TYING, SELF-PREFERENCING AND THE DIGITAL COMPETITION BILL: A CHANGING LANDSCAPE FOR COMPETITION INTERVENTION?

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Abstract: The dominance of a few major entities in digital markets has led to stricter enforcement under competition law. Many jurisdictions have developed an ex-ante regulatory framework, such as the Digital Markets Act (DMA) in the EU. The need for an ex-ante regulation has also been highlighted in India, where the Committee on Digital Competition Law has issued the Draft Digital Competition Bill ("DDCB"). Some of the prohibitions included in the bill are tying, bundling, self-preferencing, restricting third-party applications and steering. There have been opinions by various scholars on the impact of such legislation on the Indian economy comparing the same with the effects of the DMA on the EU. However, this article attempts to anticipate the potential application of these obligations in light of the past decisional practice of the Competition Commission of India (CCI). On a preliminary analysis, the DDCB seems to exercise more restraint and caution in its approach than the DMA. The article attempts to look at how the CCI's intervention could potentially change (or not change) with reference to these obligations compared to the analysis done prior to DDCB. The article is divided into four parts. Part I of the article lays down briefly the various obligations imposed under the DDCB. Part II discusses the CCI's decisional practice on these obligations so far and analyses if the CCI approach differs from the EU approach, especially in the cases relating to the designated gatekeepers under the DMA. Part III evaluates the scope of the change in the CCI's approach based on the proposed ex-ante regulation. Part IV concludes the work.

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I. INTRODUCTION

The dominance of a few major entities in digital markets has led to stricter enforcement against big tech under competition law. Many jurisdictions have developed an ex-ante regulatory framework, such as the Digital Markets Act (DMA)[1] in the EU which regulates some of the most dominant entities identified as 'gatekeepers' under the regulation.[2] While earlier, the competition authorities were hesitant to intervene in digital markets due to their dynamic nature, it has now become clear that a swift intervention is required in these markets due to specific features such as network effects, reliance on data, vertical integration, etc. The need for an ex-ante regulation has also been highlighted in India, where the Committee on Digital Competition Law issued a Report ("the Report") with the Draft Digital Competition Bill ("DDCB").[3]

The DDCB is largely based on the DMA in the EU, wherein it provides for numerous obligations on certain entities identified as Systemically Significant Digital Enterprise ("SSDE") that provide a Core Digital Service ("CDS").[4] While the DDCB does not clarify who these SSDE would be, the qualitative and the quantitative criteria suggest that these would most likely be the same entities identified as gatekeepers under the DMA.[5] Some of the prohibitions included in the bill are tying, bundling, self-preferencing, restricting third-party

[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA) (14 September 2022).
[2] As per Article 3(1) of the DMA, an entity would be identified as a gatekeeper if it has a significant impact on the internal market, it provides a core platform service which is an important gateway for business users to reach end users and it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.
[3] Report by the Committee on Digital Competition Law (Ministry of Corporate Affairs, 12 March 2024).
[4] Schedule 1 of the DDCB mentions that a "core digital service" includes online search engines, online social networking services, video-sharing platform services, interpersonal communication services, operating systems, web browsers, cloud services, advertising services and online intermediation services.
[5] The criteria are mentioned under Section 3 of the DDCB. The DMA identifies six entities as gatekeepers, Alphabet, Meta, Microsoft, Apple, Amazon and ByteDance (Tiktok).

applications and steering.[6] These obligations are interrelated and, in many cases, can occur simultaneously. While in the EU, it is heavily debated whether such a regulation would fall under the ambit of competition law,[7] the Report clearly states that the proposed Digital Competition Act ("DCA") would complement and strengthen the existing competition framework.[8]

Soon after the release of the DDCB, there have been opinions by various scholars on the impact of such legislation on the Indian economy comparing the same with the effects of the DMA on the EU.[9] However, this article attempts to anticipate the potential application of these obligations in light of the past decisional practice of the Competition Commission of India (CCI). One of the reasons behind the ex-ante regulation is that it allows the authorities to take swift action. For instance, the DMA does not have a recourse for the gatekeepers to justify their non-compliance based on objective justifications. Although the Report does not explicitly mention if such a defence is available to the SSDE under the DDCB, it refers to a similar framework in Germany, which mentions that the ex-ante obligations are subject to the objective justifications test.[10] Therefore, it becomes imperative to note that the DDCB does not work with the same principles as the DMA. On a preliminary analysis, the DDCB seems to exercise more restraint and caution in its approach than the DMA. This approach is also consistent with CCI's decisional practice, which will be analysed in Part II.

