Response to the Public Consultation on the Draft Digital Competition Bill

IT for Change & Rishab Bailey

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IT for Change

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IT for Change[1] and Rishab Bailey[2]

Overall Bill Comment

The authors of this response are in agreement with the report of the Committee on Digital Competition Law (CDCL) which has recommended an *ex-ante* framework for regulating digital competition in the country. We reiterate that implementing *ex-ante* regulation in the digital economy is significant in light of:

- The fast-moving nature of digital markets and technological development and the time taken by an ex-post accountability process.
- The market dominance of Big Tech companies due to, amongst other reasons, first-mover advantage and data consolidation from their user bases.
    - In particular, there is a consistent and continuous move by Big Tech corporations to integrate themselves both horizontally and vertically in existing and emerging digital sectors in order to entrench themselves in the digital supply chain.
    - Digital markets are prone to tipping due to, amongst other reasons, network effects and economies of scale. This requires regulation from an early stage to ensure such consolidation can be prevented in emerging markets like AI systems.
    - *Ex-ante* regulation and the imposition of obligations promoting fairness, competitiveness, and a level playing field are essential to promote diversity across sectors of the digital ecosystem. This is particularly vital given the role played by digital intermediaries and gatekeepers in terms of access to media, education, financial services, and various other sectors critical to a developing economy. *Ex-ante* regulation can therefore support broader developmental and rights protection goals.

[1] Read more about IT for Change at https://itforchange.net/
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Key Recommendations:

- **In Chapter I: Preliminary**
    - Section 2: The definition of turnover, both global and India-focused, must be included in the definition section to ensure applicability to the entire law.
- **In Chapter II: Designation of a Systemically Significant Digital Enterprise**
    - Section 3: A differential approach to thresholds can ensure different Core Digital Services can be regulated appropriately.
    - Section 3(4)(2): The definition of global turnover must be housed under the definitions clause.
    - New Section 4(3A): The draft bill should require the Commission to provide a reasoned order regarding the designation of Systemically Significant Digital Enterprises (SSDEs) which includes a detailed, evidence-based assessment of the market entrenchment of the entity.
- **In Chapter III: Obligations on Systemically Significant Digital Enterprises (SSDEs) and Associate Digital Enterprises (ADEs)**
    - New Section 7A: The draft bill should provide an inclusive list of positive obligations for the SSDEs and not leave it wholly on regulations being framed by the Competition Commission of India.
- **In Chapter V: Powers of the Commission and Director General**
    - Section 21(3): There is a need for digital markets-specific experts to support the Commission in arriving at appropriate decision-making for the digital economy.
- **In Chapter VI: Penalties**
    - Section 28: There is no comprehensive tiered system of penalties for contravention by SSDEs.
    - New Section 28A: The draft bill should enable coordination between the Commission and other agencies.
    - Section 30: There is no rationale for having a limitation period for initiating an inquiry.
- **In Chapter VIII: Miscellaneous**
    - New Section 51A: The draft bill should impose transparency obligations on all entities discharging their roles under this law.

Overall Comments on Chapter I

There should be additional definitions of “turnover,” “global turnover,” and “turnover in India” in Section 2, so that it applies to the entire Act.

Section 2: The definition of turnover, both global and India-focused, must be included in the definition section to ensure applicability to the entire law.

Currently, the only definition of turnover in the draft bill is in Section 4, which focuses on designations. The definition provided under the section specifically mentions that turnover is to be calculated based on revenue derived “from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.” This expansive definition is only applicable to Section 3.

However, there are other provisions in the bill, for instance, on penalties (Section 28), which refer to turnover for calculating a penalty, which would benefit from a clear definition of “turnover” as well.

Thus, we suggest moving the definitions of “global turnover,” or “turnover in India” from Section 3(4)(1) and Section 3(4)(2) to the definitions clause (Section 2). This will ensure applicability through the entirety of the law, thereby ensuring both consistency and clarity. It will also ensure that SSDEs are punished in line with the intent of the law. It is worth noting that the Supreme Court, in *Excel Crop v. Competition Commission of India* (2017), ruled that in the absence of a specific provision clarifying whether the turnover relates to specific products or the entire turnover of a company, it would decide on penalties based on “relevant turnover” with respect to the specific product that is the subject of the violation. In the case of tech corporations, such an interpretation would significantly reduce the scope and deterrent effect of the penalties prescribed under the proposed law, thereby weakening and derogating from the intent of the law.

Overall Comments on Chapter II

The CDCL report delves into the different thresholds needed for different SSDEs offering different Core Digital Services. However, its final recommendation requires uniform designation but differentiated obligations. This has the effect of limiting the number of SSDEs and upending the goals of the law to regulate competition in the digital economy across digital markets.

Section 3: A differential approach to thresholds can ensure different Core Digital Services can be regulated appropriately.

