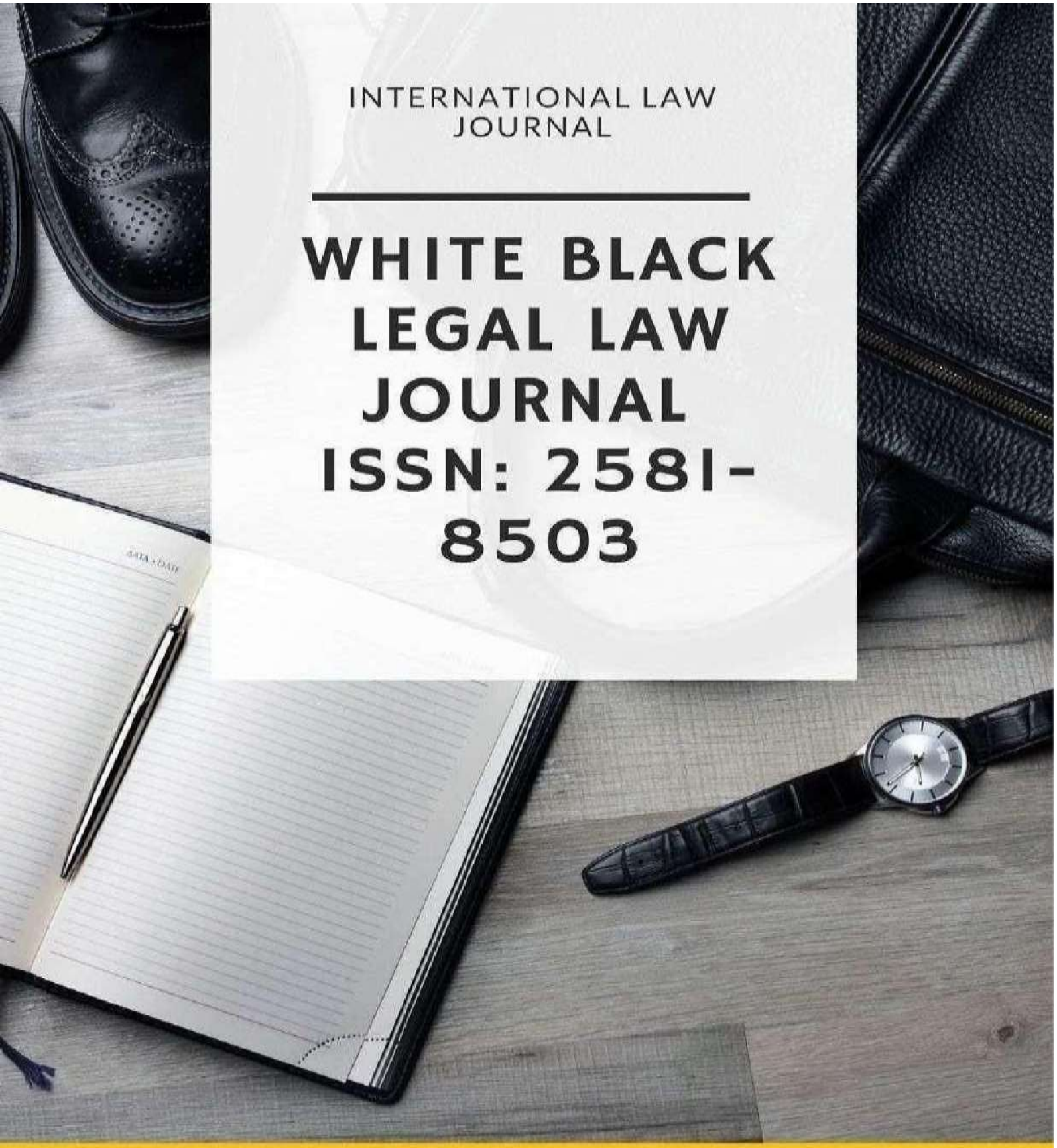

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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THE PREDATORY GAZE: EVALUATING INDIA'S PRESCRIPTION FOR PREVENTION AGAINST ANTI-COMPETITIVE PRACTICES

