

**A COMPARATIVE DOCTRINAL STUDY OF E-COMMERCE PLATFORMS:
PREDATORY PRICING AND NETWORK EFFECTS**

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ABSTRACT

The rapid expansion of digital markets in the 21st century, fuelled by advancements in information and communication technology, has reshaped traditional market dynamics, revealing gaps in classic competition law frameworks. E-commerce giants like Amazon, Flipkart, and eBay have employed strategies such as predatory pricing to dominate markets, exposing the limitations of current antitrust approaches that focus primarily on "consumer welfare" through short-term price impacts. This paper argues for a new theoretical perspective that extends beyond price and output to account for the complexities of digital markets, including the effects of network externalities, lock-in effects, and the risks of "digital feudalism." Drawing on diverse schools of thought, including Chicago, Harvard, Post-Chicago, and Ordo liberalism, the paper critically examines the implications of competition "for" the market versus competition "in" the market.

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I. INTRODUCTION

Digital markets have exploded in the 21st century, driven by information and communication technology. It has altered market dynamics and given rise to events that classic competition law theories cannot explain. In the age of digital markets, a major role has been played by E-commerce platforms like Amazon, Flipkart, eBay etc, that use predatory pricing among other techniques to capture market control. Predatory Pricing as a technique refers to the practice of sustaining short-term losses by lowering the prices of products below average cost and then making up the losses by raising prices once other competitors have been driven out of the market.

This paper makes the case that the existing antitrust framework, in particular its linking of competition to “consumer welfare,” defined as short-term price impacts, is ill-suited to capture the market power architecture in the contemporary economy. There is a need for a new theoretical perspective for the new digital market age, as the market is not self-correcting. If we only evaluate competition in terms of price and output, we will not be able to recognise the possible disadvantages to competition that Amazon’s dominance may cause. The paper draws on learnings from different schools of thought ranging from Chicago, Harvard, Post-Chicago and Ordo liberalism. It attempts to showcase predatory pricing in the context of competition for the market vs. Competition in the Market, Network effects and subsequent lock-in effects. It attempts to explore dynamic efficiency at the cost of impending digital feudalism. The rights-based approach to data and the age of surveillance capitalism. The interplay of creative destruction and disruptive innovation. The focus of this paper is to attempt to illustrate that antitrust has to be multifaceted in its objectives, that efficiency cannot be the sole goal of antitrust, and also attempts to propose a new theory, incorporating goals ranging from political goals, data privacy, protection of small players, consumer and producer freedom and public interest goals, as part of the antitrust regime.

II. E-COMMERCE PLATFORMS AND PREDATORY PRICING

A. Two-Sided Platforms Market Theory

In the context of two-sided market theory, predatory pricing practices by e-commerce platforms take on a unique dimension. These platforms serve as intermediaries, connecting two distinct user groups: consumers and merchants. The platform’s success hinges on its ability to facilitate interactions and transactions between these two sides. Predatory pricing, as a strategy, can be leveraged on either side and sometimes on both, with specific intentions in mind.¹

¹ Christopher R. Leslie, Predatory Pricing Algorithms, 98 N.Y.U. L. REV. 49 (2023).

On the consumer-facing front, e-commerce platforms might employ predatory pricing tactics by offering products at prices significantly below their costs. This aggressive pricing is designed to attract a larger number of consumers to the platform, creating a perception of affordability and value. As more consumers flock to the platform, network effects kick in, enhancing the overall attractiveness of the platform. This, in turn, can deter consumers from seeking alternatives, potentially driving competitors out of the market.

Conversely, e-commerce platforms can also engage in merchant-facing predatory pricing. They might charge merchants low fees or provide subsidies to entice them to sell their products on the platform. This strategy can lead to a surge in the number of sellers, making the platform appear as a bustling marketplace with a wide variety of offerings. Again, this can discourage merchants from exploring other distribution channels or platforms.

Two-sided platforms, due to their network effects, often have a winner-takes-all dynamic. Predatory pricing plays a pivotal role in this dynamic, by enabling dominant platforms to solidify their positions. However, this strategy is frequently part of a long-term plan. E-commerce giants may be willing to incur short-term losses to establish dominance and secure a significant market share. Once they have achieved dominance, they may have the power to raise prices or impose more favourable terms on both consumers and merchants.²

B. Competition in the Market Vs. Competition in the Market

In the context of predatory pricing on e-commerce platforms, “competition in the market” refers to the intense rivalry among existing e-commerce players, where they engage in aggressive price-cutting and competitive strategies to capture a larger share of the established customer base. This form of competition focuses on luring customers who are already part of the existing e-commerce market, often through tactics like temporary price reductions or exclusive deals. Predatory pricing in this scenario aims to undermine competitors and gain dominance within the current market landscape.

On the other hand, “market competition” involves a different strategy where e-commerce platforms use predatory pricing to stimulate demand and expand the market itself. In this context, the objective is not just to capture existing customers but to attract entirely new customer segments or create new demand for products or services. E-commerce giants may offer products at prices

² Ben Bloodstein, Amazon and Platform Antitrust, 88 FORDHAM L. REV. 187 (2019).

significantly below cost to entice first-time online shoppers or untapped customer groups, thereby growing the overall e-commerce market.

These two approaches to competition, while both involving predatory pricing, have distinct implications. “Competition in the market” seeks to dominate the current e-commerce landscape, potentially harming existing competitors. In contrast, “market competition” aims to foster market growth and may lead to concerns about long-term market power. Regulators and policymakers must carefully evaluate the impact of these strategies on competition, innovation, and consumer welfare in the dynamic e-commerce sector.³

C. Network Effects and Lock-in Effects in Predatory Pricing

Harvard School of thought focuses on the market structure and incorporates an understanding of non-price effects. But the Chicago school of thought, on the other hand, ignored these network effects and claims that as long as the price is low, that is all that matters if there is an efficiency gain on a net level, then it doesn’t matter how much distribution is there between the consumers and producers.⁴

Usage externalities and membership externalities are the two types of indirect network effects that two-sided platforms encounter. A usage externality is the requirement that two platform users work together through the platform to generate value. On the other hand, there is a membership externality, where the value to either side grows as more members engage on either side.⁵

⁶The platform is a key factor in the development of these indirect network effects. Due to this, research suggests that to generate indirect network effects, aspirant platforms need to acquire a critical number of users on each side. In other words, platforms won’t provide much value to consumers on either side unless there is a critical mass of users—or enough people to create a minimal demand—on either side. This discourages more users from using the platform. Since increasing the number of users on one side of the market necessitates increasing the number of users on the other, this is frequently referred to as a “chicken and egg” conundrum. Platforms can reach critical mass through a variety of strategies, including price, product design, and marketing.

³ Budzinski, Oliver and Köhler, Karoline, *Is Amazon the Next Google?* (October 12, 2015). Ilmenau Economics Discussion Papers, Vol. 20, No. 97.

⁴ Mark, Robert Van De. “Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy, by Ariel Ezrachi & Maurice E. Stucke.” *Osgoode Hall Law Journal* 55.2 (2018): 614-619.

⁵ Marc J. Veilleux Jr., *Alexa, Can You Buy Whole Foods: An Analysis of the Intersection of Antitrust Enforcement and Big Data in the Amazon-Whole Foods Merger*, 37 *CARDOZO Arts & ENT. L.J.* 481 (2019).

