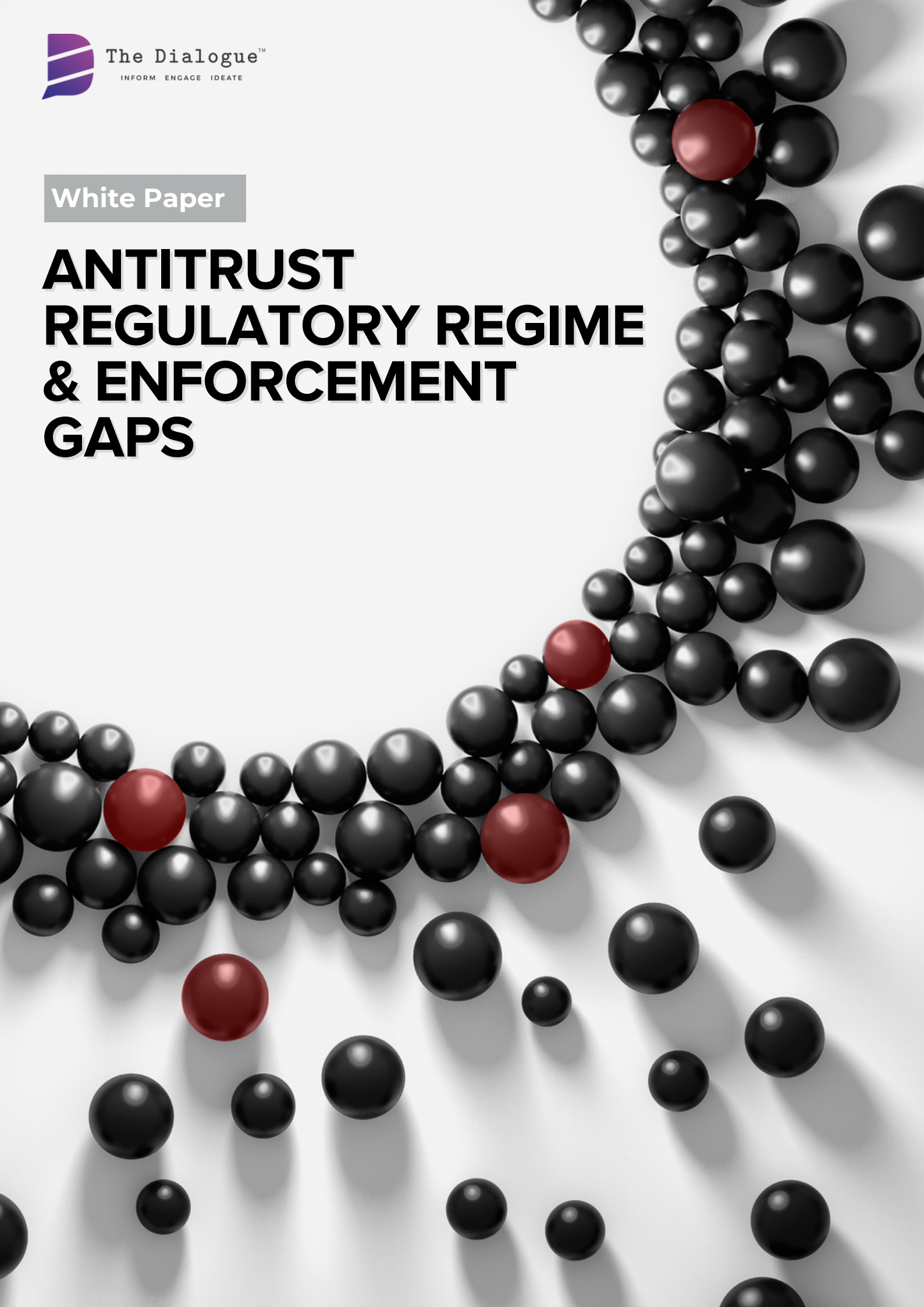




The Dialogue™
INFORM ENGAGE IDEATE

White Paper

ANTITRUST REGULATORY REGIME & ENFORCEMENT GAPS



WHITE PAPER

ANTITRUST REGULATORY REGIME AND ENFORCEMENT GAPS



The Dialogue™ is a public policy think tank with a vision to drive a progressive narrative in India's policy discourse. Founded in 2017, we believe in facilitating well-researched policy debates at various levels to help develop a more informed citizenry, on areas around technology and development issues. The Dialogue™ has been ranked as the world's Top 10 think tanks to watch out for, by the Think Tank and Civil Societies Programme (TTCSP), University of Pennsylvania in their 2020 and 2021 rankings.

