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To:
Ministry of Corporate Affairs (Competition Section),
Government of India
Email: comments.cdcl@gov.in

Submission of comments on the Draft Digital Competition Bill, 2024

We thank the Ministry of Corporate Affairs (MCA) for the opportunity to submit comments on the draft Digital Competition Bill (the draft Bill) and the report of the Committee on Digital Competition Law dated 27th February, 2024 (CDCL).

About Access Now

Access Now is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence and expertise based in over 20 countries across six continents, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights.

Access Now engages with a global community of individuals from over 162 countries in our annual RightsCon summit series, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world. We have special consultative status at the United Nations.[1]

In India and globally, Access Now has consistently engaged with stakeholders including governments and regulatory authorities on matters pertaining to digital rights,[2] including data protection,[3] content governance,[4] cybersecurity, internet shutdowns,[5] surveillance and digital security.

[1] Access Now, *About us*, https://www.accessnow.org/about-us/.
[2] Access Now, *No liberty, no safety: Sri Lanka must withdraw the Online Safety Bill*, https://www.accessnow.org/press-release/sri-lanka-must-withdraw-the-online-safety-bill/.
[3] Access Now, *Joint submission on the Bangladesh Draft Data Protection Act 2023,* https://www.accessnow.org/wp-content/uploads/2023/10/Submission-on-the-Bangladesh-Data-Protection-Act-2023-Access-Now-and-Tech-Global-Institute.pdf.
[4] Access Now, *Submission on the draft Broadcasting Services (Regulation) Bill, 2023,* https://www.accessnow.org/wp-content/uploads/2024/01/Access-Now-Submission_Broadcasting-Services-Bill_January-2024.pdf.
[5] Access Now, *Shrinking democracy, growing violence: Internet shutdowns in 2023*, https://www.accessnow.org/wp-content/uploads/2024/05/2023-KIO-Report.pdf.

Comments on the Draft Digital Competition Bill

Data portability and the rights of users

We welcome the inclusion of an obligation on Systemically Significant Data Enterprises (SSDEs) to ensure data portability for all users in clause 12(3) of the draft Bill. Data portability is key to ensuring that individuals have a real, meaningful choice as to which digital service they wish to use and are not locked into using one service. The ability to conveniently move personal data from one platform to another offering similar services strengthens individuals' control over their data, and as a consequence, makes platforms more accountable to their users, promoting the purpose of the draft Bill to "ensure fairness and contestability in the market".[6] Obligations to provide data portability play an important role in incentivising platforms to work towards interoperability.[7]

Clause 12(3) requires SSDEs to "allow business users and end users of its Core Digital Services to easily port their data, in a format and manner as may be specified." In order for a right to data portability to be effective and accessible, individuals must have the ability to not just receive, but also transfer their data, for free, and in a format which can be understood and used by a different platform offering the same service, facilitating interoperability. A right to data portability is meaningless if platforms are not interoperable.[8]

In its current form, clause 12(3) leaves the specifics of what data is to be provided, how, and when open to interpretation and rule-making. This could weaken the requirement to make data meaningfully portable and transferable, and result in delayed implementation

[6] Report of the Committee on Digital Competition Law, Para 3.13, pg.40, available at https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open.
[7] "At the same time, tech companies are facing more aggressive antitrust concerns than ever before, many of them centering on data access. The biggest tech companies have few competitors. And as they face new questions about federal regulation and monopoly power, sharing data could be one of the least painful ways to rein themselves in." The Verge, *Google, Facebook, Microsoft, and Twitter partner for ambitious new data project*, https://www.theverge.com/2018/7/20/17589246/data-transfer-project-google-facebook-microsoft-twitter.
[8] Access Now, *Creating a Data Protection Framework: A Do's and Don'ts Guide for Lawmakers,* https://www.accessnow.org/wp-content/uploads/2019/11/Data-Protection-Guide-for-Lawmakers-Access-Now.pdf.

of the obligation, defeating the purpose of promoting competition by making switching services easier.

In contrast, Article 6(9) of the European Union's Digital Markets Act (DMA) imposes a more detailed obligation on entities designated as "gatekeepers"[9] to enable data portability. Article 6(9) of the DMA is clear as to:

- What is to be provided: "effective portability" of:
    - Data provided by the end user, or
    - Data generated through the activity of the end user in the context of the use of the relevant core platform service
- When it should be provided: at the request of the end user
- Whether users should be charged for their data: no, it is to be provided free of charge
- What else gatekeepers should provide:
    - Tools to facilitate the effective exercise of such data portability
    - Continuous and real-time access to such data

In addition, Article 6(9) complements the right to data portability under the General Data Protection Regulation (GDPR) and must be read along with the specific requirements of that law.[10] Article 20 of the GDPR provides that individuals have the right to receive their data "in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance".[11] Including the right to data portability in the GDPR was in consideration of not only the individual right to privacy, but also the benefit of empowering individuals' control over their data to counter anti-competitive practices. The European Data Protection Board (EDPB) recognised the importance of data portability for promoting competition[12] in the *Guidelines on the right to*

[9] In terms of Article 3 of the Digital Markets Act, "An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) 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." Digital Markets Act, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2022.265.01.0001.01.ENG.

