



E-COMMERCE AND BIG PLATFORMS: THE NECESSITY OF NEW COMPETITION POLICIES

Obando Redondo, Nasser De Jesus

One should hardly tell academicians that information is a valuable resource: Knowledge is power.

- George J. Stigler

Abstract

In the modern society tending to the digitalization, the industry has been modernized in such a way that the most prosperous businesses are those that are based on Internet platforms or "Apps". These businesses have been recognized under the name of "Big Platforms".

Along with modernization and digitalization, new legal problems came up that put into question the current legal system of the States. Among those legal problems appear those in relation to the Law of Competition. This document discusses what are the problems that arise with the modernization of business, and in general, electronic commerce, with respect to the current rules of competition in the United States and Colombia; specifically in relation to predatory prices, vertical integrations, and the use of information or "data" as a means to collude, discriminate and carry out anticompetitive practices in a given market.

As an example of companies that can be considered as 'Big Platforms', the text will talk especially about Amazon and Uber to demonstrate the most harmful effect that these platforms can bring to a competitive market. These companies are the perfect example to demonstrate the need for the adoption of new policies for the application of the rules of the Competition.

Introduction

In the current days, e-commerce has evolved, transforming form possibilities of new businesses to a necessity for some companies for the maintenance of their business. Its importance to commerce in general has increased, in fact, more people are engaging in online transactions, more products are entering into the market, and more companies are gaining power through online transactions. Because of its importance, its constant growth, and the few knowledge ordinary people have in these types of businesses, an analysis of how Competition Laws can be infringed is required to create a warning.

In the modern era, it is generally believed e-commerce only brings benefits to our society. These sorts of arguments are basically founded on the idea that e-commerce avoids and reduces the transaction costs in the retail market, understanding these costs as the costs in which a party incurs to exchange a good or service to another party.¹ Among other things, it is believed that e-commerce eradicates barriers to entry such as the infrastructure costs; retailers can access the market by a simple inscription in an online platform instead of having a physical store for the consumers to visit. But the most acclaimed argument is that e-commerce brings more competition because of

¹ See, e.g., Luis Carigano & Steven N. Kaplan, *The effects of Business to Business E-commerce on Transaction Costs*, NBER Working Paper Series (November 2000) [<http://www.nber.org/papers/w8017.pdf>] (“B2B e-commerce has the potential to substantially reduce transaction costs in inter-firm trade (...) B2B e-commerce can improve efficiencies by reducing the costs involved in an existing business Process”); see also Abdul Gafaar Khan, *Electronic Commerce: A Study on Benefits and Challenges in an Emerging Economy*, Global Journal of Management and Business Research (2016) [<https://pdfs.semanticscholar.org/ccfd/b3fed633c338362da7e0032256ff369936bf.pdf>] (“The main benefit from the customers’ point of view is significant increase and saves of time and eases access from anywhere in the globe. Customer can place a purchase order at any time. The main benefits of e-commerce for customers are as follows: (1) Reduced transaction costs for participating exchange in a market. (...)”

the low barriers of entrance in the retail market. In this sense it seems that the general idea is that e-commerce brings low costs. Further in this article an explanation of the defects of these arguments will be explained. Instead of what its believed, e-commerce can be truly harmful for the market in general, and procompetitive effects can be diminished or undermined by anticompetitive effects in cases involving vertical integrations as well as predatory pricing policies. Throughout this essay you will realize that I'm using e-commerce as an example to show that the Status Quo of Antitrust Law is flawed on its basis.

It is important to clarify that my purpose for this article is not to criticize e-commerce in such a high level as to arguing that e-commerce should be abolished. Rather, the purpose of this article is to create awareness of the possible harmful effects, and to create a proposal for creating an Antitrust Law that can conciliate two extremes: (1) The benefits of e-commerce, and (2) The benefits of a competitive market (without discouraging of e-commerce businesses).

The purpose of this article is to explain how e-commerce can be a harmful figure for the market, how the status quo of the legal rules of US Antitrust Laws provide obsolete solutions for the real problems that e-commerce produces, and how Colombia should adopt a different policy than those imposed in the American Law. To achieve this, the article will first look at the legal concept of e-commerce, following by the market structure of e-commerce. This will be followed by the American Antitrust System and its policies which leave anticompetitive activities undetectable, followed by a brief explanation of the Colombian Law and my recommendations for competition policies in Colombia in case of the insertion of e-commerce companies or "Big Platforms".

1. The concept of e-commerce: How e-commerce is understood globally

The first step that is required for making an analysis into this sector is knowing what this sector oversees, or in other words, what is the meaning of the phrase “e-commerce”. A first view of this phrase gives a broad meaning, this is, electronic commerce (commerce generally bargained through electronic media). Nevertheless, the meaning of the phrase or abbreviator not ends there, it still has more elements that need to be added.

Globally, the word e-commerce is understood in a similar manner. An example of a definition is found in the Model Law on Electronic Commerce (MLEC). By this definition, e-commerce is understood as any form of exchange in commercial activities that are performed through the Electronic Data Interchange (EDI). In fact, e-commerce is defined in article 1 of the MLEC as “any kind of information in the form of a data message used in the context of commercial activities.”² In the other hand, EDI is defined in article 2 as the “electronic transfer of information from computer to computer using an agreed standard to structure the information”.³ The word “standard” can be understood broadly, as a medium through which parties exchange information, including internet platforms which is precisely the case of study.