⁶ Ezrachi, Ariel, *EU Competition Law Goals and the Digital Economy* (June 6, 2018). Oxford Legal Studies Research Paper No. 17/2018.

A platform, however, cannot function without a critical mass of users; without a critical mass of Uber drivers, potential customers will not benefit from the app, and vice versa.⁷

A market's efficiency is maximised with only a few enterprises competing for control of the market due to this particular worry for two-sided platforms, at least in digital marketplaces. Because of the increasing utility that each user receives from a product or service's network effects as it gains popularity, it tends towards dominance. Due to the firm's power, its dominance then generates entry barriers, which makes it more likely that competitors will enter the market from elsewhere. Some contend that low entry barriers exist in internet markets since rivalry is just "one click away." Others contend, however, that the more information an online marketplace collects about its customers, the more it can utilise its network effects to tailor its offering to those people in a way that newcomers would not be able to. Furthermore, data accumulation leads to an information asymmetry where platforms have access to a lot of data that isn't available to both sides of the market and the ability to use that data against platform users. Users may benefit from the market conditions in which platforms operate, but these benefits only materialise when the platform can win over both parties.⁸

Lock-in effects occur when consumers or businesses become heavily dependent on a particular platform or service, making it challenging to switch to alternatives. Predatory pricing can contribute to lock-in effects in various ways. E-commerce platforms may offer significant subsidies or discounts to consumers or merchants, making it financially advantageous to remain on the platform. This economic incentive discourages users from exploring other options. Predatory pricing strategies often involve collecting vast amounts of user data. Platforms can use this data to personalize services and create seamless integration, making it more convenient for users to stay. Switching to a different platform might result in a loss of personalized features or data. Some platforms offer free or heavily discounted services initially but then introduce fees or price hikes once users are locked in. These switching costs, in terms of time, effort, and potential data loss, deter users from seeking alternatives. In e-commerce, the combination of network effects and lock-in effects can create significant barriers to competition. Once a platform achieves critical mass through predatory pricing, it becomes challenging for new entrants to attract users and for existing

⁷ Varun Chikhale, *Competition Law in India and the Perils It Faces*, 2 *Jus Corpus L.J.* 463 (2021).

⁸ Pankhudi Khandelwal, *Ease of Doing E-Commerce Business in India: The FDI Policy Relating to E-Commerce and Its Impact on the Indian Economy*, 5 *RGNUL FIN. & MERCANTILE L. REV.* 20 (2018).

users to migrate to other platforms. This concentration of market power can have far-reaching implications for competition, innovation, and consumer choice.⁹

D. Platform Power

Key power sources and forms are shared by Amazon, Google, and Facebook. Even if the exact workings of their business models vary, generalising these forms of power helps create a toolkit for combating platform control. Platform-specific studies of platform power would be beneficial for more in-depth analysis, and figuring out the common factors that contribute to their dominance allows us to situate these platforms within the current legal frameworks.¹⁰

i. Gatekeeping Power

Power as a gatekeeper is the first. This authority derives from the fact that these businesses essentially act as the arteries of commerce and as the infrastructure for digital markets. They now possess the technological resources that other businesses use to conduct business in the online economy. For instance, Amazon's platform now hosts 55% of online purchasing queries, and over 40% of online sales income in the US was generated by the business last year.¹¹

Network effects and the self-reinforcing benefits of acquired data act as entrance barriers and safeguard the level of market power enjoyed by dominant platforms. This means that the platforms are not just essential intermediates but also, in many cases, the only viable choice. Even if manufacturers, retailers, advertisers, publishers, and app developers can discover new ways to connect with customers, those more limited routes can only genuinely complement access in the periphery.¹²

Platforms can coerce and obtain better terms from the business customers who depend on its infrastructure by acting as their gatekeepers. For instance, to obtain better terms, Amazon disabled the "buy-buttons" for book publishers. Executives have also described how the company changes its algorithms during negotiations to remind companies of its power to sink their sales by demoting their rank beneath where users typically look when making purchases. The business recently began shifting costs to suppliers by subsidising shipping costs through higher fees for businesses using its platform. When businesses try to negotiate with Amazon, they run the danger of having their

⁹ A. Soundarya & A. B. Abirami, Collusion between E Commerce and Brick and Mortar Stores, 3 INDIAN J.L. & LEGAL Rsch. 1 (2021).

¹⁰ Lina M. Khan, The Separation of Platforms and Commerce, Columbia Law Review, MAY 2019, Vol. 119, No. 4 (MAY 2019), pp. 973-1098.

¹¹ Aakash Kumbhat (2020): Google and the evolution of CCI's online platform market definition analysis, Indian Law Review.

¹² Pooja Shukla, An Analysis of Legal Framework Related to Anti-Competitive Behaviour in Digital Markets, 1 Jus Corpus L.J. 559 (2021).

accounts banned and being removed from the site frequently results in both lower revenue and employee layoffs.¹³

i. Power of Leveraging

Leveraging is a second type of power. The platform's ability to integrate across marketplaces as well as operate as crucial infrastructure is the basis of its strength. This makes it possible for a platform to use its position as the market leader to gain an edge in a related or distinct market. This type of integration also creates a fundamental conflict of interest, motivating a platform to prioritise its goods and services over those provided by third parties by putting it in direct rivalry with the businesses using its infrastructure. For instance, Amazon offers clothing with the Amazon brand as well as clothing from independent designers; a third-party investigation revealed that Amazon gives preference to its brands and denies competitors access to some prominent promotional locations on its website. Leveraging power gives platforms the motivation to favour their products, services, and apps over those provided by other firms, and gatekeeper authority gives platforms the capability to extort.¹⁴

ii. Power of Information Exploitation

Information exploitation is a third way of exercising power. The different types of data that platforms gather about consumers and corporate users are the source of this power. Platforms collect a tonne of data, including how long you spend hovering your mouse over a certain button, how long an item is in your shopping cart, every location you've visited with your phone, and your psychological responses to various posts and words.

Additionally, platforms deploy information exploitation tactics against the companies that employ their services to access markets. For instance, Amazon gathers a vast amount of data on the vendors using its marketplace. It frequently uses this data to inform its sales and products, utilising insights from independent producers and retailers to compete with them by releasing knockoffs that it can rank higher in search results for or sell for less. In this approach, Amazon's platform works like a petri dish, allowing independent businesses to incur the first risks associated with bringing items to market while Amazon benefits from their insights, frequently at the expense of the businesses involved. Notably, it is the other types of power—Amazon's gatekeeping role and

¹³ Aaron S. Edlin, Stopping Above-cost Predatory Pricing, 111 YALE L.J. 941 (2002).

¹⁴ Zephyr Teachout & Lina M. Khan, Market Structure and Political Law: A Taxonomy of Power, 9 DUKE J. CONST. L. & PUB. POL'y 37 (2014).

integration across business lines—that allow it to take advantage of information in this way; the first two forms of power strengthen its capacity to use the third.

Recoupment tests examine the likelihood of such pricing under the assumption that it will occur. The purpose of this test is to establish if a company's predatory price move will likely eliminate or prevent competition. Additionally, consider if it will lead to a sufficient buildup of supra-competitive profit to allow for the recovery (recoupment) of losses incurred during the predatory attack.