AUTHORED BY - HARSAHAJ BIR SINGH
Unitedworld School of Law, Karnavati University

ABSTRACT

India's shift from a structuralist, license-era regulatory framework to a conduct- based competition law regime of the Competition Act, 2002 has been substantial, but the speed of anti-competitive innovation, especially in the digital sector, still outpaces legal evolution. This paper considers the notion of the "Predatory Gaze" - the pervasive surveillance, data manipulation and market exclusion tactics used by dominant firms to eliminate nascent competition before they gain traction. This paper draws on Indian case law, the Competition (Amendment) Act, 2023, the proposed Digital Competition Bill, 2024, and comparative EU and US antitrust jurisprudence, to argue that the average variable cost (AVC) test and the "singular dominance" paradigm of Section 4 are structurally unsuited to digital markets with zero marginal costs, network effects, and algorithmic pricing. The paper examines enforcement mechanisms - the Deal Value Threshold, global turnover penalties and the Settlement and Commitment system - and pinpoints three enforcement inadequacies: delay of intervention, collective-dominance gap and judicial delay. It concludes with a reformative prescription focused on real-time enforcement, a tech-first regulatory framework and judicial streamlining, grounded in the constitutional directives of Articles 38 and 39 to prevent accumulation of wealth to the detriment of the community.

Keywords: *Predatory pricing, Competition Act 2002, abuse of dominance, digital markets, algorithmic predation, Deal Value Threshold, SSDE, Digital Competition Bill, platform neutrality.*

1. INTRODUCTION

India's transformation from a feudal, licencing and protectionist economy to a free and competitive market is remarkable. But with freedom comes market distortion. In quest of market power, "aggressive competition" and "anti-competitive predation" often merge indistinguishably. The Competition Act, 2002 abandoned the rigid restrictions of the Monopolies and Restrictive Trade Practices Act (MRTP Act), 1969 in favour of a pro-efficiency, but watchful, market philosophy. This study describes this gaze as the "Predatory Gaze" - the instinct of dominant players to monitor, smother and then kill competition so as to enjoy an unrivalled crown.

The well-known offence of below-cost pricing under Section 4(2)(a)(ii) is not the only type of predatory gaze. It includes a more comprehensive, systematic view of market lockout: dominating data moats, buying up nascent competitors with so-called Killer Acquisitions, and playing with platform neutrality by using algorithmic self-preferencing. Although there is a strong legislative framework, the anti-competitive practices are changing at a pace that is greater than the regulations. The main issue is the delay of action. Moreover, the digital economy has come with complexities of zero-pricing schemes, network effects, and two-sided markets that complicate the traditional concept of what is meant by the relevant market and dominance. The paper assesses the sufficiency of the both the existing and new legal prescriptions in India to counter the Predatory Gaze before it leads to market-wide monopolisation.

The research employs a doctrinal and comparative methodology, drawing on primary sources (the Competition Act, 2002; the Competition (Amendment) Act, 2023; and the Draft Digital Competition Bill, 2024), Indian and international case law, and secondary literature spanning Lina Khan's platform-infrastructure thesis,[1] Eleanor Fox's ex-ante gatekeeper regulation,[2] and the Areeda-Turner AVC framework as contextualised by Whish and Bailey.[3] The paper proceeds in six parts: the constitutional and jurisprudential foundations of dominance (§2); the anatomy of predatory pricing and cost-test failures (§3); the 2023 enforcement overhaul (§4); digital-frontier pathologies and the SSDE framework (§5); a comparative study of the EU DMA and US antitrust (§6); and a reformative prescription (§7).

