THE FORGOTTEN HALF OF SECTION 4: ALGORITHMIC PERSONALISATION AND THE LIMITS OF EXPLOITATIVE ABUSE IN INDIAN COMPETITION LAW

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ABSTRACT

Indian jurisprudence on abuse of dominance has evolved a monoculture of exclusion. Section 4(2)(a) of the Competition Act, 2002, lists "unfair or discriminatory" conditions and prices as the first prohibition, but the Competition Commission of India has developed its decisional practice almost entirely on exclusionary theories of harm, leaving the exploitative limb largely dormant. This article argues that algorithmic price personalisation by dominant digital platforms exposes that asymmetry as untenable. Personalised pricing affects the consumer and not the rival. It is exploitative abuse in its purest form and falls beyond the exclusionary frame on which the CCI has depended. The article evaluates whether such conduct can be caught by Section 4(2)(a)(ii) through either the "unfair" or the "discriminatory" pricing limb and concludes that both ways are blocked. The investigation into unfair pricing is stalled since there is no competitive standard. The discriminatory pricing method has been narrowed down by the Supreme Court's 2025 judgment in Competition Commission of India v. Schott Glass India Pvt. Ltd. which demands verification of equivalent transactions. The paper applies the German Facebook decision and the Court of Justice's judgment in Meta Platforms v. Bundeskartellamt to suggest redefining the investigation to centre around the architecture of extraction rather than a counterfactual price. It concludes that the Commission must either provide the exploitative limb with sufficient conceptual content to the conduct or acknowledge that a legislative category of harm is outside its effective reach.

I. The Asymmetry Hiding in Plain Sight

The plain reading of Section 4(2) of the Competition Act, 2002 from the top[1] shows that the list begins not with foreclosure, refusal to deal, or denial of market access but with "unfair or discriminatory" conditions and prices. Exploitation is the primary concern of dominance regulation under the statute, not a residual one.

However, the decisional practice tells a different story. The present reputation of the Competition Commission of India ("CCI") has been developed on the back of exclusionary architecture in the main Section 4 cases. The *Umar Javeed*[2] order was meant to target the tying and foreclosure in the Android ecosystem. The *Play Store* billing ruling[3] was about limits on app developers and denial of access to market. Where those orders did include the unfair-conditions prong of Section 4(2)(a)(i), they did so in furtherance of an exclusionary theory of injury. Conditions were unfair as they squeezed rivals. They were not unfair because they took from end consumers.

This disparity is exposed by the practice of algorithmic price personalization. The prototypical type of exploitative harm is when a dominant platform offers each consumer a distinct price, customized to that individual. It doesn't drive out competitors. It transfers excess from consumer to the dominant enterprise. If Section 4(2)(a)(ii) cannot reach this conduct, a category of harm the statute expressly contemplates has been read out of the Act.

II. The Exploitative Limb: Statutory Text and Forgotten Ambition

The statutory architecture rewards close attention. Section 4(2)(a)(i) prohibits a dominant enterprise from imposing "unfair or discriminatory" conditions in the purchase or sale of goods or services. Section 4(2)(a)(ii) extends the same adjectives to price. The Explanation brings predatory pricing within scope.[4] Neither limb is qualified by a foreclosure requirement. Neither requires demonstration of harm to consumers via the exclusion of rivals.

The text is at least as broad as Article 102(a) TFEU. It expressly couples "discriminatory" with "unfair" pricing within a single provision, where EU law locates discriminatory pricing in a

[1] The Competition Act, 2002, s. 4(2), No. 12, Acts of Parliament, 2003 (India).
[2] Umar Javeed v. Google LLC, Case No. 39 of 2018 (CCI Oct. 20, 2022).
[3] XYZ v. Alphabet Inc., Case No. 07 of 2020 (CCI Oct. 25, 2022).
[4] The Competition Act, 2002, s. 4 Explanation (b).

separate limb. It is considerably broader than Section 2 of the Sherman Act, 1890, which contains no exploitative-abuse provision at all.

