

# **Digital Competition Bill, 2024 – An Ex-Ante Regulation**

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## Introduction

Since its inception, the Indian Competition Act, 2002 (“**Competition Act**”), in letter and the spirit, has provided an ‘*ex-post*’ framework to address, enforce & regulate any anti-competitive practices by a market enterprise – essentially, the provisions of the Competition Act intervene only after an anti-competitive conduct has occurred. In December 2022, the Parliamentary Standing Committee on Finance in its 53<sup>rd</sup> report on ‘*Anti – Competitive Practices by Big Tech Companies*’ had recommended that a Digital Competition Act may be introduced by the Government to address the needs of the digital market(s) in India. Resultantly, the Committee on Digital Competition Law (“**CDCL**”) was constituted by the Ministry of Corporate Affairs, Government of India (“**MCA**”) for examining the need of having a separate legislation to regulate the competition in the digital markets.

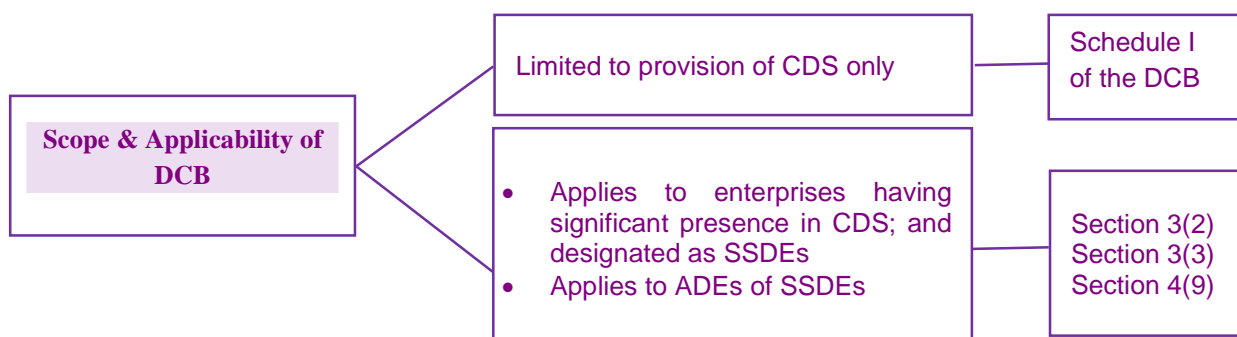
In its Report, the CDCL opined that the *ex-post* framework under the Competition Act may not be sufficient to address the unique characteristics of the digital markets and facilitate timely and speedy redressal of anti-competitive conduct by digital enterprises due to the extensive fact-finding and a tiered adjudicatory process involved in *ex-post* enforcement proceedings. In view of the same, the CDCL advocated for a supplementary legislation in shape of a new Digital Competition Law with an ‘*ex-ante*’ framework – basically, pre-empting and preventing digital enterprises from indulging in anti-competitive practices in the first place. Therefore, the CDCL drafted the Draft Digital Competition Bill, 2024 (“**DCB**”) which was published along with its Report.

The Central Government, being cognizant of the wide impact of such *ex ante* legislation across the digital market space in the country, held discussions and interviews with various stakeholders concerning the DCB, which is not only likely to impact the digital enterprises operating in India such as Amazon, Flipkart, Netflix, Uber, Zomato etc., but is also being seen to support the growth potential of the Micro, Small and Medium Enterprises (“**MSME**”) operating in the digital landscape. Last year, on 12<sup>th</sup> March 2024, the MCA had invited public comments of various stakeholders on the Report of the CDCL and the DCB.<sup>1</sup> At present the DCB is at a pre-legislative consultation stage and is expected to be introduced by the in parliament this year,<sup>2</sup> with a focus on creating a fair, transparent, and contestable digital ecosystem to foster innovation, promote competition and protect the interests of users of core digital services in India.