[10] Recital 59 of the DMA states that "For the avoidance of doubt, the obligation on the gatekeeper to ensure effective portability of data under this Regulation complements the right to data portability under the Regulation (EU) 2016/679."

[11] General Data Protection Regulation, available at https://eur-lex.europa.eu/eli/reg/2016/679/oj.

[12] "Indeed, the primary aim of data portability is to facilitate switching from one service provider to another, thus enhancing competition between services (by making it easier for individuals to switch between different providers)." Article 29 Working Party, *Guidelines on the right to data portability,* https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-right-data-portability-under-regulation-2016679_en.

data portability.[13] With regard to the specifications in Article 20 of the GDPR, the Guidelines state that:

> "The terms "structured", "commonly used" and "machine-readable" are a set of minimal requirements that should facilitate the interoperability of the data format provided by the data controller. In that way, "structured, commonly used and machine readable" are specifications for the means, whereas interoperability is the desired outcome.

In assessing the text of the GDPR, Access Now's GDPR user guide highlighted that "in order for this right to deliver its promise and for users and innovators to truly benefit from it, it will be important to develop and implement interoperability standards between services. This means that platforms should use a similar format for entering data".[14]

In contrast to the GDPR, India's data protection law — the Digital Personal Data Protection Act, 2023 (DPDPA) — does not provide any right to data portability. In the absence of such complementary provision in data protection legislation, it is essential for the draft Bill to specify as far as possible the minimum standards for data portability.

We recommend that clause 12(3) be <u>amended as follows</u> to ensure effective and accessible data portability.

> 12. (3) A Systemically Significant Digital Enterprise shall allow business users and end users of its Core Digital Service to easily port their data**, including to a Core Digital Service service offered by any other Systemically Significant Digital Enterprise, at the request of the business user or end user**~~, in a format and manner as may be specified~~.
>
> **(a) This sub-section applies to all personal data provided by business users and end users and all data generated through the activity of the business user and end user in the context of the use of the relevant Core Digital Service.**
>
> **(b) The data shall be provided in a structured, commonly used and machine-readable format which can be transferred to a Core Digital Service provided by any other entity for use on that Service.**

[13] The Guidelines on the right to data portability were adopted by the Article 29 Working Party, which was replaced by the European Data Protection Board in 2018. The EDPB endorsed the Guidelines in its first plenary meeting in 2018. https://www.edpb.europa.eu/about-edpb/who-we-are/legacy-art-29-working-party_en.
[14] Access Now, *A user guide to data protection in the European Union*, https://www.accessnow.org/wp-content/uploads/2018/07/GDPR-User-Guide_digital.pdf.

(c) No end user shall be charged any fee for providing data under this sub-section.

(d) A Systemically Significant Digital Enterprise shall also take steps to enable end users and business users to easily access their data, including by providing tools to facilitate the effective exercise of such data portability and providing continuous and real-time access to such data.

Interaction with the Digital Personal Data Protection Act, 2023

We welcome the Committee's observation that the draft Bill will complement the Digital Personal Data Protection Act, 2023 (the DPDPA).[15] This is also the framework for the EU's DMA and GDPR requirements on data portability, as discussed above. However, the DPDPA as passed by Parliament in August 2023 does not contain a right to data portability for individuals.[16]

Data portability was envisioned as part of the data protection law

The Justice Srikrishna Committee in 2018 recommended including a right to "structured, commonly used and machine-readable format" in its draft data protection bill,[17] noting that data portability "improves competition between fiduciaries who are engaged in the same industry and therefore, has potential to increase consumer welfare."[18] Subsequently, a right to receive and transfer personal data in a "structured, commonly used and machine-readable format" was also included in the draft Personal Data Protection Bill, 2019.[19] However, this right to data portability was omitted from the draft Digital Personal Data Protection Bill, 2022[20] and from the final text of the DPDPA.

Effect of the absence of the right to data portability in the DPDPA

The absence of a right to data portability in the DPDPA undermines the CDCL's objective of promoting competition by excluding most data processors from the ambit of

[15] Report of the Committee on Digital Competition Law, Para 3.13, pg.40, available at https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open.
[16] The Digital Personal Data Protection Act, 2023, available at https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf.
[17] The Personal Data Protection Bill, 2018, available at https://www.meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf.
[18] Committee of Experts on a Data Protection Framework for India, available at https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.
[19] The Personal Data Protection Bill, 2019, available at https://prsindia.org/files/bills_acts/bills_parliament/2019/Personal%20Data%20Protection%20Bill,%202019.pdf.
[20] The Digital Personal Data Protection Bill, 2022, available at https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Potection%20Bill%2C%202022_0.pdf.

interoperability. If individuals are granted a standalone right under the DPDPA to demand data portability from data processors, this will only strengthen the incentive for all entities collecting user data to support interoperability, regardless of whether they are SSDEs or not. Interoperability needs cooperation across industries to be effective. The more companies participating in and subject to interoperability requirements, the more likely it is to succeed and become an industry norm.

