

**Report
of the
Committee on Digital Competition Law**



सत्यमेव जयते

Ministry of Corporate Affairs
Government of India

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REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW - 2024

New Delhi, 27 February, 2024

To,

The Hon'ble Union Minister of Finance and Corporate Affairs

Madam,

We have the privilege and honour to present this report of the “**Committee on Digital Competition Law**” which was set up on 6th February 2023 to examine the need for an *ex-ante* regulatory mechanism for digital markets in India. The Committee was tasked with the responsibility of reviewing the current provisions of the Competition Act, 2002; assessing whether they are sufficient to deal with challenges that have emerged from the digital economy; and evaluating whether a separate legislation to regulate digital markets is needed.

2. The Committee had the benefit of diverse views from various organisations such as industry chambers, Government Departments / Ministries, and experts of various disciplines especially in law, policy, economics, and other stakeholders.

3. The Committee has made a sincere effort to take a holistic and comprehensive view while examining the need for a separate digital competition law, bearing in mind the inherent peculiarities of digital markets vis-à-vis traditional markets as well as a wide range of stakeholder concerns. The Report seeks to address the issues that are or may potentially become concerns in the anti-trust regime in the context of digital markets.

4. We thank you for providing us an opportunity to present our views on a new digital competition law in India and related matters.

Yours sincerely,

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Chairperson

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Member

Dr. Saurabh
Srivastava
Member

Dr. Aditya
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Shri Anand S. Pathak
Member

Shri Rahul Rai
Member

Shri Manoj Pandey
Member Secretary

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REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW

PREFACE

Widespread adoption of technology and rapid growth of digital businesses have had a significant impact on the Indian society and the economy. Digitalisation has fundamentally changed the way consumers interact with each other and with providers of goods and services.

Digitalisation may have several pro-competitive benefits. Market contestability and fair practices encourage innovation and the creation of new products and services. A robust governance framework is, however, needed to support an orderly expansion of the digital ecosystem and address potential anti-competitive harm.

The current *ex-post* framework under the Competition Act, 2002 was conceived with a view to ensuring contestability and fairness in traditional markets, at a time when it was not possible to imagine the current scale of digitalisation. Certain aspects of the *ex-post* framework, including the time-consuming nature of enforcement proceedings, may not be appropriate for digital markets, given the unique characteristics of such markets. Recent times have also seen widespread stakeholder concerns about potential anti-competitive behaviour of large enterprises providing digital services.

In this backdrop, the Committee on Digital Competition Law was constituted by the Ministry of Corporate Affairs to review the existing regime under the Competition Act, 2002 and to evaluate the need for an *ex-ante* competition framework for digital markets in India. The Committee held consultations with key stakeholders and examined both the domestic legal framework and the international regulatory practices for regulation of digital services.

The Committee observes that the current *ex-post* framework under the Competition Act, 2002 needs to be supplemented to better address concerns related to alleged anti-competitive practices of large digital enterprises. The Committee recommends that *ex-ante* measures be introduced to complement the current *ex-post* framework by identifying large digital enterprises with a 'significant presence' in India in selected 'core digital services' and setting pre-determined rules for their conduct. Since digital markets are dynamic in nature, timely intervention is necessary to prevent anti-competitive conduct. A set of appropriately designed *ex-ante* measures can help the CCI in making a timely and effective intervention before the market irremediably tips.

The Committee also observes that such *de novo ex-ante* framework should be implemented in a manner that does not hinder opportunities and incentives for innovation for small enterprises, and that such enterprises are not burdened with additional compliance obligations. The Committee recommends that the CCI's capacity for technical regulation in digital markets should be strengthened, and a mechanism for inter-regulatory consultation be implemented.

We hope that this Report will help in building a broad consensus and understanding among different stakeholders and assist in designing a robust and effective framework for ensuring fair competition in the provision of core digital services in India.

Dr. Manoj Govil
Secretary, Ministry of Corporate Affairs, and
Chairperson, Committee on Digital Competition Law
New Delhi, 27 February, 2024

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ACKNOWLEDGEMENTS

The Committee takes this opportunity to thank all its stakeholders who provided insightful comments and suggestions and made presentations before the Committee on the requirement for a separate Digital Competition Act. The Committee would also like to thank the industry representatives, law firms, academicians, and other experts who made their valuable suggestions on various issues including the need for the introduction of an *ex-ante* regulatory framework for digital markets in India.

The Committee expresses gratitude to Dr. Saurabh Srivastava, Dr. Aditya Bhattarcharjea, Shri Harsha Vardhana Singh, Ms. Pallavi Shardul Shroff, Shri Anand S. Pathak, Shri Rahul Rai, Shri Haigreave Khaitan, Ms. Shweta Shroff Chopra, and Ms. Nitika Dwivedi for providing a structured framework for the Committee's discussions and helping in the shaping of the Report. In addition to the members of the Working Groups, the Committee benefitted immensely from the contributions made by special invitees to the Committee. The Committee would like to express its gratitude towards Shri Pankaj Jalote, ex-Director, IIT, Delhi, fellow of Institute of Electrical and Electronics Engineers and Indian National Academy of Engineering, Dr. M.S. Sahoo, ex-member, Competition Commission of India and ex-Chairperson, Insolvency and Bankruptcy Board of India, Shri Amit Agrawal, the then Additional Secretary, MeitY, Shri Ishtiyaque Ahmed, Sr. Adviser, NITI Aayog, Shri Darpan Jain, Joint Secretary, Department of Commerce, Shri Rajeev Saksena, Joint Secretary, Department of Economic Affairs, Shri Anupam Mishra, Joint Secretary, Department of Consumer Affairs and Ms. Manmeet K. Nanda, the then Joint Secretary, Department of Promotion of Industry & Internal Trade.

The Committee would like to specially place on record its appreciation for the expertise, leadership, and support demonstrated by the Competition Commission of India under the able leadership of its Chairperson, Ms. Ravneet Kaur and its members. The Committee would like to place on record the valuable contribution made by the officers of the Competition Commission of India - Ms. Jyoti Jindgar Bhanot, Advisor, Dr. Bidyadhar Majhi, Advisor, Dr. Payal Malik and Shri Manish Mohan Govil, ex-Advisors, Ms. Sayanti Chakrabarti, Director, and Shri Sachin Goyal and Ms. Bhawna Gulati, Joint Directors.

The Committee appreciates the valuable contribution of the team from Vidhi Centre for Legal Policy comprising Ms. Manjushree RM, Mr. Dhruv Somayajula, Ms. Anuradha Bhattacharya, Ms. Vallari Dronamraju, Ms. Meha Chandra, and Ms. Urvi

Pathak in the review process by participation in the meetings for deliberation on legal issues and conducting legal research, which was very useful to the Committee.

The Committee would like to make a special mention of the dedicated efforts put in by the team of officers of the Competition Division at the MCA comprising Shri Rajiv Shankar, Director, Shri Manoj Kumar, Under Secretary, Shri Harsha N. Hedao, Ex-Under Secretary, Shri Bal Mukund Kumar, Section Officer, Shri Dinesh Kumar, ex-Assistant Section Officer, and Shri Himanshu Sindhvani and Ms. Mansi Verma, Young Professionals for collating suggestions, facilitating discussions, and providing administrative and technical support for smooth functioning of the Committee.

Shri Manoj Pandey
Additional Secretary, Ministry of Corporate Affairs, and
Member-Secretary, Committee on Digital Competition Law
New Delhi, 27 February, 2024

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EXECUTIVE SUMMARY

The Competition Act, 2002 (Competition Act) primarily envisages an *ex-post* framework of intervention wherein the Competition Commission of India (CCI) intervenes *after the occurrence of an anti-competitive conduct*. Such a framework was designed at a time when the extent and pace of digitalisation as is witnessed today could not be foreseen.

India has seen rapid digitalisation in the recent past owing to internet accessibility. With more than 759 million reported active internet users, India has swiftly become home to large digital market segments catering to users across sectors such as healthcare, financial services, and retail. The growth of digital markets has also given rise to large digital enterprises, which often operate as platforms that provide services on multiple sides of a market.

Large digital enterprises and their unique business models have prompted a variety of anti-competitive concerns that have been brought forth before the CCI. These include unilateral and opaque policies on search rankings, and anti-competitive usage of aggregated data.

Against this backdrop, the Parliamentary Standing Committee on Finance presented the 53rd Report on “**Anti-Competitive Practices by Big Tech Companies**” before the Lok Sabha on 22nd December 2022 (Standing Committee Report).

The Standing Committee Report identified ten predominant anti-competitive practices (ACPs) by large digital enterprises and examined the need for strengthening India’s competition framework to address such practices. The Standing Committee Report acknowledged that the dynamics of digital markets are underpinned by robust network effects and increasing returns to scale. This often leads to a ‘winner-takes-most’ outcome where a leading player adopts strategies that curtail market contestability, which reinforces its strength. As such, digital markets bear the risk of becoming irreversibly polarised in favour of the incumbent.

The Standing Committee Report also observed that an *ex-post* approach may not be sufficient to remedy such conducts in fast-paced digital markets. It recommended that the behaviour of large digital enterprises should be monitored *ex-ante*, with an emphasis on *preventing such anti-competitive conducts from occurring*. It further recommended the introduction of a ‘Digital Competition Act’ to create a fair, transparent, and contestable digital ecosystem.

Following the Standing Committee Report's recommendation, the Ministry of Corporate Affairs constituted the Committee on Digital Competition Law (Committee) to *inter alia* review whether existing provisions in the Competition Act are sufficient to address the challenges in the digital economy and to examine whether an *ex-ante* digital competition law is required.

During its deliberations, the Committee took note of the enforcement practice of the CCI; the recommendations put forth in the Standing Committee Report; and the submissions it received from stakeholders on the need for an *ex-ante* competition framework for digital markets. The Committee further examined various sector-specific regulatory instruments that govern digital enterprises in India, and emerging international practices on *ex-ante* competition frameworks.

The Committee found that the *ex-post* model of regulation under the Competition Act, by design, involves fact-finding and inquiry processes which are time-consuming. Protracted enforcement proceedings hinder early detection and redressal. Given the tendency of digital markets to tip swiftly in favour of an incumbent, the Committee recommended a regulatory strategy focussed on *preventing* anti-competitive conducts.

The key recommendations of the Committee are outlined below:

- (i) **Introduction of a Digital Competition Act with ex-ante measures:** The Committee recommends the introduction of an *ex-ante* legislation specifically applicable to large digital enterprises, to supplement the Competition Act. Such an *ex-ante* law should ensure that behaviours of large digital enterprises are proactively monitored, and that the CCI intervenes *before* instances of anti-competitive conduct transpire. A draft of the legislation (Draft DCB) as prepared and deliberated upon extensively by the Committee is enclosed as Annexure IV.
- (ii) **Scope and applicability:** The Committee proposes that the Draft DCB should apply to a pre-identified list of Core Digital Services that are susceptible to concentration. The Committee recommends that this list is drawn up basis the CCI's enforcement experience, market studies, and emerging global practices. Keeping in mind the pace at which digital markets are progressing, such a list is proposed as a Schedule to the Draft DCB in order to allow timely updations by the Central Government.

- (iii) **Regulation of digital enterprises with ‘significant presence’**: The Committee recommends that the Draft DCB should only regulate enterprises which have a ‘significant presence’ in the provision of a Core Digital Service in India and the ability to influence the Indian digital market. The Committee recommends designating such enterprises as “**Systemically Significant Digital Enterprises**” (SSDEs).
- (iv) **Thresholds and criteria for designation as SSDEs**: An enterprise is deemed an SSDE if it passes a twin test demonstrating ‘significant presence’: (a) the ‘significant financial strength’ test which comprises quantitative proxies of economic power, i.e. India-specific turnover, global turnover, global market capitalisation, and gross merchandise value; and (b) the ‘significant spread’ test which evaluates the extent to which an enterprise has been present in the provision of a Core Digital Service in India on the basis of the number of end-users and business users. The Draft DCB obligates enterprises to self-assess their fulfilment of these thresholds and report the same to the CCI. Additionally, the Draft DCB envisages residuary powers for designation in the form of ‘qualitative’ criteria for designating certain enterprises as SSDEs that do not meet the quantitative thresholds but nonetheless have the ability to significantly influence the market in which they operate.
- (v) **Associate Digital Enterprises**: The Committee recommends that in cases where enterprises providing Core Digital Services are part of a group, designation may not be limited to just one enterprise in the group. Depending on the involvement of different enterprises within the group in providing a Core Digital Service, the Committee envisages two scenarios: *first*, where the holding enterprise is designated as an SSDE and other enterprises within the group, directly or indirectly involved in provision of the same Core Digital Services, are designated as Associate Digital Enterprises to the SSDE (ADEs); and *second*, a non-holding enterprise most directly involved in providing the Core Digital Service is designated as an SSDE and its holding enterprise and other group entities directly or indirectly involved in providing the same Core Digital Services are designated as its ADEs. In this regard, the Committee recommends that the CCI be given flexibility to identify the appropriate enterprises for SSDE and ADE designations.
- (vi) **Obligations**: The Committee recommends an agile and principle-based framework of *ex-ante* obligations under the Draft DCB. The specificities of the obligations as applicable to each Core Digital Service would be specified through regulations drafted by the CCI through a consultative process. The

Committee, cognisant that not all SSDEs and ADEs providing the same Core Digital Service have the same degree of influence on the market within which they operate, recommends that the regulations may provide for differential obligations upon different SSDEs and ADEs depending on factors such as their business models and size of their user base.

- (vii) **Exemptions:** The Committee recommends that the grounds for exemption from complying with the *ex-ante* obligations should be provided for in the statute itself. The features of such exemptions should be specified through regulations framed by the CCI, taking into account the particular Core Digital Service and related business models of SSDEs and their ADEs. The Committee also recommends including a provision similar to Section 54 of the Competition Act exempting certain classes of enterprises from the applicability of the statute.
- (viii) **Enforcement:** The Committee recommends borrowing the procedural framework from the Competition Act for the purposes of the Draft DCB, given that the enforcement of both these laws is to be entrusted with the CCI. The Committee also strongly advises that the CCI must strengthen the capacity of its Digital Markets and Data Unit with experts from the field of technology to keep pace with the rapid evolution of digital markets. Further, the Committee recommends instituting a separate bench within the National Company Law Appellate Tribunal to ensure timely disposal of appeals filed against the CCI's orders, particularly those relating to digital markets.
- (ix) **Remedies:** The Committee proposes that a monetary penalty for non-compliance with *ex-ante* obligations is restricted to a maximum of 10% of the global turnover of the SSDE in line with the penalty regime under the Competition Act. Additionally, in cases where the SSDE is part of a group of enterprises, the Committee recommends that the 'global turnover' cap is calculated in relation to the turnover of the entire group. The Committee further recommends that the precise quantum of penalty be determined by the CCI with due regard to the penalty guidelines under the Draft DCB. In addition to the above, separate penalties have been provided for contraventions resulting from incorrect reporting and vicarious liability of key managerial persons.

ABBREVIATIONS

5th DPSI Report	Fifth interim report under the Digital Platform Services Inquiry
6th DPSI Report	Sixth interim report under the Digital Platform Services Inquiry
7th DPSI Report	Seventh interim report under the Digital Platform Services Inquiry
9th Amendment	9 th amendment to the Act Against Restraint of Competition, 1958
10th Amendment	10 th amendment to the Act Against Restraint of Competition, 1958
11th Amendment	11 th amendment to the Act Against Restraint of Competition, 1958
ACCC	Australian Competition and Consumer Commission
ACP	Anti-competitive practice identified in the Standing Committee Report
AICO	American Innovation and Choice Online Act
AML	Anti-Monopoly Law, 2007
App-Store Act	Amendments to the South Korean Telecommunications Business Act, 2011
ARC	Act Against Restraint of Competition, 1958
Bargaining Code	Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act, 2021
CA-04	Competition Act, 2004
CA-98	Competition Act, 1998
Canada Bureau	Competition Bureau of Canada
Canadian Competition Act	Competition Act, 1985
CCA	Competition and Consumer Act, 2010
CCI	Competition Commission of India
CDCL / Committee	Committee on Digital Competition Law
Clayton Act	Clayton Act, 1914
CLRC	Competition Law Review Committee
CLRC Report	Report submitted by the CLRC in 2019
Competition Act	Competition Act, 2002
CMA	Competition and Markets Authority

CPA 2019	Consumer Protection Act, 2019
CRTC	Canadian Radio-television and Telecommunications Commission
DG COMP	European Commission's department for competition
DG CONNECT	European Commission's department for tech policy
DMA	Digital Markets Act, 2022
DMCC	Digital Markets, Competition and Consumers Bill, 2023
DMDU	Digital Markets and Data Unit
DMU	Digital Markets Unit
DOJ	US Department of Justice
DPSI	Digital Platform Services Inquiry
Draft Classification Guidelines	Classification and Grading of Internet Platforms
Draft DCB	Draft Digital Competition Bill, 2023
Draft NDGFP	Draft National Data Governance Framework Policy
Draft Responsibility Guidelines	Guidelines to Implementing Subject Responsibility for Internet Platforms
E-Commerce Rules, 2020	Consumer Protection (E-Commerce) Rules, 2020
EC	European Commission
ECMR	Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation)
EPM	Ending Platform Monopolies Act
EU	European Union
EU P2B Regulation	Regulation on Platform-to-Business Relations, 2019
FCO	<i>Bundeskartellamt</i> or the Federal Cartel Office
FDI	Foreign direct investment
FDI Policy	Foreign Direct Investment Policy and Foreign Exchange Management (Non-debt Instruments) Rules, 2019
FTA	Fair Trade Act
FTC	Federal Trade Commission
FTCA	Federal Trade Commission Act, 1914

Furman Committee	Digital Competition Expert Panel headed by Professor Jason Furman
GDPR	General Data Protection Regulation, 2016
GMV	Gross Merchandise Value
HJC Subcommittee	House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law
IDMO	India Data Management Office
IT Rules	Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
Japan Anti-monopoly Act	Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, 1947
Japan Ministerial Ordinance or JMO	Ordinance No. 1 in 2021 published by the Ministry of Economy, Trade and Industry
KCC	Korea Communications Commission
KFTC	Korea Fair Trade Commission
MCA	Ministry of Corporate Affairs
MeitY	Ministry of Electronics and Information Technology
METI	Ministry of Economy, Trade and Industry
MRFTA	Monopoly Regulation and Fair Trade Act, 1980
MRTP Act	Monopolies and Restrictive Trade Practices Act, 1969
NCLAT	National Company Law Appellate Tribunal
NIICS	Number-independent interpersonal communication services
NPCI	National Payments Corporation of India
NPCI UPI Guidelines	Guidelines on volume cap for Third Party App Providers (TPAPs) in UPI' issued by the National Payments Corporation of India
OAM	Open App Markets Act
OS	Operating system
PCI	Pro-Competition Intervention
Platform Guidelines	Anti-Monopoly Guidelines for the Platform Economy, 2021
PPI	Prepaid payment instrument
PSCAM	Paramount significance for competition across markets
PSP	Payment service provider

Raghavan Committee	High-Level Committee on Competition Policy and Law chaired by Mr. S.V.S Raghavan in 1999
Raghavan Committee Report	Report submitted by the Raghavan Committee in 2000
Review Guidelines	Review Guidelines for Regulations Against Abuse of Dominance and Unfair Trade Practice by Online Platform Businesses
RBI	Reserve Bank of India
RBI PPI Master Direction	Reserve Bank of India Master Directions on Prepaid Payment Instruments, 2021
Report	Report of the Committee on Digital Competition Law
SDP Guidelines	Guidelines on Measures to be Taken by Specified Digital Platform Providers to Promote Mutual Understanding in Transactional Relationships with User Providers of Goods, etc., 2021
Sherman Act	Sherman Act, 1890
SIDI	Systemically Important Digital Intermediary
SMS	Strategic Market Status
SPDI Rules	Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011
SSDE	Systemically Significant Digital Enterprise
Standing Committee Report	53 rd Report on 'Anti-Competitive Practices by Big Tech Companies' presented by the Parliamentary Standing Committee on Finance before the Lok Sabha on 22 nd December 2022
Telecommunications Business Act	South Korean Telecommunications Business Act, 2011
TFDP Act	Act on Improving Transparency and Fairness of Digital Platforms, 2020
TFEU	Treaty on the Functioning of the European Union, 2012
TFTC	(Taiwan) Fair Trade Commission
TPAP	Third party app provider
UK	United Kingdom
UK DMU	Digital Markets Unit sought to be housed within the Competition and Markets Authority in the UK
UPI	Unified Payments Interface

USA	The United States of America
White House Executive Order	'Executive Order on Promoting Competition in the American Economy' issued by the White House on 9 th July 2021

CHAPTER I: SETTING THE CONTEXT

1. BACKGROUND

A. The Competition Act, 2002

- 1.1. The introduction of the New Economic Policy in 1991 opened up the Indian market. Economic reforms shifted their focus towards de-regulation of various industries and fostering competition amongst market players. In 1999, the High-Level Committee on Competition Policy and Law, chaired by Shri S.V.S Raghavan (“**Raghavan Committee**”), was constituted to reform the Monopolies and Restrictive Trade Practices Act, 1969 (“**MRTP Act**”). The Raghavan Committee submitted its report in 2000 (“**Raghavan Committee Report**”) wherein it noted that the MRTP Act had become antiquated, and was inadequate for promoting competition in Indian markets and addressing emerging forms of anti-competitive conduct. It recommended large-scale reforms to bring Indian competition law in line with the new domestic economic policies and global best practices.¹ Based on its recommendations, the MRTP Act was repealed and the Competition Act, 2002 (“**Competition Act**”) was enacted to “*prevent practices having adverse effect on competition, promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India*”.²
- 1.2. The enactment of the Competition Act led to the establishment of the Competition Commission of India (“**CCI**”) and the Competition Appellate Tribunal, which was later replaced by the National Company Law Appellate Tribunal (“**NCLAT**”). The Competition Act in antitrust matters adopts an *ex-post*³ approach (wherein regulatory intervention happens after the occurrence of an anti-competitive conduct) in prohibiting anti-competitive agreements (Section 3) and abuse of dominance (Section 4). It is noteworthy that the Competition Act does not seek to prohibit the dominance of an enterprise *per se* but rather the abuse of such dominance by an enterprise.⁴
- 1.3. Combinations above certain thresholds specified under the Competition Act⁵ follow a suspensory regime wherein such combinations cannot take effect without the CCI’s approval. It follows an *ex-ante* model of regulation⁶ wherein the CCI intervenes *before* the consummation of a combination to prevent the occurrence of any potential anti-competitive conduct that may ensue.

B. The Competition Law Review Committee and its recommendations

- 1.4. Following a decade of enforcement under the Competition Act, the Ministry of Corporate Affairs (“MCA”) constituted the Competition Law Review Committee (“CLRC”) to review the Indian competition regime and provide recommendations to update and amend the key substantive and procedural provisions of the Competition Act. The CLRC presented its report in 2019 encapsulating its recommendations for introducing regulatory best practices in the competition law framework in India (“CLRC Report”). The CLRC also discussed issues relating to new-age digital markets and ‘big data’.
- 1.5. Keeping in view the fact that the digital economy in India was still at a nascent stage, the CLRC opined that it may be premature to carry out legislative interventions to the Competition Act to regulate digital entities at such a juncture, and instead suggested a periodic review of global emerging trends and their policy implications for India.⁷ For instance, the CLRC had deliberated if Section 19(4) of the Competition Act, which specifies an inclusive list of factors for evaluating whether an enterprise enjoys a dominant position, should be amended to include ‘control over data’ or ‘network effects’ in light of the competitive advantage presented to large digital enterprises by such considerations. However, the CLRC had concluded at the time that Section 19(4) was inclusive in nature and imparted sufficient flexibility to take such novel factors into consideration while assessing dominance.⁸

C. The Competition (Amendment) Act, 2023

- 1.6. Based on the recommendations of the Report of the CLRC, the Competition Act was amended and the Competition (Amendment) Act, 2023 was notified in the Gazette of India on 11th April 2023.⁹
- 1.7. In the context of digital markets, the CLRC Report had acknowledged that the scope of Section 3 of the Competition Act required widening in order to comprehensively include all types of anti-competitive restraints and agreements, particularly those pertinent to digital markets, which may fall outside the ambit of agreements recognised under Section 3.¹⁰ Its recommendation to include ‘other agreements’ under Section 3(4) of the Competition Act so as to enlarge its scope was accepted and implemented through the Competition (Amendment) Act, 2023.¹¹

- 1.8. In addition, the CLRC had recognised that the acquisition of smaller successful start-ups by dominant firms in the digital space tends to escape regulatory scrutiny because they often do not meet the asset and turnover-based thresholds provided under the Competition Act and because the CCI does not have any power to assess transactions which are not required to be notified.¹² In light of the same, the CLRC Report had recommended for the introduction of new thresholds based on broad parameters for merger notification under the Competition Act.¹³ Accepting this recommendation, the Competition (Amendment) Act, 2023 introduced a deal value threshold of INR 2,000 crore for notifying a transaction to the CCI if the entity being acquired has ‘substantial business operations’ in India.¹⁴
- 1.9. The Competition (Amendment) Act, 2023 has also expanded the scope of ‘relevant market’ under Sections 19(6) and 19(7) of the Competition Act by specifying factors such as the nature of services and costs associated with switching demand or supply.¹⁵

D. The Parliamentary Standing Committee’s Report on ‘Anti-Competitive Practices by Big Tech Companies’

- 1.10. Digital markets in India have seen exponential growth in the recent past, but this has not been without problems. Numerous complaints against large digital enterprises have been levelled by various individuals and businesses before the CCI.¹⁶ Reportedly, several industry associations and trade unions have also raised concerns against digital enterprises before other regulatory bodies on account of unfair trade practices, unilateral and discriminatory policies, and violation of consumer rights.¹⁷
- 1.11. Against this backdrop, on 22nd December 2022, the 53rd Report on ‘Anti-Competitive Practices by Big Tech Companies’ was presented by the Parliamentary Standing Committee on Finance before the Lok Sabha (“**Standing Committee Report**”).¹⁸ The Standing Committee Report examined the need for the competition law framework in India to evolve with the rapid pace of digitalisation of markets, the ‘network effects’ of large digital enterprises, and their ability to indulge in anti-competitive practices.
- 1.12. The Standing Committee Report recognised that digital markets, in comparison with traditional markets, are driven by strong network effects and tend to ‘tip’ in a swift manner, often leading to a ‘winner-takes-most’ outcome.¹⁹ The leading players in a digital ecosystem are more prone to resort to practices

which foreclose competition, reduce market contestability, and raise barriers for new entrants in the market.²⁰ Given the pace at which such markets evolve, an *ex-post* regime may not be effective to remedy the irreversible tipping of markets in favour of large digital enterprises. The Standing Committee Report thus acknowledged the need for a comprehensive *ex-ante* competition law to ensure a competitive structure for Indian digital markets.²¹

- 1.13. The Standing Committee Report identified Ten Anti-Competitive Practices (“the ACPs”) undertaken by large digital enterprises to abuse and consolidate their position in digital markets:²² (i) anti-steering provisions; (ii) platform neutrality / self-preferencing; (iii) adjacency / bundling and tying; (iv) data usage (use of non-public data); (v) pricing / deep discounting; (vi) exclusive tie-ups; (vii) search and ranking preferencing; (viii) restricting third-party applications; (ix) advertising policies; and (x) acquisitions and mergers.
- 1.14. The Committee is of the opinion that only the first nine ACPs listed above should be discussed in this Report and that anti-competitive mergers and acquisitions do not need to be dealt with extensively in this Report since the Competition (Amendment) Act, 2023 sufficiently addressed the same by introducing a deal value threshold for notification of transactions to the CCI.²³
- 1.15. A table outlining brief explanations of the ACPs is provided below:

S. No.	ACP	Explanation
1.	Anti-steering	Exclusionary behaviour that hinders business users and consumers from switching to third-party service providers.
2.	Platform neutrality / Self-preferencing	A digital enterprise according favourable treatment to its own products on its own platform, thus creating a conflict of interest.
3.	Adjacency / Bundling and tying	Combining or bundling core or essential services with complementary offerings, thus forcing users to buy related services.
4.	Data usage (use of non-public data)	Using personal data for consumer profiling to offer targeted online services and products, thus raising data privacy concerns.
5.	Pricing / Deep discounting	Predatory pricing strategies, or intentionally setting prices below cost price to exclude competitors.

S. No.	ACP	Explanation
6.	Exclusive tie-ups	Exclusive agreements with business users or sellers, thus preventing them from dealing with other enterprises.
7.	Search and ranking preferencing	Controlling search ranking to prioritise sponsored or own products and reducing the visibility of other products.
8.	Restricting third-party applications	Restricting users from accessing or utilising third-party applications.
9.	Advertising Policies	There appears to be increasing market concentration, consolidation, and integration across many levels in the ad-tech supply chain which gives the incumbent platform an unfair edge over the market.

A table containing a more detailed explanation of each ACP is attached as **Annexure I** to this Report.

- 1.16. The Standing Committee Report further recommended identifying such large incumbents as ‘Systemically Important Digital Intermediaries’ (“**SIDIs**”) on the basis of revenue, market capitalisation, and number of active business and end users;²⁴ the implementation of a ‘Digital Competition Act’ to ensure contestability in digital markets;²⁵ and the establishment of a ‘Digital Markets Unit’ within the CCI to closely monitor SIDIs and provide recommendations to the MCA on their designation²⁶.

E. Committee on Digital Competition Law and its mandate

I. CONSTITUTION OF THE COMMITTEE ON DIGITAL COMPETITION LAW

- 1.17. Against this backdrop detailed above and the growing consensus on the limitations of the Competition Act in its present form to address the ACPs in a timely manner,²⁷ the MCA constituted the Committee on Digital Competition Law (“**CDCL / Committee**”) to: (i) review whether existing provisions in the Competition Act and the rules and regulations framed thereunder are sufficient to deal with the challenges that have emerged from the digital economy; (ii) examine the need for an *ex-ante* regulatory mechanism for digital markets through a separate legislation; (iii) study the international best practices on regulation in the field of digital markets; (iv) study other regulatory regimes / institutional mechanisms / government policies regarding competition in

digital markets; (v) study the practices of leading players / SIDIs which limit or have the potential to cause harm in digital markets; and (vi) study any other matters related to competition in digital markets as may be considered relevant by the Committee. A copy of the constitution order of the Committee is at [Annexure II](#).

- 1.18. In keeping with its mandate, the Committee has examined the enforcement actions and decisional practice of the CCI and taken cognisance of the Standing Committee Report and the observations and recommendations made in respect of identified ACPs by digital market players. It has also considered the views and suggestions received from a wide range of stakeholders highlighting the unfair practices carried out by various large digital enterprises. The Committee has further studied sector-specific instruments in India regulating digital entities in a piecemeal fashion and deliberated on the international approaches to *ex-ante* regulation of digital markets.

II. 2019 - 2023: THE GROWTH OF THE INDIAN DIGITAL ECOSYSTEM

- 1.19. The Committee noted that the COVID-19 pandemic significantly affected the Indian digital economy with swift development in digital markets and e-commerce.²⁸ Social distancing guidelines led to heavy reliance on deliveries from e-commerce platforms and almost exclusively in some areas such as groceries and food, medicines, entertainment, digital health services, online learning, contactless digital payments, etc., which had the effect of driving new consumer bases online.²⁹ Thus, the pandemic considerably changed the face of marketplaces in India and turned several businesses into online platforms.³⁰ The Committee noted that there were reportedly 759 million active internet users in India who accessed the internet at least once a month in 2022³¹ compared to approximately 499 million users in 2018³². The merging of technology with mainstream public policy and governance with the introduction of the CoWIN platform, DigiLocker, and Aadhaar for better efficacy has also accelerated the development of India as a digital economy.³³
- 1.20. During the course of its deliberations, the Committee noted that the digitalisation of the Indian economy has led to the emergence of start-ups which have immense capacity to contribute substantially to the growth of the country's GDP. Start-ups not only create wealth and employment, but they also foster innovation in order to succeed against well-established players. Today, India has over 1.19 lakh start-ups and counting.³⁴

- 1.21. The Committee observed that India’s Digital Public Goods such as Aadhaar, Unified Payments Interface (“UPI”), and Open Network for Digital Commerce, have created a platform for Indian start-ups to build products and solutions which serve the remotest parts of the country and drive India towards a trillion-dollar digital economy. The Committee also took note of the Indian IT services industry, which grew from under USD 100 million to USD 250 billion in revenue in barely three decades, creating the world’s largest pool of high-quality tech talent.³⁵
- 1.22. However, the Committee noted that the digital market is increasingly becoming concentrated with a few large digital enterprises that wield immense control over the market.³⁶ This gives them an edge over other business users and start-ups. This ultimately makes smaller digital enterprises and start-ups dependent on large digital enterprises and gives rise to an imbalance in bargaining power and information asymmetry in the digital market.
- 1.23. In light of this, the Committee feels that it is important to ensure that policy measures are carefully crafted only to address anti-competitive conduct by existing large digital enterprises, and to not throttle the growth of emerging digital enterprises that have the capacity to grow into global players.

2. WORKING PROCESS OF THE COMMITTEE

- 2.1. The Committee first met on 22nd February 2023 and decided that it would benefit from extensive stakeholder consultations. Accordingly, these consultations took place on 4th March 2023, 11th March 2023, and 24th March 2023 where several representatives from trade and industry associations of small businesses, think tanks, and large digital conglomerates presented their views on the need for an *ex-ante* digital competition law. Various recommendations by such stakeholders included strengthening the powers of the CCI, appointment of subject-matter experts at the CCI, and designation of large digital enterprises as *gatekeepers* with specific obligations to ensure that they do not indulge in the ACPs identified above. A table that summarises the key submissions and suggestions of each of the stakeholders is at **Annexure III**.
- 2.2. The Committee noted that certain representations were received subsequent to the conclusion of stakeholders’ consultations with a request to provide inputs to the Committee on the need for an *ex-ante* competition framework for large digital enterprises. The Committee has taken note of such representations. The Committee felt that the Report may be placed in public domain, inviting

comments wherein all stakeholders should have an opportunity to provide their suggestions / views in the spirit of participatory governance.

- 2.3. Following stakeholders' presentations, the Committee met, discussed, and deliberated on the extant competition law framework in India and its ability to ensure contestability in digital markets. The Committee formed four sub-groups which analysed different dimensions encompassing such subject matter. The Committee also examined other existing statutory instruments that have interfaces with digital markets regulation and consequently on ensuring competition in such markets. The Committee then proceeded to discuss the contours of a new Digital Competition Act for India at its meetings held on various dates beginning 13th April 2023.
- 2.4. The Committee has benefitted from wide-ranging and diverse discussions amongst the members and with the stakeholders who have appeared before the Committee. The members of the Committee naturally did not hold identical views on all matters included in the Report. In particular, the CCI Chairperson, who is a member of the Committee, recused herself from expressing views on matters related to such specific cases that are, or could, in future, come up before the CCI or its Director General for consideration. The broad views / consensus view of the Committee are reflected in this Report.
- 2.5. The MCA engaged Vidhi Centre for Legal Policy to assist the Committee in reaching informed decisions by carrying out legal research.

3. STRUCTURE OF THE REPORT

- 3.1. This Report is divided into four chapters. Chapter I traces the development of competition law in India and delves into the need for the formation of the Committee along with its terms of reference and working process. Chapter II analyses the extant framework under the Competition Act as well as key sector-specific instruments, and their efficacy in regulating ACPs in digital markets. Chapter III examines international practices and alternative models which have emerged in regulating large digital enterprises in emerging tech economies. Chapter IV provides a comprehensive overview of the key deliberations and recommendations of the Committee in respect of a separate digital competition law.
- 3.2. The Report also contains four annexures: **Annexure I** providing a detailed explanation of the ACPs; **Annexure II** comprising the order dated 6th February

2023 constituting the Committee;³⁷ **Annexure III** providing a summary of the stakeholder submissions; and **Annexure IV** containing the Draft Digital Competition Bill as prepared by the Committee.

CHAPTER II: INDIAN REGULATORY LANDSCAPE FOR LARGE DIGITAL ENTERPRISES - EFFICACY AND GAPS

1. BACKGROUND

- 1.1. The Committee notes that the regulation of large digital enterprises in India is carried out under a host of different statutory instruments, whose enforcement is vested with a multitude of ministries and regulators. The Committee also notes that such a fragmented approach appears inevitable given that *digitalisation* of markets cuts across various sectors. Prior to deliberating on the need for a new digital competition law, the Committee thought it fit to examine the key statutory and policy instruments applicable to digital enterprises in India, and their efficacy and gaps in regulating ACPs.
- 1.2. In light of the above, the Committee at first examined the extant competition framework and its limitations in addressing the peculiarities of the digital economy. The Committee then assessed the following instruments insofar as their applicability to ACPs by digital enterprises is concerned: (i) the Foreign Direct Investment Policy and Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (“**FDI Policy**”); (ii) the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**IT Rules**”) and the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“**SPDI Rules**”); (iii) the Consumer Protection Act, 2019 (“**CPA 2019**”), the Consumer Protection (E-Commerce) Rules, 2020 (“**E-Commerce Rules, 2020**”), and the Consumer Protection (Direct Selling) Rules, 2021 (“**Direct Selling Rules, 2021**”); (iv) the proposed Digital India Act (“**DIA**”); (v) the Digital Personal Data Protection Act, 2023 (“**DPDP Act**”); (vi) the Draft National Data Governance Framework Policy (“**Draft NDGFP**”); (vii) the Draft E-Commerce Policy, 2019 (“**Draft E-Commerce Policy**”); (viii) Reserve Bank of India Master Directions on Prepaid Payment Instruments, 2021 (“**RBI PPI Master Direction**”); and (ix) the ‘Guidelines on volume cap for Third Party App Providers (TPAPs) in UPI’ issued by the National Payments Corporation of India (“**NPCI UPI Guidelines**”).

2. THE COMPETITION ACT, 2002

2.1. The Competition Act aims to “*promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India*”.³⁸ Section 3 of the Competition Act seeks to prohibit anti-competitive agreements between enterprises, while Section 4 seeks to prohibit abuse of their position by dominant enterprises. Section 5 relates to combinations wherein parties intending to enter into a combination are required to notify and seek approval from the CCI prior to consummation of the transaction if the thresholds in Section 5 of the Competition Act are triggered. The Competition Act follows an *ex-post* approach under Sections 3 and 4 where anti-competitive agreements and abuse of dominance are scrutinised after such contraventions have occurred.³⁹ All combinations are regulated *ex-ante*.⁴⁰

2.2. Under the current scheme of abuse of dominance assessment, the practices enumerated in Section 4 of the Competition Act are anti-competitive only if carried out by dominant entities. Therefore, establishing ‘dominance’ is a pre-condition for assessing whether a certain practice is abusive under Section 4 of the Competition Act. Section 4 defines dominance as a position of market strength enjoyed by an enterprise in its *relevant market* that allows it to operate independently of competitive forces.⁴¹ Therefore, while assessing dominance, the first step for the CCI is to delineate the ‘relevant market’ within which the strength of the enterprise is examined.⁴² Following this, the CCI assesses whether the enterprise enjoys dominance in the defined ‘relevant market’ by accounting for factors enumerated in Section 19(4) of the Competition Act,⁴³ on a case-by-case basis.

A. Time-consuming nature of investigation and enforcement proceedings

2.3. The Committee deliberated on how the present *ex-post* framework under the Competition Act is not designed to facilitate timely and speedy redressal of anti-competitive conduct by digital enterprises given the extensive fact-finding and a tiered adjudicatory process involved in *ex-post* enforcement proceedings. The Committee further discussed the factors which contribute to prolonged enforcement proceedings.

2.4. *First*, the Committee noted that the structure of the Competition Act itself involves several stages in enforcement proceedings, i.e. formation of a *prima facie* view by the CCI;⁴⁴ investigation by the Director General;⁴⁵ and passing of final order by the CCI,⁴⁶ without specifying outer timelines for the same⁴⁷.

- 2.5. For instance, the Committee noted that in one case involving allegations of abuse of dominant position by a large digital enterprise in the market for licensable operating system (“OS”) for smart mobile devices in India,⁴⁸ the Director General submitted their investigation report to the CCI after more than two years of passing of order under Section 26 of the Competition Act by the CCI⁴⁹. The CCI passed final order⁵⁰ imposing monetary penalty on the enterprise in question a year later in October 2022⁵¹. The Committee noted that this matter was filed before the CCI in 2018, and even after a period of five years, it is yet to reach finality as the matter is currently *sub-judice* before the Supreme Court.⁵²
- 2.6. Similarly, in another case which involved alleged contraventions of Section 4 of the Competition Act, information was filed before the CCI in 2012; the CCI adjudicated on the matter in 2018 and found the concerned digital enterprise to be abusing its dominant position and thus, imposed a penalty.⁵³ However, even after a period of 11 years, the matter has not reached finality and the same is currently *sub-judice* before the NCLAT.⁵⁴
- 2.7. Further, the Committee noted that despite the CCI passing several orders since 2019 wherein *prima facie* evidence of anti-competitive behaviour in digital markets was inferred and an investigation was directed to be conducted,⁵⁵ final orders under Section 27 of the Competition Act have only been passed in three instances⁵⁶. Of these, one order is pending final disposal before the Supreme Court⁵⁷ and the rest are pending adjudication before the NCLAT⁵⁸. The Committee, considering the pace of digital markets, alluded to the propensity of such markets to ‘tip’ irreversibly in favour of the dominant enterprise. For quicker enforcement in digital markets, the Committee noted that the CCI should be equipped with appropriate tools for the early detection of anti-competitive conduct.
- 2.8. *Second*, the Committee observed that the complexity of delineating the ‘relevant market’ and assessing the dominance of digital enterprises adds substantially to the time taken for redressal of grievances against such enterprises.⁵⁹ The delineation of relevant market is an evidence-based exercise wherein the CCI scopes the strength of a digital enterprise by assessing the availability of substitutes to the enterprises’ services in a given geographical market.⁶⁰ The purpose of such an assessment is to evaluate the enterprise’s market strength *relative* to its competitors operating in the same relevant market. The Committee noted that digital enterprises, by design, are ‘multi-sided’ and provide distinct yet interrelated services to both consumers and business users.

As such, the assessment of what constitutes a ‘relevant market’ for the purposes of an enterprise that is operational on multiple sides of the platform in a given transaction, is a time-intensive exercise.⁶¹

- 2.9. Additionally, the Committee noted many inherent peculiarities of digital markets such as multi-sidedness, cross and same-side network effects, zero-price services, and access to vast repositories of consumer data. The Committee noted that these features have a unique potential to rapidly fortify the position of existing incumbents. As such, large digital enterprises which are not ‘statutorily’ dominant but which may nonetheless wield the ability to influence markets may therefore escape scrutiny.⁶²
- 2.10. The Committee observed and appreciated the CCI’s ongoing efforts in accounting for the peculiarities such as the role of ‘big data’ in reinforcing market strength⁶³ and the impact of pronounced network effects of multi-sided platforms in raising high barriers to entry in the market⁶⁴. The Committee was especially appreciative of the CCI’s ingenious way to examine certain conducts of large digital enterprises, especially those operating duopoly or concentrated oligopolistic market structures, under Section 3(4) of the Competition Act.⁶⁵ However, despite the CCI’s best efforts, analysing a case under Section 3(4) of the Competition Act raises two main challenges. *First*, only conduct which flows from an agreement may be examined under the provisions of Section 3(4) of the Competition Act; and *second*, Section 3(4) of the Competition Act requires an explicit demonstration of appreciable adverse effect on competition, which would further add to the time taken for investigating cases.
- 2.11. **In line with the deliberations above and taking into account the pace at which the Indian digital market is evolving, the Committee feels that the powers of the CCI under the present *ex-post* model may not sufficiently enable early detection and intervention required to prevent digital markets from irreversibly tipping. As such, the Committee is of the view that new tools that strengthen and supplement the CCI’s existing *ex-post* powers are the need of the hour. Although the *ex-ante* framework may still be subjected to judicial interventions, it will be a much more efficient market correction mechanism compared to Sections 3 and 4 of the Competition Act which are essentially *ex-post* interventions.**

3. SECTOR-SPECIFIC INSTRUMENTS GOVERNING LARGE DIGITAL ENTERPRISES

- 3.1. The Committee noted the features of various sector-specific instruments regulating digital enterprises in a sporadic manner and the points of interface

such instruments have with the extant competition law framework in India and their limitations in regulating digital markets as a whole.

A. The Foreign Direct Investment Policy and Foreign Exchange Management (Non-debt Instruments) Rules, 2019

- 3.2. The FDI Policy aims to encourage economic development by attracting foreign direct investment (“**FDI**”) in India and augmenting domestic capital. Amongst others, the FDI Policy imposes certain conditions on foreign e-commerce players in order to maintain a level playing field between domestic and foreign e-commerce entities. For instance, though 100% FDI is permitted in e-commerce activities under the automatic route, foreign e-commerce enterprises can only engage in business-to-business transactions and not in business-to-consumer transactions.⁶⁶ Additionally, FDI is permitted in the marketplace model, i.e. the provision of a platform which acts as an intermediary between buyers and sellers, but not in the inventory-based model wherein the stock is owned by the e-commerce entity itself and sold directly to consumers.⁶⁷
- 3.3. The Committee observed that the FDI Policy seeks to address the practices of self-preferencing and preferential listing which may be indulged in by large e-commerce entities. Such entities may favour their own labels by displaying them more prominently on their platforms, thus undermining platform neutrality and increasing barriers to competition. Under the FDI Policy, a foreign e-commerce entity providing an online marketplace is not permitted to exercise ownership or control over the inventory.⁶⁸ Any services, including logistics, warehousing, advertisement / marketing, etc. can only be provided by e-commerce marketplaces to business users in which they have equity participation or common control on an arm’s length basis, and in a fair and non-discriminatory manner, in order to maintain a level playing field.⁶⁹ Furthermore, the FDI Policy also disincentivises potentially anti-competitive vertical consolidation in the e-commerce space by prohibiting marketplace entities from exercising ownership over inventory, including through equity participation, in seller enterprises on the marketplace.⁷⁰
- 3.4. The Committee further noted that in prohibiting foreign e-marketplaces from directly or indirectly influencing the sale price of goods or services,⁷¹ or requiring fair and non-discriminatory cash back policies, the FDI Policy strives to restrain predatory pricing and deep discounting tactics which may be employed by large digital enterprises. The FDI Policy also seeks to prevent foreign e-commerce entities from entering into exclusive arrangements with

certain vendors, thus foreclosing competition, by restraining them from compelling any seller to sell products on their platforms exclusively.⁷²

- 3.5. The Committee discussed the limitations of the FDI Policy in terms of an *ex-ante* tool to regulate digital markets and concluded that the FDI Policy has a very narrow ambit in that it only covers certain anti-competitive conduct as described above in the e-commerce space. It does not include within its purview large platform enterprises operating in multi-sided markets such as digital search engines, social media platforms, online private messaging, media referral services, digital advertising, video-sharing platform services, etc. In addition, the FDI Policy does not apply to domestic e-commerce marketplaces but only to foreign-funded e-commerce entities in India, thereby further constricting its regulatory sphere.
- 3.6. The Committee further observed that any violation of FDI norms is enforced by the Enforcement Directorate under the penal provisions of the Foreign Exchange Management Act, 1999. However, the obligations applicable to e-commerce entities are notified by the Department for Promotion of Industry and Internal Trade, thus leading to uncertainty amongst market players regarding its enforcement.⁷³ Most importantly, the FDI Policy does not address the collection, storage, and usage of personal and sensitive data by online marketplaces from the point of view of competitive harm.

B. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011

- 3.7. The IT Rules aim to regulate news aggregators, online gaming intermediaries, publishers of news and current affairs content and online curated content, significant social media intermediaries⁷⁴ and social media intermediaries. The SPDI Rules protect sensitive personal data collected by body corporates.
- 3.8. The Committee observed that large digital enterprises could prevent consumers from using third-party applications by curbing their installation, thus undermining competition in the market and denying market access to third-party competitors. For instance, the IT Rules provide that an intermediary should take all reasonable measures to secure its computer resource; that it should not knowingly deploy, install, or modify the technical configuration of a computer resource; and that it should not become a party to any act that may change the normal course of operation of the computer resource than what it is

supposed to perform.⁷⁵ Such measure has been implemented from the perspective of securing the resource and its functioning. However, there is no provision which requires large digital intermediaries to demonstrate the necessity of restricting installation of third-party applications by consumers.

- 3.9. In respect of the SPDI Rules, the Committee observed that though the rules provide measures for disclosure and transfer of sensitive personal data by an enterprise to any third party with the prior consent of the data provider, they do not adequately address the usage of such sensitive and personal data by large digital enterprises for commercial purposes / targeted advertising and the cross-usage of personal data between core service and related services of large digital enterprises. Such practices may pose large anti-competitive risks and undermine the privacy of consumers.
- 3.10. As a potential tool for *ex-ante* antitrust enforcement, the Committee deliberated that the IT Rules and SPDI Rules have a limited mandate wherein most ACPs engaged in by large digital enterprises across most sectors (such as the e-commerce sector) are not addressed. The IT Rules only apply to specific types of digital intermediaries and the obligations imposed on such intermediaries are mostly consumer welfare-centric.

C. The Digital Personal Data Protection Act, 2023

- 3.11. The DPDP Act came into force on 11th August 2023.⁷⁶ The DPDP Act applies to the processing of digital personal data within the territory of India where the personal data is collected in: (i) digital form or (ii) in non-digital form and digitised subsequently, as well as outside India, if such processing is in connection with any activity related to offering of goods or services to data principals⁷⁷ within India⁷⁸. Personal data which is processed by an individual for any personal or domestic purpose or made publicly available is excluded from its ambit.⁷⁹ The DPDP Act places importance on the right of individuals to protect their personal data as well as the requirement of processing of such data for lawful purposes.⁸⁰
- 3.12. The rapid growth of, and value of 'data' in, digital markets has brought the fields of data protection and competition law closer.⁸¹ Large digital enterprises are characterised by their access to vast stores of user data which are used to improve products and services. This creates barriers to the entry of new players in digital markets which do not have access to these enormous repositories of data, thus reducing contestability in the market. Further, personal data

collected by large digital enterprises may be used for profiling of consumers and may also be sold to advertisers seeking to curate targeted online services and products, leading to concerns surrounding data privacy.⁸²

- 3.13. The Committee noted that although data protection under the DPDP Act and competition enforcement in digital markets under the Competition Act may have an ostensible overlap, the objectives sought to be achieved by both statutes are entirely different. While both statutes ultimately try to maximise the welfare of data principals and consumers, the manner in which they seek to achieve the same is distinct. While the DPDP Act is concerned with ensuring that a data principal's personal data is protected, the Competition Act seeks to ensure fairness and contestability in the market. The Committee noted that it is imperative to consider the complementary nature of these legislations and that the provisions of the DPDP Act are not in conflict with the goal of promotion of competition.

D. Draft National Data Governance Framework Policy

- 3.14. The Ministry of Electronics and Information Technology ("**MeitY**") released the Draft NDGFP on 26th May 2022 for public consultation. The policy aims to have standardised data management and security standards for non-personal and anonymised data across all government bodies. Sharing of any non-personal data can be done only through platforms authorised by the India Data Management Office ("**IDMO**"). The IDMO is empowered to ensure the data usage rights of data principals;⁸³ ensure ethical and fair use of data shared beyond the government ecosystem;⁸⁴ and specify norms for the disclosure of data collected, stored, shared, or accessed over a certain threshold⁸⁵.
- 3.15. The Committee noted that the primary focus of the Draft NDGFP is on data security and informational privacy, and that its relevance in regulating private entities in digital markets is limited.

E. Proposed Digital India Act

- 3.16. The Committee noted that the MeitY has released a presentation on the broad contours of the proposed DIA – a legislation which is purported to be the successor to the Information Technology Act, 2000.⁸⁶ The DIA proposes to regulate a vast array of digital enterprises including social media websites, artificial intelligence-based platforms, and e-commerce enterprises.

3.17. The Committee observed that since the draft of the proposed legislation is currently unavailable, the exact contours of its applicability cannot be delineated yet.

F. The Consumer Protection Act, 2019, the Consumer Protection (E-Commerce) Rules, 2020, and the Consumer Protection (Direct Selling) Rules, 2021

3.18. The Committee observed that the CPA 2019 places strong emphasis on protection of the interests of consumers and is primarily consumer welfare-centric. The CPA 2019 primarily aims to address unfair trade practices which are prejudicial to the interests of the public and of consumers.⁸⁷ While the CPA 2019 may have some points of interface with the extant competition law framework – such as barring tying and bundling⁸⁸ or disclosure of a consumer’s personal information to a third party⁸⁹ – its capacity to regulate other ACPs by large digital enterprises as an *ex-ante* tool is highly circumscribed.

3.19. The E-Commerce Rules, 2020 apply to all kinds of e-commerce entities and marketplaces providing a platform for the buying and selling of goods and services over a digital or electronic network. The Committee deliberated on the scope of the rules and the manner in which they seek to prevent unfair trade practices across all models of e-commerce. Marketplace entities are required to ensure transparency in pricing considerations;⁹⁰ disclose a description of any differential treatment being meted out between goods or services or sellers of the same category;⁹¹ and specify the main parameters used to determine the ranking of goods or sellers on their platform⁹². A seller offering goods or services through a marketplace e-commerce entity is also prohibited from engaging in any unfair trade practice.⁹³ However, the ambit of the E-Commerce Rules, 2020 is only restricted to the e-commerce sector and does not extend to other sectors prevalent in the digital space. In addition, the ambit of the E-Commerce Rules, 2020 is narrow in that ‘business users’ do not fall under the purview of ‘consumer’. The applicability of such rules in regulating ACPs arising in platform-to-business transactions is therefore limited.

3.20. The Direct Selling Rules, 2021 regulate direct selling, i.e. the marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location.⁹⁴ It seeks to curb pyramid schemes and money circulation schemes⁹⁵ as well as unfair trade practices undertaken by direct selling entities⁹⁶. The rules mandate that direct selling entities should store sensitive personal data within India and ensure

adequate safeguards to prevent the misuse of such data.⁹⁷ The Committee noted that the Direct Selling Rules, 2021 were implemented for a specific mandate and that their scope to regulate digital markets is limited.

- 3.21. While the consumer protection and competition law frameworks in India both strive to maximise consumer welfare, their manner of achieving the same is different. While the CPA 2019 is designed to protect consumers from unfair or deceptive practices, the Competition Act is designed to promote the creation of fair and contestable markets.

G. Draft E-Commerce Policy, 2019⁹⁸

- 3.22. The Draft E-Commerce Policy seeks to build a facilitative regulatory environment for the growth of the e-commerce sector by empowering domestic entrepreneurs. The Draft E-Commerce Policy primarily addresses issues such as counterfeiting of products, piracy, prevention of sale of prohibited items, and strategies for consumer protection. In addition, it attempts to address the practice followed by some large digital enterprises which allow different entities to bid on relevant keywords / registered trademarks. This is done by providing the option to trademark owners to register themselves with e-commerce platforms so that whenever a trademarked product is uploaded for sale on the platform, the platform shall be required to notify the respective trademark owner. The Draft E-Commerce Policy attempts to safeguard platform neutrality by mandating transparency and non-discrimination in publishing of ratings and reviews.
- 3.23. The Committee, however, observed that the Draft E-Commerce Policy had very limited coverage and that it failed to address other significant ACPs indulged in by e-commerce platforms such as exclusive tie-ups, tying and bundling, deep discounting, etc. In addition, the scope of the Draft E-Commerce Policy is limited to only entities engaged in e-commerce activities and not digital enterprises operating in other sectors. Further, although the policy imposes some restrictions on the cross-border flow of data generated by users in India through various sources including social media and search engines, the scope is largely limited to e-commerce activities. It does not adequately address sharing of data between online marketplaces and business users. In fact, it exempts business-to-business data sent to India as part of a commercial contract between a business entity located outside India and an Indian business entity from cross-border implications. Large platforms may leverage access to such

data in order to entrench their position in the market and use such data for profiling of consumers.

- 3.24. The Committee further observed that the Draft E-Commerce Policy is yet to be implemented. In addition, being in the nature of a policy and not a statutory instrument, its compliance will not be enforceable before a court of law, thus reducing its efficacy as a measure to regulate digital markets.

H. Reserve Bank of India Master Directions on Prepaid Payment Instruments, 2021

- 3.25. The RBI PPI Master Direction was issued in order to provide a framework for authorisation, regulation, and supervision of entities issuing and operating prepaid payment instruments (“PPIs”) and to provide for harmonisation and interoperability of PPIs. The RBI PPI Master Direction mandates a PPI issuer to provide the holders of KYC-compliant PPIs with interoperability through authorised card networks (for PPIs in the form of cards) and UPI (for PPIs in the form of wallets).⁹⁹ Interoperability is mandated on the acceptance (consumer) side as well.¹⁰⁰ Though this may address any potential risk of anti-steering, the RBI PPI Master Direction does not seem to tackle any other ACP likely to be engaged in by large digital enterprises. In addition, the Committee noted that the said instrument has extremely limited coverage since it is only applicable to PPI issuers and system participants.

I. ‘Guidelines on volume cap for Third Party App Providers (TPAPs) in UPI’ issued by the National Payments Corporation of India

- 3.26. The National Payments Corporation of India (“NPCI”) is an umbrella organisation created by the Reserve Bank of India (“RBI”) under the aegis of the Payment and Settlement Systems Act, 2007 for managing retail payments and settlement systems in India.¹⁰¹ The NPCI was responsible for launching the UPI – a system which facilitates inter-bank transactions seamlessly through a single application.¹⁰² In view of the rapid growth in UPI transaction volumes and in order to avert the risk of concentration,¹⁰³ the NPCI issued the NPCI UPI Guidelines on 5th November 2020¹⁰⁴.
- 3.27. The NPCI UPI Guidelines mandate payment service providers (“PSP”)¹⁰⁵ and third-party app providers (“TPAPs”)¹⁰⁶ to ensure that the total volume of transactions initiated through a TPAP does not exceed a cap of 30% of the overall volume of transactions processed in UPI during the preceding three months (on a rolling basis)¹⁰⁷.

- 3.28. The Committee observed that such volume cap restriction has been imposed in order to ensure contestability in the UPI ecosystem and encourage new TPAPs to increase their UPI transaction volume.¹⁰⁸ However, it was also noted that the NPCI UPI Guidelines do not address any ACPs except mergers and acquisitions in the UPI space which may be prone to risk of concentration. The scope of the guidelines is restricted since they only apply to TPAPs operating in the UPI ecosystem, and not to other classes of digital enterprises.
- 3.29. The Committee observed that at present, there is a prevalence of different instruments which regulate digital enterprises in a piecemeal fashion since digital markets permeate across most sectors. Some instruments have not even been notified yet and hence their enforcement efficacy cannot be commented upon. Further, none of the instruments discussed above are capable of comprehensively tackling all challenges emerging from the digital ecosystem from a competition perspective, which has led to a regulatory vacuum. This is on account of the fact that most instruments have differing mandates. For instance, some instruments have been drafted from a consumer-centric viewpoint while others have been designed to protect the privacy of individuals whose personal data is collected and used by businesses. Therefore, while competition law and sector-specific instruments are both important tools for ensuring market contestability and consumer protection, and while sector-specific instruments can certainly affect the competitive dynamics of the market, their means of achieving these objectives are different.
- 3.30. **The Committee has taken note of the various *ex-ante* sector-specific instruments that are applicable to digital enterprises in India that operate in parallel with the *ex-post* regime under the Competition Act. However, the Committee notes that the primary mandate of such instruments is to ensure orderly growth of the specific sector within which they operate. The Committee therefore takes the view that while such instruments have sporadic points of interaction with the Indian competition regime, they are limited in their ability to holistically ensure fair competition in digital markets in an *ex-ante* manner.**

CHAPTER III: EMERGING INTERNATIONAL PRACTICE

1. BACKGROUND

- 1.1. While noting the inadequacy of existing legal instruments in ensuring effective contestability in the Indian digital economy and rapidly growing role of large digital enterprises as indispensable access points for businesses as well as consumers, the Committee also deliberated upon the anti-trust laws prevailing in other jurisdictions.
- 1.2. The Committee observed that the Raghavan Committee Report had discussed the antitrust law prevailing in the European Union (the “EU”), the United Kingdom (“UK”), Germany, and the United States of America (“USA”). An overview of the *ex-ante* framework in the EU, UK and USA was provided in the Standing Committee Report.¹⁰⁹ The Committee notes that the *ex-ante* instruments for regulation of digital markets have been implemented or proposed to be implemented in these jurisdictions. The Committee also noted certain other models in emerging tech economies such as Australia, Japan, China, and South Korea at the time of stakeholder consultations. The Committee has noted that while the structure of an *ex-ante* regulation may be inspired by international best practices, the implementation of *ex-ante* mechanisms must cater to every jurisdiction’s unique social, political, and economic needs.¹¹⁰
- 1.3. A brief overview of *ex-ante* instruments across various jurisdictions, viz; the: (i) Digital Markets Act, 2022 (“DMA”); (ii) the Digital Markets, Competition and Consumers Bill, 2023 (“DMCC”); (iii) Amendment to the Act Against Restraint of Competition, 1958 (“ARC”); (iv) Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act, 2021 (“**Bargaining Code**”); (v) Amendments to the South Korean Telecommunications Business Act, 2011 (“**App Store Act**”) and Review Guidelines for Regulations Against Abuse of Dominance and Unfair Trade Practice by Online Platform Businesses (“**Review Guidelines**”); (vi) Act on Improving Transparency and Fairness of Digital Platforms, 2020 (“**TFDP Act**”) and Guidelines on Measures to be Taken by Specified Digital Platform Providers to Promote Mutual Understanding in Transactional Relationships with User Providers of Goods, etc., 2021 (the “**SDP Guidelines**”); (vii) American Innovation and Choice Online Act (“AICO”),

Ending Platform Monopolies Act (“EPM”), Open App Markets Act (“OAM”) and nine other Bills; (viii) Anti-Monopoly Law, 2007 (“AML”) (as amended in 2022), Anti-Monopoly Guidelines for the Platform Economy, 2021 (“Platform Guidelines”), Classification and Grading of Internet Platforms (“Draft Classification Guidelines”) and Guidelines to Implementing Subject Responsibility for Internet Platforms (“Draft Responsibility Guidelines”); (ix) Amendments to the Competition Act, 1985 (“Canadian Competition Act”), Online Streaming Act, and Online News Act; (x) Fair Trade Act (“FTA”); and (xi) Competition Act, 2004 (“CA-04”) and updated Guidelines studied by the Committee is captured in the table below:¹¹¹

Table: Brief overview of relevant *ex-ante* legislative instruments and policy reforms particular to digital markets in international jurisdictions

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
1.	EU	<p><u>Legislative instrument</u></p> <p>The DMA was introduced through the Digital Services Act Package in December 2020.¹¹² It is the most significant <i>ex-ante</i> instrument introduced in the EU to address anti-competitive conduct by large digital undertakings designated as ‘Gatekeepers’ providing ‘core platform services’. Both prohibitory and mandatory <i>ex-ante</i> obligations are imposed on Gatekeepers.</p>	<p>The DMA came into force on 1st November 2022.¹¹³</p>
2.	UK	<p><u>Legislative instrument</u></p> <p>Post the report of the Digital Competition Expert Panel constituted by the Government of the UK headed by Professor Jason Furman,¹¹⁴ and the report of the Competition and Markets Authority (“CMA”) on its market study on Online Platforms and Digital</p>	<p>The Draft DMCC is currently at the draft stage and is awaiting passage in the UK Parliament.¹¹⁷</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>Advertising,¹¹⁵ a need was felt to institute a robust <i>ex-ante</i> regime to regulate digital markets in the UK and establish a Digital Markets Unit within the CMA, respectively. The Draft DMCC,¹¹⁶ which was introduced before the UK Parliament on 25th April 2023, focuses on large undertakings engaged in digital activities having a UK nexus. Undertakings fulfilling certain criteria may receive a ‘Strategic Market Status’ (“SMS”) in respect of a digital activity from the CMA. The Draft DMCC imposes obligatory and preventive conduct requirements on SMS entities which are <i>ex-ante</i> in nature.</p>	
3.	Germany	<p><u>Legislative instrument</u></p> <p>The ARC, which follows an <i>ex-post</i> approach in regulating anti-competitive conduct of dominant entities in Germany, has been amended considerably to allow for <i>ex-ante</i> intervention. The 10th Amendment to the ARC (“10th Amendment”)¹¹⁸ imposes obligations on undertakings which are active to a significant extent on multi-sided markets and networks and which may be regarded as being of ‘paramount significance for competition across markets’ (“PSCAM”). PSCAM entities are prohibited from engaging in certain kinds of anti-competitive conduct. The 11th Amendment to the</p>	<p>The 10th Amendment came into force in 2021. The 11th Amendment came into force in November 2023.</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>ARC (“11th Amendment”), effective from 7th November 2023, introduces significant changes: it grants the <i>Bundeskartellamt</i> or the Federal Cartel Office (“FCO”) authority to enforce remedies upon companies post sector inquiries regardless of the company infringing competition laws;¹¹⁹ allows the FCO to skim off profits made from competition law infringements;¹²⁰ and facilitates the implantation of the DMA in Germany¹²¹.</p>	
4.	USA	<p><u>Legislative instruments</u></p> <p>Apart from the central antitrust laws in the US, namely, the Sherman Act, 1890 (“Sherman Act”), the Clayton Act, 1914 (“Clayton Act”), and the Federal Trade Commission Act, 1914 (“FTCA”), twelve Bills have been proposed specifically for regulating competition in digital markets before the US Congress, viz.:¹²² (a) AICO;¹²³ (b) EPM;¹²⁴ (c) OAM;¹²⁵ (d) Augmenting Compatibility and Competition by Enabling Service Switching Bill (ACCESS); (e) Competition and Antitrust Law Enforcement Reform Bill; (f) Competition and Transparency in Digital Advertising Bill; (g) Consolidation Prevention and Competition Promotion Bill; (h) Digital Platform Commission Bill; (i) Merger Filing Fee Modernization Bill; (j) Platform Competition and</p>	<p>All twelve Bills - including the AICO, EPM and OAM - are pending passage.</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>Opportunity Bill; (k) Prohibiting Anticompetitive Mergers Bill; and (l) Trust-Busting for the Twenty-First Century Bill.</p>	
		<p><u>Policy reforms</u></p> <p>The House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (“HJC Subcommittee”) conducted an investigation in 2019 which assessed the market strength of large platforms and the effectiveness of extant competition law in regulating anti-competitive practices in digital markets.¹²⁶ An ‘Executive Order on Promoting Competition in the American Economy’ was issued by the White House on 9th July 2021 (“White House Executive Order”); the order <i>inter alia</i> established the White House Competition Council within the President’s Executive Office.¹²⁷</p>	-
5.	Japan	<p><u>Legislative instrument</u></p> <p>The TFDP Act is an <i>ex-ante</i> instrument which was introduced to ensure transparency and fairness in the conduct of Specified Digital Platforms in Japan.¹²⁸ The Ministry of Economy, Trade, and Industry (“METI”) published the SDP Guidelines¹²⁹ and the Ordinance No. 1 in 2021 (“Japan Ministerial Ordinance / JMO”)¹³⁰ which lay down certain measures to be</p>	<p>The TFDP Act came into force on 1st February 2021. The SDP Guidelines are also currently in force.</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>complied with by Specified Digital Platform providers. METI’s cabinet orders have specified four separate business classifications, along with thresholds for designation as Specified Digital Platforms.¹³¹</p>	
6.	Australia	<p><u>Legislative instrument</u></p> <p><i>Ex-post</i> competition enforcement in Australia is undertaken under the Competition and Consumer Act, 2010 (“CCA”).¹³² The Bargaining Code has amended the CCA and imposed <i>ex-ante</i> standards on Designated / Responsible Digital Platform Corporations carrying content by Australian news media businesses, in respect of Designated Digital Platform Services provided by them.¹³³ The Bargaining Code seeks to address the disparity between Australian news businesses and Designated Digital Platform Corporations who benefit from a significant bargaining power imbalance.</p> <p><u>Policy Reforms</u></p> <p>The Australian Government directed the Australian Competition and Consumer Commission (“ACCC”) in 2020 to conduct the Digital Platform Services Inquiry (“DPSI”) into the concentration of power and market trends in the supply of digital platform services. Interim reports under the</p>	<p>The Bargaining Code came into force on 3rd March 2021.¹³⁴</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>DPSI are to be submitted by the ACCC every six months until the conclusion of the DPSI in 2025. The fifth interim report under the DPSI (“5th DPSI Report”) proposes, <i>inter alia</i>, service-specific codes of conduct for Designated Digital Platforms with <i>ex-ante</i> obligations and measures.¹³⁵ The ACCC has issued seven interim reports under the DPSI up till now.¹³⁶</p>	
7.	China	<p><u>Legislative instruments</u></p> <p>China’s main antitrust enforcement legislation – the AML¹³⁷ – follows an <i>ex-post</i> approach and was amended in 2022 to address anti-competitive practices arising in digital markets. The Platform Guidelines specifically focus on China’s platform economy and aim to curb anti-monopolistic practices.¹³⁸</p> <p>In addition, <i>ex-ante</i> measures have been sought to be introduced through the Draft Classification Guidelines¹³⁹ and Draft Responsibility Guidelines¹⁴⁰. The former provides for different categories of markets along with the thresholds for classification of internet platforms and the latter provides for obligations by platform entities.</p>	<p>The amendment to the AML is in force. The Platform Guidelines came into force on 7th February 2021.</p> <p>The Draft Classification Guidelines and Draft Responsibility Guidelines are still at the stage of public consultation.</p>
8.	South Korea	<p><u>Legislative instruments</u></p> <p>The Monopoly Regulation and Fair Trade Act, 1980 (“MRFTA”)¹⁴¹ is the</p>	<p>The App-Store Act came into force on 31st</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>main antitrust enforcement legislation in South Korea and is enforced by the Korean Fair Trade Commission (“KFTC”). The App-Store Act¹⁴² and the Review Guidelines¹⁴³ are other legislative instruments pertaining to digital markets. The App-Store Act prohibits dominant app market business operators from abusing their dominant position. The Review Guidelines supplement the existing Guidelines on Review of the Abuse of Market Dominant Position, 2009 under the MRFTA and examine whether the business activities of online platform operators violate Article 5 of the MRFTA (<i>prohibition of abuse of market dominance</i>). South Korea has not introduced new <i>ex-ante</i> regulations; instead, it aims to bolster <i>ex-post</i> regulatory measures by providing for a platform’s responsibilities.</p>	<p>August 2021. The Review Guidelines came into force on 12th January 2023.</p>
		<p><u>Other miscellaneous initiatives</u></p> <p>The KFTC has proposed amendments to the Consumer Protection in Electronic Commerce Act to reclassify online businesses and address issues arising in the e-commerce sector.¹⁴⁴ Further, the KFTC and Korea Communications Commission (“KCC”) have proposed separate bills, i.e. the Fair Intermediate Transactions on Online Platforms Bill and the Online Platform User Protection Bill aiming to curb unfair trade practices</p>	<p>The proposed amendment and bills are still in a draft stage.</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>by online platform operators and protect the rights of online platform users, respectively.¹⁴⁵ A pan-governmental joint body known as the ‘Government Committee of Digital Platforms’ has been established to develop South Korea’s new digital platform self-regulation policy.¹⁴⁶</p>	
9.	Canada	<p><u>Legislative instruments</u></p> <p>The Canadian Competition Act¹⁴⁷ is the primary antitrust legislation in Canada and is enforced by the Competition Bureau of Canada (“Canada Bureau”). Certain amendments to the Canadian Competition Act received Royal Assent on 23rd June 2022.¹⁴⁸ The said amendments include, <i>inter alia</i>, increasing the upper limit of fines and penalties for individuals and corporations engaging in abuse of dominance and deceptive marketing practices; and clarifying that incomplete price disclosure constitutes deceptive marketing.¹⁴⁹</p> <p>The Online Streaming Act aims to subject all audio and audio-visual content transmitted and received through the internet to regulation by the Canadian Radio-television and Telecommunications Commission (“CRTC”). The Canadian Government has issued proposed policy directions</p>	<p>The Online Streaming Act received Royal Assent on 27th April 2023.¹⁵²</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>to the CRTC, which will be responsible for implementation.¹⁵⁰</p> <p>The Online News Act seeks to regulate online platforms in order to promote fairness in the Canadian digital media news market.¹⁵¹</p>	<p>The Online News Act received Royal Assent on 22nd June 2023.¹⁵³ Obligations under the same came into effect in December 2023.¹⁵⁴ Final regulations under the same have been published.</p>
		<p><u>Policy reforms</u></p> <p>The Canada Bureau published its Strategic Vision for 2020–2024 in February 2020 which highlighted its focus on digital markets in the coming years.¹⁵⁵ The Digital Enforcement and Intelligence Branch (CANARI) has been established to supplement the Canada Bureau’s ability to protect and promote competition in Canadian digital markets.¹⁵⁶</p> <p>In June 2021, the Competition and Growth Summit emphasised the need for a thorough review of the Canadian Competition Act to ensure its effectiveness in addressing challenges posed by the dominance of large digital platforms.¹⁵⁷ Senator Howard Wetston initiated a consultation in October 2021¹⁵⁸ and following this, a report titled ‘Examining the Canadian</p>	<p>-</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>Competition Act in the Digital Era¹⁵⁹ to review the provisions of the Canadian Competition Act was commissioned. Subsequently, the Canada Bureau submitted a comprehensive set of recommendations to revamp the Canadian Competition Act in February 2022¹⁶⁰. The Canadian Competition Act was amended in June 2022 (<i>discussed above</i>). The Canada Bureau has also submitted its inputs¹⁶¹ on a discussion paper titled ‘The Future of Competition Policy in Canada’¹⁶² issued by the Canadian Government on the future of competition policy in Canada.</p>	
10.	Taiwan	<p><u>Legislative instruments</u></p> <p>The primary competition law legislation in Taiwan is the FTA¹⁶³ which is enforced by the Fair Trade Commission (“TFTC”). The FTA aims to regulate monopolies, anti-competitive mergers, concerted practices, and vertical restraints.</p> <p><u>Policy reforms</u></p> <p>The TFTC created a ‘Digital Economy Competition Policy Task Force’ in March 2021 which conducted an extensive study on antitrust issues relating to the digital economy and released its White Paper on Competition Policy in the Digital</p>	<p>The FTA is currently in force.</p> <p>-</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		<p>Economy in December 2022.¹⁶⁴ The said White Paper also examined the current enforcement position and policy direction in Taiwan and highlighted several anti-competitive practices prevalent in digital markets. The White Paper further stated that the incurrence of lower social costs should determine whether <i>ex-ante</i> or <i>ex-post</i> approach in regulation of digital markets should be adopted.</p>	
11.	Singapore	<p><u>Legislative instruments</u></p> <p>The primary competition law in Singapore is the CA-04¹⁶⁵ which bans any conduct that amounts to an abuse of a dominant position by one or more undertakings in any market in Singapore. On the basis of market studies, international best practices, and the Competition and Consumer Commission of Singapore’s (“CCCS”) own enforcement practice, the Guidelines to the CA-04 have been revised.¹⁶⁶ The updated Guidelines clarify, <i>inter alia</i>, measures for assessment of market power; potentially abusive conduct in digital markets; market definition; as well as procedures related to mergers.¹⁶⁷</p> <p><u>Policy reforms</u></p> <p>The Committee on the Future Economy released a report in February 2017 to outline essential strategies to</p>	<p>The CA-04 is in force. The revised Guidelines to the CA-04 came into force on 1st February 2022.</p> <p>-</p>

S. No.	Jurisdiction	Relevant <i>ex-ante</i> legislative instruments and policy reforms	Status
		combat challenges arising in an 'era of rapid technological change'. ¹⁶⁸ The CCCS conducted market studies on Singapore's online travel booking sector in 2019 ¹⁶⁹ and e-commerce platforms in 2020 ¹⁷⁰ in order to identify potential anti-competitive practices in such sectors. The CCCS also collaborated with the Personal Data Protection Commission to release a discussion paper on data portability in 2019. ¹⁷¹	

1.4. The Committee noted the apparent consensus across jurisdictions to use *ex-ante* laws to regulate large digital enterprises. In order to examine the feasibility of a similar model for India, the Committee studied the *ex-ante* instruments in some of the above jurisdictions in detail.

2. EUROPEAN UNION

2.1. In recent years, the EU has proactively monitored and introduced various legislative measures to address anti-competitive behaviour by large digital enterprises. In addition to stringent enforcement under the *ex-post* competition framework under the Treaty on the Functioning of the European Union, 2012 (“TFEU”), the EU has also introduced numerous *ex-ante* measures to strengthen regulation in digital markets.

2.2. Key *ex-ante* measures that have a bearing on competition in digital markets include the General Data Protection Regulation, 2016 (“GDPR”), the Regulation on Platform-to-Business Relations, 2019 (“EU P2B Regulation”), and most notably, the DMA¹⁷² introduced through the Digital Services Act Package¹⁷³.

2.3. The GDPR is the primary data protection law in the EU and imposes obligations in relation to notice and consent and transparency obligations upon data controllers.¹⁷⁴ The EU P2B Regulation is applicable towards online

intermediation services that facilitate transactions between businesses and consumers.¹⁷⁵ The Regulation specifically focuses on the interplay between business-users and online intermediation services, and imposes obligations on them to deal with business-users in a fair and transparent manner. The DMA is a new *ex-ante* competition legislation introduced in 2022 to categorically regulate large digital enterprises that act as ‘Gatekeepers’ in the EU’s digital markets.

2.4. The key *ex-post* competition decisions adopted by the European Commission (“EC”) in relation to large digital enterprises under the TFEU, along with the limitations of such an *ex-post* regime, were examined by the Committee. The *ex-ante* competition measures introduced through the DMA were also looked at.

a. *Ex-post* enforcement under the Treaty on the Functioning of the European Union, 2012

2.5. The TFEU is part of the EU’s foundational documents, setting out core principles on the EU’s functioning as a union of nation states.¹⁷⁶ Article 101 of the TFEU prohibits certain concerted practices that restrict competition, and Article 102 prohibits abuse of dominant position by an undertaking. Over the last five years, the EC has ramped up its enforcement under these provisions to penalise large technology companies in relation to their anti-competitive conduct that has the potential to affect the EU’s internal market.

2.6. For instance, in 2017, Google was fined EUR 2.42 billion for abusing its dominance in the search engine market by unfairly prioritising the placement of its ‘Google Shopping’ service.¹⁷⁷ Google Android was fined EUR 4.34 billion in 2018 in relation to the unfair restrictions it imposed upon Android device manufacturers and mobile network operators.¹⁷⁸ In 2019, AdSense, Google’s search advertisement service, was fined EUR 1.49 billion for imposing restrictive clauses in contracts with third-party websites. The EC noted that Google’s dominance in the online search advertising market may be traced back to 2006.¹⁷⁹

2.7. In 2022, the EC accepted voluntary commitments from Amazon after it charged Amazon for (a) its use of non-public data generated by marketplace sellers on Amazon Marketplace, (b) preferential treatment offered by Amazon to prefer its own retail businesses for its Buy Box program, and (c) its preferential treatment for sellers who use Amazon’s logistics and delivery services.¹⁸⁰ The

EC has also commenced proceedings against Facebook Marketplace in 2022 regarding its conduct in the online classified advertisement services sector.¹⁸¹

- 2.8. However, owing to protracted investigations and the propensity of digital markets to irreversibly tip in favour of large incumbents, the EU has sought to implement an *ex-ante* competition regime through the DMA.

b. *Ex-ante* enforcement under the Digital Markets Act, 2022

- 2.9. Following an extensive public consultation process, the DMA was finally adopted in 2022 whose enforcement is entrusted with the EC. Within the EC, the enforcement of the DMA will be shared between the EC's departments for competition ("**DG COMP**") and tech policy ("**DG CONNECT**").¹⁸² The DMA seeks to identify and selectively regulate the behaviour of large digital undertakings in an *ex-ante* manner. The DMA entered into force on 1 November 2022 with a six-month built-in buffer period before it became applicable (i.e. by May 2023).¹⁸³

I. SCOPE AND APPLICABILITY

- 2.10. The DMA applies to only large undertakings that are designated as 'Gatekeepers'. In order for an entity to be eligible for a Gatekeeper designation, it must provide at least one of the ten 'core platform services' enumerated under the DMA, which include online intermediation services, online search engines, video-sharing platform services, virtual assistants, online social networking services, and web-browsers.¹⁸⁴ Newer services within the digital sector may be added to this list pursuant to a market investigation by the EC.¹⁸⁵

II. DESIGNATION AND THRESHOLDS

- 2.11. The DMA envisages two ways to designate an undertaking as a 'Gatekeeper': either when an undertaking triggers the thresholds detailed below,¹⁸⁶ or through the exercise of the EC's residuary powers¹⁸⁷. The DMA requires a combined reading of its qualitative and its quantitative thresholds for designating a Gatekeeper.

a. Qualitative thresholds

- 2.12. For an entity to be designated as a Gatekeeper, the DMA prescribes three qualitative thresholds, namely that an entity:

- i. has a significant impact on the internal EU market,
- ii. provides a core platform service which is an important gateway for business users to reach end users, and
- iii. enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.¹⁸⁸

2.13. In the interest of specificity, the DMA lays down that the above qualitative thresholds are presumed to be satisfied if the quantitative thresholds detailed below are met.

b. Quantitative thresholds

- i. An entity can be presumed to have a ‘significant impact’ if it provides the same core platform service in at least three member states and has triggered a monetary threshold of either (a) annual EU turnover being at least EUR 7.5 billion in each of the last three financial years, or (b) its average market capitalisation or fair market value amounting to at least EUR 75 billion in the last financial year.¹⁸⁹
- ii. An entity’s service can be presumed to be an ‘important gateway between business users and end users’ if in the last financial year, it has at least 45 million monthly active end users and 10,000 yearly active business users in the EU.¹⁹⁰ The Committee notes that the DMA’s threshold for active end-users has been calculated as 10% of EU’s population, parallel to its calculation for the Digital Services Act, 2022.¹⁹¹
- iii. Finally, an entity is presumed to have an ‘entrenched and durable position’ if it meets the end user and business user thresholds above for each of the last three financial years.¹⁹²

2.14. The DMA also prohibits Gatekeepers from circumventing the quantitative thresholds by segmenting, dividing, fragmenting, or splitting its core platform services.¹⁹³

III. DESIGNATION PROCESS AND REVIEW

2.15. The DMA puts the onus on the undertakings providing core platform services to notify the EC when it triggers any of the quantitative thresholds envisaged, within a period of two months.¹⁹⁴ However, such an undertaking may, at the time of notification, present sufficiently substantiated arguments as to why it should not be designated as a Gatekeeper.¹⁹⁵

- 2.16. Within forty-five working days after notification by an undertaking (i.e. by September 2023), the EC shall communicate its decision on the Gatekeeper designation.¹⁹⁶ In the designation decision, the EC must list the relevant core platform services that an undertaking provides and which act as an important gateway for business users to reach end users.¹⁹⁷
- 2.17. Once designated, the EC is required to review the designation decision every three years.¹⁹⁸ Within the three-year period, the EC may also review its decision either upon request or on its own initiative on two grounds: first, a substantial change in any facts based on which the designation was awarded; or second, the designation decision was based on incomplete, incorrect, or misleading information.¹⁹⁹

IV. *EX-ANTE* OBLIGATIONS

- 2.18. The DMA prescribes various *ex-ante* obligations on Gatekeepers, both prohibitory and mandatory, in relation to the core platform services listed in the designation decision. These obligations are set out under Articles 5, 6 and 7 of the DMA. Key obligations include the following:

a. *Prohibited conduct*

- 2.19. The DMA prohibits Gatekeepers from *tying* and *bundling*²⁰⁰ their core platform services, and imposing restrictions on *switching*²⁰¹ or *changing default pre-installed services*²⁰². Gatekeepers are also prohibited from imposing *platform parity clauses*,²⁰³ and from engaging in *self-preferencing*²⁰⁴. In terms of data related obligations, Gatekeepers are prohibited from processing or cross-using data obtained through its core platform unless the notice and consent requirements under the GDPR are met.²⁰⁵ Similarly, the DMA restricts Gatekeepers from using any non-publicly available data generated by or provided by business users while using the Gatekeeper's core platform service.²⁰⁶

b. *Mandated conduct*

- 2.20. The DMA requires Gatekeepers to enable *interoperability* of third-party software applications with its operating system.²⁰⁷ Further, Gatekeepers must provide, free of charge, *effective interoperability* to third-party hardware and software service providers for the purposes of using the Gatekeeper's designated core platform service. Such effective interoperability requires Gatekeepers to ensure

similarity between the manners in which the third parties' and the Gatekeeper's hardware and software features interact with the Gatekeeper's OS or virtual assistant service.²⁰⁸ In the context of self-preferencing, Gatekeepers are mandated to apply *transparent, fair and non-discriminatory* conditions to ranking, indexing, and crawling, in relation to their dealings with third-parties.²⁰⁹ The DMA also imposes positive obligations regarding uninstalling default services. The Gatekeeper must offer *choice screens* on defaults and enable end users to easily *uninstall default software applications* in the Gatekeeper's operating system, unless installing such default services is essential for the functioning of the OS or the device.²¹⁰

- 2.21. Gatekeepers must provide end users with technical means, free of charge, to ensure *effective portability* of their data generated in their activity in relation to the core platform service.²¹¹ Additionally, Gatekeepers must also provide business users with free of charge, continuous, real-time, and high-quality *access to all data generated by business users* using a core platform service.²¹² The DMA also sets out specific obligations to reduce data concentration advantages in the online search engine markets: Gatekeepers' search engines must provide third-party online search engines with *anonymised access to ranking, query, click and view data* generated by end users on fair, reasonable, and non-discriminatory terms.²¹³

c. Obligations on number-independent interpersonal communication services

- 2.22. Article 7 of the DMA lists specific obligations in relation to the provision of number-independent interpersonal communication services ("NIICS"). These obligations include making the basic functionalities of its NIICS interoperable with an EU third-party provider's NIICS, by providing the necessary technical interface free of charge.²¹⁴ The DMA also prescribes a staggered timeline for making various types of NIICS interoperable.²¹⁵

V. SUSPENSION AND EXEMPTIONS

- 2.23. The DMA lays down specific grounds for suspending or exempting a Gatekeeper from obligations under the DMA. Gatekeepers may demonstrate through a reasoned request to the EC to suspend compliance in relation to a specific obligation if it endangers the Gatekeeper's *economic viability* due to exceptional circumstances beyond the Gatekeeper's control.²¹⁶ Additionally, the EC may, on request or *suo motu*, exempt a Gatekeeper in relation to one or more obligations only on the grounds of public health or public security.²¹⁷

Both suspensions and exemption are limited, and must be reviewed at least on a yearly basis.²¹⁸

VI. ENFORCEMENT AND MONITORING

a. DMA provisions to aid enforcement

2.24. The DMA empowers the EC to carry out market investigations to assess whether a Gatekeeper has engaged in systematic non-compliance with its obligations under the DMA.²¹⁹ If a Gatekeeper has done so, and has strengthened or maintained its market position, the EC may impose additional behavioural or structural remedies proportionate and necessary to ensure effective compliance with its obligations.²²⁰ The EC may also conduct a market investigation to (a) assess whether one or more services in the digital sector should be added to the current list of ten core platform services as defined in the DMA; or (b) detect practices which limit contestability and are not already addressed by the DMA.²²¹

b. Gatekeeper's compliance function and EC monitoring powers under the DMA

2.25. Gatekeepers are required to appoint and maintain a compliance function independent from the operations function of the Gatekeeper.²²² The compliance function, which is to be headed by an independent senior manager, is envisaged to report directly to the management body of the Gatekeeper.²²³ The Gatekeeper must share the name and contact details of the head senior manager with the EC. Additionally, the EC is empowered to request for information,²²⁴ to carry out interviews,²²⁵ and to conduct inspections to collect information, including explanations on functioning, data-handling, algorithms, and business practices of the Gatekeeper²²⁶.

c. Other measures to improve DMA implementation

2.26. In order to effectively implement the DMA, the EC has reportedly planned to increase the capacity of DG CONNECT to over 100 full-time staff and to establish a European Centre for Algorithmic Transparency.²²⁷ Within DG CONNECT, a societal issues team (handling risk assessments and audits), a technical team (handling interoperability of messenger services and development of technical standards supporting the new rules), and an economic team (handling DMA-related unfair trade practices such as data

access) shall be created.²²⁸ The EC may also request assistance from national-level competition regulators and enforcement agencies in the implementation of the DMA.²²⁹

VII. REMEDIES

- 2.27. The EC may issue a non-compliance decision if it notes that a Gatekeeper has not complied with its obligations under the DMA.²³⁰ Such non-compliance also includes failure to carry out any measures imposed against the Gatekeeper for systematic non-compliance or failure to carry out interim measures as ordered by the EC.²³¹ Under a non-compliance decision, the EC may fine the Gatekeeper up to 10% of its total worldwide turnover in the preceding financial year.²³²
- 2.28. The DMA empowers the EC to conduct a market investigation to assess whether a gatekeeper has taken part in systematic non-compliance.²³³ According to the DMA, a systematic non-compliance with the obligations under Articles 5, 6, and 7, occurs when the EC has issued at least three non-compliance decisions against a Gatekeeper regarding any of its core platform services, within a period of 8 years before the EC's decision of opening a market investigation.²³⁴ To ensure effective compliance,²³⁴ the EC has the power to impose any structural or behavioural remedies, that are necessary and proportionate, on the Gatekeeper if it is found to maintain, strengthen, or extend its gatekeeper position, and systematically infringe one or more of its obligations under the DMA.²³⁵ Such remedy can take the form of a ban, for a limited period of time, on the Gatekeeper from entering into a concentration in relation to the core platform services or other services in the digital sector or from enabling the collection of data that is affected by the systematic non-compliance.²³⁶
- 2.29. Additionally, the EC may fine the Gatekeeper up to 20% of its total worldwide turnover in the preceding financial year if there have been repeated infringements in the same core platform service that has already been subject to a non-compliance decision in the previous eight years.²³⁷ For minor contraventions including failing to report, provide access to or share required information, the EC may fine a Gatekeeper up to 1% of total worldwide turnover in the preceding financial year.²³⁸ Finally, the EC may fine a Gatekeeper up to 5% of the average worldwide daily turnover in the previous financial year per day, calculated from the date of the decision, to compel compliance with decisions and measures, or to allow inspection or access as required under the DMA.²³⁹

VIII. MERGER REVIEW

Competition aspects of large concentrations in the EU that meet certain pre-specified thresholds are examined by the EC under the EC Merger Regulation (“ECMR”).²⁴⁰ In addition to compliance under the ECMR, the DMA obligates Gatekeepers to notify the EC about every intended concentration where the target of such a concentration provides digital services.²⁴¹ Non-compliance with such an obligation may result in a fine of up to 1% of the total worldwide turnover in the preceding financial year.²⁴² The DMA also empowers the EC to prohibit Gatekeepers from entering into future concentrations in cases where Gatekeepers have engaged in systematic non-compliance.²⁴³

3. UNITED KINGDOM

- 3.1. In the UK, the Competition Act, 1998 (“CA-98”)²⁴⁴ is the primary competition legislation, and its enforcement is entrusted with the CMA²⁴⁵. The CA-98 prohibits one or more undertakings from engaging in conduct that amounts to abuse of dominant position in a market if it may affect trade in the UK.²⁴⁶ The CA-98, like most of its other global counterparts, primarily follows an *ex-post* method of intervention.
- 3.2. Owing to the emergence of certain large digital enterprises in digital markets such as e-commerce, online advertising and social media, the Government of the UK constituted the Digital Competition Expert Panel, headed by Professor Jason Furman (the “Furman Committee”).²⁴⁷ The task of the Furman Committee was to identify potential challenges to fair competition posed by the digital market and to put forward recommendations for fair and contestable digital markets.²⁴⁸ The Furman Committee report argued that a new robust *ex-ante* regime should complement the existing *ex-post* framework under the CA-98.²⁴⁹ Subsequently, the Digital Markets Task Force was set up to implement and design the new pro-competitive regime for digital markets²⁵⁰ and gave its advice to the UK Government on the same on 8th December 2020²⁵¹.
- 3.3. This was followed by the CMA report on its market study on Online Platforms and Digital Advertising that reiterated the need for a Digital Markets Unit (“UK DMU”)²⁵² that would have the power to enforce a code of conduct specifically tailored for regulating the behaviour of platforms with significant market power²⁵³.