Predatory losses could be recovered by imposing a price that is higher than what would otherwise be the case. Long-term harm to customers is caused by excessively competitive pricing. Predatory pricing would be irrational; hence it is presumed that it has not been done if the recoupment test shows that there is little to no possibility of recoupment. The recoupment test allows courts or the competition authorities to reject claims of predatory pricing without having to conduct price cost analyses, even if a company is charging below cost and recoupment is not possible to obtain.¹⁵

Therefore, to succeed on a claim of predatory pricing today, a plaintiff must demonstrate that the defendant would be able to recover its losses by maintaining super competitive prices to pass the Brooke Group recoupment test. The number of cases filed and won by plaintiffs has significantly decreased since the Court instituted this recoupment requirement. Despite the Court's claim that "predatory pricing schemes are rarely tried and even less frequently successful," a wealth of research demonstrates that predatory pricing can be "an attractive anti-competitive strategy" and has been employed by dominant corporations across sectors to stifle or dissuade.¹⁶

Even though courts now demand evidence showing the alleged predator would be able to raise prices and make up for its losses, predatory pricing lawsuits are very challenging to succeed in. The recoupment criterion in situations of below-cost pricing by dominating platforms would need to be dropped for the predatory pricing doctrine to be updated to reflect the economics of platform marketplaces, where corporations can sink money for years with unlimited investor backing.

A competition-based strategy might also think about adopting a presumption of predation for dominant platforms that are proven to be pricing products below cost, given that platforms are particularly positioned to support predation competition. In these situations, there should be presumed predation for several reasons. First, businesses may increase prices years after the initial

¹⁵ V. Sudekshana, *Predatory Pricing - An Analysis of the Existing Framework and Its Shortcomings*, 4 INDIAN J.L. & LEGAL Rsch. 1 (2022).

¹⁶ Alves Gomes, M., Meisen, T. A review on customer segmentation methods for personalized customer targeting in e-commerce use cases. *Inf Syst E-Bus Manage* (2023).

predation or increase prices on unrelated commodities in ways that are challenging to demonstrate in court. Second, businesses may raise prices through subtle forms of price discrimination or personalised pricing. Third, even if the company does not raise consumer prices, predation can result in a variety of market harms. These harms include a decline in product quality and the depletion of choice diversity from a consumer welfare perspective.

III. E-COMMERCE ECONOMY AND EXPLOITATIVE OR EXCLUSIONARY DATA

A. Big Data as a Barrier to Entry

Pricing below cost enables predatory businesses with control over huge datasets to more readily recover their losses. Even for consumers who buy from other sellers, large digital platforms can gather useful consumer data. As previously mentioned, having access to consumer data enables both traditional and targeted price discrimination, in which a seller can impose super competitive charges on customers who have a high WTP (Willingness to pay). In the words of Howard Shelanski, “When customer information is a useful input for a platform and is not equally available to that platform’s competitors, the informational advantage can help to entrench market power.”¹⁷ Big data control is a substantial entry barrier.¹⁸

A dominant company that employs predatory pricing algorithms to gain its monopoly position will be better able to recover through monopoly pricing (for at least some consumers) without losing sales to (less knowledgeable) rivals if it has access to a special and important dataset. In essence, the company that controls big data is in a good position to carry out both parts of a predatory pricing strategy: recoupment and predation.¹⁹

Even though going from store to store is frequently far easier than buying online, search expenses remain due to the complexity and constant change of product selections and offerings on websites. Algorithms can be used by some big businesses to raise search costs for customers. For instance, Amazon can prevent price comparisons by choosing which products to emphasise and which to burden by hiding them from customers’ views many clicks away. These search expenses encourage logical consumers to stick with the market leader rather than devote time and effort to online price comparison shopping.²⁰

¹⁷ Howard A. Shelanski, Information, Innovation, and Competition Policy for the Internet, 161 U. PA. L. REV. 1663, 1680-81 (2013).

¹⁸ Douglas M. Kochelek, Data Mining and Antitrust, 22 HARV. J. L. & TECH. 515 (2009).

¹⁹ Thomas K. Cheng, Buyer Power in the Digital Economy: The Case of Uber and Amazon, 19 N.Y.U. J.L. & Bus. 1 (2022).

²⁰ Lina M. Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, 11 HARV. L. & POL'Y REV. 235 (2017).

Savvy predators can alter consumer preferences and purchase decisions by using their data resources. During the recoupment phase, the targeted advertising and couponing tactics used during the predation phase can be changed because “businesses use microtargeted ads to shape consumers’ preferences and steer them into a particular consumption pattern, effectively locking them into a lifestyle determined by their past choices and those of likeminded consumers.” If well implemented, this tactic can keep customers locked into the monopolist, making it more difficult for other businesses to enter or re-enter the market.

B. Trade-Offs

The convergence of antitrust regulation and the utilization of big data by e-commerce platforms presents a nuanced landscape fraught with trade-offs. These trade-offs have far-reaching implications for competition, innovation, consumer welfare, and data privacy.

One prominent trade-off involves the tension between promoting competition and recognizing network effects. E-commerce platforms often grow more valuable as they attract more users, a phenomenon known as network effects. While these networks can enhance user experiences and drive innovation, they can also lead to market dominance. Regulators must carefully weigh the benefits of competition against the efficiencies and innovations that dominant platforms can deliver.

At the core of this trade-off lies the promise of consumer convenience. E-commerce platforms, armed with sophisticated algorithms and comprehensive user data, deliver a shopping experience tailored to individual preferences. Personalized product recommendations, streamlined checkout processes, and targeted promotions are just a few manifestations of this convenience. Consumers revel in the time saved and the hassle spared when presented with precisely what they desire, often before they even realize it themselves. Moreover, big data-driven pricing strategies can result in cost savings for consumers. Dynamic pricing, influenced by factors like demand fluctuations and competitor pricing, ensures that buyers can find products at competitive rates. In essence, consumer convenience in the e-commerce landscape hinges on the seamless integration of user data to curate an efficient, user-centric shopping journey.²¹

On the flip side, the allure of convenience must contend with data privacy concerns. As e-commerce platforms collect, process, and leverage extensive troves of user data, individuals grow increasingly wary of the scope and implications of this data handling. Privacy concerns encompass not only the sheer extent of data collection but also the potential misuse or mishandling of this

²¹ Martin Edwards, *Competition Upstream of Amazon*, 25 VAND. J. ENT. & TECH. L. 691 (2023).

information. The modern consumer is apprehensive about the extent to which online behaviour is tracked, profiled, and potentially monetized. Worries about data breaches, cyberattacks, and unauthorized access to sensitive information loom large. Consumers grapple with the idea that companies possess highly detailed profiles encompassing shopping habits, personal preferences, and even emotional states, which can feel invasive and unsettling.

Innovation and competition are at the heart of the e-commerce landscape. E-commerce giants invest heavily in technology and services, driving innovation that benefits consumers. However, if these platforms resort to anticompetitive tactics to eliminate rivals, they may stifle innovation. Regulators face the challenge of distinguishing between procompetitive innovation and anti-competitive practices.

Price dynamics present a trade-off as well. E-commerce platforms can offer competitive prices due to their operational efficiencies and data-driven pricing strategies. However, these platforms can also engage in price discrimination, charging different prices to users based on their data profiles. Regulators must discern when such price discrimination goes beyond acceptable limits and harms consumers or competitors.

