Lloyd's List Intelligence
Competition Law Insight
www.competitionlawinsight.com

Agility in digital markets regulation

India publishes Big Tech competition report and draft legislation

by **Anshuman Sakle** and **Siddharth Bagul**

The Indian antitrust regime has witnessed a host of key updates in the past year, most significant of which is the proposal to regulate digital markets under a de-novo legislation. A key catalyst behind the proposal was a report prepared by the Standing Committee of Finance (Standing Committee Report)[1] which highlighted: (i) a list of 10 anti-competitive practices routinely undertaken by big-tech enterprises; and (ii) the anti-competitive impact of such practices on digital markets. Additionally, the Standing Committee Report also focused on: (i) systemic issues in the extant Indian competition law framework; and (ii) concerns associated with ensuring competitiveness in digital markets in India, among others.

Subsequently, the Ministry of Corporate Affairs, Government of India (MCA) constituted a Committee on Digital Competition Law (CDCL) which was tasked with: (i) examining the robustness of the extant Indian competition framework; and (ii) assessing the need for a de-novo competition legislation for digital markets in India. After more than a year of deliberations involving: (i) multiple consultations with key stakeholders (including entities operating in digital markets); (ii) evaluating global approaches to regulation of digital markets; and (iii) discussions on the current framework (sector-specific) and its efficacy in regulating digital markets, the CDCL and the MCA released the Report of the Committee on Digital Law (CDCL Report) on 12 March 2024. Interestingly, the CDCL Report was also accompanied by a draft of the proposed de-novo legislation, ie the Draft Digital Competition Bill (DCB), highlighting the legislative intent to address competitive concerns in Indian digital markets.

This article analyses key findings of the CDCL (presented via the CDCL Report) and undertakes a comparative analysis of the DCB vis-à-vis global jurisdictions.

The CDCL Report: Key findings and analysis of the DCB

The key findings of the CDCL Report can be segmented into two buckets: (i) the necessity of a de-novo legislation (focusing on adopting an ex-ante approach) to regulate digital markets; and (ii) the proposed de-novo legislation, ie the DCB.

Ex-ante framework for digital markets: Need of the hour?

The Standing Committee Report espoused its concerns on competitiveness in digital markets by: (i) identifying 10 anti-competitive practices prevalent in the digital markets; and (ii) analysing the effectiveness of the extant framework in mitigating harm caused to competition.

Subsequently, the Standing Committee Report recommended that anti-competitive practices in digital markets would best be addressed by the institution of an ex-ante framework. The intent behind the introduction of an ex-ante framework was to: (i) act as a deterrent to enterprises engaging in anti-competitive conduct in digital markets; and (ii) focus on addressing anti-competitive conduct before it could impact markets. Accordingly, the recommendations of the Standing Committee included among others: (i) the introduction of a de-novo legislative framework to regulate digital markets; (ii) reinforcing the Competition Commission of India (Commission) with adequate powers; and (iii) establishment of a Digital Markets and Data Unit (DMDU) within the Commission which would focus solely on monitoring anti-competitive practices by enterprises in digital markets.[2]

The CDCL Report, whilst substantiating the concerns raised in the Standing Committee Report, made similar observations. Briefly, the observations of the CDCL were: (i) digital markets have demonstrated rapid evolution, which coupled with network effects has turned these markets into "winner takes all" markets; (ii) traditional ex-post investigations are beset with delays; and (iii) remedies under the extant framework are focused on addressing harm on a case-by-case basis as opposed to a macro-level behaviour correction, among others. Thus, the CDCL Report concluded that the traditional ex-post framework was not sufficient to address anti-competitive harms in digital markets.[3] Analysing global practices, the CDCL observed that jurisdictions such as the EU, the UK and Germany have also instituted an ex-ante framework. The proposed ex-ante framework relies on identifying entities with significant presence across digital markets and subsequently regulating their behaviour to ensure free competition in digital markets.[4]

Accordingly, the CDCL Report recommended: (i) introduction of a de-novo legislation, ie the DCB, assisting the Commission in regulating enterprises operating in digital markets; (ii) introduction of qualitative and quantitative criteria for identification of enterprises governed under the ambit of the DCB; and (iii) a hybrid principle-based approach for identification of anti-competitive practices under the DCB.