Following the MLEC, the Colombian Law 527 of 1999 in its article 2b defines e-commerce as “issues raised by any relationship of a commercial nature, whether or not contractual, structured

² United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996: with additional article 5 bis as adopted in 1998* (Vienna: United Nations, 1998), available from https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf

³ *Id.*

from the use of one or more data messages or any other similar means.”⁴ The same article specifies a non-exhaustive list of activities that are considered as e-commerce which include:

“any commercial operation of supply or exchange of goods or services; all distribution agreements; any operation of representation or commercial mandate; all types of financial, stock and insurance operations; of construction of works; consulting; of engineering; of licensing; any agreement for the concession or exploitation of a public service; of joint venture and other forms of industrial or commercial cooperation; of transport of goods or passengers by air, sea and rail, or by road.”⁵

In the United States, no legal definition is provided of what e-commerce means, therefore, cases within the scope of internet-based transactions would have to follow the general rules of the regular commerce itself. In the United States, regular commerce covers a wide spectrum of activities. In fact, it is recognized in various cases that commerce involves:

“Intercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and

⁴ Law 527 of 1999, by means of which the access and use of data messages, electronic commerce and digital signatures is defined and regulated, and certification entities are established, and other provisions are dictated, August 18, 1999, DO 43.673

⁵ *Id.*

appliances by which it is carried on, and the transportation of persons as well as of goods, both by land and by sea.”⁶

In this sense, e-commerce covers transactions between parties through an electronic platform, in which, because of the transaction the parties are interchanging electronic data.

2. Market Definition – A required process to delimit e-commerce market and to find market power

In the previous subsection, e-commerce was defined very broadly. In fact, almost all Internet Business Platforms can be classified as e-commerce. This conception can lead to confusions towards the e-commerce market definition: Defining e-commerce very broadly could lead to ideas under which e-commerce is integrated as a single market. Therefore, in this subsection a definition of the relevant market will be made with the purpose of obtaining conceptual clarity.

But prior to defining the market, it is important to acknowledge and explain the recent discussions that exist towards the importance of market definition. In the one hand, some scholars argue that there is no necessity of market definition, and that this process is “impossible, and

⁶ *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Railroad Co. v. Fuller*, 17 Wall. 5GS, 21 L. Ed. 710; *Winder v. Caldwell*, 14 How. 444, 14 L. Ed. 487.

counterproductive”⁷, while other scholars argue that is the only way to separate the “active forces of competition from the passive forces of competition”.⁸

Within the first perspective, Louis Kaplow dazzles. In general terms, he argues that there is no comprehensive way to define a market (or to make market definition and market power inferences) without first having a market power analysis. This because in redefining the market, antitrust authorities often see themselves caught in a dilemma in which market to choose. Choosing the right market is necessary, because not doing so would lead to erroneous conclusions. In this sense, the necessity of a market power (which is the sole purpose of a market definition) appears. In Kaplow’s words, “one cannot choose which market definition is superior without already having in hand one’s best estimate of market power, rendering the exercise pointless.”⁹

Perhaps, one of the most important critiques to Kaplow’s ideas are found in the article “Market Definition: Possible and Productive” by Gregory J. Warden. In this article, it is highlighted by the author that market definition is important because it separates the “active forces” from the “passive forces” in a determined market.¹⁰ Therefore, not making a market definition process, and inferring a market power without a market definition leads to unreliable results, because no market power can be determined if no order has been made to a “real world chaos”¹¹. I subscribe to this

⁷ Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361 (2013).

⁸ Gregory J. Warden, *The Relevant Market: Possible and Productive*, 79 ANTITRUST L.J. (2014), Gregory J. Warden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 730–32 (2013).

⁹ See Kaplow, *supra* note 5, at 366.

¹⁰ Warden, *supra* note 6.

¹¹ *Id.*

perspective because among other things, the methods proposed by Kaplow do not include all the goods that can become substitutes, and on the contrary, they only include homogeneous goods.

Now that has been explained the importance of market definition, I now proceed to explaining how the analysis is made in Antitrust Law.

With some exceptions, the anticompetitive analysis in Antitrust Laws always requires a market definition and market power analysis. Since Market definition is important, courts in United States have adopted a “market structure method of analysis.”¹² Most of the anticompetitive conducts follow a “Rule of Reason” rather than a “Per se Rule” that is limited to a narrower range of conducts that are presumed to “almost always raise prices and have little or no redeeming procompetitive value.”¹³ The rule of reason, in contrast, requires an analysis of a market definition to further demonstrate an anticompetitive effect. Antitrust Law is based on the ideas that no anticompetitive effect can be proven if there is no market analysis, that no anticompetitive effect can be proven if there is no market to compare it with, and finally, that no market power can be predicated if there is no market where that power originates.

As stated above, the first step within the rule of reason is to determine an anticompetitive effect of a conduct in a “relevant geographical and product market”. This constitutes what Antitrust defines as relevant market, which combines the geographical area where the affected firms develop their

¹² Robert G. Harris, Antitrust Market Definition: An Integrated Approach, 72 Cal. L. Rev. 1 (1984)

¹³ Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, The Civil Practice and Procedure Panel: Perspectives in Antitrust Vol. 1 No. 2 (2013), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf

activities and provide their services, and the products or services that consumers consider as interchangeable or replaceable due to their characteristics. While finding the geographical area can be an easy procedure (a simple look to where a firm sell their products or where they provide their services is enough), determining the product market seems to have a greater level of difficulty. Determining the product market has two steps. On the one hand, it is necessary to find the substitutability of the demand, and in the other, the substitutability of the offer (or substitutability of the supply).

