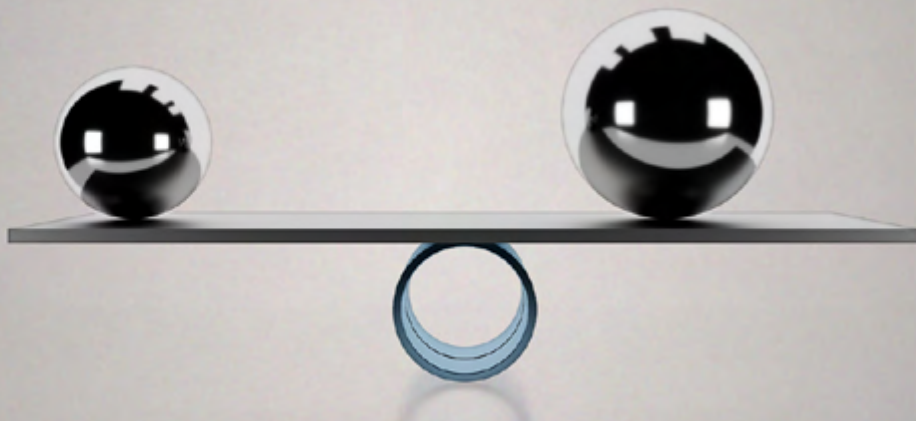


March 2024



Summary of The Report of The Committee on Digital Competition Law

On 12 March 2024, the Ministry of Corporate Affairs (**MCA**) published the Report of the Committee on Digital Competition Law's (**Committee**) Report (**Report**) along with a draft of the Digital Competition Bill, 2024 ([here](#)) (**DCB**).¹ The summary of the Report and DCB is set out below:

BACKGROUND

1. The 53rd Report on 'Anti-Competitive Practices by Big Tech Companies' was presented by the Parliamentary Standing Committee on Finance (**SCR**) before the Lok Sabha on 22 December 2022. The SCR identified ten Anti-Competitive Practices (**ACPs**) undertaken by large digital enterprises to abuse and consolidate their position in digital markets. These ACPs are set out below.

TABLE 1: ACPs IDENTIFIED BY THE SCR

SN	ACP	DESCRIPTION
1.	Anti-steering provisions	Exclusionary behaviour that hinders business users and consumers from switching to third-party service providers.
2.	Platform neutrality/ self-preferencing	A digital enterprise according favourable treatment to its own products on its own platform.
3.	Adjacency/ bundling and tying	Combining or bundling core or essential services with complementary offerings, forcing users to buy related services.
4.	Data usage (use of non-public data)	Using personal data for consumer profiling to offer targeted online services and products.
5.	Pricing/ deep discounting	Predatory pricing strategies, or intentionally setting prices below cost price to exclude competitors.
6.	Exclusive tie-ups	Exclusive agreements with business users or sellers, preventing them from dealing with other enterprises.
7.	Search and ranking preferencing	Controlling search ranking to prioritise sponsored or own products and reducing the visibility of other products.
8.	Restricting third-party applications	Restricting users from accessing or utilising third-party applications.

¹ Mrs. Pallavi Shroff (Managing Partner, Shardul Amarchand Mangaldas & Co.), was part of the Committee in her personal capacity as a legal expert and provided inputs in the preparation of the Report, along with Mrs. Shweta Shroff Chopra (Partner) and Mrs. Nitika Dwivedi (Partner).



SN	ACP	DESCRIPTION
9.	Advertising policies	Increasing market concentration, consolidation, and integration across many levels in the ad-tech supply chain which gives the incumbent platform an unfair edge over the market.
10.	Acquisitions and mergers	Acquisitions of smaller successful start-ups by dominant firms in the digital space tends to escape regulatory scrutiny because they do not often meet the asset and turnover based thresholds under the Competition Act, 2002 (Competition Act).