C. Digital Feudalism and Sustained Competitive Advantage

The concept of “Digital Feudalism” in the context of sustained competitive advantage under predatory pricing on e-commerce platforms is a multifaceted issue with profound implications for both businesses and consumers.²²

In the contemporary landscape of e-commerce, the notion of “Digital Feudalism” has emerged as a concept that encapsulates the dynamics between dominant platforms, consumers, and smaller businesses. At its core, Digital Feudalism draws parallels with the feudal systems of the past, where powerful lords held sway over land and livelihoods. In the digital realm, dominant e-commerce platforms often wield similar control, becoming the digital lords of vast digital ecosystems. This platform becomes a gatekeeper, setting the rules of engagement, extracting rents, and enjoying disproportionate power.

These platforms thereafter leverage their dominance to practice predatory pricing. While the low prices under predatory pricing may appear as a boon for consumers, it conceals a more complex narrative. Predatory pricing can catalyze digital feudalism by decimating competitors and fostering a sense of dependency among consumers and smaller businesses. In the short term, consumers

²² Mariana Mazzucato. 2019. Preventing Digital Feudalism. Project Syndicate. Retrieved from <https://www.project-syndicate.org/commentary/platform-economy-digital-feudalism-by-mariana-mazzucato-2019-10>.

rejoice at the prospect of lower prices and increased convenience. However, the long-term implications are far less rosy. Once competitors are driven out of the market, the predatory platform can wield monopolistic power with limited checks on its conduct. This results in sustained competitive advantage, as the platform can dictate prices, terms of engagement, and access to the digital marketplace. Consumers and smaller businesses, now dependent on this platform, find themselves with limited alternatives, mirroring the dependence of medieval serfs on lords for land and protection.²³

The erosion of choice and innovation is a consequential effect of this digital feudalism. Smaller businesses struggle to compete, as they face a behemoth that can undercut their prices indefinitely. Consumers, in turn, find themselves in a marketplace where alternatives are scarce, and the digital lord exerts unparalleled control over their data and digital experiences. Mitigating this digital feudalistic trend requires a multifaceted approach. Antitrust enforcement plays a pivotal role in preventing predatory pricing from stifling competition. Regulatory bodies must scrutinize the behaviour of dominant e-commerce platforms and intervene when anti-competitive practices are identified. Additionally, stringent data protection and privacy regulations are imperative to ensure that data collection practices do not infringe on user privacy rights.

Promoting market access for smaller businesses and startups is equally crucial. Policymakers can implement measures that reduce entry barriers and increase access to digital markets. Simultaneously, empowering consumers with knowledge about the implications of Digital Feudalism and predatory pricing is pivotal. Informed consumers can make choices that support healthy competition.

The balance between the allure of convenience and the need to protect competition and innovation is the fulcrum upon which the resolution of digital feudalism and sustained competitive advantage under predatory pricing hinges. In an era where the digital lords of e-commerce hold significant power, it falls upon regulators, businesses, and consumers to collectively navigate this delicate equilibrium, ensuring that the digital landscape remains fair, innovative, and conducive to healthy competition.

D. Surveillance Capitalism

In the rapidly evolving digital economy, the fusion of surveillance capitalism and predatory pricing by e-commerce giants has ignited a contentious debate. This part delves deeper into this intricate

²³ Joseph F. Brodley and George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 *Cornell L. Rev.* 738 (1981).

web of issues, drawing insights from the Harvard, Chicago, and post-Chicago schools of thought in economics, to dissect the profound implications and potential policy responses.

Surveillance capitalism, coined by Shoshana Zuboff, describes an economic system where data is harvested, processed, and monetized on an unprecedented scale. E-commerce platforms, as prominent data aggregators, epitomize this model. They meticulously collect user data, employing sophisticated algorithms to decipher consumer behaviour, preferences, and inclinations. This treasure trove of data fuels personalized advertising, services, and product recommendations, redefining the boundaries of consumer interaction.

Predatory pricing, often perceived as a relic of the past, has found new life in the digital realm. E-commerce giants employ this strategy by deliberately offering products or services at prices substantially below their production costs. This approach appears advantageous to consumers initially, luring them with unbeatable prices and convenience. However, it conceals a more profound purpose: the elimination of competitors and the consolidation of market power.

The Harvard School of thought, deeply rooted in antitrust traditions, raises significant concerns about predatory pricing. Pioneered by scholars like Philip Areeda and Donald Turner, this perspective underscores the potential harm to competition. Predatory pricing, when unchecked, can lead to the monopolization of markets. In the long run, this stifles innovation, limits consumer choices, and ultimately harms societal welfare.²⁴

In contrast, the Chicago School, with luminaries like Robert Bork and Richard Posner, takes a more market-centric stance. It contends that predatory pricing might be a short-term strategy that does not necessarily warrant intervention. This school emphasizes the importance of consumer welfare and efficiency. According to this view, if lower prices benefit consumers, then short-term predatory pricing should not be of significant concern.

The post-Chicago school, represented by scholars like Herbert Hovenkamp, introduces a nuanced perspective. It recognizes that the effects of predatory pricing can be context-dependent. This school advocates for a case-by-case analysis, considering factors such as market power, barriers to entry, and data-driven advantages. It emphasizes the importance of balancing consumer welfare and competition preservation.

The intersection of surveillance capitalism and predatory pricing is where the conundrum unfolds. Surveillance capitalism provides e-commerce platforms with a granular understanding of

²⁴ B. Wu, J. Cheng and Y. Qi, Tripartite evolutionary game analysis for “Deceive acquaintances” behaviour of e-commerce platforms in cooperative supervision, *Physica A* (2019).

consumer behavior, enabling them to optimize predatory pricing strategies. This data-driven approach lets platforms identify the most opportune moments to undercut competitors, rendering them financially vulnerable.

To address this intricate challenge, a balanced approach is essential. Robust data privacy regulations, as advocated by the post-Chicago school, can mitigate excessive data collection. Simultaneously, stringent antitrust enforcement, aligned with the Harvard tradition, can deter predatory pricing and its potential to undermine competition.

The convergence of surveillance capitalism and predatory pricing in the e-commerce landscape is emblematic of the complex ethical, economic, and societal dilemmas posed by the digital age. Striking a balance between the benefits of data-driven personalization, consumer welfare, and the preservation of competition remains a formidable task for policymakers, businesses, and consumers alike. It requires an approach that harmonizes the insights from the Harvard, Chicago, and post-Chicago schools to navigate this multifaceted challenge successfully.

E. Predatory Pricing and Antitrust Schools of Thought

i. *The Shift to the Rule of Reason under Chicago School of Thought*

The shift from the per se rule, championed by the Harvard School of antitrust thought, to the rule of reason, associated with the Chicago School, marked a profound transformation in how predatory pricing cases are assessed under antitrust and competition law.²⁵

Historically, during the mid-20th century, the Harvard School's antitrust philosophy was dominant. It staunchly advocated for the per se rule in predatory pricing cases. This rule regarded certain practices, including below-cost pricing, as inherently and unconditionally anti-competitive. It offered simplicity and legal certainty, allowing authorities to swiftly condemn such practices without in-depth economic scrutiny. However, over time, the per se rule faced mounting criticism. Detractors argued that it was overly rigid and indiscriminate, failing to acknowledge the nuances of various industries and potentially stifling procompetitive price competition. Critics contended that it didn't consider the potential benefits of aggressive pricing strategies, such as predatory pricing, for consumers.²⁶

²⁵ Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955).

²⁶ Jonathan B. Baker, *Predatory Pricing after Brooke Group: An Economic Perspective*, 62 Antitrust L.J. 585 (1994).