3.4. In July 2021, the Department for Digital, Culture, Media and Sport and the Department for Business, Energy and Industrial Strategy jointly published a consultation paper which sought the opinion of various stakeholders regarding the proposed regime for digital markets.²⁵⁴ After considering the feedback received, in May 2022, the two Government bodies confirmed the manner in which such regime will be designed.²⁵⁵ The DMCC was finally presented before the Parliament in April 2023.²⁵⁶

A. Proposed *ex-ante* measures under the Digital Markets, Competition and Consumers Bill, 2023

I. SCOPE AND APPLICABILITY

3.5. The DMCC regulates large undertakings in the digital market that are engaged in digital activities having a UK nexus.²⁵⁷ Under the DMCC, a digital activity can be said to have a UK nexus if any of the following conditions are met: (i) the digital activity has a significant number of users residing in the UK; (ii) the undertaking that carries out the digital activity carries on business in the UK in relation to the digital activity; or (iii) the digital activity or the manner in which the digital activity is being carried out is likely to have an immediate, substantial and foreseeable effect on trade in the UK.²⁵⁸

3.6. The DMCC has kept the definition of digital activity broad while including within its ambit:²⁵⁹ (a) the provision of a service by means of the internet (for consideration or otherwise); (b) the provision of one or more pieces of digital content (for consideration or otherwise); or (c) any other activity carried out for the purposes of the above.

II. DESIGNATION AND THRESHOLDS

3.7. As per the DMCC, the CMA is empowered to accord a 'Strategic Market Status' / SMS to undertakings in respect of a digital activity carried out by them.²⁶⁰ In order to be granted the SMS, the DMCC requires undertakings to meet the following criteria:

- a. have a UK nexus;²⁶¹ (discussed above)
- b. have substantial and entrenched market power;²⁶² and
- c. have a position of strategic significance.²⁶³

- 3.8. The above is subject to the undertaking *first* satisfying the ‘turnover’ condition.²⁶⁴ The ‘turnover’ condition is met in relation to an undertaking if the CMA estimates the undertaking (or the group that the undertaking is a part of) to have a global turnover value exceeding GBP 25 billion or a UK turnover value exceeding GBP 1 billion.²⁶⁵ The CMA cannot designate an undertaking as having SMS in respect of a digital activity unless the turnover condition is met in relation to the undertaking.²⁶⁶
- 3.9. To evaluate whether an undertaking has attained substantial and entrenched market power, the CMA must do a forward-looking assessment of the undertaking’s current and potential market power, for at least five years.²⁶⁷ The assessment will also take into consideration foreseeable or expected effects if the undertaking was not granted the SMS status in respect of a digital activity, and other developments that may affect the conduct of the undertaking in carrying out the digital activity.²⁶⁸
- 3.10. An undertaking has a position of strategic significance with regard to a digital activity if one or more of the following criteria are met:²⁶⁹
- a. the undertaking has attained significant size or scale in respect of the digital activity;
 - b. the digital activity is used by a significant number of undertakings in the course of their business;
 - c. the undertaking’s position in respect of the digital activity allows it to extend its market power to a host of other activities;
 - d. the undertaking has the position to determine or substantially influence the ways in which other undertakings conduct themselves in respect of the digital activity or otherwise.
- 3.11. The criteria relating to the UK nexus, substantial and entrenched market power, and position of strategic significance are qualitative and therefore require a case-by-case analysis by the CMA.

III. DESIGNATION PROCESS AND REVIEW

- 3.12. The DMCC empowers the CMA to conduct an ‘initial SMS investigation’,²⁷⁰ i.e. an investigation into non-designated entities for the purposes of designation,²⁷¹ if it has reasonable grounds to believe that an undertaking can be accorded with SMS in relation to a digital activity²⁷². Upon such designation, the undertaking

will be treated as an SMS entity for five subsequent years starting from the day after the day on which the SMS decision notice is given.²⁷³

- 3.13. The CMA may conduct ‘further SMS investigation’²⁷⁴ regarding the designation of an SMS entity with respect to a relevant digital activity at any time during the five-year period²⁷⁵. After conducting further SMS investigation, the CMA may *revoke*²⁷⁶ the designation of the undertaking or *redesignate*²⁷⁷ the undertaking with respect to the same²⁷⁸ or connected²⁷⁹ digital activity. If the CMA decides to revoke the SMS entity’s designation, it may make transitional, transitory, or saving provisions as necessary in relation to any ongoing obligations for the SMS entity.²⁸⁰

IV. *EX-ANTE* CONDUCT OBLIGATIONS

- 3.14. The DMCC empowers the CMA to impose one or more *ex-ante* obligations upon SMS entities²⁸¹ that fall within the ‘permitted conduct requirements’²⁸². These conduct requirements are based on three key objectives: (i) fair dealing, (ii) open choices and (iii) trust and transparency.²⁸³ The *fair dealing* objective ensures that users or potential users of a digital activity provided by an SMS entity are fairly treated and are able to interact with the SMS entity on reasonable terms.²⁸⁴ The *open choices* objective requires users or potential users of a digital activity to be able to freely choose between the services or digital content provided by the SMS entity and that of any other undertakings.²⁸⁵ Finally, the *trust and transparency* objective aims to help users or potential users understand the services or digital content, including the terms of access, provided by the SMS entity.²⁸⁶ It also ensures that such users can make informed decisions about how they interact with the SMS entity in respect of the relevant digital activity.²⁸⁷

- 3.15. Permitted conduct requirements are of two kinds - those requirements that oblige SMS entities to follow certain conducts (obligatory conduct requirements), and those that prevent them from engaging in certain kinds of conduct (preventive conduct requirements).²⁸⁸

*a. Obligatory conduct requirements*²⁸⁹

- 3.16. These categories of conduct requirements direct an SMS entity to engage in fair trade with reasonable terms,²⁹⁰ to have effective procedures for addressing complaints by and disputes with users or potential users,²⁹¹ and to offer clear,

accurate and easily accessible information regarding the relevant digital activity to its users or potential users²⁹².

- 3.17. This set of conduct requirements also mandates the SMS entities to provide explanations and a reasonable notice period to its users or potential users before implementing any change to the relevant digital activity, especially those changes that are expected to have a material impact on them.²⁹³ Moreover, as a part of such conduct requirements, it is essential to present users with options or default settings with regard to the digital activity in a manner that permits users to make informed and effective decisions about those options or settings.²⁹⁴

*b. Preventive conduct requirements*²⁹⁵

- 3.18. Such requirements aim to prevent SMS entities from applying discriminatory terms, conditions, or policies against certain users or potential users, or specific user categories,²⁹⁶ and from leveraging their position in relation to the relevant digital activity to provide preferential treatment to their own products over those of other undertakings²⁹⁷. It also prohibits SMS entities from engaging in additional activities alongside the relevant digital activity in a manner that enhances its market power materially or reinforces the strategic significance of its position in relation to the relevant digital activity.²⁹⁸
- 3.19. The DMCC also bans the SMS entities from engaging in anti-competitive tying and bundling practices by mandating or incentivising users or potential users of one of its products to utilise one or more of its other products in conjunction with services or digital content provided within the relevant digital activity.²⁹⁹ The set of preventive conduct requirements also aims to prevent SMS entities from limiting interoperability between relevant service or digital content and products of other undertakings,³⁰⁰ unfairly using data,³⁰¹ and from restricting the manner in which users or potential users utilise the relevant digital activity³⁰² and the ability to use the products of other undertakings³⁰³.

V. EXEMPTIONS

- 3.20. Under the DMCC, an SMS entity may make representations to the CMA under the 'countervailing benefits exemption' in order to justify non-compliance with any of the imposed obligations.³⁰⁴

- 3.21. The countervailing benefits exemption is applicable only when the conduct in question benefits users or potential users of the digital activity and the benefits arising out of a breach of the conduct requirement outweigh any actual or likely detrimental impact on competition.³⁰⁵ Additionally, such an exemption is only valid when it is proven that the conduct in question is indispensable and proportionate to the realisation of the benefits, and that effective competition is not eliminated or prevented due to the conduct in question.³⁰⁶

VI. ENFORCEMENT AND MONITORING

- 3.22. The CMA is empowered to initiate a conduct investigation if it has reasonable grounds to suspect that an SMS entity has breached a conduct requirement.³⁰⁷ Before it begins its investigation, the CMA has to notify the SMS entity suspected of having breached a conduct requirement.³⁰⁸ The DMCC also casts a duty upon SMS entities to report certain mergers that meet the criteria laid down in Section 57 of the DMCC,³⁰⁹ and mandates such entities to maintain compliance reports in relation to the conduct requirements imposed upon them³¹⁰.
- 3.23. In addition to the above, the DMCC goes several steps above conduct requirements, and provides broad-ranging powers to the CMA to carry out Pro-Competition Interventions (“PCIs”).³¹¹ PCIs may be carried out by the CMA where it believes that a factor or a combination of factors relating to a digital activity carried out by an SMS entity may have an adverse effect on competition and the PCI would help in remedying, mitigating or preventing the adverse effect on competition.³¹² The DMCC also empowers the CMA to accept an appropriate commitment from an SMS entity in relation to its conduct in respect of an adverse effect on competition or detrimental effect on UK users that the CMA considers has resulted, or is likely to result, from an adverse effect on competition.³¹³

VII. REMEDIES

- 3.24. Failure to comply with the competition requirements³¹⁴ or with investigative requirements³¹⁵ can attract penalties which may be a: (i) fixed amount; (ii) amount calculated by reference to a daily rate; or (iii) a combination of the above³¹⁶. In case of failure to comply with competition requirements, the maximum amounts of a penalty that may be imposed are: (i) in the case of a fixed amount, 10% of the total turnover inside and outside the UK³¹⁷ of the SMS entity or group that the SMS entity is part of;³¹⁸ (ii) in the case of an amount

calculated by reference to a daily rate, 5% of the daily turnover inside and outside the UK³¹⁹ of the SMS entity or group that the SMS entity is part of;³²⁰ or (iii) in case of a combination of the above, the same rates as discussed above³²¹. In case the CMA considers that an SMS entity has failed to comply with its conduct requirements without any reasonable excuse, the amount of penalty imposed must be fixed.³²²

- 3.25. In case of failure to comply with investigative requirements, i.e. failure to submit information to the CMA or give information which is false or misleading in a material particular,³²³ both undertakings and individuals³²⁴ can be penalised³²⁵. The maximum penalty that may be imposed on an undertaking is: (i) in the case of a fixed amount, 1% of the total value of its turnover (both inside and outside the United Kingdom);³²⁶ (ii) in the case of an amount calculated by reference to a daily rate, 5% of the total value of its daily turnover (both inside and outside the United Kingdom) for each day;³²⁷ and (iii) in case of a combination of the above, the same rates as discussed above³²⁸. The maximum penalty that may be imposed on an individual is: (i) in the case of a fixed amount, GBP 30,000;³²⁹ and (ii) in the case of an amount calculated by reference to a daily rate, GBP 15,000 per day³³⁰. Apart from this, the DMCC also provides for director disqualification.³³¹
- 3.26. The DMCC authorises the CMA to implement a PCI on an SMS entity if, after conducting a PCI investigation, it determines that a factor or a combination of factors related to a relevant digital activity is adversely impacting competition, and implementing the PCI is likely to rectify, lessen, or prevent the adverse effect on competition.³³² A PCI can comprise either or both of the following: (a) a 'pro-competition order', which imposes specific requirements on the SMS entity concerning its conduct related to the relevant digital activity or otherwise; or (b) recommendations issued by the CMA to any person exercising certain public functions, advising on the necessary actions that the entity should take concerning the SMS entity, or the digital activity, or otherwise.³³³ A pro-competition order may include provisions that impose requirements on an SMS entity on a trial basis, to assist the CMA in determining effective measures to rectify, alleviate, or prevent the adverse effect on competition to which the order relates.³³⁴ A PCI order may take the form of requirements for an undertaking to treat different users or customers differently, with such provisions being based on user or customer descriptions, absolute user or customer numbers, or proportions of the undertaking's total user or customer count.³³⁵

4. GERMANY

4.1. In Germany, anti-competitive practices by dominant entities are examined under the ARC (German Competition Act, GWB)³³⁶ whose enforcement is carried out by the *Bundeskartellamt* or the FCO.³³⁷ While the ARC primarily followed an *ex-post* review of dominance under Section 18, the ARC has been amended extensively over the last few years to strengthen enforcement in digital markets, which includes amendments to empower the FCO to intervene *ex-ante*.

A. Abuse of dominance and relative market power under the Act Against Restraint of Competition, 1958

4.2. The ARC prohibits singular or collective *abuse of dominance* by an undertaking or a group of undertakings.³³⁸ In addition to abuse of dominance, the ARC also prohibits the abuse of *relative or superior market power* to accord protection to small market players.³³⁹ An undertaking is considered to possess relative or superior market power when other market participants rely on it as a supplier or consumer without sufficient alternatives.³⁴⁰ Specifically, in case of multi-sided markets, intermediaries possess relative market power when other undertakings are immensely dependent on their services for gaining access to supply and sales markets to the point where there is no reasonable alternative for other undertakings to switch to.³⁴¹

B. Amendments to the Act Against Restraint of Competition, 1958 to strengthen enforcement in digital markets

4.3. The series of amendments to ARC significantly expand on the scope of dominance and relative market power, and also introduce a new threshold for *ex-ante* intervention. The amendments to the ARC have been made based on evidence and expertise gathered by the FCO through its papers, market studies, and decision practice in digital markets.³⁴² The key features of these amendments have been outlined below.

I. THE 9TH AMENDMENT

4.4. Adopted in 2017, the 9th amendment to the ARC (“**9th Amendment**”) brought about several changes with respect to digital markets.³⁴³ It now recognised markets providing free online services.³⁴⁴ The 9th Amendment also introduced new criteria for the assessment of market position of undertakings in case of

multi-sided markets and networks. These criteria consist of factors such as access to competitively sensitive data, competition driven by innovation, direct and indirect network effects and economies of scale arising in connection with network effects, simultaneous usage of multiple services, and switching costs for users.³⁴⁵

II. THE 10TH AMENDMENT

- 4.5. The 10th amendment to the ARC came into force in 2021³⁴⁶ based on recommendations by the ‘Competition Law 4.0’ Commission, established by the German Federal Ministry for Economic Affairs and Energy³⁴⁷. The most important change brought about by the 10th Amendment is the *ex-ante* regulatory framework introduced under Section 19a focusing on large digital companies.³⁴⁸ Apart from this, the 10th Amendment also introduces measures to protect entities that engage with those digital companies that have ‘relative market power’ but are not necessarily dominant. Previously, such protection was limited to small and medium-sized enterprises only.³⁴⁹ Additionally, the 10th Amendment authorises the FCO to grant adequate compensation to dependent companies in exchange for providing access to data.³⁵⁰

C. *Ex-ante* competition framework under the 10th Amendment

I. SCOPE AND APPLICATION

- 4.6. As discussed above, the *ex-ante* regulatory framework introduced under Section 19a is aimed at undertakings that are active to a significant extent on multi-sided markets and networks. The 10th Amendment regards these undertakings as ‘undertakings of paramount significance for competition across markets’ (“PSCAM”).³⁵¹

II. DESIGNATION PROCESS, THRESHOLDS AND REVIEW

- 4.7. While assessing the PSCAM status of an undertaking, several factors are to be taken into account. These include the undertaking’s dominant position in one or more markets, its access to competitively sensitive data, its financial strength or access to other resources, its vertical integration and activities in related markets, its role in facilitating third parties’ access to supply and sales markets, and its related influence on the business activities of third parties.³⁵²

- 4.8. The FCO provides the PSCAM status through a declaratory decision.³⁵³ Such decision remains valid for five years from the date on which the decision becomes final.³⁵⁴

III. *EX-ANTE* OBLIGATIONS

- 4.9. The 10th Amendment outlines certain types of conduct which are strictly prohibited for the PSCAM entities. Specific conducts that are prohibited include self-preferencing,³⁵⁵ hindering the operations of other businesses engaged in activities on supply or sales markets where the undertaking's activities are of relevance for market access,³⁵⁶ anti-competitive tying and bundling,³⁵⁷ and unfair terms and conditions that hinder the entry of other competitors (anti-competitive data processing)³⁵⁸. PSCAM entities are also barred from refusing to comply with interoperability and data portability requirements or from making these requirements more difficult to follow.³⁵⁹ The FCO also has the power to ban PSCAM entities from impeding other businesses from adequately evaluating the value of a service by withholding or inadequately disclosing information regarding its scope, quality, and success,³⁶⁰ and requesting unjustified and disproportionate benefits for handling the offers of another undertaking³⁶¹.

IV. EXEMPTIONS

- 4.10. The *ex-ante* obligations imposed under Section 19a of the ARC are subject to an objective justification test. The 10th Amendment clarifies that unless the PSCAM entity in question objectively justifies its conduct to the FCO, a rebuttable presumption is established against the PSCAM entity.³⁶² While providing objective justification, the burden of demonstration and proof shall lie on the PSCAM entity.³⁶³

V. ENFORCEMENT AND MONITORING

- 4.11. With the intention to prevent irreparable harm which could potentially arise due to the anti-competitive practices of the PSCAM entities, the 10th Amendment has reduced the threshold for the FCO to issue interim orders before reaching a final decision regarding the permissibility of the conduct.³⁶⁴ Such interim measures shall not be applicable if the PSCAM entity can prove that the order would result in unfair hardship that cannot be justified by overriding public interests.³⁶⁵

- 4.12. The 10th Amendment has also facilitated faster resolution of cases by allowing appeals against FCO decisions, including all intermediary actions, to be directly presented to the Federal Court of Justice under Section 19a.³⁶⁶

VI. REMEDIES

- 4.13. Intentional or negligent acts that violate an enforceable order under Section 19a(2) amount to an administrative offence³⁶⁷ which may amount to a fine of up to EUR 1 million³⁶⁸. A fine exceeding such an amount may be levied upon undertakings or an association of undertakings, and such fine shall not exceed 10% of the total turnover of the undertaking or association of undertakings generated in the business year preceding the FCO's decision.³⁶⁹
- 4.14. To put a stop to any violation of prohibited conducts under Section 19a, the ARC authorises the FCO to mandate the adoption of appropriate behavioural or structural remedies that are proportional to the identified infringement and necessary to effectively terminate such an infringement.³⁷⁰ The ARC directs the FCO to impose structural remedies only when no behavioural remedy can achieve the same level of effectiveness, or if the behavioural remedy would place a greater burden on the concerned undertakings compared to the structural remedies.³⁷¹ As part of the order to terminate the infringement, the FCO may also order for the reimbursement of benefits gained through the infringement.³⁷²

THE 11TH AMENDMENT TO THE ACT AGAINST RESTRAINT OF COMPETITION, 1958

- 4.15. On 7th November 2023, the 11th Amendment to the ARC came into force. The 11th Amendment introduces three key changes: *first*, the newly inserted Section 32f empowers the FCO to impose both behavioural and structural remedies, following a sector inquiry, to address suspected disruptions to competition in that sector even if the entities concerned are fully compliant with competition laws;³⁷³ *second*, the FCO has now been empowered to “skim off” financial advantages (i.e. excess profits) that companies gain as a result of their infringements;³⁷⁴ and *third*, the amendment also empowers the FCO to investigate infringements of the DMA in Germany³⁷⁵. The 11th Amendment also simplifies and therefore facilitates private enforcement of the DMA in Germany.³⁷⁶

5. UNITED STATES

- 5.1. In the US, key applicable laws pertaining to antitrust enforcement are the Sherman Act, the Clayton Act, and the FTCA.
- 5.2. The Sherman Act prohibits every contract, conspiracy, or combination that restrains trade or commerce,³⁷⁷ and prohibits monopolisation and any attempt to monopolise.³⁷⁸ The Clayton Act, on the other hand, prohibits and addresses any harm that could potentially arise from certain practices that are not specifically prohibited under the Sherman Act, such as mergers and acquisitions, that may significantly lessen competition or create monopolies.³⁷⁹ The FTCA establishes the Federal Trade Commission (“**FTC**”).³⁸⁰ The FTC and the Antitrust Division of the US Department of Justice (“**DOJ**”) are jointly responsible for the enforcement of the above laws.³⁸¹

A. Key enforcement trends in digital markets

- 5.3. The FTC and the DOJ have conducted a series of investigations into alleged anti-competitive practices by online digital platforms.
- 5.4. In 2021, the FTC accused Meta of possessing monopoly power³⁸² in the market for ‘personal social networking services’³⁸³. The FTC also asserted that Meta maintained its dominant position by acquiring Instagram in 2012 and WhatsApp in 2014.³⁸⁴ As far as Google is concerned, the DOJ argued that Google holds monopoly power in the market for ‘general search services’ citing an alleged market share of 88% and significant entry barriers in the market including scale.³⁸⁵ In 2021, the Attorney General for the District of Columbia claimed that Amazon holds monopoly power in online marketplaces based on an alleged market share of 50%-70%; its ability to impose anti-competitive restrictions on third-party sellers; and entry barriers like network effects, data advantages, and extensive logistics capabilities.³⁸⁶
- 5.5. Recognising the growing influence of large digital companies, the HJC Subcommittee conducted an investigation in 2019 and published its report in 2022.³⁸⁷ The investigation examined the market power³⁸⁸ of platforms like Amazon, Apple, Facebook, and Google and assessed the effectiveness of existing antitrust laws in the digital market. The HJC Subcommittee discovered that these platforms controlled crucial distribution channels, enabling them to control market access. The HJC Subcommittee identified various anti-competitive practices such as self-preferencing and predatory pricing employed by dominant platforms to further entrench their position and

proposed various recommendations to restore competition in digital markets.³⁸⁹

B. Policy and legislative reforms

5.6. The House Judiciary Committee and both Houses of Congress have approved twelve Bills to enhance the regulation of large digital platforms in digital markets in the United States. Three of the most important Bills are the American Innovation and Choice Online Act, the Ending Platform Monopolies Act, and the Open App Markets Act.³⁹⁰

I. THE AMERICAN INNOVATION AND CHOICE ONLINE ACT³⁹¹

5.7. The AICO prohibits large digital enterprises designated as ‘Covered Platforms’³⁹² from carrying out certain ‘discriminatory conducts’³⁹³. Such discriminatory conducts include self-preferencing and similar practices that create a conflict of interest,³⁹⁴ anti-competitive tying and bundling,³⁹⁵ misusing non-public data generated on the platform,³⁹⁶ creating impediments to data portability,³⁹⁷ and imposing limitations on user control over preinstalled software applications and default settings³⁹⁸.

5.8. Upon designation, obligations under the AICO shall apply to a Covered Platform for ten years irrespective of whether ownership of or controlling interest within the Covered Platform has changed.³⁹⁹ As per the AICO, Covered Platforms may engage in discriminatory conducts if they are able to demonstrate, with clear and convincing evidence, that the conduct in question (a) does not harm the competitive process; or (b) is necessary to comply with federal or state law, protect user privacy, or safeguard non-public data; or (c) enhances consumer welfare.⁴⁰⁰

5.9. Covered Platform operators⁴⁰¹ that violate the AICO may face penalties of up to 15% of their total US revenue generated in the preceding calendar year or 30% of their US revenue in any affected or targeted line of business during the period in which the unlawful conduct takes place, whichever is greater.⁴⁰² In case it is determined that a violation of the AICO has arisen due to a conflict of interest related to the Covered Platform operator’s ownership or control of multiple lines of business, the court may order divestiture of the lines of business that give rise to such conflict.⁴⁰³ Notably, the AICO also mandates the FTC to establish a Bureau of Digital Markets specifically for enforcing the AICO.⁴⁰⁴

II. THE ENDING PLATFORM MONOPOLIES ACT⁴⁰⁵

- 5.10. The EPM aims to address the conflicts of interest that arise when ‘Covered Platforms’⁴⁰⁶ simultaneously own or control an online platform and other businesses⁴⁰⁷. The EPM prohibits Covered Platform operators⁴⁰⁸ from owning, controlling, or having a beneficial interest in a line of business other than their own platform under certain conditions⁴⁰⁹. It bans private labelling and the granting of preferential treatment to a Covered Platform’s own products, services, or lines of business on its own platform over those of a competing business.⁴¹⁰
- 5.11. Upon designation,⁴¹¹ obligations under the EPM shall apply to a Covered Platform for 10 years irrespective of whether ownership of or controlling interest within the Covered Platform has changed.⁴¹² Any party subject to such designation, or a final order from a US district court or the FTC has the right to file a petition for review with the United States Court of Appeals for the District of Columbia Circuit.⁴¹³
- 5.12. A violation of the EPM shall also constitute an unfair method of competition under Section 5 of the FTCA.⁴¹⁴ For violations of the EPM within two years of designation of the Covered Platform, any person operating a Covered Platform or any individual who is an officer, director, partner, or employee of such person may face penalties of up to 15% of the total average daily US revenue of the person in the preceding calendar year or 30% of the total average daily US revenue of the person in any affected or targeted line of business during the period in which the unlawful conduct takes place, whichever is greater.⁴¹⁵ The EPM also allows the FTC to commence a civil action in its own name to recover civil penalties and other appropriate relief against a Covered Platform operator in case it has reason to believe that a Covered Platform has violated the EPM.⁴¹⁶

III. THE OPEN APP MARKETS ACT⁴¹⁷

- 5.13. The OAM lays down a set of prohibited conducts to regulate Covered Companies that own or control an app store which has over 50,000,000 users in the US.⁴¹⁸ Among others, the OAM prohibits Covered Companies from mandating the use of their own in-app payment system for app distribution or accessibility.⁴¹⁹ It also prevents Covered Companies from requiring pricing terms or sales conditions to be better than those on other app stores as a condition for app store distribution.⁴²⁰ The OAM further prohibits Covered

Companies from taking punitive actions or offering unfavourable terms to developers for using different payment systems or app stores.⁴²¹ Concomitantly, the OAM requires Covered Companies to grant developers timely access to OS interfaces, development information, and hardware/software features.⁴²²

- 5.14. Per the OAM, conduct requirements will not be violated if an action taken by a Covered Company is necessary for user privacy, security, digital safety, prevention of spam or fraud, protection of pre-existing intellectual property rights, or compliance with federal or state laws.⁴²³ The Covered Company will be required to first establish through evidence that its action is (a) applied on a demonstrably consistent basis to its own apps, its business partners' apps, or other apps; (b) not intended to exclude or impose unnecessary or discriminatory terms on third-party apps, in-app payment systems, or app stores; and (c) narrowly tailored and cannot be achieved through less discriminatory and technically feasible means.⁴²⁴
- 5.15. The OAM grants developers the right to sue for damages⁴²⁵ or injunctive relief⁴²⁶ in a U.S. court for any actual or threatened loss or damage caused by a violation of the OAM.⁴²⁷ The OAM also allows the FTC to file a civil action in its own name to recover civil penalties and other appropriate relief in case it has reason to believe that a Covered Company has violated the OAM.⁴²⁸

C. Other legislations

- 5.16. Apart from the above Bills, the Committee has noted that nine other legislations have been proposed by both Houses of Congress, whose features, in brief, are as below:
- a. *Augmenting Compatibility and Competition by Enabling Service Switching Bill (ACCESS)*⁴²⁹ - This Bill imposes obligations on Large Communications Platform Providers⁴³⁰ to facilitate user data portability and promote interoperability with other platforms.
 - b. *The Competition and Antitrust Law Enforcement Reform Act*⁴³¹ - This Bill proposes changes to antitrust laws regarding mergers and anti-competitive behaviour. It introduces stricter criteria for allowable mergers, forbidding those that pose a significant risk of materially lessening competition.
 - c. *The Competition and Transparency in Digital Advertising Act*⁴³² - This Bill intends to promote competition in the sale and purchase of digital advertising by, *inter alia*, prohibiting companies with over USD 20 billion in digital advertising revenue in the preceding year from owning multiple

segments of the digital advertising ecosystem (such as a digital advertising exchange, sell-side / buy-side brokerage).

- d. *The Consolidation Prevention and Competition Promotion Act*⁴³³ – This Bill advocates for a more rigorous standard for permissible mergers. Similar to the proposed Competition and Antitrust Enforcement Reform Bill, this Bill also disallows mergers that pose a significant risk of materially reducing competition or unfairly lowering prices due to insufficient competition among buyers or employers.
- e. *The Digital Platform Commission Act*⁴³⁴ – This Bill proposes the establishment of a commission responsible for ensuring algorithmic fairness and safety on digital platforms while promoting competition.
- f. *The Merger Filing Fee Modernization Act*⁴³⁵ – This Bill aims to modify pre-merger filing fees and enhance enforcement resources.
- g. *The Platform Competition and Opportunity Act*⁴³⁶ – This Bill seeks to grant the FTC or the DOJ the authority to block acquisitions made by dominant platforms if they are direct or potential competitors, or if they expand a platform's market position.
- h. *The Prohibiting Anticompetitive Mergers Act*⁴³⁷ – This Bill prohibits mergers valued at USD 5 billion or higher and deals resulting in market shares exceeding 33% for the acquiring entity. It also establishes procedures to conduct retrospective reviews and facilitate the dissolution of harmful deals.
- i. *The Trust-Busting for the Twenty-First Century Act*⁴³⁸ – This Bill introduces a range of modifications to the federal antitrust laws and imposes limitations on acquisitions that involve certain dominant digital companies.

D. Miscellaneous policy initiatives

- 5.17. In July 2021, an Executive Order on Promoting Competition in the American Economy (“**Executive Order**”) was issued by the White House.⁴³⁹ The Executive Order encouraged the DOJ and the FTC to enforce antitrust laws to address challenges posed by the rise of dominant digital platforms owing to the acquisition of nascent competitors.⁴⁴⁰ The Executive Order also established the White House Competition Council within the President’s Executive Office.⁴⁴¹ A review of the Merger Guidelines⁴⁴² was announced by the DOJ and the FTC in January 2022 and in this line, public input⁴⁴³ on modernising antitrust enforcement was sought, with a specific focus on technology companies, potential competitors, market definition in zero-price or negative-price markets, and indicators of market power in multi-sided markets.

6. AUSTRALIA

- 6.1. Australia has typically followed an integrated approach towards competition enforcement and consumer protection under the CCA.⁴⁴⁴ The CCA provides an *ex-post* framework to curb anti-competitive practices and misuse of market power. The traditional *ex-post* enforcement under the CCA has been bolstered by the introduction of the Bargaining Code⁴⁴⁵ which came into force on 3rd March 2021⁴⁴⁶. Additionally, the ACCC released its report on the Digital Platforms Inquiry in 2019, which undertook a substantive review of the competition effects posed by certain digital enterprises.⁴⁴⁷ Based on its recommendations, the ACCC has embarked on the DPSI which is scheduled to deliver biannual reports between 2020 and 2025. The DPSI project aims to identify practices and trends in the markets for the supply of digital platform services. Seven interim reports have been released as part of the DPSI project so far.⁴⁴⁸
- 6.2. The Committee studied the key provisions of the Bargaining Code and the 5th DPSI Report released in November 2022, focusing on the grounds for designation, the key obligations, penalties, and exemptions. The Committee also took note of the 6th DPSI Report released in March 2023 on social media services in Australia.⁴⁴⁹ The Committee was apprised of the 7th DPSI Report that was released in November 2023 which examines competition and consumer issues arising from the expanding ecosystems of digital platform providers in Australia, using smart home devices and consumer cloud storage solutions as illustrative examples.⁴⁵⁰

A. *Ex-ante* framework under the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act, 2021

- 6.3. The Bargaining Code imposes *ex-ante* standards on digital platforms carrying content by Australian news businesses in order to address power imbalances in the news media sector. Corporations may be classified as ‘Designated Digital Platform Corporations’⁴⁵¹ and one or more services in relation to a corporation may be specified as a ‘Designated Digital Platform Service’⁴⁵². The determination for both Designated Digital Platform Corporations and Designated Digital Platform Services is based on two factors: (i) there is a significant bargaining power imbalance between the corporation and its related bodies corporate, and Australian news businesses; and (ii) whether the corporation and its related bodies corporate have made a significant contribution to the sustainability of the Australian news industry through

agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).⁴⁵³

- 6.4. The Bargaining Code imposes certain data-sharing and fairness obligations on Responsible Digital Platform Corporations⁴⁵⁴ insofar as their Designated Digital Platform Services are concerned.⁴⁵⁵ ⁴⁵⁶ Responsible Digital Platform Corporations must prepare a proposal for the Designated Digital Platform Service to recognise original covered news content during the distribution of such content, and consult registered news business corporations while developing such proposal.⁴⁵⁷ The Bargaining Code also prohibits differentiation by the Responsible Digital Platform Corporations among any news business corporations in respect of any digital service it operates or controls.⁴⁵⁸ Penalties for violating the Bargaining Code are set out in the CCA. Under the CCA, penalties for any violations of *ex-ante* standards are up to AUD 1,878,000 for body corporates⁴⁵⁹ and up to AUD 500,000 for persons who are not body corporates⁴⁶⁰. A substantial penalty for violating the non-differentiation standard is provided.⁴⁶¹

B. Proposed *ex-ante* framework under the 5th Digital Platform Services Inquiry Report

- 6.5. The 5th DPSI Report condenses the key learnings from the previous reports and proposes an *ex-ante* regulatory model to address the major issues in the digital sector.⁴⁶² It notes conducts such as self-preferencing, tying, exclusivity agreements, impeding switching, denying interoperability, and withholding access to important hardware, software, and data inputs by digital platforms, which can hinder competition.⁴⁶³ It suggests a targeted *ex-ante* approach using service-specific codes of conduct containing obligations that are made applicable to ‘designated digital platforms’. The obligations in these codes of conduct can be designed based on principles to be included in the primary legislation.⁴⁶⁴ Regarding market identification, the 5th DPSI Report recommends that relevant services must be identified subject to appropriate public and industry consultation during the development of any new proposed legislation to apply to digital platforms in Australia.⁴⁶⁵
- 6.6. The 5th DPSI report suggests having a quantitative threshold based on the financial strength (looking at both Australian revenue and global revenue) and the reach of the platform (number of business users and end users) as the *primary* criteria for Designated Digital Platforms. It also recommends a qualitative threshold for when the quantitative thresholds are not suitable or

verifiable based on whether the platform occupies an important intermediary position in at least one digital platform service, whether the platform has substantial market power in at least one digital platform service it operates, and whether the platform operates multiple services.^{466 467}

- 6.7. The 5th DPSI Report notes that exemptions to the *ex-ante* obligations imposed by the service-specific codes of conduct can be given on a case-by-case basis taking into account likelihood and materiality of unintended consequences of compliance with such obligations.⁴⁶⁸ It recommends imposing significant penalties under the proposed *ex-ante* framework equivalent to the largest penalties under the CCA.⁴⁶⁹

7. JAPAN

- 7.1. Under the *ex-post* competition framework, the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, 1947⁴⁷⁰ (the “**Japan Anti-monopoly Act**”) has aimed to curb private monopolies, and unfair methods of competition. The Japan Fair Trade Commission is empowered to conduct market investigations upon receiving reports of violations⁴⁷¹, and derives its powers from the Japan Anti-monopoly Act.
- 7.2. Noting recent developments in digital platforms, Japan has considered taking cognisance of mitigating potential harms of the digital economy through *ex-ante* measures. Recognising the rise of user access to digital platforms, the METI proposed the TFDP Act⁴⁷² and the SDP Guidelines⁴⁷³.

A. Act on Improving Transparency and Fairness of Digital Platforms, 2020

- 7.3. The TFDP Act, effective since February 1, 2021⁴⁷⁴, operates as an *ex-ante* enforcement law with a limited goal of ensuring transparency and fairness in the conduct of digital platforms. To effectively implement this, the METI published the Japan Ministerial Ordinance / JMO,⁴⁷⁵ that elaborates on the disclosure obligations of the specified digital platform provider towards user providers and general users⁴⁷⁶. The METI also brings out cabinet orders that are administrative orders to enforce a relevant law, like the Cabinet Order No. 17, for stipulating the business category and thresholds in Article 4(1) of the TFDP Act.⁴⁷⁷
- 7.4. The TFDP Act defines ‘digital platforms’ as digital platform forums that seek to continuously display information pertaining to goods, services, or rights by

a 'provider' to a 'recipient' via the internet or other such means, for platforms where there are cross-side network effects and same-side network effects.⁴⁷⁸ The TFDP Act, however, does not specify a set of digital services it seeks to regulate.

- 7.5. Further, the TFDP Act seeks to designate certain digital platforms as 'Specified Digital Platforms'.⁴⁷⁹ They will be designated based on the triggering thresholds notified for specific types of digital platform services through METI cabinet orders.⁴⁸⁰ The thresholds are qualitative in nature, based on the total amount earned by providing the platform for the sale of goods and services, number of users, or other indicators.⁴⁸¹ The METI's cabinet orders have set out four business classifications along with thresholds,⁴⁸² i.e. (i) e-commerce platforms,⁴⁸³ (ii) app-store platforms,⁴⁸⁴ (iii) media-integrated digital platforms,⁴⁸⁵ and (iv) advertising intermediary digital platforms⁴⁸⁶.
- 7.6. Specified Digital Platforms must make certain disclosures to user providers and general users, like sharing the terms and conditions of access to their platform services to both in a clear, plain, and accessible manner.⁴⁸⁷ Specifically, for user providers, the Specified Digital Platform must disclose details relating to fees charged by the digital platform provider for providing any goods or services to the user providers,⁴⁸⁸ and the criteria used to determine rankings where the information on the platform is displayed in a ranked manner along with disclosure regarding sponsored ranking⁴⁸⁹.
- 7.7. For general users, the Specified Digital Platform must disclose the criteria used to determine any ranked results, highlight sponsored ranking as well as share the particulars and conditions relating to any acquisition of user provider-generated data.⁴⁹⁰ The JMO also imposes additional obligations. For instance, the specified e-commerce platforms digital platform must disclose the reasoning behind requesting platform parity treatment.⁴⁹¹
- 7.8. Under the TFDP Act, the specified digital platform provider is exempt from certain disclosure obligations if those disclosures would harm the interests of general users.⁴⁹² The disclosure obligations of Specified Digital Platforms towards the user providers are exempted where (i) the user providers have engaged in repeated violations of the terms of access, (ii) the user providers are linked with an organised crime group, or (iii) the specified digital platform provider can show a likelihood of harm to the legitimate interests of either the Specified Digital Platform, user providers, or general users as a result of such disclosures.⁴⁹³

7.9. If a Specified Digital Platform is found violating its obligations, the METI may issue a recommendation and later an order, to undertake recommended measures.⁴⁹⁴ If the Specified Digital Platform fails to comply with the order issued by METI, it can be penalised by a fine up to JPY 1,000,000.⁴⁹⁵

B. Guidelines on Measures to be Taken by Specified Digital Platform Providers to Promote Mutual Understanding in Transactional Relationships with User Providers of Goods, etc., 2021

7.10. The SDP Guidelines indicate a set of measures to be undertaken by the designated entities to improve fairness, transparency, dispute resolution, and local reporting norms.⁴⁹⁶ The SDP Guidelines expand on the obligations imposed under the TFDP Act. It sets out obligations on Specified Digital Platforms in terms of self-preferencing in the advertisement classifications, and covers the use of user provider-generated data and conflicts of interest to ensure fairness.⁴⁹⁷

7.11. The SDP Guidelines also provide that the Specified Digital Platform may evolve mechanisms to consult user providers and general users prior to changes in terms of access, ranking, display etc.⁴⁹⁸ Furthermore, the METI is empowered to evaluate the transparency and fairness by the Specified Digital Platform based on the SDP Guidelines and the reports submitted by the Specified Digital Platforms.⁴⁹⁹ The SDP Guidelines further recommend standardising and publishing decision-making criteria regarding treatment of user providers, and evolving business operations that take into account instances of conflict of interest and self-preferencing.⁵⁰⁰

8. SOUTH KOREA

8.1. In South Korea, the applicable laws pertaining to antitrust enforcement in the digital market include the MRFTA,⁵⁰¹ the App-Store Act,⁵⁰² and the Review Guidelines⁵⁰³.

A. Key policy and legislative reforms in digital markets

8.2. The KFTC has made active efforts to restore competition in digital markets through diverse remedies. For instance, in 2021, Naver Shopping, a dominant search engine in South Korea, was found to be abusing its dominant position in the comparison shopping services market.⁵⁰⁴ In another instance, the KFTC also imposed corrective measures on seven platform operators for violating the

Act on the Consumer Protection in Electronic Commerce.⁵⁰⁵ Furthermore, Google was fined USD 177 million for restricting device manufacturers from modifying Android operating system.⁵⁰⁶

- 8.3. South Korea intends to strengthen its *ex-post* regulatory measures, and in this context, the following legislations have been adopted.

B. Review Guidelines for Regulations Against Abuse of Dominance and Unfair Trade Practice by Online Platform Businesses

- 8.4. The MRFTA, enforced by KFTC, is the primary source of law governing competition matters in South Korea. The Review Guidelines⁵⁰⁷ act as a supplement to the existing Guidelines on Review of the Abuse of Market Dominant Position, 2009⁵⁰⁸ under the MRFTA to delineate the distinct characteristics of online platform operators. The Review Guidelines are applicable when examining whether the business activities of online platform operators violate Article 5 of the MRFTA which provides for prohibition of abuse of market dominance.⁵⁰⁹ The Review Guidelines also apply to cases where a foreign business operator has an impact on the domestic market through actions taken abroad. This is regardless of whether the foreign business operator has a business base in South Korea or whether the counterparty to the transaction is a domestic business operator or consumer.⁵¹⁰
- 8.5. The Review Guidelines define an ‘online platform operator’ as a person whose business is to provide online platform services.⁵¹¹ ‘Online platform services’ are defined as services that promote interactions such as transactions and information exchange between different groups of users through an online platform and cover online platform mediation services, viz;⁵¹² online search engines; online social network services; digital content services such as video; operating systems; online advertising service; and other services corresponding to the above that promote interactions such as transactions and information exchange between users of different groups⁵¹³.
- 8.6. Further, the Review Guidelines lay down certain key characteristics of online platforms that include multi-sided markets and cross-network effects, economies of scale, data usage capabilities and nominally free services.⁵¹⁴ They also provide reviewing criteria for prohibited conduct of online platforms including multi-homing, self-preferencing practices, and anti-competitive tying, among others.⁵¹⁵

C. Amendments to the South Korean Telecommunications Business Act, 2011 (App-Store Act)

- 8.7. The KCC amended the South Korean Telecommunications Business Act, 2011 (“**Telecommunications Business Act**”) in September 2021 to include Article 50(1)(9-11) that bars dominant app market business operators⁵¹⁶ from engaging in certain anti-competitive conducts⁵¹⁷. The App-Store Act prohibits certain app market business entities from engaging in conducts that undermine or is likely to undermine fair competition or users’ interests in the app market.⁵¹⁸ Such conduct includes compelling a mobile content supplier to use certain means of payment by unduly leveraging their position in a transaction;⁵¹⁹ unfairly delaying the examination of mobile content;⁵²⁰ and unfairly removing mobile content from the app market⁵²¹.
- 8.8. The App-Store Act also stipulates that an app market business operator shall prevent any damage to users and protect their rights, by methods like stipulating matters concerning the settlement of payment and refund for mobile contacts etc., in the app’s terms of use.⁵²² Additionally, it empowers the Ministry of Science and ICT or the KCC to conduct fact-finding surveys on the operation of app markets for protection of mobile content providers.⁵²³
- 8.9. Per the App-Store Act, if Article 50(1) is violated, the KCC may impose measures including disclosure of information on telecommunication services, suspension of prohibited acts, and improvement of business processes, among others.⁵²⁴ A telecommunications business operator may be penalised, on commission of a prohibited act, with a surcharge of up to 3% of the sales prescribed by Presidential Decree.⁵²⁵

D. Other miscellaneous legislations and policy reforms

- 8.10. The KFTC has proposed an amendment to the Act on Consumer Protection in Electronic Commerce Act⁵²⁶ to reclassify current business models into platform operators, platform-using business operators, and independent online mall operators.⁵²⁷ Additionally, the KFTC has also proposed the Fair Intermediate Transactions on Online Platforms Act which aims to curb unfair trade practices by online platform operators.⁵²⁸ Moreover, the KCC has proposed an Online Platform User Protection Act which focuses on protecting rights of online platform users and prohibits online platform operators from engaging in anti-competitive practices.⁵²⁹ Apart from this, a pan-governmental body has been

instituted in South Korea to create a self-regulation policy in respect of digital platforms and conduct a study into digital markets.⁵³⁰

9. CHINA

9.1. Over the last decade, China has seen the rise of large digital enterprises such as Alibaba, Tencent, and ByteDance in its digital market.⁵³¹ Noting these developments, it has strengthened competition enforcement in the digital economy, where for instance, despite being home-grown, a fine of USD 2.75 billion was imposed on Alibaba for abusing its dominant position for several years.⁵³²

9.2. In addition to proactive enforcement under China's AML,⁵³³ the Anti-Monopoly Commission of the State Council brought out the Platform Guidelines on 7th February 2021 which follow a primarily *ex-post* approach⁵³⁴. This was followed by the State Administration for Market Regulation, China's top antitrust watchdog, publishing the Draft Classification Guidelines⁵³⁵ and Draft Responsibility Guidelines⁵³⁶ in 2021, aiming to prevent anti-competitive conduct through *ex-ante* mechanisms⁵³⁷.

A. Anti-Monopoly Law, 2007 (as amended in 2022)

9.3. The AML, China's primary competition law, was amended in 2022 to address monopolistic practices in China's expanding digital markets.⁵³⁸ It prescribes factors to determine a dominant entity and sets out thresholds for *presuming* dominance.⁵³⁹ To address potential anti-competitive practices, recent amendments to the AML prohibit undertakings from using data, algorithms or capital advantages to engage in anti-competitive monopolistic practices or abuses of dominance.⁵⁴⁰ These prohibitions do not directly engage with the conduct of an undertaking, and instead seek to mitigate negative consequences.