The Indian record is thin in proportion to that ambition. The closest the CCI has come to substantive engagement with the exploitative limb is the *Belaire* line of real-estate cases. In that case, DLF's one-sided buyer agreements were held to be unfair conditions under Section 4(2)(a)(i).[5] However that finding was limited to contractual asymmetry. It was based on terms that were clearly weighted against the apartment buyer. It did not develop a doctrine of unfairness as a concept of competition.

The pattern is not limited to litigation. The CCI's own flagship Market Study on E-commerce in India focused on platform to business issues: platform neutrality, vertical restraints, exclusivity and deep discounting.[6] Exploitative pricing towards final consumers rarely occurred at all. The difference with the exclusionary case law is also clear and obvious. The *Umar Javeed* and *Play Store* decisions come out as rigorous exercises in effects-based foreclosure analysis. They engaged with the relevant market definition. They record switching barriers. They state the principle of harm quite clearly. The handful of exploitative cases, by contrast, read as fairness intuitions dressed in doctrinal vocabulary.

The reasons behind the disparity are not without principle. First, institutional caution. Exploitative abuse pushes the regulator to price regulation. That is a job that a competition commission is not well placed to do. Second, the benchmark problem. Any exploitative allegation assumes a counterfactual price with reference to which the impugned price is compared. That benchmark is methodologically problematic in its construction. Third, the long shadow of Chicago-school suspicion of "excessive-pricing" theories. It has filtered into Indian discourse through academic borrowing and through the European Union's own reluctance to pursue *United Brands*-style cases.[7]

None of these reasons is intellectually unserious. Each, however, loses force when the conduct in question is algorithmic personalisation.

[5] *Belaire Owners' Ass'n v. DLF Ltd.*, Case No. 19 of 2010 (CCI Aug. 12, 2011).
[6] Competition Comm'n of India, *Market Study on E-commerce in India: Key Findings and Observations* (Jan. 8, 2020).
[7] Pinar Akman, *The Concept of Abuse in EU Competition Law* 273–78 (2012); Robert O'Donoghue & A. Jorge Padilla, *The Law and Economics of Article 102 TFEU* 783–85 (3d ed. 2020).

III. What Algorithmic Personalisation Actually Is

Definitional discipline matters here, because the popular discourse conflates three distinct practices.

Dynamic pricing is price variation by time or aggregate demand. The surge a user encounters at 9 a.m. is experienced by every other rider in the same location.

Personalised pricing is price variation by inferred individual characteristics. These include device type, geolocation history, browsing patterns, and behavioural signals from session data.[8]

First-degree price discrimination is the theoretical limit case. The seller extracts each buyer's exact reservation price.

The real platform deployments are in between the second and the third. They are imperfectly personalized but more and more granular as inference improves. There is empirical evidence of price steering and differentiation for e-commerce, ride-hailing and online-travel platforms, by device class, by geography, and by inferred user attributes.[9] The prevalence of fully personalised pricing remains contested, but the technical capacity is no longer in doubt. It is increasingly the default architecture of platform pricing.

The economic stakes deserve attention. Classical price-discrimination theory treats first-degree discrimination as allocatively efficient. Output expands, deadweight loss shrinks, and every consumer with a willingness to pay above marginal cost is served. But the welfare gain is captured entirely by the seller. Consumer surplus collapses to zero.[10]

This forces a question Indian competition lawyers have largely avoided. Is the relevant standard total welfare or consumer welfare? The Act's preambular concern for consumer interests answers it.[11] The textual structure of Section 4(2)(a), which targets harm to the trading party

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[8]OECD, *Personalised Pricing in the Digital Era*, OECD Roundtables on Competition Policy Papers No. 222 (2018).

[9]Aniko Hannak et al., *Measuring Price Discrimination and Steering on E-commerce Web Sites*, in Proceedings of the 2014 ACM Internet Measurement Conference 305 (2014); Le Chen et al., *Peeking Beneath the Hood of Uber*, in Proceedings of the 2015 ACM Internet Measurement Conference 495 (2015); Thomas Hupperich et al., *An Empirical Study on Online Price Differentiation*, in Proceedings of the 8th ACM Conference on Data and Application Security and Privacy 76 (2018).

[10]Christopher Townley, Eric Morrison & Karen Yeung, *Big Data and Personalised Price Discrimination in EU Competition Law*, 36 Y.B. Eur. L. 683 (2017).