For more information

<https://thedialogue.co>

Suggested Citation

The Dialogue (2023). White paper: Antitrust regulatory regime and enforcement gaps. The Dialogue™

Catalogue No.

TD/CMP/WP/0523/01

Publication Date

May 09, 2023

CONTENTS



Introduction	1
Need for a new legal framework - Review of work by different stakeholders	1
Evaluation of factors cited by the PSC to recommend a new DCA	3
Conclusion	5



1. Introduction

The Competition Act, 2002 (**Act**), which was enacted as a comprehensive competition legislation, primarily seeks to regulate three types of conduct: anti-competitive agreements, abuse of a dominant position and combinations. The Act adopts an ex-post review and remediation mechanism for the first two categories of conduct and adopts an ex-ante review framework for merger control. The rationale for ex-post regulation primarily hinges on the fact that certain market-facing conduct may give rise to pro-consumer and pro-competition effects, which is why it is necessary to establish an adverse effect on the competition before regulatory intervention. On the other hand, many jurisdictions follow an ex-ante framework for merger control, which assumes that an increase in market concentration (through common ownership or control) may lead to reduced competition.

While minor amendments have been made to the Act since its enactment, the emergence of new and rapidly evolving markets necessitated a holistic review of the Act to equip the Competition Commission of India (**CCI**) to intervene effectively in digital markets. Accordingly, a Competition Law Review Committee (**CLRC**)¹ was constituted to primarily review the current legal framework in view of changing business environment, look into international best practices, study regulatory overlaps and make suitable recommendations. The recommendations² of CLRC in 2018, ultimately culminated in the enactment of the Competition (Amendment) Act, 2023.³ Simultaneously, however, increasing scrutiny of digital markets across the world prompted the Parliamentary Standing Committee on Finance (**PSC**) to take up a review of potential anti-competitive practices prevalent in digital markets. The PSC tabled its report on anti-competitive practices⁴ by Big Tech companies in December 2022, with a recommendation to explore framing a ‘Digital Competition Act’ – which could potentially contain a set of pre-emptively applicable obligations and prohibitions for players that it termed as “systematically important digital intermediaries.”⁵

This white paper provides an overview of the current regulatory framework. The paper discusses the rationale given by the PSC for recommending an ex-ante framework and evaluates the need for the same in light of these reasons. The paper also looks at the adequacy of the current competition law framework which includes the major amendments made by the Parliament in 2023 to address competition concerns in the digital market.

2. Need for a new legal framework - Review of work by different stakeholders

When a technology or development outpaces existing laws, regulatory gaps may occur, leaving certain market failures unaccounted for. It’s therefore important to determine whether such regulatory or enforcement gaps exist in the current framework vis-à-vis digital markets, and if a new law would serve any purpose. The CLRC’s report and the CCI’s own demonstrated capacity to tackle issues are instructive on the subject:

¹ Government constitutes Competition Law Review Committee to review the Competition Act, Press Information Bureau [September 30, 2018] <https://pib.gov.in/newsite/PrintRelease.aspx?relid=183835>

² Report Of Competition Law Review Committee, Ministry of Corporate Affairs, Government of India [July, 2019] <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

³ Competition (Amendment) Act, 2023 that was passed in the Parliament on 29th March 2023, received the President’s assent on 11th April 2023

⁴ Standing Committee on Finance, Seventeenth Lok Sabha, *Anti Competitive Practices by Big Tech Companies*, Fifty Third Report [December 2022] https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf

⁵ PSC recommended identifying a small number of the leading players that can negatively influence competitive conduct in the digital market. Such players identified as ‘Systematically Important Digital Intermediaries’ (“SIDI”), were recommended to be defined on the basis of revenue, market capitalisation, number of active businesses and end users. This is essentially a designation mechanism similar to that adopted by EU’s identification of ‘gatekeepers’ [*The Digital Markets Act: ensuring fair and open digital markets*, European Commission https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en] under the Digital Markets Act.

