EVENT REPORT

Panel Discussion on Draft Digital Competition Bill

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Introduction

The Draft Digital Competition Bill, 2024 ("Bill"), has been released recently by the Central Government, for public consultations initiated by the Ministry of Corporate Affairs. The Bill comes against the backdrop of a long debate on the pros and cons of having an *ex-ante* regulation for big tech and its effect on competition and innovation. In leading the discussion on Competition in the digital markets, the Law and Technology Society organized a panel discussion to address the report and the Bill's shortcomings and suggest a way forward. The panel comprised the finest minds in the competition and technology law sector, having the following members:

1. **Ms. Deeksha Manchanda**, Partner at Chandhiok & Mahajan
2. **Dr. Tilottama Raychaudhuri**, Associate Professor, NUJS Kolkata
3. **Mr. Kashish Makkar**

Mr. Kazim Rizvi, Founding Director, *The Dialogue*, moderated the panel and discussed broad themes including the designation of Core Digital Services, obligations of Systemically Significant Digital Enterprises, powers of Central Government and nature of *ex-ante* regulation.

L-tech would like to thank Divyansh Bhansali and Shivam Gupta for creating this report.

Panel Discussion on Report of the Committee on Digital Competition Law and Draft Digital Competition Bill

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Panel Members

1. **Ms. Deeksha Manchanda,** Partner at Chandhiok & Mahajan
2. **Dr. Tilottama Raychaudhuri,** Associate Professor at NUJS Kolkata
3. **Mr. Kashish Makkar**[1]

Moderator: Mr. Kazim Rizvi, Founding Director of *The Dialogue*

Executive Summary

The panel discussion centred on the Report by the Committee on Digital Competition Law and the Draft Digital Competition Bill, exploring four key themes: Core Digital Services, obligations of Systemically Significant Digital Enterprises, powers of the Central Government, and the nature of *ex-ante* regulations.

Firstly, discussing about the **Core Digital Services**, the panellists expressed concerns about the lack of empirical evidence supporting the selection of nine CDS, noting heavy influence from European legislation. They highlighted the need for a theoretical framework for designating CDS which take into account the criticality of infrastructure and the harm caused by anti-competitive conduct and remedial measures, etc. The discussion also touched upon the exclusion of merger controls, with panellists suggesting that the Committee on Digital Competition Law should have taken a more holistic approach and included it.

Secondly, on the topic of '**Obligations of Systemically Significant Digital Enterprises**', the panel discussed the six principal-based obligations for SSDEs. They cautioned against creating broad presumptions of anti-competitive practices at this stage. They also questioned the necessity of introducing the new law when it's the framework mirrors the current Competition Act. They also highlighted the challenge of defining and enforcing obligations in the digital space and expressed concerns regarding CCI's capacity to handle additional responsibilities under the new framework.

Thirdly, moving towards '**the powers of the Central Government',** the panelists generally viewed the provisions granting powers to the Central Government as standard and present in many

[1] His views at the panel, captured in this report, were in his personal capacity and do not reflect the views of the organization(s) he is affiliated with.

other laws. They noted that these powers have been exercised sparingly in the past. However, they expressed concerns about the less-defined nature of the power of exemption.

Fourthly, delving into '**Nature of *Ex-Ante* Regulations**', the panel questioned whether the bill genuinely provides for an *ex-ante* approach. It was suggested that the Draft Bill primarily eliminates the need to define relevant markets and inverts the burden of proof. The discussion revealed scepticism about whether the proposed framework truly constitutes *ex-ante* regulation which in practice seems *ex-post* only.

Panellists emphasized the importance of tailoring the approach to India's unique market conditions and suggested that some objectives could potentially be achieved by amending the existing Competition Act. They also stressed the need for a longer, more comprehensive consultation process to ensure all stakeholders' perspectives are considered.

In conclusion, while acknowledging the bill as a starting point, the panel highlighted several areas requiring further refinement and consideration to create an effective and balanced digital competition framework for India. The discussion underscored the complexity of regulating the digital market and the need for a more critical and nuanced approach that encourages innovation while ensuring fair competition.

Panel Discussion

The report of the Committee on Digital Competition Law (the Report) was recently published which at length discusses the Competition Law problems surrounding the digital markets. It also includes a Draft Digital Competition Bill which seeks to address the problems as highlighted by the Report.

In this context, **Mr. Kazim Rizvi** opened the panel discussion on the Report by outlining the roadmap of the discussion, dividing it into four themes: 1.) Examining the nine Core Digital Services (CDS) mentioned in the Report, 2.) Discussing the obligations of Systemically Significant Digital Enterprises (SSDEs) to combat anti-competitive practices listed in the Report, 3.) Exploring the powers of the Central Government and their scope to give directions and grant exemptions. 4.) Delving into issues surrounding *ex-ante* regulations.