In contrast, the Chicago School of antitrust thought emerged in the latter half of the 20th century, introducing a more economic and flexible approach to antitrust analysis. Central to this paradigm shift was the rule of reason, which became the cornerstone of evaluating predatory pricing cases. Under the rule of reason, each case is meticulously assessed based on a delicate balance of its potential anticompetitive effects against its procompetitive benefits. Economic analysis and substantial evidence take center stage, replacing the blanket condemnation of practices like predatory pricing. This approach focuses on consumer welfare and economic efficiency. The Chicago School recognized that aggressive pricing strategies, even those involving below-cost pricing, could have positive outcomes for consumers, such as lower prices, increased product choices, and innovation. Rather than relying on a one-size-fits-all approach, the rule of reason prioritized economic realism, taking into account the specific market dynamics of each case.²⁷

ii. ***Harvard School of Thought***

Harvard or the Structuralist school of thought focuses on ‘market structuralism’ that is it focuses on the structural paradigm of industries, and not just price theory as the only determinant of anti-competitive behavior, unlike Chicago. Predatory pricing by e-commerce platforms, as viewed through the lens of the Harvard School of thought, raises critical concerns regarding its impact on both consumers and the competitive marketplace. This approach places paramount importance on safeguarding consumer welfare, emphasizing that antitrust laws should primarily serve the interests of the end-users. While the short-term benefits of lower prices may seem advantageous, Harvard scholars argue that predatory pricing can have dire consequences in the long term.

From a Harvard School perspective, predatory pricing can disrupt the natural balance of competition in e-commerce. By driving competitors out of the market through unsustainable pricing practices, dominant platforms can establish monopolistic or oligopolistic positions. This, in turn, may lead to reduced incentives for quality improvements and innovation, as the absence of competition may stifle the drive to enhance products and services.²⁸

Furthermore, the Harvard School highlights concerns about the creation of barriers to entry for potential competitors. When established e-commerce giants are willing to sustain losses to maintain dominance, new entrants may be discouraged from challenging the status quo. This

²⁷ Stephen J. Marietta, *An Apple a Day Doesn't Keep Doctor Miles Away: The Second Circuit's Misuse of the Per Se Rule in United States v. Apple*, 69 Rutgers U.L. REV. 325 (2016).

²⁸ Piraino, Thomas A. Jr. (2007) “Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century,” *Indiana Law Journal*: Vol. 82: Iss. 2, Article 4.

stifling of competition not only limits choices for consumers but can also hinder economic growth and technological progress.

In practice, the case of Amazon's alleged predatory pricing serves as a pertinent example. While consumers may enjoy lower prices, critics argue that the company's aggressive pricing strategies could harm competition by driving smaller retailers out of business. The Harvard School would advocate for rigorous antitrust scrutiny to ensure that e-commerce platforms strike a balance between offering competitive prices and maintaining a healthy, innovative, and competitive marketplace.

iii. *Chicago School of Thought*

The essence of the Chicago School position is that "the proper lens for viewing antitrust problems is price theory. The Chicago School of thought considers predatory pricing to be benign and even a beneficial practice. This school of economic thought emphasizes the virtues of unregulated markets and minimal government intervention. The Chicago School holds that price predation is almost always irrational since recoupment is almost always improbable. Consequently, instances of what appears to be below-cost pricing almost always represent competition rather than predation. Pricing below cost is either a sane kind of competition or the cost has been miscalculated. Therefore, predatory pricing is a rare white tiger or a unicorn in the Chicago zoological classification.

Chicago School scholars argue that e-commerce platforms operate in highly competitive environments, characterized by low entry barriers and constant innovation. In such a setting, they contend that predatory pricing is unlikely to succeed because it would require the predator to sustain losses for an extended period, which is financially unsustainable. The Chicago School maintains that rational profit-maximizing firms wouldn't engage in such practices.

From this perspective, aggressive price-cutting by e-commerce giants like Amazon is often seen as a pro-competitive strategy that benefits consumers through lower prices, increased product variety, and enhanced convenience. Chicago economists assert that antitrust laws should be cautious when intervening in e-commerce markets, as doing so may inadvertently harm consumer welfare by stifling price competition and innovation.²⁹

Thus the Chicago School generally downplays concerns about predatory pricing by e-commerce platforms, arguing that market forces and competition are sufficient safeguards against

²⁹ Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L. J. 710 (2017).

anticompetitive behaviour. This perspective emphasizes the efficiency and benefits of laissez-faire economics in the e-commerce sector.³⁰

iv. *Post Chicago School of Thought*

Based on the realization that if predation happens in one market, recoupment can happen quickly and profitably in many other markets, post-Chicago economics offers a novel theory of recoupment. The Chicago School's contention that recoupment is never conceivable in the classic single-market predation tale is also called into question by post-Chicago economics.

In regards to the conventional single-market predatory pricing story, the post-Chicago economics differs from the Chicago School in its degree of sympathy. If the prey has less access to financial money than the predator due to flaws in the capital market, the predator may anticipate using its "deep pockets" in a conventional manner to force the prey to leave. In addition, predatory pricing with single-market recoupment may no longer be an illogical tactic if high prices following the exit of the prey are unlikely to be undermined by new competition (due to entry obstacles).

Even if cost is accurately calculated, post-Chicago economics argues that price-cost tests can be deceptive. Scholars from the Chicago School noted that "false positives" (competitive behaviour mistakenly referred to as predatory) will develop if competing companies charge below marginal Cost. However, post-Chicago economics acknowledges that there is a chance for both positive and negative errors and that it is possible to experience "false negatives" (anti-competitive predation that does not drive prices below the cost standard). though a company's pricing is sufficiently low in comparison to its competitors' costs, it can dissuade aggressive competition even though the low price is more than the price-cutter's average cost. Therefore, it is conceivable for low prices to hurt competition even if they are higher than the price cutter's costs. Therefore, post-Chicago economics won't completely rule out the prospect that powerful predatory tigers could be hiding out in the market jungle.

The Post-Chicago School offers a nuanced perspective on predatory pricing. It acknowledges that aggressive price-cutting by e-commerce giants can indeed harm competition by driving rivals out of the market. However, it also argues that predatory pricing should be assessed case by case, taking into account specific market dynamics.

From this perspective, not all predatory pricing is necessarily harmful. Some forms of predatory pricing may be anti-competitive, while others may be pro-competitive. The focus should be on the

³⁰ Wayne D. Collins, Trusts and the Origins of Antitrust legislation, 81 FORDHAM L. REV. 2279 (2013).

effects on competition and consumer welfare. If predatory pricing leads to long-term monopolization or harms consumer choice, it should be scrutinized and regulated.³¹

The Post-Chicago School recognizes that e-commerce platforms, with their vast resources and data-driven strategies, can engage in complex pricing practices that go beyond the simplistic model of selling below cost. Therefore, antitrust authorities should adopt a more sophisticated approach to assess predatory pricing allegations, considering factors like network effects, data leverage, and barriers to entry.

v. *Ordo Liberalism on Predatory Pricing*

Ordo liberalism focuses on “Social costs”. The main characteristic of the ordo-liberal thought on competition law is the need to protect individuals from the misuse of economic power, i.e. abusive behaviour of firm(s) with a dominant position, in addition to that from the misuse of public power, as a result of having witnessed the anticompetitive conducts of agents with economic power during the Weimar period to destroy political and social institutions. The state can establish an appropriate legal framework for the economy and should maintain a healthy degree of competition by measures that adhere to market principles, by ordoliberalism, who have a broader view of liberalism (Ordo). In this regard, the most crucial tool for defending a (social) market economy is competition legislation.³²

Ordo liberalism’s two core tenets are that (i) only a state free from economic lobbying can defend its citizens’ freedom and rights from abuses of market power and (ii) only a state with defined functions can shield people from the arbitrary use of public authority. Thus, the preservation of competition is a fundamental principle of ordo liberalism.³³

Competition based on ability and handicap was distinguished by Eucken. Capacity competition helps one’s performance, i.e., producing the greatest products and services at the most affordable costs. The goal of handicap competition is to make opponents perform worse so that one’s performance can be comparably improved (but not significantly). The basis of capacity competition is the self-interest of competing agents. However, handicap competition, which ordoliberalism often refer to as prevention competition, is based on rival other-regarding agents and

³¹ David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25 (1994).