The substitutability in the demand is defined as the group of products that the consumer considers as substitutes. The economic theory, defines substitute goods as goods that because of their condition can work as replacements for each other in use or in consumption.¹⁴ In part, the analysis would require to see the from the point of the consumer, which attributes are considered as replaceable among the candidate goods for defining a market.¹⁵ When goods are substitutes, a positive cross-elasticity in the demand exist between the products, meaning that an increment in a price of one good would decrease the demand for that product and increment the demand for the other product. Finding substitute products requires to make a mental exercise where a small increase in the price of the good is made and finding out the possible reaction of the consumers to

¹⁴ The relevant product market must include the different products that consumers can readily purchase to accomplish the purpose for which they buy the products. Such products compete against one another for their favor and are said to be “reasonably interchangeable substitutes”. As such, they are deemed to belong to same “relevant product market”. See *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007 (1956). See also *Queen City Pizza, Inc. v. Domino’s Pizza, Inc*, 124 F.3d 430, 436 (3 Cir., rd 1997) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”)

¹⁵ See Brenan Markey-Towler “A good economist needs to know... *Substitutability vs non-substitutability*”, Medium (May. 22, 2017), <https://medium.com/@brendanmarkeytowler/a-good-economist-needs-to-know-substitutability-vs-non-substitutability-718910198b5e> , (“A state of substitutability exists if we can take one course of action, substitute it for another, and obtain roughly equivalent outcomes in terms of their preferability.”)

that variation in the price. Following the “small but significant and non-transitory”¹⁶ (SSNIP) standard, the recommended variation in the price is of 5 or 10 percent above the actual price of the good. If the variation of the price produces consumers to drift away to other products, those products to which consumers drift away should be included as the substitute goods of the original product defined. This exercise is done until reaching a set of products where an increase of price would not conduct to a sufficient substitution of the supply. (There is a point in which consumers decide not to change to any other product with an increase in the price)

In the other hand, the substitutability in the offer is analyzed from the perspective of the possible competitors. In this sense, it is said that an offer (understood as the product that a determined company is selling in the market) is replaceable when potential competitors can access the market without incurring in substantial costs of entry or investment.

3. Defining the market of e-commerce in the US territory

Within e-commerce, different transactions can be done. Different goods and services are provided. Therefore, e-commerce is not composed of a single market, rather, it is composed of various markets in which different goods and services come into play that are not substitutable because they provide distinct features that satisfy distinct needs. Nevertheless, all markets share same characteristics as it can be inferred of what has been said so far. These characteristics are: (1) Goods or services are provided through an internet platform (2) All markets are multi-sided

¹⁶ Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines, *reprinted in* 4 Trade. Reg. Rep. ¶ 13,104, at § 1.11 (1992).

markets (3) Consumers prefer to access the goods and services through online platforms when possible, rather than accessing those goods and services through physical stores. In these analysis, the geographical market is presumed to be the US territory because certain are present in all the territory. For instance, transportation costs in the retail market is available for the entire US territory, and/or custom and familiarity of Uber is generally the same for consumers around the US territory,

Two markets are going to be analyzed in this article. The first market will be the retail market of goods and the ‘Ride Sharing’ or ‘Ride Hailing’ market. These two markets where chosen because are perhaps where the most anticompetitive outcomes are being produced, and where the ‘Brick-and-mortar’ markets are increasingly being replaced and abandoned. In the following explanations, the market definition analysis will follow the logic of why we should separate goods sold through online platforms, rather than

a. The retail market of goods

Retail can be defined as the sale of small quantities of goods to the ultimate consumer. Some companies provide an online platform in which the main objective is the retail sale of goods. As an example, we can find companies such as Amazon, eBay, or Alibaba. These types of companies make up a different market than physical stores. The reasons for delimiting the market in this way (and not including physical stores) can be found in the paragraphs below.

Defining the market of these types of Online Platforms can be quite challenging due in part because they can be considered as “multi-sided markets”: these firms “act as platforms and sells two

different products or services to two groups of consumers”.¹⁷ In fact, goods are sold to one side of the market, while in the other side, services of marketplace are charged. In these scenarios, the greater the number of consumers, the greater the number of third-party sellers pay services fee to use the Online Platforms.

Two define a marker for these type of businesses, a prior distinction must be clarified. Two-sided markets can be classified into two: (1) non-transactions two-sided markets and (2) transaction two-sided markets.¹⁸ In the first types of market there is no observable interaction between the end-consumers and no transactions happen between them, while in the second there is an observable and direct interaction between the end-consumers of the platform that is caused because of their direct transaction¹⁹. In this sense, Online retailers can be classified under the second type of two-sided market because both end-consumers (third-party sellers and goods consumers) transact with each other, making their interaction to be direct, and observable by the Online Platform.

In the current literature, market definition comprising transaction two-sided markets is currently viewed and analyzed under a single market analysis, where a SSNIP test is made taking the overall prices to both end-consumers as the price under analysis. This because both end-consumers are charged for the use of the Online Platform, whether it is used to sell goods or to buy them. Or in the other hand, the increase in the price in one side of the market is proportional to the decrease in

¹⁷ Lapo Filistrucchi, *Market Definition in Multi-Sided Markets*, OECD (Nov. 15, 2017), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2017\)27/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2017)27/FINAL&docLanguage=En)

¹⁸ See Lapo Filistrucchi, Filistrucchi, Lapo and Geradin, Damien and van Damme, Eric and Affeldt, Pauline, *Market Definition in Two-Sided Markets: Theory and Practice* (March 16, 2013). TILEC Discussion Paper No. 2013-009

¹⁹ *Id.*

the price in the other side. This is different from non-transaction two-sided markets, where to markets are analyzed, but both are interdependent.²⁰

Following the logic explained above, I now proceed to analyze all the steps to a market definition following the SSNIP (also called the HMT test). The relevant market is defined when combining the geographical market and the product market. The product market, in turn, is defined by substitutability in supply and substitutability in demand.²¹

Finding the substitutability in demand requires finding the list of products which consumers find as similar in terms of their characteristics, and hence, are close substitutes. Multiple goods are sold through online platforms that can also be acquired through physical means. This can lead to an erroneous conclusion that the market includes those goods that are sold through physical means because those goods have the same characteristics as those that are sold through online platforms. Nevertheless, the market should be narrowed in the way that only include those goods that are sold through online platforms because a big gap exists between brick-and-mortar sale of goods and the online sale of goods, making certain transaction costs avoided through the use of an internet platform.²² Ultimately, the avoided costs make those goods bought through online platforms

²⁰ *Id.*

²¹ See, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter U.S. Merger Guidelines]; Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5; Commission Notice on the Definition of Relevant Market for Purposes of Community Competition Law, 1997 O.J. (C 372); *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (Dec. 2005).