B. Anti-Monopoly Guidelines for the Platform Economy, 2021⁵⁴¹

9.4. The Platform Guidelines aim to prevent monopolistic practices in the platform economy and promote fair competition.⁵⁴² They identify factors to define the relevant product market.⁵⁴³ The Platform Guidelines also highlight that concerted monopoly agreements achieved by data, algorithms, or other methods will be considered as anti-competitive.⁵⁴⁴ They further note the impact of killer acquisitions on the platform economy, and further scrutinise concentrations that may restrict competition below the notifiable value.⁵⁴⁵

C. Proposed *ex-ante* measures

- 9.5. China has proposed to introduce *ex-ante* obligations through the Draft Classification Guidelines and Draft Responsibility Guidelines.⁵⁴⁶ The Draft Classification Guidelines provide for different categories of markets along with the thresholds of internet platforms, graded by scale and impact. The Draft Responsibility Guidelines principally provide for the obligations of platform entities.
- 9.6. Under the Draft Classification Guidelines, internet platforms have been classified based on functions, such as online sales, life service, social entertainment, information, financial service, and network computing application platforms.⁵⁴⁷
- 9.7. The thresholds for designation of a super platform are (i) at least 500 million annual active users in China in the preceding year, (ii) core business involves at least two types of platform business, (iii) at least RMB 1 trillion market value at the end of the previous year, and (iv) the platform has strong ability to restrict merchants from contacting the user.⁵⁴⁸ The thresholds for designation of a large platform are (i) at least 50 million annual active users in China in the preceding year, (ii) outstanding performance of the main business, (iii) the market value at the end of the previous year was at least RMB 100 billion, and (iv) a strong ability to restrict merchants from contacting consumers.⁵⁴⁹
- 9.8. The Draft Responsibility Guidelines impose certain key *ex-ante* obligations on ‘super-large internet platforms operators’.⁵⁵⁰ These include that super-large internet platform operators are prohibited from using non-public data generated or provided by operators and users that use the platform without legitimate reasons,⁵⁵¹ and that they must promote interoperability of services amongst other platform operators⁵⁵². They are also prohibited from using the tied-in services of a related platform when users on the platform access or register the platform services they need⁵⁵³ and must abide by the principles of fairness and prohibit any self-preferential treatment⁵⁵⁴.
- 9.9. The Draft Responsibility Guidelines provide general obligations applicable to all internet platforms. For instance, internet platform operators must verify and register relevant information of the operators who apply to enter the platform.⁵⁵⁵ They must not engage in anti-monopoly behaviour⁵⁵⁶ and use technical means to unfairly hinder the normal operation of other operators⁵⁵⁷.

They should strengthen the rectification of illegal and criminal activities on the platform and seek to build a healthy online business environment.⁵⁵⁸

- 9.10. Under the Draft Responsibility Guidelines, the obligations can be modified on the grounds of (i) damage to public interest and national security, (ii) compliance that exceeds their scope of control and technical capabilities, and seriously affects their normal business activities, and (iii) any other laws or regulations that permit modifications stipulated in national laws.⁵⁵⁹

CHAPTER IV: A FIT-FOR-PURPOSE COMPETITION REGIME FOR THE INDIAN DIGITAL ECONOMY

1. THE NEED FOR *EX-ANTE* COMPETITION INTERVENTION IN DIGITAL MARKETS

1.1. The Committee observed that competition jurisprudence has traditionally favoured *ex-post* models to *ex-ante* models of intervention, as the latter bears the risk of false positives (i.e., over-regulation) and a consequent chilling effect on innovation. The Committee noted that this premise may require rethinking in case of Indian digital markets, for the following reasons.

A. The complementary relationship between *ex-ante* and *ex-post* enforcement

1.2. First, the Committee took note of the abundant literature that underscores the symbiotic relationship between *ex-ante* and *ex-post* models of intervention in promoting fairness and contestability in markets.⁵⁶⁰ *Ex-post* competition enforcement works best when complemented with and supported by *ex-ante* regulation. Traditionally, sectoral regulators, through *ex-ante* regulation, ‘set the rules of the game’ and competition authorities, through *ex-post* regulation, act as ‘umpires of the game’.⁵⁶¹ More simply put, sectoral regulators who have a broader mandate to ensure orderly growth in a given sector often stipulate what should be done by enterprises, while competition authorities, in line with their limited and sector-agnostic mandate of ‘promoting competition’ across markets, prescribe what should not be done. They have convergent roles in maximising consumer welfare.⁵⁶² The resultant enforcement from a combination of *ex-ante* and *ex-post* approaches sets boundaries for market players to operate within. In India, digital enterprises do not fall under the purview of a specific sector or a statute, although aspects of their operations are regulated in a fragmented manner by a host of different ministries and authorities. The Committee evaluated two divergent views on whether the *ex-ante* framework for digital enterprises should be subsumed within the Competition Act or whether a *de novo ex-ante* competition legislation is required.

1.3. In light of the above, the Committee first evaluated whether it is feasible to amend the Competition Act to incorporate a chapter specific to *ex-ante* regulation in digital markets. The Committee felt that amending the inherent

framework of the Competition Act which primarily relies on an *ex-post* enforcement model to intervene against large digital enterprises may result in uncertainty and therefore protracted litigations as regards the scope of the Competition Act. The Committee noted that the Competition Act is sector-agnostic by design, and as such the inclusion of a separate chapter containing *ex-ante* provisions for the regulation of digital enterprises specifically may not be feasible.

- 1.4. The Committee also observed emerging international practice where separate *ex-ante* laws for digital markets had been or were in the process of being enacted in mature jurisdictions such as in the EU (DMA), UK (DMCC) and the US (such as AICO, OAM, and EPM). Additionally, the Committee acknowledged the Standing Committee Report's recommendation that a new 'Digital Competition Act' should be introduced to ensure a fair, transparent, and contestable digital ecosystem.⁵⁶³

B. The time-consuming nature of *ex-post* investigations

- 1.5. Second, *ex-post* enforcement does not always lead to optimal restoration of competition in evolving and fast-paced markets.⁵⁶⁴ Investigations into incumbent players under the Competition Act, which begin *after a* contravention has occurred, are resource-intensive and time-consuming. In the meanwhile, the market may irreversibly tip in favour of the incumbent and consequently drive out competitors. The harm thus caused is irremediable *ex-post facto*. The Committee observed that the benefits of early detection and intervention in digital markets tend to outweigh the costs associated with over-regulation.⁵⁶⁵

C. Narrow Remedies

- 1.6. Third, *ex-post* competition investigations are limited to the narrow claims made in each specific case.⁵⁶⁶ As such, they may not effectively address repeated conducts by the same digital enterprise,⁵⁶⁷ or similar conducts by different enterprises⁵⁶⁸. The Committee observed that addressing such recurring patterns of anti-competitive behaviour through an *ex-ante* digital competition law will lead to significantly increased administrative efficiency.
- 1.7. **In light of the above discussions, the Committee recommends that a *de novo* Digital Competition Act that enables the CCI to selectively regulate large digital enterprises in an *ex-ante* manner be enacted. The Committee further**

notes that the proposed Digital Competition Act should complement and strengthen the existing competition framework governing large digital enterprises by ensuring timely detection, enforcement, and disposal of proceedings in digital markets.

1.8. Noting India's thriving digital economy and the likelihood of an *ex-ante* framework to cause undue adverse effect upon innovation, the Committee emphasises the need to strike a fine balance between increased regulation and enabling innovation. Therefore, the Committee urges that such a Digital Competition Act may regulate only those enterprises that have a significant presence and as such, the ability to influence the Indian digital market.

2. TRADITIONAL MARKETS VS. DIGITAL MARKETS: THRESHOLD FOR INTERVENTION

2.1. The Committee deliberated on thresholds for intervention to be envisaged under the Digital Competition Act, by discerning the rationale for imposing asymmetrical obligations only upon 'dominant' enterprises under the Competition Act. The Committee noted that under Section 4 of the Competition Act, dominance indicates the power of an enterprise to unilaterally influence the market within which it operates.⁵⁶⁹ Section 19(4) of the Competition Act lays down sources of such power, and includes factors such as market share of the entity, its size, resources at its disposal and the economic power of such enterprises.

2.2. The Committee noted many unique features at play in digital markets that allow digital enterprises to swiftly gain such influence.

A. Data as a resource

The Committee noted that the role played by data is a defining feature of digital markets.⁵⁷⁰ Entities in digital markets routinely collect, store, and use large amounts of data derived from users that transact upon them.⁵⁷¹ This accumulated user-data is an invaluable resource for businesses that require large data samples to study population-wide trends. The Committee also noted the prevalence of 'platform markets' in the digital economy wherein entities transact on multiple sides, where one side is subsidised by the other.⁵⁷² Therefore, in case of 'free' services, what appears as a free service may not really be free - the implicit price is the data that the user parts with.⁵⁷³ The Committee noted that such practices stand in contrast with traditional markets, where money is the sole medium of exchange.

- 2.3. The Committee was also cognisant of how data uniquely plays to the advantage of large incumbents in their entry into related markets. For instance, the search engine Google's entry into comparison shopping or the e-marketplace giant Amazon's entry into retail through Amazon Basics are examples of the consequential vertical integration due to data.⁵⁷⁴ The Committee has also taken note of the stakeholders' fear⁵⁷⁵ that once such large incumbents enter adjacent markets, the aggregated data at their disposal will result in foreclosure of new entrants, who cannot compete as efficiently without access to this critical input⁵⁷⁶.
- 2.4. Additionally, the Committee noted that access to volumes of aggregated data can present a distinct form of competitive advantage.⁵⁷⁷ A data-rich incumbent is able to further bolster its market position through feedback loops. Feedback loops manifest in two ways: a 'user feedback loop,' where an entity with a large user base is able to collect more data to improve the quality of its service and thereby acquire new users,⁵⁷⁸ and a 'monetisation feedback loop,' where intermediaries are able to cash in on the aggregated user data to improve targeted advertisements, which in turn brings in more revenue to invest in the quality of the service, thereby attracting more users⁵⁷⁹.

B. Data-Driven Network effects

- 2.5. 'Network effects' refer to increased utility that a user derives from a service when the number of other users consuming the service increases.⁵⁸⁰ For instance, the utility of an e-marketplace increases for a consumer with a concomitant increase in the number of sellers on the marketplace and *vice versa*. Similarly, the more users a social network has, the more utility it has to each of its users.
- 2.6. The Committee noted that this creates an effect wherein it is not only the product, but also the network of its users that bears utility to the user.⁵⁸¹ As such, the greater is the number of users of a digital service, the harder it becomes to create a more attractive competitor. This grants an incumbent an enormous first-mover advantage.⁵⁸² Consequently, for a new entrant offering similar services as an incumbent, the entrant has to compete not only on the quality/price of service but also with the networks of users offered by the incumbent.

C. Economies of scale

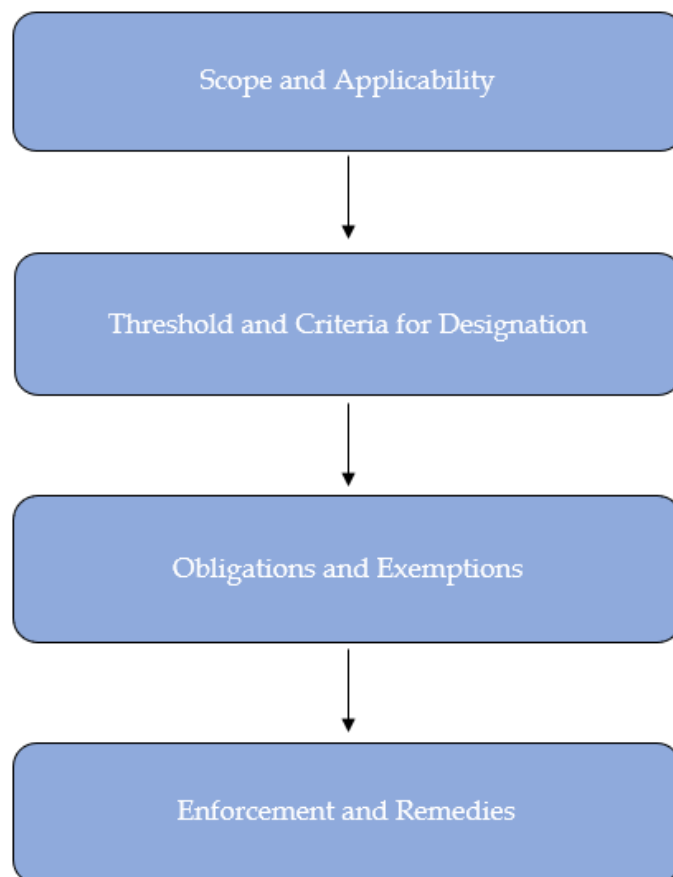
- 2.7. Economies of scale refer to a reduction in the per-unit cost of production of a good/service with an increase in the amount produced. Economies of scope arise when an increase in the number of goods/services produced by an enterprise reduces the total costs of production, as compared to a situation in which each one was to be produced by a separate enterprise. An enterprise can benefit from these economies when it can spread its fixed costs⁵⁸³ over a larger volume of output, or a larger range of goods/ services, respectively. While this generally holds true for most industries, the Committee observed that this phenomenon plays out in a more extreme manner in case of digital services. Moreover, the incremental cost of production incurred to provide services to a newly acquired user, and to provide for greater usage by existing users, is negligible in case of a digital service. A digital enterprise can collect a subscription, usage fee, or commission from every user, without incurring any significant additional cost towards the provision of such a service. Even if the service is provided at no charge, the enterprise collects valuable digital data on the user, which can be monetised or used to improve the service.
- 2.8. The Committee discerned that these peculiarities also result in incumbents having an enormous competitive advantage over new entrants in terms of the price at which a digital service can be offered. Additionally, in order to grow in size and reach economies of scale, large digital enterprises may defer their profits indefinitely by running at losses, which becomes an additional entry barrier.⁵⁸⁴
- 2.9. From the above, the Committee felt that the features of digital markets such as consumer data feed-back loops, network effects, and economies of scale quickly pivot the market in favour of incumbent enterprises, making such markets inherently prone to concentration.⁵⁸⁵ The lack of a competitive market structure also makes sellers/ business users *dependent* on the digital enterprise to reach their consumers, making such enterprises gatekeepers to certain segments of the digital economy.⁵⁸⁶
- 2.10. Further, the conjoint effect of a first-mover advantage, which is amplified by reinforcing data-driven network effects and feedback loops, presents onerous barriers of entry to competitors. Such markets are also known as *Schumpeterian markets*, where entities do not compete *in* the market, but compete *for* the market,⁵⁸⁷ resulting in a winner-takes-most dynamic. This results in situations where an entity, although not statutorily dominant per the Competition Act, may behave and influence markets in ways that dominant entities do.⁵⁸⁸

- 2.11. The Committee concludes that given the unique and self-reinforcing features at play in digital markets, pegging the CCI's intervention to an *ex-post facto* demonstration of 'dominance' may result in situations where large digital enterprises, despite having a significant presence and the ability to influence markets, may escape timely scrutiny.
- 2.12. Alluding to the recommendations of the Standing Committee Report, the Committee suggests that a complementary threshold for *ex-ante* intervention for *Systemically Significant Digital Enterprises* ("SSDE") be formulated in the Digital Competition Act. Additionally, cognisant of the time-consuming and elaborate processes involved in assessing dominance under the Competition Act and of the tendency of digital markets to irreversibly tip in favour of the incumbents, the Committee also recommends that the thresholds be formulated with objective parameters to empower the CCI with tools for early identification and intervention.

3. KEY FEATURES OF THE PROPOSED DIGITAL COMPETITION ACT

3.1. As elaborated above, the Committee recommends enacting a *de novo* Digital Competition Act to selectively regulate Systemically Significant Digital Enterprises / SSDEs by imposing *ex-ante* obligations upon them. The Draft Digital Competition Bill, 2024 (“the Draft DCB”) as prepared and deliberated by the Committee is attached as **Annexure - IV**. A schematic representation of the key features of the Draft DCB and the accompanying deliberations of the Committee are encapsulated below:

Figure 1: Key Features of the Draft DCB



A. Scope and applicability of the Draft DCB

3.2. Noting the higher error costs that may be associated with an *ex-ante* competition framework, the Committee discussed that the scope of the Draft DCB should apply only to clearly identified digital services that are susceptible to concentration to avoid unintended chilling effects. However, the Committee

also remained mindful of the pace at which digital markets are progressing, and, therefore, felt the need to keep the scope of the Draft DCB inclusive and forward-looking. For instance, the Committee took note of the recent revolutionary developments in Artificial Intelligence (“AI”): ChatGPT, an AI-powered language model, attracted close to 100 million subscribers within 2 months of its launch.⁵⁸⁹ The Committee therefore emphasised the need for agility in identification of digital services under the Draft DCB in order to enable swifter regulatory responses and minimise the need for repeated amendments.

- 3.3. The Committee took note of the two divergent approaches followed internationally in determining the applicability of *ex-ante* competition instruments: (a) service/market specific approach as adopted in the EU, Australia, and South Korea; and (b) service/market agnostic approach as proposed under the DMCC in UK, and as in force under the TFDP Act in Japan.
- 3.4. For instance, the EC has identified a list of ten digital services as ‘core platform services’⁵⁹⁰ for the purposes of *ex-ante* intervention under the DMA⁵⁹¹. Drawing from expert studies and enforcement practices in European and global digital markets, these services were identified as those with weak contestability, a higher propensity for anti-competitive practices,⁵⁹² and the potential to impact a large number of end users and business users⁵⁹³. Similarly, in Australia⁵⁹⁴ and South Korea,⁵⁹⁵ the *ex-ante* instruments in force are applicable only to pre-identified markets, i.e., digital news publishers and mobile app-stores, respectively. The Committee discerned that pre-identifying markets/services fosters certainty for market players and regulators alike. Such certainty is of particular importance especially when the obligation to self-assess and notify the regulator rests on the parties.⁵⁹⁶
- 3.5. On the other hand, the UK, Japan, and Germany have refrained from pre-identifying the specific markets/services that require *ex-ante* competition scrutiny. The UK’s DMCC is proposed to be applicable to all ‘digital activities’,⁵⁹⁷ while Japan’s TFDP Act is applicable to specified ‘digital platforms’ irrespective of the market the platform operates in or the services it provides⁵⁹⁸. Similarly, in Germany, Section 19a of the ARC does not restrict the applicability of *ex-ante* powers to any pre-determined markets/services.⁵⁹⁹ The Committee observed that such an approach allows for greater adaptability and therefore to respond swiftly to dynamism in digital markets.

3.6. In order to strike a balance between certainty and flexibility, the Committee recommends that the Draft DCB should apply to an inclusive and pre-identified list of Core Digital Services that are susceptible to concentration and anti-competitive behaviour.⁶⁰⁰ Such a list, the Committee recommends, should be guided by CCI's enforcement experience, market studies, as well as emerging international practices. Additionally, recognising the dynamic nature of digital markets, the Committee also suggests that the list of Core Digital Services be provided as a Schedule to the Draft DCB in order to accord flexibility for the Central Government to add new digital services from time to time.⁶⁰¹

B. Thresholds and criteria for designation as an SSDE

3.7. During the deliberations on the Draft DCB, the Committee emphasised that this law should envisage thresholds to 'catch' those entities that have the power to influence digital markets in a manner analogous to dominant entities. Noting the difficulties associated with using traditional parameters to assess dominance in digital markets, the Committee recommended that the criteria for SSDEs be formulated expressly based on attributes that allow entities to establish significant presence and influence in such markets. Concomitantly, the Committee was also of the view that the effectiveness of an *ex-ante* model will hinge on precise identification of SSDEs in digital markets and therefore may require quantitative/objective thresholds.

3.8. In this regard, the Committee sought to carry out a comparative study of the parameters envisaged under *ex-ante* competition instruments internationally. The Committee observed that these parameters include both *quantitative thresholds* (objective markers of significant presence that allow for swifter identification) and *qualitative criteria* (subjective factors that are indicative of an entity's ability to influence the market).

Table: Parameters for intervention under *ex-ante* competition instruments in international jurisdictions⁶⁰²

S. No.	Jurisdiction	Applicable law	Nature of the factor	
			Quantitative thresholds	Qualitative criteria
1.	EU	DMA	✓	✓
2.	UK	DMCC	X ⁶⁰³	✓
3.	Germany	ARC	X	✓
4.	Australia	Bargaining Code	X	✓
		5 th DPSI Report	✓	✓
5.	USA	AICO	✓	✓
		EPM	✓	✓
		OAM	✓	X
6.	Japan	TFDP Act	✓	X
7.	China	AML (as amended in 2022)	X	✓
		Draft Classification Guidelines	✓	✓
8.	South Korea ⁶⁰⁴	App-Store Act	-	-
		Platform Guidelines	-	-

I. QUANTITATIVE THRESHOLDS

3.9. The Committee observed that providing quantitative thresholds, i.e. objective markers that may be used as a ‘proxy’ to estimate an entity’s systemic significance in digital markets, allows for swifter identification and early intervention.

3.10. The Committee noted the manner in which the IT Rules, 2021 identifies *Significant Social Media Intermediaries*. Under these rules, any social media intermediary that has more than fifty lakh registered users is a Significant Social Media Intermediary, which becomes subject to additional obligations. The Committee considered whether the Draft DCB should also similarly envisage thresholds linked to user numbers.

- 3.11. However, upon further discussion, the Committee observed that certain digital enterprises may have a significant spread in terms of users but may lack the requisite financial muscle to foreclose competition. In order to avoid 'catching' such enterprises under the ambit of the Draft DCB, the Committee proposed that the objective markers should holistically account for the overall strength of the enterprise, inclusive of the financial strength of its group entities. This would ensure that only digital enterprises whose Core Digital Service has significantly penetrated the market in India in terms of user base, and which are backed by significant economic strength (whether at the individual or group level), would be designated as SSDEs.
- 3.12. The Committee took note of the EU model wherein similar quantitative thresholds are used to identify potential Gatekeepers based on size and internal market impact (such as annual EU turnover, average market capitalisation or the equivalent fair market value, and presence in various Member States) and economic dependency (such as the number of end users and business users).⁶⁰⁵ The Committee also observed the UK model wherein the DMCC accords SMS status to undertakings if they meet certain qualitative criteria, subject to them first satisfying the quantitative 'turnover' condition.⁶⁰⁶ In addition, the Committee examined the proposed legislative instruments in the US where 'Covered Platforms' are designated based on objective indicators relating to the number of end users and business users, net annual sales, and market capitalisation.⁶⁰⁷
- 3.13. **In light of the above, the Committee recommends including quantitative thresholds for identifying and designating an enterprise as an SSDE under the Draft DCB. The Committee further recommends that such a quantitative threshold be based on a dual test which demonstrates significant presence in the context of competition concerns: (a) 'the significant financial strength' test which comprises quantitative thresholds serving as proxies for economic power, i.e. an entity's Indian turnover, global turnover, gross merchandise value, and global market capitalisation or equivalent fair value, at an enterprise or group level, and which should be fulfilled consistently for a period of three financial years, thereby demonstrating persistent economic strength; and (b) the 'significant spread' test which comprises metrics relating to the number of business users and end users of the Core Digital Service in India, which should also be fulfilled consistently for a period of three financial years. The Committee also recommends that an enterprise should be deemed as an SSDE when it fulfils any of the several thresholds of the 'significant financial strength' test along with fulfilling**

either the end/business users' thresholds under the 'significant spread' test.

3.14. The Committee further evaluated whether the thresholds should be stipulated under the Draft DCB or through subordinate legislative instruments (regulations/rules/notifications). However, the Committee noted that the extant practice under the Competition Act wherein quantitative thresholds were provided for upfront within the statute for notification of combinations⁶⁰⁸ is well-received by market participants⁶⁰⁹. The Committee also noted that international practice also supports encoding the quantitative thresholds within the statute itself.⁶¹⁰ **Therefore, the Committee recommends indicating quantitative thresholds as base values for designation of SSDEs under the Draft DCB.**

a. Thresholds under the 'significant financial strength' test

i. Turnover in India

3.15. The Committee was in agreement that the turnover of an enterprise, as under the Competition Act, serves as a valuable indicator of an enterprise's financial strength. As regards value of Indian turnover to be stipulated under the Draft DCB, the Committee at first observed the turnover values that trigger notifiability for combinations under Section 5 of the Competition Act.⁶¹¹ Presently, any combination transaction between two enterprises involving a turnover equal to or more than INR 6000 crore must be notified *ex-ante* to the CCI. Similarly, the Committee took note of the fact that the Competition (Amendment) Act, 2023 has mandated notification of combinations where the value of transaction is equal to or exceeds INR 2000 crore. It was also noted that the value of annual turnover to trigger notification under the DMA (for the EU, comprising 27 countries) is EUR 7.5 billion. Noting these values, and based on the turnover values of large digital enterprises that have come under CCI's scrutiny, **the Committee recommends a base value of INR 4000 crore for Indian turnover.**

ii. Global Turnover

3.16. The Committee remained cognisant of the difficulty faced by CCI in obtaining accurate figures for the relevant India-based turnover of digital enterprises. The Committee examined recent orders passed by the CCI under Section 27 of the Competition Act wherein digital enterprises had submitted incomplete and inconsistent data to the CCI in respect of India-based turnover, which was further subject to multiple caveats and disclaimers.⁶¹² **As such, the Committee**

recommends incorporating global turnover as another criterion in line with the UK's DMCC. The Committee noted the UK figure for global turnover which stands at GBP 25 billion (approximately USD 32 billion). The Committee recommends that a similar base value, i.e. USD 30 billion, should be encoded into the Draft DCB for the purposes of the global turnover threshold.

iii. Gross Merchandise Value

- 3.17. Further, based on the CCI's extensive enforcement history in e-commerce markets,⁶¹³ the Committee has noted that for certain online intermediation services such as e-marketplaces, the Gross Merchandise Value ("GMV") of the enterprise is a more accurate indicator of the volume of commerce carried out by or through the enterprise's Core Digital Service.⁶¹⁴ Accordingly, in addition to turnover-based thresholds, the Committee recommends that a **GMV with base value of INR 16,000 crore (approximately USD 1.95 billion) be envisaged as a distinct quantitative threshold.**

iv. Global Market Capitalisation

- 3.18. **The Committee, noting that market capitalisation often serves as an accurate indicator of the value of a listed company,⁶¹⁵ recommends the same as a quantitative threshold under the Draft DCB.** As regards to the value of global market capitalisation, the Committee noted that the value stipulated under the DMA was arrived at based on the observed figures of market capitalisation of the largest digital undertakings that have been scrutinised by the EC and national competition authorities in recent years. Noting that the evaluation of market capitalisation of a global entity remains unchanged whether calculated in the EU or India, **the Committee recommends adopting a base value of USD 75 billion, a figure similar to the EUR 75 billion as codified under the DMA.** The Committee opined that the manner of calculation/ determination of the value of global market capitalisation should be specified through regulations framed by the CCI. For unlisted companies, the Committee recommends that a value equivalent to global market capitalization that similarly indicates the financial position of unlisted companies be computed in a manner as may be prescribed by the Central Government.

b. Thresholds under the 'significant spread' test

- 3.19. While arriving at values related to end users and business users, the Committee first noted the figures under the IT Rules for the purposes of

identifying a 'Significant Social Media Intermediary', which currently stand at fifty lakh registered users. However, the IT Rules do not distinguish between end and business users.⁶¹⁶ The Committee felt that for the purposes of the Draft DCB, 'end users' and 'business users' should be defined separately. The Committee also noted that under the DMA, an undertaking's service is presumed to be an 'important gateway for business users to reach end users' if in the last financial year, it has at least 45 million monthly active end users and 10,000 yearly active business users in the EU.⁶¹⁷ The Committee observed that the respective figures for such criteria were based on a substantive percentage of the entire population and of business users in the EU using core platform services.⁶¹⁸ The Committee noted that the DMA's threshold for active end users had been calculated as 10% of the EU's population, parallel to its calculation for the Digital Services Act, 2022.⁶¹⁹

- 3.20. Unlike the EU, the Committee feels that quantitative figures relating to end users and business users under the Draft DCB should not be solely based on Indian population figures. The Committee took further note of the disparity between the EU and India as regards digital literacy rates (54% in the EU⁶²⁰ compared to 38% in India⁶²¹); average internet penetration (89% in the EU⁶²² compared to 48.7% in India⁶²³ in 2022); and GDP per capita in terms of purchasing power parity (approx. USD 57,000 for the EU compared to approx. USD 9000 for India)⁶²⁴. The Committee concluded that the thresholds for active end users and business users under the Draft DCB would have to be contextualised against factors specific to India such as the number of *active* internet users, linguistic and regional considerations, household earning, spending power, gender, and rural - urban divide.⁶²⁵ **Based on the above, the Committee recommends that the Draft DCB incorporates 'base values' of at least 1,00,00,000 (one crore) end users or at least 10,000 (ten thousand) business users in India for the purposes of the significant spread test.**

c. *The need for quantitative thresholds specific to each Core Digital Service*

- 3.21. The Committee considered whether separate quantitative thresholds (both under the significant financial test and under the significant spread test) should be specified for each Core Digital Service given that financial strength and spread metrics differ across different Core Digital Services depending on the nature and size of their respective markets.
- 3.22. For instance, the Committee noted the wide disparity in global turnover in the year 2022 of Meta, the holding company of Facebook (the most popular social

networking service), i.e. approximately USD 116.6 billion⁶²⁶ vis-à-vis that of Uber (a renowned cab aggregator service, covered under 'online intermediation service under the Draft DCB), i.e. USD 32 billion⁶²⁷.

- 3.23. The Committee also noted that the number of end users and business users would differ for each Core Digital Service and business model. For instance, it has been reported that while 60.72% of the Indian population used social media in 2023,⁶²⁸ user penetration in the online food delivery market was only 16.2%⁶²⁹. In addition, while there is a negligible difference in the percentage of active internet users using social media in urban areas (73%) and rural areas (67%),⁶³⁰ the online food delivery market is mainly concentrated in Tier-I cities⁶³¹. The officers from CCI, based on the findings from the CCI's E-commerce market study and its enforcement practice, briefed the Committee on the difference in the penetration of e-commerce activities such as food-delivery and hotel booking services in rural versus urban areas.
- 3.24. Taking the above into consideration, the Committee felt that, in theory, a case could be made for specifying different quantitative thresholds for each Core Digital Service under the Draft DCB. However, the Committee took note of the operational difficulties in obtaining data for accurately setting different thresholds for each Core Digital Service. The Committee also examined the EU, UK, and US models wherein separate thresholds for different platform services were not provided. **The Committee therefore recommends that the Draft DCB stipulate a uniform set of thresholds to identify and designate SSDEs, irrespective of the Core Digital Service they provide. Obligations may however be differentiated.**⁶³²

d. Quantitative thresholds to be periodically revised

- 3.25. The Committee is aware that the base values are susceptible to change given the rapid pace at which digital markets are growing and given that the number of business and end users differ across the Core Digital Services. A view was also expressed by certain Committee members that the base values recommended for user-based thresholds may be too low and may cause a chilling effect on innovation in case smaller digital enterprises are designated as SSDEs and made to comply with prescriptive *ex-ante* obligations. **As such, in order to provide certainty to market participants and simultaneously introduce a measure of flexibility to account for changing market dynamics, the Committee recommends that the base values should be reviewed every three years. Concomitantly, the Committee also recommends that the CCI, while framing regulations for a Core Digital Service, may consider whether**

to adopt a graded approach of compliance by outlining differentiated sets of obligations based on factors such as nature of the market and number of users.⁶³³ This will ensure that all obligations under the Draft DCB are not necessarily applicable uniformly to each enterprise designated as an SSDE.⁶³⁴ In addition, the Committee proposes that the CCI be empowered to frame specific regulations detailing the manner of determination and calculation of the user-based thresholds.⁶³⁵

- 3.26. In line with the view to model the *ex-ante* framework under the Draft DCB in line with the extant combinations' regime, the Committee recommends that the digital enterprises should self-assess their fulfilment of the above quantitative thresholds and report the same to the CCI in such form and manner as may be specified by regulations. The CCI may then proceed to designate the enterprise as an SSDE. In the spirit of promoting ease of doing business, the Committee further recommends that the procedure for self-notification by SSDEs to the CCI should not be cumbersome and that the CCI may consider instituting a self-reporting mechanism through an online portal. Furthermore, the Committee recommends that upon designation as an SSDE, such a designation should remain valid for a period of three years, unless there is a significant change in market dynamics.

e. Associate Digital Enterprises

- 3.27. The Committee observed that the definition of 'undertaking' under the DMA includes all linked / connected enterprises or undertakings forming a group on account of direct / indirect control of one enterprise by the other.⁶³⁶ The Committee considered whether all entities in a group to which the SSDE belongs need to necessarily fulfil the same obligations which are to be complied with by the SSDE. It was also observed that within a large group, many entities may have no direct or indirect role in the provision of the Core Digital Services. The Committee noted that the corresponding definition of 'enterprise' under the Competition Act or Draft DCB does not include group⁶³⁷ entities. Taking cognizance of the above, the Committee deliberated on a potential scenario wherein compliance may be required from multiple digital enterprises within a group that are engaged in providing a Core Digital Service. This could be on account of the holding company of the 'group' controlling the management / affairs of such SSDE or holding ownership over key intellectual property rights which enable the provision of the concerned Core Digital Service.

- 3.28. The Committee examined the recent decisions issued by the EC for designation

of Gatekeepers under the DMA⁶³⁸ and observed that as regards designations of enterprises that are part of a complexly structured group, the DMA accords sufficient flexibility to the EC to designate the holding digital enterprise, together with all legal entities directly or indirectly controlled by it in relation to the provision of core platform service, as a ‘Gatekeeper’.⁶³⁹ The Committee observed that in a similar manner, the FCO in Germany had determined that the holding company of a large digital enterprise, including its affiliates,⁶⁴⁰ is of paramount significance for competition across markets.⁶⁴¹ The Committee noted that in cases of enterprises which are part of a group, an approach wherein the designation is not limited to one enterprise alone and is extended to the whole group, is desirable to ensure effective compliance and anti-circumvention of obligations under the Draft DCB.

- 3.29. The Committee envisaged two scenarios in the context of SSDE designation in cases of group enterprise(s). *First*, the holding digital enterprise, which has control over the enterprise providing the Core Digital Service, may be designated as an SSDE. Its group entities which are also involved in the provision of the Core Digital Service (whether directly or indirectly) may be designated as ‘Associate Digital Enterprises’ to the SSDE (“ADE”). The Committee noted that designating the controlling entity as an SSDE would prevent circumvention of obligations under the Draft DCB.⁶⁴² *Second*, the Committee noted that in certain cases, it may be beneficial to designate a non-holding digital enterprise most directly involved in providing the Core Digital Service in India as an SSDE rather than the holding enterprise for ease of communication and compliance reporting. In such case, the non-holding digital enterprise may be designated as an SSDE and its holding enterprise and other group entities involved in the provision of the Core Digital Service may be designated as its ADEs.
- 3.30. The Committee noted that it may be difficult for the CCI to identify each enterprise which is involved in directly or indirectly providing a Core Digital Service for the purposes of designating SSDEs or ADEs, especially in cases of large digital conglomerates with global operations.⁶⁴³ Concomitantly, the Committee took note of the practice in the EU wherein the notifying undertaking is required to provide the identity of the entities operating each of its core platform services and the entities controlling⁶⁴⁴ the former entities (directly or indirectly), for the purposes of Gatekeeper designation⁶⁴⁵. **In view of the same, the Committee proposes that notifying enterprises should be required to identify all other enterprises within its group which are directly or indirectly involved in the provision of a Core Digital Service.**

3.31. The Committee further notes that it may be prudent in many cases that the holding digital enterprise exercising control over the enterprise providing Core Digital Services be designated as the SSDE and its other group enterprises which are directly or indirectly engaged in the provision of a Core Digital Service should be designated as ADEs. However, the Committee also noted that the above may not be prudent in other circumstances. Therefore, the Committee proposes that the CCI should be accorded the flexibility to identify the most appropriate enterprise whose compliance can be proactively monitored under the Draft DCB (for instance, an enterprise directly involved in the provision of the Core Digital Service in India). Such enterprise may then be designated as an SSDE and its group enterprises (whether at the holding or subsidiary level) involved in the provision of the Core Digital Services may be designated as ADEs. In cases of standalone enterprises, such enterprise itself should be designated as an SSDE.

II. QUALITATIVE CRITERIA

3.32. The Committee was in general consensus on the need to identify specific parameters that indicate an entity's ability to influence digital markets. Such qualitative criteria are especially important in instances where the proxies envisaged as quantitative thresholds may not suffice to encompass *all* digital enterprises that have a position of significant presence in Indian digital markets. The Committee therefore affirmed that the CCI should be empowered to intervene where the enterprise does not meet the quantitative thresholds, but the CCI has reason to believe that such an enterprise enjoys a significant presence in respect of a Core Digital Service.

3.33. Therefore, in line with the recommendations of the Standing Committee Report, the CCI's enforcement practice in digital markets, and emerging global practices, the Committee recommends that the Draft DCB envisage a set of qualitative criteria for SSDE designation, which encompasses metrics such as resources of the enterprise, volumes of data aggregated, direct and indirect network effects at play, and the entity's bargaining position vis-à-vis its business users and consumers. The Committee is of the view that such factors are indicative of the manner and extent of the enterprise's ability to set the rules of the ecosystem and influence the market.

C. Obligations and exemptions

I. OBLIGATIONS

- 3.34. The Committee has deliberated on obligations for SSDEs by taking note of the ten ACPs identified by the Standing Committee Report⁶⁴⁶ in December 2022. One of the identified ACPs relates to practices concerning mergers and acquisitions, which the Committee felt has now been adequately dealt with under the Competition (Amendment) Act, 2023.⁶⁴⁷ A key amendment introduced pertains to 'Deal Value Thresholds',⁶⁴⁸ wherein any combination whose transaction value exceeds INR 2000 crore, requires *ex-ante* approval by the CCI. The Committee, cognisant of the ability of this amendment to target killer acquisitions, felt that it would be prudent to leave out mergers and acquisitions while formulating *ex-ante* obligations under the Draft DCB.
- 3.35. Of the nine other ACPs, the Committee deliberated at length as to whether they should all be prohibited in a similar manner and extent under the Draft DCB. In this line, the Committee noted that not all ACPs are anti-competitive to the same degree and some ACPs may also have pro-competitive benefits. For instance, the Committee extensively deliberated how large digital enterprises that engage in self-preferencing practices almost always cause anti-competitive harm. They can unfairly divert traffic from rivals and increase the latter's costs, as observed by the CCI in one case.⁶⁴⁹ They can also discourage entry and innovation by third-party suppliers, as pointed out by leading economists and illustrated by several cases decided by the European Commission and national competition authorities in Europe.⁶⁵⁰ However, the Committee also considered as to how practices such as tying and bundling which may be anti-competitive in certain circumstances, may also have pro-competitive benefits such as reduced costs of manufacturing and distribution, and enhanced product quality in other circumstances.⁶⁵¹
- 3.36. The Committee noted that some ACPs may have some pro-competitive benefits as well and then proceeded to deliberate on how the pro-competitive effects of these ACPs may be taken into consideration while formulating *ex-ante* obligations under the Draft DCB.
- 3.37. The Committee concurs that it is prudent to lay down *ex-ante* obligations in the form of broad principles in the Draft DCB.⁶⁵² Taking into account the peculiarities of different business models, the Committee recommends that the specificities on the manner and procedure relating to the applicability of *ex-ante* obligations⁶⁵³ are to be specified for each Core Digital Service through subordinate legislation⁶⁵⁴. The Committee was apprised of the model of

'Participative Antitrust'⁶⁵⁵ which encourages collaboration between governments, and industry and consumer representatives to create rules that further innovation by market players of all sizes. **The Committee recommended a robust consultative process with all key stakeholders of the digital economy to frame these regulations, borrowing from procedure from Section 64A⁶⁵⁶ of the Competition Act in spirit. In particular, the Committee observed that the Draft DCB, being an *ex-ante* law, should mandate consultation with statutory authorities or government bodies before the framing of regulations.**

- 3.38. **In light of the above deliberations, the Committee first recommends that out of the ten ACPs identified in the Standing Committee Report, the ACP relating to mergers and acquisitions may not be included in the Draft DCB given recent amendments to the Competition Act. Second, cognisant of the varying degrees of anti-competitive harms that are likely to emanate from different ACPs, the Committee recommends that the Draft DCB incorporate an agile principle-based framework that lays down the broad contours of each ACP. The Committee further opines that the particulars of such *ex-ante* obligations should be stipulated through regulations for each Core Digital Service.⁶⁵⁷ The CCI may even specify different conduct requirements for different business models within a Core Digital Service, if applicable, in a graduated manner.⁶⁵⁸ The Committee further recommends that the regulations should be made through a consultative process by taking the views of all stakeholders involved, including market players of all sizes, business users and end users, representatives of civil society and the various ministries that regulate the Indian digital economy.**
- 3.39. **The Committee also proposes that all SSDEs should be obligated to institute a transparent grievance redressal mechanism upon designation.⁶⁵⁹ The specific operational modalities of setting up such a mechanism should be outlined by the CCI by way of regulations.**
- 3.40. **As regards the obligations for ADEs, the Committee proposes that by default, all the broad principle-based obligations under the Draft DCB should apply to ADEs as well. However, in cases where ADEs are only partly or indirectly involved in the provision of Core Digital Services, the CCI should be empowered to specify differential obligations for ADEs so as to reduce their compliance burden. In such cases, the CCI may specify a lower degree of compliance with obligations by ADEs or outline certain obligations which need not be complied with.**

II. EXEMPTIONS

3.41. During the course of its deliberations, the Committee noted the need to stipulate two kinds of exemptions, *first*, the CCI's expert prerogative to exempt the applicability of certain obligations through regulations; and *second*, the Central Government's power to exempt an enterprise from the purview of the Draft DCB on grounds of public interest and national security.

a. Exemptions from obligations through regulations

3.42. During the Committee's deliberations on obligations, the Committee also felt the need to enable the CCI to stipulate exemptions from obligations on grounds such as economic viability and protection of existing intellectual property rights. The Committee noted that such power will allow CCI to formulate specific instances under which the conduct of SSDEs may be justifiable.

3.43. Noting that the obligations for SSDEs would differ from one Core Digital Service to the other, the Committee opined exemptions from such obligations would also consequently differ, and therefore recommended that exemptions should not be hardwired in the Draft DCB. The Committee suggests CCI may consider framing accompanying exemptions in the same set of regulations relating to obligations. The Committee however felt legislative guidance on the grounds for such exemptions should be laid down in the Draft DCB.

3.44. Furthermore, the Committee also deliberated if it would be prudent to have an *advance ruling mechanism* where enterprises may avail a stipulated exemption prior to fully complying with an obligation. The Committee however felt that implementing a constrictive system of advance ruling, in practice, could become akin to the *Licence Raj* regime where enterprises would need to repeatedly approach regulators for *permission* to innovate. The Committee noted that such a mechanism would therefore stand at odds with objectives of an innovation-driven ecosystem,⁶⁶⁰ and therefore concluded against advanced ruling to obtain exemptions.

3.45. **The Committee recommends that grounds under which compliance from the *ex-ante* obligations may be exempted should be statutorily encoded. However, the attributes of such exemptions should be devised with regard to the uniqueness of each Core Digital Service, and therefore is best left to the CCI's expertise. As such, the Committee feels that exemptions should be**

woven into the regulations on obligations, depending on the Core Digital Service and related business models in question.

b. Exemptions by the Central Government

- 3.46. The Committee began its deliberations on exemption powers of the Central Government by drawing from Section 54 of the Competition Act wherein the Central Government has the power to specify in a notification the exemption for "(a) any class of enterprise in the interest of security of state or public interest, (b) any practice or agreement arising out of any obligation under any treaty, or (c) any enterprise that performs a sovereign function".⁶⁶¹
- 3.47. The Committee felt that a similar over-arching power to exempt certain enterprises from the Draft DCB should be vested with the Central Government.⁶⁶² The Committee also deliberated if *start-ups* as a distinct class of enterprises should be statutorily exempt from the Draft DCB. However, the Committee concluded that blanket exemption for start-ups should not be encoded as the legal criteria for start-ups is presently amorphous. Further, it is doubtful that any enterprise which meets the financial thresholds stated in Section 3(2)(a) of the Draft DCB would continue to be classified as a start-up.
- 3.48. **In light of the above, the Committee recommends that the Draft DCB should empower the Central Government to exempt certain enterprises or classes of enterprises from the purview of the Draft DCB, in a manner analogous to Section 54 of the Competition Act.**

D. Enforcement and Remedies

I. ENFORCEMENT

- 3.49. A view was expressed with regard to the possibility of overlapping jurisdictions between the Competition Act and the Draft DCB, which could potentially lead to simultaneous or different proceedings under both the statutes. The Committee noted the difference in approach followed under the Competition Act which evaluates the anti-competitive effects of a particular conduct on the market vis-à-vis the Draft DCB wherein the contravention of pre-determined conduct requirements by SSDEs would be considered illegal *per se*. The Committee considered two scenarios: *first*, where an SSDE may be penalised for violating its obligations under the Draft DCB but may not be found to have abused its dominant position under the Competition Act; and *second*, where the CCI may return a finding of abuse of dominant position

against an enterprise, but its behaviour may not contravene the particular conduct requirements specified under the Draft DCB. The Committee further noted that a single conduct could potentially be penalised twice under the Competition Act itself.⁶⁶³

- 3.50. In view of the foregoing, the Committee thus opined that on account of the distinct nature of regulatory intervention and proceedings under both the Competition Act and the Draft DCB, CCI should not be disempowered to proceed against a digital enterprise in parallel under both statutes. However, in the event the CCI initiates two parallel proceedings under the two statutes for the same conduct, there is a need to guard against the possibility that the resulting penalties upon the enterprise may be seen as being disproportionate.
- 3.51. The Committee remained cognisant that the enforcement of both competition laws is entrusted with the CCI. The CCI is an expert body vested with the discretion to rationalise penalties arising out of two different proceedings examining the same/substantially similar conduct by an enterprise.⁶⁶⁴ It was noted that both under the Competition Act and the Draft DCB, CCI is empowered to issue suitable penalty guidelines. The Committee therefore concluded that such overlaps in proceedings and penalties may be resolved on a case-by-case basis by the CCI.
- 3.52. In the same vein, given that the enforcement of the Draft DCB would be entrusted with the CCI, the Committee was in general agreement to borrow the enforcement framework from the Competition Act. As such, the Committee agreed that the powers of the CCI under the Competition Act including the powers of the Director General,⁶⁶⁵ the right to claim compensation for harms ensued by SSDEs' conducts,⁶⁶⁶ the power to issue interim orders,⁶⁶⁷ and other provisions of such nature should apply *mutatis mutandis* subject to any specific modifications that may be essential to give effect to the Draft DCB.
- 3.53. The Committee also took note of the Settlements and Commitments regime introduced through the Competition (Amendment) Act, 2023 which allows for a shorter timeframe for investigations and resolution of cases. To this end, the Committee sought it fit to borrow the settlements⁶⁶⁸ and commitments⁶⁶⁹ regime for the purposes of the Draft DCB whose enforcement hinges on timelines. The Committee noted that the intent of the settlement and commitment mechanisms is to enable swifter resolution of cases since applications in both cases are accepted only after the CCI has formed a *prima*

facie opinion, thus eliminating the need for a fact-finding exercise and accelerating an otherwise lengthy enforcement process.