Proposed DCB: Addressing competitive harm in digital markets?

As a part of its mandate, the CDCL reviewed proposed and existing legislation across the globe on certain key aspects such as: (i) necessity scope and applicability; (ii) threshold and criteria for designation; (iii) obligations; and (iv) enforcement and remedies.

We briefly analyse global practices in line with the draft DCB against each of the key aspects set out above.

Scope and applicability

The CDCL analysed the ex-ante framework (extant and proposed) globally and observed that a majority of the jurisdictions, including established jurisdictions such as the EU, and the UK, have sought to: (i) identify enterprises which are dominant or have a significant presence in the identified market; and (ii) regulate their behaviour. However, there have been divergent approaches adopted by jurisdictions whilst analysing the applicability of ex-ante competition instruments. For example, while jurisdictions such as the EU, Australia and South Korea have adopted a service/market specific approach, other jurisdictions such as the UK and Japan have adopted a service/market agnostic approach.

Analysing both these approaches, the CDCL observed that while a service/market specific approach allows for certainty for both market players and regulators, a service/market agnostic approach allows for greater flexibility/adaptability, ensuring that regulators can swiftly react to any changes in the market. Accordingly, and to achieve a balanced approach, the CDCL recommended that the DCB should be applicable to an inclusive and pre-identified list of core digital services (CDS) which are typically susceptible to anti-competitive behaviour. Further, to ensure that the DCB provides flexibility, the CDCL also recommended that the Central Government be empowered to add new digital services within its scope.

From a structural perspective, an enterprise: (i) providing a specific CDS; and (ii) fulfilling the qualitative/quantitative thresholds set out under the DCB, would be identified as a systemically significant digital enterprise (SSDE). Pertinently, the DCB also envisages the concept of an associate digital enterprise (ADE) under which group entities of a SSDE/entity proposed to be designated as a SSDE are covered within the ambit of the DCB, if such group entities are also engaged in the provision of a CDS.

In line with global practices, the CDCL also recommended that SSDEs undertake a self-assessment of their designation (as a SSDE) based on the quantitative thresholds set out in the DCB for a fixed assessment period. Subsequently, on the expiry of the assessment period, the qualitative thresholds would kick in, empowering the Commission to designate certain enterprises as SSDEs based on either the quantitative thresholds or the qualitative thresholds.

Proposal under the DCB

Currently, the DCB provides for an inclusive list of core digital services, comprising: (i) online search engines; (ii) online social networking services; (iii) video-sharing platform services; (iv) interpersonal communications services; (v) operating systems; (vi) web browsers; (vii) cloud services; (viii) advertising services; and (ix) online intermediation services.[5]

Thresholds and designation criteria

Given the uncertainty in identifying SSDEs/ADEs, the CDCL analysed the identification criteria in established jurisdictions globally. In its analysis the CDCL observed that globally, identification parameters include a mix of both quantitative and qualitative criteria.

For instance, jurisdictions such as the EU and the US have broadly utilised quantitative thresholds (based on their size, the number of users, revenue and market capitalisation), while jurisdictions such as Germany have generally relied on qualitative thresholds to identify entities impacting digital markets. Pertinently, the CDCL also observed that there were established jurisdictions such as the UK which rely on a mix of quantitative and qualitative thresholds for identifying enterprises which could impact digital markets.

The CDCL observed that while quantitative criteria allowed for swiftness in identification, qualitative criteria allowed the regulators flexibility in determining whether an enterprise could influence the digital markets in its favour. Interestingly, the CDCL also observed that quantitative criteria (such as revenue, market capitalisation, sales) would be insufficient to catch enterprises which may not generate sufficient revenue but could impact digital markets through their users.

Accordingly, the CDCL recommended that the identification criteria under the DCB should be twofold: (i) quantitative; and (ii) qualitative. The quantitative thresholds would require an enterprise to fulfill two tests:

(i) significant financial strength test (comprising of metrics such as revenue, market capitalisation); and (ii) significant spread test (comprising of metrics such as number of business users and end users). The qualitative thresholds would be a mix of criteria such as: (i) resources of the enterprise; (ii) direct/indirect network effects; (iii) and bargaining power of the enterprise, among others, identified based on the Commission's decisional practice and its experience in navigating digital markets.