- The SCR observed that an *ex-post* approach may not be sufficient to remedy the ACPs in fast-paced digital markets. It recommended that the behaviour of large digital enterprises be monitored *ex-ante*, with an emphasis on preventing such anti-competitive conduct from occurring. The SCR amongst other matters recommended setting up of a 'Digital Competition Act' to ensure contestability of digital markets, and establishment of a 'Digital Markets and Data Unit (**DMDU**)' within the Competition Commission of India (**CCI**) to monitor the ACPs of identified digital enterprises.
- Following the SCR's recommendation, the MCA constituted the Committee to, amongst other matters: (a) review whether existing provisions in the Competition Act were sufficient to address challenges in the digital economy; (b) examine whether an *ex-ante* digital competition law is required; and (c) study international best practices in relation to competition in digital markets.
- The Report highlights the findings and recommendations of the Committee. With regard to the ACPs identified by the SCR, the Committee was of the opinion that only the first nine ACPs should be discussed in the Report and that anti-competitive mergers and acquisitions do not need to be dealt with extensively in the Report since the Competition (Amendment) Act, 2023 sufficiently addressed the same with the introduction of a deal value threshold for notification of transactions to the CCI.

LIMITATIONS OF THE INDIAN REGULATORY LANDSCAPE

- The regulation of large digital enterprises in India is carried out under a host of different statutory measures, which are enforced by a number of ministries and regulators. In light of this, the Committee examined: (a) the current competition framework and its limitations; and (b) other existing regulations/ policies, along with their ability to address the issues in the digital economy.
- The Committee highlighted the existing investigations and enforcement framework were time consuming due to: (a) the structure of the Competition Act involving several stages in enforcement proceedings; and (b) the complexity of delineating a 'relevant market' and assessing the dominance of digital enterprises.
- The Committee felt that the powers of the CCI under the present *ex-post* model (Sections 3 and 4 of the Competition Act) may not sufficiently enable the early detection and intervention required to prevent digital markets from irreversibly tipping. Accordingly, the Committee found that new tools that strengthen and supplement the CCI's existing *ex-post* powers are needed. Although the *ex-ante* framework may still be subjected to judicial interventions, it will be a much more efficient market correction mechanism compared to Sections 3 and 4 of the Competition Act.
- The Committee analysed various existing legal policy frameworks in the digital, data and e-commerce space, such as the Foreign Direct Investment Policy and Foreign Exchange Management (Non-debt Instruments) Rules, 2019; the Consumer Protection Act, 2019; and the Digital Personal Data Protection Act, 2023. However, the Committee noted that the primary mandate of such instruments is to ensure orderly growth of the specific sectors within which they operate. The Committee therefore took the view that, while such instruments have sporadic points of interaction with the Indian competition law regime, their ability to holistically ensure fair competition in digital markets in an *ex-ante* manner was limited.



EMERGING INTERNATIONAL PRACTICE SUPPORTS THE CASE FOR *EX-ANTE* REGULATION

9. While noting the inadequacy of the existing Indian legal instruments in ensuring effective contestability in the digital economy, the Committee also considered the *ex-ante* laws prevailing in/ proposed to be issued in other jurisdictions.
10. In doing so, the Committee noted that several mature jurisdictions have already enacted/ are in the process of enacting *ex-ante* laws for digital markets, e.g., the European Union (**EU**) (Digital Markets Act), the United Kingdom (**UK**) (Digital Markets Competition and Consumer Bill) and the US (such as American Innovation and Choice Online Act).

THE NEED FOR *EX-ANTE* COMPETITION INTERVENTION IN DIGITAL MARKETS

11. The Committee recommended a separate *ex-ante* law for digital markets to regulate enterprises that have a significant presence because—
 - (i) **ex-post investigations are time consuming and resource-intensive:** By the time *ex-post* investigations conclude, the market may irreversibly tip in favour of the market player (due to factors such as the data-driven nature of the market and network effects) and raise entry barriers/ drive out competitors. Further, the benefits of early detection and intervention outweigh the costs associated with over-regulation;
 - (ii) **ex-ante regulations would reduce the administrative burden and lead to efficient regulation in digital markets:** *Ex-post* competition investigations are limited only to the claims made in each case. They may not effectively address similar conduct by the same or different enterprises in the same sector; and
 - (iii) **ex-post competition enforcement works best when complemented with ex-ante enforcement:** Typically, the sectoral regulator sets the 'rules of the game' and the competition regulator, through *ex-post* regulation acts as the 'umpire'. However, digital enterprises do not fall within the purview of a specific sector, although aspects of their operations are regulated in a fragmented manner by a host of different regulators. The Competition Act is sector-agnostic, and inclusion of a separate chapter on *ex-ante* provisions for regulating digital enterprises may therefore not be appropriate.