³² Felice, Flavio and Vatiello, Massimiliano, *Ordo and European Competition Law* (December 31, 2015). A Research Annual (Research in the History of Economic Thought and Methodology, Vol. 32), Emerald Group Publishing Limited, Bingley, pp. 147-157, 2015.

³³ David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25 (1994).

is intended to stop competition from other producers rather than increasing one's performance for the benefit of consumers. Eucken and his colleagues believed that the goal of competition policy should be to thwart handicap competition and drive businesses to focus on capacity competition.

Under predatory pricing where the company in a dominant position keeps lowering its price until it is lower than the average cost of its rivals, which results in a loss of profit on each unit sold. The justification for this practice does not stem from capacity rivalry; in fact, deciding to reduce one's profits is irrational. Instead, the basis for this argument is handicapped competition. The dominating company uses this tactic to drive away rivals from the market, which allows it to raise prices and enjoy monopoly profits in perpetuity. In actuality, such a strategy only succeeds if and only if the losses of the rival firms to the dominant firm are greater than those of the dominating firm itself. When this happens, rival companies may leave the market, enabling the dominating firm to strengthen its position. When this happens, predatory pricing turns into a useful tactic for the dominant firm, which doesn't want to engage in capacity rivalry by lowering prices raising product quality, or both. Because a departure from the dominant strategy of capacity competition is permitted, the special responsibility granted to the market-dominant enterprise under Art. 106 TFEU can be seen as a way in which handicap competition is decreased.³⁴

IV. PREDATORY PRICING AND GOALS OF ANTITRUST

A. Dynamic Efficiency vs. Consumer Protection

The idea that boosting economic efficiency is the best approach to maximizing consumer welfare has gained support from a growing number of antitrust stakeholders. The assertion that efficiency should be the main goal and determining factor of competition policy and antitrust legislation is, however, still the subject of significant and ongoing debate. The complex issue of predatory pricing intersects with the broader goals of antitrust enforcement, particularly the tension between promoting dynamic efficiency and safeguarding consumers from exploitation.

One of the fundamental objectives of antitrust enforcement is to promote dynamic efficiency. Dynamic efficiency focuses on long-term innovation, economic growth, and technological progress. It recognizes that competitive markets incentivize firms to innovate, reduce costs, and introduce new products and services. From this perspective, predatory pricing can be viewed as a

³⁴ Behrens, Peter, The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU (September 9, 2015). Nihoul/Takahashi, Abuse Regulation in Competition Law, Proceedings of the 10th ASCOLA Conference Tokyo 2015, Forthcoming.

short-term strategy aimed at eliminating inefficient competitors. By doing so, it clears the path for more efficient firms to thrive, fostering dynamic efficiency over time.

However, the pursuit of dynamic efficiency should not come at the expense of consumer protection. Predatory pricing can be a double-edged sword. While it may drive inefficient competitors out of the market and lead to lower prices in the short term, it can also create monopolies or concentrated market power. Once competition diminishes, the predator can raise prices above competitive levels, potentially harming consumers in the long run. From the standpoint of consumer protection, antitrust authorities must remain vigilant to prevent such exploitation.³⁵

Balancing dynamic efficiency and consumer protection requires a nuanced approach. Antitrust authorities often rely on case-specific analysis to determine the appropriate course of action. Factors such as market structure, barriers to entry, and the likelihood of recoupment are considered. Recoupment, the predator's ability to recoup its losses from below-cost pricing by later raising prices once competition is eliminated, plays a pivotal role. If recoupment is likely, antitrust authorities are more inclined to intervene. This reflects a concern that even if predatory pricing appears to benefit consumers in the short term, the long-term harm of reduced competition could outweigh those benefits.

Antitrust authorities must also consider the broader implications for innovation policy. Fostering dynamic efficiency requires maintaining competitive markets where firms are incentivized to innovate and invest in research and development. Allowing predatory practices to stifle competition may hamper innovation, ultimately harming both consumers and the economy.³⁶

B. Disruptive Innovation and Predatory Pricing

The intersection of disruptive innovation and predatory pricing represents a dynamic and complex area within the realms of business strategy, economics, and antitrust regulation. Disruptive innovation, a concept introduced by Clayton Christensen in the late 20th century, describes a phenomenon where new entrants introduce innovative products or services into a market, initially targeting niche or underserved segments. These innovations often start with lower price points and simpler features compared to incumbent products, gradually gaining market share and

³⁵Robert H. Bork, *The Goals of Antitrust Policy*, *The American Economic Review*, May, 1967, Vol. 57, No. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association (May, 1967), pp. 242-253.

³⁶Gregory T. Gundlach & Diana Moss, *The Role of Efficiencies in Antitrust Law: Introduction and Overview*, *The Antitrust Bulletin*, 2015, Vol. 60(2) 91-102.

eventually disrupting established industry players. Key characteristics of disruptive innovations include affordability, accessibility, and a focus on addressing unmet consumer needs.³⁷

Predatory pricing, in contrast, is a pricing strategy employed by dominant firms or potential monopolists to drive competitors out of the market. This tactic involves setting prices below production costs, with the goal of eliminating rivals and establishing market dominance. Predatory pricing can be a contentious issue, as it raises questions about its intent, impact on competition, and long-term effects on consumer welfare.³⁸

The intersection of disruptive innovation and predatory pricing is not always straightforward. Disruptive innovators often enter markets with lower-cost, more accessible offerings that initially appear to be priced below their production costs, resembling predatory pricing. However, their ultimate aim is not to monopolize the market but to disrupt it by providing innovative alternatives that resonate with consumers. This creates a grey area where the intent behind pricing strategies becomes a critical consideration for antitrust authorities. Disruptive innovators can bring significant benefits to consumers by increasing choice, lowering prices, and improving product accessibility. However, if their practices lead to the exclusion of competitors, it could result in a lack of future competition and ultimately harm consumers. Antitrust authorities must carefully evaluate the competitive effects of disruptive innovation and predatory pricing, weighing short-term benefits against long-term risks.

C. Creative Destruction by Joseph Schumpeter and Single Monopolist Theorem

The economic theories of predatory pricing, creative destruction, and the single monopolist theorem offer intriguing insights into market behaviour and competition dynamics. While these concepts are distinct in their focus, they intersect in ways that illuminate the complexities of modern economies. Joseph Schumpeter's concept of creative destruction describes how innovation, entrepreneurialism, and market dynamism drive economic progress. It's a paradoxical process where innovations and business models replace established ones, rendering existing technologies and industries obsolete. While creative destruction spurs innovation and economic growth, it can also disrupt traditional industries and livelihoods. The tension lies in the trade-off between economic progress and the social costs of disruption. The single monopolist theorem is an economic theory that examines the behaviour of a single monopolist in a market. It posits that

³⁷ Abernathy W.J. and K.B. Clark; "Innovation: Mapping the winds of creative destruction", *Research Policy*, vol. 14, No1, pp.3-22, 1985.

