Comments on the Draft Digital Competition Bill and the Committee Report

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1 Introduction

1.1 The Committee on Digital Competition Law (the "Committee") has produced a report (the "Report") and a draft Digital Competition Bill (the "Draft Bill"). The Draft Bill aims to prevent anticompetitive conduct in digital markets via *ex-ante* regulation. The Report argues that the Draft Bill is needed because of (i) the tendency for digital markets to tip swiftly in favour of an incumbent; and (ii) the time required for investigations under the Competition Act of 2002, which makes early detection of anticompetitive conduct difficult.[3] The Draft Bill aims to focus on the "*principles of contestability, fairness and transparency, with an objective to foster innovation, promote competition, protect the interest of users of such services in India, and for matters connected herewith and incidental thereto*".[4]

1.2 This note sets out our comments on the Draft Bill. Overall, we commend the Committee for drafting a law that is balanced in its approach and recognises the heterogeneity of markets in India's digital sector. We particularly commend the Committee for not mirroring a 'one-size-fits-all' approach used in other jurisdictions, but rather drafting a law that allows for tailored obligations for each core digital service ("CDS"), reflecting different economic considerations and the fact that behaviour may be harmful in one CDS but beneficial in another.

1.3 In our comments, we also identify some areas where we think the Draft Bill could benefit from further development. In particular, we recommend (i) the Competition Commission of India ("CCI") be given greater flexibility in the designation of systematically significant digital enterprises ("SSDEs") which meet the thresholds but do not have systemic or significant market power; (ii) the designation of

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2 Avinash Mehrotra and Jincy Francis are economists at FTI Consulting. The views expressed herein are those of the authors and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals. FTI Consulting, Inc., including its subsidiaries and affiliates, is a consulting firm and is not a certified public accounting firm or a law firm. FTI Consulting is an independent global business advisory firm dedicated to helping organizations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities. fticonsulting.com.

3 The Report, page 16.

4 Preamble to the Draft Bill, the Report, page 151.

SSDEs be based not just on past data, but also an assessment of likely future developments; (iii) given the varying size of the CDSs, designation thresholds differ by the CDS in question; and (iv) the CCI implements measures to ensure that the process and the methodology of assessment remain transparent and predictable.

1.4 Lastly, given the specific issues in digital markets, we also recommend that the CCI uses this opportunity to build its capacity, including in the disciplines of economics and data science, to enforce the Draft Bill efficiently.

1.5 We would be pleased to discuss any of our comments further if the government would find it helpful to do so.

2 Overview of the Draft Bill

2.1 The Draft Bill would regulate the practices of entities with a significant presence in the provision of select CDSs.[5] The Central Government can amend the list of CDSs.[6]

Designation of SSDEs

2.2 The Draft Bill provides for two ways to identify SSDEs in the provision of a CDS.

Based on quantitative thresholds

2.3 An entity is deemed an SSDE if it meets certain financial[7] and user thresholds[8] in each of the three preceding financial years.[9]

2.4 Digital entities are required to self-report to the CCI if they fulfil the above criteria to qualify as an SSDE, following which the CCI may pass an order designating the entity as an SSDE.[10] The SSDE also needs to notify the CCI of any enterprise within its group company that is directly or indirectly involved in the provision of the same CDS. Such a related enterprise of an SSDE is defined as an associate digital enterprise ("ADE").[11]

Based on economic assessment

2.5 An entity can be designated as an SSDE even if it does not meet the quantitative thresholds, if the CCI considers that it has a significant presence in a CDS.

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5 These include 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. The Draft Bill, Schedule I.

6 The Draft Bill, section 51(1).

7 The financial thresholds should satisfy one of the following: (i) turnover in India of INR 4,000 crore or above; (ii) global turnover of USD 30 billion or above; (iii) gross merchandise value in India of INR 16,000 crore or above; or (iv) global market capitalisation (or fair value) of USD 75 billion or above. Section 3(2) of the Draft Bill.

8 The user thresholds are (i) at least one crore end users; or (ii) at least ten thousand business users. Section 3(2) of the Draft Bill.