Interestingly, while the fulfilment of any of the multiple thresholds mentioned under the: (i) "significant financial strength test"; and (ii) "significant spread test" is a pre-requisite to be classified as a SSDE, it is imperative that an enterprise fulfil at least one threshold under each test. Pertinently, if an enterprise fails to maintain data to analyse the thresholds set out above, the DCB provides that such enterprise will be deemed to be a SSDE.[6] Additionally, the qualitative thresholds have been designed in a manner so as to widen the ambit of the DCB.

Proposal under the DCB

Currently, the thresholds under the DCB are crafted in line with the CDCL recommendations. These are:[7]

Quantitative thresholds

Significant financial strength test (any one of the following metrics need to be met)

Sr No	Thresholds	Value (INR billion/US$ million/ € million)
1.	Indian turnover	Greater than INR 40 billion (approximately US$480 million[8]/ €444 million)
2.	Global turnover	Not less than US$30 billion (€27.41 billion)
3.	Indian gross merchandise value	Not less than INR 160 billion (approximately US$1.92 billion/ €1.77 billion)
4.	Global market capitalisation	Not less than US$75 billion/equivalent fair value

Significant spread test (any one of the following metrics need to be met)

Sr No	Thresholds	Volume
1.	End users	10 million
2.	Business users	10,000

Qualitative thresholds

The proposed qualitative thresholds under the DCB include: (i) enterprise volume and commerce; (ii) enterprise size and resources; (iii) number of business or end users; (iv) the enterprise's economic power; (v) enterprise integration with regard to multiple sides of the market; (vi) dependence of end users or business users on the enterprise; (vii) monopoly position (acquired on account of a legislative change or government policy); (viii) barriers to entry including regulatory barriers, financial risk, high cost of entry, among others; (ix) extent of business user or end user lock in; (x) network effects and data driven advantages; (xi) scale and scope of the activities of the enterprise; (xii) countervailing buyer power; (xiii) structural business or service characteristics; (xiv) social obligations and social costs; (xv) market structure and size of market; and (xvi) any other factor that the Commission may consider relevant.[9]

Obligations on SSDEs

Analysing the findings of the Standing Committee Report, ie the identified 10 anti-competitive practices, the CDCL deliberated on the degree of harm caused by the anti-competitive practices. Pertinently, the CDCL observed that while certain anti-competitive practices typically lead to competitive harm in the market, there are certain practices which (whilst deemed anti-competitive) have the proclivity to demonstrate pro-competitive benefits as well. For instance, while self-preferencing typically causes an anti-competitive effect in the market, practices such as tying and bundling could have pro-competitive effects such as: (i) reduced manufacturing costs; (ii) improvement in distribution chain; and (iii) enhanced product quality, among others.

In light of the divergent nature of anti-competitive practices and cognisant of the impact of the ex-ante framework (on innovation), the CDCL observed that a principle-based framework under the DCB would best address the nuances associated with digital markets.

Accordingly, the CDCL recommended that the DCB provide for an agile, flexible and principle-based framework highlighting the broad contours of identified anti-competitive practices. Further, the CDCL also recommended that ex-ante obligations applicable for SSDEs/ADEs under each of the identified anti-competitive practices should be specified by the Commission, through regulations. Such an approach was envisaged to allow the Commission to factor in the pro-competitive benefits of each anti-competitive practice and customise obligations accordingly. To ensure a holistic approach, the CDCL also recommended that the Commission undertake consultations with all relevant stakeholders whilst preparing the regulations.

Proposal under the DCB

The broad-based obligations listed under the DCB are: (i) fair and transparent dealing; (ii) no self-preferencing; (iii) no restrictions on third-party party applications; (iv) anti-steering; (v) no tying and bundling; and (vi) restrictions on usage of business user/end user data. The Commission has been tasked with identifying specific conduct-based requirements under each of the broad-based obligations. Interestingly, under the DCB, considering that an ADE may not have a similar impact on digital markets as an SSDE, the Commission has also been given the power to specify differential obligations for ADEs/SSDEs.[10]

Enforcement and remedies

The CDCL analysed the extant enforcement framework under the Competition Act 2002 (Competition Act) and deliberated on the efficacy of applying the same framework under the DCB. Since the Commission would be tasked with enforcement of the DCB and the Competition Act, the CDCL concluded that: (i) interweaving the current enforcement framework with the DCB; and (ii) allowing the Commission the flexibility to customise it for enforcing the DCB would efficaciously address enforcement concerns under the DCB. To further reduce enforcement timelines, the CDCL also recommended that the existing DMDU within the Commission be staffed with experts (including on emerging technologies) to build practices for early detection and disposal of cases under the DCB.