³⁸ Yu Dan and Hang Chang Chieh, "A reflective review of disruptive innovation theory," PICMET '08 - 2008 Portland International Conference on Management of Engineering & Technology, Cape Town, South Africa, 2008, pp. 402-414.

a monopolist will choose a price and quantity combination that maximizes its profit, taking into account the price elasticity of demand and its cost structure. This theory helps us understand how monopolists exercise their market power by setting prices above marginal costs, which is contrary to the price competition seen in more competitive markets.³⁹

Predatory pricing, if successful, can stifle creative destruction by eliminating potential disruptors from the market. This can lead to reduced innovation and slower creative destruction dynamics. While creative destruction drives innovation, established firms that survive the process often acquire substantial market power. This can lead to monopolistic behaviour, potentially contradicting the competitive ideal necessary for creative destruction to thrive. It can also result in monopolistic or oligopolistic market structures, contradicting the competitive ideal necessary for creative destruction. This can hinder long-term economic progress.

Data collected by E-commerce platforms does provide innovative techniques but later ostracizes other players due to entry barriers. In e-commerce, creative destruction manifests in the form of rapid innovation and disruption. Amazon itself is a prime example of a disruptor that revolutionized retail. The constant introduction of new services, like Amazon Prime and AWS, demonstrates the ever-evolving nature of this digital giant. While creative destruction is celebrated for its role in fostering innovation and efficiency, it can also pose challenges to traditional retailers, potentially resulting in market consolidation. Amazon's position as an e-commerce behemoth invites scrutiny under the single monopolist theorem. As the dominant player, Amazon can wield substantial market power. It often dictates terms to third-party sellers on its platform, leveraging its control to extract fees and gain competitive advantages. The theorem's insights into monopolistic pricing behaviour apply, as Amazon can set prices and terms that maximize its profits, sometimes to the detriment of smaller sellers. The e-commerce landscape is a battleground between predatory pricing aimed at attracting consumers and concerns about monopolistic behaviour that could harm consumers in the long term. Policymakers must grapple with how to balance the benefits of creative destruction and innovation with the need to ensure fair competition and prevent anti-competitive behaviour.

V. REGULATION OF PREDATORY PRICING IN THE E-COMMERCE SECTOR

The sale of goods or the provision of services at a price that is less than the cost of production of those goods or the provision of those services, as determined by regulations, to limit competition

³⁹ Diamond, Jr., Arthur M. / 2006. "Schumpeter's Creative Destruction: A Review of the Evidence." *The Journal of Private Enterprise*, 22(1): 120-146.

or eliminate rivals has been defined as “predatory pricing” [further interpretation is provided in section 4(b)]. Being in a dominant position is the primary requirement for predatory activity.

It is essential to demonstrate that a price is set below the benchmark of average cost to remove other rivals to demonstrate that a certain pricing strategy is “predatory”. Therefore, it is crucial to identify the point at which prices start to act predatorily as well as the associated conditions.

The Competition Commission of India (“CCI”) published the Competition Commission of India (Determination of Cost of Production) Regulations on August 20, 2009, which made it clear that the Average Variable Cost (“AVC”) test is the default cost benchmark for determining whether a dominant undertaking is pricing below cost, but that the CCI may also consider other factors such as the nature of the industry, cost at market value, etc.

The CCI has complete authority to apply several additional ways for determining predatory pricing in India, as was highlighted in *MCX Stock Exchange Ltd. v. NSE*⁴⁰ (the first case involving predatory pricing in India). In this example, it was determined that the Average Total Cost (hereafter “ATC”) test is a more practical and long-term way to identify predatory pricing. The ATC test estimates a firm’s total average cost by dividing its fixed expenses and variable costs by its total output.⁴¹

Predatory pricing is forbidden by the Competition Act, 2002 (hereafter “Act”) and is described as “discriminatory or unfair pricing” under Indian law. A group or business is expressly forbidden by Section 4 of the Act⁴² from abusing its dominant position in the market by imposing an “unfair price” (including a predatory price) or any “unfair condition” that could end competition or prevent new competitors from entering the market.⁴³

It must be established that such an e-commerce platform is a dominating participant in the industry because predatory pricing is the practice of abusing the dominant position. Market share in the relevant market is a crucial factor to take into account when assessing an enterprise’s dominant position. In contrast, the CCI ruled in *All India Online Vendors Association v. Flipkart*⁴⁴ that

⁴⁰ *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd*, 2011 SCC OnLine CCI 52.

⁴¹ Aarchi & Soumee Roy, *Abuse of Dominance by the E-Commerce Sector: An Overview*, 4 INT’L J.L. MGMT. & HUMAN. 1037 (2021).

⁴² Section 4, THE COMPETITION ACT, 2002.

⁴³ Rahul Shaw, *The Progress of E-Commerce and Competition Law in India*, 4 INT’L J.L. MGMT. & HUMAN. 212 (2021).

⁴⁴ *All India Online Vendors Association (“AIOVA”) v. Flipkart India Private Limited* (Case No. 20 of 2018).

online marketplaces cannot be sued for abusing their “dominant position” because their current market share accounts for a minute portion of the overall market.⁴⁵

Furthermore, the Act’s restrictive definition of “dominant position” will prevent a new player in the market from being investigated for engaging in predatory pricing, even though it may have the financial wherewithal to withstand losses. Many organisations that were believed to have engaged in such unfair and anti-competitive practices have been cleared thanks to this understanding. For instance, in the case of *Airtel v. Reliance*,⁴⁶ the CCI determined that Reliance Jio Infocomm Ltd. could not be held accountable for predatory pricing because it was a new entrant in the relevant industry and its competitive pricing was a short-term business plan to build its identity.

The European Economic Treaty (EEC) Article 86⁴⁷ and the Treaty on the Functioning of the European Union (TFEU) Article 102⁴⁸ largely govern anti-competitive practices in the EU. In *Akzo v. Commission of EU*,⁴⁹ which first addressed the problem of predatory pricing, the court established two situations in which organisations may be subject to antitrust law liability:

1. Prices below the AVC used by a dominating undertaking to try to oust a rival must be viewed as abusive.
2. Prices intended to eliminate competitors that are below the ATC but above the AVC will be viewed as abusive.

Consider whether the pricing policy has an actual or likely exclusionary effect on the disadvantage of competition and consumer interests to determine whether anti-competitive effects are present in this case. It’s interesting to note that, unlike Indian law, EU anti-trust law does not recognise the necessity of recoupment as a crucial component to levy culpability for predatory pricing, making it more practical and effective than Indian law.⁵⁰

VI. A NEW THEORETICAL ANTITRUST PERSPECTIVE FOR THE DIGITAL AGE

The digital age has ushered in a new era of commerce, communication, and competition. In this landscape, traditional antitrust theories often fall short of addressing the unique challenges posed by digital markets. To adapt to the digital age, it is imperative to develop a new theoretical antitrust

⁴⁵ Srobona Sadhukhan & Jhumpa Pakira, *The Legal Position of E-Commerce in India and the Significance of Competition Law for Its Improvement*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).