2. CONSTITUTIONAL FOUNDATIONS AND THE ANATOMY OF DOMINANCE

The Competition Act, 2002 is not only an economic law, but a constitutional law. Articles 38 and 39 of the Directive Principles of State Policy require the State to ensure that the "operation of the economic system does not result in the concentration of wealth and means of production to the common detriment".[4] The S.V.S. Raghavan Committee (2000) that drafted the Act explicitly stated that competition law must "give effect to the directive principles".[5]The "prescription" against predation in Indian competition law is therefore not solely about consumer-price efficiency, as in the US "Chicago School", but about market diversity - the right to compete for millions of MSMEs, Kirana shopkeepers and first-time entrepreneurs.

The transition from the structuralist suspicion of bigness under the MRTP Act to the behavioural sentinel model of the Competition Act in the form of Section 4's two-pronged test - first, the presence of "dominant position" (qualitatively determined under Section 19(4) in relation to economic power, vertical integration and entry barriers); and second, "abuse". The behavioural model acknowledges that size is (often) a function of efficiency, but abuse - the "Predatory Gaze" - must be excised. The CCI in this context becomes a Constitutional Sentinel whose charter is to safeguard "Market Plurality," ensuring the economic system is subservient to the people, not to conglomerate ecosystems.

The determination of the Relevant Market is the first application of the Predatory Gaze to law. In the digital economy, the established SSNIP Test (Small but Significant and Non-transitory Increase in Price) fails: if Google Search or Facebook is free, a 5% increase in price is impossible. The Sentinel therefore needs to look to "quality" and "data privacy" as the new competitive measures - a trend that began with the CCI investigation into WhatsApp's privacy policy in 2021,[6] where the imposition of unfair data-collection terms was deemed a non-price abuse of dominance.

3. THE PRICE-COST PARADOX: FROM AVC TO LRAIC

The Competition Act 2002 labels predatory pricing as the sale below "cost" to eliminate competition (Section 4(2)(a)(ii). This is effected via the Competition Commission of India (Determination of Cost of Production) Regulations, 2009, which adopt the Areeda-Turner AVC standard: that any price below the Average Variable Cost (AVC) is economically irrational, and hence predatory. This benchmark was elevated to canon in MCX Stock Exchange Ltd v NSE (2011),[7] where the CCI found NSE's zero pricing in currency derivatives

(obviously below AVC) to be an abuse of dominance through cross-subsidy from its dominant equity business.

But the AVC test is pathologically averse to the digital economy. In the digital economy, once the computers and algorithms are in place, the marginal cost of serving extra users tends to zero. In this way, a digital platform may charge prices not technically below AVC but nearly zero, while destroying non-digital competitors. In Bharti Airtel Ltd v Reliance Jio Infocomm Ltd (2017),[8] the CCI dismissed predatory pricing claims against Jio, noting that its free-services package was "penetration pricing" and not abuse, in part due to Jio's lack of dominance as a new player. Importantly, the Commission did not address how Reliance Industries' conglomerate power allowed Jio to lose money for several years, which this paper calls the "Conglomerate Power Loophole. "

The way forward is Long-Run Average Incremental Cost (LRAIC), which captures all costs that are directly attributable to providing a particular service in the long run - including R&D costs, the "burn rate" of marketing costs and special equipment. An LRAIC-based "Equally Efficient Competitor" test is: would a firm as operationally efficient as the defendant, but without access to conglomerate cross-subsidies or foreign venture capital, be able to survive on this price? The Competition Commission of India (Determination of Cost of Production) Regulations, 2025 now explicitly give the Competition Commission of India (CCI) discretion to apply LRAIC in technology-intensive markets, eradicating the digital blind spot that led to false negatives under AVC. Moreover, this paper suggests that the American Recoupment Test from Brooke Group Ltd v Brown & Williamson Tobacco Corp (1993)[9] should be rejected by Indian courts: in the "burn-rate" model adopted by Indian startups, recoupment is not via future price increases but through inflated valuations at the time of IPO or acquisition, by which time all other innovation will be dead.