The CDCL report, on page 104, considers the scope for a quantitative threshold for each Core Digital Service, given the difference in, for instance, social media usage versus ride-hailing services use. This is a logical approach to ensure that SSDEs in different verticals can be appropriately designated and regulated. However, in the final draft, the Committee suggests adopting a uniform quantitative and

qualitative designation criteria—which significantly limits the ambit of the law. The CDCL posits that this uniform designation criteria can help eliminate "operational difficulties" such as not having access to the right kind of data.

The chapter on designation can learn from the chapter on obligations—which creates scope for specific obligations based on Core Digital Services. This ensures that sectors like ride-hailing can still have SSDEs based on specific qualitative criteria like user base, and a large threshold will not exclude a company from being designated an SSDE that is a rightful market leader in its sector. As such, the concerns around not having access to the right kind of data to create a Code Digital Service-specific designation criteria can be mitigated through the Commission conducting relevant studies or inviting experts or calling for information as required in order to establish appropriate sectoral quantitative thresholds. In the alternative, the provision could be revised to allow the use of different quantitative criteria where such information is available to the Commission or after a study is carried out.

It is also imperative to note that while Section 3(4) empowers the Central Government to revise these thresholds every three years, it still is insufficient to address the concerns of ensuring monopolistic players or dominant players in specific sectors are brought within the fold of the SSDE obligation framework.

Section 3(4)(2): The definition of global turnover must be housed under the definitions clause.

Since the definition of turnover is relevant for the imposition of penalties as well, this provision should be deleted from here and included in the definitions clause. Refer to comments regarding Chapter I, Section 2.

New Section 4(3A): The draft bill should require the Commission to provide a reasoned order regarding the designation of SSDEs which includes a detailed, evidence-based assessment of the market entrenchment of the entity.

In order to enable a process of designation that is evidence-based and reasoned, the Commission must publish an impact assessment, which reviews the expected or foreseeable impact of a firm's market power entrenchment and digital activities. This impact assessment should invite public comments for a specified period and then be made available before the reasoned designation order under Section 4(4)(a).

A forward-looking assessment into whether an SSDE has "substantial and entrenched" market power is a proposal being considered in the draft UK Digital Markets, Competition and Consumers Bill, and can help build grounds for an evidence-based and reasoned order of designation. This also creates a documentary trail for any subsequent challenges to the order of designation, as also seen in the case of

the European Union's Digital Markets Act (DMA), which went through a round of litigation with Big Tech companies challenging their designation as gatekeepers.

Overall Comments on Chapter III

The Chapter on Obligations for SSDEs and ADEs should have, in addition to the obligations already prescribed in Chapter III, an inclusive list of additional positive obligations that may be prescribed through regulation to ensure adequate competition in the relevant sector. This list could include obligations such as mandatory interoperability, portability, data sharing/access to data, price setting, access to digital platforms, information sharing, explainability of recommendation systems, and algorithmic decision-making, amongst others.

Such a list, even if not exhaustive, would provide clarity for businesses and a direction for the regulation to be framed.

New Section 7A: The draft bill should provide an inclusive list of positive obligations for SSDEs and not leave it wholly on regulations being framed by the Competition Commission of India

Conduct requirements for SSDEs and ADEs are expected to be framed through regulations under Section 7(3) for specific Core Digital Services. Effectively, there are no clear directions for what conduct is restricted within the draft bill. This extends the timeline for compliance by SSDEs to the time until such regulations are framed, while also promoting uncertainty.

While regulations offer a certain level of flexibility to cater to a fast-moving environment, overreliance on unfettered regulation can leave the law without teeth. Given that the Chapter lays down certain obligations as well, particularly through Sections 11 (self-preferencing), 12 (data usage), 13 (restricting third-party applications), 14 (anti-steering), 15 (tying and bundling), there should also be positive obligations that are enumerated in the law (going beyond the generic requirements in Sections 9 and 10) as an inclusive and non-exhaustive list to provide greater clarity and certainty in the law.

In particular, comparing with the DMA, SSDEs (gatekeepers, in the DMA context) in the current draft law are not required to share information about advertisements placed on their platforms (Article 5(9)), or interoperability provisions for end users (Article 6(6)), or access to real-time aggregated or non-aggregated data to business users (Article 6(10)).

An inclusive list of this nature can draw from the lessons of Article 6 of the EU Digital Markets Act as well as the conduct requirements in the draft UK Digital Markets, Competition and Consumers Bill, as well as regulatory best practices. The inclusive list can have the following obligations:

a. Interoperability of hardware and software between platforms functioning atop SSDEs

Taking lessons from the DMA, interoperability provisions for end users (Article 6(6)) should be considered as an important positive obligation for SSDEs to promote a digital market that is competitive and not walled off by large and dominant platforms.

b. Data portability

Enabling portability of data generated by end users (as in the DMA Article 6(9)) and the tools to pursue such portability ensures that SSDEs do not restrict the movement of users across different services using their monopolistic hold over a core digital service.

c. Data sharing obligations

Access to real-time aggregated or non-aggregated data to business users (as envisaged under Article 6(10) of the DMA) can ensure that businesses running atop SSDEs can benefit from the data they generate and there is equitable distribution of such data power, instead of large tech corporations capturing and hoarding this data.

d. Data and algorithms of firms and algorithmic impact assessment

The DMA envisages that the Commission will call for algorithms and their explanations from firms using them. This also ensures that unfair and discriminatory algorithmic systems are not being utilized in labor platforms, and autonomous interventions are tracked for failing to submit things within time. Algorithmic assessment can also help with transparency of the AI systems.

e. Price setting and market capping

Considerations of price setting or market capping (as in the case of UPI) must be included in the main text to ensure that there is clarity with regard to the obligations.

f. Continued monitoring, including regular compliance reports from SSDEs

SSDEs should also include regular transparency and compliance reports, and a non-confidential summary of which will be made publicly available.