- 3.54. The Committee took note of the observations of stakeholders for setting up a Digital Markets Unit (“DMU”) under the aegis of the CCI. The Committee deliberated at length on the importance of building CCI’s technical capacity to keep pace with the dynamism of digital markets and proactively engage with all stakeholders involved.
- 3.55. The Committee took note of international practices wherein a special division for enforcement of the competition regime pertaining to digital markets has been established. For instance, the Committee noted that in the United Kingdom, competition enforcement for digital markets was sought to be entrusted to a separate entity named the ‘Digital Markets Unit’ (UK DMU), housed within the Competition and Markets Authority, i.e., UK’s primary regulator for competition enforcement. The Committee observed that the UK DMU is envisaged to enforce UK’s pro-competition regime swiftly and has been accorded powers such as granting the ‘Significant Market Status’ to digital undertakings; enforcing codes of conduct; and monitoring the activities of SMS entities.⁶⁷⁰ The Committee also observed that in the EU, the enforcement of the DMA is to be shared between the EC’s departments for competition (**DG COMP**) and technology policy (**DG CONNECT**).⁶⁷¹ The Committee also lauded the CCI’s initiative in setting up a Digital Markets and Data Unit (“DMDU”), a specialised interdisciplinary centre of expertise for digital markets, housed within the CCI.⁶⁷² As such, the Committee concluded that an express provision to set up a DMU under the Draft DCB is not required.
- 3.56. The Committee noted that the DMDU was set up to enforce *ex-post* provisions under the Competition Act and therefore it may be strengthened on an urgent basis so that it gains enough experience by the time the Draft DCB is enacted. Given the strategic importance of the DMDU, the Committee strongly recommended that the DMDU should be staffed with experts on emerging technologies to build practices that allow for early detection and disposal of cases pertaining to digital markets. The Committee urged that such experts perform advisory roles with respect to both enforcement and regulation-making under the Draft DCB, especially given the highly technical nature of *ex-ante* regulations. The Committee also observed that such technical capacity is also required to allow for swifter identification of compliance breaches under the Draft DCB.

3.57. **For the purposes of enforcement of the Draft DCB, the Committee sees it fit to borrow from the procedural framework of the Competition Act. The Committee also urges that the CCI bolsters its technical capacity, including within the Director General’s office, to ensure early detection and disposal of cases, dynamic regulation-making and all other ancillary regulatory functions in digital markets by onboarding experts. The Committee further recommends that a separate bench should be instituted within the NCLAT for speedy disposal of appeals, particularly those relating to digital markets.**

II. REMEDIES

3.58. The Committee observed that competition authorities frequently categorise remedies imposed against anti-competitive behaviour into two broad classes: structural remedies such as divestment which focus on restoring competition by altering market structure, and behavioural remedies such as commitments which seek to modify the conduct of enterprises through orders or contractual arrangements. Behavioural remedies typically require oversight by the competition regulator to ensure compliance. The Committee noted that some jurisdictions also allow criminal sanctions against competition infringements.⁶⁷³

3.59. The Competition Act has primarily relied on behavioural remedies and high monetary penalties that are deterring in nature in order to address anti-competitive behaviour in Indian markets.⁶⁷⁴ In this context, the Committee took note of the recent efforts by the Central Government to promote ease of doing business in India, which includes decriminalising of corporate offences.⁶⁷⁵ Therefore, in order to strike a balance between ease of doing business and deterrence, the Committee recommended that contraventions of the Draft DCB should be met with civil penalties.⁶⁷⁶

3.60. The table below contains a brief snapshot of the quantum of penalties as contemplated under the *ex-ante* competition instruments in the EU, UK, Germany, and USA.

Table: Penalties under *ex-ante* instruments in international jurisdictions

S. No.	Jurisdiction	Applicable Penalties
1.	EU	<p><u>DMA</u></p> <ul style="list-style-type: none"> • <i>Systematic non-compliance</i>: The EC may fine the gatekeeper up to 10% of its total worldwide turnover in the preceding financial year if it fails to carry out any measures imposed against it for systematic non-compliance or if it fails to carry out interim measures as ordered by the EC.⁶⁷⁷ • <i>Repeated infringements</i>: The EC may fine the gatekeeper up to 20% of its total worldwide turnover in the preceding financial year if there have been repeated infringements in the same core platform service that have already been subject to a non-compliance decision in the previous 8 years.⁶⁷⁸ • <i>Minor contraventions</i>: For minor contraventions including failing to report, provide access to, or share required information, the EC may fine a gatekeeper up to 1% of total worldwide turnover in the preceding financial year.⁶⁷⁹ • <i>Non-compliance</i>: The EC may fine a gatekeeper up to 5% of the average worldwide daily turnover in the previous financial year per day calculated from the date of the non-compliance decision, to compel compliance with decisions and measures under the DMA.⁶⁸⁰
2.	UK	<p><u>DMCC</u></p> <ul style="list-style-type: none"> • Failure to comply with the competition requirements⁶⁸¹ or with investigative requirements⁶⁸² can attract penalties which may be a: (i) fixed amount; (ii) amount calculated by reference to a daily rate; or (iii) a combination of the above⁶⁸³. • <i>Non-compliance</i>: In case of failure to comply with competition requirements, the maximum amounts of a penalty that may be imposed are: (i) in the case of a fixed amount, <u>10% of the total</u>

S. No.	Jurisdiction	Applicable Penalties
		<p><u>turnover inside and outside the UK⁶⁸⁴ of the SMS entity</u> or group that the SMS entity is part of;⁶⁸⁵ (ii) in the case of an amount calculated by reference to a daily rate, <u>5% of the daily turnover inside and outside the UK⁶⁸⁶ of the SMS entity</u> or group that the SMS entity is part of;⁶⁸⁷ or (iii) in case of a combination of the above, the same rates as discussed above⁶⁸⁸. In case the CMA considers that an SMS entity has failed to comply with its conduct requirements without any reasonable excuse, the amount of penalty imposed must be fixed.⁶⁸⁹</p> <ul style="list-style-type: none"> • <i>Minor contraventions:</i> In case of failure to comply with investigative requirements, i.e. failure to submit information to the CMA or give information which is <i>false</i> or misleading in a material particular,⁶⁹⁰ both undertakings and individuals⁶⁹¹ can be penalised⁶⁹². The maximum penalty that may be imposed on an undertaking are: (i) in the case of a fixed amount, <u>1% of the total value of its turnover (both inside and outside the United Kingdom)</u>;⁶⁹³ (ii) in the case of an amount calculated by reference to a daily rate, <u>5% of the total value of its daily turnover (both inside and outside the United Kingdom)</u> for each <u>day</u>;⁶⁹⁴ and (iii) in case of a combination of the above, the same rates as discussed above⁶⁹⁵. The maximum penalty that may be imposed on an individual are: (i) in the case of a <u>fixed amount</u>, GBP <u>30,000</u>;⁶⁹⁶ and (ii) in the case of an amount calculated by reference to a <u>daily rate</u>, GBP <u>15,000 per day</u>⁶⁹⁷. Apart from this, the DMCC also provides for director disqualification.⁶⁹⁸
3.	Germany	<p><u>ARC</u></p> <ul style="list-style-type: none"> • <i>Breach:</i> Intentional or negligent acts that violate an enforceable order amount to an administrative offence which may amount to a

S. No.	Jurisdiction	Applicable Penalties
		<p>fine of up to EUR 1 million.⁶⁹⁹ A fine exceeding such an amount may be levied upon undertakings or an association of undertakings, and it shall not exceed 10% of the total turnover of the undertaking or association of undertakings, generated in the year prior to the launch of the FCO decision.⁷⁰⁰</p>
4.	USA	<p><u>AICO</u></p> <ul style="list-style-type: none"> • <i>Breach:</i> Covered Platform operators may face penalties of up to 15% of their total US revenue generated in the preceding calendar year or 30% of their US revenue in any affected or targeted line of business during the period in which the unlawful conduct takes place, whichever is greater, for violation of the AICO.⁷⁰¹ • <i>Repeat offences:</i> If it is determined that a Covered Platform operator has engaged in a pattern or practice of violating the AICO, the Chief Executive Officer, and any other corporate officer may be ordered to forfeit any compensation received by them during the 12 months preceding or following the filing of a complaint in this regard.⁷⁰² <p><u>EPM</u></p> <ul style="list-style-type: none"> • <i>Breach:</i> Any person operating a Covered Platform or any individual who is an officer, director, partner, or employee of such person, may face penalties of up to 15% of its total average daily US revenue in the preceding calendar year or 30% of its total average daily US revenue in any affected or targeted line of business during the period in which the unlawful conduct takes place, whichever is greater, for violations of EPM within two years of designation of the Covered Platform.⁷⁰³

3.61. As demonstrated in the table above, penalties upon enterprises in relation to

infringements of competition law are calculated as a percentage of the enterprise's turnover. The Committee notes that such penal provisions have: (a) a 'floor' baseline value, which is the starting point for penalty computation;⁷⁰⁴ and (b) a 'ceiling' or the amount at which a penalty is capped. While the baseline value is often determined through penalty/fine guidelines, the ceiling for such penalties is statutorily capped.

- 3.62. For the purposes of the Draft DCB, the Committee discussed as to whether the ceiling should be set in relation to the SSDE's Indian/local turnover, or its global turnover, or its global relevant turnover⁷⁰⁵. The Committee noted the complexities involved in conclusively determining the local turnover of a digital enterprise,⁷⁰⁶ and therefore a resultant preference by global competition authorities (as demonstrated in the table above) to impose ceiling on penalties basis global/total turnover. The Committee noted that post amendment, the Competition Act also envisages that the calculation of ceiling on penalty be based on 'global turnover'.⁷⁰⁷ **Therefore, the Committee concludes that the global turnover of enterprises should be considered as the basis for calculating the ceiling on penalties under the Draft DCB.**
- 3.63. As regards to penalties for SSDEs that are part of a group of enterprises, the Committee took note of emerging jurisprudence, both domestically and internationally. Under the Competition Act, the Committee noted that Section 27 enables the CCI to impose a penalty upon all members of the group that have contributed to a contravention.⁷⁰⁸
- 3.64. The Committee also observed that fines on undertakings⁷⁰⁹ which infringe Articles 101 and 102 of the TFEU⁷¹⁰ under the *ex-post* competition framework can reach up to 10% of the worldwide turnover of the corporate group to which the infringing company belongs in the previous business year⁷¹¹. The Committee noted the similarities in the provision for imposition of fines under the *ex-ante* DMA model wherein 'undertakings' included '*all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another*'⁷¹² and fines for non-compliance of obligations by Gatekeeper undertakings could reach up to 10% of their total worldwide turnover in the preceding financial year⁷¹³.
- 3.65. In addition, the Committee took note of the UK DMCC wherein failure to comply with conduct requirements without any reasonable excuse⁷¹⁴ can attract penalties of amounts equal to 10% of the total turnover inside and outside the UK of the SMS entity or group that the SMS entity is part of⁷¹⁵. The

Committee also noted the manner in which the systemic significance of the SSDE should be contextualised in relation to the group to which the SSDE belongs to.⁷¹⁶

- 3.66. **In view of the above, the Committee recommends that the Draft DCB caps the penalty at 10% of the SSDE's 'global turnover', in line with the Competition Act. The Committee notes that such a cap also harmonises the penalty regimes across the Competition Act and the Draft DCB, and therefore minimises avenues for forum shopping. Additionally, in cases where the SSDE is part of a group of enterprises, the Committee recommends that the 'global turnover' cap be calculated in relation to the turnover of the entire group of enterprises. The Committee also recommends that the CCI determines the appropriate quantum of penalty (of up to 10% of the global turnover) on a case-by-case basis, with due regard to the penalty guidelines to be framed under the Draft DCB.**

ANNEXURE I – OVERVIEW OF ACPs

The following table summarises the features of the ACPs identified in the Standing Committee Report⁷¹⁷ along with examples and instances of ACPs investigated by the CCI.

S. No.	ACP	Explanation
1.	Anti-steering	A form of exclusionary conduct practised by large digital enterprises, particularly in the app store market, which prevents consumers and business users from shifting to third-party service-providers which may offer cheaper alternatives with better functionality. Such practices suppress consumer choice and prevent app developers from communicating with users and re-directing them to better substitutes outside the app environment.
2.	Platform neutrality / Self-preferencing	In cases where large digital enterprises also play the role of retailers on their own platforms, such entities may leverage their dominant market position to favour their own products. They may do so by manipulating the search function to ensure that their products are listed at the top of the search ranking, thus drawing more users. Such conduct undermines platform neutrality which warrants the fair and non-discriminatory treatment of all business users on a digital platform. It also creates a conflict of interest between the dual roles of an enterprise as a platform as well as a business user.
3.	Adjacency / Bundling and tying	There is often an overlap between digital products and other related hardware or software applications which may provide added functionality. Large digital enterprises may choose to tie or bundle their main or ‘must have’ product with complementary products and offer the same as a package to their users, thereby limiting consumer choice and simultaneously foreclosing competition from smaller rival firms in the market. This enables digital enterprises to expand and consolidate their position in adjacent markets as well.

S. No.	ACP	Explanation
4.	Data usage (use of non-public data)	Large digital enterprises have access to vast stores of user data which they use to innovate and improve their own products, thereby entrenching their position in the market. Network effects enable them to attract more users and generate and accumulate more data, thus creating a profitable feedback loop. The personal data collected by large digital enterprises may be used for profiling consumers and may also be sold to advertisers seeking to curate targeted online services and products, leading to concerns surrounding data privacy. This creates barriers to the entry of new players in digital markets which do not have access to these enormous repositories of data, thus distorting the level playing field for smaller digital enterprises and restricting competition in the market.
5.	Pricing/ Deep discounting	Large digital enterprises are more prone to employ predatory pricing tactics which involve setting prices below cost so that competitors can be excluded from the market, subsequent to which they raise prices to recoup their losses.
6.	Exclusive tie-ups	Large digital enterprises may enter into exclusive arrangements with business users or sellers of products and services to not deal with other enterprises, thus denying them market access. Exclusive agreements can be classified into two kinds: agreements which exclusively launch a specific product on a platform or under which a platform provides only one particular brand in a specific product group. ⁷¹⁸
7.	Search and ranking preferencing	Consumers use keywords on search engines, i.e. terms used to match advertisements with the search queries of consumers. Large digital enterprises may use non-transparent search algorithms and tend to exercise control over the search rankings in order to give preference to sponsored / their own products so as to reduce the contestability of products favoured more by consumers. They may also allow bidding on relevant keywords (which may even be registered trademarks) enabling advertisers to increase their consumer reach.

S. No.	ACP	Explanation
		This leads to dilution of the brand power of products and services originally being searched for by consumers and compels companies to spend considerably in order to protect their own intellectual property and outrank competitors on search pages.
8.	Restricting third-party applications	Large digital enterprises tend to prevent users from accessing or using third-party applications other than their own. They may do so by using exclusionary anti-steering policies (which have been discussed above) including curbing the installation of third-party applications.
9.	Advertising policies	Large digital enterprises appear to be dominant at each stage of the advertising technology chain, i.e. demand, supply and exchange and their revenue models are primarily based on monetisation through advertisement revenue. There appears to be increasing market concentration, consolidation and integration across many levels in the ad-tech supply chain which gives the incumbent platform an unfair edge over the market. They may require advertisers to use 'web crawlers', i.e. programs used by search engines to collect and extract large amounts of consumer activity and data, on their websites which further allows them to provide targeted advertising. Large digital enterprises with dominant search engines or app stores reportedly also tend to prevent third-party app stores / apps from advertising on their platform citing vague and arbitrary concerns thereby limiting their consumer reach.

ANNEXURE II - ORDER CONSTITUTING THE COMMITTEE

No. COMP-06/11/2022- Comp-MCA
Government of India
Ministry of Corporate Affairs

*Shastri Bhawan, Dr. Rajendra Prasad Road
New Delhi-110001
The 12th February, 2023*

ORDER

Subject: Constitution of the Committee on Digital Competition Law- regd.

A Committee on Digital Competition Law (CDCL) is hereby constituted to examine the need for a separate law on competition in digital markets with the following composition:

- | | | |
|--------|---|--------------------|
| (i) | Secretary, Ministry of Corporate Affairs | - Chairperson |
| (ii) | Chairperson, Competition Commission of India (CCI) | - Member |
| (iii) | Dr. Saurabh Srivastava, Chairman at Indian Angel Network and Co-founder at NASSCOM | - Member |
| (iv) | Dr. Aditya Bhattacharjea, Professor of Economics (Retd.), Delhi School of Economics | - Member |
| (v) | Shri Haigreave Khaitan, Khaitan & Co. | - Member |
| (vi) | Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP | - Member |
| (vii) | Ms. Pallavi Shardul Shroff,
M/s Shardul Amarchand Mangaldas & Co. | - Member |
| (viii) | Shri Anand S. Pathak, P&A Law Offices | - Member |
| (ix) | Shri Rahul Rai, Axiom5 Law Chamber | - Member |
| (x) | Joint Secretary (Competition), MCA | - Member Secretary |

Invitees (not below the Rank of Joint Secretary) to be nominated by the following Institutions/ Departments/ Ministries:

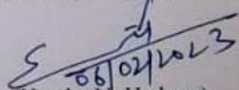
- (xi) Niti Aayog (NITI)
- (xii) Department of Commerce (DoC)
- (xiii) Department of Economic Affairs (DEA)
- (xiv) Department of Consumer Affairs (DoCA)
- (xv) Department for Promotion of Industry and Internal Trade (DPIIT)
- (xvi) Ministry of Electronics and Information Technology (MEiTY)

2. The Chairperson of the Committee may co-opt any other person as a member/ special invitee as and when required.

3. The terms of reference of the Committee are:-

- (i) to review whether existing provisions in the Competition Act, 2002 and the rules & regulations framed thereunder are sufficient to deal with the challenges that have emerged from the digital economy;
- (ii) to examine the need for an ex-ante regulatory mechanism for digital markets through a separate legislation;

- (iii) to study the international best practices on regulation in the field of digital markets;
 - (iv) to study other regulatory regimes/ institutional mechanisms/ government policies regarding competition in digital markets;
 - (v) to study the practices of leading players/ Systemically Important Digital Intermediaries ('SIDIs') which limit or have the potential to cause harm in digital markets; and
 - (vi) Any other matters related to competition in digital markets as may be considered relevant by the Committee.
4. The Competition Commission of India (CCI) will provide logistic support, secretarial support and research assistance to the Committee, as required. The Committee shall submit its report to the Government including a draft Digital Competition Act (DCA) within 03 Months.
5. This has the approval of the Competent Authority.


(Harsha N. Hedao)

Under Secretary to the Government of India

To,

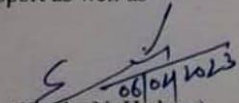
1. Secretary, Ministry of Corporate Affairs (MCA)
2. Chairperson, Competition Commission of India (CCI)
3. Dr. Saurabh Srivastava, Chairman at Indian Angel Network and Co-founder at NASSCOM
4. Dr. Aditya Bhattacharjea, Professor of Economics (Retd.), Delhi School of Economics
5. Shri Haigreve Khaitan, Khaitan & Co.
6. Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP
7. Ms. Pallavi Shardul Shroff, M/s Shardul Amarchand Mangaldas & Co.
8. Shri Anand S. Pathak, P&A Law Offices
9. Shri Rahul Rai, Axiom5 Law Chamber

Copy to (with the request to nominate an officer not below the rank of Joint Secretary):-

10. CEO, Niti Aayog, Niti Bhawan, New Delhi
11. Secretary, Department of Commerce, Udyog Bhawan, New Delhi
12. Secretary, Department of Economic Affairs, North Block, New Delhi
13. Secretary, Department of Consumer Affairs, Krishi Bhawan, New Delhi
14. Secretary, Department for Promotion of Industry & Internal Trade (DPIIT), New Delhi
15. Secretary, Ministry of Electronics and Information Technology (MEITY), New Delhi

Copy also to (for information):-

- a. PS to CAM
- b. PS to MOS, CA
- c. Joint Secretary (Competition), MCA
- d. Secretary, CCI (with the request to provide logistics & secretarial support as well as research assistance to the Committee)


(Harsha N. Hedao)

Under Secretary to the Government of India

ANNEXURE III - SUMMARY OF STAKEHOLDER SUBMISSIONS

The following table summarises the key inputs and recommendations of each of the stakeholders who provided written submissions to the Committee⁷¹⁹ in respect of the need to introduce an *ex-ante* competition framework for digital markets⁷²⁰.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
1.	All India Gaming Federation	Large digital enterprises engage in issuing arbitrary app distribution policies; imposition of unfair and discriminatory terms on app developers through arbitrary app review guidelines; mandatory use of native billing system for in-app purchases; imposition of a high commission fee; advertising restrictions; and infringement of intellectual property enabling search engines to bid on relevant keywords.	In favour of <i>ex-ante</i> regulation.
2.	Alliance of Digital India Foundation	<ul style="list-style-type: none"> • Large app stores engage in bundling of products; mandatory usage of native payment systems; data-hoarding and use of third-party data to improve own products; self-preferencing; forcing app developers to enter into arbitrary and unilateral agreements; infringement of trademarks; imposition of high commissions on revenue; anti-steering provisions including displaying warnings when a user attempts to install an app from a source other than the official app stores; pre-installation of apps on app 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>stores; non-transparent advertising policies; lack of interoperability; and predatory pricing and deep discounting.</p> <ul style="list-style-type: none"> • SIDIs must be permitted to contest their designation before the regulatory body. • A special wing of the CCI with requisite manpower should adjudicate complaints brought against digital enterprises. 	
3.	Amazon	<ul style="list-style-type: none"> • Amazon is already heavily regulated by the FDI Policy which mandates that it can only act as an online marketplace and not as a seller, and that it should provide fair terms to all sellers. • <i>Ex-ante</i> regulation for the e-commerce sector may be untimely and excessive and may lead to over-regulation. There is a risk of increased compliance costs and regulatory overlap. • <i>Ex-ante</i> regulations in the EU remain largely untested. In Japan, broad <i>ex-ante</i> laws for the e-commerce sector are not being pursued. • CCI should consider alternative regulatory models such as in Japan (focusing on transparency / reporting), Singapore (self-regulatory 	Not in favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		model), UK (sector-specific) or Australia (service-specific).	
4.	Apple India Private Limited	<ul style="list-style-type: none"> • The establishment of a DMU by the CCI would address any capacity constraints. • CCI should also consider opening a regional office in Bengaluru in order to get easy access to the technology ecosystem of the country. 	Not in favour of a regulatory approach modelled after the DMA. In favour of a light-touch regime which promotes innovation.
5.	Artha Global	<ul style="list-style-type: none"> • Large digital enterprises engage in <i>inter alia</i> data collection and concentration which could lead to risks of privacy and security breaches; leveraging of user and seller data to tailor their own products in line with consumer preference; and compelling users to share information in case they wish to continue interacting with a particular app. • Data protection considerations are important to assess consumer welfare losses. Such considerations are also essential to inform mergers and acquisitions in digital markets. • Regulatory overlap while regulating digital markets will need to be avoided. 	In favour of regulation of digital markets.
6.	Asia Travel Technology	<ul style="list-style-type: none"> • <i>Ex-post</i> competition regimes have proven ineffective at maintaining a 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
	Industry Association	<p>level playing field for travel technology platforms in their competition with dominant platforms, in the digital economy.</p> <ul style="list-style-type: none"> • The focus of a new regulation should be to address self-preferencing concerns, including unfair use of data, in online search, app stores and other relevant areas. • Transposing foreign legal principles and obligations like the EU Digital Markets Act (DMA) and Digital Services Act (DSA) should be conducted carefully. • <i>Ex-ante</i> competition regime should be targeted at only the strategic digital platforms, to avoid unfairly burdening platforms that are simply big. Arbitrary metrics for scope and thresholds should be avoided and the focus should be on evaluating criteria such as whether a firm acts as a vital conduit for other firms to reach consumers. • A flexible approach is needed that enables regulators to tailor remedies specific to individual sectors, products and activities within the digital economy. • Speedy and effective enforcement is essential in any new <i>ex-ante</i> competition regime. 	

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
7.	AZB & Partners	<ul style="list-style-type: none"> • AZB & Partners understands that the Committee intends to introduce reforms and the appropriate safeguards to ensure fair, transparent, and contestable digital ecosystems without compromising on innovation and growth. • It has thus proposed a hybrid model of Digital Competition regulation for India. • Conduct stakeholder consultation and invitation of public comments on the thresholds. Prescription of conjunctive quantitative entry level threshold for each Targeted Digital Service (“TDS”). When quantitative thresholds are met, then required platforms can self-report. • For qualitative assessment, the CCI may come up with non-exhaustive list of factors akin to S. 19(4) of the Competition Act that lays down criteria for assessing the platform’s position in the concerned service. • The reasons given for the hybrid model are that it would ensure equilibrium, qualitative assessment ensures that the principle of <i>audi alteram partem</i>, is followed and that the mere quantitative thresholds would restrict scaling. 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<ul style="list-style-type: none"> • The code of conduct for SIDIs should address the antitrust problems of the relevant Targeted Digital Service and fulfil broader competition law goals. The code of conduct may be determined by being service specific or service specific and SIDI specific. • The enforcement of the proposed legislation includes setting up a monitoring agency, interim measures taken by the CCI, penalties, and an appellate mechanism. 	
8.	Bundl Technologies Private Limited and Swiggy	<ul style="list-style-type: none"> • The size of the Indian digital economy is approximately 3% of the digital economy in Europe. Thus, an <i>ex-ante</i> regime at this stage would cause a chilling effect on the start-up industry. • In case two legislations are present simultaneously for all digital businesses, without any distinction, it will increase a company's regulatory cost without necessarily tackling anti-competitive conduct. • <i>Ex-ante</i> regulations may pose a risk of incorrect / misplaced regulation of smaller home-grown players which provide digital technology-enabled products and services. The exact same concerns cannot be mapped across all digital businesses and platforms in practice. Introduction of a legislation 	Not in favour of <i>ex-ante</i> regulation except under certain conditions as outlined.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>regulating all players with a broad brush has the potential to hinder innovation in the country.</p> <ul style="list-style-type: none"> • The CCI has imposed penalties on multiple companies in the digital space. With the implementation of the Competition (Amendment) Act, 2023, the CCI's powers will become more robust wherein it can settle cases or seek commitments to promptly dispose of more cases in the digital sector, prior to any harm that occurs in the market. • The establishment of the Digital Markets and Data Unit by the CCI with subject matter experts would be effective in correcting the potentially distortive conduct of large enterprises. • In case an <i>ex-ante</i> regime is sought to be introduced, the Committee should: (i) identify and assess the harm that such regime seeks to address; (ii) identify and assess the relevant sectors / services that would be subject to such regime after conducting a detailed market study in consultation with stakeholders; (iii) apply universally applicable thresholds for identification of SIDIs or apply separate thresholds to each specified sector / service; (iv) identify the <i>ex-ante</i> obligations that can be imposed on each of the identified services; and 	

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>(v) submit its report to the MCA which should constantly monitor the impact of <i>ex-ante</i> regulations on identified sectors / services.</p> <ul style="list-style-type: none"> • Detailed studies within different digital markets should be conducted to identify (on a sector-specific basis): (i) nature of the entry barriers in a sector / service; (ii) whether the state of competition is sufficient to address the harm; (iii) whether market forces and state of competition only favour significant digital enterprises; and (iv) the level of dependency of business users and end users on the relevant digital enterprises. 	
9.	Centre for the Digital Future	<ul style="list-style-type: none"> • <i>Ex-ante</i> is not context-specific and therefore can be counter-productive. • India needs to chart its own course by setting up a regulatory system that works in its best interests, and it can gain disproportionately by leveraging its potential as a large potential market and a small, but growing digital ecosystem. • Large firms have unprecedented control over data and information flows that are proposed to be regulated through specialised data protection and digital safety laws in most jurisdictions. 	Not in favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<ul style="list-style-type: none"> • Digital markets will be Schumpeterian markets – digital players will drive others as well in innovation and competition. • Innovation cannot be limited to a regulatory standpoint – it has to be ensured that these new ideas have access to adequate capital. The current position is targeting larger firms based on the presumption that they will remain in a position to keep making large profits. • Regulatory action needs to ensure contestability in markets. • <i>Ex-ante</i> regulations would specify undesirable actions and trigger regulatory behaviour. • All platforms are not the same and should be treated the same by regulators. If they are treated the same, <i>ex-ante</i> will impose high costs on all stakeholders. • Should leave <i>ex-ante</i> to sector specific regulators and have competition policy operate as an <i>ex-post</i> enforcer. • Outcome independent <i>ex-ante</i> regulations as broad an area of operations as digital markets will almost certainly spur the discovery of 	

S. No.	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>another area of weak regulatory oversight.</p> <ul style="list-style-type: none"> India has a history of being overly protectionist and over-regulated. 	
10.	Confederation of All India Traders	<ul style="list-style-type: none"> Large digital enterprises in the e-commerce sector provide reduced commission or discounts and more favourable terms for preferred sellers; do not follow platform neutrality; influence search rankings for preferred sellers; enter into arrangements with brands for exclusive launches; launch private labels through preferred sellers; fund deep discounts themselves; and misuse data to gain control over the market, create private labels, etc. <i>Ex-ante</i> regulations are essential to address the irreversible market harm caused by large digital enterprises, especially due to the lengthy and time-consuming nature of CCI investigations. The DMA can be used as a reference point for introducing <i>ex-ante</i> regulation in India. 	In favour of <i>ex-ante</i> regulation.
11.	Digital News Publishers Association	<ul style="list-style-type: none"> Large digital enterprises indulge in non-transparent data sharing and revenue-sharing policies⁷²¹; search and ranking preferencing; bundling and tying; collecting user data to 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>improve their own products; allowing bidding on keywords leading to infringement of registered trademarks; and allow crawling of publishers' websites by search engines and use such data to power their own search results.</p> <ul style="list-style-type: none"> • CCI should have a <i>pre-factum</i> power for checking abuse of dominant position by large digital enterprises before revenue sharing agreements are entered into with news publishers. • A <i>pre-facto</i> bargaining code should be devised to ensure a level playing field between large digital enterprises and news publishers such as those in France, Australia, and Canada. • CCI should be established as a statutory body with powers akin to the Central Information Commission and Election Commission of India. • The Director General, CCI should be appointed independently with a fixed tenure and enhanced powers to impose penalties. 	
12.	Esya Centre	<ul style="list-style-type: none"> • ACPs identified include exclusion of competitor channels in base packs by distribution platform operators vertically integrated with telecom service providers; arbitrary site- 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>blocking; and unfair practices in the e-commerce sector.</p> <ul style="list-style-type: none"> • <i>Ex-ante</i> rules should be applied uniformly to all sectors including to the e-commerce sector which is regulated by the FDI Policy. • Mandating interoperability should be refrained from to lower barriers to entry in digital markets since it does not incentivise switching and leads to network vulnerabilities. • Video-on-demand and gaming industries should be exempted from the ambit of <i>ex-ante</i> regulation. 	
13.	Federation of Hotel & Restaurant Associations of India	<ul style="list-style-type: none"> • OTAs and food service aggregators indulge in <i>inter alia</i> cartelisation; predatory pricing and deep discounting; charging exorbitant commissions from restaurant partners; non-transparent bookings; imposition of arbitrary and unfair terms in contracts; collection and use of consumer data; and lack of transparency in search algorithms. • A regulator like an ombudsman should be established to regulate digital markets and enforce <i>ex-ante</i> regulations. 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<ul style="list-style-type: none"> • SIDIs should be identified based on their revenue, market capitalisation and number of active users. • A DMU should be established. • Similar to the <i>ex-ante</i> regime proposed in the EU and adopted in Japan, companies may self-assess whether they meet the qualitative and quantitative thresholds applicable to gatekeeper entities and notify the competent regulatory authority. 	
14.	Flipkart	<ul style="list-style-type: none"> • The existing <i>ex-post</i> regime in India is well-equipped to effectively regulate digital markets in India. A one-size-fits-all approach similar to the DMA model would be unsuitable for effective regulation of digital markets since it remains untested. • Subject-matter experts should be appointed at the CCI. • A facility for obtaining principle-based guidance on the application of existing law for conducting self-assessment as well as for obtaining informal guidance / clarifications should be provided. • The existing regime should work in harmony with other specialised legislations governing distinct aspects of digital markets such as data 	Not in favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		protection, privacy, interoperability, etc.	
15.	Google	<ul style="list-style-type: none"> • There has been no global consensus on a regulatory approach to govern digital markets. Most regimes are untested and provide for rigid rules adversely impacting product innovation and benefits to consumers or are based on extensive engagement with industry participants. • Changes to rules should be pursuant to stakeholder consultation; there should not be unfettered discretion to change or add to such rules. • Any new regulation should be implemented in a phased manner that considers regulatory overlaps. • SIDI designations should be applied to identified activities in specific markets. • SIDI designations should be business-model agnostic. • SIDI designations should be based on clear criteria. • SIDI assessments should be reviewed periodically. 	<p>Not in favour of <i>ex-ante</i> regulation except under certain conditions.</p> <p>The new regime should promote competition and innovation; provide for evidence-based justifications (e.g., pro-competitive) for conduct under scrutiny; provide for separation of powers between rule-making bodies in charge of designation of SIDs and bodies in charge of enforcement, etc.</p> <p>Any new <i>ex-ante</i> regulation ought only to apply to firms in markets where they are found to have 'SIDI' power.</p>

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
16.	India Cellular and Electronics Association	<ul style="list-style-type: none"> • India's digital enterprises are not as mature as EU's and an identical system as that of the EU will not work for an industry like India's. It is important for India to focus on promotion of investment, economic growth, and innovation. • DMA-related regulation will have a debilitating effect on innovation and technological advancement since it favours static competition over dynamic competition, and fairness over disruption. • The implementation of a DMA-like regime would also discourage growing companies which may not be able to cope with the increased compliance burden. 	Not in favour of <i>ex-ante</i> regulation.
17.	Indian Council for Research on International Economic Relations	<ul style="list-style-type: none"> • The current competition regime intervenes only when harm is done which is too late in the case of digital markets. The current fines and remedies are not enough of a deterrent. Constraints faced by competition authorities include: (i) difficulty in establishing dominance and anti-competitive effects using traditional theories of harm; (ii) difficulty in designing remedies for rapidly changing markets; and (iii) capacity constraints. 	In favour of <i>ex-ante</i> regulation but only if it is introduced with caution. There must be tailored gatekeeping and flexibility for sector-specific business models.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<ul style="list-style-type: none"> The definition of 'relevant market' is also important to be demarcated on a case-to-case basis. 	
18.	Internet and Mobile Association of India	<ul style="list-style-type: none"> The current regulatory framework allows the CCI to act swiftly when needed without excessive regulation in the digital sector. Having two legislations applicable parallelly to all digital businesses would increase regulatory costs for companies. Rigid pre-emptive standards should not be created under the law as it may negatively affect investments, innovation, consumer choice, and welfare. Additional regulation should not be considered since there is no empirical evidence suggesting any failure in the existing regulatory framework. In order to avoid false positives and type I errors, it is crucial to conduct detailed market studies to identify and analyse issues and concerns that require regulatory intervention and resolution. The EU has recently implemented new comprehensive regulations for competition in digital markets. However, it is crucial to recognise that India's market is distinct from that of Europe's and directly adopting rules from other markets, such as Europe, without considering the local nexus, 	Not in favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>could potentially damage local markets, hinder innovation, impede economic growth, and harm consumers in India.</p> <ul style="list-style-type: none"> • After studying recent developments regarding an <i>ex-ante</i> regime in nations like EU, UK, USA, Singapore, Japan, Australia, and Korea, it can be inferred that there is currently no global consensus among countries or experts regarding which <i>ex-ante</i> approach to adopt or whether <i>ex-ante</i> regulation is even necessary. • Broader public consultations and surveys should be carried out before making any recommendations. Additionally, there should be a brief round of public consultation on the draft recommendations, following the standard practice of other government policy proposals. 	
19.	Meta (Facebook)	<ul style="list-style-type: none"> • The proposals of the Committee may cut across the regulatory sphere of extant legislation and run the risk of inhibiting the growth and innovation of services and products in India due to regulatory inconsistency. • There is no evidence of enforcement gaps in the extant framework. CCI is an effective regulator of competition issues in digital markets. The length of CCI proceedings is a procedural issue. 	<p>Not presently in favour of <i>ex-ante</i> regulation.</p> <p>A comprehensive impact assessment of the Indian economy and clarity about the policy goals that such legislation is</p>

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<ul style="list-style-type: none"> • There has been no global consensus on whether <i>ex-ante</i> regulations are needed, and there has been no convergence towards one particular model. • There is a need to identify specific harms as has been done in other jurisdictions such as the UK, Japan, Australia and South Korea. 	<p>slated to achieve is necessary.</p> <p>Meta believes in observing and advancing further research before rushing to adopt any variation of the DMA (or any of the other <i>ex-ante</i> frameworks being considered presently).</p>
20.	MakeMyTrip	<ul style="list-style-type: none"> • The criteria enforced in other jurisdictions necessitating <i>ex-ante</i> regulation cannot be applied to Indian markets due to different economic and market conditions. • Any proposed thresholds for designation of gatekeepers must be at EU levels or higher to protect domestic players who need to compete with global leaders in the Indian market. 	<p>In favour of <i>ex-ante</i> regulation only to the extent that they are made applicable to select large horizontal platforms that have created economy-wide ecosystems.</p> <p>Not in favour of <i>ex-ante</i> regulation of the online travel market.</p>
21.	Newspaper Association of India	A digital competition law is required to prevent the spread of inaccurate information in order to increase	In favour of a new digital competition law.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		consumer reach across all digital media.	
22.	National Restaurant Association of India	<ul style="list-style-type: none"> • Malpractices by dominant food service aggregators include preferential treatment to a few sellers by providing them with better commission rates, targeted platform-funded discounts and minimum business guarantees; lack of transparency in search rankings; deep discounting; unfair contract terms; exclusivity agreements with restaurants for exclusive listing on the platform; price parity; data masking which is used to understand and predict market and consumer preferences without such data being shared with the restaurant partners; and exorbitant commissions, non-transparent listing practices and potentially rigged search algorithms for non-preferred sellers. • Appropriate legislation to regulate such enterprises and timely checks are crucial due to time-consuming investigations. Further, certain unfair practices cannot be remedied by market regulators alone. • Reference to DMA can be made. 	In favour of <i>ex-ante</i> regulation.
23.	NASSCOM	<ul style="list-style-type: none"> • Designation of an entity for <i>ex-ante</i> obligations should be based on a combination of both quantitative and qualitative factors. They should 	In favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>neither be mutually exclusive nor have an overriding effect.</p> <ul style="list-style-type: none"> • Any <i>ex-ante</i> obligation imposed on a designated entity should have objective justification provided in the primary law. • <i>Ex-ante</i> framework should focus on competition harms and not create overlaps by imposing privacy/data protection related obligations. • <i>Ex-ante</i> must provide for a consultative mechanism where an entity after getting designated can approach the CCI to clarify how a certain type of conduct falls within the purview of a given exemption. • The <i>ex-ante</i> framework must carry a statutory obligation for the CCI to conduct market studies before identifying a Core Digital Service or specific conduct/obligation with respect to the identified digital service. 	
24.	Oyo	<ul style="list-style-type: none"> • Digital technology is evolving, and it is important that competition remains fair and transparent. Regulations should focus on promoting competition, protecting consumer rights, and ensuring fair and equitable access to digital services. 	Not in favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<ul style="list-style-type: none"> • A level playing field should be created basis the nature of services holistically rather than an offline-online segment. • Regulation of technology markets should not be a one-size fits all approach. Broad based legislation creating uniform categories & imposing uniform obligations may have unintended consequences like actually removing incentives to innovate, create more efficient products or user experiences. It can also hinder India's growing tech sector/adversely affect investments in homegrown tech companies and make our economy less competitive globally. • At present, CCI has institutional expertise in regulating competition and the latest Competition Bill, 2023 addresses the issues raised by growth of digital economies. The CCI is also ramping capabilities on digital markets through market studies. • There is no evidence of an enforcement gap or market failure that requires an <i>ex-ante</i> intervention. • Rule of reason approach allows consideration of India-specific factors 	

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>and dynamic nature of competition in the technology sphere.</p> <ul style="list-style-type: none"> This allows market to correct itself, rather than imposing a top-down approach that limits potential growth. 	
25.	Paytm	<ul style="list-style-type: none"> The dominance of large digital enterprises is visible in the bundling of services which create asymmetric pricing and binds developers into taking all services from app store operators; anti-steering provisions which restrict choices for developers; control of app review process and search algorithms that creates an avenue for stores to self-preference their own apps at the expense of others; and high commissions which affect business viability and increase costs for customers. There is a need for a digital markets regulator. The regulator must seek submission of an annual compliance report from large digital enterprises. Any foreign large digital enterprise delivering services in India for at least the last 3 years in the digital services sector needs to be registered in India. A mandatory grievance redressal office to be established. 	In favour of <i>ex-ante</i> regulation as long as only large digital enterprises who have a critical mass (for instance, a certain specified revenue and a certain number of users) are subject to the regulations.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
26.	Twitter	<ul style="list-style-type: none"> • In order to implement an <i>ex-ante</i> regulatory framework, regulatory institutions need to be staffed by skilled academics who are trained in tracking global / local technological developments, and are able to reasonably contextualise these developments and potential applications in the Indian market. • The definition of 'SIDIs' needs to be carefully considered. • Data collection by the SIDIs needs to be as per norms mandated in the proposed DPDP Bill, 2022. 	In favour of <i>ex-ante</i> regulation.
27.	Uber	<ul style="list-style-type: none"> • <i>Ex-ante</i> regulatory interventions may discourage innovation and restrict existing players from investing in improving quality, efficiency, processes, etc. It might also change market dynamics / incentives such that it reduces consumer benefit. • The existing framework is already sufficient and it would not be apt to have to introduce a fresh legislation to regulate digital markets. • The CCI must be further empowered to track changing market dynamics across digital markets. 	Not in favour of <i>ex-ante</i> regulation.
28.	USIBC	<ul style="list-style-type: none"> • <i>Ex-ante</i> regulation targeting 'big tech' is too broad. Such a regulation must 	Not in favour of <i>ex-ante</i> regulation.

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>not target companies but seek to regulate conduct unique to specific appropriately defined markets.</p> <ul style="list-style-type: none"> • Incentivising competition will not serve as an <i>ex-ante</i> approach that only captures the largest players in the market but not all competitors. It might create a disincentive for other platforms to compete unless they offer the same benefits as those that are regulated. • There will be an adverse impact on existing players in the market that includes both Indian and foreign companies as they will be restricted in the improvement and evolution of their products. • There will also be an adverse impact on small digital market players in India. • Selective overly aggressive <i>ex-ante</i> regulations could reduce competition for Indian consumers. The additional legislative burden would lead to uncertainty for digital companies globally and India may not remain the 'first market'. • Very few legal systems have adopted aggressive <i>ex-ante</i> laws globally and marking a paradigm shift this early 	

S. No	Name of the Stakeholder	Submissions of Stakeholders	Observations on need for a new digital competition law
		<p>may have a detrimental impact on ease of doing business in India.</p>	
29.	Zomato	<ul style="list-style-type: none"> • <i>Ex-ante</i> regulation remains untested in global markets. Unlike the mature economies of the EU, the Indian economy is developing and needs nimble regulation. India is a growing economy with a diverse demographic divide and blanket legislations modelled after the DMA may impact the Digital India Movement. • The existing competition framework in India appears to be sufficient. CCI has wide-ranging powers and is already addressing substantive issues concerning digital markets. It has the powers to issue interim orders to correct any egregious practices. • A new legislation along with existing sectoral regulations could potentially result in over-regulation for Indian startups. 	<p>Not in favour of <i>ex-ante</i> regulation. However, if it is sought to be introduced, it should be tailored to the Indian ecosystem, should be conducive to the growth of startups, and should not stifle innovation and / or consumer interest.</p> <p>It should operate in consonance with other proposed regulatory laws in the digital market space as well as existing laws. SIDI thresholds should not impact smaller players.</p>

ANNEXURE IV

DRAFT DIGITAL COMPETITION BILL, 2024

An Act, to identify systemically significant digital enterprises and their associate digital enterprises, and to regulate their practices in the provision of core digital services, keeping in view the principles of contestability, fairness and transparency, with an objective to foster innovation, promote competition, protect the interest of users of such services in India, and for matters connected herewith and incidental thereto.

