(76) of the Companies Act, 2013 (18 of 2013);</p> <p>(15) “Service” means service of any description which is or may be made available to actual or potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information, and advertising, for a consideration or otherwise;</p> <p>(16) “Specified” means specified by regulations made under this Act;</p> <p>(17) “Systemically Significant Digital Enterprise” means an enterprise designated as such by the Commission under Section 4 of the Act;</p>	
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	<p>(18) “Trade” means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services; and</p> <p>(19) “Users” includes business users and end users.</p> <p>(20) Any term not defined specifically in this Act shall have the same meaning as assigned to it in the Competition Act.</p>	
<p>CHAPTER II</p>	<p>Designation of Systemically Significant Digital enterprise “SSDE”:</p>	
<p>Section 3</p>	<p>Systemically Significant Digital enterprises</p> <p>For an enterprise to be designated as SSDE following thresholds to be met for preceding three financial years):</p> <p>Financial Threshold: Turnover in India: 4000 Crore INR or more Global turnover: 30 billion USD or more</p> <p>Gross Merchandise Value: 16000 Crore or more OR Global market capitalisation: USD 75 Billion or more</p> <p>AND</p> <p>User Threshold: For core digital services provided by the enterprise: 1 crore end users OR 10,000 business users</p> <p>Power of Commission to designate an enterprise as SSDE in respect of core digital service, even if it does not meet the threshold.</p>	<ul style="list-style-type: none"> • Need to relook at the market in the Indian context and not global context - in terms of market cap, revenue and user thresholds. <p>Threshold should capture the enterprise and not the group. It is important to consider that any enterprise might be significant in terms of size, but systemically insignificant and vice versa. Therefore, it is recommended to realign the criteria to capture systemically significant enterprises.</p> <ul style="list-style-type: none"> • A dipstick study carried out by CUTS revealed that at least 13 Indian digital firms will be covered under the existing SSDE thresholds³.

³ https://circ.in/pdf/Digital_competition_bill_2024_and_its_potential_impact_on_consumers_in_india.pdf

	<p>The commission decision will be based on enterprise presence in market and following factors:</p> <p>(i) volume of commerce of the enterprise; (ii) size and resources of the enterprise; (iii) number of business users or end users of the enterprise; (iv) economic power of the enterprise; (v) integration or inter-linkages of the enterprise with regard to the multiple sides of market; (vi) dependence of end users or business users on the enterprise; (vii) monopoly position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (viii) barriers to entry or expansion including regulatory barriers, financial risk, high cost of entry, marketing costs, technical entry barriers, barriers related to data leveraging, economies of scale and scope, high cost of substitutable goods or services for end users or business users; (ix) extent of business user or end user lock in, including switching costs and behavioural bias impacting their ability to switch or multi-home; (x) network effects and data driven advantages; (xi) scale and scope of the activities of the enterprise; (xii) countervailing buying power; (xiii) structural business or service characteristics; (xiv) social obligations and social costs; (xv) market structure and size of the market; and (xvi) any other factor which the Commission may consider relevant for the assessment.</p>	
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	The threshold will be revised after every three years from the date of commencement of this Act.	
Section 4	Self-reporting obligation and designation	-
	<ul style="list-style-type: none"> • Enterprise has to notify to the commission within 90 days of meeting the threshold that it qualifies as SSDE in respect of one or more core digital services. • The commission can direct an enterprise to furnish information to ascertain whether the said enterprise qualifies as SSDE at anytime after the expiry of 90 days from the date of section 3 coming into force. • The commission, upon receiving of the information, can designate the enterprise as SSDE and direct the enterprise to show cause as to why penalties may not be imposed on it. The commission can pass such order if it is of the view that enterprise meets the ‘financial’ and ‘user’ threshold. • The commission, upon receiving of the information, can designate the enterprise as SSDE and direct the enterprise to show cause as to why penalties may not be imposed on it. The commission can pass such order if it is of the view that 	-

	<p>enterprise meets the factors set out in section 3(3).</p> <ul style="list-style-type: none"> • Enterprise to be designated as SSDE for a period of three years. • The commission can designate an enterprise which is the part of SSDE and is providing core digital services as Associate Digital enterprise. 	
Section 5	Anti-circumvention from Designation	-
	An enterprise cannot directly or indirectly segment, divide, subdivide the services through any means in order to circumvent the threshold.	-
Section 6	Revocation of re-designation	-
	<ul style="list-style-type: none"> • SSDE may at anytime during the last six months before the expiry of the period of designation apply to the Commission that it no longer meets the threshold to be designated as SSDE for one or more core digital services. • At anytime after one year of being designated or re-designated, the SSDE can request for revocation of designation, if there is a significant change in the market dynamics. • The commission within 90 days after receiving the application have to either revoke the status or dismiss the application. • Time taken by enterprise to reply to the information 	-

