

PRIMER 2

# IS A NEW DIGITAL COMPETITION LAW REQUIRED?

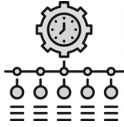

ASSESSING THE EXISTING REGULATORY LANDSCAPE

# Is a New Digital Competition Law Required? Assessing the Existing Regulatory Landscape

# INTRODUCTION

Acting on the recommendations contained in the 53<sup>rd</sup> Report of the Parliamentary Standing Committee on Finance (**PSCF Report**), the Government constituted the Committee on Digital Competition Law (**CDCL**) to deliberate whether a new law is needed to deal with competition law issues in digital markets. This primer re-evaluates the need for a new law and the ability of the Competition Commission of India (**CCI**) implement such a law.

**Gaps in Current Competition Laws:** The PSCF Report identifies two major gaps in current competition laws – the lack of timely intervention under current laws, and second the absence of tools that can enable the CCI to prevent the creation of digital monopolies.<sup>1</sup>

PROPOSED OBJECTIVE	GAPS IDENTIFIED IN THE FINANCE COMMITTEE REPORT	CONSIDERATIONS
<p><b>Timely Intervention</b></p> 	<p>The Report observed that competition harms remain unaddressed for the duration of CCI investigations. It therefore recommended a new <i>ex-ante</i> (pre-emptive) law that presumes the existence of harms arising from certain practices adopted by digital firms and outrightly prohibits them without an investigation.</p>	<p>The CCI has powers to issue <i>interim orders</i> targeted at addressing competition harms pending the conclusion of an investigation. In any event, it took the CCI an average time of 1074 days (approximately 3 years) to reach final orders. A pre-emptive law is likely to involve similar or longer timelines. For instance, procedures under EU’s Digital Markets Act, can take between 21 to 50 months before enforcing preemptive measures against identified companies.</p>
<p><b>Preventing Digital Monopolies</b></p> 	<p>Observing the typical speed of growth for digital companies, the PSCF Report calls for new tools that can help CCI act against companies which are yet to attain a dominant position, and effectively prevent the creation of digital monopolies.</p>	<p>The Competition Act already enables the CCI to review mergers in advance of their completion. This enables the CCI to prevent transactions that can lead to the creation of monopolies. As for other forms of market growth with risk of monopolization, the CCI retains the power to investigate problematic market conduct and prescribe remedies which includes forced sale of assets/control.</p>

<sup>1</sup> The current law enables CCI to take action against a company once it has attained a certain amount of market power (‘dominant position’) and has engaged in conduct harmful for competition (‘abuse of dominant position’). It cannot intervene against companies that do not enjoy a ‘dominant position’, or intervene solely to prevent a company from attaining a ‘dominant position’.

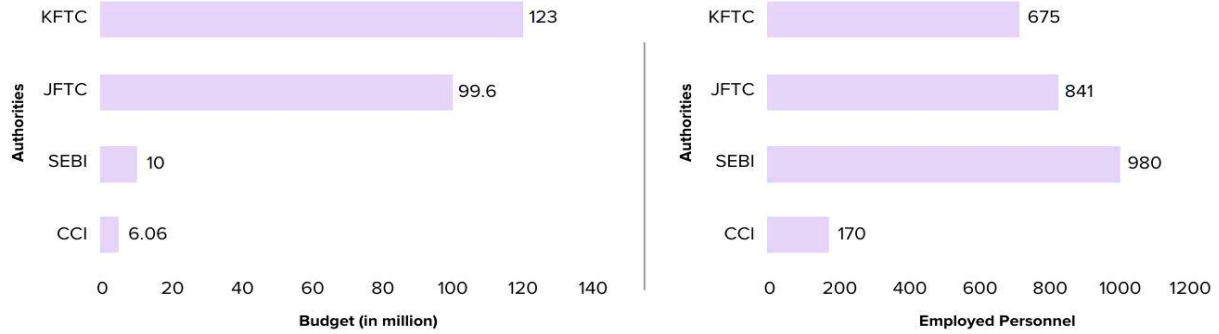
**Points to consider:** Both of the primary gaps identified by the PSCF Report, are addressed under the existing competition law framework. Recent amendments to the Competition Act have further strengthened the speed with which CCI can remedy harms. For example, the introduction settlements and commitments under the Competition Act, enables companies to undertake voluntary obligations or settle with the CCI, leading to quicker resolution of anti-competitive conduct. Similarly, a new rule mandates that any acquisition above Rs 2000 crores has to be approved by the CCI before taking effect. The rule is expected to capture strategic acquisitions which are targeted at monopolizing markets, or reducing potential and future competition by acquiring promising new entrants in digital markets.

**Overlap of PSCF’s Recommendations with Other Existing Laws:** The diversity of digital business models has led to multiple laws and sector-specific rules aimed at regulating the operations of digital businesses. Any law proposed by the CDCL will need to account for overlaps with these frameworks. Shown below are the practices identified in the PSCF Report and the laws that already seek to prevent these practices.



**Points to consider:** The activities and prohibitions explored in the PSCF’s Report are already being simultaneously addressed through other existing and proposed frameworks including the FDI Policy, the Proposed Ecommerce Policy and Rules, as well as the upcoming data protection law and the Digital India Act. The CDCL should be cognizant of these measures, and should aim to avoid overlaps.

**Ease of Enforcing New Rules by the CCI:** The PSCF Report argues that pre-emptive frameworks are easier to enforce. However, there is no evidence available regarding the effectiveness of pre-emptive frameworks, or the ease of enforcing such frameworks. Similar laws in other countries are yet to be implemented or are still in the proposal stage. In any event, the CCI might be stretched for bandwidth in ensuring the effective enforcement of these laws, since they would entail continuous monitoring and supervision, as opposed to case-by-case interventions.



The figures above demonstrate the resources deployed by domestic and foreign regulators. Recent evidence suggests that the CCI's bandwidth on budgets and employed personnel is substantially lower, when compared to other competition regulators internationally and other Indian regulators like SEBI that are tasked with continuous monitoring of markets.

**Points to consider:** Unlike its current role as an adjudicatory forum, the CCI would need to continuously monitor compliance with the prescribed obligations. This would be in addition to its recently acquired responsibilities of enforcing anti-profiteering measures under the GST Act. Therefore, introducing a new law without augmenting the CCI's capacity could render the move unworkable.

## KEY TAKEAWAYS

- ➔ The gaps identified in the PSCF's Report are adequately addressed under the recently amended Competition Act and other existing and proposed laws. Therefore, the need for a new law cannot be conclusively established.
- ➔ The PSCF's concerns may be better addressed by augmenting CCI's resources, including its budgets and human resources.
- ➔ Before implementing a new law to regulate digital markets, it may be prudent to wait and analyze the efficacy of similar frameworks in other jurisdictions, before revisiting the need for a similar law in India.