In light of the above background, the article attempts to look at how the CCI's intervention could potentially change or not change with reference to these obligations compared to the analysis done prior to DDCB. The article is divided into four parts. Part II of the article lays down briefly the various obligations imposed under the DDCB. Part III discusses the CCI's decisional practice on these obligations so far and analyses if the CCI approach differs from

[6] Draft Digital Competition Bill, ss 11, 13 and 14.
[7] Moreno Belloso N and Petit N, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (April 5, 2023) European Law Review (Forthcoming) <https://ssrn.com/abstract=4411743> accessed 30 April 2023; Cabral L et. al., 'The EU Digital Markets Act: A Report from a Panel of Economic Experts (Publications Office of the European Union 2021); Larouche P and Streel AD, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 Journal of European Competition Law & Practice 542.
[8] Page 93 of the Report.
[9] See Pinar Akman, Carmelo Cennamo, Juliana Oliveira Domingues, Bowman Heiden, Constance E. Helfat, Pankhudi Khandelwal and Nicolas Petit, 'DCI Submission to the India Ministry of Corporate Affairs on the Draft Digital Competition Bill' (May 23, 2024).<http://dx.doi.org.eui.idm.oclc.org/10.2139/ssrn.4839502> accessed 30 April 2023; Dirk Auer and others, 'ICLE Comments on India's Draft Digital Competition Act', International Center for Law & Economics (22 April 2024) <https://laweconcenter.org/resources/icle-comments-on-indias-draft-digital-competition-act/> accessed 2 May 2024.
[10] Supra note 3, pg. 74.

the EU approach, especially in the cases relating to the designated gatekeepers under the DMA (the paper assumes that entities such as Alphabet, Apple, Meta and Amazon would most probably be identified as SSDEs under the DCA). Part IV evaluates the scope of the change in the CCI's approach based on the proposed ex-ante regulation. Part IV concludes the work.

II. OBLIGATIONS UNDER THE DDCB

The DDCB rests upon similar principles of fairness and contestability as the DMA. As mentioned above, the DDCB imposes certain obligations on the SSDE. While some of these obligations are new, some are already provided as an anti-competitive practice under the Competition Act, 2002 ("Competition Act"). One such conduct is tying and bundling. The Competition Act defines "tie-in arrangement" as any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.[11] The CCI has laid down that a "tie-in arrangement" is treated as harmful since the consumer is forced to buy a good (tied one) that he may not necessarily want at the time of purchase of a good that he actually wants (tying good).[12]

Under the Competition Act, tying and bundling are analysed under a rule of reason approach since such practices can have certain pro-competitive justifications, such as lower production costs leading to low prices for consumers, reduction in transaction and information costs for consumers and increased convenience and variety.[13] In its previous decision, the CCI has held that to establish a case for tying, it should be proved that (i) the tying and tied products are two separate products; (ii) the entity concerned is dominant in the market for the tying product; (iii) the customers or consumer does not have a choice to only obtain the tying product without the tied product; and (iv) the tying is capable of restricting/foreclosing competition in the market.[14]

In its ex-ante enforcement, the DDCB prohibits tying and bundling the CDS of the SSDE with its other products or the products and services of the related parties or third parties with whom

[11] Competition Act, s 3(4).
[12] *Re: IELTS Australia Pty Ltd. and Ors.*, Case No 60 of 2010.
[13] Christian Ahlborn, David S Evans, A Jorge Padilla, 'The antitrust economics of tying: a farewell to per se illegality' Spring 2004 Antitrust Bulletin 49, 1/2; ABI/INFORM Global, pg. 287, <https://www.justice.gov/atr/antitrust-economics-tying-farewell-se-illegality> accessed 2 May 2024
[14] *Sonam Sharma v. Apple*, CCI Case No. 24/2011.

the SSDE has arrangements for the manufacture and sale of products or provision of services unless such tying or bundling is 'integral'.[15] This implies that for the SSDE, the competition authority does not need to establish the conditions mentioned above. The DDCB also has a separate provision prohibiting preferencing by the SSDE towards such products and services.[16] This is similar to Article 6(5) of the DMA, which also prohibits a gatekeeper from treating its own services and products favourably over those of a third party. A related obligation to this is the provision on anti-steering, i.e., the SSDE cannot restrict business users from communicating directly with end users.[17] While self-preferencing and anti-steering are not explicitly mentioned under the Competition Act, the CCI has recognised them as anti-competitive in its decisional practice.[18]

It is interesting to note that very recently, in the final decision on the Google shopping case by the CJEU, it has been held that "as a general rule, it cannot be considered that a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits, irrespective of the circumstances of the case".[19] However, the CJEU held that Google's conduct was discriminatory as it also demoted competitor's offerings and, therefore, constituted an abuse of its dominant position.[20] One interpretation of the decision can be that self-preferencing can only be considered illegal if it is accompanied by discrimination between competitors. If this approach is also followed in India, then it might be prudent to remove the blanket ban on self-preferencing from the final Act.

The theory of harm for all the conducts mentioned above is similar, i.e. the entity that is dominant in one market tries to leverage its dominance in another market by forcing the consumers to use the product in which it is not dominant with the product in which it enjoys

[15] Draft Digital Competition Bill, s 15.
[16] Draft Digital Competition Bill s 11.
[17] Draft Digital Competition Bill, s 14.
[18] *Federation of Hotel and Restaurant Associations of India v. MakeMyTrip India Private Limited and Others*, Case No. 14 of 2019 (CCI 19 October 2022); *Matrimony.com Ltd. and Consumer Unity and Trust Society v. Google LLC* (Case Nos. 7 and 30 of 2012); In *Re: XYZ (Confidential) v. Alphabet Inc.*, Case no. 07 of 2020, Para 395 <https://www.cci.gov.in/images/antitrustorder/en/order1666696935.pdf> accessed 2 May 2024.
[19] Case C-48/22 P, *Google and Alphabet v Commission* (Google Shopping), ECLI:EU:C:2024:726, 10 Sep. 24, para 186, available at <https://curia.europa.eu/juris/document/document.jsf;jsessionid=5A23F62877F25BF19290510DAB736D53?text=&docid=289925&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=945157> accessed 2 May 2024.
[20] Ibid [187]