Theme 1: Core Digital Services (CDS)

Mr. Rizvi began by highlighting the nine CDS identified by the Committee on Digital Competition Law (CDCL). He pointed that if any enterprise plays an important role in providing the CDS identified in the Report and qualifies the designation criteria, it can be classified as an SSDE. He asked the panel whether there was sufficient evidence for the selection of these CDS, keeping in mind the needs of the Indian market.

Ms. Deeksha Manchanda noted that CDS form the foundation of any *ex-ante* law and define its applicability. She emphasized that CDS are crucial for creating *ex-ante* law as they help identify the scope of the problem. The definition of CDS also determines the effectiveness of the law. Referring to work in other jurisdictions, she pointed out that identifying CDS means identifying critical elements of the digital ecosystem that could potentially be subject to anti-competitive conduct, resulting in immense negative effects on the market that cannot be rectified after the fact, according to regulators. This, in her opinion, is the broad theoretical construct within which CDS should be identified.

Commenting on the Report, she highlighted that it is heavily influenced by developments in other jurisdictions, especially the European Union (EU), and the structure of the law is largely based on European law. While the EU has identified ten services, the Report has listed nine. However, she questioned how the CDCL defined these services, as there is no discussion in the Report about the reasons for selecting the CDS. There are scattered discussions regarding platforms the CDCL has looked into, such as Amazon, Zomato, and WhatsApp, from which one may trace the committee's thinking about areas with a higher degree of anti-competitiveness, which are then included in the list of CDS. However, there is a lack of detailed evidence for specifically choosing the nine CDS.

Mr. Rizvi added that, in his opinion, there is little evidence to suggest anti-competitive conduct when it comes to some of the identified CDS with respect to the Indian market, and there is a lack of market studies by the CCI in that regard. He stated that in cases where there have been ongoing or concluded investigations, it might be sensible to add those services as

CDS. However, he questioned the addition of services as CDS where there is no history of investigations or market studies by the CCI.

Mr. Kashish Makkar agreed that there is not much discussion in the Report regarding the identification of CDS and the sources of their definitions. However, he opined that the criticism may be toned down, as one needs to start somewhere, and building upon existing frameworks is a good starting point. Given the nature of the technology world and its rapid advancement, most examples are widely applicable, and using them is not necessarily problematic. While he pointed that he is highly critical of India blindly following other jurisdictions in making its laws, such as the Competition Act, 2002, which was enacted because other jurisdictions were implementing similar legislations, he thinks that choosing these CDS from other frameworks is still helpful as they provide a starting point from which to build further.

Dr. Tilottama Raychaudhuri opened by stating that there is not enough analysis for designating certain services as CDS. However, she mentioned that other legislations were referred to and reviewed by the CDCL, and the services identified are accepted as core services in other jurisdictions. In her opinion, these can be a good starting point, although she pointed that a little more discussion around their selection would have been more appreciable. However, she also mentioned that we need to watch how the law will work out. While there seems consensus on the point that these practices are anti-competitive in digital market, there is a debate about whether these should be regulated by *ex-ante* or *ex-post* law.

Mr. Rizvi made a last comment on the topic by mentioning that we should think whether, the market practices in India are similar to Europe from there we are borrowing this. He proceeded to the next question and asked what process could have been followed in identifying CDS.

Ms. Manchanda pointed out that *firstly* we have to consider how critical the infrastructure that CDS provides. *Secondly*, with the *ex-ante* regulations we are trying to address the problems in which remediation is not possible through market forces once the anti-competitive conduct has taken place. So, focus should be on the eco-systems where remedying through regulatory intervention is not possible if anti-competitive conduct has taken place. According to her, the theoretical framework has to be critical of the eco-system, and the ability to incorporate remedy for the harm once it is done, and *third*ly, this all should be supported by empirical market studies. On this point, she emphasized that one has to go out in the field and understand the criticality of the system by referring to the example of video-sharing platform market which is highly disruptive.

She also mentioned that she agreed with the other panelists that what is happening in other jurisdictions has to be starting point, but that work should be considered in the context of each market. She highlighted the possibility that we may come to the conclusion that all the markets are very similar and global in nature, but that empirical exercise needs to be done to remove any possibility of error.

On **Ms. Manchanda's** assertions, **Dr. Raychaudhuri** added that there is also lack of conclusive case laws on this point in India. The CCI in most cases has directed preliminary investigations and at the same time we also do not have enough market studies. So, we have

no concrete analysis that we can rely on, so far. She also mentioned that the Report is a positive step in the sense it has taken into account views of a number of stakeholders including startups having India presence, who have expressed concerns about *ex-ante* regulation as the same may have a chilling effect on the start-up industry.