- i. **CLRC's work:** The CLRC specifically assessed gaps vis-a-vis digital markets, and affirmed the absence of any legislative or enforcement gaps. In fact, it emphasized the sufficiency of current provisions of the Act to address the nuances and peculiarities of the digital markets, such as factoring control over data⁶ for determining the dominant position of an enterprise, addressing scenarios of algorithmic collusion⁷, etc.

Nonetheless, to account for emerging and potential harm theories associated with digital markets, the CLRC recommended a specific inclusion of 'hub and spoke'⁸ cartels, broadening the scope of actionable anti-competitive agreements to include 'other agreements'⁹ that cause or are likely to cause appreciable adverse effect on competition (AAEC), and to formulate new merger control thresholds such as 'deal-value'¹⁰ thresholds for reviewing strategic acquisitions of smaller players which pose potential competitive constraints to larger players. The CLRC also recommended introduction of settlements and commitments mechanisms which would accelerate the remedying of the market inconsistencies and bring finality to CCI's decisions much sooner. These recommendations have now been translated into the provisions of the Competition (Amendment) Act, 2023 i.e. they have been given legal force now and will guide the regulation of the digital market space in India.

- ii. **CCI has demonstrated an exceptional capacity to tackle issues of digital markets:** Over time, the CCI has demonstrated an exceptional capacity to effectively intervene in digital markets under the existing legislative framework – be it through legal proceedings (investigations/merger reviews) or market studies. Pertinently, there has been a steady rise¹¹ in the number of digital market investigations taken up by CCI, which extend to issues such as online search advertising, play-store policies and in-app purchase obligations. In fact, all anti-competitive practices identified by the PSC, have either been remediated or are currently being investigated by the CCI. In fact, CCI is also in the process of setting up a Digital Market Unit¹² which can bring enhanced expertise, resources, and focus for investigating potential anti-competitive behaviour in this rapidly evolving sector. However, it remains to be seen whether the DMU will be established under the DCA or as a standalone measure. For instance, in the UK, the Digital Markets Unit was established as a non-statutory body.

The CCI also continues to proactively monitor emerging markets through market studies¹³ involving extensive research, analysis and stakeholder consultations. For example, the market study on e-commerce¹⁴ brought to the fore certain issues such as possible lack of platform neutrality, unfair platform-to-business contractual terms, exclusivity to deal, issue of deep discounts, etc. Similarly, the telecom study¹⁵ brought out new issues and challenges with the market moving towards data-based applications and services and technology-led convergence across the value chain.

- iii. **Parliamentary Committees:** There do exist some gaps in the current enforcement practice as highlighted by the Parliamentary Standing Committee on Commerce (**Commerce Committee**) and the Standing Committee on Finance in their respective reports. The Commerce Committee in its 172nd Report on 'Promotion and

⁶ Paragraph 215, page 157, supra at 2

⁷ Paragraph 2,7, page 154, id

⁸ Paragraph 3.5, page 62, id

⁹ Paragraph 4.6, page 64, id

¹⁰ Paragraph 5.14, page 133, id

¹¹ Ruchika Chitravanshi, *Controlling mergers in digital markets a challenge: CCI chief Ashok Gupta*, Business Standard [December 11, 2021]

https://www.business-standard.com/article/economy-policy/controlling-mergers-in-digital-markets-a-challenge-cci-chief-ashok-gupta-121121000506_1.html

¹² Sourabh Lele, *CCI to set up in-house digital mkt data unit for regulating tech platforms* [March 22, 2023]

https://www.business-standard.com/article/companies/cci-to-set-up-in-house-digital-mkt-data-unit-for-regulating-tech-platforms-123032200133_1.html

¹³ Market Study on the Telecom Sector in India, Competition Commission of India [2021]

<https://www.cci.gov.in/economics-research/market-studies/details/20/1>

¹⁴ Market Study on E-Commerce In India- Key Findings and Observations, Competition Commission of India [2020]

<https://www.cci.gov.in/economics-research/market-studies/details/18/6>

¹⁵ Supra at 13

Regulation of E-commerce in India’ opined¹⁶ that the absence of coordination between the Ministries/Departments that deal with e-commerce resulted in enforcement gaps in the current regulatory regime. The Committee recommended establishment of a regulatory body that integrates the various ministries or departments and authorities responsible for regulating e-commerce. Similarly, the PSC in its 53rd Report on ‘Anti-competitive Practices by Big Tech Companies’ emphasised that delay in enforcement and the tipping effect in digital markets led to ineffective enforcement.