This primer attempts to provide a quick snapshot of the DCB for enhanced understanding and clarity of its key provisions. However, the application and the actual impact of the same can only be truly assessed once the DCB gets enacted as a Law.

## Scope & Applicability of DCB

The DCB is applicable only to those enterprises which have – (i) significant presence in the provision of Core Digital Services (“**CDS**”) specified at Schedule I of the DCB; and (ii) are designated as Systemically Significant Digital Enterprises (“**SSDEs**”) and Associate Digital Enterprises (“**ADEs**”) of SSDEs.

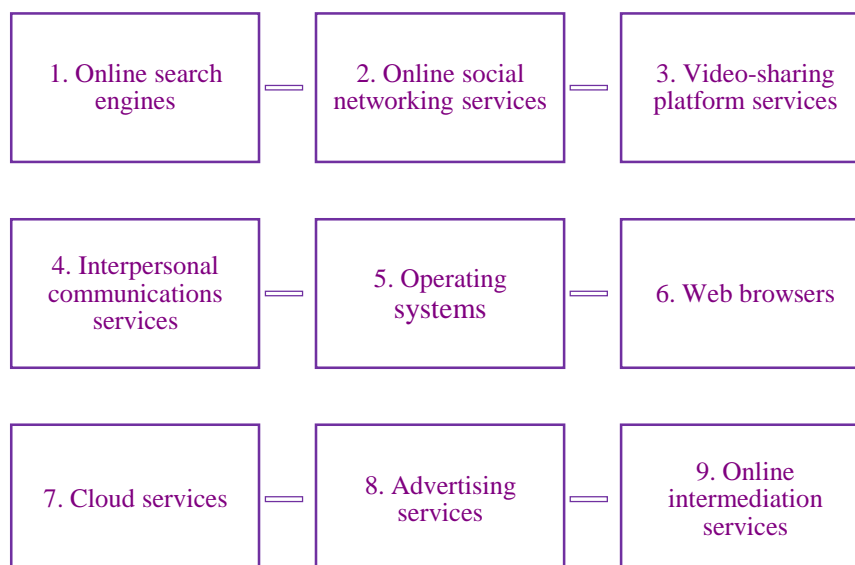


<sup>1</sup> Available at <https://pib.gov.in/PressReleasePage.aspx?PRID=2013947>

<sup>2</sup> <https://www.thehindubusinessline.com/economy/digital-competition-bill-centre-held-closed-door-parleys-with-big-tech-other-stakeholders-fm-tells-parliament/article68966015.ece>

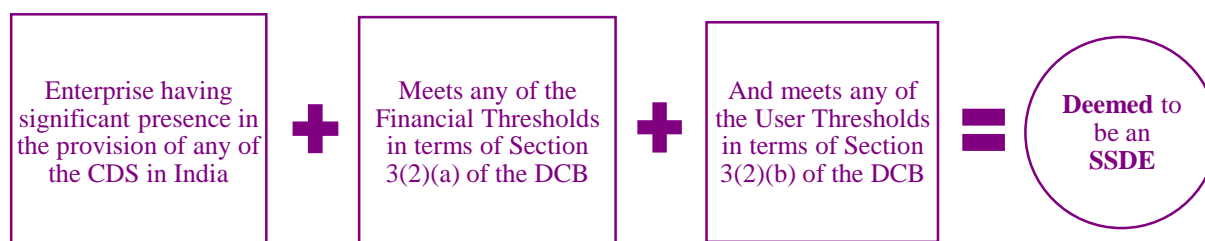
**CDS under Schedule I of DCB:** The DCB is not applicable to all types of digital / tech companies and applies only to digital / tech companies which are engaged in provision of CDS enlisted at Schedule I of the DCB. As per the Schedule, CDS includes any of the following:

#### CDS listed at Schedule I of DCB



**Threshold criteria for designation of SSDEs:** The DCB, under Section 3(2), provides twin threshold criteria for identification of SSDEs and ADEs – i) Financial Thresholds and ii) User Thresholds. Additionally, the Competition Commission of India (“**CCI**”), in terms of Section 3(3) of the DCB and basis its assessment and factors enumerated therein, may designate an enterprise as an SSDE. The ‘Financial Thresholds’, so prescribed, has 4 (four) independent parameters – Indian Turnover, Global Turnover, Gross Merchandise Value (GMV) or Global Market Capitalization, on which the identification of an SSDE may be assessed. And for ‘User Thresholds’ have 2 (two) independent parameters – End Users and Business Users of CDS, have been provided.

#### Criteria for Designation of an SSDE under Section 3(2) of DCB



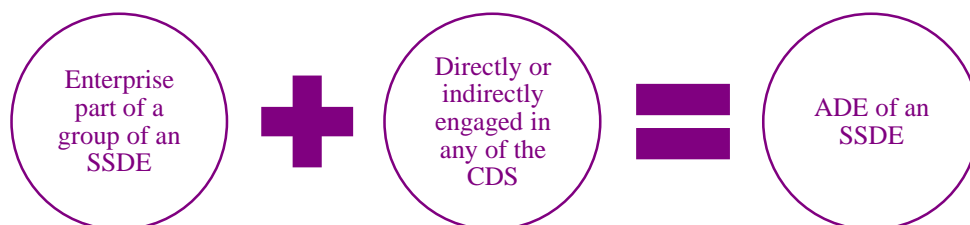
***Note:*** if an enterprise fails to maintain or furnish data specified at Section 3(2)(a) and 3(2)(b) of DCB, then it shall be deemed to be an SSDE if it meets any of the stipulated thresholds

The thresholds specified under Section 3(2)(a) and 3(2)(b) of the DCB are tabulated below. The prescribed thresholds are to be met in each of the immediately preceding 3 (three) financial years. Further, in case an enterprise is a part of a group, then thresholds are to be evaluate at the group level.

Thresholds specified under Section 3(2) of DCB							
<i>(*if an enterprise is a part of a group, then thresholds are to be evaluated at group level)</i>							
<b>Financial Thresholds</b>  <i>(in each of the immediately preceding 3 (three) financial years)</i>	<b>Turnover in India</b>	<u>OR</u>	<b>Global turnover</b>	<u>OR</u>	<b>Gross merchandise value in India</b>	<u>OR</u>	<b>Global market capitalization or equivalent fair value</b>
	Not less than INR 4000 crore (≈USD 0.48 billion)		Not less than USD 30 billion		Not less than INR 16000 crore (≈USD 1.92 billion)		Not less than USD 75 billion
<u>AND</u>							
<b>User Thresholds</b>  <i>(in each of the immediately preceding 3 (three) financial years)</i>	<b>End users of CDS</b>		<u>OR</u>	<b>Business users of CDS</b>			
	At least one crore in India			At least ten thousand in India			

**Designation of ADEs:** Apart from CCI designating enterprises as SSDEs and the prescribed thresholds, the DCB imposes a self-reporting obligation upon the enterprises to report themselves as SSDEs and their ADEs to the CCI, failure of which may lead to imposition of penalties.

#### Criteria for Designation of an ADE specified at Section 4(9) of DCB



#### Self – Reporting Obligation upon Enterprises and Timelines

Section 4 of the DCB imposes a self – reporting obligation upon enterprises to identify themselves as SSDE and their ADEs and notify the same to the CCI in the specified form, within 90 (ninety) days of meeting the thresholds under Section 3(2) of the DCB. The CCI may then pass an order designating an enterprise as SSDE and its ADEs.

