To

The Secretary
Ministry of Corporate Affairs, GOI
A Wing, Shastri Bhawan
Rajendra Prasad Road
New Delhi - 110001

30th May, 2024

Subject: Stakeholder Consultation on the Draft Digital Competition Bill, 2024 conducted by CCLE

Dear Sir/ Ma'am,

This is to inform that we had organised a stakeholder consultation on the Draft Digital Competition Bill, 2024 as proposed by CDCL in its recent report, on 24th May 2024 (Friday).

Some of the panelists at the conference included:

1. **Mr. Panduranga Acharya**, General Counsel, Zepto, Bengaluru
2. **Mr. Lazar Radic**, Senior Scholar (Competition Policy), International Centre for Law and Economics, Portland
3. **Ms. Lilla Nóra Kiss**, Senior Policy Analyst, Information Technology Innovation Foundation, Washington DC
4. **Mr. Ram Kumar Poornachandran**, Senior Partner, AZB & Partners, Delhi-NCR
5. **Mr. Vineet John Samuel**, Doctoral Fellow, Hertie School, Berlin, Germany
6. **Mr. Sumit Jain** (Moderator), Founding Director, CCLE

Please find attached the memorandum of the consultation along with the minutes which may also be considered as public comments submitted by us on the Draft Bill.

We would be happy to discuss the Bill in details and will be looking forward to meeting you in-person.

Best Regards,
Sumit Jain
Director
Centre for Competition Law and Economics
www.icle.in
Contact No. +91 93116 83349; +91 81072 87270
Email ID: centrecomplaw@gmail.com; contact@icle.in

Memorandum of the conference conducted by CCLE on the 'Draft Digital Competition Bil, 2024'

1. The panellists broadly agreed that the current structure of the Indian digital competition law needs reconsideration both in form and shape. Some of the broad concerns raised include a non-focus on the reality of the Indian market and a lack of empirical evidence in support of the new regulation.
2. The panellists broadly agreed that the Indian government should focus on enhancing the current regulatory capacity in terms of the manpower available and the technical expertise.
3. The panellists broadly agreed that proper differentiation between various platform services should be there in the DCB. This would allow room for a more customised approach in line with the economic analysis.
4. The panellists also agreed that there is a requirement to increase the quantitative thresholds as mentioned in the DCB. The current threshold might have unintended consequences as it might cover the Indian tech companies which are serving the larger Indian populace.
5. The panellists agreed that proposing a new law in complementarity with the existing framework is something which is unknown. There is a requirement to first test the proposed concept and then only implement it.
6. The panellists also agreed that the UK experience might be of specific relevance. In the UK, the burden of proof to show economic efficiency with a contended practice is still on the Big Tech company, however, this burden is less onerous. This is particularly true when the Indian startup ecosystem is currently booming and there may be potential to unlock.
7. There was a view expressed that such an ex-ante approach might be harmful to the Indian startup ecosystem. A lot of the companies are currently at the experimenting stage where putting restrictions on practices such as bundling and tying might threaten their very existence.
8. Another view was that since a global consensus has already been taking place on regulating the Big Tech, India needs to follow some of the developments in the EU, the UK and the US.
9. It was also highlighted that the contemporary antitrust approach revolves around effects-based analysis and competition laws have to be coherent on those lines.
10. There is a growing understanding of the consumer welfare standard across the globe. Increasingly, regulators are relying on non-price factors such as innovation and privacy while passing orders.

Minutes of the conference

Moderator: What sets digital markets apart from traditional brick-and-mortar markets - both from an innovation and subsequent regulation standpoint?

Panellist 1: Some of the key features of digital markets include access to a wider market and audience, cost reduction in setting up businesses and fulfilling orders, greater convenience to the customers including doorstep delivery, range of product choices available and ultimately prices. Some other factors include a personalised shopping experience, speedy delivery and convenience of making digital payments.