²² See, e.g., Alexandra Belousova, *Relevant Market: The application to the E-commerce area in EU* (2010), Pure, http://pure.au.dk/portal/files/9751/Final_thesis_Relevant_Market_the_application_to_the_E-commerce_area_in_the_EU_.pdf (“Searching in-store is becoming less time consuming due to multi channel stores activities and advertisement online. Searching in online store goes quite fast in comparison with the searching process in-store.”)

irreplaceable. Put it differently, the costs avoided make the Online Platform as a whole, irreplaceable to goods consumers, making it at the same time, irreplaceable for third-party sellers because of the access to more consumers, and hence, best marketing of their products.

Transportation costs appear as good examples of avoided costs. Going to a physical store requires to incur in transportation costs such as paying gas to use your car, or otherwise, paying public transportation. Instead, by buying goods through internet, people do not require moving, since people can use all kinds of technology to buy a good (cell phone, iPad, laptop).

A second type of avoided costs are searching costs. Engaging in physical exploration of prices means wasting time exploring stores to find the best bid for a product. Meanwhile, price transparency (understood as the ability to know all of the bid prices of a good) in online platforms is instantaneous. A search for a good online always result in a listing of that kind of good and a listing of bids that exist towards that particular good.

Finally, time saving is also a factor that works as a benefit when buying a product through an online platform. Buying through online platforms does not require spending a lot of time, while buying through physical means as a general rule requires spending a lot of time.

For the reasons above explained, buying through online platforms means choosing the economic rational choice. It is clear that buying goods through online platforms means making the most optimal decision that reports to the consumer a greater number of benefits and utilities.

Now an analysis regarding the substitutability in the supply is needed. By the theory of market definition, the substitutability of the supply is determined by the number of potential competitors that would enter into the market of a determined product (the reference product) when an increase in that product results, without incurring in substantial expenses nor risks, and with the ability of marketing the product in a short term.

It seems that engaging in this type of e-commerce does not have a reasonable substitutability in the supply. An increment in the price of a good through e-commerce does not incentivize potential competitors to enter into the market. Creating an online platform to sell goods means incurring in substantial expenses and risks. The substitutability in the supply can also be analyzed differently: there is no substitutability in the supply because no third-party sellers would change Online selling to Brick-and-mortar selling without substantial loss and investment (transaction costs).

Even though there is no bounding authority for the United States, my argument is reinforced by the fact that European authorities have considered differently markets for the sale of goods through online means than the sale of goods through Brick-and-Mortar sale of goods.²³

²³ See Brian Dagle, *Doing business in Europe: The US Tech Industry struggles with regulators* (December 2017), USITC https://www.usitc.gov/publications/332/executive_briefings/daigle_doing_business_in_europe_1_2.11.pdf (“Given the growing importance of technology in the consumer marketplace and U.S. firms’ dominance in several areas, the Competition Commission (ECC) of the European Union (EU) has increasingly viewed digital trade through the lens of antitrust enforcement.”)

b. The 'Rideshare' market or 'Ride Hailing' market

This market is perhaps the most debated market within e-commerce. Real economic losses to transportation companies (such as taxi companies and drivers) have resulted since the adoption of Rideshare apps such as Uber or Lyft. Those who argue that the Rideshare market and the transportation companies provide substitutable services are right in doing so. Nevertheless, arguments for defining the market more narrowly can be made.

Since this is also a transaction two-sided market (drivers and users transact with each other by using a determined Ride Sharing App), the analysis of market definition in this section will also be guided of a single-market definition comprising the overall charge to consumers. In this market, the passenger is charged once, but this price contains both the money the driver earns and the money that is charged to drivers for the use of the Online Platform.

Again, the first step to complete is analyzing the substitutability in the demand. This means increasing the price of Ride Sharing and including all the services that consumers start to use because of that increment. By doing this mental exercise, it seems that an increment in the price does not lead to a change in the election of the services by consumers. With some exceptions, ride sharing apps charge passengers substantially less than normal taxis do. Taking four of the most important cities in the US territory, the price of taxis exceeds in almost the double of the prices of ride sharing apps. In Boston, while a ride sharing app such as Uber or Lyft is charging \$10 to \$15, taxis are charging \$30. In Chicago, when a ride sharing app is charging \$15 to \$20, taxis are

charging \$38. In Los Angeles, when ride sharing apps are charging \$10 to \$12, taxis are charging \$30. Finally, in Dallas, when a ride sharing app is charging \$10, taxis are charging \$20.²⁴

However, low prices are not the only reason why consumers prefer to use a ride sharing app rather than a taxi. A recent UC Berkeley paper shows that wait times in San Francisco (waiting for the transportation to arrive) in ride sharing apps are “dramatically shorter than typical taxi dispatch and hail times”.²⁵ This paper shows that only 35% of passengers wait less than 10 minutes when calling a taxi to their home. In contrast, 90% of ride sharing users stated that they waited 10 minutes or less, and 67% stated that they waited 5 minutes or less. Passengers almost never waited more than 20 minutes.

A third reason why passengers elect ridesharing apps is because they provide quick payment interactions between the driver and the passenger. Fares are automatically charged to the passenger’s credit card, making the transaction a cash free transaction and prevents the use of card machines. All these reasons combined, make the ridesharing app irreplaceable with a small but not transitory increase of their prices.

²⁴ See RideGuru Team, *Uber vs. Lyft vs. Taxi: Cost Analysis Across the United States*, RideGuru (March. 3. 2018), <https://ride.guru/content/newsroom/uber-vs-lyft-vs-taxi-cost-analysis-across-the-united-states>.