[11]The Competition Act, 2002, pmbl.

rather than to the structure of competition, reinforces the answer. The CCI's decisional practice does the same.

The doctrinal consequence is significant. Algorithmic personalisation cannot be defended in Indian competition law by the move available in some US-influenced frameworks: "but output expands."

IV. The Doctrinal Fit, and Misfit, Under Section 4(2)(a)(ii)

Two routes into Section 4(2)(a)(ii) are doctrinally available. A third, more interesting one is emerging from comparative practice.

The first is the unfair-pricing route, borrowed from the European Court of Justice's decision in *United Brands*.[12] The court articulated a two-limb cumulative test. First, is the price excessive in relation to the economic value of the product? Second, is it unfair in itself or by comparison with competitors' prices? The CCI has never formally adopted this test. The European Union itself has applied it sparingly in the decades since. The methodological difficulty of personalisation is significant. There is no one price to compare. The platform generates a distribution of prices and the dominant firm is itself the sole observable seller. The comparator collapses into the object of study.

The second way is the discriminatory-pricing limb of the same provision. It looks, at first glance, the more doctrinally clean. Algorithmic personalization is discriminatory by nature. It conditions the price on the inferred consumer type. Another point of doctrine, and a more difficult one, is whether the drafters had in mind discriminatory pricing among end consumers, as opposed to commercial customers. The text does not differentiate.[13]

This path has been complicated further by a recent development. In *Competition Commission of India v. Schott Glass India Pvt. Ltd.*, the Supreme Court held in May 2025 that volume-based rebates uniformly applied across customers were not discriminatory under Section 4(2)(a).[14] Drawing on the European *British Airways* line, the Court required proof of "equivalent transactions" before discrimination could be found.[15] Differential outcomes that

[12]Case 27/76, *United Brands Co. v. Comm'n*, 1978 E.C.R. 207.
[13]Inge Graef, *Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers?*, 24 Colum. J. Eur. L. 541 (2018).
[14]*Competition Comm'n of India v. Schott Glass India Pvt. Ltd.*, 2025 INSC 668.
[15]Case C-95/04 P, *British Airways plc v. Comm'n*, 2007 E.C.R. I-2331.

reflect differential commercial circumstances are not enough.

The judgment poses an obvious problem for personalisation cases. Transactions are not equivalent under personalised pricing. By design, each consumer is treated as a distinct economic type. On one reading, this places personalisation outside the discrimination doctrine entirely. On another, personalisation is the clearest possible case of dissimilar treatment of equivalent transactions, because the inferred "type" is constructed by the platform rather than tied to any independent commercial variable. The Supreme Court did not address this question. It will arise.

There is a third possibility. It is gestured at by the *German Bundeskartellamt's Facebook* decision, and confirmed in important respects by the Court of Justice of the European Union in *Meta Platforms v. Bundeskartellamt*.[16] The Bundeskartellamt reframed exploitative abuse not as a question of excessive price, but of extracted value under conditions of asymmetric bargaining power.[17] The abuse lay in Facebook's terms of data processing, not in any monetary tariff. The CJEU accepted that a competition authority can take account of compliance with data-protection law in assessing abuse, subject to obligations of sincere cooperation.[18]

For Indian doctrine, this is a significant opening. Algorithmic personalisation can be characterised not as unfair pricing in the *United Brands* sense. Rather, it is the exploitative extraction of consumer surplus. It is enabled by an informational asymmetry that the consumer cannot meaningfully discipline through choice.

The reframing has a considerable virtue. It sidesteps the benchmark problem. The wrong is no longer that the price is over some imaginary competitive threshold the building of which is dubious. The error is that the dominant corporation has created an environment in which it can extract customized surplus. The customer lacks the epistemic resources or the realistic exit possibilities to resist. The harm it causes is structural, not numerical.