market power.[21] The theory of leveraging has evolved in digital markets.[22] This is because digital markets are identified with specific features such as network effects,[23] economies of scope[24], etc. Further, the services in digital markets enjoy data-driven advantages since most digital gatekeepers monetise their investments through targeted advertising. Therefore, the harms arising to consumers from leveraging are different in digital markets than in traditional markets since the entities are providing free services in exchange for data, which requires them to have more consumers on their platforms for different services. Strong network effects and economies of scope can keep the consumers locked to a particular ecosystem despite the availability of other efficient options. Therefore, in the digital sphere, leveraging makes it much easier for big tech to expand its market power across its various services in exclusion of its competitors.[25] Therefore, it becomes imperative to keep a check on such practices undertaken by entities with large market shares.

Other obligations in the DDCB relate to prohibiting inter-mixing or cross-using data across different SSDE services and enabling data portability for other business users and end-users.[26] The DMA also similarly prohibits the cross-using and combining of data from different services of the gatekeepers without user consent.[27] This provision can also be related to tying where platforms use privacy policies as a way to monopolize the data from one platform and use it for another platform.[28] Therefore, the DDCB tries to increase competition by asking

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[21] Guy Sagi, 'A Comprehensive Economic and Legal Analysis of Tying Arrangements' (2014) 38 Seattle University L. R., <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2233&context=sulr> accessed 2 May 2024; Alden F. Abbott & Joshua D. Wright, 'Antitrust Analysis of Tying Arrangements and Exclusive Dealing, Antitrust Law and Economics' (Edward Elgar Publishing, Keith N. Hylton, ed.), George Mason University Law and Economics Research Paper Series, <https://www.law.gmu.edu/assets/files/publications/working_papers/08-37%20Antitrust%20Analysis%20of%20Tying.pdf> accessed 2 May 2024.

[22] Jay Pil Choi, Doh-Shin Jeon, A Leverage Theory of Tying in Two-Sided Markets with Non-Negative Price Constraints, (October 2019) <https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/jeon/tying-in-two-sided-markets.pdf> accessed 2 May 2024.

[23] Network effects occur when the value of the product or the services increase with the increase in the number of users.

[24] Economies of scope exist when it is less costly to combine two or more product lines in one firm than to produce them separately. See, Panzar J C and Willig R D, 'Economies of Scope' (1981) 71(2) American Economic Review, American Economic Association 268-272; Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M., The EU Digital Markets Act, Publications Office of the European Union, Luxembourg, 2021; Henten A, Windekilde I. Demand-Side Economies of Scope in Big Tech Business Modelling and Strategy. Systems. 2022; 10(6):246. <https://doi.org/10.3390/systems10060246> accessed 27 September 2023.

[25] Daniel Mandrescu, supra note 13.

[26] Draft Digital Competition Bill.

[27] DMA art 5(2); Article 6(10) of the DMA provides for data portability.

[28] Condorelli, Daniele and Padilla, Jorge, 'Harnessing Platform Envelopment in the Digital World (December 14, 2019), available at SSRN: <https://ssrn-com.eui.idm.oclc.org/abstract=3504025 or http://dx.doi.org.eui.idm.oclc.org/10.2139/ssrn.3504025> accessed 27 September 2023.

SSDEs to share the data with other business users and enabling the consumers to port their data between different services to decrease the data-driven advantages enjoyed by big players.

III. CCI'S EX-POST DECISIONAL PRACTICE

The CCI has been enforcing the above-mentioned anti-competitive practices in digital markets for some time now. In doing so, it follows the consumer welfare standard. This part of the paper looks at a few of these decisions to lay down the approach that the CCI has taken so far with regard to these obligations.

Many cases that the CCI has taken against big tech in India are similar to the ones decided by the European Commission (EC). This includes the Google Shopping and the Google Android cases. In the Google Shopping case decided by the EC, it was found that Google abused its dominant position by leveraging its market power in the general search market to its specialised shopping services (hereinafter "the EC Google shopping order").[29] Contrary to this, in examining the claims alleged against Google concerning search bias, the CCI found that the only anti-competitive conduct subsisting at the time of the decision by Google was its prominent display and placement of Commercial Flight Unit with link to Google's specialised search options/ services.[30] While the CCI agreed that "Google provides a gateway to the internet and therefore, has a special responsibility to ensure fairness of all online markets accessed through search engines", it also exercised caution by acknowledging that "intervention in technology markets has to be carefully crafted so as not to stifle innovation or create a detrimental effect on economic welfare and economic growth, particularly in countries relying on high growth, such as India".[31]

The reason for different decisions on somewhat similar claims could be attributed to the different approaches to innovation and product design issues.[32] The literature on technical or

[29] Commission Decision of 27.6.2017 (AT.39740, Google Search (Shopping)), C(2017) <https://ec-europa-eu.eui.idm.oclc.org/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf> accessed 27 September 2023.
[30] *Matrimony.com v. Google LLC and others*, CCI Case Nos. 07 and 30 of 2012 [420(b)].
[31] ibid [202], [203].
[32] Geoffrey A. Manne, 'Google's India Case and a Return to Consumer-Focused Antitrust', (*Truth on the Market*, 9 February 2018), ,https://truthonthemarket.com/2018/02/08/return-to-consumer-focused-antitrust-in-india/> accessed 2 May 2024.

technological tying suggests that such tying should be considered abusive when a monopolist or a dominant firm designs their product so that it functions only when used in conjunction with its own complementary products, engaging in foreclosure of competition or leveraging.[33] However, in some cases, technical tying may lead to product improvement or innovation in products and services.[34] This is why, in cases of technical tying, it is required to prove that the practice of tying by the dominant firm in question is capable of foreclosing competition.