²⁵ Rayle, Shaheen, Chan, Dai, and Cervero, *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco*, (2014)

Analyzing the substitutability in the supply, the same conclusion is reached: There is no substitutability in the supply as an increase in the price would not encourage others in forming new businesses of ride sharing. This is due to the expensiveness of elaborating a ride sharing app, and because the costs of gathering drivers is too high (drivers are already using the famous ride sharing apps).

In the other hand, an increase in the fee charged to drivers would almost never result in the change to a taxi company. Having a taxi involves incurring in more costs due to governmental regulations towards insurance.

4. Antitrust Law: Competition Policies in the United States

a. The idea of Structuralism

With the origin of Antitrust in the United States, and further expansion to the rest of the world, the study of market structures has been important to determine how the market can be harmed by anticompetitive conducts of the actors involved, and to determine how to eradicate the incentives of engaging in anticompetitive conducts within the market itself. The basis of this “economic structuralism” approach follows the idea that companies in an anticompetitive structure of a market, “will not have competitive behavior”.²⁶ In other words, “an industry which does not have a competitive structure will not have competitive behavior”.²⁷ By this approach, causation runs from “structure-to-conduct-to-performance”. This means structure determines conduct, and

²⁶ Charles E. Mueller, *The New Antitrust: A Structural Approach*, 12 Vill. L. Rev. 764 (1967). Available at: <http://digitalcommons.law.villanova.edu/vlr/vol12/iss4/5>

²⁷ *Id.*

conduct determines performance (an anticompetitive output). For better understanding an example can be explained: High entry barriers and high concentration in a market (which are both structural features) are said to be conducive to price fixing (which is considered as a form of conduct) and this leads to artificially inflated prices (which is considered as an anticompetitive output within a determined market).

The idea of structuralism follows the logic that owners and actors within a market are not ‘bad people’ “acting out of socially reprehensible personal motives”²⁸, but rather, their anticompetitive conducts follow their desire of profit maximization (the rational choice). By this idea, this school of thought is based on the logic that a market must be corrected if by the structure of this market is predictable that in a long run the actors are going to engage in an anticompetitive conduct that would lead to an anticompetitive performance. This means that structuralists disagree with the affirmative defense of good performance and good conduct. In brief, this affirmative defense works as an excuse to abolish the penalty that derives from a conduct which lead to an artificial and “anticompetitive” change in the market.

Following this logic, the original idea or policy behind the Antitrust Law has been that the Law should intervene in anticompetitive market structures because these types of structures incentive its actors to play in an anticompetitive way. There can be found two types of market structures that are desired to be avoided if they are the resulting product of artificial changes made by the actors rather than structures acquired through competition: (1) Monopoly (2) Oligopoly.

²⁸ *Id.*

In summary, scholars who support this view argue that markets that are dominated by few large companies are likely to be less competitive than markets in which a vast amount of small companies come into play. Three reasons are highlighted: (1) Monopolistic and Oligopolistic structures allows its actors to coordinate with ease, ultimately, these structures incentivize conducts such as market division and tacit collusion (2) These type of structures also enables its actors to use its dominance as an entry barrier to block new competitors in the market (3) Firms with greater dominance in these structures have greater bargaining power against their consumers and suppliers which allows these firms to get better prices while degrading their products and maximizing their profit unjustifiably.

Under the Structuralism approach, Courts in the United States blocked mergers, both vertical and horizontal, that would lead to anticompetitive results. In fact, both vertical and horizontal integrations were looked in the same way. Enforcers looked at both through the lens of the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. In this manner, enforcers blocked vertical integrations that “substantially lessen competition”²⁹, or constituted a “restraint of trade”³⁰ or an unfair “method of competition”³¹. This means enforcers did not only look for concentration of market share (greater size of the new company) in the blocking of mergers, but also looked for conflicts of interest originated by mergers (like in the case of allowing a dominant manufacturer to engage in the retailing of the same product, that ultimately would allow this

²⁹ Clayton Act, ch. 323, § 7, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 18 (2012)).

³⁰ Sherman Act, ch. 647, §§ 1, 3, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

³¹ Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1) (2012)).

manufacturer to exclude other competitor retailers out of the market). This theory called “The leverage theory” is based on the Harvard economist Donald Turner.

In the other hand, when talking about price predation, Structuralists believe that predatory pricing was a very effective strategy that large firms employed to exclude competitors. This idea had great influence towards the Antitrust Laws. In the Standard Oil case in 1911, the Supreme Court of Justice recognized that “slashing”³² prices below the marginal cost represented an anticompetitive behavior under the article 2 of the Sherman Act. Following the approach of the Supreme Court, congress later enacted the Clayton Act to reinforce the Sherman Act, and because of it, it included prohibitions for predating prices, but also for price discrimination.

Following the Structuralism approach, it seems important to study the market structure of e-commerce to examine if the market structure is by itself an incentive for the companies to engage in anticompetitive conducts. It is going to be concluded that, ultimately, leaving the market structure as it is, would lead to a concentrated market with few actors in play who would make anticompetitive business decisions.

In the subtitle below, the market of e-commerce is going to be analyzed. This analysis will give us the result of what is the market structure that e-commerce obeys.

³² *Standard Oil Co. v. United States*, 22 U.S. 1 (1911).

b. Market Structure in e-commerce: the market share in the United States

Finding the market structure of each of the subdivisions of e-commerce is a prevailing necessity according to the Structuralism approach of Antitrust. Therefore, I proceed to explain what the structure of each of the markets is.

Market share is defined as the percentage or portion of the market that a firm has. The way to calculate a market share is by taking a firm's total "sales divided by the total sales in the relevant market, including items that consumers regard as reasonable substitutes".³³ Acquiring information of market share is a difficult task, therefore, the values indicated here are values product of studies that analyze the market share of companies within the narrow markets.