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement

- (1) This Act may be called the Digital Competition Act, [2024].
- (2) It extends to the whole of India, and save as otherwise provided extends to acts outside India having an effect on obligations and conduct requirements under this Act.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
- (4) The Central Government may appoint different dates for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Definitions

In this Act, unless the context otherwise requires:

- (1) "Act" means the Digital Competition Act, [2024];
- (2) "Associate digital enterprise" means an enterprise designated as such under sub-section (9) of Section 4;

- (3) “Business user” means any natural or legal person supplying or providing goods or services, including through Core Digital Services;
- (4) “Commission” means the Competition Commission of India established under sub-section (1) of Section 7 of the Competition Act;
- (5) “Competition Act” means the Competition Act, 2002 (12 of 2003) as amended from time to time;
- (6) “Core Digital Service” means any service specified in Schedule I of the Act;
- (7) “Director General” shall have the same meaning assigned to it under the Competition Act;
- (8) “End user” means any natural or legal person using Core Digital Services other than as a business user;
- (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, –

- (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 provision of any service;
 - (iii) any place of business of the enterprise.

- (10) "Group" shall have the same meaning as assigned to it under the Competition Act;
- (11) "Person" shall have the same meaning as assigned to it under the Competition Act;
- (12) "Prescribed" means prescribed by rules made under this Act;
- (13) "Regulations" means the regulations made by the Commission under Section 49;
- (14) "Related party" shall have the same meaning as assigned to it in Section 2(76) of the Companies Act, 2013 (18 of 2013);
- (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;
- (16) "Specified" means specified by regulations made under this Act;
- (17) "Systemically Significant Digital Enterprise" means an enterprise designated as such by the Commission under Section 4 of the Act;
- (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
- (19) "Users" includes business users and end users.
- (20) Any term not defined specifically in this Act shall have the same meaning as assigned to it in the Competition Act.

CHAPTER II

DESIGNATION OF A SYSTEMICALLY SIGNIFICANT DIGITAL ENTERPRISE

3. Systemically Significant Digital Enterprises

- (1) An enterprise may be designated as a Systemically Significant Digital Enterprise in accordance with Section 4, in respect of a Core Digital Service if it has a significant presence in the provision of such Core Digital Service in India.
- (2) An enterprise shall be deemed to be a Systemically Significant Digital Enterprise in respect of a Core Digital Service, if:
 - (a) it meets any of the following financial thresholds in each of the immediately preceding three financial years:
 - (i) turnover in India of not less than INR 4000 crore; OR
 - (ii) global turnover of not less than USD 30 billion; OR
 - (iii) gross merchandise value in India of not less than INR 16000 crore; OR
 - (iv) global market capitalisation of not less than USD 75 billion, or its equivalent fair value of not less than USD 75 billion calculated in such manner as may be prescribed;
 - AND
 - (b) it meets any of the following user thresholds in each of the immediately preceding three financial years in India:
 - (i) the core digital service provided by the enterprise has at least one crore end users; OR
 - (ii) the core digital service provided by the enterprise has at least ten thousand business users.

Provided that if the enterprise does not maintain or fails to furnish data mentioned in clause (a) or (b), it shall be deemed to be a Systemically Significant Digital Enterprise if it meets any of the thresholds stipulated in clause (a) or (b).

- (3) The Commission may designate an enterprise as a Systemically Significant Digital Enterprise in respect of a Core Digital Service, even if it does not meet the criteria set out under sub-section (2), if the Commission is of the opinion that such enterprise has significant presence in respect of such a Core Digital Service, based on an assessment of information available with it, and based on any or all of the following factors:
 - (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.

- (4) The Central Government shall, every three years from the date of commencement of this Act and in consultation with the Commission, by notification, enhance or reduce, or keep at the same level, the thresholds stipulated in sub-section (2).

Explanation. – For the purposes of this section,

(1) “Turnover in India” includes revenue derived in India from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise;

(2) “Global turnover” includes revenue derived from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise;

(3) “Gross merchandise value” means the total value of goods or services, or both, sold by, or through the intermediation of, the enterprise through all the Core Digital Services it provides;

(4) "Global market capitalisation" means market capitalisation of the enterprise calculated at the global level;

(5) The values of "turnover in India", "global turnover", "gross merchandise value" and "global market capitalisation" shall be calculated in the manner as may be specified;

(6) "End Users" and "Business Users" for each Core Digital Service shall be identified and calculated in the manner as may be specified;

(7) Where the enterprise is a part of a group, then the values of "turnover in India", "global turnover", "gross merchandise value", "global market capitalisation", "number of end users" and "number of business users" shall be computed with reference to the entire group.

4. Self-reporting obligation and designation

(1) An enterprise shall, within a period of ninety days of meeting the thresholds under sub-section (2) of Section 3, notify the Commission in the form as may be specified, that it fulfills the criteria to qualify as a Systemically Significant Digital Enterprise in respect of one or more of its Core Digital Services.

Provided that the enterprise shall also notify the Commission of such other enterprises within the group the enterprise belongs to, which are directly or indirectly involved in provision of the Core Digital Service, as Associate Digital Enterprises.

(2) Upon receipt of the information under sub-section (1), the Commission may pass an order designating the enterprise as a Systemically Significant Digital Enterprise and identifying its Core Digital Services, thereby subjecting the enterprise to the obligations under Chapter III and the rules and regulations framed thereunder.

(3) The Commission may, at any time after the expiry of ninety days from the date of Section 3 coming into force, and in a manner as may be specified, direct an enterprise to furnish such information as it deems necessary to ascertain whether the said enterprise fulfills the criteria set out under sub-section (2) or (3) of Section 3.

- (4) Upon consideration of the information received, if any, under sub-section (3) or any other information in its possession, if the Commission is of the view that the enterprise meets the thresholds set out under sub-section (2) of Section 3, the Commission may, after providing an opportunity of being heard to the enterprise:
 - (a) pass an order designating the enterprise as a Systemically Significant Digital Enterprise in accordance with sub-section (2); and
 - (b) direct the enterprise to show cause as to why a penalty may not be imposed under sub-section (4) of Section 28.

- (5) Upon consideration of the information received under sub-section (3) and any other information in its possession, if the Commission is of the view that the enterprise meets the factors set out under sub-section (3) of Section 3, the Commission shall issue a show cause notice to the enterprise calling upon it to provide reasons as to why it should not be designated as a Systemically Significant Digital Enterprise.

- (6) Upon consideration of the response received pursuant to the show cause notice issued under sub-section (5), the Commission after giving an opportunity of being heard to the enterprise shall pass an order either:
 - (a) designating the enterprise as a Systemically Significant Digital Enterprise, if in the opinion of the Commission, the enterprise has significant presence in respect of a Core Digital Service in accordance with sub-section (3) of Section 3; or
 - (b) closing the proceedings if, in the opinion of the Commission, the enterprise does not have significant presence in respect of a Core Digital Service in accordance with sub-section (3) of Section 3.

- (7) If an enterprise fails to comply with the Commission's direction under sub-section (3), or provides incomplete or incorrect information in response to that direction, the Commission may, after giving an opportunity of being heard to the enterprise and based on the information in its possession, pass an order designating it as a Systemically Significant Digital Enterprise, if it meets any of the thresholds under sub-section (2) of Section (3) or based on any factors stipulated under sub-section (3) of Section 3.

- (8) An enterprise shall be designated as a Systemically Significant Digital Enterprise for a period of three years.
- (9) Where an enterprise has been designated as a Systemically Significant Digital Enterprise or the Commission is considering whether to designate an enterprise as a Systemically Significant Digital Enterprise, and such enterprise is a part of a group, and one or more other enterprises within such group are directly or indirectly involved in the provision of the Core Digital Service in India, the Commission may, after giving an opportunity of being heard to such other enterprises, pass an order designating them as Associate Digital Enterprises, and such designation as Associate Digital Enterprise shall continue for the period of designation of the enterprise as Systemically Significant Digital Enterprise.

5. Anti-circumvention from designation

- (1) An enterprise shall not directly or indirectly segment, divide, subdivide, fragment or split services through contractual, commercial, technical or any other means in order to circumvent the thresholds stipulated under clause (a) or clause (b) of sub-section (2) of Section 3.
- (2) The Commission may, at any time, direct an enterprise to furnish any information that the Commission deems necessary, to determine whether the enterprise has contravened sub-section (1).
- (3) Without prejudice to the penalty which may be imposed under sub-section (2) of Section 28, if the Commission is of the opinion that an enterprise may have contravened sub-section (1), the Commission may pass an order designating the enterprise as a Systemically Significant Digital Enterprise.

6. Revocation or re-designation

- (1) The Systemically Significant Digital Enterprise may, any time during the last six months before the expiry of the period of designation under Section 4 or re-designation under sub-section (5), apply to the Commission in the form as may be specified, that it no longer meets the thresholds to be designated as a Systemically Significant Digital Enterprise, for one or more Core Digital Services, as specified in sub-section (2) of Section 3 or that it no longer needs to be designated as a Systemically Significant Digital Enterprise under sub-section (3) of Section 3.

- (2) At any time after one year of being designated or re-designated, the Systemically Significant Digital Enterprise may request the Commission, in such form as maybe specified, to revoke the enterprise's designation as a Systemically Significant Digital Enterprise in respect of all or any Core Digital Services if there has been a significant change in market dynamics.
- (3) The Commission shall, within ninety days of receipt of the application under sub-section (1) or (2), pass an order:
 - (a) revoking the enterprise's designation as a Systemically Significant Digital Enterprise in respect of all or any Core Digital Services; or
 - (b) dismissing the application.

Provided that such an enterprise shall continue as a Systemically Significant Digital Enterprise till the time of passing of the order under this sub-section;

Provided further that the time taken by such an enterprise to reply to the information sought by the Commission for the purposes of this sub-section shall be excluded from the computation of ninety days as mentioned above.

- (4) The Commission shall provide an opportunity of being heard to the Systemically Significant Digital Enterprise prior to passing an order under sub-section (3).
- (5) On the date of expiry of the designation or re-designation of a Systemically Significant Digital Enterprise it shall be deemed to have been re-designated as a Systemically Significant Digital Enterprise for a further period of three years, if no order has been passed under clause (a) of sub-section (3) revoking its designation as Systemically Significant Digital Enterprise.

CHAPTER III

OBLIGATIONS ON SYSTEMICALLY SIGNIFICANT DIGITAL ENTERPRISES AND THEIR ASSOCIATE DIGITAL ENTERPRISES

- 7. Requirement for Systemically Significant Digital Enterprises and their Associate Digital Enterprises to comply with obligations**

- (1) Upon designation as a Systemically Significant Digital Enterprise, the enterprise shall comply with the obligations in this Chapter and the rules and regulations framed thereunder with respect to the Core Digital Services identified in the Commission's order under Section 4.
- (2) The Associate Digital Enterprises shall comply with all the obligations that the Systemically Significant Digital Enterprise is required to comply with, and non-compliance with such obligations shall be subject to the same penalties that may be imposed on the Systemically Significant Digital Enterprise.
- (3) The Commission shall specify, by regulations, separate conduct requirements for each Core Digital Service in relation to the applicable obligations set out in this Chapter.

Provided that the Commission may, within each set of regulations pertaining to a Core Digital Service, subject Systemically Significant Digital Enterprises providing such a Core Digital Service to differential obligations based on the nature of the market, the number of users in India, and such other factors that the Commission may deem fit.

Provided further that the Commission may subject an Associate Digital Enterprise to differential obligations than those applicable on the Systemically Significant Digital Enterprise in such manner as may be specified.

Explanation.— For the purposes of this sub-section, the term “conduct requirements” includes the manner of complying with such requirements and the timelines associated with such compliance.

- (4) A Systemically Significant Digital Enterprise and its Associate Digital Enterprises, if any, that complies with the regulations for its identified Core Digital Service shall be deemed to have complied with the obligations under this Chapter.
- (5) The Commission may, while framing regulations, subject the conduct requirements to one or more of the following factors which may impede the Systemically Significant Digital Enterprise's and its Associate Digital Enterprise's compliance with such conduct requirements:

- (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.

Explanation.— For these purposes of this sub-section, the term “cybersecurity” will have the same meaning as assigned to it under the Information Technology Act, 2000 (21 of 2000).

8. Anti-circumvention from obligations

- (1) A Systemically Significant Digital Enterprise shall not engage in any behaviour that undermines effective compliance with the obligations under this Chapter and the rules and regulations framed hereunder, regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature, or consists in the use of behavioural techniques or interface design.
- (2) The Systemically Significant Digital Enterprise shall not directly or indirectly prevent or restrict business users or end users from raising any issue of non-compliance with the Systemically Significant Digital Enterprise’s obligations under this Act.

9. Reporting and Compliance

- (1) A Systemically Significant Digital Enterprise shall establish transparent and effective complaint handling and compliance mechanisms as may be specified.
- (2) A Systemically Significant Digital Enterprise shall report to the Commission on the measures taken to comply with the obligations in Chapter III and the rules and regulations framed hereunder in such manner and form, and after such period(s) of time as may be specified.

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.

11. Self-preferencing

A Systemically Significant Digital Enterprise 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.

12. Data usage

- (1) A Systemically Significant Digital Enterprise shall not, directly or indirectly, use or rely on non-public data of business users operating on its Core Digital Service to compete with such business users on the identified Core Digital Service of the Systemically Significant Digital Enterprise.

Explanation. – For the purposes of this sub-section, “non-public data” shall include any aggregated and non-aggregated data generated by business users that can be collected through the commercial activities of business users or their end users, on the identified Core Digital Service of the Systemically Significant Digital Enterprise.

- (2) A Systemically Significant Digital Enterprise shall not, without the consent of the end users or business users:
 - (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.

Explanation. – For the purposes of this sub-section, “consent”:

(1) For end users, shall have the same meaning as assigned to it in the Digital Personal Data Protection Act, 2023 (22 of 2023);

(2) For business users, shall have the same meaning as may be specified.

- (3) A Systemically Significant Digital Enterprise shall allow business users and end users of its Core Digital Service to easily port their data, in a format and manner as may be specified.

13. Restricting third-party applications

The Systemically Significant Digital Enterprise shall:

- (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.

14. Anti-steering

A Systemically Significant Digital Enterprise shall not restrict business users from, directly or indirectly, communicating with or promoting offers to their end users, or directing their end users to their own or third party services, unless such restrictions are integral to the provision of the Core Digital Service of the Systemically Significant Digital Enterprise.

Explanation. – For the purpose of this section, the Commission may specify, by regulations, the nature of restrictions that may be considered “integral” to the provision of a Core Digital Service.

15. Tying and bundling

A Systemically Significant Digital Enterprise shall not require or incentivise business users or end users of the identified Core Digital Service to use one or more of the Systemically Significant Digital Enterprise’s other products or services, 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

alongside the use of the identified Core Digital Service, unless the use of such products or services is integral to the provision of the Core Digital Service.

Explanation. – For the purpose of this section, the Commission may specify, by regulations, the nature of products or services that may be considered “integral” to the provision of a Core Digital Service.

CHAPTER IV

POWER OF THE COMMISSION TO CONDUCT AN INQUIRY

16. Power of the Commission to inquire into non-compliance of obligations by Systemically Significant Digital Enterprises and Associate Digital Enterprises

- (1) The Commission, if:
 - (a) either on its own knowledge; or
 - (b) on receipt of an information in such manner and accompanied by such fee as may be specified from any person; or
 - (c) through a reference made to it by the Central Government or a State Government or a statutory authority

is of the opinion that there exists a *prima facie* case, it shall direct the Director General to conduct an investigation for the purpose of examining whether a Systemically Significant Digital Enterprise or an Associate Digital Enterprise is in breach of the obligations in Chapter III or the regulations framed thereunder.

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

- (2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under subsection (1), the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

- (3) The Commission may not inquire into conduct if the same or substantially the same facts and issues raised in the information or reference from the Central Government or a State Government or a statutory authority, received under this Section has already been decided by the Commission in its previous order.
- (4) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
- (5) If, after consideration of the report of the Director General referred to in sub-section (4), the Commission is of the opinion that further investigation is required, it may direct the Director General to investigate further into the matter.
- (6) The Director General shall, on receipt of direction under sub-section (5), investigate the matter and submit a supplementary report on his findings within such period as may be specified by the Commission.
- (7) The Commission may forward a copy of the report referred to in sub-sections (4) and (6) to the parties concerned.
- (8) In case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-sections (4) and (6) to the Central Government or the State Government or the statutory authority, as the case may be.
- (9) If the report of the Director General referred to in sub-sections (4) and (6) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
- (10) If, after consideration of the objections and suggestions referred to in sub-section (9), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central

Government or the State Government or the statutory authority or the parties concerned, as the case may be.

- (11) If, after consideration of the objections or suggestions referred to in sub-section (9), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
- (12) If the report of the Director General referred to in sub-sections (4) and (6) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.
- (13) Upon completion of the investigation or inquiry under sub-section (11) or sub-section (12), as the case may be, the Commission may pass an order closing the matter or pass an order under Section 17 of this Act and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- (14) Before passing an order under sub-section (13), the Commission shall issue a show-cause notice indicating the contraventions alleged to have been committed and such other details as may be specified and give a reasonable opportunity of being heard to the parties concerned.

17. Orders of the Commission after inquiry

- (1) Where after inquiry the Commission finds that a Systemically Significant Digital Enterprise or its Associate Digital Enterprise is in contravention of one or more of the obligations under Chapter III and the rules and regulations framed thereunder, it may pass all or any of the following orders:
 - (a) directing any enterprise to discontinue and not to resume such conduct, as the case may be;
 - (b) imposing such penalty, as it may deem fit under Section 28;

- (c) directing that the conduct of the enterprise shall stand modified to the extent and in the manner as may be specified in the order by the Commission; or
- (d) passing such other order or issue such directions as it may deem fit.

Provided that while passing orders under this Section, if the Commission comes to a finding, that the Systemically Significant Digital Enterprise is a member of a group and that the other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this Section, against such members of the group.

- (2) The Systemically Significant Digital Enterprise, its Associate Digital Enterprises, and any other party against whom an order under sub-section (1) has been passed, shall provide the Commission with the description of the measures, in a manner as may be specified, that they have taken to ensure compliance with the order under sub-section (1) within such time period and in such manner as may be specified.

18. Settlement

- (1) Any enterprise, against whom any inquiry has been initiated under sub-section (1) of Section 16 for contravention of this Act, may for settlement of the proceeding initiated for the alleged contraventions, submit an application in writing to the Commission in such form and upon payment of such fee as may be specified.
- (2) An application under sub-section (1) may be submitted at any time, in a manner as may be specified, after the receipt of the report of the Director General under sub-section (7) of Section 16 but prior to the passing of an order under sub-section (1) of Section 17.
- (3) The Commission may, after taking into consideration the nature, gravity and impact of the contraventions, agree to the proposal for settlement, on payment of such amount by the applicant or on such other terms and manner of implementation of settlement and monitoring as may be specified.
- (4) While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any.

- (5) If the Commission is of the opinion that the settlement offered under sub-section (1) is not appropriate in the circumstances or if the Commission and the party concerned do not reach an agreement on the terms of the settlement within such time as may be specified, it shall, by order, reject the settlement application and proceed with its inquiry under Section 16.
- (6) The procedure for conducting the settlement proceedings under this section shall be such as may be specified.
- (7) No appeal shall lie under Section 34 against any order passed by the Commission under this section.

19. Commitment

- (1) Any enterprise, against whom any inquiry has been initiated under sub-section (1) of Section 16 for contravention of Chapter III and the rules and regulations framed thereunder, may submit an application in writing to the Commission, in such form and on payment of such fee as may be specified, offering commitments in respect of the alleged contraventions stated in the Commission's order initiating an inquiry under sub-section (1) of Section 16.
- (2) An offer for commitments under sub-section (1) may be submitted at any time, in a manner as may be specified, after an order initiating an inquiry under sub-section (1) of Section 16 has been passed by the Commission but within such time prior to the receipt by the party of the report of the Director General under sub-section (7) of Section 16.
- (3) The Commission may, after taking into consideration the nature, gravity and impact of the alleged contraventions and effectiveness of the proposed commitments, accept the commitments offered on such terms and the manner of implementation and monitoring as may be specified.
- (4) While considering the proposal for commitment, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any.
- (5) If the Commission is of the opinion that the commitment offered under sub-section (1) is not appropriate in the circumstances or if the Commission and

the party concerned do not reach an agreement on the terms of the commitment, it shall pass an order rejecting the commitment application and proceed with its inquiry under Section 16.

- (6) The procedure for commitments offered under this section shall be such as may be specified.
- (7) No appeal shall lie under Section 34 against any order passed by the Commission under this section.

20. Revocation of orders on settlements and commitments

If an applicant fails to comply with the order passed under Section 18 or Section 19 or it comes to the notice of the Commission that the applicant has not made full and true disclosure or there has been a material change in the facts, the order passed under Section 18 or Section 19, as the case may be, shall stand revoked and withdrawn and such enterprise shall be liable to pay legal costs incurred by the Commission which may extend to rupees one crore and the Commission may restore or initiate the inquiry in respect of which the order under Section 18 or Section 19 was passed.

CHAPTER V

POWERS OF THE COMMISSION AND DIRECTOR GENERAL

21. Power of the Commission to regulate its own procedure and conduct studies

- (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;

- (c) receiving evidence on affidavit;
 - (d) issuing commissions for the examination of witnesses or documents;
 - (e) requisitioning, 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 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.

22. Reference by Statutory Authority

- (1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions

of this Act, then such statutory authority may make a reference in respect of such issue to the Commission:

Provided that any statutory authority, may, suo motu, make a reference to the Commission on any issue that involves any provision of this Act or is related to promoting the objectives of this Act, as the case may be.

- (2) On receipt of a reference under sub-section (1), the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.

23. Reference by Commission

- (1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of an Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, suo motu, make a reference to a statutory authority on any issue that involves provisions of an Act whose implementation is entrusted to that statutory authority.

- (2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

24. Director General to Investigate Contraventions

- (1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.
- (2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of Section 21.

- (3) Without prejudice to sub-section (2), it shall be the duty of all officers, other employees and agents of a party which are under investigation:
- (a) to preserve and to produce all information, books, papers, other documents and records of, or relating to, the party which are in their custody or power to the Director General, or any person authorised by it in this behalf; and
 - (b) to give all assistance in connection with the investigation to the Director General.
- (4) The Director General may require any person other than a party referred to in sub-section (3) to furnish such information or produce such books, papers, other documents or records before it or any person authorised by it in this behalf if furnishing of such information or the production of such books, papers, other documents or records is relevant or necessary for the purposes of its investigation.
- (5) The Director General may keep in his custody any information, books, papers, other documents or records produced under sub-section (3) or sub-section (4) for a period of one hundred and eighty days and thereafter shall return the same to the person by whom or on whose behalf the information, books, papers, other documents or records were produced:

Provided that the information, books, papers, other documents or records may be called for by the Director General if they are needed again for a further period of one hundred and eighty days by an order in writing:

Provided further that the certified copies of the information, books, papers, other documents or records, as may be applicable, produced before the Director General may be provided to the party or person on whose behalf the information, books, papers, other documents or records are produced at their own cost.

- (6) On receipt of any books, or other documents, or any relevant information from the Systemically Significant Digital Enterprise and its Associate Digital Enterprise, the Director General may enter the premises of such a Systemically Significant Digital Enterprise and its Associate Digital Enterprise to verify such information.

- (7) The Director General may examine on oath:
- (a) any of the officers and other employees and agents of the party being investigated; and
 - (b) with the previous approval of the Commission, any other person, in relation to the affairs of the party being investigated and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.
- (8) The examination under sub-section (7) shall be recorded in writing and shall be read over to or by, and signed by, the person examined and may thereafter be used in evidence against it.
- (9) Where in the course of investigation, the Director General has reasonable grounds to believe that information, books, papers, other documents or records of, or relating to, any party or person, may be destroyed, mutilated, altered, falsified or secreted, the Director General may make an application to the Chief Metropolitan Magistrate, Delhi for an order for seizure of such information, books, papers, other documents or records.
- (10) The Director General may make requisition of the services of any police officer or any officer of the Central Government to assist him for all or any of the purposes specified in sub-section (11) and it shall be the duty of every such officer to comply with such requisition.
- (11) The Chief Metropolitan Magistrate, Delhi may, after considering the application and hearing from the Director General, by order, authorise the Director General:
- (a) to enter, with such assistance, as may be required, the place or places where such information, books, papers, other documents or records are kept;
 - (b) to search that place or places in the manner specified in the order; and
 - (c) to seize information, books, papers, other documents or records as it considers necessary for the purpose of the investigation:

Provided that certified copies of the seized information, books, papers, other documents or records, as the case may be, may be provided to the party or person from whose place or places such documents have been seized at its cost.

- (12) The Director General shall keep in his custody such information, books, papers, other documents or records seized under this section for such period not later than the conclusion of the investigation as it considers necessary and thereafter shall return the same to the party or person from whose custody or power they were seized and inform the Chief Metropolitan Magistrate, of such return:

Provided that the Director General may, before returning such information, books, papers, other documents or records take copies of, or extracts thereof or place identification marks on them or any part thereof.

- (13) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, (2 of 1974) relating to search or seizure made under that Code.

Explanation. – For the purposes of this section, –

- (a) “agent”, in relation to any person, means, any one acting or purporting to act for or on behalf of such person, and includes the bankers and persons employed as auditors and legal advisers, by such person;
- (b) “officers”, in relation to any company or body corporate, includes any trustee for the debenture holders of such company or body corporate;
- (c) any reference to officers and other employees or agents shall be construed as a reference to past as well as present officers and other employees or agents, as the case may be.

25. Interim order

Where during an inquiry, the Commission is satisfied that an act in contravention of the provisions of this Act or rules or regulations framed thereunder has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

26. Acts taking place outside India

The Commission shall, notwithstanding that,

- (a) an enterprise is outside India; or
- (b) any other matter or practice or action arising out of an enterprise's conduct is outside India

have power to cause an inquiry against such enterprise for non-compliance of this Act or rules or regulations framed thereunder, in India, and pass such orders as it may deem fit in accordance with the provisions of this Act.

CHAPTER VI

PENALTIES

27. Contravention of orders of Commission

- (1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.
- (2) If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under Section 17, Section 25, Section 26 or Section 28 he shall be liable to a penalty which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.
- (3) If any person does not comply with the orders or directions issued, or fails to pay the penalty imposed under sub-section (2), he shall, without prejudice to any proceeding under Section 33, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit:

Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this Section save on a complaint filed by the Commission or any of its officers authorised by it.

28. Penalties

- (1) In an order finding a contravention under sub-section (1) of Section 17, the Commission may impose on a Systemically Significant Digital Enterprise

or its Associate Digital Enterprise, penalties not exceeding ten per cent of its global turnover, in the preceding financial year where it finds that the Systemically Significant Digital Enterprise or its Associate Digital Enterprise, fails to comply with any of the obligations laid down in Chapter III and the rules and regulations framed thereunder.

- (2) In an order finding a contravention under sub-section (3) of Section 5, the Commission may impose on a Systemically Significant Digital Enterprise or its Associate Digital Enterprise, penalties not exceeding ten per cent of its global turnover, in the preceding financial year where it finds that the Systemically Significant Digital Enterprise or its Associate Digital Enterprise, fails to comply with the obligation under sub-section (1) of Section 5.
- (3) The Commission may pass an order, imposing on an enterprise a penalty where applicable which shall not exceed one per cent of the global turnover of such an enterprise where they fail to notify the Commission that they meet the criteria specified in sub-section (2) of Section 3 and the notifications issued thereunder.
- (4) The Commission may pass an order, imposing on an enterprise a penalty, which shall not exceed one per cent of the global turnover of the enterprise, where it:
 - (a) provides incorrect, incomplete or misleading information or no information under sub-section (1) or sub-section (3) of Section 4;
 - (b) fails to provide information, or supplies incorrect, incomplete or misleading information that is required pursuant to a show cause notice under Section 4 or Section 16;
 - (c) provides or supplies incorrect, incomplete or misleading information under sub-section (1) of Section 6;
 - (d) fails to provide information, or provides or supplies incorrect, incomplete or misleading information under sub-section (2) of Section 9;
 - (e) provides incorrect, incomplete or misleading information, or fails to or refuses to provide complete information or cooperate pursuant to the powers of the Commission under Section 21 or the Director General under Section 24.

- (5) The Commission shall, prior to passing an order imposing a penalty under this section, provide the enterprise a reasonable opportunity of being heard.

Explanation. – For the purposes of this section:

(1) "Global turnover" shall include revenue of the enterprise derived from the sale of all goods and provision of all services, whether digital or otherwise, and when an enterprise is part of a group, shall include the revenue derived from the sale of all goods and provision of all services, whether digital or otherwise, of such group.

(2) The value of "global turnover" shall be calculated in the manner as may be specified.

29. Contravention by Companies

- (1) Where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is established against the Systemically Significant Digital Enterprise or its Associate Digital Enterprise, every person who, at the time the contravention was committed, was in charge of, and was responsible to the Systemically Significant Digital Enterprise or its Associate Digital Enterprise for the conduct of its business, shall be deemed to be in contravention of this Act and unless otherwise provided in this Act, the Commission may impose such penalty on such persons, as it may deem fit which shall not be more than ten per cent of the average of the income for the last three preceding financial years.
- (2) Nothing contained in sub-section (1) shall render any such person liable to any penalty if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.
- (3) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a Systemically Significant Digital Enterprise or its Associate Digital Enterprise and it is proved that the contravention has taken place with the

consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers shall also be deemed to be in contravention of the provisions of this Act and unless otherwise provided in this Act, the Commission may impose such penalty on such persons, as it may deem fit which shall not be more than ten per cent. of the average of the income for the last three preceding financial years.

Explanation. – For the purposes of this section, –

(a) “company” means a body corporate and includes a firm or other association of individuals;

(b) “director”, in relation to a firm, means a partner in the firm;

(c) “income”, in relation to a person, shall be determined in such manner as may be specified.

30. Limitation Period for initiation of inquiry

- (1) The Commission shall not entertain any information or reference under Section 16 unless it is filed within three years from the date on which the cause of action has arisen.
- (2) An information or reference may be entertained after the period specified in sub-section (1) if the Commission is satisfied that there had been sufficient cause for not filing the information or reference within such period after recording its reasons for condoning such delay.

31. Crediting sums realised by way of penalties to Consolidated Fund of India

All sums realised by way of penalties, settlement, and recovery of legal costs by the Commission under this Act shall be credited to the Consolidated Fund of India.

32. Rectification of orders

- (1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.
- (2) Subject to the other provisions of this Act, the Commission may make:

- (a) an amendment under sub-section (1) of its own motion;
- (b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

Explanation.— For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

33. Execution of orders of Commission imposing monetary penalty

- (1) If an enterprise or a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified.
- (2) In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income Tax Act, 1961 (43 of 1961), it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.
- (3) Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 (43 of 1961) and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income tax and sums imposed by way of penalty, fine, and interest under the Income Tax Act, 1961 (43 of 1961) and to the Commission instead of the Assessing Officer.

Explanation 1. - Any reference to sub-section (2) or sub-section (6) of section 220 of the Income Tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made thereunder shall be construed as references to Section 28 of this Act.

Explanation 2. - The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income Tax Act, 1961 (43 of 1961) shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a

certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

Explanation 3. - Any reference to appeal in Chapter XVIII and the Second Schedule to the Income Tax Act, 1961 (43 of 1961), shall be construed as a reference to appeal before the National Company Law Appellate Tribunal under Section 34 of this Act.

CHAPTER VII

APPEALS AND POWERS OF APPELLATE TRIBUNAL

34. Appeal to Appellate Tribunal

- (1) The National Company Law Appellate Tribunal constituted under section 410 of the Companies Act, 2013 (18 of 2013) shall be the Appellate Tribunal for the purpose of this Act and the said Appellate Tribunal shall have jurisdiction to hear and dispose of appeals against directions issued or decision made or order passed by the Commission under the following:
 - (a) Clause (a) of sub-section (4) of Section 4;
 - (b) Clause (a) of sub-section (6) of Section 4;
 - (c) Sub-sections (7) or (9) of Section 4;
 - (d) Sub-section (3) of Section 5;
 - (e) Sub-sections (3) of Section 6;
 - (f) Sub-sections (2), (10) and (13) of Section 16;
 - (g) Sub-section (1) of Section 17;
 - (h) Section 25;
 - (i) Section 26;
 - (j) Section 27;
 - (k) Section 28;
 - (l) Section 29;
 - (m) Section 32;
 - (n) Section 33.
- (2) The Central Government, or the State Government or a local authority, or an enterprise or any person, aggrieved by any direction, decision or order referred to in sub-section (1) may prefer an appeal to the Appellate Tribunal.
- (3) Every appeal under sub-section (2) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order

made by the Commission is received by the Central Government, or the State Government or a local authority, or an enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed.

- (4) The Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.
- (5) No appeal by a person, who is required to pay any amount in terms of an order of the Commission, shall be entertained by the Appellate Tribunal unless the appellant has deposited twenty-five per cent of that amount in the manner as directed by the Appellate Tribunal.
- (6) On receipt of an appeal under sub-section (2), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.
- (7) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.
- (8) The appeal filed before the Appellate Tribunal under sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

35. Awarding Compensation

Any person aggrieved by non-compliance of obligations imposed under this Act, by a Systemically Significant Digital Enterprise or its Associate Digital Enterprise as determined by the Commission, may approach the Appellate Tribunal or the Supreme Court for compensation in accordance with Section 53N of the Competition Act.

36. Procedures and powers of Appellate Tribunal

Sections 53N, 53O, 53P, 53Q(1), 53S, and 53U of the Competition Act shall apply *mutatis mutandis* to the power and procedures of the Appellate Tribunal under this Act.

37. Appeal to Supreme Court

- (1) The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them.
- (2) The Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

CHAPTER VIII

MISCELLANEOUS

38. Power of the Central Government to exempt enterprises

The Central Government may, by notification, exempt an enterprise from the application of one or more provisions of this Act, the rules or regulations framed thereunder, or any provision thereof, and for such period as it may specify in such notification:

- (a) in the interest of security of the State or public interest;
- (b) in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.
- (c) if it performs a sovereign function on behalf of the Central Government or a State Government, only in respect of activities relatable to the discharge of the sovereign functions.

39. Power of Central Government to issue directions

- (1) Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:

Provided that the Commission shall, as far as practicable, be given an opportunity to express its views before any direction is given under

this sub-section.

- (2) The decision of the Central Government whether a question is one of policy or not shall be final.

40. Power of Central Government to supersede Commission

- (1) If at any time the Central Government is of the opinion:
 - (a) that on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
 - (b) that the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or
 - (c) that circumstances exist which render it necessary in the public interest so to do,

the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification:

Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Commission to make representations against the proposed supersession and shall consider representations, if any, of the Commission.

- (2) Upon the publication of a notification under sub-section (1) superseding the Commission –
 - (a) the Chairperson and other Members shall as from the date of supersession, vacate their offices as such;
 - (b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Commission shall, until the Commission is reconstituted under sub-section (3), be exercised and discharged by the Central Government or such authority as the Central Government may specify in this behalf;

- (c) all properties owned or controlled by the Commission shall, until the Commission is reconstituted under sub-section (3), vest in the Central Government.
- (3) On or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.
- (4) The Central Government shall cause a notification issued under subsection (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

41. Restriction on disclosure of information

No information relating to any enterprise or person, being information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the concerned enterprise or person, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

42. Chairperson, Members, Director General, Secretary, officers and other employees, etc., to be public servants

The Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Secretary and officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

43. Protection of action taken in good faith

No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director- General, Additional, Joint, Deputy or Assistant Directors General or the Secretary or officers or other

employees of the Commission or the Chairperson, Members, officers and other employees of the Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

44. Act to have overriding effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

45. Application of other laws not barred

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

46. Exclusion of jurisdiction of civil courts

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

47. Power to seek recommendations

The Central Government may request the Commission to examine and make recommendations including on whether one or more services should be added or removed from the list of Core Digital Services.

48. Power to make rules

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the manner of calculating equivalent fair value under clause (iv) of subsection (2) of Section 3;

- (b) other factors to which conduct requirements may be subjected to under clause (f) of sub-section (5) of Section 7;
 - (c) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (3) of Section 34 and the fees payable in respect of such appeal;
 - (d) the form of publication of guidelines under sub-section (5) of Section 50; and
 - (e) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.
- (3) Every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or rule, or both Houses agree that the notification should not be issued or rule should not be made, the notification or rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule, as the case may be.

49. Power to make regulations and process of issuing regulations

- (1) The Commission may, by notification, make regulations consistent with this Act and the rules or notifications made thereunder to carry out the purposes of this Act.
- (2) In particular, and without prejudice to the generality of the foregoing provisions, such regulations may provide for all or any of the following matters, namely:
 - (a) the manner of calculating turnover in India, global turnover, gross merchandise value and global market capitalisation under explanation (5) to sub-section 2 to Section 3;
 - (b) the manner of calculating number of end users and business users under explanation (6) to sub-section 2 to Section 3;

- (c) the form and manner for an enterprise notifying the Commission that it fulfils the criteria to qualify as a Systemically Significant Digital Enterprise under sub-section (1) of Section 4;
- (d) the form and manner for an enterprise furnishing information to the Commission that it fulfils the criteria to qualify as a Systemically Significant Digital Enterprise under sub-section (3) of Section 4;
- (e) the form and manner of application by an enterprise that it no longer fulfils the criteria to qualify as a Systemically Significant Digital Enterprise under sub-section (1) of section 6;
- (f) the form and manner of application by an enterprise for revocation of designation under sub-section (2) of section 6;
- (g) the separate conduct requirements for each Core Digital Service under sub-section (3) of Section 7;
- (h) the differential obligations for Associate Digital Enterprises under the proviso to sub-section (3) of Section 7;
- (i) the manner of establishing complaint handling and compliance mechanisms under sub-section (1) of Section 9;
- (j) the form and manner of reporting of measures undertaken by an enterprise under sub-section (2) of Section 9;
- (k) the meaning of the term consent for business users under explanation 2 of under sub-section (2) of Section 12;
- (l) the manner of allowing users to port data under sub-section (3) of Section 12;
- (m) the nature of restrictions considered integral for compliance with anti-steering obligations under Section 14;
- (n) the nature of restrictions considered integral for compliance with tying and bundling obligations under Section 15;
- (o) the manner and fee for receipt of information under clause (b) of sub-section (1) of Section 16;
- (p) the time period within which the report of the Director General may be submitted under sub-section (4) and sub-section (6) of Section 16;
- (q) other details to be indicated in the show cause notice under sub-section (14) of Section 16;
- (r) the manner and form of providing description of measures undertaken by an enterprise and the time period under sub-section (2) of Section 17;
- (s) the form of application and fee under sub-section (1), the time under sub-section (2), the terms and manner of implementations and monitoring under sub-section (3) and the procedure for conducting settlement proceedings under subsection (6) of Section 18;

- (t) the form of application and fee under sub-section (1), the time under sub-section (2), the terms and manner of implementations and monitoring under sub-section (3) and the procedure for commitments offered under sub-section (6) of Section 19;
 - (u) the manner of calculating global turnover under explanation 2 to Section 28;
 - (v) the manner of determining income under explanation (c) of Section 29;
 - (w) the manner in which penalty shall be recovered under sub-section (1) of Section 33;
 - (x) the other details to be published along with draft regulations and the period for inviting public comments under clause (a) of sub-section (5) of this Section; and
 - (y) any other matter in respect of which provision is to be, or may be, made by regulations.
- (3) While framing regulations under Chapter III, the Commission may specify conduct requirements with due regard to factors such as the nature of the Core Digital Service(s), including online intermediation services, the end users or business users, the nature of the industry or service, and any other factor that the Commission may deem fit.
- (4) In exercise of its powers to make regulations under sub-section (1), the Commission may consult any statutory authority, government body or other entity as the Commission may deem fit.
- (5) The Commission shall ensure transparency while making regulations under this Act, by:
- (a) publishing draft regulations along with such other details as may be specified on its website and inviting public comments for a specified period prior to issuing regulations;
 - (b) publishing a general statement of its response to the public comments, not later than the date of notification of the regulations; and
 - (c) periodically reviewing such regulations.

Provided that if the Commission is of the opinion that certain regulations are required to be made or existing regulations are required to be amended urgently in public interest or the subject matter of the regulation relates solely to the internal functioning of the Commission, it may make regulations or amend the existing regulations, as the case may be, without

following the provisions stated in this section recording the reason, for doing so.

- (6) Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

50. Power to issue guidelines

- (1) The Commission may publish guidelines on the provisions of this Act or the rules and regulations made thereunder either on a request made by a person or on its own motion.
- (2) Guidelines issued under sub-section (1) shall not be construed as determination of any question of fact or law by the Commission, its Members or officers and shall not be binding on the Commission, its Members or officers.
- (3) Without prejudice to anything contained in sub-section (1), the Commission shall publish guidelines as to the appropriate amount of any penalty for any contravention of provision of this Act.
- (4) While imposing a penalty under Section 28 or under Section 29 for any contravention of provision of this Act, the Commission shall consider the guidelines under sub-section (3) and provide reasons in case of any divergence from such guidelines.
- (5) The guidelines under sub-sections (1) and (3) shall be published in such form as may be prescribed.

51. Power of the Central Government to notify and amend Schedules

- (1) The Central Government in consultation with the Commission, may by amendment, notify new services, or alter or delete services mentioned in Schedule I to this Act.
- (2) Any amendment notified under sub-section (1) shall have effect as if enacted in this Act and shall come into force on the date of the notification unless the notification otherwise directs.
- (3) Every alteration made by the Central Government under sub-section (1) shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the alteration, or both Houses agree that the alteration should not be made, the alteration shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done in pursuance of that alteration.

52. Finance, Accounts and Audit

Provisions of Chapter VIII of the Competition Act shall have application for the purpose of implementation of this Act.

53. Power to remove difficulties

- (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty.
- (2) No such order shall be made under this Section after the expiry of a period of five years from the commencement of this Act.
- (3) Every order made under this Section shall be laid, as soon as may after it is made before each House of Parliament.

SCHEDULE I

1. 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.

For the purposes of paragraph 1, the following terms shall mean:

- (a) “Online search engine” includes a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found;
- (b) “Online social networking services” includes a digital service that enables one or more users to connect, communicate or interact with other users, create, upload, disseminate electronic information and discover other users and electronic information across multiple devices and, in particular, via messages, posts, videos, and recommendations;
- (c) “Video-sharing platform services” includes a digital service, whose provider performs a significant role in determining the online curated content being made available, and makes available to users a computer resource that enables such users to access online curated content over the internet or computer networks, and such other entity called by whatever name, which is functionally similar to publishers of online curated content but does not include any individual or user who is not transmitting online curated content in the course of systematic business, professional or commercial activity;
- (d) “Interpersonal communications service” includes an interpersonal communications digital service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with

a number or numbers in national or international numbering plans, including providing end-to-end to voice call or messaging between individual users or between group of users and individual end users;

- (e) "Operating system" includes a system software that controls the basic functions of the hardware or software and enables software applications to run on the computer resource;
- (f) "Advertising service" means a digital service in relation to anything published (in any form) for the purpose of promoting a product or service to the public or a section of the public, and includes a catalogue, a circular or a price list published in any format and in any accessible medium and includes any advertising networks, advertising exchanges and any other advertising intermediation services;
- (g) "Web browser" includes a software application that enables end users to access and interact with information hosted on computer resources that may be connected to networks such as the Internet, including standalone web browsers as well as web browsers integrated to or embedded in software or similar applications;
- (h) "Cloud service" includes a digital service that enables access to a scalable and elastic pool of computer resources; and
- (i) "Online intermediation service" includes any other digital service, not expressly covered under clauses (a) to (h) of Schedule I, which on behalf of an end user or a business user, receives, stores or transmits electronic record or provides any service with respect to that record and includes web-hosting service providers, payment sites, auction sites, online application stores, online marketplaces and aggregators providing services such as mobility aggregation, food ordering, food delivery services and match-making.

ENDNOTES

¹ Raghavan Committee Report (2000) <https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf> accessed 30 May 2023.

² Competition Act, Preamble.

³ An *ex-post* regulatory approach envisages intervention in a market after the occurrence of an anti-competitive conduct. Such an approach is fact-specific and relies on available market information for evidence of abuse. See OECD, 'Ex-Ante Regulation and Competition in Digital Markets - Note by BIAC', p. 10 (24 November 2021) <[https://one.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf)> accessed 20 June 2023.

⁴ Dr. Tilottama Raychaudhuri, 'Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence' (2020) *Competition Commission of India Journal on Competition Law and Policy* 1, p. 4 <<https://ccijournal.in/index.php/ccijoclp/article/view/5>> accessed 4 June 2023.

⁵ Competition Act, Sections 5 and 6.

⁶ *Ex-ante* regulation aims to identify and regulate specific areas / issues in a market before the occurrence of any anti-competitive conduct. They may specify codes of conduct for market participants and seek to guide stakeholder behaviour through regulatory intervention. See OECD, 'Ex Ante Regulation and Competition in Digital Markets' (2021) <<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf>> accessed on 23 June 2023.

⁷ CLRC Report (2019), p. 149 - 160.

⁸ CLRC Report (2019), p. 157 - 158.

⁹ Competition (Amendment) Act, 2023 <<https://www.cci.gov.in/images/legalframeworkact/en/the-competition-amendment-act-20231681363446.pdf>> accessed on 30 May 2023.

¹⁰ CLRC Report (2019), p. 64.

¹¹ Competition Act, Section 3(4).

¹² CLRC Report (2019), p. 129.

¹³ CLRC Report (2019), p. 133.

¹⁴ Competition Act, Section 5(d).

¹⁵ Competition Act, Sections 19(6) and 19(7). See also CLRC Report (2019), p. 71 - 72.

¹⁶ The CCI has investigated several large digital enterprises for abusing their dominant position in the market by engaging in ACPs such as *inter alia* anti-steering, self-preferencing, tying and bundling, predatory pricing and restricting third party applications in the recent past. The CCI has also passed orders under Section 27 of the Competition Act and imposed large monetary penalties on digital enterprises in three instances since 2019. **Chapter II** (The Competition Act, 2002) contains discussion on the enforcement practice of the CCI.