In the EC decision, the Commission held that "nothing in the case laws suggest that product design cases should be assessed under a different legal standard to that developed to assess the leveraging of dominant position from one market to other adjacent markets".[35] However, the CCI specifically acknowledged that product design is an important dimension of competition and any undue intervention in designs of search engine results may affect legitimate product improvements, resulting in consumer harm.[36] The dissenting opinion goes one step further by stating that the majority decision did not account for the impact of the flights unit on users and that any change the Commission imposes in the product design must be supported by evidence of user behaviour to avoid any harm to innovation leading to inferior outcomes.[37]

This is similar to the approach taken in the US concerning product design cases where it has been held that "as a general rule, courts are sceptical about claims that competition has been harmed by a dominant firm's product design changes and that to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design."[38] Therefore, if the EU and the US approach are put on a spectrum, with one end being the stance taken by the US courts on product design cases and the other end

[33] Damien E. Gaynor, Technological Tying, Working Paper No. 284, August 2006; Guy Sagi, A Comprehensive Economic and Legal Analysis of Tying Arrangements, available at <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2233&context=sulr> accessed 2 May 2024; John M. Newman, Anticompetitive Product Design in the New Economy, (2012) 39 FLA. ST. U. L. REV. 681, 683; Emma C. Smizer, Epic Games v. Apple: Tech-Tying and the Future of Antitrust, (2021). 41 LOY. L.A. ENT. L. REV. 215.

[34] Richard J. Gilbert and Michael H. Riordanz, Product improvement and technological tying in a winner-take-all market, The Journal of Industrial Economics, 0022-1821, March 2007; Charles M. Gastle & Susan Boughs, Microsoft III and the Metes and Bounds of Software Design and Technological Tying Doctrine, (2001) 6 VA. J.L. & TECH. 1; Sarita Frattaroli, Dodging the Bullet again: Microsoft III's Reformation of the Foremost Technological Tying Doctrine, (2010) 90 B.U. L. REV. 1909.

[35] Para 652 of the EC Google shopping order.

[36] Para 204, supra note 30.

[37] Ibid, para 13 of the dissenting opinion.

[38] *U.S. v. Microsoft Corp.*, 253 F.3d 34, 75 (D.C. Cir. 2001), pg. 75.

being the EU approach in the EC Google Shopping order, the CCI approach would be somewhere in the middle, although closer to the US approach.

The caution exercised by the CCI against intervention in cases of tying by big players under the consumer welfare standard is also seen in the case of *Harshita Chawla v. CCI*. In this case, a complaint was lodged with the CCI, alleging that WhatsApp tying its payment service to its messaging app was anti-competitive (hereinafter "the WhatsApp Pay order").[39] The CCI held that this practice by WhatsApp did not amount to tying as there was no coercion since consumers were free to use other payment apps. In this order, the first two requirements for tying were satisfied, i.e., there were two separate relevant markets: the market for over-the-top (OTT) messaging apps through smartphones and the market for UPI-enabled digital payment applications, and WhatsApp was found to be dominant in the messaging market. Regarding the third condition on consumer choice and coercion, the Commission observed that "*While WhatsApp Pay is embedded in WhatsApp messenger app when it is downloaded by users on their smartphones, the consumers are at freewill to use WhatsApp Pay or any other UPI enabled digital payments app in India to make instant interbank transfers."*

Coercion is an essential element to be proved for tying since, in the absence of coercion, the competitors of the dominant firm can persuade customers to switch through lower prices, better quality or services, thus leading to competition on the merits. In the EU, it has been laid down that coercion could exist even when there are other ways for rival entities to reach the consumers[40] or even when the consumer is not required to use the same product supplied by a competitor of the dominant undertaking.[41] The literature also suggests that coercion can range from an explicit obligation to use both the services of the dominant entity to nudging strategies used by the firms to trigger an unsolicited functioning of a separate service.[42]

It has been criticised that in the WhatsApp Pay case, the CCI did not consider that the consumers do not have the option to use WhatsApp messaging service without its payment

[39] *Harshita Chawla v. WhatsApp*, Case no. 15/2020.
[40] Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), <https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf> accessed 2 May 2024 (Microsoft I EU decision).
[41] Commission Decision of 18.7.2018 (Case AT. 40099 – Google Android) C(2018) 4761 final, [748] <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf> accessed 2 May 2024.
[42] Daniel Mandrescu, 'Tying and bundling by online platforms – Distinguishing between lawful expansion strategies and anti-competitive practices', (2021) 40 Computer Law & Security Review 105499 <https://doi.org/10.1016/j.clsr.2020.105499> accessed 2 May 2024.

service, which amounts to pre-installation of a service already on the consumer's devices.[43] There could have been alternate ways to look at this tying practice of WhatsApp by the CCI. Most consumer communication takes place on WhatsApp. This includes sending QR codes to scan to make payment or sending UPI ID. As soon as the QR code is opened by the consumer or the consumer clicks on the UPI ID on WhatsApp, WhatsApp immediately asks the consumer to make the payment through WhatsApp Pay (except when the UPI ID of the user is their phone number). This leads to a default setting where the end users are not provided with other options unless they go to a different app and upload the QR code to complete the transaction. Such default settings could lead to consumer inertia, where the consumers would accept inefficient services over efficient competitors since choosing the latter would require consumers to make an active choice or take an action that changes the status quo.[44] However, the CCI did not delve into this aspect in the order.