KEY FEATURES OF THE PROPOSED DIGITAL COMPETITION ACT

Services / markets proposed to be regulated under the DCB

12. The Committee took note of the two divergent international approaches in determining the applicability of *ex-ante* competition instruments: (a) service market specific approach (adopted by the EU, Australia, and South Korea); and (b) service/ market agnostic approach (proposed by the UK and followed by Japan). The Committee noted that pre-identifying the service/ markets instils certainty, while refraining from pre-identifying the service/ markets allows for greater adaptability, enabling swift responses to the dynamism in digital markets.
13. To strike a balance between the two approaches, the Committee proposed that the DCB apply to a pre-identified list of Core Digital Services (**CDS**) that are susceptible to concentration and at the same time allow flexibility to the Central Government to add or delete services/ markets from the pre-identified list. Accordingly, the DCB lists the 'Core Digital Services' (Schedule 1) and empowers the Central Government, in consultation with the CCI, to notify new services, or alter or delete services/ markets from the list.
14. The list of CDS' comprise: (a) online search engines; (b) online social networking services; (c) video - sharing platform services; (d) interpersonal communication services; (e) operating systems; (f) web browsers; (g) cloud services; (h) advertising services; and (i) online intermediation services. Each CDS has also been defined. From this list, 'online intermediation services' is widely defined and includes web-hosting service providers, payment sites, auction sites, online application stores, online marketplaces and aggregators providing services such as mobility aggregation, food ordering, food delivery services and match-making. The list has been prepared based on the CCI's enforcement experience, market studies and emerging global practices.

Threshold and criteria for designation as a Systematically Significant Digital Enterprises

15. Under the DCB, an enterprise that crosses the thresholds under Section 3(2) or satisfies the qualitative criteria under Section 3(3) shall be designated as a Systematically Significant Digital Enterprise (**SSDE**) with respect to one or more CDS which will be identified in the CCI's designation order.
16. The Committee recommended that the DCB should only regulate enterprises which have a 'significant presence' in the provision of a CDS in India and the ability to influence the Indian digital market. To determine if an enterprise has significant presence, the Committee has laid down the following thresholds:

(i) Quantitative thresholds

QUANTITATIVE THRESHOLDS (IN EACH OF THE PRECEDING THREE FINANCIAL YEARS)									
A. FINANCIAL THRESHOLDS									
TURNOVER IN INDIA ²		GLOBAL TURNOVER ³		GROSS MERCHANDISE VALUE IN INDIA ⁴		GLOBAL MARKET CAPITAL ⁵		FAIR VALUE	MARKET VALUE
≥ INR 4,000 crore	OR	≥ USD 30 billion	OR	≥ INR 16,000 crore (approx. USD 1,931.25 million)	OR	≥ USD 75 billion	OR	≥ USD 75 billion	
(approx. USD 482.81 million)									
AND									
B. USER THRESHOLDS IN INDIA									
END USERS OF THE CORE DIGITAL SERVICE PROVIDED BY THE ENTERPRISE IN INDIA			OR				BUSINESS USERS OF THE CORE DIGITAL SERVICE PROVIDED BY THE ENTERPRISE IN INDIA		
≥ 10 million							≥ 10,000		

* Provided that if the enterprise does not maintain or fails to furnish data, it shall be deemed to be an SSDE if it meets any of the thresholds mentioned in (A) or (B) above.

17. When the enterprise is part of a group, then the quantitative thresholds shall be computed with reference to the entire group. The wording of the DCB further seems to suggest that only the end users/ business users pertaining to that relevant CDS may be considered while undertaking the user threshold computation; however, this will need to be relooked once the implementing regulations are in place.
18. The Central Government shall, every 3 years from the commencement of the DCB and in consultation with CCI, by notification enhance or reduce these thresholds or keep them at the same level.
19. The manner of calculation of "turnover in India", "global turnover", "gross merchandise value" and "global market capitalisation" will be prescribed.

(ii) Qualitative thresholds

2 Includes revenue derived in India from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.

3 Includes revenue derived from the sale of all goods and provision of all services, whether digital or otherwise, by the enterprise.

4 Refers to the total value of goods or services, or both, sold by, or through the intermediation of, the enterprise through all the CDS it provides.