Mr. Rizvi then steered the discussion towards the exclusion of merger controls from the list.

Mr. Makkar, commenting, pointed out that the Parliamentary Standing Committee's report on "Anti-Competitive Practices by Big Tech Companies" (the Parliamentary Committee Report) identified mergers and acquisitions by big companies as one of the anti-competitive practices in the technology-space which make them too large to be managed. He focused on "killer acquisitions" which are generally not caught by the competition law because of *de minimis* threshold as the targets are very small companies which are exempted. The Report reasoned that this anti-competitive practice has been taken care of by the recently introduced deal-value thresholds in Competition Law, and that is why the it is no being considered.

However, **Mr. Makkar** opined that though deal-value thresholds do try to capture the scenarios where small companies are acquired, but the CDCL should have taken a more holistic approach and should have considered merger-controls. He pointed that certain SSDEs are designated under the draft legislations based on annual turn-over, global presence and number of users in India. But it needs to be understood that they function by acquiring small companies in very nascent stage with their technology and then become indefeasible in that sphere. With the example of Alphabet acquiring Indian startup SimSim in 2021, he pointed out that deal-value thresholds would not have caught this as the acquisition was only for some Rs. 500 crores. This is one of the primary modes with which the large technology companies stay-relevant and expand, but this has not been considered in the Report and the deal-value thresholds are also not capturing it. The report could have done much more and included it in the realm on inquiry as already so many resources are spent on regulating SSDEs.

Dr. Raychaudhuri agreed with Mr. Makkar that a comprehensive study should have been done and merger-controls should have been included.

However, **Ms. Manchanda** mentioned that the CDCL could have changed the concept and definition of "Combinations" and required all transactions done by the players in this sector needs to be notified to the regulator. Their choice not to do so may well be due to the nature of role a competition regulator plays in cases of mergers. She pointed out that while reviewing mergers, a regulator is examining the likelihood of impact on competition and gazing into a crystal ball. Assessment of whether such mergers as are "killer acquisitions" or anti-competitive is extremely complicated. Especially, with the acquisition of smaller companies, she pointed out that at times these startups want to be acquired and release their capital. Then it is very difficult to define what actually, is a "killer acquisition" as a very small gamut of things would come under this definition particularly when we put into perspective the rights of the shareholders and entrepreneurs to release the capital vis-à-vis the regulatory power.

Responding to this **Mr. Makkar** agreed that such acquisitions are not necessarily anti-

competitive and added that, with the SimSim example, in long run we never know whether SimSim would have been a success and a competitor to Youtube shorts. But he opined that the Report should have at least considered this issue and presented its finding on this. He again reiterated that the infrastructure is being setup to monitor the SSDEs, so this aspect could also have been monitored by asking them to notify any merger/acquisition they do.

Theme 2: Obligations of Systemically Significant Digital Enterprises (SSDEs)

Mr. Rizvi introduced the second theme by outlining the six principal-based obligations for SSDEs mentioned in the Report: Tying and bundling, Fair and transparent dealing, Self-preferencing, Data usage, Restricting third-party apps, and Anti-steering. He explained that SSDEs must report and comply with these obligations by developing compliance mechanisms and submitting reports to the (CCI) about the steps taken to meet these obligations. He asked the panel to compare these obligations with the ten anti-competitive practices (ACPs) identified in the Parliamentary Committee Report and share how these obligations might impact the digital economy at large.

Dr. Raychaudhuri pointed out that designating anything as an anti-competitive practice or an obligation in the legislation creates a presumption that such practice must not be carried out. This may differ from models like the UK, where the Digital Markets Unit can frame tailored rules for each entity and it is up to the digital market regulator to decide whether there is a violation. Though the CCI has been given wide mandate in terms of designation of SSDEs, and the framing of rules pertaining to their obligations, the terms are too general and we do not have any clarity as to how this will work in practice. Further, there is a debate about whether one should have a broad presumption like the one created by the Draft Bill at all, at this stage, in India. She highlighted various difficulties with the present approach.

Firstly, traditional antitrust law primarily focuses on consumer gain and considers price injuries more seriously than non-price injuries. In the digital space, there are several non-price injuries that can later translate into price injuries, such as data-related issues. Due to the difficulty in evaluating harm in such cases, the CCI has traditionally been more cautious while dealing with these. However, in an *ex-ante* law, should practices like tying and bundling - where someone gets a complementary product – be subject to a presumption of anti-competitiveness? There can be aspects of such practices which are pro-competitive, and which may need to be analysed more carefully in digital markets before creating an obligation.