	sought by commission will be excluded while calculating the 90 days period.	
CHAPTER III	Obligations of SSDE and their ADE	-
Section 7	<ul style="list-style-type: none"> • SSSDE shall comply with the obligation of this chapter • ADE shall comply with the obligation of this chapter • Separate conduct for each core digital services to be specified separately by regulation (both for SSDE and ADE) • SSDE and ADE: if comply with the regulation for its identified core digital service shall be deemed to have complied with the obligation. • Factors to be considered by Commission while framing regulation for SSDE and ADE <ul style="list-style-type: none"> (a) economic viability of operations; (b) prevention of fraud; (c) cybersecurity; (d) prevention of unlawful infringement of pre-existing intellectual property rights; (e) requirement of any other law in force; and (f) such other factors as may be prescribed. 	-
Section 8	Anti-circumvention from obligation	-
	<ul style="list-style-type: none"> • SSDE shall not engage in any behaviour that undermines effective compliance with 	-

	<p>obligations and regulations framed thereunder.</p> <ul style="list-style-type: none"> • SSDE cannot prevent business users or end users from raising any issue of non-compliance with SSDE’s obligations 	
Section 9	Reporting and compliance	-
	<ul style="list-style-type: none"> • SSDE to establish transparent and effective complaint handling mechanism • SSDE to report to the commission the measures it took to comply with the obligations and the regulations framed 	-
Section 10	Fair and transparent dealing	
	A Systemically Significant Digital Enterprise shall operate in a fair, non-discriminatory, and transparent manner with end users and business users.	In the proviso certain illustration may be added to this section to make clear the terminology of fairness, transparency and non-discrimination.
Section 11	Self-preferencing	
	SSDE shall not, directly or indirectly, favour its own products, services, or lines of business, or those of: (a) related parties; or (b) third-parties with whom the Systemically Significant Digital Enterprise has arrangements for the manufacture and sale of products or provision of services over those offered by third party business users on the Core Digital Service, in any manner.	-
Section 12	Data Usage	
	<p>SSDE shall not use non-public data of business users operating on its core digital platform to compete with such business users</p> <p>SSDE cannot without consent of end users or business users</p>	<p>The impact of data usage on end users (Consumers and small businesses) needs to be studied.</p> <p>For instance, a study titled “A Survey-Based Assessment of the Impact of the Draft Digital Competition Bill,</p>

	<p>(a) intermix or cross use the personal data of end users or business users collected from different services including its Core Digital Service; or (b) permit usage of such data by any third party.</p> <p>SSDE have to allow business users and end users of its Core Digital Services to easily port their data in a manner as may be prescribed.</p>	<p>2024 On MSMEs In India” pointed that MSMEs rely on targeted advertisement for revenue generation, customer acquisition, time saving and efficiencies and the ability to compete in the market⁴.</p> <p>A study carried out by CIRC titled Digital Competition Bill, 2024 and its potential impact on consumers in India mentioned that frequent consent pop-ups would have a negative impact on consumers experience of using the application⁵. Similarly, seamlessness will be compromised once the designated SSDEs are required to unbundle the apps or services.</p>
Section 13	Restricting third party applications	-
	SSDE shall not (a) not restrict or impede the ability of end users and business users to download, install, operate or use third-party applications or other software on its Core Digital Services; and (b) allow end users and business users to choose, set and change default settings.	-
Section 14	Anti-steering	
	SSDE cannot restrict communication between end users and business users unless such restrictions are integral to the provision of core digital service of SSDE What is “integral” have to be specified by Commission through regulation.	Basic principles regarding what is integral could be defined in the Act itself.
Section 15	Tying and bundling	A study “A Survey-Based Assessment of the Impact of the Draft Digital

⁴<https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/66064be16caf107df12c6e1f/1711688684866/Esya+Centre+Report+-+A+Survey-Based+Assessment+of+the+Impact+of+the+Draft+Digital+Competition+Bill+2024+on+MSMEs+in+India.pdf>

⁵ https://circ.in/pdf/Digital_competition_bill_2024_and_its_potential_impact_on_consumers_in_india.pdf

		<p>Competition Bill, 2024 On MSMEs In India” mentioned that unbundling of products and services in digital markets and serving them ala-carte is problematic for business users (MSME’s) ⁶</p> <p>A study carried out by CIRC titled Digital Competition Bill, 2024 and its potential impact on consumers in India” mentioned that Integrated products and services generate better user experience and any attempt to disintegrate product, unbundling them might have implications on convenience, price and user experience and it will increase the cost of the products⁷</p> <p>Bundled products need to be observed closely, specifically in search engine market, free search cannot be provided without bundling it with advertisements.</p> <p>Many existing tying and bundling services currently available and that may be pro-competitive effects will become illegal under provisions of the Bill.</p>
CHAPTER IV	POWER OF THE COMMISSION TO CONDUCT AN INQUIRY	
Section 16	Power of the Commission to inquire into non-compliance of obligations by Systemically Significant Digital Enterprises and Associate Digital Enterprises	The Bill envisages various functions such as regulation making, addition to the list of core digital services, framing conduct requirements, investigations,