9 The Draft Bill, section 3(2).

10 The Draft Bill, section 4(1) and 4(2).

11 The Draft Bill, section 4(1).

2.6 The CCI may assess this based on factors including economic power, monopoly position, dependence of end users or business users and integration or inter-linkages of the enterprise with regard to the multiple sides of market.[12]

Obligations of SSDEs

2.7 SSDEs and ADEs will need to comply with certain obligations and prohibitions. The Draft Bill lists some of the obligations and prohibitions, for example, the obligation for fair and transparent dealing, and the prohibition of self-preferencing, anti-steering, tying and bundling and restriction of third parties.[13] It also has a provision for the CCI to introduce regulations with obligations for each CDS.[14] In doing so, the CCI may consider factors including the nature of the market, the number of users in India and the economic viability of operations, when specifying the obligations.[15]

2.8 SSDEs are required to report to the CCI on their compliance with the obligations.[16] In the case of alleged non-compliance by an SSDE, the investigative process is similar to an investigation under the Competition Act of 2002.[17] The CCI will first form its *prima facie* opinion. If *prima facie*, the CCI finds there is a concern, it will order the Director General ("DG") to investigate. The relevant parties will then be provided an opportunity to respond to the DG's findings and based on its consideration of all the facts, the CCI will pass its final order. The Draft Bill also allows for settlements with and commitments by SSDEs investigated by the CCI for non-compliance.

3 Our comments on the Draft Bill

3.1 Below we provide some comments on the Draft Bill. Overall, we commend the Committee for drafting a law that is balanced in its approach and recognises the heterogeneity of markets in India's digital sector. We particularly commend the Committee for not mirroring a 'one-size-fits-all' approach used in other jurisdictions, but rather drafting a law that allows for tailored obligations for each CDS, reflecting different economic considerations and the fact that behaviour may be harmful in one CDS but beneficial in another.

3.2 We also identify some areas where we think the Draft Bill could benefit from further development. In particular, we recommend (i) the CCI be given greater flexibility in the designation of SSDEs which meet the thresholds but do not have systemic or significant market power; (ii) the designation of SSDEs be based not just on past data, but also an assessment of the likely future developments; (iii) given the varying size of the CDSs, designation thresholds differ by the CDS in question; and (iv) the CCI implements measures to ensure that the process and the methodology of assessment remain transparent and predictable.

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12 The Draft Bill, section 3(3). The full list factors are: (i) volume and commerce of the enterprise; (ii) size and resources of the enterprise; (iii) number of business users or end users of the enterprise; (iv) economic power of the enterprise; (v) integration or inter-linkages of the enterprise with regard to the multiple sides of market; (vi) dependence of end users or business users on the enterprise; (vii) monopoly position; (viii) barriers to entry or expansion; (ix) extent of business user or end user lock in; (x) network effects and data driven advantages; (xi) scale and scope of the activities of the enterprise; (xii) countervailing buying power; (xiii) structural business or service characteristics; (xiv) social obligations and social costs; (xv) market structure and size of the market; and (xvi) any other factor the Commission may consider relevant.

13 The Draft Bill, sections 10, 11, 12, 13, 14 and 15.

14 The Draft Bill, section 7(1) and 7(3).

15 The Draft Bill, section 7(5).

16 The Draft Bill, section 9.

17 The Draft Bill, chapter IV.

3.3 Lastly, given the specific issues in digital markets, we also recommend that the CCI uses this opportunity to build its capacity, including in the disciplines of economics and data science, to enforce the Draft Bill efficiently.

The Draft Bill is evolved and agile

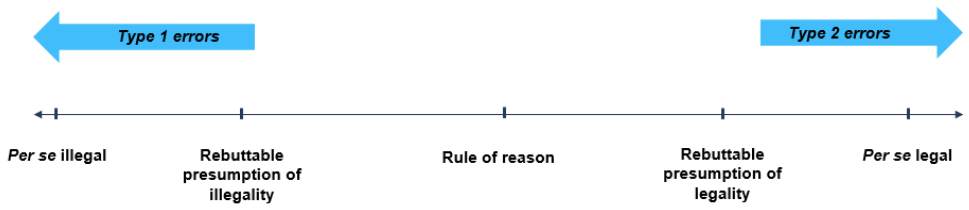
3.4 Competition authorities across the world have been grappling with concerns in digital markets. Over the past few years, there has been a growing sentiment that *ex-post* competition law is too slow, and too archaic to deal with the concerns in digital markets. These markets tend to be characterised by network effects, endogenous sunk costs, and increasing returns to scale where a winner 'might take all', and so intervention that is timely is of paramount importance. They are also highly dynamic and innovative markets where any errors in enforcement can snowball, and they may be subject to new theories of harm, which may not have an obvious place in traditional competition law.