3. Evaluation of factors cited by the PSC to recommend a new DCA

In its Report, the PSC acknowledged the CCI’s ability to effectively intervene in digital markets. However, the PSC cited the following reasons¹⁷ to justify its recommendation for a separate “Digital Competition Law”: (a) time involved in investigations and procedural requirements under the existing regime; (b) inability of the current framework to prevent attempts to monopolize markets; and (c) time saved in enforcing rules against conduct that has previously been established as anti-competitive.

These reasons, in addition to the Committee’s observation that digital markets are different from traditional markets form the basis for the Committee’s recommendation in favour of an ex-ante regulatory framework. However, it would be prudent to analyse these factors in further detail:

i. Ex-ante frameworks and timely intervention

The Ministry of Corporate Affairs submission recorded in the report suggests that ex-post antitrust adjudication impedes timely intervention in digital markets owing to its emphasis on evidence gathering, procedural fairness and judicial review.¹⁸ However, there is scant evidence to suggest that ex-ante frameworks can guarantee faster interventions.

Notwithstanding the fact that EU’s Digital Markets Act (DMA) is yet to be implemented, based on timelines indicated in the DMA, it can take anywhere between 21 to 50 months for the EC to designate ‘gatekeepers’ and conclude proceedings against non-compliant ‘gatekeepers’. Whereas, the UK’s Draft Digital Markets, Competition and Consumer Bill stipulates 9 months as a period for investigation to determine whether an undertaking can be designated as someone with Strategic Market Status (SMS).¹⁹ The market investigation to determine whether an undertaking is fit to be designated as a gatekeeper can alone take upto 12 months.²⁰ By contrast, the average time taken by CCI (1,074 days/35 months²¹) to dispose of cases is at par with both the DMA, as well as ex-post intervention in EU and US. In fact, the timeline for disposal is set to be truncated further owing to the introduction of commitments and settlements framework²² as well as leniency plus regime in the Competition (Amendment) Act, 2023.²³ Based on evidence from EU, which has had settlements since 2008,²⁴ the existing framework is likely to

¹⁶ Department Related Parliamentary Standing Committee on Commerce, Rajya Sabha, *Promotion and Regulation of E-Commerce in India*, One Seventy Second Report [July 2022] https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/13/159/172_2022_7_14.pdf?source=rajyasabha

¹⁷ Paragraph 1, page 31, Standing Committee on Finance, Seventeenth Lok Sabha, *Anti Competitive Practices by Big Tech Companies*, Fifty Third Report [December 2022] https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf

¹⁸ Page 27, Standing Committee on Finance, Seventeenth Lok Sabha, *Anti Competitive Practices by Big Tech Companies*, Fifty Third Report [December 2022] https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf

¹⁹ Section 14, Digital Markets, Competition and Consumers Bill <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf>

²⁰ Article 17(1), Digital Markets Act, 2022

²¹ *Why the fuss over ex ante regulation for Big Tech?*, The Ken [March 15, 2023]

<https://the-ken.com/techpolicy/why-the-fuss-over-ex-ante-regulation-for-big-tech/>

²² Key provisions that allow parties to offer settlements or commitments to address potential concerns arising from their conduct / practices, at different stages of the inquiry. Having been tested in more mature jurisdictions, such as the European Union and United Kingdom, these effective antitrust enforcement tools are essential to efficiently utilize the CCI’s resources that are expended on protracted and long-drawn investigations/appeals.

²³ Leniency Plus is a proactive antitrust enforcement strategy aimed at attracting leniency applications by encouraging companies already under investigation for one cartel to report other cartels unknown to the competition regulator.