Further, as per Section 4(3) of the DCB, the CCI may direct an enterprise to furnish the requisite information and in case it finds that the threshold(s) specified under Sections 3(2) or 3(3) of the DCB are met, the CCI may accordingly designate such enterprise as an SSDE and impose a penalty. Alternatively, if CCI finds that the enterprise meets the factors enumerated under Section 3(3) of the DCB basis the information furnished by the enterprise, the CCI after issuing a show cause notice may designate it as an SSDE or close the proceedings accordingly.



## Period of Designation, Revocation or Re-designation

- **Period of Designation:** In terms of Section 4(8) of DCB, an enterprise shall be designated as an SSDE for a period of 3 (three) years.
- **Re-designation:** In terms of Section 6(5) of DCB, on the date of expiry of designation or re-designation of an SSDE, such SSDE shall be deemed to have been re-designated as SSDE for another period of 3 (three) years, unless any order revoking its designation as an SSDE has been passed.
- **Revocation:** An SSDE may at any time during the last 6 (six) months before the expiry of period of designation, may apply to the CCI in a specified form specifying that it no longer meets the thresholds for one or more CDS or that it no longer needs to be designated as an SSDE. Further, after one year of being designated or re-designated, an SSDE may request the CCI for revocation of the said designation if there has been a significant change in market dynamics.

## Obligations & Requirements under Chapter III

The designated SSDEs and ADEs are required to comply with the obligations enumerated under Chapter III of the DCB and other rules and regulations thereunder. The DCB provides that the CCI shall by regulations provide separate set of conduct requirements for each CDS in relation to the applicable obligations under DCB.

Obligations under Chapter III of DCB		
1.	<b>Anti-circumvention</b>	<ul style="list-style-type: none"><li>• Not to restructure (through division, split, fragmentation etc) itself through any means (contractual, commercial, technical etc) to circumvent the prescribed thresholds.</li><li>• Not to engage in any behaviour that undermines effective compliance of obligations under DCB.</li><li>• Not to prevent, either directly or indirectly, any end user or business user from raising issue of non-compliance with SSDE's obligations under DCB.</li></ul>
2.	<b>Reporting and compliance</b>	<ul style="list-style-type: none"><li>• SSDE shall establish a transparent and effective complaint handling and compliance mechanisms as may be specified.</li><li>• SSDE shall report to the CCI on the measures taken to comply with the obligations in Chapter III and the rules and regulations framed thereunder in such manner and form, and after such period(s) of time as may be specified.</li></ul>
3.	<b>Fair and transparent dealing</b>	<ul style="list-style-type: none"><li>• SSDE shall operate in a fair, non-discriminatory, and transparent manner with end users and business users.</li></ul>
Obligations with respect to Anti-Competitive Practices ("ACP")		
1.	<b>Self – preferencing</b>	<p>SSDE shall not directly or indirectly favour:</p> <ul style="list-style-type: none"><li>• its own products, services, or lines of business; or</li><li>• products, services, or lines of business of related parties; or</li></ul>