4. THE 2023 ENFORCEMENT OVERHAUL: DVT, GLOBAL TURNOVER, AND SETTLEMENT

4.1 The Deal Value Threshold: Catching Killer Acquisitions

For 20 years, the CCI's merger control powers were confined to asset and turnover thresholds, making it powerless to intervene in transactions where a fledgling competitor has low turnover but high potential - a mine of data, or a disruptive innovation. The Competition (Amendment) Act, 2023 rectifies this with the introduction of the Deal Value Threshold (DVT) under new Section 5(d): any merger with a deal value of more than ₹2,000 crore must

be notified to the CCI, if the target entity has "substantial business operations in India". This shifts the law's focus from "revenue of the company" to "price paid by the predator," a premium that accounts for the target's potential. India thus joins the club of deal-value-based merger control pioneers, Germany and Austria.[10] The high price is, in fact, the premium to preserve quiet monopoly. The meaning of "Substantial Business Operations" - whether based on active users, data, GMV, or the like - will decide whether this armoury is real or illusory.

4.2 From Relevant to Global Turnover: A Deterrence Revolution

For decades, the Supreme Court's "Doctrine of Proportionality" in the case of Excel Crop Care Ltd v CCI (2017)[11] capped penalties at "relevant turnover" (the turnover from the product or service that has been infringed). For a global technology giant, a CCI penalty was a trivial "tax on doing business", overshadowed by monopoly profits. The 2023 Amendment changes this, amending Section 27 to allow penalties of up to 10% of the average turnover for the last three financial years. This is a game-changing deterrence measure: a 10% penalty on Google's global turnover is a life or death threat that would be taken seriously at the Google board table. The statutory reasoning is impeccable - in the digital economy, market power is fungible across jurisdictions, and data is universal across subsidiaries. A Sentinel with a limited vision of Indian revenue cannot guard against a predator with global power. Some critics fear regulatory overreach, but this paper contends that in a developing economy where local businesses cannot compete with the "deep pockets" of global platforms, a global deterrence measure is constitutional imperative under Article 39(c).

4.3 Settlement and Commitment: Fast-Track or Precedent Vacuum?

The Settlement and Commitment (S&C) provisions in Sections 48A and 48B permit enterprises to walk away from investigations with behavioural commitments or financial settlements, before a finding of abuse. The EU precedents include commitment orders in Microsoft and Amazon that extracted behavioural commitments that transformed global markets.[12] The Indian S&C mechanism is a "Fast-Track Prescription" for digital markets where investigations take three-to-five years to arrive, after the victimised startup has collapsed. But two risks are worth noting. First, while the non-appealable finality of S&C orders prevents the Appellate Bottleneck (below), a Precedent Vacuum emerges: if all the big tech investigations settle, then India does not have the jurisprudential corpus to define 21st century predatory tactics. Second, an S&C order not being a finding of "abuse", the status of victimised competitors to sue for compensation under Section 42A/53N is uncertain. The prescription is

uncomplete without a legal clarification that a settlement doesn't extinguish the civil liability to victims.

5. THE DIGITAL FRONTIER: DATA MOATS, ALGORITHMIC PREDATION, AND THE SSDE FRAMEWORK

5.1 Data as a Competitive Weapon

Data is now the critical resource for market power in the digital economy. A platform with access to ten years of search terms, location, and purchase data can forecast potential market trends more accurately than any competitor can - generating a "Data Moat". The moat fulfils a dual malady. First, it allows "Nowcasting": the mining of data to identify emergent competitors and "Killer Acquisitions" or cloning of features before they gain momentum. Externally, it facilitates "Dynamic Personalised Pricing" - whereby precision discounts are targeted at the precise customers of a rival, hidden from the regulator and incomputable by the AVC standard. The Supreme Court's affirmation of informational privacy as a fundamental right in Justice K.S. Puttaswamy v Union of India (2017)[13] and the CCI's inquiry into the WhatsApp privacy policy of 2021[14] are a clear indication that the degradation of privacy - forcing users to accept invasive data collection once a platform monopoly is achieved - is itself an instance of non-price abuse. This paper proposes that "Data Dominance" be formally brought in as a separate factor in the Section 19(4) dominance test.