¹⁷ Special Correspondent, 'Define unfair trade practice for e-com' (*The Hindu*, 24 March 2021) <<https://www.thehindu.com/business/define-unfair-trade-practice-for-e-com/article34154056.ece>> accessed 4 June 2023; Business Today Desk, 'Government warns Ed-tech companies against unfair trade

practices' (*Business Today*, 1 July 2022) <<https://www.businesstoday.in/latest/corporate/story/government-warns-ed-tech-companies-against-unfair-trade-practices-340028-2022-07-01>> accessed 4 June 2023; Gireesh Chandra Prasad, 'Ola, Uber get CCPA notices for 'unfair trade practices'' (*LiveMint*, 20 May 2022) <<https://www.livemint.com/news/india/central-consumer-protection-authority-issues-notices-against-ola-uber-for-unfair-practices-11653058167113.html>> accessed 4 June 2023.

¹⁸ Standing Committee Report (2022) <https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf> accessed on 30 May 2023.

¹⁹ Standing Committee Report (2022), p. 1.

²⁰ Standing Committee Report (2022), p. 1.

²¹ Standing Committee Report (2022), p. 31.

²² Standing Committee Report (2022), p. 4.

²³ Competition Act, Section 5(d).

²⁴ Standing Committee Report (2022), p. 31.

²⁵ Standing Committee Report (2022), p. 38.

²⁶ Standing Committee Report (2022), p. 39.

²⁷ Shubhangi Heda, 'Contours of Competition Policy in the Digital Economy' in Pradeep S. Mehta, Ujjwal Kumar and Garima Sodhi, *Competition and Regulation in India, 2021: Towards Inclusive Digital Economy in a post-COVID era*, Chapter 3 (CUTS, 2021) <<https://cuts-ccier.org/pdf/Report-ICRR2021.pdf>> accessed on 30 May 2023; Dr. Tilottama Raychaudhuri, 'Predatory Pricing and Market Determination in Non-Traditional Markets: An Analysis of Recent Cases Decided by the Competition Commission of India' (2020) *Indian Journal of Law and Justice* 11; Alok Prasanna Kumar and Manjushree RM, 'Data, Democracy and Dominance: Exploring a new antitrust framework for digital platforms' in Centre for Communication Governance, *The Future of Democracy in the Shadow of Big and Emerging Tech* (National Law University Delhi Press, 2021) <<https://ccgdelhi.s3.ap-south-1.amazonaws.com/uploads/the-future-of-democracy-in-the-shadow-of-big-and-emerging-tech-ccg-248.pdf>> accessed 30 May 2023; Geeta Gouri and Kalyani Pandya, 'The Indian competition law experience - its history and its (digital) future' (2020) *Indian Law Review* 4.

²⁸ Ankita Sharma, 'Covid-19 has accelerated India's digital reset' (*World Economic Forum*, August 2020) <<https://www.weforum.org/agenda/2020/08/covid-19-has-accelerated-india-s-digital-reset/>> accessed 24 July 2023.

²⁹ NITI Aayog, 'India's Booming Gig and Platform Economy: Perspectives and Recommendations on the Future of Work' (June 2022) <https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf> accessed 24 July 2023.

³⁰ UNCTAD, 'How Covid-19 triggered the digital and e-commerce turning point' (15 March 2021) <<https://unctad.org/news/how-covid-19-triggered-digital-and-e-commerce-turning-point>> accessed 24 July 2023.

³¹ PTI, 'Over 50% Indians are active internet users now; base to reach 900 million by 2025: report' (*The Hindu*, 4 May 2023) <<https://www.thehindu.com/news/national/over-50-indians-are-active-internet-users-now-base-to-reach-900-million-by-2025-report/article66809522.ece>> accessed 24 July 2023.

³² Statista, 'Number of internet users in India from 2010 to 2023, with estimates until 2050' <<https://www.statista.com/statistics/255146/number-of-internet-users-in-india/>> accessed 24 July 2023.

³³ Jibu Elias, 'AI for all: How India is carving its own path in the global AI race' (*OECD*, January 2023) <<https://oecd.ai/en/wonk/india>> accessed 24 July 2023.

³⁴ Department for Promotion of Industry and Internal Trade, "DPIIT Recognized Startups" <<https://www.startupindia.gov.in/>> accessed 29 January 2024.

³⁵ Beena Parmar, 'Indian tech industry to grow slower at 3.8%, crosses \$250 billion: Nasscom' (*The Economic Times*, 16 February 2024) <<https://economictimes.indiatimes.com/tech/technology/tech-industry-revenue-to-touch-254-billion-this-fiscal-nasscom/articleshow/107754547.cms?from=mdr>> accessed 7 March 2024.

³⁶ CCI, 'Market Study on E-commerce in India: Key Findings and Observations' (8 January 2020), para 50, p. 17 <<https://www.cci.gov.in/economics-research/market-studies/details/18/6>> accessed 10 August 2023. ("**CCI E-commerce Market Study**")

³⁷ The term of the Committee was extended from time to time. The Committee held various meetings on different dates to discuss and deliberate various issues and then proceeded to write the Report.

³⁸ Competition Act, Preamble.

³⁹ Competition Act, Section 4.

⁴⁰ Competition Act, Sections 5 and 6.

⁴¹ Competition Act, Section 4, Explanation (a).

⁴² Competition Act, Section 19(5).

⁴³ Competition Act, Section 19(4).

⁴⁴ Competition Act, Section 26.

⁴⁵ Competition Act, Section 26.

⁴⁶ Competition Act, Section 27.

⁴⁷ CLRC Report (2019), p. 40.

⁴⁸ *Mr. Umar Javeed v. Google LLC*, CCI order dated 20 October 2022 in Case No. 39 of 2018.

⁴⁹ *Mr. Umar Javeed v. Google LLC*, CCI order dated 20 October 2022 in Case No. 39 of 2018, paras 9 and 10.

⁵⁰ Competition Act, Section 27.

⁵¹ *Mr. Umar Javeed v. Google LLC*, CCI order dated 20 October 2022 in Case No. 39 of 2018.

⁵² *Google LLC v. Competition Commission of India*, Civil Appeal No. 4098 / 2023.

⁵³ *Matrimony.com Limited v. Google LLC*, CCI order dated 8 February 2018 in Case Nos. 7 and 30 of 2012.

⁵⁴ *Matrimony. Com Limited v. CCI*, Competition Appeal (AT)/17/2018.

⁵⁵ For instance: *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, CCI order dated 24 March 2021 in Suo Moto Case No. 01 of 2021; *Kshitiz Arya v. Google LLC*, CCI order dated 22 June 2021 in Case No. 19 of 2020; *Together We Fight Society v. Apple Inc. & Ors.*, CCI order dated 31 December 2021 in Case No. 24 of 2021; *Digital News Publishers v. Alphabet Inc.*, CCI order dated 7 January 2022 in Case No. 41 of 2021; *National Restaurant Association of India ('NRAI') v. Zomato Limited ('Zomato')*, CCI order dated 4 April 2022 in Case No. 16 of 2021; and *Vijay Gopal v. Big Tree Entertainment Pvt. Ltd. (BookMyShow)*, CCI order dated 16 June 2022 in Case No. 46 of 2021.

⁵⁶ *XYZ v. Alphabet Inc. & Ors.*, CCI order dated 25 October 2022 in Case No. 07 of 2020; *Mr. Umar Javeed v. Google LLC*, CCI order dated 20 October 2022 in Case No. 39 of 2018; and *Federation of Hotel & Restaurant Associations of India (FHRAI) v. MakeMyTrip India Pvt. Ltd. (MMT)*, CCI order dated 19 October 2022 in Case No. 14 of 2019.

⁵⁷ *Google LLC v. Competition Commission of India*, Civil Appeal No. 4098 / 2023.

⁵⁸ *Alphabet Inc v. CCI, NCLAT, Competition Appeal (AT) No. 4 of 2023* and *Oravel Stays v. CCI, NCLAT, Competition App. (AT) No. 55 of 2022*.

⁵⁹ Dr. Tilottama Raychaudhuri and Ramya Chandrashekhar, 'The Growing Necessity of Interim Measures to Preserve Competition in Rapidly Changing Digital Markets' (2021) *Indian Journal of Law and Technology* 17, p. 16 - 17.

⁶⁰ Competition Act, Sections 2(t), 2(r), 2(s).

⁶¹ Sebastian Wismer & Arno Rasek, 'Market definition in multi-sided markets' (*OECD*, 15 November 2017) <<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2933/FINAL&docLanguage=En#:~:text=As%20multi%20sided%20markets%20involve,important%20in%20multi%20sided%20markets>> accessed 18 July 2023.

⁶² Alok Prasanna Kumar and Manjushree RM, 'Data, Democracy and Dominance: Exploring a new antitrust framework for digital platforms' in Centre for Communication Governance, *The Future of Democracy in the Shadow of Big and Emerging Tech* (National Law University Delhi Press, 2021), p. 32 <<https://ccgdelhi.s3.ap-south-1.amazonaws.com/uploads/the-future-of-democracy-in-the-shadow-of-big-and-emerging-tech-ccg-248.pdf>> accessed 30 May 2023.

⁶³ *Matrimony.com Limited v. Google LLC*, CCI order dated 8 February 2018 in Case Nos. 7 and 30 of 2012, para 84.

⁶⁴ *Matrimony.com Limited v. Google LLC*, CCI order dated 8 February 2018 in Case Nos. 7 and 30 of 2012, para 199.

⁶⁵ *Jasper Infotech Private Limited (Snapdeal) v. KAFF Appliances (India) Pvt. Ltd. (Kaff)*, CCI order dated 15 January 2019 in Case No. 61 of 2014; *National Restaurant Association of India ('NRAI') v. Zomato Limited ('Zomato')*, CCI order dated 4 April 2022 in Case No. 16 of 2021.

⁶⁶ FDI Policy, para 5.2.15.2.1.

⁶⁷ FDI Policy, para 5.2.15.2.3.

⁶⁸ FDI Policy, para 5.2.15.2.4 (iv). Inventory of a vendor is deemed to be controlled by an e-commerce marketplace entity if more than 25% of the purchases of such vendor are from the marketplace entity or its group companies.

⁶⁹ FDI Policy, para 5.2.15.2.4 (ix).

⁷⁰ FDI Policy, para 5.2.15.2.4 (v).

⁷¹ FDI Policy, para 5.2.15.2.4 (ix).

⁷² FDI Policy, para 5.2.15.2.4 (xi).

⁷³ FF Bureau, 'DIPP formulates policies on FDI, but can't enforce them' (*Financial Express*, 12 May 2016) <<https://www.financialexpress.com/economy/dipp-formulates-policies-on-fdi-but-cant-enforce-them/253327/>> accessed on 5 June 2023.

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⁷⁵ IT Rules, Rule 3(1)(k).

⁷⁶ DPDP Act
<<https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf>> accessed 18 August 2023.

⁷⁷ 'Data principal' refers to individuals to whom the personal data relates; DPDP Act, Section 2(j).

⁷⁸ DPDP Act, Sections 3(a) and (b).

⁷⁹ DPDP Act, Section 3(c).

⁸⁰ DPDP Act, Preamble.

⁸¹ Beatriz Kira, Vikram Sinha, Sharmadha Srinivasan, 'Regulating digital ecosystems: bridging the gap between competition policy and data protection' in *Industrial and Corporate Change* 30 (Oxford University Press, 2021) <<https://academic.oup.com/icc/article/30/5/1337/6356942>> accessed 11 August 2023.

⁸² Standing Committee Report (2022), p. 7.

⁸³ Draft NDGFP, para 6.10.

⁸⁴ Draft NDGFP, para 6.13.

⁸⁵ Draft NDGFP, para 6.11.

⁸⁶ MeitY, 'Proposed Digital India Act, 2023' (9 March 2023) <https://www.meity.gov.in/writereaddata/files/DIA_Presentation%2009.03.2023%20Final.pdf> accessed 1 August 2023.

⁸⁷ CPA 2019, Section 2(47). Unfair trade practices include making false and misleading representations regarding goods and services, manufacturing of spurious goods, etc.

⁸⁸ CPA 2019, Section 2(41)(ii).

⁸⁹ CPA 2019, Section 2(47)(ix). Such disclosure would be an unfair trade practice except if it is done in accordance with the provisions of any law.

⁹⁰ E-commerce Rules, 2020, Rule 4(11)(a).

⁹¹ E-commerce Rules, 2020, Rule 5(4).

⁹² E-commerce Rules, 2020, Rule 5(3)(f).

⁹³ E-commerce Rules, 2020, Rule 6(1) read with CPA 2019, Section 2(47). This would include the disclosure of a user's personal information to a third party (except in accordance with the provisions of any law).

⁹⁴ CPA 2019, Section 2(13).

⁹⁵ Direct Selling Rules, 2021, Rule 10.

⁹⁶ Direct Selling Rules, 2021, Rule 5(3).

⁹⁷ Direct Selling Rules, 2021, Rule 5(5).

⁹⁸ The Committee was informed that the Ministry of Commerce and Industry is in the process of revising the Draft E-Commerce Policy.

⁹⁹ RBI PPI Master Direction, para 11.4.4.

¹⁰⁰ RBI PPI Master Direction, para 11.4.5.

¹⁰¹ NPCI, 'About Us' <<https://www.npci.org.in/who-we-are/about-us>> accessed on 31 May 2023.

¹⁰² NPCI, 'Unified Payments Interface (UPI) Product Overview' <<https://www.npci.org.in/what-we-do/upi/product-overview>> accessed on 31 May 2023.

¹⁰³ 'NPCI in talks with RBI on 30% UPI volume cap deadline, to consider industry request for extension' (ET Government, 22 November 2022) <<https://government.economictimes.indiatimes.com/news/governance/npci-in-talks-with-rbi-on-30-upi-volume-cap-deadline-to-consider-industry-request-for-extension/95683059>> accessed 4 June 2023.

¹⁰⁴ NPCI UPI Guidelines (5 November 2020) <[https://www.npci.org.in/PDF/npci/upi/circular/2022/UPI-OC-159-Guidelines-on-volume-cap-for-Third-Party-App-Providers-\(TPAPs\)-in-UPI.pdf](https://www.npci.org.in/PDF/npci/upi/circular/2022/UPI-OC-159-Guidelines-on-volume-cap-for-Third-Party-App-Providers-(TPAPs)-in-UPI.pdf)> accessed on 31 May 2023.

¹⁰⁵ A PSP is a bank which connects to the UPI platform for availing the UPI payment facility. It engages TPAPs to make their UPI payment app available to end users and merchants. It is also responsible for authenticating end-users through its own app or the TPAP's app. NPCI, 'UPI Roles & Responsibilities' <<https://www.npci.org.in/what-we-do/upi/roles-responsibilities>> accessed on 31 May 2023.

¹⁰⁶ A TPAP is a service provider which provides the app for facilitation of UPI-based payments by end users. NPCI, 'UPI Roles & Responsibilities' <<https://www.npci.org.in/what-we-do/upi/roles-responsibilities>> accessed on 31 May 2023.

¹⁰⁷ NPCI UPI Guidelines.

¹⁰⁸ NPCI, 'Standard Operating Procedure (SOP) - Market Share Cap for Third Party Application Providers (TPAP)' (25 March 2021) <<https://www.npci.org.in/PDF/npci/upi/circular/2021/standard-operating-procedure-sop-market-share-cap-for-third-party-application-providers-tpap.pdf>> accessed on 31 May 2023.

¹⁰⁹ Standing Committee Report (2022), p. 40 - 54.

¹¹⁰ Amber Darr has comparatively analysed policy diffusion for South Asian emerging countries on modern competition law. See Amber Darr, *Competition Law in South Asia*, (Cambridge University Press, February 2023).

¹¹¹ Please note that while the information presented in Chapter 3 is comprehensive and up-to-date as of 19th July 2023, significant developments have occurred since. Specifically, the sections covering the Digital Markets, Competition and Consumers Bill (DMCC) in the UK, the 11th Amendment to the Act on Restraint of Competition (ARC) in Germany, and the Digital Platforms Services Inquiry (DPSI) in Australia have been updated to incorporate key changes that have taken place until 5th February 2024.

¹¹² 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) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925>> accessed 3 June 2023.

¹¹³ European Commission, 'About the Digital Markets Act' <https://digital-markets-act.ec.europa.eu/about-dma_en#:~:text=The%20DMA%20entered%20into%20force,and%20provide%20all%20relevant%20information.> accessed 9 February 2024.

¹¹⁴ The Digital Competition Expert Panel, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 5 June 2023.

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¹⁸³ DMA, Article 54.

¹⁸⁴ DMA, Article 2(2).

¹⁸⁵ DMA, Article 19(1).

¹⁸⁶ DMA, Article 3(3). Requires undertakings that meet the thresholds to self-assess and notify the EC upon meeting such thresholds.

¹⁸⁷ DMA, Article 3(8). The EC takes into account some or all of the following elements while exercising its residuary powers in designating an undertaking as a 'Gatekeeper': (i) size, including turnover and market capitalisation, operations and position of the undertaking; (ii) number of business users using the core platform service to reach end users and the number of end users; (iii) network effects and data driven advantages; (iv) any scale and scope effects from which the undertaking benefits, including with regard to data, and, where relevant, to its activities outside the EU; (iv) business user or end user lock-in; (v) conglomerate corporate structure or vertical integration of that undertaking which may enable cross-subsidisation, combining data from different sources or leveraging of its position; or (g) other structural business or service characteristics.

¹⁸⁸ DMA, Article 3(1).

¹⁸⁹ DMA, Article 3(2)(a).

¹⁹⁰ DMA, Article 3(2)(b).

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¹⁹² DMA, Article 3(2)(c).

¹⁹³ DMA, Article 13(1).

¹⁹⁴ DMA, Article 3(3).

¹⁹⁵ DMA, Article 3(5). The quantitative threshold must be seen as an aid to facilitate interpretation of the qualitative threshold, and sets out a rebuttable presumption which the entity may argue against.

¹⁹⁶ DMA, Article 3(4).

¹⁹⁷ DMA, Article 3(9).

¹⁹⁸ DMA, Article 4(2).

¹⁹⁹ DMA, Article 4(1).

²⁰⁰ DMA, Articles 5(7) and 5(8).

²⁰¹ DMA, Article 6(6).

²⁰² DMA, Article 6(4).

²⁰³ DMA, Article 5(3).

²⁰⁴ DMA, Article 6(5).

²⁰⁵ DMA, Article 5(2).

²⁰⁶ DMA, Article 6(2).

²⁰⁷ DMA, Article 6(4).

²⁰⁸ DMA, Article 6(7).

²⁰⁹ DMA, Article 6(5).

²¹⁰ DMA, Article 6(3).

²¹¹ DMA, Article 6(9).

²¹² DMA, Article 6(10).

²¹³ DMA, Article 6(11).

²¹⁴ DMA, Article 7(1).

²¹⁵ DMA, Article 7(2).

²¹⁶ DMA, Article 9(1).

²¹⁷ DMA, Article 10.

²¹⁸ DMA, Articles 9(2) and 10(2).

²¹⁹ DMA, Article 18(1). Article 18(3) clarifies that an entity can be said to engage in systematic non-compliance if the EC has given 3 non-compliance decisions against the Gatekeeper regarding any of its core platform services in the past 8 years prior to commencement of this market investigation.

²²⁰ DMA, Article 18(1).

²²¹ DMA, Article 19(1).

²²² DMA, Article 28(1).

²²³ DMA, Article 28.

²²⁴ DMA, Article 21.

²²⁵ DMA, Article 21.

²²⁶ DMA, Article 23.

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²²⁸ EC, 'Sneak peek: how the Commission will enforce the DSA & DMA - Blog of Commissioner Thierry Breton' (5 July 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4327> accessed 3 June 2023.

²²⁹ DMA, Article 16(5) and Article 37(2).

²³⁰ DMA, Article 29(1)(a).

²³¹ DMA, Article 29(1)(c) and (d).

²³² DMA, Article 30(1).

²³³ DMA, Article 18.

²³⁴ DMA, Article 18(3).

²³⁵ DMA, Article 18(1).

²³⁶ DMA, Article 18(2).

²³⁷ DMA, Article 30(2).

²³⁸ DMA, Article 30(3).

²³⁹ DMA, Article 31(1).

²⁴⁰ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&qid=1687531982403>> accessed 23 June 2023.

²⁴¹ DMA, Article 14.

²⁴² DMA, Article 30(3)(c).

²⁴³ DMA, Article 18(2).

²⁴⁴ CA-98 <<https://www.legislation.gov.uk/ukpga/1998/41/contents>> accessed 5 June 2023.

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²⁵⁶ DMCC <<https://bills.parliament.uk/publications/53073/documents/4037>> accessed 5 February 2024.

²⁵⁷ DMCC, Section 2(1)(a).

²⁵⁸ DMCC, Section 4.

²⁵⁹ DMCC, Section 3(1).

²⁶⁰ DMCC, Section 2(1).

²⁶¹ DMCC, Section 2(1)(a) read with Section 4.

²⁶² DMCC, Section 2(1)(b) and Section 2(2)(a) read with Section 5.

²⁶³ DMCC, Section 2(1)(b) and Section 2(2)(b) read with Section 6.

²⁶⁴ DMCC, Section 2(3) read with Section 7.

²⁶⁵ DMCC, Section 7(2).

²⁶⁶ DMCC, Section 7(1).

²⁶⁷ DMCC, Section 5.

²⁶⁸ DMCC, Sections 5(a) and (b).

²⁶⁹ DMCC, Section 6(1).

²⁷⁰ DMCC, Section 9.

²⁷¹ DMCC, Section 9(2).

²⁷² DMCC, Section 9(1).

²⁷³ DMCC, Section 18(1).

²⁷⁴ DMCC, Section 10.

²⁷⁵ DMCC, Section 10(1). The CMA must begin a further SMS investigation in relation to the designation of an SMS entity in respect of a relevant digital activity not later than 9 months before the end of the designation period, if it is not already carrying one out at that time; DMCC, Section 10(2).

²⁷⁶ DMCC, Section 10(3).

²⁷⁷ DMCC, Section 10(3).

²⁷⁸ DMCC, Section 10(3).

²⁷⁹ DMCC, Section 10(4).

²⁸⁰ DMCC, Section 17(1).

²⁸¹ DMCC, Section 19.

²⁸² DMCC, Section 19(9) read with Section 20.

²⁸³ DMCC, Section 19(5).

²⁸⁴ DMCC, Section 19(6).

²⁸⁵ DMCC, Section 19(7).

²⁸⁶ DMCC, Section 19(8)(a).

²⁸⁷ DMCC, Section 19(8)(b).

288 DMCC, Sections 20(2) and 20(3).
289 DMCC, Section 20(2).
290 DMCC, Section 20(2)(a).
291 DMCC, Section 20(2)(b).
292 DMCC, Section 20(2)(c).
293 DMCC, Section 20(2)(d).
294 DMCC, Section 20(2)(e).
295 DMCC, Section 20(3).
296 DMCC, Section 20(3)(a).
297 DMCC, Section 20(3)(b).
298 DMCC, Section 20(3)(c).
299 DMCC, Section 20(3)(d).
300 DMCC, Section 20(3)(e).
301 DMCC, Section 20(3)(g).
302 DMCC, Section 20(3)(f).
303 DMCC, Section 20(3)(h).
304 DMCC, Section 29(1).
305 DMCC, Sections 29(2)(a) and (b).
306 DMCC, Sections 29(2)(c) and (d).
307 DMCC, Section 26(1).
308 DMCC, Section 26(3).
309 DMCC, Section 57.
310 DMCC, Section 84(1) read with Section 83(3)(a).
311 DMCC, Sections 46 and 47.
312 DMCC, Section 46(1).
313 DMCC, Section 56(1).
314 DMCC, Section 85.
315 DMCC, Section 87.

³¹⁶ DMCC, Sections 86(2) and 88(2).

³¹⁷ DMCC, Section 86(5).

³¹⁸ DMCC, Section 86(4)(a).

³¹⁹ DMCC, Section 86(5).

³²⁰ DMCC, Section 86(4)(b).

³²¹ DMCC, Section 86(4)(c).

³²² DMCC, Section 86(3).

³²³ DMCC, Section 87(1).

³²⁴ DMCC, Sections 87(2) and 87(3). 'Individual' may refer to senior manager or nominated officer of an undertaking.

³²⁵ DMCC, Section 88.

³²⁶ DMCC, Section 88(3)(a).

³²⁷ DMCC, Section 88(3)(b).

³²⁸ DMCC, Section 88(3)(c).

³²⁹ DMCC, Section 88(5)(a).

³³⁰ DMCC, Section 88(5)(b).

³³¹ DMCC, Section 99. Failure to comply with the conduct requirement or the pro-competition interventions may result in the directors of the undertaking being disqualified.

³³² DMCC, Section 46(1).

³³³ DMCC, Section 46(3).

³³⁴ DMCC, Section 51(3).

³³⁵ DMCC, Section 51(4).

³³⁶ ARC <https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0026> accessed 5 June 2023.

³³⁷ Federal Ministry for Economic Affairs and Climate Action, 'Bundeskartellamt (Federal Cartel Office) (BKartA)' <<https://www.bmwk.de/Redaktion/EN/Artikel/Ministry/bundeskartellamt-bkarta.html>> accessed 5 June 2023.

³³⁸ ARC, Sections 18(1) and (5) read with Section 19(1).

³³⁹ ARC, Sections 20(1) and 20(3).

³⁴⁰ ARC, Section 20.

³⁴¹ ARC, Section 20(1).

³⁴² Think Tank Internet, Bundeskartellamt, 'Working paper - Market power of platforms and networks' (6 September 2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht.html;jsessionid=78759BAE7A757AF16DCE980D73DF000C.2_cid362?nn=10321672> accessed 5 June 2023; Autorité de la concurrence and the FCO, 'Competition Law and Data' (10 May 2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> accessed 5 June 2023; Autorité de la concurrence and the FCO, 'Algorithms and Competition' (November 2019) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5> accessed 5 June 2023.

³⁴³ Norton Rose Fulbright, "German competition law update: New revised act against restraints of competition entered into force" (June 2018) <[³⁴⁴ ARC, Section 18\(2a\).](https://www.nortonrosefulbright.com/en/knowledge/publications/d11d3849/german-competition-law-update-new-revised-act-against-restraints-of-competition-entered-into-force#:~:text=On%209%20June%202017%2C%20the,by%20EU%20Damages%20Directive%20(No.>https://www.nortonrosefulbright.com/en/knowledge/publications/d11d3849/german-competition-law-update-new-revised-act-against-restraints-of-competition-entered-into-force#:~:text=On%209%20June%202017%2C%20the,by%20EU%20Damages%20Directive%20(No.> accessed 18 July 2023.</p></div><div data-bbox=)

³⁴⁵ ARC, Section 18(3a).

³⁴⁶ FCO Press Release.

³⁴⁷ Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy: Report by the Commission 'Competition Law 4.0'' (September 2019) <https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=1> accessed 5 June 2023.

³⁴⁸ FCO Press Release.

³⁴⁹ FCO Press Release.

³⁵⁰ FCO Press Release.

³⁵¹ ARC, Section 19a(1) read with Section 18(3a).

³⁵² ARC, Section 19a(1).

³⁵³ ARC, Section 19a(1).

³⁵⁴ ARC, Section 19a(1).

³⁵⁵ ARC, Section 19a(2) no.1.

³⁵⁶ ARC, Section 19a(2) no. 2.

³⁵⁷ ARC, Section 19a(2) no. 3.

³⁵⁸ ARC, Section 19a (2) no. 4.

³⁵⁹ ARC, Section 19a(2) no. 5.

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- ³⁶⁰ ARC, Section 19a(2) no. 6.
- ³⁶¹ ARC, Section 19a(2) no. 7.
- ³⁶² ARC, Section 19a(2).
- ³⁶³ ARC, Section 19a(2).
- ³⁶⁴ ARC, Section 32a(1). *See also* FCO Press Release.
- ³⁶⁵ ARC, Section 32a(1).
- ³⁶⁶ ARC, Section 73(5). *See also* FCO Press Release.
- ³⁶⁷ ARC, Section 81(2) no. 2a).
- ³⁶⁸ ARC, Section 81c(1).
- ³⁶⁹ ARC, Section 81c(2).
- ³⁷⁰ ARC, Sections 32(1) and 32(2).
- ³⁷¹ ARC, Section 32(2).
- ³⁷² ARC, Section 32(2a).
- ³⁷³ ARC, Section 32f.
- ³⁷⁴ Norton Rose Fulbright – 11th Amendment.
- ³⁷⁵ ARC, Section 32g.
- ³⁷⁶ Norton Rose Fulbright – 11th Amendment.
- ³⁷⁷ Sherman Act, Section 1 (15 U.S.C. §1).
- ³⁷⁸ Sherman Act, Section 2 (15 U.S.C. §2).
- ³⁷⁹ Clayton Act, Section 7 (15 U.S.C. §18).
- ³⁸⁰ FTCA, Section 1 (15 U.S.C. §41).
- ³⁸¹ FTC, “The Enforcers” <<https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers>> accessed 21 June 2023.
- ³⁸² The US Supreme Court has defined monopoly power as “the power to control prices or exclude competition”. *See* United States v. E. I. du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377, 391 (1956) <<https://supreme.justia.com/cases/federal/us/351/377/#F18>> accessed 21 June 2023.
- ³⁸³ FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (8 September 2021) <https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no_82.pdf> accessed 21 June 2023.
- ³⁸⁴ FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (8 September 2021) <https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no_82.pdf> accessed 21 June 2023.

³⁸⁵ United States v. Google LLC, No. 1:20-cv-03010-APM (15 January 2021) <<https://www.justice.gov/atr/case-document/file/1428271/download>> accessed 21 June 2023.

³⁸⁶ Complaint, District of Columbia v. Amazon.com, Inc. (In the Superior Court of the District of Columbia, Civil Division, 25 May 2021) <<https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf>> accessed 21 June 2023.

³⁸⁷ HJC Subcommittee Investigation (2022).

³⁸⁸ The US Supreme Court clarified the meaning of market power and stated that it is “the ability to raise prices above those that would be charged in a competitive market”. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) <<https://supreme.justia.com/cases/federal/us/468/85/>> accessed 21 June 2023.

³⁸⁹ These recommendations include prohibiting dominant entities from abusing their superior bargaining power, facilitating data access through interoperability and portability measures, implementing non-discrimination rules to prevent self-preferencing, and considering structural separations in certain businesses to reduce conflicts of interest and predatory practices. See HJC Subcommittee Investigation (2022).

³⁹⁰ The 12 legislative proposals are still at the draft stage. They are under review by the House Judiciary Committee or the Houses of Congress and are subject to frequent revisions. The versions of the Bills as on 20 June 2023 have been considered for the purposes of this Report.

³⁹¹ AICO <<https://www.congress.gov/bill/117th-congress/house-bill/3816/text>> accessed on 21 June 2023.

³⁹² AICO, Sections 2(d) and 2(g)(4). A ‘Covered Platform’ is an online platform that has been designated as such or:

- (a) has at least 50 million US-based monthly active users or 100,000 US-based monthly active business users at any given time during the 12 months preceding a designation or filing of a complaint for alleged violation under the AICO;
- (b) is owned or controlled by a person with US net annual sales or market capitalisation greater than USD 600,000,000,000 at any given time during the 2 years preceding a designation or filing of a complaint for alleged violation under the AICO; and
- (c) is a critical trading partner for sale or provision of any product or service offered on or directly related to the online platform.

³⁹³ AICO, Preamble.

³⁹⁴ AICO, Sections 2(a) read with 2(f)(2)(D).

³⁹⁵ AICO, Section S 2(b)(2).

³⁹⁶ AICO, Section 2(b)(3).

³⁹⁷ AICO, Section 2(b)(4).

³⁹⁸ AICO, Section 2(b)(5).

³⁹⁹ AICO, Section 2(d)(3).

⁴⁰⁰ AICO, Section 2(c)(1) – (3).

⁴⁰¹ The term ‘Covered Platform operators’ has not been defined in AICO, but it has been defined in EPM as a person that, directly or indirectly, owns or controls a Covered Platform. *See* EPM, Section 5(6).

⁴⁰² AICO, Sections 2(f)(1)(A) and (B). Such penalties will be calculated on the basis of a Covered Platform operator’s revenue, and not the Covered Platform’s revenue.

⁴⁰³ AICO, Section 2(f)(2)(d).

⁴⁰⁴ AICO, Section 4(a).

⁴⁰⁵ EPM <<http://www.congress.gov/bill/117th-congress/house-bill/3825/text>> accessed 23 June 2023.

⁴⁰⁶ EPM, Section 5(5). A ‘Covered Platform’ is an online platform that has been designated as such or

- a. it has at least 50 million US-based monthly active users or 100,000 US-based monthly active business users at the time of, or in any of the 12 months preceding a designation, or in any of the 12 months preceding filing of a complaint for alleged violation under the EPM;
- b. it is owned or controlled by a person with net annual sales or market capitalisation greater than USD 600 billion at the time of, or in any of the 2 years preceding a designation, or in any of the 2 years preceding filing of a complaint for alleged violation under the EPM;
- c. is a critical trading partner for sale or provision of any product or service offered on or directly related to the online platform.

⁴⁰⁷ EPM, Preamble.

⁴⁰⁸ EPM, Section 5(6).

⁴⁰⁹ EPM, Section 2. A designated Covered Platform is not permitted to own, control, or have a beneficial interest in a line of business other than the covered platform that (i) utilises the Covered Platform for the sale or provision of products or services; (ii) offers a product or service that the Covered Platform requires a business user to purchase or utilise as a condition for access to the Covered Platform, or as a condition for preferred status or placement of a business user’s product or services on the Covered Platform; or (iii) gives rise to a conflict of interest.

⁴¹⁰ EPM, Section 2.

⁴¹¹ EPM, Section 6(a).

⁴¹² EPM, Section 6(a)(1)(C). *See* EPM, Section 6(b)(1); The FTC or DOJ may consider removing the Covered Platform designation before the lapse of that period if the covered platform operator shows that it has ceased to be a ‘critical trading partner’. *See also* EPM, Section 5(7); An entity can be termed as a ‘critical trading partner’ when it can restrict a business user’s ability to reach its users or customers, or limit access to essential tools or services needed to effectively serve its users or customers.

⁴¹³ EPM, Section 7(a). The petition for review of designation or order should be filed within 30 days of issuance of such designation or order.

⁴¹⁴ EPM, Section 3(b).

⁴¹⁵ EPM, Sections 3(c)(1) and (2).

⁴¹⁶ EPM, Section 3(d).

⁴¹⁷ S. 2710, OAM <<http://www.congress.gov/bill/117th-congress/senate-bill/2710/text>> accessed 23 June 2023.

⁴¹⁸ OAM, Section 2(3).

⁴¹⁹ OAM, Section 3(a)(1).

⁴²⁰ OAM, Section 3(a)(2).

⁴²¹ OAM, Section 3(a)(3).

⁴²² OAM, Section 3(f). Such access should be on terms that are functionally equivalent to the terms of access by similar apps or functions provided by the Covered Company or to its business partners.

⁴²³ OAM, Section 4(a)(1).

⁴²⁴ OAM, Section 4(b).

⁴²⁵ OAM, Section 5(b)(1).

⁴²⁶ OAM, Section 5(b)(2).

⁴²⁷ See OAM, Section 5(3). This provision does not apply to developers of apps owned by, or under the control of, a foreign state.

⁴²⁸ OAM, Section 5(a)(2).

⁴²⁹ Mark R. Warner, 'Lawmakers Reintroduce Bipartisan Legislation to Encourage Competition in Social Media' (Press Release, 25 May 2022) available at <<https://www.warner.senate.gov/public/index.cfm/2022/5/lawmakers-reintroduce-bipartisan-legislation-to-encourage-competition-in-social-media>> accessed 20 June 2023; The ACCESS Act of 2022 <https://www.warner.senate.gov/public/_cache/files/f/a/fa171ce7-0ffe-4c4e-97e4-2119c22a7926/1F8A55612935322C453C41FB62CB8E5E.access-act-of-2022.pdf> accessed 20 June 2023.

⁴³⁰ ACCESS, Sections 2(7) and 2(8).

⁴³¹ S.225 - Competition and Antitrust Law Enforcement Reform Act <<http://www.congress.gov/bill/117th-congress/senate-bill/225/text>> accessed 23 June 2023.

⁴³² S.4258 - Competition and Transparency in Digital Advertising Act <<http://www.congress.gov/bill/117th-congress/senate-bill/4258/text>> accessed 23 June 2023.

⁴³³ S.3267 - Consolidation Prevention and Competition Promotion Act <<http://www.congress.gov/bill/117th-congress/senate-bill/3267>> accessed 23 June 2023.

⁴³⁴ S.4201 - Digital Platform Commission Act <<http://www.congress.gov/bill/117th-congress/senate-bill/4201/text>> accessed 23 June 2023.

⁴³⁵ S.228 - Merger Filing Fee Modernization Act <<http://www.congress.gov/bill/117th-congress/senate-bill/228/text>> accessed 23 June 2023.

⁴³⁶ S.3197 - Platform Competition and Opportunity Act <<http://www.congress.gov/bill/117th-congress/senate-bill/3197/text>> accessed 23 June 2023.

⁴³⁷ S.3847 - Prohibiting Anticompetitive Mergers Act <<http://www.congress.gov/bill/117th-congress/senate-bill/3847/text>> accessed 23 June 2023.

⁴³⁸ S.1074 - Trust-Busting for the Twenty-First Century Act <<http://www.congress.gov/bill/117th-congress/senate-bill/1074/text>> accessed 23 June 2023.

⁴³⁹ White House Executive Order (2021).

⁴⁴⁰ White House Executive Order (2021).

⁴⁴¹ White House Executive Order (2021), Section 4(a).

⁴⁴² 2010 Horizontal Merger Guidelines <<https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>> accessed 23 June 2023; and 2020 Vertical Merger Guidelines <https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf> accessed 23 June 2023.

⁴⁴³ DOJ and FTC, 'Request for Information on Merger Enforcement' (18 January 2022) <<https://downloads.regulations.gov/FTC-2022-0003-0001/content.pdf>> accessed 23 June 2023; FTC, 'Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers' (Press Release, 18 January 2022) <<https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>> accessed 23 June 2023.

⁴⁴⁴ CCA <<https://www.legislation.gov.au/Details/C2021C00151>> accessed 15 July 2023.

⁴⁴⁵ CCA, Bargaining Code <<https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20ho%20uses.pdf>> accessed 15 July 2023. The Bargaining Code has been included as Part IVBA of the CCA.

⁴⁴⁶ Australian Government, Federal Register of Legislation, Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act, 2021, Section 2 <<https://www.legislation.gov.au/C2021A00021/asmade/text>> accessed 5 February 2024.

⁴⁴⁷ ACCC, 'Digital Platforms Inquiry: Final Report' (June 2019) <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>> accessed 16 July 2023.

⁴⁴⁸ ACCC, 'Digital platform services inquiry 2020-25' <<https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25>> accessed 5 February 2024.

⁴⁴⁹ ACCC, 'Digital platforms services inquiry: Interim report 6: Report on social media services' (March 2023) <https://www.accc.gov.au/system/files/Digital%20platforms%20services%20inquiry%20-%20Interim%20report%206%20-%20Report%20on%20social%20media%20services_0.pdf> accessed 5 February 2024.

⁴⁵⁰ ACCC, 'Digital platform services inquiry: Interim report 7: Report on expanding ecosystems of digital platform service providers' (November 2023) <<https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202023%20Report%20-%20Interim%20Report%207%20-%20Final%2815835612.1%29.pdf>> accessed 5 February 2024.

⁴⁵¹ CCA, Bargaining Code, Section 52E(1).

⁴⁵² CCA, Bargaining Code, Section 52E(1). Services in relation to a corporation may be specified as Designated Digital Platform Services if they are operated or controlled by: (a) a corporation, either by itself or together with its related bodies corporate; or (b) a related body corporate of the corporation, either by itself or together with other related bodies corporate of the corporation; CCA, Bargaining Code, Section 52E(2).

⁴⁵³ CCA, Bargaining Code, Section 52E(3).

⁴⁵⁴ CCA, Bargaining Code, Section 52A. A 'responsible digital platform corporation' for a designated digital platform service is a corporation that: (i) is a related body corporate of the service's designated digital platform corporation; and (ii) if the corporation is not incorporated in Australia, is managed in Australia; and (iii) either by itself or together with other corporations, operates or controls the designated digital platform service in supplying services used by Australians. If no corporation satisfies such criteria, the service's designated digital platform corporation will be the responsible digital platform corporation.

⁴⁵⁵ CCA, Bargaining Code, Section 52R. A Responsible Digital Platform Corporation must share information with the entity generating news content relating to user interactions with covered news content carried by the Designated Digital Platform Service.

⁴⁵⁶ CCA, Bargaining Code, Section 52S. A Responsible Digital Platform Corporation must give notice for changing an algorithm of the Designated Digital Platform Service if the dominant purpose behind this change is to alter how the Designated Digital Platform Service makes content available and if the change is likely to have a significant effect on the referral traffic from the Designated Digital Platform Service to the covered news content of registered news businesses.

⁴⁵⁷ CCA, Bargaining Code, Section 52X.

⁴⁵⁸ CCA, Bargaining Code, Sections 52ZC.

⁴⁵⁹ CCA, Section 76(1A)(baa). Also ACCC, 'Fines and penalties' <<https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties>> accessed 15 July 2023.

⁴⁶⁰ CCA, Section 76(1B)(b).

⁴⁶¹ CCA, Section 76(1A)(b). The penalty for violating the non-differentiation standard under Section 52ZC of the CCA would be the greatest of the following: (i) AUD 10,000,000; (ii) three times the value of the direct or indirect benefit that the body corporate or its related bodies corporate have obtained which is reasonably attributable to the act or omission, as determined by the Court; or (iii) 10% of the annual turnover of the body corporate during the turnover period of 12 months ending at the end of the month in which the act or omission occurred, in case the Court cannot determine the value of the benefit.

⁴⁶² ACCC, 'Interim Report No. 5 - Regulatory reform' (September 2022) <<https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>> accessed 15 July 2023.

⁴⁶³ 5th DPSI Report, Chapter 6, p. 123.

⁴⁶⁴ 5th DPSI Report, Chapter 5, p. 108.

⁴⁶⁵ 5th DPSI Report, para 5.2.1, p. 112.

⁴⁶⁶ 5th DPSI Report, para 5.4, p. 114-119.

⁴⁶⁷ By setting quantitative thresholds as the primary criteria, the 5th DPSI Report departs from other global jurisdictions such as the EU, which has qualitative thresholds as the primary criteria and uses quantitative thresholds to create a rebuttable presumption of having triggered the qualitative thresholds.

⁴⁶⁸ 5th DPSI Report, para 7.2.4, p. 194.

⁴⁶⁹ 5th DPSI Report, para 7.2.3, p. 192.

⁴⁷⁰ Japan Anti-Monopoly Act <https://www.jftc.go.jp/en/policy_enforcement/21041301.pdf> accessed 3 June 2023.

⁴⁷¹ Japan Anti-Monopoly Act, Article 45(2).

⁴⁷² TFDP Act
<https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001a.pdf> accessed 3 June 2023.

⁴⁷³ SDP Guidelines, 2021
<https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001d.pdf> accessed 3 June 2023.

⁴⁷⁴ METI, ‘Cabinet Decisions Made on Two Cabinet Orders for the Act on Improving Transparency and Fairness of Digital Platforms’ (26 January 2021) <https://www.meti.go.jp/english/press/2021/0126_003.html> accessed 3 June 2023.

⁴⁷⁵ Japan Ministerial Ordinance or JMO
<https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001c.pdf> accessed 3 June 2023.

⁴⁷⁶ This term is analogous to business users and end users under the TFDP Act.

⁴⁷⁷ Cabinet Order No. 17 (2022).

⁴⁷⁸ TFDP Act, Article 2(1).

⁴⁷⁹ TFDP Act, Article 2(6) read with Article 4.

⁴⁸⁰ TFDP Act, Article 4(1).

⁴⁸¹ TFDP Act, Article 4(1).

⁴⁸² Cabinet Order No. 17 (2022). The manner of identifying business classification and their thresholds is not a one-time exercise, and will expand to cover anti-competitive conduct by digital enterprises in other markets.

⁴⁸³ Amazon Japan G.K., Rakuten Group, Inc., and Yahoo Japan Corporation have been designated as specified digital platforms under this classification. *See* METI, ‘Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving Transparency and Fairness of Digital Platforms’ (1 April 2021) <https://www.meti.go.jp/english/press/2021/0401_001.html> accessed 3 June 2023 (“**METI News Release**”).

⁴⁸⁴ Apple Inc. and Google LLC have been designated as specified digital platforms under this classification. *See* METI News Release (2021).

⁴⁸⁵ Google LLC, Meta Platforms, Inc., and Yahoo Japan Corporation have been designated as specified digital platforms under this classification. *See* METI News Release (2021).

⁴⁸⁶ Google LLC has been designated as a specified digital platform under this classification. *See* METI News Release (2021).

⁴⁸⁷ TFDP Act, Article 5(1) read with JMO, Article 5.

488 TFDP Act, Article 5(2)(i)(b).

489 TFDP Act, Article 5(2)(i)(c).

490 TFDP Act, Article 5(2)(ii).

491 JMO, Article 6.

492 TFDP Act, Article 5(3).

493 JMO, Article 9(1)(iii).

494 TFDP Act, Article 6(4).

495 TFDP Act, Article 23.

496 SDP Guidelines, 2021
<https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001d.pdf> accessed 3 June 2023.

497 SDP Guidelines, Guideline 2.

498 SDP Guidelines, Guideline 2.1.2(i).

499 TFDP Act, Article 9(2).

500 SDP Guidelines, Guideline 2.1.2.

501 MRFTA <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=61424&lang=ENG> accessed 23 June 2023.

502 Telecommunications Business Act, App-Store Act
<<https://www.law.go.kr/LSW/eng/engLsSc.do?query=TELECOMMUNICATIONS+BUSINESS+ACT#liBgcolor1>> accessed 23 June 2023.

503 Kim & Chang, 'Guidelines on Review of Abuse of Market Dominance by Online Platform Operators' (12 January 2023) <https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=26661> accessed 15 July 2023.