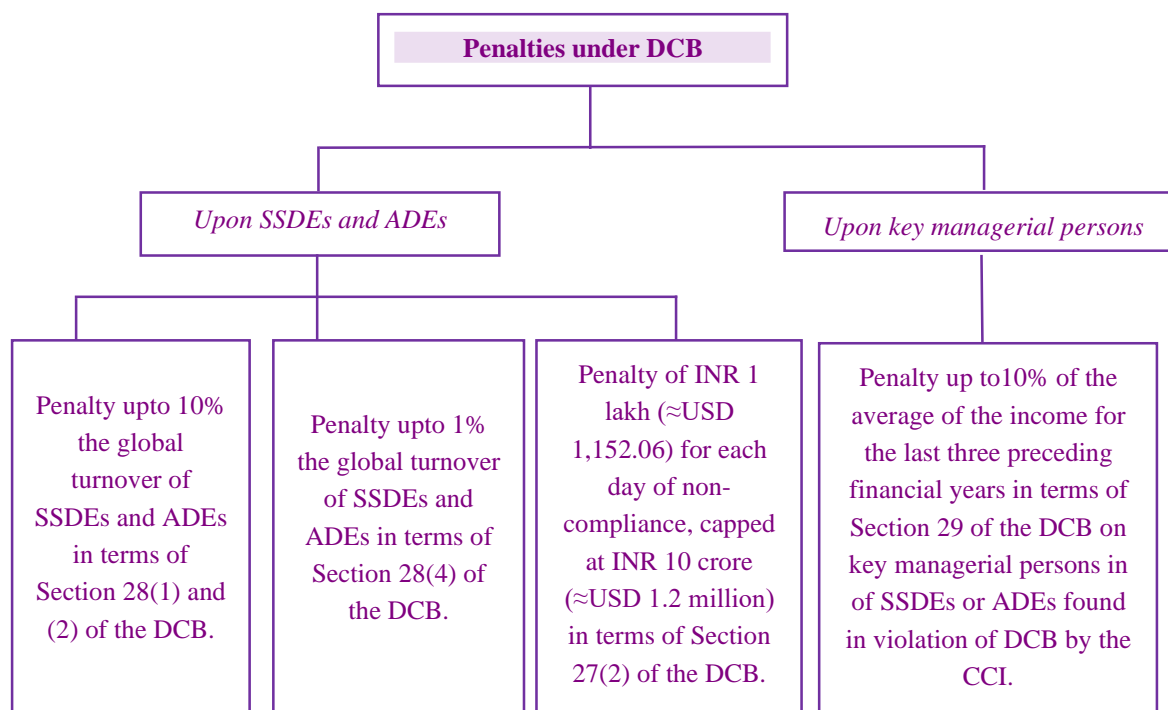
		<ul style="list-style-type: none"> <li>products, services, or lines of business of third parties with whom SSDE has arrangements for the manufacture and sale of products or provision of services over those offered by third party business users on the CDS, in any manner.</li> </ul>
2.	<b>Data usage</b>	<ul style="list-style-type: none"> <li>SSDE shall not directly or indirectly use or rely on non-public data of business users operating on its CDS to compete with such business users on the identified CDS of the SSDE.</li> <li>SSDE shall not, without the consent of the end users or business users: <ul style="list-style-type: none"> <li>a) intermix or cross use the personal data of end users or business users collected from different services including its CDS; or</li> <li>b) permit usage of such data by any third party.</li> </ul> </li> <li>SSDE shall allow business users and end users of its CDS to easily port their data, in a format and manner as may be specified.</li> </ul>
3.	<b>Restricting third-party applications</b>	SSDE shall: <ul style="list-style-type: none"> <li>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 CDS; and</li> <li>b) allow end users and business users to choose, set and change default settings.</li> </ul>
4.	<b>Anti-steering</b>	SSDE 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 CDS of the SSDE.
5.	<b>Tying and bundling</b>	SSDE shall not— <ul style="list-style-type: none"> <li>a) require or incentivise business users or end users of the identified CDS to use one or more of the SSDE's other products or services; or</li> <li>b) those of related parties; or</li> <li>c) of third-parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services alongside the use of the identified CDS, unless the use of such products or services is integral to the provision of the CDS.</li> </ul>

### Penalties for violation and non-compliance under DCB

Any non-compliance by SSDEs and ADEs may attract significant penalties under the DCB. In addition to penalty, the CCI may also direct the enterprises to discontinue and not to resume certain conduct and/or modify the conduct of the enterprises and/or pass any order as it deem fit.<sup>3</sup> For stringent enforcement, the DCB further provides stricter penalties for other non-compliances and vicarious liability of key managerial persons of enterprises.

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<sup>3</sup> Section 17 of the DCB



**\*Failure to pay:** Chief Metropolitan Magistrate of Delhi, upon a complaint from the CCI, may impose an imprisonment for up to 3 (three) years or fine upto INR 25 crore (≈USD 3 million) or both.