Secondly, she emphasized the need to be cautious in avoiding false positives, as antitrust law has traditionally been wary of this. A false positive is when a firm is found guilty of anticompetitive practices, but the practice may not reduce consumer welfare. If *ex-ante* regulations lead to false positives in the current situation, it could be even more harmful. She suggested that at the current stage, such practices should not be automatic obligations until the pros and cons are properly weighed. Presently the obligation-sets are very broad, and the CCI has been left to spell out the specific criteria. But till that is done, she believes that, the net casted by these obligations is very wide. Further, specific practices harmful in the context of digital markets, like the concept of dark patterns within advertising has not been addressed

in the Report, despite being discussed in various jurisdictions.

Ms. Manchanda suggested that bespoke obligations (six defined obligations) would be more ideal from the perspective of attuning to each company's business model, understanding the technical infrastructure, and designing something that does not disrupt the ecosystem in a way that renders it valueless to people. However, she pointed out that bespoke obligations also imply more subjectivity with the regulator, raising concerns about excessive delegation in an *ex-ante* law. Bespoke obligations also raise questions on the need for this law altogether, as the determination process would be identical to the current process under the Competition Act.

She believes that the way the Draft Bill is currently structured, it will end up with something close to current process under the Competition Act. She referred to Section 7(5) of the Draft Bill, which lists elements the CCI should consider while designing the obligations for each SSDE, including subjective factors like economic viability of operations, prevention of unlawful infringement of pre-existing intellectual property rights, prevention of fraud, and cybersecurity among others. These factors are typically used as defenses by companies accused of abusing the statute. So, the process of the current Competition Act has been put into a separate statute, and the same thing will be done under this new statute.

She highlighted that the more important point to consider is whether there is the need for *ex-ante* regulation for anti-competitive practices, as they are already regulated under the current Competition Act. If the framework in this new statute mirrors what is done under the current law, she wonders about the necessity of introducing it in the first place. She also raised some surrounding questions such as are these six obligations enough, and what about other anti-competitive practices, and what is the rationale of not including and putting obligations to control them. She pointed out that there needs to be informed discussion before implementing such measures.

Mr. Rizvi, in response to this and to steer the discussion raised the question regarding the sufficiency of the current Competition Act itself.

Ms. Manchanda responded by acknowledging the fact that the current law is not sufficient. She mentions that the report itself highlights the long duration of the investigations as one of the limitations of the Competition Act. A complaint is filed, CCI examines the matter and see whether there is any *prima facia* violation, and then sends the matter for investigations. There may be various writs filed during this process by the parties for violation of their rights which causes significant delays. Then the matter comes back to CCI and it passes final orders which may be further appealed. She mentioned that this prolongs the duration of investigations under the current Act and further highlighted the three-step process involved in the investigations: defining the relevant market, assessing dominance, and identifying abusive behavior.

However, she asserted that the Draft Bill does not solve this issue at all. She highlighted that in the Draft Bill, the procedure prescribed involves a separate stage for dominance assessment, where based on the submissions of the party concerned their dominance will be established. Once dominance is established, conduct requirements for the party need to be set out under section 7.3. Then the concerned entity has to comply with the obligations and file compliance

report. Based on this compliance report an inquiry will be conducted to establish the abuse and **Ms. Manchanda** pointed that this stage is seems very similar to the investigations stage. She expressed skepticism about whether these changes would expedite proceedings, as the same steps previously conducted post-investigation are now distributed across multiple stages.

Moreover, **Ms. Manchanda** pointed out that opportunities for judicial intervention are still many, as parties can still challenge designations and decisions at various stages in writs, leading to potential delays. She questioned the efficacy of the proposed Act in addressing the concerns raised in the report, emphasizing the need for clarity on how the proposed changes would improve the regulatory framework and reduce delays.

Mr. Rizvi then touched upon the point of monitoring of the entities in their compliance with the regulations asked for the views of the panelists.

Mr. Makkar reflected on two key aspects of the proposed bill, acknowledging both its strengths and weaknesses. He commended the bill for not blindly adopting enforcement and monitoring mechanisms from other jurisdictions. Instead, it allows for flexibility in adapting obligations to suit different industries, reflecting an understanding of Indian circumstances and industry needs. This approach, he argued, strikes a balance between standardized legislation and bespoke industry requirements, potentially reducing litigation.

However, he raised concerns about the heavy reliance on these obligations and the lack of clarity on how they will be monitored and enforced. He mentioned that the bill still does not go far enough, and in fact, enforcement of the law is going to be *ex-post* only, requiring the regulator to conduct investigations and establishing compliance or non-compliance. He critiqued the Draft Bill for essentially creating a litigation process rather than a true *ex-ante* regulation.