A right to data portability in the DPDPA would also be enforceable by individuals, who are empowered to file complaints before the Data Protection Board of India under Section 27(1)(b) of the DPDPA. These proceedings would complement the structure of inquiry by the Competition Commission of India (CCI) under the draft Bill, and could help bring to light breaches of obligations under clause 12(3).

We recommend that to complement the Digital Competition law and strengthen the data portability obligation, the DPDPA be amended to include a right to data portability, which includes the right to receive and transfer personal data in a structured, commonly used, and machine-readable format, and is enforceable against all data processors.

Comments on the procedure to designate an SSDE

Clause 4 of the draft Bill provides the procedure for designation of an SSDE. We appreciate the incorporation of both a self-reporting mechanism and a procedure to be initiated by the Commission in this regard. The process of designation of an SSDE is of significant public interest given the consequences for people's choices and for the relevant industry. In this context, it would be beneficial for the Commission to consider not only the information and response received from an enterprise, but also the specialised knowledge that impacted stakeholders, civil society organisations, academic and research organisations and technical experts possess. For example, researchers and technical experts could provide the Commission with detailed inputs as to the potential anti-steering practices that a web browser may engage in, which would help the Commission make specific inquiries of any enterprise providing such a service.

We appreciate that the draft Bill appears to foresee the need for the Commission to consider external material in Clause 4(4) of the draft Bill, referring to "any other information in its possession". Core Digital Services and their practices evolve quickly, and there are a multiplicity of researchers and civil society organisations investigating the

effects of these practices across the world on not only end users and businesses, but on other enterprises. In this situation, rather than the Commission having to seek out relevant information, it would be more efficient for the Commission to establish a procedure whereby upon the initiation of the designation process, the Commission makes a public notice for comments or issues a call for evidence, inviting stakeholders to comment on the issues.

We recommend that clause 4 be amended by adding the following sub-clause to ensure that stakeholders are able to submit pertinent information regarding the designation of an enterprise as an SSDE to the Commission, and to ensure that the Commission is able to act after consideration of all relevant information.

> **(10) The Commission shall, at the time of giving an opportunity to be heard to any enterprise under sub-section (4), sub-section (5), and sub-section (6), also invite public comments on the designation of the enterprise through a notice on its website, and that all such public comments should be published on the website, unless specifically requested otherwise by the commenter and approved by the Commission.**

Comment on the framing of regulations to lay down obligations of SSDEs

Framing regulations to implement the in-principle obligations under the draft Bill will be a highly contentious and technical process. In this context, we welcome the reference to assistance from experts in the fields of "economics, law, technology, regulation, accountancy, commerce, international trade, or from any other discipline" and the reference to potential studies to be conducted, in clause 21(3) of the draft Bill.

We also appreciate the specific provisions to ensure transparency in the regulation-making process in clause 49(5) of the draft Bill. We recommend that a further step to ensure transparency should be to also publish the comments received, unless a specific request is made by the commenter to withhold their identity. Further, the reasons for making emergency regulations made under the proviso to clause 49(5), if any, should also be published in the interest of transparency and people's certainty in the decision-making process.

We recommend that clause 49(5) be amended to ensure full transparency.

> 49. (5) The Commission shall ensure transparency while making regulations under this Act, by:
> (a) publishing draft regulations along with such other details as may be specified on its website and inviting public comments for a specified period**, which shall be not less than two months,** prior to issuing regulations;
> (b) publishing **all public comments received, unless specifically requested otherwise by the commenter and approved by the Commission, and** a general statement of its response to the public comments, not later than the date of notification of the regulations; and
> (c) periodically reviewing such regulations.
>
> Provided that if the Commission is of the opinion that certain regulations are required to be made or existing regulations are required to be amended urgently in public interest or the subject matter of the regulation relates solely to the internal functioning of the Commission, it may make regulations or amend the existing regulations, as the case may be, without following the provisions stated in this section recording the reason, for doing so **and such reasons shall be published at the time of publication of such regulation or amendment**.

We thank you for the opportunity to participate in this consultation. We hope that the Ministry will undertake further public consultation after review of initial comments from all stakeholders, including through public meetings. We remain available for any clarification or queries in relation to this feedback, and any other further assistance.

Yours sincerely,

Shruti Narayan
Policy and Advocacy Fellow
shruti@accessnow.org

Namrata Maheshwari
Senior Policy Counsel
namrata@accessnow.org

Raman Jit Singh Chima
Senior International Counsel and Asia Pacific Policy Director
raman@accessnow.org

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