504 KFTC Decision of 27 January 2021, *Naver (Shopping)*, No. 2021-027.

505 KFTC, 'KFTC Imposes corrective measures on 7 platform operators for violating the E-Commerce Act' (7 March 2022)
<https://www.ftc.go.kr/solution/skin/doc.html?fn=2b34a68ace7e194deb415a0a8da8ca1a8d379c23a69aa10e99dba714ac10a045&rs=/fileupload/data/result/BBSMSTR_000000002402/> accessed 23 June 2023.

506 Jon Porter, 'Google found guilty of restricting Android forks in South Korea, fined \$177 million' (*The Verge*, 14 September 2021) <<https://www.theverge.com/2021/9/14/22673202/google-south-korea-android-fork-fine-anti-fragmentation-agreement-antitrust>> accessed 23 June 2023.

507 KFTC, Review Guidelines
<<https://www.ftc.go.kr/solution/skin/doc.html?fn=1970be9e561a08552bc21061944be980fcc066254c99af9eb3e272e25a802d4c&rs=/fileupload/data/result/news/report/2023/>> accessed 23 June 2023.

The unofficial translated version is available at: <<https://competition.tistory.com/entry/platformguidelines20230112>> accessed 17 July 2023.

⁵⁰⁸ Guidelines for Review of the Abuse of Market Dominant Position, 2009, <https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=2855&bbsId=BBSMSTR_000000003632&bbsTyCode=BBST11> accessed 15 July 2023.

⁵⁰⁹ Review Guidelines, para I (2).

⁵¹⁰ Review Guidelines, para I (2).

⁵¹¹ Review Guidelines, para I 3(3).

⁵¹² Review Guidelines, para I 3(2)(A). Online platform mediation service refers to a service that mediates the initiation of transactions between different groups of users through an online platform.

⁵¹³ Review Guidelines, para I 3(2).

⁵¹⁴ Review Guidelines, para II(2).

⁵¹⁵ Review Guidelines, para III.

⁵¹⁶ Telecommunications Business Act, Article 2(13). App market business operator refers to a person who registers and sells mobile contents, etc. among businesses that provide additional communication services, and brokers transactions so that users can purchase mobile contents, etc.

⁵¹⁷ KCC, 'KCC drafts amendments to Telecom Act enforcement decree and enacts notice prohibiting forcing certain in-app payments' <<https://www.kcc.go.kr/user.do?mode=view&page=E04010000&dc=E04010000&boardId=1058&cp=1&boardSeq=52182>> accessed 23 June 2023.

⁵¹⁸ Telecommunications Business Act, App-Store Act, Article 50(1).

⁵¹⁹ Telecommunications Business Act, App-Store Act, Article 50(9).

⁵²⁰ Telecommunications Business Act, App-Store Act, Article 50(10).

⁵²¹ Telecommunications Business Act, App-Store Act, Article 50(11).

⁵²² Telecommunications Business Act, App-Store Act, Article 22-9(1).

⁵²³ Telecommunications Business Act, App-Store Act, Article 22-9(2).

⁵²⁴ Telecommunications Business Act, Article 52.

⁵²⁵ Telecommunications Business Act, Article 53.

⁵²⁶ Act on Consumer Protection in Electronic Commerce <https://elaw.klri.re.kr/eng_service/lawView.do?hseq=38513&lang=ENG> accessed 23 June 2023.

⁵²⁷ Kim & Chang, 'KFTC Releases its Proposed Amendments to the E-Commerce Act' (9 March 2021) <https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=22891> accessed on 15 July 2023.

⁵²⁸ Mission Report – South Korea (2023), p. 4.

⁵²⁹ Mission Report – South Korea (2023), p. 4.

⁵³⁰ Henry Mostyn and Bianca Buzatu, ‘Digital Markets Regulation Handbook: South Korea’ (*Cleary Gottlieb*, December 2022), p. 2 <https://www.clearygottlieb.com/-/media/files/rostrum/south%20korea/22092308%20digital%20markets%20regulation%20handbook_r16south%20korea> accessed 23 June 2023.

⁵³¹ Annabelle Liang, ‘Chinese internet giants hand algorithm data to government’ (*BBC News*, 16 August 2022) <<https://www.bbc.com/news/business-62544950>> accessed 3 June 2023.

⁵³² Scott Murdoch & David Stanway, ‘China fines Alibaba record \$2.75 bln for anti-monopoly violations’ (*Reuters*, 10 April 2021) <<https://www.reuters.com/business/retail-consumer/china-regulators-fine-alibaba-275-bln-anti-monopoly-violations-2021-04-10/>> accessed 3 June 2023.

⁵³³ AML as amended; the unofficial translated version is available at <<https://www.chinalawtranslate.com/en/anti-monopoly-law-2022/>> accessed 17 July 2023.

⁵³⁴ State Council, People’s Republic of China, ‘China unveils antitrust guidelines on platform economy’ (7 February 2021) <http://english.www.gov.cn/policies/latestreleases/202102/07/content_WS601ffe31c6d0f72576945498.html> accessed 13 July 2023.

⁵³⁵ Draft Classification Guidelines; the unofficial translated version is available at <<https://www.ianbrown.tech/2021/11/01/chinas-new-platform-guidelines/>> accessed 18 July 2023.

⁵³⁶ Draft Responsibility Guidelines; the unofficial translated version is available at <<https://www.ianbrown.tech/2021/11/01/chinas-new-platform-guidelines/>> accessed 18 July 2023.

⁵³⁷ ‘China proposes Guidelines on Internet Platform Guidelines’ (*Reuters*, October 2021) <<https://www.reuters.com/world/china/china-proposes-guidelines-internet-platform-responsibilities-2021-10-29/>> accessed 18 July 2023.

⁵³⁸ Alexandr Svetlicinii & Xie Fali, ‘Main Developments in Competition Law and Policy 2022’ (*Kluwer Competition Law Blog*, December 2022) <<https://competitionlawblog.kluwercompetitionlaw.com/2022/12/12/main-developments-in-competition-law-and-policy-2022-china/>> accessed 19 July 2023.

⁵³⁹ AML, Articles 23 and 24.

⁵⁴⁰ AML, Articles 9 and 22(7).

⁵⁴¹ State Council, People’s Republic of China, ‘Draft rules aim to curb monopolistic behavior of internet platforms’ (14 November 2020) <http://english.www.gov.cn/policies/policywatch/202011/14/content_WS5faf2a06c6d0f7257693fb9f.html> accessed 13 July 2023.

⁵⁴² State Council, People’s Republic of China, ‘China unveils antitrust guidelines on platform economy’ (7 February 2021) <http://english.www.gov.cn/policies/latestreleases/202102/07/content_WS601ffe31c6d0f72576945498.html> accessed 13 July 2023.

⁵⁴³ Wei Huang, Wendy Zhou, Xiumin Ruan & Xi Zhang, ‘Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny’ (*Competition Policy International*, March 2021) <<https://www.competitionpolicyinternational.com/wp-content/uploads/2021/03/10-Antitrust-Guidelines-for-the-Platform-Economy-in-the-Era-of-Enhanced-Antitrust-Scrutiny-By-Wei-Huang->

Wendy-Zhou-Xiumin-Ruan-Xi-Zhang.pdf> accessed 3 June 2023. (“CPI - Antitrust Guidelines for the Platform Economy”)

⁵⁴⁴ CPI - Antitrust Guidelines for the Platform Economy (2021).

⁵⁴⁵ CPI - Antitrust Guidelines for the Platform Economy (2021).

⁵⁴⁶ The Draft Classification Guidelines and the Draft Responsibility Guidelines are presently at the public consultation stage.

⁵⁴⁷ Draft Classification Guidelines, Articles 2.3, 2.4, 2.5, 2.6, 2.7, 2.8.

⁵⁴⁸ Draft Classification Guidelines, Article 3.3. There is a terminology issue wherein the table provided in the translated version of the Draft Classification Guidelines provides for platform has strong restrictions on merchants contacting *consumer (user)* while the text of the provision provides for *author (user)*.

⁵⁴⁹ Draft Classification Guidelines, Article 3.4.

⁵⁵⁰ There is a potential terminology issue with the Draft Responsibility Guidelines introducing the phrase ‘super-large platforms’, which is absent from the Draft Classification Guidelines. However, the definition of the term ‘super-large platform’ in the Draft Responsibility Guidelines is consistent with the criteria for ‘large platforms’ in the Draft Classification Guidelines. As there is no official English translation to these guidelines, it is difficult to assess the reasons behind this conflict, or whether these obligations may also be applied to ‘super platforms’ under the Draft Classification Guidelines.

⁵⁵¹ Draft Responsibility Guidelines, Article 1(1).

⁵⁵² Draft Responsibility Guidelines, Article 3.

⁵⁵³ Draft Responsibility Guidelines, Article 1(2).

⁵⁵⁴ Draft Responsibility Guidelines, Article 2.

⁵⁵⁵ Draft Responsibility Guidelines, Article 10.

⁵⁵⁶ Draft Responsibility Guidelines, Article 16.

⁵⁵⁷ Draft Responsibility Guidelines, Article 17.

⁵⁵⁸ Draft Responsibility Guidelines, Article 24.

⁵⁵⁹ Draft Responsibility Guidelines, Article 35.

⁵⁶⁰ John C. Hilke, ‘Improving Relationships Between Competition Policy and Sectoral Regulation’, *The Latin American Competition Forum* (2006) <<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38819635.pdf>> accessed 1 July 2023; Paul Crampton, ‘Striking the Right Balance between Competition and Regulation: The Key is Learning from our Mistakes’, APEC-OECD Co-operative Initiative on Regulatory Reform (*OECD*, 2002) <<https://www.oecd.org/regreform/2503205.pdf>> accessed 1 July 2023; Gary Hewitt, ‘Relationship between Regulators and Competition Authorities’ (*OECD*, 1998) <<http://www.oecd.org/regreform/sectors/1920556.pdf>> accessed 1 July 2023.

⁵⁶¹ Vidhi Centre for Legal Policy, ‘Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users’ Narrative’ (September 2021) <<https://vidhilegalpolicy.in/research/fair-and-competitive-e-marketplaces-f-a-c-e-the-business-users-narrative/>> accessed 23 January 2024.

⁵⁶² Maher M. Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) *Cambridge Law Journal* 70, p. 113-143 <https://www.jstor.org/stable/41300946?seq=1#metadata_info_tab_contents> accessed 1 July 2023.

⁵⁶³ Standing Committee Report, p. 38 – 39.

⁵⁶⁴ Gary Hewitt, 'Relationship between Regulators and Competition Authorities' (OECD, 1998), p. 23 <<http://www.oecd.org/regreform/sectors/1920556.pdf>> accessed 1 July 2023.

⁵⁶⁵ Congressional Research Service, 'Antitrust Reform and Big-tech firms' (2023) <<https://crsreports.congress.gov/product/pdf/LSB/LSB10889>> accessed 1 July 2023.

⁵⁶⁶ Vidhi Centre for Legal Policy, 'Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users' Narrative' (September 2021), p. 45-46 <<https://vidhilegalpolicy.in/research/fair-and-competitive-e-marketplaces-f-a-c-e-the-business-users-narrative/>> accessed 23 January 2024.

⁵⁶⁷ Google has been subject to repeated antitrust scrutiny by CCI. See *Umar Javeed and Ors v. Google LLC and Ors.*, CCI order dated 20 October 2022 in Case no. 39 of 2018; *Matrimony.com Limited v. Google LLC and Ors. and Consumer Unity and Trust Society v. Google LLC*, CCI order dated 8 February 2018 in Case no. 7 and 30 of 2012.

⁵⁶⁸ CCI has noted, for instance, that self-preferencing is a recurring concern; see CCI E-commerce Market Study.

⁵⁶⁹ Competition Act, Section 4.

⁵⁷⁰ Ling-Chieh Kung and Guan-Yu Zhong, 'The Optimal Pricing Strategy for Two-sided Platform Delivery in the Sharing Economy' (2017) *Transportation Research Part E: Logistics and Transportation Review* 101 <<https://scholars.lib.ntu.edu.tw/bitstream/123456789/455958/1/SSRN-id2931383.pdf>> accessed 1 July 2023.

⁵⁷¹ Cassandra Liem and Georgios Petropoulos, 'The economic value of personal data for online platforms, firms and consumers' (*LSE Business Review*, January 2016) <<https://blogs.lse.ac.uk/businessreview/2016/01/19/the-economic-value-of-personal-data-for-online-platforms-firms-and-consumers/>> accessed 1 July 2023.

⁵⁷² A multi-sided market comprises a platform that connects at least two distinct groups. These two groups may have a subsidy-based relationship that exists when one side indirectly covers the cost of using the platform for another side, without offering a separate service that directly attracts users to that platform. For instance, platforms like Facebook, Twitter and YouTube connect users with advertisers, and grant free access to the platform and the services provided by it to the users, as the cost of using the platform is covered by the advertisers. See OECD, 'Network Effects and Efficiencies in Multisided Markets' DAF/COMP/WD(2017)40/FINAL p. 4 <[https://one.oecd.org/document/DAF/COMP/WD\(2017\)40/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)40/FINAL/en/pdf)> accessed 1 July 2023. Evans notes with respect to zero-price platforms, "Charging nothing for a product or service enables them to make money, somehow, somewhere else.", see David S. Evans, 'The Antitrust Economics of Free' John M. Olin Law & Economics Working Paper (2011) <<https://docplayer.net/11563755-The-antitrust-economics-of-free-david-s-evans-the-law-school-the-university-of-chicago-may-2011.html>> accessed 1 July 2023.

⁵⁷³ Chris Jay Hoofnagle and Jan Whittington, 'Free: Accounting for the Costs of the Internet's Most Popular Price' (2014) *UCLA Law Review* 61 <<https://www.uclalawreview.org/pdf/61-3-2.pdf>> accessed 1 July 2023.

⁵⁷⁴ Amazon Basics is Amazon's original private label brand and collection. It offers many everyday staple products such as electronics, home goods, office supplies, etc. It has thus become a competitor to other smaller vendors and companies that are selling their products on Amazon's platform. See Julie Creswell, 'How Amazon steers shoppers to its own products' (*NY Times*, 23 June 2018) <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html> accessed 25 August 2023.

⁵⁷⁵ **Annexure III** on the stakeholder submissions may be referred.

⁵⁷⁶ European Round Table for Industry, 'Shaping Competition Policy in the Era of Digitisation' (2018) <https://ec.europa.eu/competition/information/digitisation_2018/contributions/ert.pdf> accessed 1 July 2023.

⁵⁷⁷ Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (2019) European Commission Report <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 1 July 2023.

⁵⁷⁸ CLRC Report (2019).

⁵⁷⁹ OECD, 'Big Data: Bringing Competition Policy To The Digital Era' (2016) <[https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf#_ga=2.106957570.1680213474.1559388897-1619135612.1554836539](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf#_ga=2.106957570.1680213474.1559388897-1619135612.1554836539)> accessed 1 July 2023.

⁵⁸⁰ UNCTAD, 'Competition issues in the digital economy' (2019) <https://unctad.org/system/files/official-document/ciclpd54_en.pdf> accessed 1 July 2023.

⁵⁸¹ Tim Stobierski, 'What are network effects?' (*Harvard Business School*, November 2020) <<https://online.hbs.edu/blog/post/what-are-network-effects>> accessed 1 July 2023.

⁵⁸² Andrei Hagiu and Julian Wright, 'When Data Creates Competitive Advantage' (*Harvard Business Review*, 2020) <<https://hbr.org/2020/01/when-data-creates-competitive-advantage>> accessed 1 July 2023.

⁵⁸³ Fixed costs are costs that remain independent of the volume of output, such as costs of research and development, or setting up of production and distribution facilities.

⁵⁸⁴ Richard A. Posner, 'Antitrust in the New Economy', John M. Olin Program in Law and Economics Working Paper (2000) <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=law_and_economics> accessed 1 July 2023.

⁵⁸⁵ Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welke, 'Modernising the law on abuse of market power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)' (2018) <https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3> accessed 1 July 2023.

⁵⁸⁶ Secretariat, UNCTAD, 'Competition issues in the digital economy' (2019) <https://unctad.org/system/files/official-document/ciclpd54_en.pdf> accessed 1 July 2023.

⁵⁸⁷ Lina Khan, 'Amazon's Antitrust Paradox' (2018) *Yale Law Journal* 126(3) <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=ylj>> accessed 1 July 2023.

⁵⁸⁸ Lina Khan, 'Amazon's Antitrust Paradox' (2018) *Yale Law Journal* 126(3) <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=ylj>> accessed 1

July 2023. For instance, CCI has repeatedly held that Amazon is not a dominant entity despite the many allegations of unfair unilateral conduct levelled against it. See *Delhi Vyapar Mahasangh v. Flipkart and Ors.*, CCI order dated 13 January 2020 in Case no. 40 of 2019; *Lifestyle Equities C.V. and Anr v. Amazon Seller Services Private Ltd. and Ors.*, CCI order dated 11 September 2020 in Case no. 9 of 2020.

⁵⁸⁹ Krystal Hu, 'ChatGPT sets record for fastest-growing user base - analyst note' (*Reuters*, 2 February 2023) <<https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>> accessed 24 July 2023.

⁵⁹⁰ The ten core platform services identified by the DMA are online intermediation services, online search engines, online social networking services, video-sharing services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, advertising services, web browsers and virtual assistants.

⁵⁹¹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council', p. 37-48 (15 December 2020) <https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 24 July 2023. Initially, only 8 services were included, namely, online intermediation service, online search services, social network services, video sharing platform services, number independent messaging services, operating systems, cloud services, and online advertising services. However, taking into account market studies and the EC's past enforcement practices, two additional services were included under the definition of core platform services, i.e., web browsers and virtual assistants.

⁵⁹² DMA Recitals, para 13.

⁵⁹³ DMA Recitals, para 14.

⁵⁹⁴ CCA, Bargaining Code.

⁵⁹⁵ Telecommunications Business Act, App-Store Act.

⁵⁹⁶ In para 3.26 of the section on 'Thresholds and Criteria for designation as an SSDE', the Committee has recommended a self-notification mechanism for SSDEs.

⁵⁹⁷ It is however of note that while the DMCC envisages applicability to all "digital services", the DMCC concomitantly enables the CMA to put together service-specific codes of conduct for each designated SMS.

⁵⁹⁸ See TFDP Act and Cabinet Order No. 17 (2022).

⁵⁹⁹ Germany ARC, 19a. Section 19a of the ARC is applicable only to multi-sided markets and networks.

⁶⁰⁰ A concern was expressed that the scope of 'online intermediation services' as a Core Digital Service under the Draft DCB may be too broad. This may lead to online stockbrokers / stock trading platforms / online mutual fund distributors qualifying as SSDEs. The Committee observed that only digital enterprises which meet the twin tests of 'significant financial strength' and 'significant spread' would qualify as SSDEs. Such SSDEs would further be subject to differentiated sets of obligations based on factors such as *inter alia* number of users. For further information, section on 'Quantitative Thresholds' in Chapter IV of this Report may be referred.

⁶⁰¹ The Committee took note of MeitY's recommendation that the Core Digital Services specified under Schedule I to the Draft DCB be harmonised with the intermediaries intended to be included in the proposed DIA. The Committee observed that any new service could be included within Schedule I in due course if it presented concerns to competition.

⁶⁰² For a detailed overview of the factors under each of these jurisdictions, Chapter III of this Report may be referred.

⁶⁰³ While the UK's DMCC does not have a turnover threshold, the DMCC nevertheless imposes a turnover condition, i.e., it stipulates the minimum turnover an undertaking must have before it is designated as an SMS entity.

⁶⁰⁴ In South Korea, no factors apart from dominance have been contemplated.

⁶⁰⁵ EC, "Commission Staff Working Document: Impact Assessment Report Accompanying the document - Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)" (15 December 2020), para 135, p. 47 - 48 <https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 23 July 2023. ("EC Impact Assessment Report - DMA")

⁶⁰⁶ DMCC, Section 2(3) read with Section 7.

⁶⁰⁷ See AICO, Sections 2(d) and 2(g)(4) and EPM, Section 5(5).

⁶⁰⁸ Competition Act, Sections 5 and 6.

⁶⁰⁹ Competition Act, Section 5. Combinations that meet the asset and turnover thresholds prescribed under Section 5 require notification to, and approval of, the CCI prior to their consummation.

⁶¹⁰ See DMA, Article 3(2), AICO, Sections 2(d) and 2(g)(4) and EPM, Section 5(5).

⁶¹¹ CCI, 'Filing of Combination Notices' <<https://www.cci.gov.in/combination/combination/filing-of-combination-notice/introduction>> accessed 26 July 2023.

⁶¹² *Mr. Umar Javeed v. Google LLC*, CCI order dated 20 October 2022 in Case No. 39 of 2018, paras 630 - 635; *XYZ v. Alphabet Inc. & Ors.*, CCI order dated 25 October 2022 in Case No. 07 of 2020, paras 411 - 414.

⁶¹³ CCI E-commerce Market Study (2020), p. 5; *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities & Ors.*, CCI order dated 13 January 2020 in Case No. 41 of 2019; *Lifestyle Equities C.V. v. Amazon Seller Services Private Limited*, CCI order dated 11 September 2020 in Case No. 09 of 2020.

⁶¹⁴ GMV refers to the cumulative value of goods or services or both sold through an online platform during a certain period while turnover refers to the revenue derived from the sale of goods and services.

⁶¹⁵ See the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

⁶¹⁶ The Committee noted that the definition of 'user' under the IT Rules does not distinguish between 'business users' and 'end users' in that any person who accesses or avails any 'computer resource' for certain specified purposes is said to be a 'user', regardless of the provision of goods or services through such computer resource. The Committee opined that such a broad definition would not serve the purpose of the Draft DCB since the objective of the Draft DCB is the regulation of the practices of SSDEs in the provision of Core Digital Services. Thus, the definitions of 'users' in the context of the Draft DCB would be required to be linked to the provision of goods and services through a digital mode, and not merely the usage of the system. In addition, the definition of 'business users' under the Draft DCB should include business-to-business transactions. The Committee therefore felt that 'business users' and 'end users' should be defined separately under the Draft DCB.

⁶¹⁷ DMA, Article 3(1)(b) read with Article 3(2)(b).

⁶¹⁸ DMA, Recital 20.

⁶¹⁹ Tambiama Madiega, 'Briefing: EU Legislation in Progress- Digital Services Act' (*European Parliamentary Research Service*), November 2022), p. 8. <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689357/EPRS_BRI\(2021\)689357_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689357/EPRS_BRI(2021)689357_EN.pdf)> accessed 24 July 2023.

⁶²⁰ Eurostat, 'How many citizens had basic digital skills in 2021?' (30 March 2022) <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-1>> accessed 6 November 2023.

⁶²¹ Oxfam India, 'Digital Divide: India Inequality Report 2022' (December 2022), p. 23 <https://d1ns4ht6ytuzzo.cloudfront.net/oxfamdata/oxfamdatapublic/2022-12/Digital%20Divide_India%20Inequality%20Report%202022_PRINT%20with%20cropmarks.pdf?3l73PGQrpQfYrnwWeoXV3BFjhETfA_p> accessed 6 November 2023.

⁶²² Ani Petrosyan, 'Internet penetration rate in the European Union from 2019 to 2022, by country' (*Statista*, 26 July 2023) <<https://www.statista.com/statistics/1246141/eu-internet-penetration-rate/#statisticContainer>> accessed 6 November 2023.

⁶²³ Tanushree Basuroy, "Internet penetration rate in India from 2007 to 2022" (*Statista*, 29 August 2023) <<https://www.statista.com/statistics/792074/india-internet-penetration-rate/>> accessed 6 November 2023.

⁶²⁴ International Monetary Fund, 'GDP per capita, current prices' (2023) <<https://www.imf.org/external/datamapper/PPPCC@WEO/EUQ/EU>> accessed 6 November 2023.

⁶²⁵ Oxfam India, 'Inequality Report 2022: Digital Divide' (December 2022) <https://d1ns4ht6ytuzzo.cloudfront.net/oxfamdata/oxfamdatapublic/2022-12/Digital%20Divide_India%20Inequality%20Report%202022_PRINT%20with%20cropmarks.pdf?3l73PGQrpQfYrnwWeoXV3BFjhETfA_p> accessed 7 November 2023.

⁶²⁶ Statista, "Annual revenue generated by Meta Platforms from 2009 to 2022" <<https://www.statista.com/statistics/268604/annual-revenue-of-facebook/#:~:text=In%202022%2C%20the%20revenue%20general,for%20the%20social%20media%20company.>>> accessed 17 January 2024.

⁶²⁷ Pranav Mukul, "Uber India posts 54% increase in FY23 revenue" (*The Economic Times*, 9 January 2024) <https://economictimes.indiatimes.com/tech/technology/uber-india-fy23-revenue-jumps-to-rs-2666-crore-net-loss-widens/articleshow/106636607.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 17 January 2024.

⁶²⁸ Tanushree Basuroy, "Social network user penetration in India from 2018 to 2020, with estimates until 2028" (*Statista*, 31 July 2023) <<https://www.statista.com/statistics/240960/share-of-indian-population-using-social-networks/>> accessed 6 November 2023.

⁶²⁹ Statista, 'Online Food Delivery - India' <<https://www.statista.com/outlook/dmo/online-food-delivery/india>> accessed 6 November 2023.

⁶³⁰ Kantar and IAMAI, 'Internet in India: 2022' (April 2023) <https://www.iamai.in/sites/default/files/research/Internet%20in%20India%202022_Print%20version.pdf> accessed 6 November 2023.

⁶³¹ Rucha Sharma, 'News by Numbers: 42 percent revenue of online food delivery business comes from only 8 Indian cities' (*Forbes India*, 8 July 2021) <<https://www.forbesindia.com/article/news-by->

numbers/news-by-numbers-42-percent-revenue-of-online-food-delivery-business-comes-from-only-8-indian-cities/69019/1> accessed 6 November 2023.

⁶³² Section on 'Obligations' may be referred.

⁶³³ Under the Draft Classification Guidelines in China, platforms are designated as 'super platforms' or 'large platforms' on the basis of number of annual active users, core business, market value in the previous year, and ability to restrict merchants from contacting consumers. The Draft Responsibility Guidelines impose certain key ex-ante obligations on the 'super large platforms' whereas general obligations are applicable to all internet platforms. For further reference, refer to the section on China in Chapter III of this Report.

⁶³⁴ For instance, an SSDE fulfilling base-level thresholds, i.e. with an Indian turnover of INR 4,000 crore and one crore end users may have a lower level of compliance with obligations under the Draft DCB than an SSDE with an Indian turnover of INR 20,000 crore and with ten crore end users.

⁶³⁵ For instance, the regulations framed by the CCI may provide for whether calculation of end users or business users is to be done on a monthly or yearly basis, and whether active or passive end users are to be considered, for each Core Digital Service.

⁶³⁶ 'Undertaking' under the DMA is defined as "*an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, including all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another*"; DMA, Article 2(27).

⁶³⁷ The term "group" has been used in the context of combinations in the Competition Act. It refers to two or more enterprises where one enterprise is directly or indirectly, in a position to: (i) at least exercise 26% of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise; *see* Competition Act, Explanation (b) to Section 5.

⁶³⁸ *See for instance* EC, 'Commission Decision of 5.9.2023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector' (5 September 2023) <https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100002_145.pdf> accessed 23 January 2024; and EC, 'Commission Decision of 5.9.2023 designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector' (5 September 2023) <https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100013_215.pdf> accessed 23 January 2024.

⁶³⁹ For instance, the EC has designated Alphabet Inc. (the parent company), together with all legal entities directly or indirectly controlled by Alphabet Inc., as a Gatekeeper in relation to certain core platform services. *See* EC, 'Commission Decision of 5.9.2023 designating Alphabet as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector' (5 September 2023) <https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100002_145.pdf> accessed 1 February 2024.

⁶⁴⁰ The meaning of 'affiliates' is provided in the German ARC as follows: "If an undertaking concerned is a dependent or dominant undertaking within the meaning of Section 17 of the German Stock Corporation Act [Aktiengesetz] or a group company within the meaning of Section 18 of the German Stock Corporation Act, then the undertakings so affiliated shall be regarded as a single undertaking. If several undertakings act together in such a way that they can jointly exercise a controlling influence on another undertaking, each of them shall be regarded as controlling"; ARC, Section 36(2).

⁶⁴¹ FCO, “Case summary: Bundeskartellamt determines Google’s paramount significance for competition across markets” (5 January 2022) <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.pdf?__blob=publicationFile&v=6> accessed 1 February 2024.

⁶⁴² The Committee discussed that an enterprise may cite excessively technical or insubstantial reasons to evade compliance with obligations under the Draft DCB such as the holding company exercising control over its actions or owning key intellectual property enabling the provision of the concerned Core Digital Service.

⁶⁴³ For instance, enterprises providing online search engine services may also be directly / indirectly involved in providing online advertising services.

⁶⁴⁴ The term ‘control’ has been defined under the DMA as the possibility of exercising decisive influence on an undertaking, within the meaning of Article 3(2) of the ECMR; DMA, Article 2(28). Control is said to be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking; ECMR, Article 3(2).

⁶⁴⁵ Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council, Annex I - Form relating to the Notification pursuant to Article 3(3) of Regulation (EU) 2022/1925 for the purposes of Gatekeeper Designation (“Form GD”), Section 1.1.2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0814>> accessed 1 February 2024.

⁶⁴⁶ Standing Committee Report (2022), p. 4.

⁶⁴⁷ Competition (Amendment) Act, 2023 <<https://www.cci.gov.in/images/legalframeworkact/en/the-competition-amendment-act-20231681363446.pdf>> accessed on 19 July 2023.

⁶⁴⁸ Competition Act, Section 5(d).

⁶⁴⁹ *Matrimony.com Limited v. Google LLC*, CCI order dated 8 February 2018 in Case Nos. 7 and 30 of 2012.

⁶⁵⁰ Andrei Hagiu, Tat-How Teh and Julian Wright, ‘Should Platforms be Allowed to Sell on their Own Marketplaces?’ (2022) *Rand Journal of Economics* 53; Massimo Motta, ‘Self-preferencing and Foreclosure in Digital Markets: Theories of harm for abuse cases’ (2023) *International Journal of Industrial Organization* 90.

⁶⁵¹ The Unilateral Conduct Working Group, ‘Unilateral Conduct Workbook-Chapter 6: Tying and Bundling’ (*International Competition Network*, April, 2015) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_UCW-Ch6.pdf> accessed 19 July 2023.

⁶⁵² The Committee noted that though the Standing Committee Report had identified ten ACPs, such list was not exhaustive and that the nomenclature of such ACPs could vary from case to case. A broad, principle-based framework would allow for such ACPs to be included even if they are not enumerated as a specific obligation in the statute. The Committee noted, for instance, that ACPs such as ‘exclusive tie-ups’ and ‘pricing / deep discounting’ may be subsumed under the obligation on ‘Fair and Transparent Dealing’ under the Draft DCB.

⁶⁵³ The Committee discussed that, for instance, the regulations should specify that obligation relating to ‘data usage’ under the Draft DCB is primarily concerned with harm caused to competition.

⁶⁵⁴ Certain Committee members expressed views that obligations relating to interoperability should be excluded from the ambit of the Draft DCB or that anti-steering provisions should only regulate app-stores. Some members also sought clarity on the scope of the term ‘integral’ to provision of Core Digital Services in the context of the provision on anti-steering in the Draft DCB. The Committee felt that the CCI should be allowed the discretion to frame the related conduct requirements as it deems fit, pursuant to stakeholder consultations, in due course of time.

⁶⁵⁵ Oliver J. Bethell, Gavin N. Baird and Alexander M. Waksman, ‘Oliver J. Bethell, Gavin N. Baird and Alexander M. Waksman’ (*Journal of Antitrust Enforcement*, 2019) <https://awards.concurrences.com/IMG/pdf/42_ensuring_innovation_through_participative_antitrust.pdf?55639/d1ca13b4fa457cd27ac17d9e31d362bc3034ca67239d61fe5a4dda9d51d5ff7d> accessed 19 July 2023.

⁶⁵⁶ Section 64A was introduced through the Competition (Amendment) Act, 2023. It provides for the process of issuing regulations that includes publishing draft regulations and inviting public comments, publishing general statement of its response and periodically review such regulations.

⁶⁵⁷ The Committee discussed the possibility of a digital service possessing the nature of one or more Core Digital Services and therefore being classified under more than one Core Digital Service as listed under Schedule I to the Draft DCB. The Committee noted, for instance, that an instant messaging service could be classified as an ‘interpersonal communications service’ and ‘online intermediation service’. In such case, the concerned SSDE would be required to comply with the *ex-ante* obligations framed for both such Core Digital Services.

⁶⁵⁸ The Committee discussed that, for instance, the CCI may specify varying conduct requirements for different business models or segments such as cab aggregators, food delivery apps, and e-commerce platforms, all of which would come within the purview of a single Core Digital Service, i.e. ‘online intermediation services’ under the Draft DCB.

⁶⁵⁹ The Committee took note of the E-Commerce Rules, 2020 which mandate that an e-commerce entity should establish an adequate grievance redressal mechanism. See E-Commerce Rules, 2020, Rule 4(4).

⁶⁶⁰ V. Sridhar, ‘Deregulation: License to Loot Raj’ (*Frontline*, September 2021) <<https://frontline.thehindu.com/cover-story/deregulation-licence-to-loot-raj-india-monopolies-after-1991/article36293318.ece>> accessed 19 July 2023.

⁶⁶¹ Section 54 of the Competition Act states the following:

“54. Power to exempt: The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification –

(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government;

Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.”

⁶⁶² The Committee considered whether a specific exemption from the purview of the Draft DCB should be provided to enterprises engaged in providing critical support to the government (such as the enforcement of any legal right or claim) or enterprises providing a Core Digital Service which has been designated as Critical Information Infrastructure. The Committee opined that such enterprises could

be exempted on grounds already present in the Draft DCB (such as public interest and performance of sovereign function).

⁶⁶³ The Committee discussed that, for instance, a dominant enterprise which has entered into a combination and not notified the CCI may be penalised for gun-jumping (under Section 43A of the Competition Act) and may also be proceeded against for abuse of its dominant position (under Section 4 of the Competition Act).

⁶⁶⁴ See *Ashutosh Bhardwaj v. DLF Limited*, CCI order dated 04 January 2017 in Case No. 01 of 2014. In this case, a penalty of INR 630 crore had already been imposed on DLF for abusing its dominant position in an earlier case in 2011. The CCI stated that since DLF had already been penalised for the same period to which the contravention in the present case belonged, no further financial penalty was required to be imposed, and directed DLF to cease and desist from indulging in abusive and unfair conduct.

⁶⁶⁵ Competition Act, Section 41.

⁶⁶⁶ Competition Act, Sections 42A and 53N.

⁶⁶⁷ A view was expressed that the Commission's power to issue interim orders should be limited to contraventions committed by SSDEs and ADEs only, and should not encompass 'any party' as provided under the Draft DCB as the Draft DCB is intended to regulate the conduct of SSDEs and ADEs only. The Committee opined that there may be cases wherein ADEs or other group enterprises of the SSDE, which have not been identified yet, engage in anti-competitive conduct. The CCI should thus be empowered to issue interim orders to temporarily restrain all such parties (and not just SSDEs) from carrying on such conduct, even prior to their designation.

⁶⁶⁸ Competition Act, Section 48A.

⁶⁶⁹ Competition Act, Section 48B.

⁶⁷⁰ Competition and Markets Authority, 'Policy paper: The CMA's Digital Markets Strategy: February 2021 refresh' (9 February 2021) <<https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh>> accessed 19 July 2023.

⁶⁷¹ European Commission, 'Commission Decision of 23.03.2023 on setting up the High-Level Group for the Digital Markets Act', Article 4 (23 March 2023) <https://competition-policy.ec.europa.eu/system/files/2023-03/High_Level_Group_on_the_DMA_0.pdf> accessed 19 July 2023.

⁶⁷² CCI, 'CCI organizes 8th edition of National Conference on Economics of Competition Law, <<https://cci.gov.in/images/economicconference/en/press-release-of-8th-national-conference-on-economics-of-competition-law1684131990.pdf>> accessed 19 July 2023; 'CCI establishes digital markets and data unit to tackle competition concerns in digital markets', (*Medianama*, 28 July, 2023), <<https://www.medianama.com/2023/07/223-cci-establishes-digital-markets-and-data-unit/>> accessed 19 July 2023.

⁶⁷³ OECD, 'Criminalisation of cartels and bid rigging conspiracies – Note by Finland' (May 2020) <[https://one.oecd.org/document/DAF/COMP/WP3/WD\(2020\)5/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)5/en/pdf)> accessed 19 July 2023.

⁶⁷⁴ 'Decriminalisation of Companies Act: Decoding the Covid economic relief' (*Economic Times*, 29 July 2020) <<https://economictimes.indiatimes.com/small-biz/legal/decriminalisation-of-companies-act-decoding-the-covid-economic-relief/articleshow/77235232.cms?from=mdr>> accessed 24 July 2023; Ruchika Chitravanshi, 'Govt decriminalizes Companies Act to promote greater ease of doing business' (*Business Standard*, 21 September 2020) <<https://www.business-standard.com/article/economy->

[policy/govt-decriminalises-companies-act-to-promote-greater-ease-of-doing-business-120092000398_1.html](https://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf)> accessed 24 July 2023.

⁶⁷⁵ MCA, Report of the Company Law Committee (November 2019), <https://www.mca.gov.in/Ministry/pdf/CLCReport_18112019.pdf> accessed 24 July 2023.

⁶⁷⁶ The Committee deliberated on the penalties to be imposed on an enterprise for failure to provide the requisite information or supplying incorrect, incomplete, or misleading information under the Draft DCB. The Committee noted that the CCI should be empowered to issue a show-cause notice to an SSDE / ADE under the Draft DCB indicating the contraventions alleged to have been committed, after supplementary investigation or further inquiry, in a manner similar to the Competition Act. A view was expressed that any failure to provide information / the furnishing of incorrect, incomplete or misleading information pursuant to such show-cause notice should not be penalised under the Draft DCB as there is no such corresponding provision under the Competition Act. The Committee noted that digital enterprises had greater incentives to not provide / provide incorrect information to prolong inquiries or investigations against them, thereby hindering early detection and redressal of anti-competitive conduct. The Committee considered the importance of timely detection and disposal of proceedings in digital markets, as well as the differences in approaches followed under the Competition Act (*ex-post* intervention) vis-à-vis the Draft DCB (*ex-ante* intervention). The Committee thus opined that failure to provide information / providing incorrect information, pursuant to a show-cause notice issued by the CCI after supplementary investigation or further inquiry, should be penalized under the Draft DCB.

⁶⁷⁷ DMA, Article 30(1).

⁶⁷⁸ DMA, Article 30(2).

⁶⁷⁹ DMA, Article 30(3).

⁶⁸⁰ DMA, Article 31(1).

⁶⁸¹ DMCC, Section 85.

⁶⁸² DMCC, Section 87.

⁶⁸³ DMCC, Sections 86(2) and 88(2).

⁶⁸⁴ DMCC, Section 86(5).

⁶⁸⁵ DMCC, Section 86(4)(a).

⁶⁸⁶ DMCC, Section 86(5).

⁶⁸⁷ DMCC, Section 86(4)(b).

⁶⁸⁸ DMCC, Section 86(4)(c).

⁶⁸⁹ DMCC, Section 86(3).

⁶⁹⁰ DMCC, Section 87(1).

⁶⁹¹ DMCC, Sections 87(2) and 87(3). 'Individual' may refer to senior manager or nominated officer of an undertaking.

⁶⁹² DMCC, Section 88.

⁶⁹³ DMCC, Section 88(3)(a).

⁶⁹⁴ DMCC, Section 88(3)(b).

⁶⁹⁵ DMCC, Section 88(3)(c).

⁶⁹⁶ DMCC, Section 88(5)(a).

⁶⁹⁷ DMCC, Section 88(5)(b).

⁶⁹⁸ DMCC, Section 99. Failure to comply with the conduct requirement or the pro-competition interventions may result in the directors of the undertaking being disqualified.

⁶⁹⁹ ARC, Section 81c (1).

⁷⁰⁰ ARC, Section 81c (2).

⁷⁰¹ AICO, Sections 2(f)(1)(A) and (B).

⁷⁰² AICO, Section 2(f)(3).

⁷⁰³ EPM, Sections 3(c)(1) and (2).

⁷⁰⁴ The Committee observed that generally, the starting point for penalty calculations is the ‘relevant turnover’. The Committee notes that in the present case, the relevant turnover of the contravening SSDEs, along with ADEs if any, may be used as the baseline value to compute penalties under the Draft DCB.

⁷⁰⁵ A view was expressed that the ‘global relevant turnover’ of the SSDE should be the basis for calculating the penalty cap under the Draft DCB. The Committee noted that pursuant to the decision of the Supreme Court in *Excel Crop*, the criteria of ‘relevant turnover’, i.e. turnover relating to the product of the enterprise in question, was adopted for the purpose of imposition of penalty; *Excel Crop Care Ltd. v. CCI & Ors.*, (2017) 8 SCC 47. The Committee however notes the difficulties associated with using relevant turnover in certain scenarios such as those involving hub and spoke cartels. The Committee also remained cognisant of the CCI’s decision in *Nagrak Chetna Manch* which held that the interpretation of ‘turnover’ in *Excel Crop* would not be directly applicable in cases such as bid-rigging and not having ‘relevant turnover’, thus defeating the objective of the Competition Act; *Nagrak Chetna Manch v. Fortified Security Solutions*, CCI order dated 01 May 2018 in Case No. 50 of 2015, paragraph 96. The Committee thus opined that using ‘global relevant turnover’ as a basis for calculation of ceiling on penalty would not be feasible.

⁷⁰⁶ *Umar Javeed and Ors v. Google LLC and Ors.*, CCI order dated 20 October 2022 in Case no. 39 of 2018; *XYZ v. Alphabet Inc. & Ors.*, CCI order dated 25 October 2022 in Case No. 07 of 2020. In both these cases, the CCI held that the values of the local turnovers disclosed by the parties are inconsistent.

⁷⁰⁷ Competition Act, Explanation 2 to Section 27(b).

⁷⁰⁸ *See Mr. Umar Javeed v. Google LLC*, CCI order dated 20 October 2022 in Case No. 39 of 2018 and *XYZ v. Alphabet Inc. & Ors.*, CCI order dated 25 October 2022 in Case No. 07 of 2020. In the referred cases, the CCI directed Google to submit revenue generated or arising/accruing from India or attributable to services delivered in India. It was also directed to submit details of turnover and profit generated or arising/accruing from its entire business operations in India (including its group entities) for the three preceding financial years.

⁷⁰⁹ In the context of Article 101 of the TFEU, ‘undertakings’ are said to be any entities of personal, tangible and intangible elements, engaged in an economic activity, irrespective of their legal status and

the way in which they are financed. When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking. See 'Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01)' (21 July 2023), paragraphs 10 and 11 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01))> accessed 23 January 2024.

⁷¹⁰ Article 101 of the TFEU prohibits certain concerted practices that restrict competition, and Article 102 prohibits abuse of dominant position by an undertaking.

⁷¹¹ 'Guidelines for setting fines: Summaries of EU Legislation' (29 May 2020) <https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-for-setting-fines.html#keyterm_E0001> accessed 23 January 2024. See also Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) (1 September 2006) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01))> accessed 23 January 2024.

⁷¹² DMA, Article 2(27).

⁷¹³ DMA, Article 30(1). Further, Article 47 of the DMA indicates that the EC may adopt guidelines on setting of fines under the DMA.

⁷¹⁴ DMCC, Section 85(3) read with Section 19.

⁷¹⁵ DMCC, Section 86(4)(a) read with Sections 86(3) and 86(5).

⁷¹⁶ The Committee also noted the recent Supreme Court judgment on the 'Group of Companies' doctrine which held that the underlying basis for the application of doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement. The Supreme Court further observed that whether two or more companies constitute a single economic entity depends upon the concerted efforts of the companies to act in pursuance of a common endeavour or enterprise. See *Cox and Kings Limited v. SAP India Pvt. Ltd.*, 2023 SCC OnLine SC 1634.

⁷¹⁷ The Committee decided to not consider mergers and acquisitions as an ACP for the purposes of this Report. Chapter I, para 1.14 of this Report.

⁷¹⁸ CCI E-commerce Market Study (2020), p. 26.

⁷¹⁹ Annexure-III has been drafted considering the presentations made by stakeholders to the Committee on 4th March 2023, 11th March 2023, and 24th March 2023. Any references to legislations and other terms in this annexure should be construed with respect to the time period at which such presentations were made to the Committee.

⁷²⁰ The Committee noted that certain stakeholders such as OLA and Netflix India made oral submissions on the need for an *ex-ante* framework to regulate large digital enterprises. The Committee has taken note of such submissions while preparing the Report.

⁷²¹ The Committee noted the specific submission made by the Digital News Publishers Association regarding large digital enterprises being non-transparent in respect of their revenue-sharing policies with news publishers. In view of the same, the Digital News Publishers Association has suggested that a *pre-facto* bargaining code be put in place to eliminate the power imbalance between large digital enterprises and news publishers. The Committee took note of the Bargaining Code under the Australian model wherein *ex-ante* standards are imposed on digital platforms carrying content by Australian news businesses in order to address power imbalances in the news media sector.

At the same time, the Committee was aware of the fact that the Bargaining Code in Australia seeks to largely govern commercial relationships between two parties, i.e. Australian news businesses and 'designated' digital platforms. The Draft DCB however does not seek to govern contractual relationships / negotiations between two parties; rather it seeks to regulate any potential anti-competitive practices which large digital enterprises may engage in. The Committee noted that the scope of CCI's powers could not extend to interference in contractual matters between two parties. Further, the Committee observed that the ACCC operates under several mandates - competition, consumer affairs, fair trading and product safety; *see* ACCC, "About us" <<https://www.accc.gov.au/about-us>> accessed 7 August 2023. However, the CCI is the primary enforcement authority for competition law in India and its mandate is limited to that extent.

Keeping in mind the differing approaches between the Indian and Australian models, the Committee felt that this aspect should not be dealt with under the Draft DCB but should ideally be dealt with by the concerned sectoral regulator such as the Ministry of Information and Broadcasting.