3.5 Unsurprisingly, some authorities, led by the European Union ("EU"), have developed *ex-ante* regulation to combat some of these concerns. However, the devil is in the details, and the efficacy, and the appropriability of any such regulation depends, in part, on the identification of the entities that need to be regulated, the level of prescription in the regulation and the flexibility of the instrument.

Decision theory and the choice of regulatory instrument

3.6 As a matter of economics, the appropriate balance between *ex-ante* and *ex-post* regulation (and indeed other associated decisions such as the timing of intervention and the burden of proof) can be determined by decision theory, in particular by minimising the costs of what are called Type 1 and the Type 2 errors associated with the regulation.[18] Type 1 errors are those that arise from over-enforcement (i.e., prohibiting the conduct when it is procompetitive) and Type 2 errors are those that arise from under-enforcement (i.e., allowing the conduct when it is anticompetitive). For example, a conduct such as say agreeing to exclusive contracts could, in theory, be considered, at one extreme, *per se* illegal, or have a rebuttable presumption of illegality. Alternatively, it could be judged based on a rule of reason, or, at the other extreme, it could have a rebuttable presumption of legality or even be per se legal. These different approaches are shown in Figure 1 below.

Figure 1: Legal standards



Source: Schematic based on Padilla, Jorge, Decision Theory and Legal Process in EU Competition Law (June 4, 2021).

3.7 Type 1 errors increase as we move to the left and Type 2 errors increase as we move to the right. For example, *per se* illegality cannot lead to under-enforcement as the conduct is never allowed. However, it could very well lead to a situation where conduct that is not anticompetitive is also prohibited. The choice of *per se* illegality as the standard would therefore result in many Type 1 errors but no Type 2 errors. On the other hand, *per se* legality cannot lead to over-enforcement as

18 Padilla, Jorge, Decision Theory and Legal Process in EU Competition Law (June 4, 2021). Available at SSRN: https://ssrn.com/abstract=3859937, page 3.

the conduct is always allowed. However, it could very well lead to a situation where a conduct is anticompetitive but not prohibited. The choice of *per se* legality as the standard would therefore result in many Type 2 errors but no Type 1 errors.[19]

3.8 One way to eliminate both Type 1 and Type 2 errors is to implement a rule of reason approach, since an in-depth analysis of anticompetitive and procompetitive effects will determine the appropriate level of regulation in each case. However, there are two concerns with this. The first is that there is generally asymmetry of information between the regulator and the defendant, both about the market as well as information related to the defendant's activities. This means that a rule of reason approach may not always arrive at the right answer, and the regulator may err on one direction or another, perhaps likely err on the side of under-regulation if the defendant is opportunistic with regards to information sharing. The second is that the rule of reason approach is costly to implement. In depth effects analysis typically takes significant time and resources, creating an associated opportunity cost since these resources could be used for other activities. This concern is particularly significant in digital markets because, as explained above, these markets tend to be highly dynamic and innovative markets where the winner 'might take all', and so intervention that is timely is of paramount importance. Therefore, a full rule of reason approach may not be a practical solution in every case, and the regulator may need to rely on *per se* rules and rebuttable presumptions instead.

3.9 Decision theory suggests that the right legal standard should be chosen to minimise the costs of under and over-enforcement, subject to constraints like administrability, legal certainty and resource constraints. Therefore, conduct which is more likely to be procompetitive, should likely have a rebuttable presumption of legality, or even be *per se* legal. On the other hand, conduct which is more likely to be anticompetitive, should have a rebuttable presumption of illegality, or even be *per se* illegal.

3.10 Crucially, the costs associated with these Type 1 and Type 2 errors depend both on the likelihood of these errors, and the size of these errors. In the case of conduct in digital markets, these errors depend on the likelihood that a particular conduct was anticompetitive, and the size of consumer harm that the conduct generates. While economic theory predicts that certain practices may be more likely than not to lead to consumer harm, they typically also result in some procompetitive effects. The probability that the procompetitive effects outweigh the likely consumer harm, and the size of the harm or efficiency that may arise, are a function of the facts of the market. These are the facts that are usually considered in effects-based analyses, such as market structure, extent of market power, extent of multi-homing, buyer power, barriers to entry, and efficiencies. In digital markets, other factors such as the business model also become particularly important, as different entities have their own ways of monetising their platforms, and therefore their incentives to engage in a particular conduct could be very different.