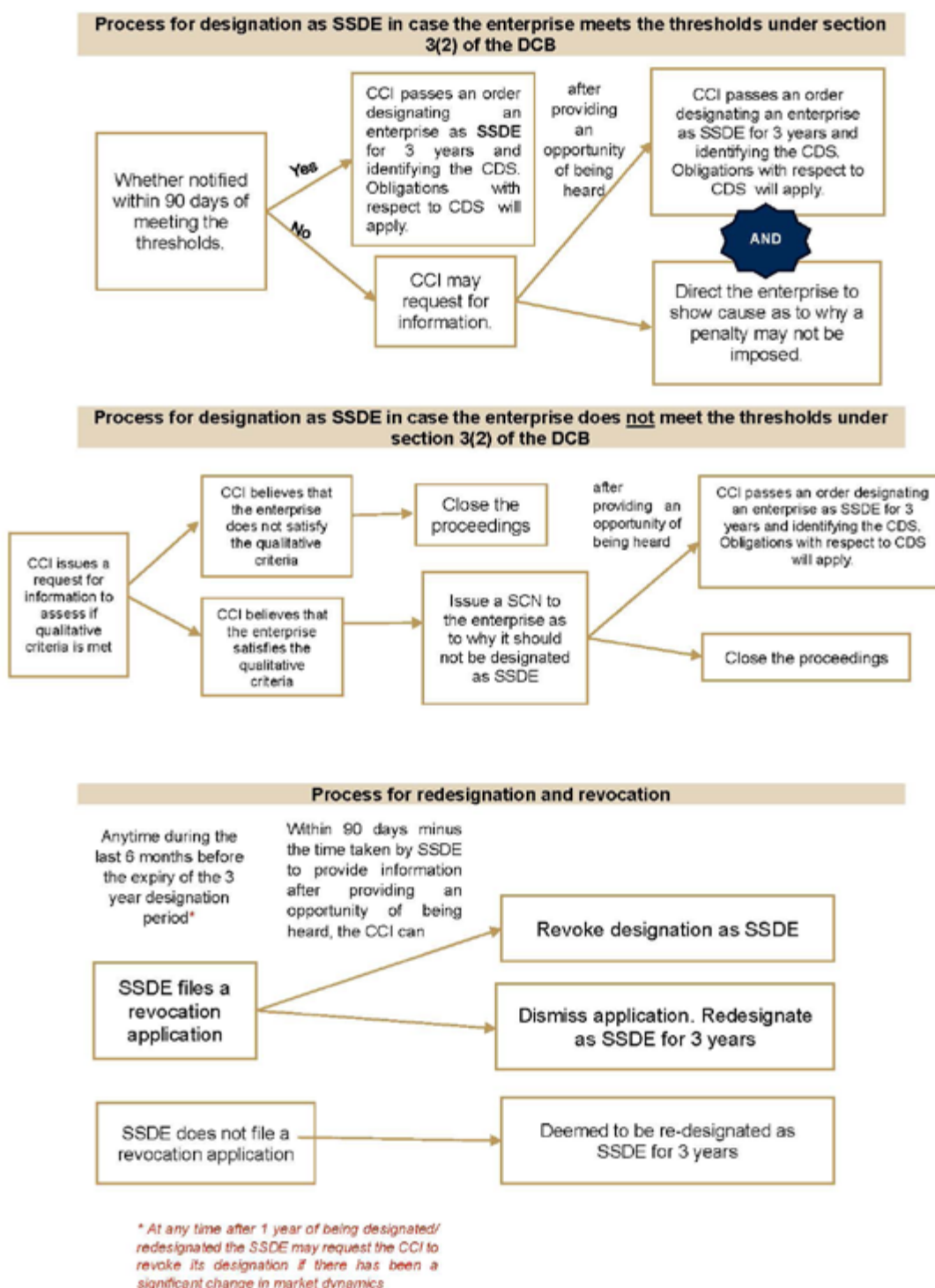
5 Refers to the market capitalisation of the enterprise calculated at the global level.