As of 2016, it was predicted that Amazon had 46% of market share in the Online Retailing market.³⁴ Now days, it is predicted that Amazon's market share is of 44% of the total of sales of retail market through online platforms.³⁵ Allegedly these sources based their market share by dividing the total sales of Amazon into the total sale of goods comprising all the Online Platforms. Nevertheless, no other trustworthy website gives the market share of the rest of competitors. Amazon's market share however, indicates a high concentrated structure within the Online Retail Market.

³³ Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* (6th ed. 2014)

³⁴ Olivia LaVecchia & Stacy Mitchell, Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities, *Inst. for Loc. Self-Reliance* 10 (Nov. 2016), http://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf [http://perma.cc/A4ND-2NDJ].

³⁵ See, Lauren Thomas, Amazon grabbed 4 percent of all US retail sales in 2017, new study says, *CNBC* (Jan. 3, 2018), <https://www.cnbc.com/2018/01/03/amazon-grabbed-4-percent-of-all-us-retail-sales-in-2017-new-study.html>.

Changing to the Ride-Sharing market, no trustworthy findings of market shares were found. However, few companies exist that provide these types of services. Nevertheless, the fact that Uber and Lyft accounted 65% of the ground transportation for business travelers in 2017, suggests the Ride-Sharing market is highly concentrated with few companies competing.³⁶ This study was based on 10 million business travelers' receipts and expenses. The study divided the number of Uber and Lyft uses into the number of total Ride Sharing Apps uses (applying the market share paradigm).

The cases stated above, are just a few examples of concentrated markets within e-commerce. All these examples show two things: (1) Narrow markets in e-commerce are dominated by few large firms, rather than a vast number of small firms (2) Within this large firms involved, one firm has the biggest market share. The last two ideas lead to a conclusion, which is, the frequent market structure in e-commerce is an oligopoly.

A conclusion about the type of market has been reached: markets within e-commerce follow an oligopolistic structure. For instance, the market is dominated by few firms that have "large" sums of market power compare to the market as a whole. As is going to be further explained, these markets have high entry barriers for potential competitors, and companies are interdependent with each other.

³⁶ See, Michael Goldstein, *Uber Slipping In The Ride-Hailing Market?*, Forbes (Jan. 3, 2018), <https://www.forbes.com/sites/michaelgoldstein/2017/10/24/is-uber-slipping-in-the-ride-hailing-market/#2d7452033dea>

The fact that e-commerce is an oligopolistic market, would mean that enforcers such as the Federal Trade Commission (FTC) and the Department of Justice (DOJ) would be reluctant to allow mergers between dominant firms within a narrow market. Nevertheless, mergers such as Comcast with NBC (vertical integration), and Facebook and Instagram (horizontal Integration) were permitted. But why enforcers decided to allow these types of mergers? The answer to this question is that enforcers of Antitrust Laws and policies have shifted away from the Structuralist approach, and now have moved to “The Chicago Law School” approach to Antitrust Law. This approach will be explained in the following subtitle with greater detail.

c. “The Chicago School” approach

The Chicago School approach is a theory of antitrust that was developed in the 1950’s, and which is based on the ideas orally expressed by Aaron Director. The basis or foundational principle of this view is the faith in the efficiency of the markets which is impelled by actors who want to maximize their benefits. Two ideas become important for this analysis. These ideas are explained by Richard Posner in his article “The Chicago School of Antitrust Analysis”.³⁷ In this article, Richard Posner explains the following:

1. **Predatory Pricing:** “Selling below cost to drive out a competitor is unprofitable even in the long run”.³⁸ This conception is based on the idea that predation is ineffective because a firm who engages in predation loses big amount of profits and can only extract a

³⁷ Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, 932 (1979).

³⁸ *Id* at 927.

competitor from the market if the competitor does not have an “equal access to capital to finance a price war”.³⁹ Under this idea, even if a large firm actually drives out a competitor, the firm will try to “recoup” money, which leads to incrementing prices above the marginal costs and ultimately incentivizing new firms in accessing the market with lower prices than the predating firm. Ultimately, the attempt to recoup money will fail.

2. **Vertical Integration:** For the “The Chicago School” it makes no sense that a firm would try to make monopoly profits from two or more steps within the chain of production. As an example, Richard Posner establishes that a manufacturing company should not try to obtain monopoly profits in the market of distribution of their product. This because increasing the price above the marginal cost in the distribution market would lead to a slump in the demand of the product itself. By this logic, the reason why a firm wants to privilege a distribution subsidiary is because is more efficient than the competitors, rather than looking for profits in that step. Ultimately, this would mean that vertical integrations in fact generate procompetitive effects on the market.

From the ideas explained above, it can be deduced the following: “The Chicago School” approach strongly believes that firms cannot obtain “or enhance” monopoly power by unilateral action, “unless, of course, they are irrationally willing to trade profits for position”.⁴⁰ Therefore, the focus of antitrust analysis, under this approach should be bilateral actions that give rise to monopoly

³⁹ *Id.*

⁴⁰ *Id* at 928.

power directly, such as (1) cartelization and (2) horizontal mergers. Additionally, it is stated that the “proper lens for viewing antitrust problems is “price theory.”⁴¹

d. The reflection of the Chicago School approach

Since the late 60’s and early 70’s, antitrust enforcers changed their policy enforcement shifting away from the Structuralism view to the Chicago School Approach. This meant taking price theory as the proper way of viewing Antitrust. Two major consequences can be predicted from the adoption of the ‘Chicago School’ Approach. As a first consequence, entry barriers were analyzed narrowly in the sense that economies of scale, capital requirements, and product differentiation were considered as mere “objective technical demands of production and distribution”⁴² and not as entry barriers. In this manner, many requisites to enter into a market were discounted from the analysis, and therefore, it was considered that all the current competitors had the threat that possible competitors would enter into the market. Lastly, this meant that market power was fluctuating, and that Antitrust enforcement was rarely needed.