The CCI analysis came closer to the EU approach in the case of *Umar Javeed v. Google*[45], where the aspects of pre-installation and consumer inertia were dealt with in greater detail. In this case, the CCI investigated Google's practices of tying Google Android with its own services. The CCI's decision is very similar to the Google Android case decided in the EU.[46] Defining the market for operating systems, the CCI held that the market for licensable operating systems such as Android is separate from the market for non-licensable operating systems like iOS.[47] This is different from the earlier approach that the CCI took in the case of *Sonam Sharma v. Apple*, in which the CCI refused to consider Apple devices as a separate market from other smartphones.[48]

In this order as well, the CCI acknowledged the gatekeeper position of Google in the OS market.[49] While examining the tying allegations, the CCI focused on how the pre-installation of these apps creates a behavioural bias in consumers and leads to entry barriers for other service providers. In its arguments, Google relied on the Harshita Chawla case, stating that pre-

[43] Rajarshi Singh, The Problematic Stance of CCI in Whatsapp Pay Tying Case: An Opportunity Missed? (*Kluwer Competition Law Blog*, January 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/01/11/the-problematic-stance-of-cci-in-whatsapp-pay-tying-case-an-opportunity-missed/#_ftn4> accessed 2 May 2024.
[44] Bastidas, Vladimir, 'Consumer Inertia' (2018) 2 the New Economy and EU Competition Law, Market and Competition Law Review 47-53
[45] *Umar Javeed v. Google* CCI Case No. 39 of 2018.
[46] n41.
[47] *Umar Javeed* (n45) [84].
[48] *Sonam Sharma v. Apple*, (n14), [46]-[47].
[49] *Umar Javeed* (n45) [470].

installation does not automatically lead to increased usage.[50] The CCI rejected this argument by distinguishing the WhatsApp case where the user is required to take an additional step of registration before using WhatsApp Pay.[51]

This difference in CCI's approach is also seen in the subsequent case of *XYZ (confidential) v. Alphabet* investigating Google's practice of self-preferencing its own payments app, Google Pay, on the Google Play store (hereinafter "Google Pay order"). The CCI held that dominant platforms that operate within multiproduct/multi-platform ecosystems, through even small actions, can leverage and extend their dominance in related markets.[52] The CCI recognized the ability of gatekeepers to leverage their market power through consumer behavioural biases, which guide their activity towards their own vertically related services through carefully designed architecture.[53] The CCI held that given the interoperability offered by the UPI ecosystem, generally, the user does not multi-home and uses only one UPI app.[54] This is contrary to the observations made by the CCI in the WhatsApp Pay case above, where the CCI held that 'since UPI-enabled payment is a competitive market with established players including Google Pay, PhonePe etc., in such a market, to perceive that WhatsApp Pay will automatically get a considerable market share only on the basis of its pre-installation seems implausible'.[55]

The WhatsApp Pay case was not argued by Google in this case, probably because the CCI had already rejected it in the Umar Javeed case. However, even though the CCI does not delve deeply into this, there could be multiple reasons behind the different treatment of tying of payment apps by dominant firms. Firstly, unlike Android and Play Store, the CCI does not identify WhatsApp as a gateway to other services. Secondly, although not explicitly stated, Google Pay has a significant market share in the payments market compared to WhatsApp Pay. In the WhatsApp Pay order, the Commission does observe that WhatsApp Pay was earlier working only as a beta version due to data localisation norms and got approval to act as a payment app only recently and therefore, its actual conduct had yet to manifest in the market.[56] Therefore, indirectly, the CCI looks at the market share of WhatsApp Pay to conclude that no

[50] ibid [499].
[51] ibid [500].
[52] *In Re: XYZ v. Alphabet Inc. and ors.*, CCI Case No. 07 of 2020 ('Google Pay order') [358].
[53] ibid [358].
[54] ibid [352].
[55] ibid [97].
[56] ibid.

intervention was required in that case, even though, in tying cases, it is not a requirement that the firm should be dominant in the secondary market.

The above discussion tries to show that the CCI has done a thorough analysis under the rule of reason approach for the prohibitions mentioned in the DDCB and taken a different stance than the EU based on a pro-innovation approach. This is also mentioned in the Report, which emphasises 'the need to strike a fine balance between increased regulation and enabling innovation, given India's thriving digital economy'.[57] However, the Report does not elaborate on how this would be achieved.