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<https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/66064be16caf107df12c6e1f/1711688684866/Esya+Centre+Report+-+A+Survey-Based+Assessment+of+the+Impact+of+the+Draft+Digital+Competition+Bill+2024+on+MSMEs+in+India.pdf>

⁷https://circ.in/pdf/Digital_competition_bill_2024_and_its_potential_impact_on_consumers_in_india.pdf

		<p>adjudication of matters etc will be performed by CCI.</p> <p>The government may consider giving adequate time and creating adequate regulatory capacity before commencing the enforcement of the law.</p>
Section 17	Orders of the Commission after inquiry	-
Section 18	Settlement	-
Section 19	Commitment	-
Section 20	Revocation of orders on settlements and commitments	-
CHAPTER V	POWERS OF THE COMMISSION AND DIRECTOR GENERAL	
Section 21	<p>Power of the Commission to regulate its own procedure and conduct studies</p> <p>(1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice, and subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure. (2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters: (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; 170 (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; (e) requisitioning,</p>	

	<p>subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office. (3) The Commission may call upon such experts, from the fields of economics, law, technology, regulation, accountancy, commerce, international trade, or from any other discipline or conduct such studies as it deems necessary to assist the Commission in the discharge of its functions under this Act, including for specifying regulations with regard to obligations under Section 7. (4) The Commission may direct any person: (a) to produce before the Director General or the Secretary or an officer authorised by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act; (b) to furnish to the Director General or the Secretary or any other officer authorized by it, any relevant information relating to their products or services or areas of expertise, as may be required for the purposes of this Act. Explanation. — For the purposes of this section, the term “document” includes information in the possession of a Systemically Significant Digital Enterprise and its Associate Digital Enterprise whether stored electronically or</p>	
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	otherwise. (5) Subject to the provisions of this Act, Sections 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 22 and 35 of the Competition Act, and the regulations framed thereunder, shall apply mutatis mutandis to the Commission's powers and activities under this Act	
Section 22	Reference by Statutory Authority	-
Section 23	Reference by Commission	-
Section 24	Director General to Investigate Contraventions	A separate Digital Market Unit (DMU) within CCI needs to be constituted to assist the Director General in carrying out this work. The unit needs to have a manpower plan with the required competencies.
Section 25	Interim order	-
Section 26	Acts taking place outside India	-
Section 27	Contravention of orders of Commission	-
Section 28	Penalties	-
Section 29	Contravention by Companies	-
Section 30	Limitation Period for initiation of inquiry	-
Section 31	Crediting sums realised by way of penalties to Consolidated Fund of India	-
Section 32	Rectification of orders	-
Section 33	Execution of orders of Commission imposing monetary penalty	-
CHAPTER VII	APPEALS AND POWERS OF APPELLATE TRIBUNAL	
Section 34	Appeal to Appellate Tribunal	-
Section 35	Awarding Compensation	-
Section 36	Procedures and powers of Appellate Tribunal	-
Section 37	Appeal to Supreme Court	-
Section 38	Power of the Central Government to exempt enterprises	-

Section 39	Power of Central Government to issue directions	-
Section 40	Power of Central Government to supersede Commission	-
Section 41	Restriction on disclosure of information	-
Section 42	Chairperson, Members, Director General, Secretary, officers and other employees, etc., to be public servants	-
Section 43	Protection of action taken in good faith	-
Section 44	Act to have overriding effect	-
Section 45	Application of other laws not barred	-
Section 46	Exclusion of jurisdiction of civil courts	-
Section 47	Power to seek recommendations	-
Section 48	Power to make rules	-
Section 49	Power to make regulations and process of issuing regulations	-
Section 50	Power to issue guidelines	-
Section 51	Power of the Central Government to notify and amend Schedules	-
Section 52	Finance, Accounts and Audit	-
Section 53	Power to remove difficulties	-
SCHEDULE I	A “Core Digital Service” includes any of the following: (a) online search engines; (b) online social networking services; (c) video-sharing platform services; (d) interpersonal communications services; (e) operating systems; (f) web browsers; (g) cloud services; (h) advertising services; and (i) online intermediation services.	<ul style="list-style-type: none"> • The definition of online intermediation service is open ended and creates uncertainty within the startup ecosystem. • The action needs to be targeted on those services that pose competition concern. A broad focus will challenge innovation.