5.2 Algorithmic Predation and the "Black Box" Problem

An algorithmic pricing system can track a competitor's prices in real time on thousands of products and respond in milliseconds. When such pricing is undertaken by self-learning neural networks, it is impossible to establish "predatory intent" under Section 4 of the Competition Act - an enterprise can plausibly deny that any human executive ordered the pricing conduct. The CCI faced this in Samir Agrawal v ANI Technologies (Ola) (2018), 15 where it was impossible to establish whether the algorithmic surge-pricing was collusion without technical know-how the CCI did not possess. The answer is a shift to "Effects-Based Liability": if an algorithm's persistent behaviour proves to exclude an otherwise efficient competitor, then the Predatory Gaze is present regardless of human intention. Another approach is "Algorithmic Auditing"; the CCI needs to build capacity for, or contract with forensic technologists to undertake, code inspection of SSDE pricing systems.

5.3 Platform Envelopment and the SSDE Framework

The guileiest expression of the Predatory Gaze is "Platform Envelopment" or self-preferencing: the double role of digital platforms as both the referee and player in the marketplace. The Competition Commission of India's (CCI) cases of Matrimony.com Ltd v Google LLC (2018)[16] and Delhi Vyapar Mahasangh v Flipkart (2020)[17] confirmed that search-result manipulation and differentiation in discounting for private labels are acts of abuse of dominance. But the current ex-post approach results in intervention after exclusion.

The proposed Digital Competition Bill (DCB), 2024 takes the offensive with the Systemically Significant Digital Enterprise (SSDE) designation - India's answer to the European Gatekeeper. The test for designation is a quantitative two-part test: the "financial strength" test (India turnover ≥ ₹4,000 crore, or global turnover ≥ $30 billion, or global market cap ≥ $75 billion) and the "spread" test (≥1 crore active end-users or ≥10,000 active business users in India). The SSDE's "Dos and Don'ts" include a ban on self-preferencing and cross-use (data matching) of services, and interoperability and anti-steering requirements. The DCB also designates "Associate Digital Enterprises" (ADEs) - members of the corporate group of an SSDE that are engaged in the provision of Core Digital Services - to capture conglomerate leverage in situations where retail, telecom and digital-media subsidiaries share data to create a "Flywheel Effect" that no independent startup can counter. The gatekeeper must self-report within 90 days of threshold traversal, moving the investigation burden from the CCI to the gatekeeper.

6. GLOBAL BENCHMARKS AND INDIA'S PROCEDURAL PARADOXES

6.1 The Transatlantic Schism: Chicago School vs. Ordoliberalism

The Chicago School version of the US Sherman Act model reduces the object of anti- trust law to consumer welfare, as only price efficiency. In the Recoupment Test in Brooke Group 1, the plaintiff is required to demonstrate below-cost pricing and a hazardous likelihood of future supra-competitive recuperation- so high that no recent US predatory pricing case against Big Tech has ever been won. Article 102 of the TFEU, and the AKZO Chemie (1991)[19] presumption, in contrast, imply that pricing below AVC is presumed to be abusive in EU law without the need to show recoupment. The European route was carefully selected by the Raghavan Committee: Section 4 is about abuse, not about recoupment, and the Ordoliberal interest in the market structure and the Article 38 and 39 constitutional requirement. Neo-Brandeisian globalism, typified in the title of Lina Khan's The Antitrust Paradox of Amazon

(2017) (herein referred to as 20), now champions the US the very structural, platform-infrastructure strategy already practiced in principle by the competition law of India.