3.11 In addition, given the dynamic and innovative nature of digital markets, the effects (both procompetitive and anticompetitive) of any conduct may be high, i.e., a given conduct may lead to significant consumer welfare and efficiencies if procompetitive, however it could also lead to material consumer harm if anticompetitive. In such a scenario, *per se* rules are likely to lead to high error costs, because there is far too much risk associated with an incorrect decision. In these scenarios, regulators are more likely to prefer rebuttable presumptions and rule of reason approaches as a way to minimise these risks.

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[19] Logically under-enforcement cannot exist under *per se* illegality and over-enforcement cannot exist under *per se* legality, unless there is a failure to enforce the law in the former case or the law is applied incorrectly in the latter case.

The Draft Bill strikes the right balance

3.12 The Draft Bill sets out a framework for *ex-ante* regulation and provides broad principles for conduct that should be prohibited (for example self-preferencing, restriction of third-party applications, anti-steering, and tying and bundling) and conduct that should be mandated (fair and transparent dealing and fair use of data).[20]

3.13 However, it has not set out precise obligations and prohibitions for the CDSs, as for example the EU's Digital Markets Act Regulation, 2022 (the "DMA") has done. Using the terminology from the framework above, the Draft Bill avoids *per se* rules. Instead, it leaves the CCI to specify separate conduct requirements for each CDS, based on the nature of the market, the number of users in India, and other factors.[21] The Draft Bill therefore allows for more tailored obligations, reflecting different business models and the fact that behaviour may be harmful in one CDS but beneficial in another, compared to a 'one-size-fits-all' approach used in other jurisdictions.

3.14 This is particularly important in the digital sector because, as described above, entities have different business models. The Draft Bill's flexible approach allows for the CCI to impose heterogeneous obligations on SSDEs, which might vary by the way in which the platform is monetised, the market factors relevant for competition, the economic viability of operations, cybersecurity, and fraud prevention requirements.

The Draft Bill and its enforcement can be strengthened by avoiding certain risks

3.15 Based on our review of the Draft Bill, *ex-ante* regulations of other jurisdictions, and experience in competition assessment of digital markets globally, we identify some risks with the Draft Bill in the following subsections. We hope the government will consider these comments while finalising the law.

SSDE designation based only on quantitative thresholds may lead to over-enforcement

3.16 The Draft Bill deems an entity to be an SSDE if it meets the financial and user thresholds. However, such an approach risks over-enforcement, and an increase in the risk of Type 1 errors identified above.[22]

3.17 The draft SSDE designation assumes that an entity that meets the Draft Bill's quantitative thresholds is a significant digital enterprise capable of affecting competition in the CDS. However, this may not always be the case. An entity may meet the quantitative thresholds but its significance in the market may be constrained due to economic factors such as, *inter alia*:

a. multi-homing: if either or both business and end users of the CDS choose to be present on multiple platforms providing the CDS. With multi-homing, even a duopoly where the two platforms have 50% market share may be quite competitive.

b. an absence of barriers to entry: if new platforms are able to enter the CDS relatively easily. Without strong barriers to entry, even a monopoly with a 100% market share may be constrained by the threat of potential entry and may not be able to exercise its market power.

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20 The Draft Bill, sections 10, 11, 12, 13, 14 and 15.

21 The Draft Bill, section 7(3).

22 There is no parallel risk of increased Type 2 errors because the Draft Bill already allows the CCI to designate an entity an SSDE even if it does not meet the quantitative thresholds. See: The Draft Bill, Section 3(3).