He drew parallels with the challenges faced in merger control, where the CCI is hesitant to recommend behavioral remedies due to difficulties in monitoring the compliance. He warned that the Draft Bill could create a significant burden for both the CCI and businesses, with consultants playing a predominant role in interpreting and ensuring compliance with the obligations. But he was unsure about how an effective *ex-ante* monitoring process would look without such prescribed obligations. He speculated whether a collaborative approach involving industry stakeholders and regulators might be more effective in tailoring regulatory measures. This, he suggested, could lead to more practical and sustainable solutions for monitoring compliance in the digital market.

Mr. Rizvi came to **Dr. Raychaudhuri** and asked her response to **Mr. Makkar's** observations and also about the experience in the Europe about such regulations.

Dr. Raychaudhuri agreed that a significant burden has been placed on the CCI, and there are already concerns about its capacity constraints. The monitoring of compliance with the obligations is unclear, and self-reporting and review alone may not be sufficient. She acknowledged that it is a starting point, but much of it remains wide and unclear.

Regarding the European experience with the Digital Markets Act (DMA), she stated that it is

too soon to assess its effectiveness, as it is still very new. While some jurisdictions, like Germany, are working proactively, there is no general consensus on the DMA's impact in Europe. She suggested that a few years would be needed to observe how the monitoring plays out before drawing conclusions.

Ms. Manchanda added that even in Europe, where companies are less litigious compared to India, challenges against designations have been made, such as TikTok contesting its designation. This indicates that the designation mechanism itself will be a hurdle for the CCI, and it will not be a smooth process. She also mentioned that the obligations in the draft bill are similarly worded to that in DMA, and open discussions in Europe have revealed a lack of clarity on what is required under some of those requirements. She also emphasized that *ex-ante* regulation is not self- executing by referring to the example of recent investigations against the four gatekeepers.

According to her, the European experience has shown that *ex-ante* has its limitations. It also evident that collaborative process between the industry and the regulator would be necessary to determine the obligations. She stressed that the CCI cannot work in isolation and will need to engage in constructive and trustworthy discussions with the industry for the law to be effective. Thus, she suggested that the Indian regulatory framework could learn from the European experience, particularly regarding the collaborative nature of the process and the challenges associated with defining and enforcing obligations.

Mr. Makkar emphasized the need to reflect on past experiences within the Indian regulatory landscape, particularly in the context of merger control, which shares similarities with *ex-ante* regulation. He highlighted the CCI's historical reluctance to recommend behavioral remedies due to monitoring challenges should have guided the development of a true *ex-ante* framework.

Furthermore, addressing **Ms. Manchanda's** point regarding the notorious nature of the writ remedy in India, he noted that challenges extend beyond designations to encompass issues like the scope of Requests for Information (RFIs). He explained that RFIs are initial requests made by the commission to the parties under investigation to gather information about their activities, but even the scope of these requests can be subject to challenge in writs, causing delays of four to five years and disrupting investigations. In light of these challenges, he expressed uncertainty about the effectiveness of a top-down approach to regulation, particularly given the complexities and delays associated with litigation in the Indian legal system.

However**, Mr. Makkar** adding further highlighted the importance of India setting its own standards for laws, rather than solely relying on the experiences of other jurisdictions like the EU. He acknowledged that mistakes may occur in India's regulatory journey but viewed them as part of the learning process. He advocated for India to take initiative in establishing its own regulatory frameworks and not to delay implementation while waiting for validation from other regions. This proactive approach, he argued, would enable India to contribute to global standards and shape its own regulatory landscape according to its unique needs and circumstances.

Theme 3: Powers of the Central Government

Mr. Rizvi introduced the third theme by outlining the powers granted to the Central Government under the Draft Bill:1.) Exempting an enterprise based on the grounds of state security, public interest, treaty obligations, or sovereign function, 2.) Issuing directions on questions of policy to the Commission, 3.) Superseding the CCI for up to six months in case of uncontrollable circumstances, persistent non-compliance with directives, or when necessary for the public interest, 4.) Seeking recommendations from the CCI 5.) Making rules to carry out the provisions of the Digital Competition Act 6.) Notifying and amending schedules.

Mr. Rizvi asked the panel if these exemptions are too broad and whether the Central Government has been given too much power under the bill.

Dr. Raychaudhuri noted that the overriding authority of the Central Government is not new and is present in many other laws in India. While there are certain dangers associated with this provision, it is not something that cannot be challenged. She pointed out that in the years since the Competition Act has been in force, there have been very few instances where the Central Government has intervened. During the COVID-19 crisis, there was a time when systematic exemptions may have been needed, but no such exemption was granted by the Central Government. The CCI had issued a generally worded advisory, which differed from other countries where specific exemptions were granted.