6.2 EU DMA vs. India's Digital Competition Bill: Convergence and Divergence

The EU Digital Markets Act (DMA, 2022) implements ex-ante regulation of gatekeepers by creating a standardised list of prohibitions (no self-preferencing, interoperability mandates, data portability) that are implemented by the European Commission. The DCB of India resembles this architecture, but has two important deviations. To begin with, the ADE classification manages the unique conglomerate reality of India, which is not as central to the interests of the EU in the US Big Tech, by dragging the whole group structure into compliance. Second, India is in a "Developmental Dilemma that the EU is not: as a Startup Nation, with the potential to create tech champions on the global stage, could prematurely tie domestic unicorns to the ground by overly broad SSDE requirements. A carve-out of companies that have not yet reached the threshold two years later would be called a Regulatory Sandbox and would strike a balance between preventive intervention and domestic scale space.

The most crucial divergence, though, is the enforcement capacity. EU DMA enforcement is through a centralised, specialised Digital Markets Unit comprising data scientists and engineers. In India, the CCI has lawyers as the main personnel already overworked with a backlog of merger notifications and traditional antitrust cases. The lack of a real Digital Markets Unit with algorithmic auditors will leave the DCB, as the Parliamentary Standing Committee on Finance warned in its 53rd Report, as a Paper Tiger.

6.3 The Appellate Bottleneck and Collective Dominance Gap

There are two structural gaps that make the intervention latency worse. The former is the Appellate Bottleneck. The Competition Appellate Tribunal (COMPAT) was abolished in 2017 and replaced by the NCLAT as antitrust appeals were buried in a docket on Insolvency and Bankruptcy Code, which, as of early 2026, has the NCLAT permanently overwhelmed. The almost reflexive granting of interim stays, such as that in the case of Meta Platforms Inc and WhatsApp LLC v CCI (NCLAT, 2025) 22, is turned into a tactic itself: to a global megachop, paying a fraction of the fine to hold a cease-and-desist order is a drop in the ocean in terms of lost revenues. In March 2025, the NCLAT banned the CCI from submitting its Google Play Store penalty to relevant turnover by returning to a 2023 Amendment intent: in effect, undoing the intent of the law during that timeframe. The paper suggests a 75 percent mandatory deposit of the penalty in the digital competition issues as a prerequisite to any stay, and the creation of

a special bench, the Fast-Track Antitrust Bench.

The second is the Collective Dominance Gap. The wording of Section 4 is in the singular: it forbids an enterprise or group to misuse its dominant position. The CCI has thus been of the view that two fierce competitors cannot be dominant at the same time, as in Fast Track Call Cab v ANI Technologies (Ola) (2015)[24], which generates a regulatory safe harbour to the Ola-Uber and Zomato-Swiggy duopoly whose joint control on the respective markets precludes smaller competitors without a Section 4 inquiry. Article 102 TFEU of the EU, by its turn, has long accepted the concept of collectives dominance between entities that pursue a common market policy, codified by Piau v Commission (2005) 25 amending Section 4 to include one or more enterprises would seal this loophole and allow the CCI to intervene in parallel predatory pricing in tight oligopolies.

7. A REFORMATIVE PRESCRIPTION: RECOMMENDATIONS FOR A FUTURE- READY REGIME

The above analysis indicates that there is a competition regime that has strong bones but is lacking in connective tissue. The subsequent suggestions are aimed at bridging the gap between the legislative ambition and the market reality in terms of implementation.

(i) **Adopt LRAIC as the Default Cost Benchmark in Tech Markets.** The CCI needs to revise the 2025 Cost Regulations to turn LRAIC into the main standard available in assessing predatory pricing in all platforms-based and digital-intensive markets, and explicitly include the costs of subscriber acquisition and venture-capital burn rates as attributable costs. The Recoupment Test ought to be strenuously disavowed in Indian jurisprudence as irreconcilable with the Burn-Rate economy.

(ii) **Operationalise the Digital Markets Unit with Algorithmic Auditing Capacity.** The DCB needs to have a fully staffed DMU with data scientists and software engineers authorized to perform real time monitoring of data on SSDE pricing and ranking of data using the so-called Regulatory API. Codification of periodic and required algorithmic audits of SSDE systems should be possible, which allows the proactive detection of self- preferencing and algorithmic collusion.