²⁴ G Seetharaman, *Can CCI be more agile like its EU and US counterparts in disposing of cases?*, The Economic Times [November 25, 2019]

<https://economictimes.indiatimes.com/news/economy/policy/can-cci-be-more-agile-like-its-eu-and-us-counterparts-in-disposing-of-cases/articleshow/7220183.cms?from=mdr>

perform as well, if not better than a new ex-ante mechanism. A study that analysed 84 cartel cases in the EU also found that the settlement procedures brought down the duration of settled cases by around 9 months.²⁵

ii. Standardising regulation on tipping

PSC has flagged the digital market's potential to tip in favour of one or two players resulting in monopolisation by those players. It accordingly recommended evaluation of competitive behaviour ex-ante before markets end up monopolized. However, it may also be observed that achieving a network tipping point, where the scale of a network becomes more valuable to its participants than any competing network, can be a challenging task. This is because network externalities can either strengthen or weaken the network scale, depending on other indicators such as product quality.

For example: MySpace, Orkut, etc., remained the leading social networks till around 2008, until they failed to keep up quality,²⁶ led unsuccessful attempts to save network scale through acquisitions²⁷ and ultimately ceded the space to Facebook.²⁸ A decade later, despite Facebook's innovation, scale and introduction of multiple features, it has still lost ground to competing products which are launched every year. Consumers have become informed and are able to shift to such competing services easily and without incurring costs. For example, proposed changes to WhatsApp's privacy policy in 2021 resulted in mushrooming of user base of Signal to 23 million²⁹ from a meagre 1.6 million – with the Monthly Active Users (MAU) growing steadily beyond 40 million as of end of 2021. Other recent examples, include the example of the cab aggregator market where new mobility companies are cornering³⁰ market share from leaders, owing to sub-optimal experiences faced by users and drivers.

Therefore, network effects, which refers to platforms gaining additional value with increased user base, does not always result in winner takes all outcomes. Poor user experience or availability of innovative options result in negative network externalities and prevent companies from gaining scale. It also follows that market “tipping” in favour of a few limited companies cannot be an assumption as the market players are continually innovating and competing on merits.

In fact, in some highly competitive and dynamic market segments characterised by multi-homing, the occurrence of any form of “tipping” may itself be in question. Unlike markets where regulatory intervention may be required to impose interoperability as a manner of diluting potential ‘network lock-ins’ – markets exhibiting multi-homing (for example in online retail) inhibit the attainment of “tipping” altogether, since users as well as sellers bear little to no switching costs and can simultaneously avail services from multiple providers.

Given the uncertainty associated with the occurrence of “tipping”, it follows, that any attempts to create a legislative standard that tries to pre-empt the network tipping point, cannot be wholly immune from errors especially when most of these concerns can be prevented by way of ex-ante interventions under existing merger control regimes on a case-by-case basis. To the contrary, proscribing pro-competitive conduct in an attempt to prevent companies from gaining scale, can limit growth, and adversely impact innovation in Indian digital markets.

²⁵Kai Hüschelrath & Ulrich Laitenberger, *The Settlement Procedure in the European Commission's Cartel Cases: An Early Evaluation*, 5 J. Antitrust Enforcement 458 (2017), <https://doi.org/10.1093/jaenfo/jnw015>

²⁶ *Network Effects Killed Myspace*, Cornell Blogs [December 1, 2016] <https://blogs.cornell.edu/info2040/2016/12/01/network-effects-killed-myspace/>

²⁷ Stuart Dredge, *MySpace – what went wrong: The site was a massive spaghetti-ball mess*, The Guardian [March 6, 2015] <https://www.theguardian.com/technology/2015/mar/06/myspace-what-went-wrong-sean-percival-spotify>

²⁸ Cory Doctorow, *The Last Days of Myspace*, Medium [Feb 17, 2022] <https://onezero.medium.com/the-last-days-of-myspace-7bd197173603>

²⁹ Michael Grothaus, *Signal usage is skyrocketing after WhatsApp's disastrous privacy policy changes*, Fast Company [March 30, 2021] <https://www.fastcompany.com/90620439/signal-usage-is-skyrocketing-after-whatsapps-disastrous-privacy-policy-changes>

³⁰ Lijee Philip & Pranav Balakrishnan, *New mobility companies seek to disrupt Ola, Uber*, The Economic Times [July 25, 2022] <https://auto.economicstimes.indiatimes.com/news/aftermarket/new-mobility-companies-seek-to-disrupt-ola-uber/93100943>

iii. The Existing Framework Enables the CCI to Ensure Implementation of Remedies

The report enlists certain anti-competitive conduct which are prevalent in digital markets which requires timely intervention and hence requires ex-ante regulation. In this regard, it is to be noted that within the four corners of the current law, CCI has in fact delved into such issues.