As a second consequence, consumer price was taken as the proper criterion to analyze competition in the market. As Barak Orbach stated, the Supreme Court followed the idea of Bork in the case *Reiter v. Sonotone* to state that the sole purpose of Antitrust was to achieve “Consumer Welfare”,

⁴¹ *Id.*

⁴² Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change* 107, at 105. (1991).

and that the Sherman Act was a “Consumer Welfare prescription”⁴³. Even though Bork was referring to “allocative efficiency” and “social wealth” while talking about Consumer Welfare, the Supreme Court did not explain what the phrase meant in this leading case, and hence, produced a confusion that lead to a number of wrong decision making where price was the only factor taken into account.

A proof of this confusion is the case *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*⁴⁴ where the Supreme Court endorsed the previous conclusion that the Sherman Act was a “Consumer Welfare” prescription, and used this Borkean phrase to rule that a “restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”⁴⁵ This ultimately caused controversy because the prescription thus used would lead to block activities that produce efficiencies for the simple fact that the they would result in an increase in prices. Although it seems reasonable to believe that an increase in the prices would hurt consumers, taking this as an absolute premise would result in not enforcing the Antitrust Laws in cases where is needed with the excuse that an increment in the price did not resulted. It would also result in the negation of the Williamson

⁴³ Barak Orbach, Foreword: Antitrust’s Pursuit of Purpose, 81 Fordham L. Rev. 2151 (2013). Available at: <http://ir.lawnet.fordham.edu/flr/vol81/iss5/1>

⁴⁴ 104 S.Ct. 2948 (1984)

⁴⁵ *Id* at 108.

trade-off model where it is stated that some mergers are socially desirable because of the promotion of efficiencies even though would result in the increment in prices.⁴⁶

Obviously, this way of thinking resulted in a change in the policy of the enforcement of predatory pricing and vertical integration. Below, a thorough explanation of both of these conducts will be given.

I. Predatory Pricing - Brief hIstory of the Jurisprudence of Predatory Pricing.

Predatory pricing is understood generally as charging prices to consumers below the cost of producing them with the intention of excluding other firms from the market. Since the beginning of Antitrust, Courts and enforcers looked at Predatory Pricing as one of the most important tactics that large firms used to exclude other firms from the market. This was due primarily for the case of Standard Oil Gas where the Supreme Court had the chance to rule that Predatory Pricing was against section 2 of the Sherman Act and ruled as a remedy the division of the company.

As a result of the trending of considering predatory pricing as “perhaps the most effective weapon of the larger corporation”⁴⁷ a number of laws were enacted by the congress to bar predatory pricing. Within the enacted laws, the Clayton Act was created in 1914 with the purpose of reinforcing the Sherman Act. The second section of this Act was created with the purpose of banning predatory pricing.

⁴⁶ See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, The American Economic Review, Vol. 58, No. 1 (Mar. 1968), <http://www.jstor.org/stable/1831653>

⁴⁷ United States v. A. Schrader’s Son, 264 F. 175, 181 (D. Ohio 1919), *rev’d*, 252 U.S. 85 (1920)

Another example of this trending is the Robinson-Patman Act which was created with the purpose of maintaining the retail price of products in order to protect small retail stores rather than giving priority or leverage to large stores chains of pricing below cost and driving out competition. Section 3 of this Act attacks predatory pricing directly by stating that is unlawful to establish “unreasonably low prices for the purpose of destroying competition or eliminating a competitor.”⁴⁸ The Robinson-Patman Act attached Criminal penalties and charges to violations of its prescriptions.

Both of these Acts demonstrate the intent that the congress had in maintaining the unlawfulness of predatory pricing and to eradicate the incentives of large firms to engage in these types of conduct.

Nevertheless, it was enough with just one case to change the way of thinking of commentators, and ultimately, Courts and enforcers. In *Utah Pie Co. v. Continental Baking Co.*, the Supreme Court held Continental liable for effective predatory pricing. Even though the analysis was correct, the idea that an unfair decision was reached increased among commentators.⁴⁹ The base of this idea was the fact that the predatory pricing engaged by Continental decreased Utah Pie’s market share from 66.5% to 45.3%, which helped Chicago School commentators to argue that predatory pricing policies were misguided, and that the policies were holding honest competitors as liable.

⁴⁸ 15 U.S.C. § 13(a) (2012).

⁴⁹ 87 S.Ct. 1326, (1967)

Following commentators, and specifically Borke's ideas, the Supreme Court ruled in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*⁵⁰. that in order for predatory pricing policies of companies to be rational "the conspirators must have a reasonable expectation of recovery, in the form of later monopoly profits, more than the losses suffered."⁵¹ This ruling reflected the "skepticism of the majority of predatory pricing conspiracies".⁵² As can be noted, Matsushita's case intended ruling was to establish a test under Section 1 of the Sherman Act. In other words, Matsushita's ruling was intended for claims of bilateral anticompetitive conducts, but not for cases of unilateral anticompetitive conducts. Nevertheless, this doctrine found its way to develop under cases involving Section 2 of the Sherman Act. The policy behind the ruling follows the idea that is implausible to recover from predatory pricing when there is an underlying agreement between companies to charge below cost because even though the companies drive a competitor out, charging monopoly or oligopoly prices through cartelization seems unlikely since the stability of a cartel is flawed.

The following case that dealt with predatory pricing was *Brooke Group Ltd. v. Brown Williamson Tobacco Corp.*⁵³ which involved a case under the Robinson-Patman Act and under Section 2 of the Sherman Act. Following the ruling in *Matsushita*, the Supreme Court imposed two requirements for a successful claim of predatory pricing regardless of the law and the section in which the claim was based on. First, the Court ruled that the Plaintiff must demonstrate that the

⁵⁰ 475 U.S. 574 (1986).

⁵¹ *Id* at 589.