(iii) **Interim-First Adjudication for Core Digital Services.** Where there is a Core Digital Services, the criterion on which interim relief is granted under Section 33 must be re-tuned so that a prima facie case of predatory conduct be rebuttable presumption in favour of a temporary Stop-Work Order. Fast-tipping digital markets almost always have a

balance of convenience trend towards maintaining market structure, as opposed to letting the so-called predator go.

(iv) **Fix the Appellate Bottleneck.** To enhance competition bench within the NCLAT, parliament must create a specialized Competition Bench, and include judges with training in digital-market economics. A 12-month shot-clock on digital competition appeals should be put in place. The deposit required to stay must be increased to three-quarters of the penalty, deposited in escrow at market rates, which must be paid into a Competition Victims Fund in case of refusal of the appeal.

(v) **Introduce Collective Dominance into Section 4.** Section 4 needs to be revised to ban the collective misuse of a dominant position by one or more enterprises, which is well-aligned with Article 102 TFEU and would allow the duopolistic practices that prevent competition to be scrutinized without causing the current singular-dominance criterion.

(vi) **Recognise Data as a Material Resource under Article 39(b).** The SSDE of data portability and cross-service data silos are to be addressed not only as a regulatory compliance requirement but also enshrined in law as a statement of constitutional responsibility to avert the concentration of material resources of the community. The Competition authorities are to liaise with the Data Protection Board to identify that privacy degradation, which arises in the wake of monopoly, is acknowledged as a form of non-price abuse.

(vii) **Establish a Competition Legal Aid Fund.** There should be a fund funded by a percentage of CCI penalties to offer leading legal and economic services to MSMEs and startups whose prima facie victimisation cases have been found. This should be supplemented by an encrypted anonymous-reporting system, allowing business users to be insulated against platform retaliation.

(viii) **Iterative Remedies and Regulatory Sandboxes.** Settlement and Commitment orders are to be taken as a Beta Version prescription that can be reviewed after six months in comparison to real market data. The CCI ought to be empowered in law to patch behavioral commitments in case it finds out that the algorithm has circumvented, without initiating a complete investigation.

8. CONCLUSION

The paper has tracked the Predatory Gaze over the ordeals of the price-cost orthodoxy of the post-MRTP epoch to the algorithmic frontiers of 2026. The main conclusion is that the

Predatory Gaze is now institutionalized in the digital ecosystem: the largest companies no longer have to offer prices below AVC to foreclose competition; they now own the digital highways on which all business passes, and use data moats, algorithmic self-preferencing, and ecosystem advantage to wipe out competitors before they can get large enough to compete. These realities are structurally unsustainable by the current Section 4 framework, which is anchored to the AVC benchmark and singular-dominance doctrine.

The Competition (Amendment) Act, 2023 has made important corrective actions: the Deal Value Threshold is an actual innovation that makes Killer Acquisition vulnerable to the threshold instead of post-factum; the global-turnover-calculus-of-penalty turns deterrence into a business tax, not an existential financial risk; the Settlement and Commitment mechanism halves the latency of market correction. The Digital Competition Bill proposed is based on these foundations and ex-ante SSDE requirements which neutralise platform envelopment at the gatekeeping level.

But there are still structural gaps. The Appellate Bottleneck turns regulatory wins into a decade-long procedural morass; the Collective Dominance Gap forms safe havens around predatory duopolies; and the Digital Markets Unit is inadequately staffed in comparison to the sophistication of the algorithms it is meant to regulate. The way forward does not just entail new legislation but a technological and judicial renaissance: an algorithmically literate CCI, a judicially quick and deferential court of appeal level and a healthy ecosystem of private enforcement that puts in place the very entrepreneurs that the constitutional mandate of Articles 38 and 39 was meant to safeguard.

After all, the Predatory Gaze will never go away as a concentrated capital instinct. Instead of removing that instinct, that is the task of the law, which is to make the stare of the Sentinel no less piercing--real-time, technologically savvy, and constitutionally grounded in the responsibility to ensure concentration of wealth to the common harm is avoided.

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