In her view, she pointed that she does not see any problem with having this overriding provision, as it has been exercised very sparingly in the past. She believes that the focus should be on encouraging newer markets and innovation, and the dangers of overregulation are often greater.

Ms. Manchanda agreed that these provisions are fairly boilerplate and can be challenged on constitutional grounds, although it has not been done so far. She believes that even if the provisions themselves are not challenged, any untoward action by the government based on these provisions can be challenged. While having a law without these overriding powers is a possibility, she acknowledged that they are quite common in other statutes.

Regarding the power of superseding, she noted that there are specific circumstances outlined within which it can be exercised. However, she expressed concerns about the less defined nature of the power of exemption, highlighting issues raised by similar provisions in other statutes. She cited examples from the Competition Act, where exemptions have been granted to public sector oil companies, such as ONGC, from certain requirements. While acknowledging that such measures and powers of the government may not be ideal, she suggested that unless challenged, we may not have any solutions and will be seeing such provisions in future as well.

Mr. Makkar agreed with **Dr. Raychaudhuri** and **Ms. Manchanda**, stating that these provisions are part of the trial-and-error phase that the bill will undergo upon enactment. He did not express a strong agreement or disagreement with the powers granted to the Central Government.

Theme 4: Nature of Ex-Ante Regulations

In the final theme, **Mr. Rizvi** asked the panelists to compare the Indian approach to *ex-ante* regulations with that of the EU and the UK, and whether the bill is truly providing *ex-ante* regulations. He also asked if the bill has been able to ensure that it is specific to the Indian market.

Dr. Raychaudhuri acknowledged that while the Report is commendably detailed and explores the need for *ex-ante* regulation in digital markets, she contemplated that there's room for improvement in practical implementation. She emphasized the complexity of regulating digital markets compared to traditional ones and stressed the importance of designating certain companies and imposing obligations as a starting point, even if it may not fully qualify as *ex-ante* regulation.

She pointed out that the Draft Bill is a mix of the European and UK approaches, as it designates dominant entities (SSDEs) and identify a set of practices a set of practices as anti-competitive but leaves a lot of discretion to the CCI. Thus, it is slightly similar the UK approach, where sector- specific activities are weighed by the regulating authorities. Given the uncertainty regarding the obligations and other circumstances, she thinks that the Draft Bill is a great starting point, but much work has been given to the CCI in terms of framing regulations, and it remains to be seen how those rules will pan out.

Mr. Makkar opined that the Digital Competition Act can be called *ex-ante* in the same way that the Companies Act, 2013 is *ex-ante*. The bill defines certain obligations similar to how Director Duties are established under the Companies Act and Corporate Governance Principles under SEBI Regulations. If these duties are not complied with, investigations by the authorities take place, and similar is the approach taken by the Draft Bill. He questioned whether this approach would truly increase the CCI's capabilities which seems to be the underlying issue the law is trying to address. He suggested that empowering the CCI to conduct more consultations, develop remedies based on those consultations, and utilize tools like market studies might be a better solution.

Ms. Manchanda expressed her reservation about the need for any form of *ex-ante* regulations without contemplating the empirical reason behind it. She believes that the push for *ex-ante* regulation is driven more by fear and paranoia than empirical evidence, and there is a strong element of formality involved, with countries adopting it because others have done so.

She further highlighted that the Draft Bill is not truly *ex-ante* and achieves two main things: (1) doing away with the requirement to define relevant markets, and (2) inverting the burden of proof. Instead of the CCI or the complainant demonstrating infringement or a *prima facie* case, the company must submit a compliance report and prove its compliance. She believes that the six anti- competitive practices could have been added as explanations to Section 4 of the Competition Act, and the bill does not have any significant *ex-ante* elements per se.

Mr. Rizvi, going ahead in the discussion, asked if the bill would help reduce the time for final adjudication.

Ms. Manchanda expressed doubt, stating that the processes under the Competition Act and

the proposed Bill are similar and will not significantly change the time for the CCI to react and remedy the market significantly. Additionally, she echoed one of the suggestions regarding conducting more robust market studies, highlighting their potential to inform effective remedies.

She suggested that if the problem with the current regime is delays in investigations and adjudication, then those should be specifically targeted. Interim orders should be passed more often to prevent further damage in the market. Procedural architecture of the CCI should be strengthened to reduce the writ challenges, and its capacity should be increased to reduce the delay in investigations generally. Further, the courts should all be better equipped to deal with these kinds of challenges, and these could together tackle the problem of delay in CCI proceedings. **Mr. Makkar** also largely agreed with these points.