The section below tries to put together the missing pieces of the puzzle by analysing the intent behind the obligations provided under the DDCB with the CCI's pattern of intervening or exercising restraint under competition law. The Report talks about the timely enforcement that can be achieved through ex-ante regulation which clearly implies that it seeks to create a *per se* approach to these obligations. Against this background, it is now imperative to see what could be the potential changing scope of competition law in digital markets in India through the proposed ex-ante regulation.

IV. ROLE OF THE EX-ANTE REGULATION

As per the Report, sector regulation sets the rules of the game.[58] There are many concerns regarding the implementation costs that an ex-ante regulation can impose both on the regulator and the regulated entities. However, a careful reading of the Report suggests that the DDCB attempts to manage these costs while maintaining a balance between regulation and innovation. The Report explicitly mentions that 'given the higher error costs associated with an ex-ante competition framework, the DDCB should apply only to clearly identified digital services susceptible to concentration to avoid unintended chilling effects'.[59]

[57] The Report (n3) 93.
[58] ibid 91.
[59] ibid 96.

Keeping in mind these considerations, this part attempts to anticipate the changing scope of CCI's intervention in digital markets through the following three different criteria: (i) comparing the nature and the language of the obligations provided under the DDCB with the corresponding obligations under the DMA, (ii) analysing the extent of the discretion that the CCI can exercise while interpreting these per-se obligations and (iii) the different compliance costs that the DDCB attempts to impose on the dominant local companies as compared to the global gatekeepers.

A. Services and obligations included in the DDCB

At this stage, the DDCB does not clarify who the SSDE's are and which of their digital services are included within its scope. However, Schedule 1 of the DDCB specifies a list of nine Core Digital Services that fall within its scope.[60] The list of services is very similar to the 'core platform services' mentioned under Article 2(2) of the DMA except for one service, i.e. virtual assistants, which is omitted in the list of CDS. However, the DDCB does not contain many obligations that the DMA imposes on such services. For instance, the DMA includes provisions on interoperability between number-independent interpersonal communication services (NIICS) such as WhatsApp and Facebook Messenger[61] and mandates interoperability for other rival services with the software and hardware features of the OS that the gatekeepers use to provide their own ancillary services.[62] Even though in the WhatsApp Pay case, the CCI has identified that the lack of interoperability between messaging platforms is a concern that leads to switching costs for customers,[63] the interoperability provisions have not been included in the DDCB. The Report does not explicitly state the reasons for this omission but only mentions that "certain Committee members expressed views that obligations relating to interoperability should be excluded from the DDCB".[64]

[60] Schedule 1 of the DDCB mentions that a "core digital service" includes online search engines, online social networking services, video-sharing platform services, interpersonal communication services, operating systems, web browsers, cloud services, advertising services and online intermediation services.
[61] DMA art 7.
[62] DMA art. 6(7).
[63] *Harshita Chawla* (n39) [86].
[64] The Report fn 654.

One of the reasons could be that interoperability raises certain trade-offs in terms of privacy and data security,[65] and the data protection framework in India is less developed than the GDPR in the EU. However, it should also be noted that the DDCB provides an express provision on data portability between different services, which raises similar concerns about data security and privacy.[66] Data portability can create more competition and innovation in the market since the big companies would be required to share data, such as regarding the behaviour of users on a platform, which can be beneficial for third-party providers to understand consumer demand and engage in data-driven innovations.[67] The inclusion of data portability provision indicates that the ex-ante regulation seeks to create more innovation by companies other than big tech. Similar benefits can accrue from interoperability provisions as well. However, interoperability goes one step further from data portability since it requires real-time data-sharing and more coordination and standardisation among players,[68] which might be the reason to avoid including such provisions in the DDCB at this stage.

Another way of deciphering the insertion of some obligations and the omission of others in the DDCB could be that even in the case of DMA, most of the obligations that it contains come from the cases that the EC has decided against gatekeepers like Alphabet, Meta, Apple and Amazon. The approach in India seems similar, where most of the obligations mentioned under the DDCB have already been treated as anti-competitive by the CCI. For instance, other than the cases already discussed in Part II, the CCI has also, in the case of In *Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*[69], held that the sharing of data by WhatsApp with other Facebook companies is unfair to the users who do not have the option to opt-out due to the take-it-or-leave-it nature of the policy. The DDCB, therefore, prohibits the inter-mixing or cross-using of data between different services.

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[65] Laura Alexander and Randy Stutz, 'Interoperability in Antitrust Law & Competition Policy', (2021) CPI Antitrust Chronicle, <https://www.competitionpolicyinternational.com/wp-content/uploads/2021/06/4-Interoperability-in-Antitrust-Law-Competition-Policy-By-Laura-Alexander-Randy-Stutz.pdf> 30 April 2023; Bennett Cyphers and Cory Doctorow, 'Privacy Without Monopoly: Data Protection and Interoperability', (*Electronic Frontier Foundation*, 12 February 2021) <https://www.eff.org/wp/interoperability-and-privacy> accessed 30 April 2023.

[66] DDCB s 12(3).

[67] Inge Graef, 'Data portability at the crossroads of data protection and competition policy', (*AGCM*, November 2016); OECD, 'Data portability, interoperability and competition – Note by India', DAF/COMP/WD(2021)31, <https://one.oecd.org/document/DAF/COMP/WD(2021)31/en/pdf>, accessed 19 July 2024.

[68] Barbara Engels, 'Data Portability among Online Platforms' (2016) 5(2) *Internet Policy Review.*

[69] CCI Case No. 01 of 2021.