#### Penalties upon SSDEs and ADEs:

- Penalty up to 10% of the global turnover of SSDEs and ADEs for violation of obligations stipulated under Chapter III and other rules and regulations thereunder.<sup>4</sup>
- Penalty of 1% of the global turnover of an enterprise for:
  - Failure to notify the CCI that it meets the criteria qualifying as an SSDE under Section 3(2) of the DCB and notifications thereunder<sup>5</sup>;
  - Providing incorrect, incomplete, misleading, or no information while self-reporting as SSDEs and their ADEs<sup>6</sup>, or when filing application with the CCI for revocation or for re-designation<sup>7</sup>, or in response to a show cause notice issued by the CCI under Section 4 or Section 16 of DCB<sup>8</sup>;
  - Failure of an SSDE to report or supply incorrect, incomplete or misleading information regarding measures taken to comply with the obligations under Chapter III and the associated rules and regulations<sup>9</sup> and;
  - Failure or refusal to provide complete information or cooperate during investigation, or providing incorrect, incomplete or misleading information in response to any directions or orders issued by the CCI or by the Director General.<sup>10</sup>
- Penalty of INR 1 lakh (≈USD 1,152.06) for each day of non-compliance, capped at INR 10 crore (≈USD 1.2 million), for failure to adhere to the directions and orders of the CCI issued after inquiry; interim orders; orders related to acts occurring outside India and; any penalty orders issued under Section 28 of the DCB.<sup>11</sup> In case a person fails to pay said penalty, the Chief Metropolitan Magistrate of Delhi, upon a complaint received from

<sup>4</sup>Section 28(1)&(2) of the DCB

<sup>5</sup> Section 28(3) of the DCB

<sup>6</sup> Section 28(4)(a) of the DCB

<sup>7</sup> Section 28(4)(c) of the DCB

<sup>8</sup> Section 28(4)(b) of the DCB

<sup>9</sup> Section 28(4)(d) of the DCB

<sup>10</sup> Section 28(4)(e) of the DCB

<sup>11</sup> Section 27(2) of the DCB

the CCI, may impose an imprisonment up to three years, or a fine up to INR 25 crore (≈USD 3 million), or both.<sup>12</sup>

**Penalties upon key managerial persons:** Penalty up to 10% of the average of the income for the last three preceding financial years on key managerial persons of SSDEs or ADEs found in violation of DCB by the CCI.<sup>13</sup> This penalty may be imposed on every person who, at the time of contravention, was in-charge or responsible for the conduct of the business of the SSDE or ADE, and/or any other officer with whose consent, connivance or negligence the contravention has taken place. This penalty is a consequential one which means that a penalty upon the key managerial person may be imposed only when a contravention by the SSDE or ADE has been found by the CCI. A similar penalty has also been provided under the Competition Act.

## Conclusion

The draft DCB has found a lukewarm response from the relevant stakeholders and key market players alike. Besides, the skepticism on the application of an *ex-ante* framework, it has been felt that borrowing the construct prevalent in the European Union to Indian digital landscape, without considering the differentiating factors of the respective economies, might be counterproductive for sustainable growth of the sector in India. The industry has also voiced its concerns around the potential fallout in terms of scaling down of investments for Start-ups in India, in order to avoid qualifying the quantitative thresholds under the DCB. It has also been opined that the pre-emptive restrictions proposed on bundling and data usage under the DCB might hamper MSMEs who place significant reliance on technology offerings of large digital enterprises so as to reduce their own operational costs and enhance customer outreach. The Central Government has since been sensitive about these and other concerns of the Digital market players and has been making sincere and concerted efforts to bridge the gap amongst the need of a robust regulation and taming of anti-competitive behaviours, whilst ensuring sustainable growth of the Digital market space in the Country.

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<sup>12</sup> Section 27(3) of the DCB

<sup>13</sup> Section 29 of the DCB



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