20. Under the residuary powers envisaged in the DCB, the CCI has the discretion to designate an enterprise as an SSDE in respect of a CDS, even if it does not meet the quantitative criteria above, if it opines that the enterprise has a significant presence in respect of such a CDS, based on an assessment of information available with it, and based on any or all of the factors mentioned in Section 3(3) of the DCB. An indicative list of factors includes (a) economic power of the enterprise; (b) network effects and data driven advantages; (c) volume of commerce of the enterprise; (d) size and resources of the enterprise; (e) countervailing buyer power and (f) extent of business user or end user lock-in.

Self-Reporting obligation and designation

21. The process of designation is set out below.





Designating an Associate Digital Enterprise

22. The Committee recommended that where enterprises providing CDS are part of a group, the designation envisaged may not be limited to just one enterprise in the group. The Committee deliberated on a potential scenario in which compliance may be required from multiple digital enterprises within a group that are engaged in providing CDS. Depending on the involvement of different enterprises within the group in providing a CDS, the Committee envisaged two scenarios: (a) where the holding enterprise is designated as an SSDE and other enterprises within the group, directly or indirectly involved in provision of the same CDS, are designated as Associate Digital Enterprises to the SSDE (**ADEs**); and (b) a non-holding enterprise most directly involved in providing the CDS is designated as an SSDE and its holding enterprise and other group entities directly or indirectly involved in providing the same CDS are designated as its ADEs. In this regard, the Committee recommended that the CCI be given flexibility to identify the appropriate enterprises for SSDE and ADE designations.

Obligations of SSDEs / ADEs

23. The Committee considered whether all nine ACPs should be prohibited in a similar manner. The Committee recognised that some ACPs like tying and bundling have pro-competitive benefits in certain situations but may also lead to anti-competitive effects in other situations. The Committee agreed that the *ex-ante* obligations in the form of broad principles would be laid down in the DCB and the regulations would take into account the pro-competitive effects and set out the applicability of the obligation. The regulations shall be drafted by the CCI through a consultative process.

24. The CCI may also specify different conduct requirements for various business models such as cab aggregators, food delivery apps and e-commerce platforms, all of which come under the purview of a single CDS (online intermediaries).

25. Once designated, the SSDE must follow all the obligations applicable to the CDS it provides. By default, all the obligations will also apply to the ADE. However, in cases where the ADE is partly or indirectly involved in the provision of the CDS, the CCI may reduce their compliance burden through regulations.

26. The Committee identified two categories of obligations - general obligations (applicable to all CDS) and specific obligations (applicable to specific ACPs).

(i) *General obligations on the SSDE/ ADE*

(ii) *Specific obligations on the SSDE/ ADE as per the DCB*

TABLE 2: OBLIGATIONS ON THE SSDE/ ADE

SN	ANTI-COMPETITIVE CONDUCT	OBLIGATIONS
1.	Self-preferencing	An SSDE shall not favour— (a) its own products, services, or lines of business; or (b) those of related parties; or (c) those of third-parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services over those offered by third-party business users on the CDS, in any manner.



SN	ANTI-COMPETITIVE CONDUCT	OBLIGATIONS
2.	Data usage	An SSDE shall not, directly or indirectly, use or rely on non-public data of business users operating on its CDS to compete with such business users on the identified CDS of the SSDE. An SSDE must obtain consent of end users and business users before: (a) intermixing / cross-using their personal data; or (b) permitting usage of their data by third-parties.
3.	Restricting third-party applications	An SSDE shall— (a) not restrict or impede the ability of end users and business users to download, install, operate or use third-party applications or other software on its CDS; and (b) allow end users and business users to choose, set and change default settings.
4.	Anti-steering	An SSDE shall not restrict business users from, directly or indirectly, communicating with or promoting offers to their end users, or directing their end users to their own or third-party services, unless such restrictions are integral to the provision of the CDS of the SSDE.
5.	Tying and bundling	An SSDE shall not— (a) require or incentivise business users or end users of the identified CDS to use one or more of the SSDE's other products or services; or (b) those of related parties; or (c) those of third-parties with whom the SSDE has arrangements for the manufacture and sale of products or provision of services alongside the use of the identified CDS, unless the use of such products or services is integral to the provision of the CDS.

EXEMPTIONS

Exemptions by the CCI

27. The CCI can exempt certain CDSs from complying with one or more obligations through regulations. The exemptions can be formulated keeping in mind factors such as: (a) economic viability of operations; (b) prevention of fraud; (c) cybersecurity; and (d) prevention of infringement of Intellectual Property Rights.