3.18 We understand that in case of deemed SSDEs, the Draft Bill does not include a provision for any assessment by the CCI or any discussion on whether the designation is appropriate. In comparison, both the EU's DMA and the DMCC Bill[23] have a provision for such representation or investigation prior to the designation:

a. DMA: The DMA presumes that an entity that meets the prescribed thresholds is a gatekeeper. However, it allows the entity to present sufficiently substantiated arguments to demonstrate that despite meeting the thresholds it does not enjoy the gatekeeper status.[24] The assessment of whether the entity should be designated a gatekeeper is based on the (i) its impact on the 'internal market', (ii) the importance of the entity as a gateway for business users to reach end users, and (ii) whether the entity has or is expected to have an entrenched and durable position in the market.

b. DMCC Bill: The procedure in the DMCC Bill includes investigation and public consultation on the proposed decision regarding strategic market status ("SMS"), prior to making the designation.[25] The assessment of whether the entity has a position of strategic influence is based on the scale of the entity, reliance on the entity, its ability to leverage its market position in other activities, and its ability to influence other players in the market.

3.19 Errors in designation that confer SSDE status on entities that do not hold any systematic or significant market power could be detrimental to the goals of the Draft Bill. The imposition of the regulation on such entities could limit their ability to compete in the CDS against entities that do have significant market power and hence should be subject to the regulation. Ultimately, it could reduce contestability in the CDS and hinder the goals of the Draft Bill "*to foster innovation, promote competition, protect the interest of users*."[26]

3.20 To overcome any such risk, we recommend that the Draft Bill be amended to allow the CCI to either:

a. precede the designation of SSDEs with an investigation (as proposed under the DMCC Bill); or

b. give the potential SSDE an opportunity to present its response to the proposed SSDE status (as under the DMA).

3.21 This would ensure that the SSDE designation is appropriate, and entities without significant market power are not subject to unnecessary regulation, which could have the effect of chilling competition.

SSDE designation based on historical data may have an adverse effect

3.22 The designation of an SSDE as per the quantitative thresholds is based on financial indicators such as turnover, gross merchandise value, market capitalisation and the number of users. However, these financial and user indicators are based on historical data,[27] which may not be appropriate in dynamic markets as it does not consider recent changes and foreseeable market realities which may have an adverse effect on the sector and the entity's business.

3.23 In comparison, the proposed approach in the DMCC Bill is more forward looking. The DMCC Bill considers historical turnover data only as a minimum condition that needs to be met for an entity to

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23 The DMCC Bill referred to in this document is the Bill dated 8 November 2023.
24 The DMA, paragraphs 1 and 5 of Article 3. Available here.
25 The DMCC Bill, sections 9 to 14. Available here.
26 The Draft Bill, preamble.
27 The Draft Bill, section 3(2).

be designated as SMS.[28] In addition, it proposes to designate an entity with digital activity linked to the UK[29] as having SMS if it has (i) a position of strategic significance; and (ii) substantial and entrenched market power in the future, which requires the CMA to undertake forward-looking assessment for at least five years.[30]

3.24 We recommend that the designation of SSDEs under the Draft Bill be based not just on historical data, but also on recent and/or foreseeable changes in the market that may influence the significance of the SSDE.

Identical designation thresholds for different CDSs may lead to errors in enforcement

3.25 The Draft Bill proposes an entity be deemed an SSDE if:

a. it meets any one of these financial thresholds: (i) turnover in India of INR 4,000 crore or above; (ii) global turnover of USD 30 billion or above; (iii) gross merchandise value in India of INR 16,000 crore or above; or (iv) global market capitalisation (or fair value) of USD 75 billion or above; and

b. if it has (i) at least one crore end users; or (ii) at least ten thousand business users.[31]

3.26 The above thresholds for designation are independent of the CDS that the entity is operating in. In particular, the financial and user thresholds are the same whether an entity is present in, for example, online social networking services[32] or whether it is present in, for example, online intermediation services[33].

3.27 This means that the financial and user thresholds, while useful as a starting point, do not necessarily have a direct relationship with the significance of the entity in a given CDS. For small CDSs, the thresholds may over-enforce the regulation (and likewise for large CDSs, the threshold may under-enforce the regulation).

3.28 This may explain why the DMCC Bill, instead of relying on turnover and user thresholds to identify digital entities in the UK having SMS status, assesses if the entity: (i) has substantial and entrenched market power (based on a forward looking assessment); and (ii) a position of strategic significance in the digital activity (based on factors such as its size/scale in the activity, its ability to extent market power to other activities, and its ability to influence other undertakings in the activity).[34] If these two conditions are met, then the entity is designated as having SMS in the digital activity only if its turnover exceeds a certain minimum threshold.[35]

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28 Global turnover should exceed £25 billion and UK turnover should exceed £1 billion. The DMCC Bill, section 7.