⁴⁶ *Bharti Airtel Ltd. v. Reliance Industries Ltd. & Anr.*, CCI Case No. 03/2017.

⁴⁷ Article 86, The European Economic Treaty (EEC).

⁴⁸ Article 102, Treaty on the Functioning of the European Union (TFEU).

⁴⁹ *Akzo Nobel and Others v Commission*, C-97/08P, ECLI:EU:C:2009:536).

⁵⁰ Anuja Paul, *Antitrust Laws in India & USA: A Comparative Analysis*, 5 INT’L J.L. MGMT. & HUMAN. 504 (2022).

perspective that not only protects competition but also comprehensively addresses network issues and recognizes the social and political costs associated with digital dominance.

This paper attempts to propose a new hybrid theory which incorporates various goals of antitrust and learning from the past. Before any law can be formulated, it is sine qua non, that a theory which would guide its trajectory is formulated. Therefore, to formulate an antitrust regulation for the new digital age, it is essential that a broad theory of what antitrust stands for and 'should' stand for in today's age.

This paper proposes a hybrid theory, largely incorporating the broad characteristics of the Harvard School of Thought and the Ordo-liberalism School of thought. Under this new theory, the market structure and not the price theory will be an essential factor and would incorporate both network effects in regards to the digital age, as well as the social costs that are privacy, inequality, and abuse of dominant economic power in the political arena. Competition should be the guiding principle as long as it creates a reasonable balance of certain specified values, including a sense of justice for as many participants as possible, stimulation and opportunity for innovation and growth, effectiveness, and efficiency. Antitrust and competition policy in general have the primary objective of making decisions about the relationship between competition and cooperation within the private part of a largely market-based economic system.⁵¹

A. Preservation of Competition and Data Privacy

While efficiency remains important, it should not come at the expense of competitive markets. The process-focused antitrust perspective aims to strike a balance between efficiency and the preservation of competition. In the new theoretical antitrust perspective for the digital age, the protection of competition as a dynamic and ongoing process should take centre stage. By recognizing competition as an evolving phenomenon, addressing unique digital challenges, and balancing efficiency with competition preservation, this approach ensures that antitrust remains effective in promoting innovation, safeguarding consumers, and fostering dynamic and competitive digital markets.⁵²

Under this new theory, Data privacy should not be seen as disjunct from competition law, and should instead be seen as one of the primary goals of antitrust enforcement. In today's digital age, data drives competition and data hoarding threatens the constitutional right to privacy. It has been

⁵¹ Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, *The Yale Law Journal Forum*, 18 Jan 2021.

⁵² Oles Andriychuk (2010) *Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process*, *European Competition Journal*, 6:3, 575-610.

highlighted in numerous cases like *Hiq v. LinkedIn*⁵³ and *People Broser v. Twitter*,⁵⁴ that Data is the currency of the market in today's digital age.⁵⁵

B. Behavioral Remedies

Traditional structural remedies, such as breaking up companies, may not be suitable for digital giants. Instead, behavioural remedies that regulate specific practices can be more effective. For example, imposing data-sharing requirements or prohibiting self-preferencing can foster competition without disbanding innovative companies.

Some Major amendments have been made in 2023, though have not yet been notified, and have proposed a commitments and settlement regime rooted in Behavioral remedies.

C. Political Dimension

It has been claimed that antitrust laws should be treated fundamentally as political policy at various times, including more and more recently. For reformers, the objectives of antitrust laws should be the decentralization of economic power, freedom, justice, equitable distribution of income, preservation of a level playing field, and other "public interest" objectives.⁵⁶

Another political perspective emphasizes the pursuit of freedom as a universal goal and calls for legislation that gives consumers the freedom to make meaningful choices about the products they buy while giving producers the freedom to enter markets and compete on a "level playing field."

D. State and the Sponge

A market economy is a structure created by the state. The fundamental principles of an economy are established by government activity; without these principles, an economy cannot function. Falsely, the legal and economic frameworks on antitrust assume that the market existed before the state. The market becomes a natural force. The optimistic view of the State is that it responds to discrete market failures in which the functioning markets do not meet predetermined textbook criteria. The pessimistic view is that it responds to political pressures from powerful people and/or organisations. The legal construction of the current market and economy is eliminated in this framework. The political and legal decisions that produced the market we have today are obscured by this worldview. The courts limit antitrust "intervention" to distinct market failures, typically

⁵³ *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985 (9th Cir. 2019).

⁵⁴ *PeopleBrowsr, Inc. v. Twitter, Inc.*, No. C-12-6120 EMC, (N.D. Cal. Mar. 6, 2013).

⁵⁵ Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, Competition Policy International, 2018; Columbia Public Law Research Paper No. 14-608 (2018).

⁵⁶ Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, *The Antitrust Bulletin*, SAGE, 1-16, 2019.

linked to “artificial” market power when applying the test of consumer welfare in antitrust cases, and this is one of the reasons why a new theory recognising the pre-existing state is necessary. For the State to source its legitimacy from the fact that the market is not self-correcting.

To foster shift from competition for the market to competition in the market, it is necessary that the state imposing restrictions is not seen as a negative practise, considering today many of the Big Giants in every other sector of the economy exist, which leads to other competitors having diminished countervailing bargaining power,

Ariel Ezrachi has argued for a Sponge approach in handling antitrust enforcement, according to which different values should be absorbed and considered objectives of antitrust, depending on the country.⁵⁷ Competition law can no longer be just limited to economic goals because the paradigms of the Market have drastically changed with the digital age. Today’s understanding of competition law is also a political choice that is required to be made. Therefore, antitrust law doesn’t have to be the same for all jurisdictions and there should be an emphasis on formulating domestic law that is suited and deals with domestic issues at hand. All markets are not the same, all nations are not the same, the conditions are not the same.⁵⁸

In light of this theoretical formulation, the powers of the CCI can no longer be limited to being just a regulatory body with a lack of resources and technical expertise. CCI needs to adopt the practice of analysing the market structure. The laws and the powers of the CCI should be expanded in a manner which authorises the CCI to take action, even if an arrangement is not dominant or harmful for consumers per se from a price point of view, as other factors should be considered and looked at and the protection of competition as a process that should be disregarded, like network effects, non-price effects like switching costs. Presently, Sections 3 and 4 are governed by an ex-post regime wherein firms may be penalized only after they have been adjudged guilty of contravening the Act, which causes the issue of irreparable harm to become a real possibility.

VII. CONCLUSION

To conclude, the effects of predatory pricing are myriad when it comes to e-commerce platforms and the existing regulatory framework is incapable of ensuring the soul of antitrust is preserved. Therefore, a new theoretical formulation and consequently, a framework on digital markets and antitrust, incorporating values beyond just economic efficiency and consumer welfare are required to be taken into consideration. As long as competition fosters a fair balance of certain ideals, such

⁵⁷ Ezrachi, Ariel, *Sponge* (March 1, 2006). *Journal of Antitrust Enforcement* (2016) 1-26 (Open Access - Available on the JAE website).

⁵⁸ Sophie Copenhaver, *Big Tech Is Why I Have (Anti)Trust Issues*, 95 *St. JOHN'S L. REV.* 869 (2021).

as a sense of fairness for as many players as possible, stimulation and opportunity for innovation and growth, effectiveness, and efficiency, competition can be preserved in its essence.