The SSDEs can also be obligated to share advertising and similar revenue-related information with other online advertising services or publishers. This information can be about aspects of either the share of revenue received through placing such ads, or performance measuring tools to conduct independent assessment of advertisements inventory, as well as information about search-related functionalities, etc.

Overall Comments on Chapter V

We recommend that the experts listed under Section 21(3) expressly recognize the need for digital economy experts, like researchers, academics, and practitioners to support the Commission in its regulation of the digital markets.

Section 21(3): There is a need for digital markets-specific experts to support the Commission in arriving at appropriate decision-making for the digital economy.

While the current draft bill envisages the need for support from experts under Section 21(3), arguably in an expansive provision, it is imperative for the purposes of this bill that it recognizes expressly in the text the need for digital economy experts, in the nature of researchers, academics, and practitioners engaged in the study of the digital economy. This is also to enable a deeper understanding of the evolving nature of the digital market, one that is driven by data, and also increasingly, by AI-related systems. The shift in approach to and emphasis on the digital economy can be seen in the US Federal Trade Commission, which through the leadership of Lina Khan, an expert on the Big Tech-led digital economy, has pushed for greater regulation of these large corporations. It is also worth noting that the Commission, under Section 49 of the Competition Act 2002, has set up Guidelines empaneling institutions to support initial competition assessment. Such a provision should also be included in the bill, and in fact, be part of the main law to have a statutory advisory body to the Commission in respect of digital competition matters. Similar expert bodies have been created to support, for instance, the EU's Observatory on the Online Platform Economy which supports the European Commission in policymaking.

Overall Comments on Chapter VI

We recommend modifications to this chapter by including a tiered system of penalties, introducing a new section that mandates coordination between different agencies, and deleting the provision imposing a limitation on initiating inquiries.

Section 28: There is no comprehensive tiered system of penalties for contravention by SSDEs

The DMA envisages a tiered system of penalties, which covers repeated contraventions by SSDEs. Under Article 30(2), the DMA requires a fine of 20% of the global turnover of the gatekeeper in case of a repeated offense in the preceding eight years. There is no such provision in the Indian bill, which effectively reduces the compliance burden on these large transnational corporations.

New Section 28A: Coordination with other agencies

The bill should include a provision for the Commission to coordinate with other agencies—especially the Data Protection Board constituted under the Digital Personal Data Protection Act. In particular,

such coordination should include a non-exhaustive list of matters and agencies as well as requirements for memorandums of understanding outlining responsibilities. This will ensure there is clarity with regard to the powers and roles of agencies with similar or concurrent jurisdiction—in particular, overlaps between personal data protection and SSDEs (which are also likely to be data fiduciaries) are expected. It also ensures that data protection norms that the DPB oversees are upheld when imposing obligations on data sharing and interoperability within the Digital Competition laws.

Section 30: There is no rationale for having a limitation period for initiating an inquiry.

The restriction on the Commission to entertain information or references for contraventions by SSDEs under Section 16 does not have any rationale in the draft. The Competition Act 2002 also does not have similar limitations on initiating inquiries. We therefore suggest deleting the limitation period prescribed under the section.

The Commission, in fact, has noted in the case of *Neha Gupta v. Tata Motors* (4 May 2021 order of the CCI), that the Competition Act does not recognize a scheme for limitation and the "dynamic nature of markets makes application of plea of limitation to anti-trust inquiries as wholly irrelevant and ill-suited." In fact, this goes against the nature of highly dynamic digital markets and restricts initiation of cases through a limitations clause.

Overall Comments on Chapter VIII

We recommend introducing a new provision requiring transparency obligations in the discharge of all functions of the law, including the Commission's power to frame guidelines (which is currently under Section 49(5)), designate SSDEs, and the government's power to exempt enterprises and frame rules.

New Section 51A: The draft bill should impose transparency obligations on all entities discharging their roles under this law.

We recommend that there be an overarching transparency obligation for the entities discharging their functions under this law. This would include having reasoned orders published and open for public comments—both for the Commission, for instance, over questions of designation of SSDEs, revocation of such designation, obligations imposed on certain SSDEs based on Core Digital Services, as well as the Central Government over exempting enterprises from designation, framing rules, and amending Schedules in this law. This follows the principle of regulatory governance which requires decisions impacting the markets or imposing costs to provide information about the problem sought to be addressed, the cost incurred because of the regulation, the impact and effect of the intervention, and the benefits expected to be derived from it.