However, it should also be noted that despite the Google Pay case, the DDCB does not include payment services within the list of services included as CDS. While the DMA also does not have payment services as one of the 'core platform functions', it is worth noting that the payments market in India is different from the payments market in the EU and gatekeeper platforms, especially Google Pay, have one of the largest shares in the market.[70] The Report mentions that different business models, such as cab aggregators, food delivery apps, and e-commerce platforms, could fall within the definition of 'online intermediation services'.[71] Payments services can also fall under the same category. However, this has not been clarified in the Report.

One of the reasons for excluding payment services could be that the Reserve Bank of India regulates this market and puts a cap of 30% on the market share that each entity can have in the UPI-enabled payments market.[72] However, this did not stop the CCI from interfering in the market in the Google Pay case. The Report also mentions that these sectoral regulations are 'limited in their ability to ensure fair competition holistically'.[73] Another reason for such an omission could be that the payment app was tied to the Google Play Store, which would most likely be included in the CDS. However, there could be other forms of abuse, such as the inter-mixing of data between different services, including payment apps. Therefore, it might be reasonable for the Commission to include such services within the scope of CDS.

In this respect, the Report also points out that due to network effects, economies of scope and other digital market features, 'large digital enterprises that are not 'statutorily' dominant but may nonetheless wield the ability to influence markets may escape scrutiny.'[74] Such an observation insinuates that the idea behind such a regulation is to intervene before the market tips in favour of one provider. However, this contradicts the decisions in the Google Shopping and WhatsApp Pay case, where the CCI has exercised caution before prematurely intervening

[70] Vasudha Mukherjee, 'PhonePe, Google Pay Creating a Duopoly in India's UPI Space? NPCI to Check', *(Business Standard*, 17 April 2024) <https://www.business-standard.com/finance/personal-finance/phonepe-google-pay-creating-a-duopoly-in-india-s-upi-space-npci-to-check-124041700314_1.html> accessed 18 July 2024.
[71] The Report (n3) fn 658.
[72] Guidelines on volume cap for Third Party App Providers (TPAPs) in UPI (2nd December 2022) NPCI/UPI/OC-159/2022-23, <https://www.npci.org.in/PDF/npci/upi/circular/2022/UPI-OC-159-Guidelines-on-volume-cap-for-Third-Party-App-Providers-(TPAPs)-in-UPI.pdf> accessed 11 September 2024.
[73] The Report (n3) 44.
[74] The Report (n3) 36.

in a market, especially in product design cases. In such instances, the Report hints at a more interventionist approach of the CCI than the one taken in earlier cases.

B. CCI's discretionary powers under the DDCB

Even though the DDCB provides for a more interventionist per-se approach, in many instances, the bill also provides some discretion to the CCI. The first point of discretion can be seen in the designation of SSDEs and CDS. It has been observed that even though the DMA provides an objective criterion for the designation of gatekeepers, from the first set of designation decisions of the EC, it can be seen that the EC enjoyed certain flexibility and exercised its own discretion to deciding the cases against the big tech entities.[75] A similar scope for discretionary powers can be assumed for the CCI from the DDCB.

The second point of discretion can be seen in the substantive provisions. For instance, the prohibition against anti-steering and tying and bundling states that 'the Commission may specify, by regulations, the nature of restrictions that may be considered "integral" to the provision of a CDS'.[76] Regarding the scope of the term 'integral', the Report states that 'CCI should be allowed the discretion to frame the related conduct requirements as it deems fit, pursuant to stakeholder consultations'.[77] The question of whether a particular service is 'integral' or not is complicated and might require detailed investigations to assess how the impact that it can have on the end-users, mainly due to a high level of information asymmetry between regulators and big-tech companies. It can be argued that through this provision, the DDCB provides for a scope of dialogue between the regulator and the regulated entities, thus leaving some room to consider the objective justifications and benefits that the tying of SSDE's different services can provide to the end-users under the consumer welfare standard.

Another point of discretion is regarding anti-steering provisions. The Report states that the CCI has the discretion to decide whether the anti-steering should apply only to regulate app stores or also to other CDS.[78] This is because, in India, the anti-steering provision has been held to be

[75] Alba Ribera Martínez, The Requisite Legal Standard of the Digital Markets Act's Designation Process, (2024) Journal of Competition Law & Economics nhae011.
[76] Explanation to Section 15 and 16 of the DDCB.
[77] The Report (n3) fn 654.
[78] ibid.

anti-competitive by the CCI in two cases, both relating to Google's Play Store and Apple's App Store policies where both Google and Apple restricted the ability of the app developers to inform consumers or direct them for in-app payments on a different third-party website.[79] This is similar to the investigation by the EC against Apple's app store policies.[80] A prohibition on anti-steering is mentioned under the DMA which asks gatekeepers to allow the un-installation of gatekeepers' own apps or change default settings on their operating systems and web browsers, which 'steer' consumers to use the gatekeeper's services over other competitors.[81] Further, similar to the investigations into app store policies, the DMA provides that the gatekeeper shall allow business users to communicate and promote offers to end users acquired via its core platform service and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper.[82]

In this context, it is worth noting that while the DDCB has a specific provision on not restricting the installation of third-party apps, it does not have provisions relating to enabling the uninstalling of apps (unless that falls within tying or self-preferencing).[83] Considering this, it might make sense for the Commission to expand anti-steering provisions also to operating systems and web browsers. However, the DDCB is drafted in a way that even if the CCI extends these provisions to additional services, it still has the scope to look at objective justifications since it will again retain its discretion to allow steering for services that it considers to be 'integral' to the SSDE's services. While it is a good strategy to keep these points of discretion open for the CCI to maintain a pro-innovation approach in product designs, it might also become essential to acknowledge the limitations in terms of expertise and resources required to enforce such provisions.