29 Including significant number of UK users. The DMCC Bill, section 4.

30 The DMCC Bill, sections 2, 5 and 6.

31 The Draft Bill, section 3(2).]

32 Meta for instance had advertising revenue of INR 183 billion in FY 2022-23 and over 400 million end users. See Faroqui, J. “Meta India’s gross ad revenue swells 13% to INR 18.3k cr in FY23”, 24 October 2023, Economic Times. See https://economictimes.indiatimes.com/industry/services/advertising/meta-indias-gross-ad-revenue-swells-13-to-18-3k-cr-in-fy23/articleshow/104660147.cms?from=mdr, last accessed on 13 May 2024.

33 Zomato for instance had revenues of INR 86.9 billion and 58 million annual transacting customers for food delivery in FY 2022-23. See Zomato Annual Report 2022-23, pages 10 and 11. Available at https://b.zmtcdn.com/investor-relations/Zomato_Annual_Report_2022-23.pdf.

34 The DMCC Bill, section 6.

35 The DMCC Bill, section 7.

3.29 We recommend that the thresholds in the Draft Bill be reconsidered and tailored more to the size of the CDS in question.

Risk of ambiguity and clarity in enforcement

3.30 The Draft Bill provides flexibility to the CCI and the government which is important to ensure its effectiveness. However, the flexibility should be used appropriately to ensure there are no issues related to transparency and predictability of the law's enforcement. This is necessary for the Draft Bill to be aligned with its principles of contestability, fairness, and transparency.

SSDE designation

3.31 The Draft Bill allows the CCI to designate an entity as SSDE even if it does not meet the quantitative thresholds. This is important as it ensures that the relevant regulations apply to entities which may not be large in terms of turnover and users but yet hold systemic and significant market power. To assess this, the Draft Bill allows the CCI to assess factors such as barriers to entry, lock-in of users (including multi-homing), countervailing buyer power, and market structure and size of the market.[36] The Draft Bill also allows the entity to provide input on this matter prior to the CCI's decision on its SSDE status.[37]

3.32 While such provisions are important to ensure the Draft Bill is applied to appropriate entities, it will also be important to ensure the process and the methodology of assessment remain transparent and predictable. To ensure this, we recommend that the CCI in such assessments explains:

a. the evidence relied on to consider designating the entity as an SSDE;

b. how the CCI considered the entity's response; and

c. the basis for the final order on SSDE designation.

3.33 The disclosure of this information will allow the entities to understand the CCI's methodology and provide the CCI with a consistent structure for its future assessments.

Exemptions

3.34 The Draft Bill allows the government to exempt some entities.[38] While this may be necessary for security or state interest, it will be important to maintain an even playing field among all players, otherwise there is a risk of dampening future investments and innovation in the digital sector.

3.35 In order to ensure this, we recommend:

a. such exemptions are limited to instances where necessary; and

b. the underlying rationale for the exemption is clearly explained.

The enforcement of the Draft Bill allows for, and requires, expertise

3.36 The Draft Bill recognises that certain aspects differentiate digital markets from traditional markets and therefore the two need to be regulated differently. It follows, therefore, that regulation of digital

36 The Draft Bill, section 3(3).
37 The Draft Bill, sections 3(3), 4(3), 4(5) and 4(6).
38 The Draft Bill, section 38.

markets will require in-depth expertise of digital markets and specific disciplines like economics and data science.

3.37 The Draft Bill recognises this and permits the CCI to call upon experts, including economists, to provide their opinion. This will assist the CCI in reaching appropriate and proportionate conclusions, given the nuanced features of digital markets.

3.38 In our experience in other jurisdictions, strong and efficient enforcement of *ex-ante* regulation requires specific expertise and capacity. We therefore recommend that the CCI build its capacity, including in the disciplines of economics and data science, to enforce the Draft Bill efficiently. Such an approach will be consistent with that in the EU and the UK, where staff with specific expertise are being hired to implement *ex-ante* regulations. Moreover, given the specificity, it may even be useful to have a dedicated team for implementing the Draft Bill within the CCI, as is being done in other jurisdictions.