Mr. Rizvi, then asked **Dr. Raychaudhuri** as to the need of this new law, if the problems can be solved within the current framework.

Dr. Raychaudhuri emphasized a significant challenge under the existing Competition Act stemmed from the difficulty in determining dominance in the digital realm, leading to instances where abusive practices couldn't be adjudicated due to the absence of clear dominance criteria. Thus, while the proposed legislation may not offer a fully *ex-ante* approach, it could alleviate the burden of proving dominance by designating certain entities as such. However, whether these objectives could have been achieved by amending Section 4 of the existing Competition Act or if the additional complexities introduced by the new legislation are necessary remains uncertain. Nonetheless, she pointed out that it's evident that the legislation could address cases where the CCI has struggled to establish dominance, potentially streamlining enforcement efforts.

Mr. Rizvi pointed the discussion towards the consultation process. He highlighted that the consultation process is vital for ensuring comprehensive legislation that addresses the diverse needs and concerns of stakeholders. Reflecting on the EU's consultation approach, which included open house sessions and extensive stakeholder engagement, he explained the value of a more extended and interactive consultation period. With that in mind he asked panelist regarding the consultation process in India. In his view, while the current consultation period in India may seem inadequate, considering the complexity of the issues, it's worth exploring ways to enhance it further.

Mr. Makkar emphasized regarding the consultation process, that the key is to ensure that consultations are effective, regardless of the time allocated. He acknowledged that if the industry feels that the current timeframe is insufficient for effective consultation, more time should be provided. However, he believes that the focus should be on the effectiveness of the consultations rather than the duration.

Ms. Manchanda noted that the government has generally become more consultative, which is a positive development. She agreed that more time might be needed, given the intricate issues raised in the bill. However, she believes that once the draft bill becomes law, consultation will be a lifeline for the regulator and should become a crucial part of the act itself. She suggested that a section similar to the recent amendment to current Competition

Act, requiring public consultation, could have been included to ensure that consultation is an integral part of the process.

Dr. Raychaudhuri stresses the significance of building trust and awareness within the industry before engaging in consultations. She acknowledges the prevalent mistrust stemming from the sudden imposition of the Competition Act in 2002 and the lack of clarity on fundamental concepts like cartels and collaborative bidding. She further emphasizes the need for effective consultations, prioritizing their quality over their duration. She suggests that addressing trust issues and fostering awareness may take time but is crucial for meaningful engagement and effective consultation processes in the Indian context.

In the concluding remarks for the section, **Mr. Rizvi** underscored the importance of learning from the extensive consultation process that accompanied the enactment of the Data Protection Act, 2023. He emphasizes that given the potentially wide-ranging impact of the Draft Bill on both digital and non-digital sectors, a longer consultation period of at least two to three years is necessary. He highlighted the need for stakeholders to thoroughly study and interpret the bill to understand its current and future implications on the Indian ecosystem and investment landscape. He also pointed out the unique realities of the Indian market, including a strong local enterprise ecosystem, which necessitate a tailored approach to the bill. He expresses gratitude to the panelists for their insightful contributions to the discussion.

Questions and Answers session:

Mr. Rizvi then steered the session towards the last segment and included questions that were asked by the attendees:

1. **The first question pertained to the exclusion of news aggregators from the list of CDS, despite the CCI's investigation into anti-competitive practices by Google and the recommendations of the Parliamentary Standing Committee to include them.**

Ms. Manchanda responded that the definition of online intermediation services is quite broad and could potentially cover news aggregation. However, she believes that the issue does not fall within the lens of competition law, and that copyright law needs to catch up to address the concerns raised by news publishers.

Mr. Makkar emphasized that the issue at hand is not solely a burden of competition law but also involves shortcomings in copyright law. Drawing parallels with the challenges faced by entities like the New York Times regarding ChatGPT, he suggested that copyright law needs to evolve to address contemporary digital challenges adequately.

2. **The next question was on the justification for the government's exemption power under Section 38 of the bill which is analogous to section 54 of the 2002 Act and whether it would become a significant issue, given the government's involvement in several CDS through public sector undertakings (PSUs).**

Dr. Raychaudhuri, acknowledged the potential dangers associated with certain actions taken

by the Central Government, but asserts that such actions are not beyond challenge. She said that while specific justifications may not always be clear, she emphasized that avenues for challenge exist, underscoring the importance of accountability and oversight.

Ms. Manchanda highlighted the potential for challenging the provisions of Section 38, like Section 54, on constitutional grounds. While acknowledging the dangers, she emphasized the avenue for judicial review and challenges, particularly in cases where government held PSU or entities, are excluded without apparent justification. This indicates a need for careful examination and potential legal action to address such issues.