C. Decreasing the cost of compliance for local companies

[79] Google Pay order, (n52); *Together we fight society v. Apple Inc.*, CCI Case No. 24 of 2021.
[80] 'Commission Fines Apple over €1.8 billion over abusive App store rules for music streaming providers' (European Commission, 4 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161> accessed 18 July 2024.
[81] DMA art. 6(3).
[82] DMA art. 5(4).
[83] DDCB s. 13.

There is a concern that the ex-ante regulation could stifle the growth of local companies.[84] However, it is interesting to note that, to an extent, the DDCB tries to avoid putting costs on domestic companies, even if the platform has a significant market share. For instance, even though the CCI has held wide parity clauses to be anti-competitive in two of its orders against travel aggregator MMT-Go[85] and food delivery apps Zomato and Swiggy[86], the DDCB does not contain a prohibition on parity clauses or MFN clauses, unlike Article 5(3) of the DMA.[87] Though the Report does not state the reason for it, one explanation could be that the CCI never investigated such clauses against gatekeepers and therefore, such obligations will still be judged through an ex-post analysis.

It can be argued that issues relating to parity or MFN clauses have been observed in terms of gatekeepers such as Amazon and Booking.com in other jurisdictions.[88] However, while Booking.com has been designated as a gatekeeper under the DMA,[89] it is doubtful that it could be designated as an SSDE under the DDCB since the Indian travel aggregator market has many other significant players, such as MMT-GO. Further, in India, e-commerce platforms such as Amazon are also regulated through the FDI policy, which allows e-commerce companies to run only a marketplace model and not hold their own inventories.[90] Like tying, MFN clauses can also have certain pro-competitive justifications, such as promoting investment and reducing transaction costs.[91] Therefore, considering the overall scheme of the DDCB, it makes sense that it does not include such prohibitions at this stage since they can always be analysed through an ex-post decision.

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[84] Auer and others (n9).
[85] *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India Private Limited and Others*, (n18).
[86] *NRAI v. Zomato and Swiggy*, CCI, Case no. 16 of 2021.
[87] Vikas Kathuria, 'Assessing India's Ex-Ante Framework for Competition in Digital Markets', (*ProMarket* (blog), 29 May 2024) <http://www.promarket.org/2024/05/29/assessing-indias-ex-ante-framework-for-competition-in-digital-markets/> accessed 18 July 2024.
[88] *E-Book Amazon*, EC, Case AT.40153 (4 May 2017); 'German Federal Supreme Court: Narrow Best-Price Clauses Applied by Booking.Com in Germany Breach EU Competition Law', <https://www.nortonrosefulbright.com/en/knowledge/publications/a3556d82/german-federal-supreme-court-narrow-best-price-clauses-applied-by-booking-dot-com> accessed 22 July 2024.
[89] 'Commission Designates Booking as a Gatekeeper', (European Commission, 13 May 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561> accessed 22 July 2024.
[90] Department for Promotion of Industry and Internal Trade (DPIIT), Press Note 2 of 2018, Ministry of Commerce and Industry, Government of India, <https://dipp.gov.in/sites/default/files/pn2_2018.pdf> accessed 22 July 2024.
[91] See Jan Peter van der Veer, 'Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis' (2013) 4 Journal of European Competition Law & Practice 501; Andrew Marcado 'Price-Parity Clauses: The Good, The Bad, and the…Anticompetitive? - Truth on the Market' (*Truth on the Market* 21 October 2022) <https://truthonthemarket.com/2022/10/21/price-parity-clauses-the-good-the-bad-and-theanticompetitive/> accessed 22 July 2024.

V. CONCLUSION

The aim of the discussion above is not to analyse whether there should be an ex-ante intervention. Rather the article aims to consider whether the proposed ex-ante regulation suits the needs of the Indian market. The article also analyses the potential changes that it can bring for competition law intervention in digital markets, keeping in mind the experience of the CCI in dealing with such issues so far. As discussed in Part II, to an extent, the CCI had already changed to a more interventionist approach before the DDCB. Undoubtedly, digital markets are complex, which makes it challenging to find an optimum level of intervention. In light of this, it is interesting how, at the very least, the text of the DDCB and the Report tries to balance regulation and innovation.

However, implementing such a regulation would be equally complex since it leaves many gaps, such as deciding which services are 'integral', to be filled in by further regulations. Therefore, it becomes essential to determine the level of enforcement that the CCI should seek to achieve through such regulation. As discussed above, it seems that the CCI will continue analysing these issues, both ex-post and ex-ante, under the consumer welfare standard to avoid over-regulation. In this respect, it appears to be a step in the right direction to restrict the number of obligations that the DDCB imposes since most of them would require constant monitoring of the gatekeeper's platforms and policies to ensure meaningful implementation.