Panellist 2: I would like to suggest that there is nothing such as digital markets. As per the definition of digital markets under the law, the products, goods and services which are clubbed together are actually very heterogeneous. If the criteria to define digital markets is around the usage of data, then many sectors such as banking and brick-and-mortar stores use data. In fact, it would be difficult to imagine any industry which doesn't use data. My reading of the current draft law and the report accompanying it is that it will take India back to the pre-Raghavan committee era, i.e. the MRTP regime. Just like in the MRTP, the enterprises would be expected to take permission from the government for every activity beyond a certain threshold in the DCB. Raghavan committee report was progressive as it emphasised on the economic approach to regulation and took India closer to developed jurisdictions such as the US and the EU. What remains interesting is that the CDCL report uses fairness and contestability as a yardstick to make certain recommendations This, however, isn't the case in the Raghavan committee report which said that fairness is difficult to quantify.

Panellist 3: I think we are walking towards a more prescriptive MRTP regime. The draft digital competition law problematizes certain services. It is important that we first identify the gap which the new law seeks to fill. The draft law and the subsequent report are silent on the same. The CDCL report has not only used interventions made by the CCI in the past as a criteria but also assumed that the interventions have been ineffective. This assumption may be unwarranted. The quantitative threshold as set in the draft law is also very low as per the Indian standard. The threshold has to be seen in the context where a lot of small startups are catering to the Indian population. The Internet revolution is just 7-8 years old in India and there is a very small proportion of the total population which have benefited from this revolution. This new law might unwarrantedly apply to these small startups. This is likely to stifle innovation and investments in India. I would suggest that we should strengthen the CCI and market-test the law before introducing it.

Panellist 4: I agree with the differences made earlier between digital markets and brick-and-mortar economy. There is substantial research demonstrating network effects and the two-sided nature of the digital economy. There is some merit in applying the current regulatory framework as intervention has to be on the basis of market failure. The CLRC report in India said that existing law is sufficient. Also, market failure doesn't seem to exist in India in the case of digital markets. India has startup figures equivalent to the US and half of them are unicorns which suggests that it is rather prospering. While the current report correctly mentions that the ex-post framework takes time, there is merit in exploring alternative solutions. That hasn't been done recently. The way forward is to build capacity in the enforcement regime. It is yet to be settled whether *ex-ante* regulation is going to improve the status quo, or whether the reduction in the administrative cost of enforcing the remedy will outweigh the error costs that we are going to commit in the new law. What comes out is that ex ante regulation in emerging markets is going to have unintended consequences.

Panellist 5: The core differences between digital markets and brick and mortar economy include network effects, reduced marginal costs and large investment size which tends to the market tipping in the favour of few players. It is true that the draft law has to be tested. The complementarity nature of the new law with the existing framework is something which is unknown. There might be a requirement to increase the quantitative thresholds and the interpretation of qualitative thresholds would also be of interest. Based on the developments worldwide, it is suggested that the definition of consumer welfare is under expansion.

—---

Moderator: How far does the current draft go to achieve the stated goals? How is the Indian technology sector perceiving this law?

Panellist 1: There are different viewpoints on this. We have a few startups which have suffered due to the Big Tech while there are a few companies which have been working along the Big Tech. The larger perception is that this law is about ex-ante vs. ex post. It is suggested that there is also lack of patience on the part of Indian tech companies who have suffered due to the actions of the Big Tech and ultimately approached the CCI. Since India takes a lot of inspiration from the UK, the current law might be just an inspiration from the UK.

—---

Moderator: Given that the Parliamentary intent is abundantly clear on the enactment of the DCB, what would be your suggestions on the current draft? There is also a question from the audience on whether the provisions of the DCB would be applicable just to Big Tech, or they will extend to banking and insurance companies which are using data as part of their business model.

Panellist 2: My biggest criticism against this law is that there is no requirement to show any kind of harm, let alone consumer harm. The contemporary approach in antitrust is to look into the economic effects of the conduct. It sometimes might even happen that certain restrictions such as resale price maintenance might even be pro-competitive. The DMA pronounces certain conduct as bad without any analysis or assessment which might be unwarranted. India can possibly learn from the UK where even though the burden of proof is still on the Big Tech, the burden is still less onerous. As far as exploring the option of amending the current law against enacting new legislation is concerned, it might result in twisted jurisprudence.

—--

Moderator: Would amending the current law be a better option than introducing a new law? What are your thoughts on different thresholds, i.e. 10% of the population in the EU against one crore users in India?