Pertinently, the digital market players could not obtain interim stay from appellate authorities on the remedies directed by the CCI in three most recent cases— leading the digital market players to commit³¹ to compliance in a time-bound manner.³² Further the NCLAT³³ also upheld CCI's order imposing a penalty on Google in the PlayStore case in a short time frame of 3 months.³⁴ These go on to show the current regulatory environment in India is steadfastly taking on the digital market. Furthermore, CCI also has mechanisms to address continued non-compliance by imposing penalties for each instance of non-compliance followed by imprisonment³⁵. The existing penal provisions have been further revised under the Competition (Amendment) Act, 2023 to increase the quantum of penalty thereby leading to a safe assumption of higher deterrence. In any case, a regulatory mechanism of ex-ante or ex-post cannot in itself ensure compliance which is contingent on institutional capacity of the CCI. It may, therefore, be prudent to understand whether a DMU can be established to govern the existing framework, and to analyse the extent to which the CCI's institutional and financial capacities can be enhanced.

All of this indicates that the current provisions of the Act may be sufficient and broad enough to check the anti-competitive conduct enlisted by the PC in its report and to further strengthen the same, it is the enforcement that needs to be strengthened and not the laws.

Effective regulation or a new law, if sought to be established, requires empirical analysis and proof as the foundation for an ex-ante approach, especially in emerging technology industries. Moreover, the suitability of ex-ante interventions must be weighed against the trade-off between immediate consumer welfare gains and the potential negative impact of rigid regulatory structures on innovation and consumer welfare in the long run. It also needs to be kept in mind that pre-empting threat to competition merely based on the entity's market-share or market-power may also result in stifling innovation and harming capital investment, owing to the notional 'growth ceiling' created by such size-based regulations. Additionally, compliance costs may be passed on to consumers, which could result in a worse off position.

4. Conclusion

In light of the above discussion, it becomes imperative for the policymakers to give careful consideration to the reasons that prompted the need for an ex-ante framework before deciding on curating a new law. For example, the Commerce Committee's observation on inter-ministerial coordination deserves more attention. The institutional capability of the CCI is another factor that policymakers need to consider. Any new legislation must take into account the CCI's functions and the resources it would require to effectively enforce the new law. Furthermore, the efficacy of 2023 amendments to the Competition Act, 2002 should also be sufficiently assessed before bringing in

³¹ Arghanshu Bose, *Google CCI ruling: Play Store to house other app stores by next week*, Times of India [Jan. 22, 2023]

http://timesofindia.indiatimes.com/articleshow/97218766.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

³² *Google CCI ruling: Play Store to house other app stores by next week*, Times of India [Jan. 22, 2023], <https://timesofindia.indiatimes.com/gadgets-news/google-cci-ruling-play-store-to-house-other-app-stores-by-next-week/articleshow/97218766.cms>

³³ *NCLAT upholds Rs 1,338-cr fine on Google, grants partial relief on four grounds*, MoneyControl [March 29, 2023]

<https://www.moneycontrol.com/news/business/nclat-upholds-rs-1338-cr-fine-on-google-grants-partial-relief-on-four-grounds-10333531.html#:~:text=An%20appellate%20tribunal%20on%20Wednesday,stores%20on%20its%20Play%20Store.>

³⁴ Id

³⁵ Competition Act, 2002, § 42, No. 12, Acts of Parliament 2003 (India).

an additional framework. It is important to consider the unique characteristics of the Indian economy, as legislations from other countries may not be applicable in India without proper analysis.



<https://thedialogue.co>

 [@_DialogueIndia](#)

 [@thedialogue_official](#)

 [The Dialogue: My Company | LinkedIn](#)

 [The Dialogue | Facebook](#)