Mr. Makkar, adding to **Ms. Manchanda's** point suggested considering institutions like the National Payments Corporation of India (NPCI) as potential targets for examination or challenge regarding Section 38 provisions. Given UPI's significance as a government project and NPCI's monopoly status in this domain, it presents another area worth exploring for research or potential legal action.

3. **Another question was raised regarding the potential competition concerns arising from the exchange of historic, competitively sensitive, non-public information during the development of algorithms, even if no such data is further supplied during the live phase of the algorithm being used to recommend set prices.**

Ms. Manchanda showed her acknowledgment of the complexity of monitoring algorithmic collusion, and agreed with one of the theoretical concerns raised in the question regarding the data used to train AI. She emphasized that if data is distributed widely to competitors, it could raise issues. However, she admitted that there isn't a straightforward solution for monitoring and enforcing this aspect. This suggests that regulatory capacities in AI regulation need further development to effectively address algorithmic collusion and related concerns.

Dr. Raychaudhuri responded by highlighting the importance of addressing overlapping issues between AI regulation and other sectors, such as data and advertising. These intersections raise questions about how to effectively address overlaps and ensure comprehensive regulation. She suggested that as AI regulation develops, the regulatory capacities to handle such concerns may also evolve.

4. **The next question focused on the inclusivity of the bill with respect to anti-competitive issues in the labor market, considering the skill factor of an employee as an essential part of providing CDS.**

Mr. Makkar responded that the bill is unlikely to be the ideal place to address labor practices and competition law issues, as it remains focused on CDS and how companies interact with each other and consumers in respect to those services. He believes that classic competition law is still available to tackle such issues.

Ms. Manchanda emphasized that while labor market issues haven't escalated in India as they have elsewhere, traditional competition law provisions, particularly Section 3, are sufficient

to address concerns related to agreements among competitors regarding employees and fixing employee remuneration. While the Draft Bill could have explicitly included provisions regarding such agreements, she suggested that existing competition law provisions can effectively handle these matters.

5. **The last question touched upon is whether the new law introduces any changes or additional anti-competitive conduct provisions compared to the previous Competition Act. Furthermore, the concerns about network effects and the visibility of dominance over time, questions the effectiveness of designating dominance *ex-ante*.**

Dr. Raychaudhuri acknowledged the complexity of network effects and the challenge of assessing dominance in the digital sector, especially considering their gradual emergence over time. This aspect highlights the ongoing debate between *ex-post* and *ex-ante* regulations, indicating the need for further exploration and understanding as the digital landscape continues to evolve. She also emphasized the importance of not stifling innovation and new markets while discussing enforcement strategies. She highlighted the inherent challenge of balancing regulation with fostering innovation, suggesting that overregulation could pose greater risks. Her closing remarks underscored the need for a nuanced approach that encourages innovation while ensuring regulatory compliance.

Mr. Rizvi highlighted the nuanced nature of network effects, emphasizing that they are not inherently negative. While there may be concerns about their impact, especially on downstream businesses, network effects also offer significant value by enabling small businesses and content creators to thrive on digital platforms. He suggested that instead of viewing network effects solely as problematic, it's essential to recognize their role in democratizing access and breaking monopolies, particularly in industries like media and broadcasting. This perspective encourages a more balanced assessment of the benefits and challenges associated with network effects.

Conclusion

In conclusion, the panelists reiterated the importance of not curbing innovation and newer markets while regulating digital competition. They acknowledged that enforcement is a practical reality, but cautioned against the dangers of overregulation. The panelists also highlighted the need for effective consultations and building trust between the industry and regulators to ensure the successful implementation of the law.

Overall, the panel discussion provided a comprehensive overview of the Report and the Draft Bill, highlighting the key issues, concerns, and potential ways to go forward. The panelists emphasized the need for a balanced approach that encourages innovation, promotes competition, and protects consumer interests while being mindful of the specific characteristics and requirements of the Indian market.

In conclusion, the panel discussion highlighted the various aspects of the Report and the Draft Bill. The panelists discussed the selection of Core Digital Services, the obligations of Systemically Significant Digital Enterprises, the powers of the Central Government, and the nature of *ex-ante* regulations. While acknowledging the bill as a starting point, the panelists raised concerns about the lack of detailed evidence for selecting the CDS, the capacity constraints of the CCI, the potential for excessive litigation, and the need for effective consultations. The discussion also touched upon the comparison between the Indian approach and those of the EU and the UK, with panelists questioning whether the bill truly incorporates *ex-ante* regulations. Overall, the panelists emphasized the importance of encouraging innovation, building trust between the industry and regulators, and ensuring that the law is attuned to the specific needs of the Indian market.