V. The Institutional Counterargument, and Why It No Longer Holds

The strongest argument for the CCI's restraint runs as follows. Competition authorities are not tariff commissions. Once they begin policing exploitative prices, they are drawn into ongoing

[16]Case C-252/21, *Meta Platforms Inc. v. Bundeskartellamt*, ECLI:EU:C:2023:537.
[17]Bundeskartellamt, *Facebook*, Case No. B6-22/16 (Feb. 6, 2019).
[18]*Meta Platforms*, *supra* note 16.

supervision of market outcomes. They possess neither the institutional design nor the informational competence for that role. The risks are familiar. The first is over-deterrence, in which firms become reluctant to charge what the market will bear. The second is mission creep, in which the regulator slides toward a regulated-utility posture.

This is a serious argument. It is, in substantial part, why even the European Union, which possesses a textual exploitative limb in Article 102(a), has applied it cautiously.

A second counterargument is distributional. Personalised pricing can serve low-willingness-to-pay consumers who would otherwise be priced out. Surge pricing serves riders who need a cab urgently. Student and senior discounts serve those who would not otherwise consume. The welfare picture, on this view, is ambiguous rather than uniformly negative.

These points must be addressed, not ignored. The answer depends on aspects of algorithmic personalization that distinguish it from conventional price discrimination.[19]

First, the discrimination is systematic and scalable. The harm is not an isolated price gouge in a single transaction. It is an automated extraction architecture in work on millions of consumers at the same time.

Second, it is based on data asymmetries that cannot be remedied by search or switching by the consumer. The platform itself is in charge of choice architecture. The consumer does not observe the prices provided to other consumers.

Third, it works in marketplaces with network effects, multi-homing frictions and behavioural lock-in. These qualities challenge the contestability assumption upon which the institutional-restraint argument is silently based. The usual concern about the regulator "taking over" for the market presumes a market that can, indeed, fix itself. Where that capacity is structurally lacking, the worry loses much of its potency.

The distributional point still holds but is not as conclusive as it seems. The net welfare effect of customized pricing is theoretically vague and empirically under-studied.[20] Structure, doctrinally, is what counts. Those are the exact conditions which are absent where a dominant

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[19]Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* 109–30 (2016).
[20]OECD, *supra* note 8.

platform controls the choices and final consumer cannot determine the rival offers. The correct doctrinal reaction is consequently not universal ban. It is a rebuttable presumption: customization by a dominating platform is presumptively exploitative subject to a defence of verifiable pro-consumer effects.

This is a minor doctrinal suggestion. The CCI should explicitly acknowledge that algorithmic personalisation by a dominant platform may amount to discriminatory pricing under Section 4(2)(a)(ii) without evidence of an exclusionary effect. The unfairness inquiry should not seek to establish a benchmark pricing in the style of United Brands. The exercise is methodologically intractable in individualized marketplaces. The German perspective should inform an inquiry into the architecture of extraction: the data asymmetry between platform and consumer, the absence of effective consumer disciplining mechanisms, and the position of the platform in a market with features that preclude spontaneous correction.

This is the principled middle way between regulatory paralysis and tariff regulation. It also has the doctrinal virtue of suiting the conduct it addresses. It does not borrow a test designed for the banana market of 1970s Europe.

VI. Conclusion: A Statute Held to Its Own Word

Section 4(2)(a)(ii) sits at the front of the abuse provisions for a reason. Its presence reflects a legislative judgment that dominant firms can harm consumers not only by excluding rivals, but by extracting from buyers. That judgment is more demanding than US antitrust law, which polices monopolisation but not exploitation. By listing exploitation first, the Indian statute signals a primacy that its own enforcement has yet to honour.

The CCI's exclusionary focus has, in practice, suspended that judgment. The Supreme Court in *Schott Glass* has now narrowed the discriminatory route as well, by requiring equivalent transactions before discrimination can be found. The *Samir Agrawal* decision has, in parallel, set a high bar for algorithmic claims under Section 3.[21] Algorithmic personalisation is the conduct that makes continued silence untenable. It is the form of dominant-firm conduct most cleanly characterised as exploitative, and least cleanly characterised as exclusionary.

Either the exploitative limb acquires doctrinal content adequate to the conduct, or the CCI must

[21] *Samir Agrawal v. Competition Comm'n of India*, (2021) 3 SCC 136.

acknowledge that a category of harm the legislature contemplated lies beyond its effective reach. Both are intellectually honest positions. Continued silence is not.