Exemptions by the Central Government

28. Analogous to Section 54 of the Competition Act, the Central Government shall have the overarching power to exempt enterprises from the application of the DCB in: (a) the interest of security or the public interest; (b) in accordance with any obligation under any treaty; or (c) if the enterprise performs a sovereign function.

INQUIRY AND APPEAL PROCESS

29. The inquiry process provided under the DCB is similar to the Competition Act. The CCI has been authorised to conduct an inquiry on its own knowledge, or on receipt of an information or a reference by the Central/ State Government or a statutory authority along with the Director General (**DG**).

30. The DCB also contemplates a limitation period of three years from the date on which the cause of action arose. However, the limitation period may be extended if sufficient cause is exhibited to the CCI's satisfaction.



31. As under the Competition Act, appeals under the DCB shall lie to the National Company Law Appellate Tribunal (**NCLAT**) and thereafter to the Supreme Court of India (**Supreme Court**), within 60 days from the receipt of the order/ decision by the relevant authority.
32. Lastly, a claim for compensation can be made by any person aggrieved by the non-compliance of obligations by a SSDE or its ADE (as determined by the CCI) before the NCLAT or the Supreme Court for compensation in accordance with Section 53N of the Competition Act.

ENFORCEMENT, REMEDIES AND PENALTIES

Enforcement

33. The DCB largely borrows its enforcement framework from the Competition Act. Provisions of the Competition Act pertaining to powers of the CCI and the DG, the right to claim compensation, the power to issue interim orders, and other provisions will apply *mutatis mutandis* to the DCB. In addition to its power to conduct dawn raids, the DG has also been granted the power to enter the premises of the SSDE or ADE to verify information received by it. Similarly, the settlements and commitments regime envisaged under the DCB shall be the same as the Competition Act. (*Read more on the settlement and commitment regime under the Competition Act [here](#).*)
34. The Committee took note of the fact that there may be overlapping proceedings against the same enterprise under the DCB and the Competition Act, with the possibility of contrary outcomes or penalties emanating from both proceedings. The Committee recommended that the CCI may deal with such situations on a case-by-case basis.
35. The Committee observed that the CCI had already set up the DMDU, a specialised interdisciplinary centre of expertise for digital markets housed within the CCI. The Committee urged that the CCI must strengthen the technical capacity of the DMDU with experts to gain enough experience by the time the DCB is enacted. In response to stakeholder suggestions, the Committee also recommended instituting a separate bench within the NCLAT to ensure timely disposal of appeals filed against the CCI's orders, particularly those relating to digital markets.

Remedies

36. Section 17 of the DCB empowers the CCI to issue an order directing any enterprise to modify or to discontinue the contravening conduct.

Penalties

37. A snapshot of the penalties recommended by way of the DCB is set out below.

TABLE 3: DCB PENALTY MATRIX



PROVISION OF DCB	CONTRAVENTION	PARTY ON WHOM PENALTY WILL BE IMPOSED	LEGAL CAP
Section 28(1)	Failure to comply with the applicable obligations	SSDE or its ADEs	10% of the SSDE group's** global turnover in the preceding financial year. <i>**While the language of the provision does not indicate this, the Committee recommended that in cases where the SSDE is part of a group of enterprises, the 'global turnover' cap be calculated in relation to the turnover of the entire group of enterprises.</i>
Section 28(2)	Enterprise engaging in circumvention from designation	SSDE or its ADEs	10% of its global turnover in the preceding financial year.
Section 28(3)	Failure to self-report to the CCI	Enterprise	1% of the global turnover.
Section 28(4)	Failure to provide information, or providing incorrect, incomplete or misleading information as sought under the provisions of the DCB	Enterprise	1% of the global turnover.
Section 27(2)	Failure to comply with the orders or directions of the CCI issued amongst other matters in relation to (a) failure to comply with applicable obligations; (b) interim orders; and (c) penalties	Person	INR 10 crore (approx. USD 1.2 million) (INR 1 lakh (approx. USD 1,203) for each day during which such non-compliance occurs)
Section 27(3)	Failure to comply with the orders or directions issued, or failure to pay the penalty imposed under Section 27(2)	Person	Imprisonment for up to three years or Fine which may extend to INR 25 crore (approx. USD 3 million) or Both.

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