On remedies/penalties, the CDCL took note of the segmentation vis-à-vis penalties, ie structural remedies and behavioural remedies. Given the current Indian antitrust penalty regime, coupled with the Central Government's efforts to promote ease of doing business in India, the CDCL recommended that contraventions of the DCB should be met with civil penalties.

To determine the base value for calculation of penalties, and the percentage amount of penalties, the CDCL analysed the global penalty framework for digital markets. It observed that jurisdictions such as the EU, UK, Germany and US contemplated imposition of monetary penalties, based on the global turnover of the enterprise. To align with global practices, and to account for: (i) difficulties in identifying local turnover of a digital enterprise; and (ii) legislative change in the Competition Act to account for calculation of penalty based on the global turnover of the enterprise, the CDCL recommended that the penalty payable for an infringement be based on the global turnover of the enterprise.

On the percentage amount of penalty, the CDCL analysed the penalty provisions under the Treaty on the Functioning of the European Union (TFEU) and the UK Digital Markets, Competition and Consumers Bill 2023. It observed that penalties envisaged thereunder were equal to 10 per cent of the turnover of the infringing entity. With a view to: (i) harmonise penalty regimes across the Competition Act and the DCB; and (ii) minimise forum shopping, the CDCL capped the penalty payable under the DCB to 10 per cent of the global turnover of the infringing enterprise. Further, to ensure transparency in calculation of penalty, the CDCL also recommended that the Commission prepare penalty guidelines under the DCB.

Proposal under the DCB

The penalty framework under the DCB is aligned with the present scheme of the Competition Act. The DCB prescribes civil penalties on SSDEs for violations such as: (i) failure to self-assess; (ii) failure to follow the orders of the Commission; and (iii) failure to comply with obligations under the DCB, among others. While the maximum penalty under the DCB has been capped at 10 per cent of global turnover, where the SSDE is a part of a group of enterprises, the penalty payable will be determined by considering the total turnover of the entire group. Interestingly, the DCB also imputes penalties on key individuals such as directors, managers of the SSDE/ADE.[11]

Conclusion

The CDCL Report and the DCB are indicative of the legislative commitment to create a robust and contestable digital market ecosystem. Relying on established practices across jurisdictions, the DCB has been tailor-made to account for the peculiarities and nuances surrounding Indian digital markets. Given the unique fast-moving nature of the Indian digital economy, the DCB attempts to implement a fine balance between the twin aims of ensuring pro-competitive digital markets, and impeding innovation through over-regulation. While the DCB stays true to its aim, ie providing an agile, hybrid and principled ex-ante framework for regulation of digital markets, the efficacy of the DCB will only be realised once implemented. That said, the DCB is a welcome step towards regulation of digital markets and signifies India's resolve to fuel economic growth and act as an impetus for the growing Indian digital economy.

Anshuman Sakle *is a partner – and* ***Siddharth Bagul*** *is a senior associate – at Khaitan & Co in Mumbai (https://www.khaitanco.com/).*

Endnotes

1. "Anti-Competitive Practices by Big Tech Companies", 53rd Report, Standing Committee on Finance, https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf.
2. Ibid.
3. Chapter IV: *A Fit-For-Purpose Competition Regime for the Indian Digital Economy*, CDCL Report.
4. Ibid.
5. Schedule I, DCB.
6. Section 3, DCB.
7. Section 3(2), DCB
8. The INR figures have been converted to: (i) US dollars, using the conversion rate of US$1 = 83.19 INR; and (ii) euros, using the conversion rate of €1 = 90.06 INR.
9. Section 3(3), DCB.
10. Sections 7 to 14, Chapter III, DCB.
11. Sections 25 and 26, DCB.