Panellist 3: This may be less relevant as the intent of the regulation is important. Effectiveness of the current regulatory framework has to be tested. The current system has come out robust. The larger guidance should be on the principle of being less intrusive and most facilitative in approach. It is important to understand that businesses are also experimenting. Most of the startups are running on an advertisement model because the subscription side hardly generates any revenue. The draft law would simply curtail their autonomy. Take, for instance, bundling and tying. It says you can't club services. This would simply mean that a small player which might have grown to a certain size cannot enter a new market. This might threaten the very existence of the start up as it is mostly 'perform or perish' for them. Though digital markets look the same, there is heterogeneity within. At maximum, just fix what's broken on the principle of customization and soft touch approach.

Panellist 2: Another limitation with bundling and tying is that sometimes it might curtail competition within Big Tech.

—--

Moderator: Does India have the regulatory capacity to implement such a law, specifically in relation to the current manpower and budgetary allocation to the CCI?

Panellist 3: Some work is required to be done there. Though the CCI has been doing a phenomenal job for the last 15 years, it is significantly overburdened. More professionals, data scientists and technocrats should be added to the CCI. It might be unwarranted for the CCI to take additional burden to impart another standalone law.

—--

Moderator: What could India learn from the EU and the US experience?

Panellist 4: It is important to look into the objectives of the DCB. It mentions transparency, fairness and non-discrimination as the core guiding principles. These concepts are abstract and objectivity might be taken for a toss. It is clear that the DMA is an inspiration for Indian law. The positive side is that there is one clear law for the companies to comply with rather than multiple laws thereby ensuring certainty. The downside is, however, that there are uniform rules for diverse markets. The UK approach is helpful here as it has introduced flexibility in enforcement. The question of arbitrariness though remains. There are no easy answers. Different jurisdictions have taken different approaches. What India can learn is that its markets are emerging and thus, the 'wait and watch' approach is better. The DMA is also at the experimentation stage and there is a high level of unpredictability. It seems that the current actions of the Indian government are guided by regulatory enthusiasm and not regulatory wisdom.

—--

Moderator: What is the larger public policy of the government which guides this legislation?

Panellist 5: Indian government is replicating what is there in the EU, the UK and the US. There is some sort of global consensus among regulators and the public on the skepticism around large platforms. The draft legislation is already here based on the 'new Brandeis movement'. It might even be called reactionary legislation. What, however, remains the underline is that there is public support for such a law and that is why

it is there. At this point, the government should implement the law responsibly and possibly revise the thresholds.

Concluding remarks

Panellist 1: The larger perception around this law is the discourse around 'ex-ante vs. ex-post' framework. The CLRC report said that the current law is sufficient and we can stick to it. There is also an opportunity for the government and the CCI to promote the idea of self-regulation. Enacting the DCB would be going back to the MRTP era.

Panellist 2: There is merit in sticking to the current law and effects-based analysis. The only jurisdiction which has enacted an ex-ante regulatory framework is the EU which might come with its own limitations. It is important that the Indian policy framework is well suited to its robust startup culture. India is the unicorn capital of the world. India should take a step back and consider the error costs and enforcement costs of the new law. Strengthening the current enforcement regime might be a good start to begin with.

Panellist 3: It is important that the current regulatory mechanism is strengthened. Some of the suggestions would be to add more manpower, conduct faster investigations and pass clearer orders. An ex-ante framework should properly differentiate between various platform services instead of painting them with the same brush if at all it is envisaged.

Panellist 4: The Indian government should look for alternative solutions. The delay in investigation and passing orders is an administrative issue. The government could possibly think of adding more resources to the current enforcement process. There is no harm in learning from the DMA but given the nascent stage of the law, there is merit in adopting a 'wait and watch' approach. The regulation has to be ultimately on the basis of market failure. If at all India decides to stick with the new proposed law, the thresholds should be revised.

Panellist 5: The government should add more capacity to the CCI, both in terms of manpower and the skillset. The new law should certainly differentiate between various platform services to cater to the nuance. Last but not the least, the understanding of 'consumer welfare' and 'consumer harm' has to be expanded to not just include the costs but the impact of innovation and privacy as well.