⁵² Christopher R Leslie, *Predatory Pricing and Recoupment*, Columbia Law Review, Vol. 113, No. 7 (November 2013), 1771, <http://www.law.uci.edu/faculty/full-time/leslie/PredatoryPricing.pdf>

⁵³ 509 U.S. 209, (1993).

defendant charged prices that “were below the appropriate measure of its rival’s costs”.⁵⁴ While this is an easy step the second requirement is more detailed, and establishes a difficult standard:

The plaintiff must establish that “below-cost pricing is capable, as a threshold matter, of producing the intended effects on the firm’s rivals, whether driving them from the market, or... causing them to raise their prices to supracompetitive levels within a disciplined oligopoly.”⁵⁵

In this manner, a plaintiff must prove that the defendant had the potential to incur in losses and then recover them with a sustained increase in pricing that would result sufficient to recover the amount “expended on the predation”⁵⁶, creating like that a monopoly pricing. By this, the Court “converted the defendant’s aspiration in the plaintiff’s burden.”⁵⁷ By establishing this test into the jurisprudence of the Section 2 of the Sherman Act, the Court was affirming implicitly that when a failed predation policy takes place, the enforcement of Antitrust becomes futile.

Two assumptions began to take place in the jurisprudence of Predatory Pricing: (1) Entry barriers are easy to overcome (2) Targets of predation policies can secure financing in order to resist the war of below-cost pricing, either by following the same price or to reenter the market once the predation is over.

⁵⁴ *Id* at 210

⁵⁵ *Id.*

⁵⁶ *Id* at 226.

⁵⁷ Leslie, *Supra* note 38, at 1705.

The first belief is evidenced in the case *Los Angeles Land Co. v. Brunswick Corp.*, that entry barriers were defined as “additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,” or “factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.”⁵⁸

As evidence of the second belief was specifically stated by the Ninth Circuit that finding Capital Costs, and in general, “Borrowing money to *expand* a market is not really relevant as a barrier to entry.”⁵⁹

II. Vertical Integration – A brief history of Vertical integration

In the same way as predatory pricing, vertical integration’s doctrine has also moved away from a Structuralist point of view to a more “hands off” doctrine that follows the ideas of the greatest commentators or scholars of the Chicago School approach. Generally speaking, Vertical Integration is the merging of two different stages or levels in the chain of production under the same control.⁶⁰

For the most part of the last century, Antitrust enforcers have analyzed vertical integration with the same lens and standards that those used in horizontal integrations. Following the Sherman Act, the Clayton Act, as well as the Federal Trade Commission Act, Vertical Integration was prohibited

⁵⁸ *Los Angeles Land Co. v. Brunswick Corp.*, 6F 3d 1422,1427-28 (9th Cir. 1993)

⁵⁹ *Western Parcel Exp. v. United Parcel Service of America, Inc.*, 65 F.Supp.2d 1052, 1062 (N.D. Cal. 1998)

⁶⁰ See, Robert H. Cole, General Discussion of Vertical Integration, in *Vertical Integration in Marketing* 9, 9 (Nugent Wedding ed., 1952).

and barred every time it constituted a “refrain of trade”, or it supposed a threat that would “substantially lessen” competition, and/or it supposed an “unfair method of competition.” Nevertheless, since the ideas of the Chicago School gained strength, and Vertical Integrations where predicted to cause procompetitive effects, the enforcers reduced their alarming outlook and began a less market protective policy.

During the 1950’s, Courts and authorities generally began to look at Vertical Integration as anticompetitive. With the belief that the Supreme Court missed opportunities to ban Vertical Integrations, the congress amended Section 7 of the Clayton Act to make it applicable to anticompetitive Vertical integrations.

Two basic doctrines where followed to critique vertical integrations. In one side, it was believed “that a company can extract additional profits from its dominant position in a product or service by ‘extending’ that position”⁶¹ in another market. In easier words, leveraging is the use of monopoly power in one market to strengthen the monopoly share in another market. In the other hand, it was believed that a vertical integration could create disadvantages for competitors of a firm who could use one line of business to disadvantage another its competitors in another line of business.⁶² This theory is called foreclosure. (For example, a soda producer that becomes a bottle

⁶¹ Hovenkamp, Herbert J., "Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency" (2014). Faculty Scholarship. 1848. http://scholarship.law.upenn.edu/faculty_scholarship/1848

⁶² *Id.*

and cans distributor can begin to hike prices to its competitors in order to increase their price of soda).

Examples of uses of these theories can be found in cases such as *Brown Shoe v. United States*⁶³ or *Bearky Photo v. Eastman Kodak*.⁶⁴ In the first case, the Court established that a tie-up between a shoe manufacturer and a shoe distributor harmed the manufacturing market of shoes by “foreclosing independent manufacturers from markets otherwise open to them.”⁶⁵ In the second case the Court found that further analysis would be needed to uncover the issue of whether Kodak used its monopoly power in the film, color paper, and camera markets to gain an advantage in the photofinishing and services market. The Court based its decision stating that leveraging was a violation of the Section 2 of the Sherman Act.

Commentators began to describe their doubts towards Vertical Integration policies, which later reflected in the relaxing of enforcers and the permission of most of Vertical Integration cases and investigations.

Borke appears again as one of the main contenders of structuralism with regard to Vertical Integrations. As professor Herbert Hovenkamp argues, the principal idea that Robert Borke stated in his “Antitrust Paradox” was “beguilingly simple: If vertical integration creates efficiencies, then a vertically integrated firm would have cost advantages over unintegrated rivals. This might deter

⁶³ 82 S.Ct. 1502, (1962)

⁶⁴ 603 F.2d 263 (1979)

⁶⁵ *Brown Shoe*, 82 S.Ct. at 1523

entry, but only as a result of increased competition. And, if vertical integration did not create any efficiencies, then it would not impede entry. Either way, vertical integration would not harm the competitive process.”⁶⁶ Under this logic, only Horizontal integrations represented a threat to the market since helps firms to gain market share, while Vertical Integration would not work for that purpose.

This idea quickly evolved and reached Antitrust enforcers. For instance, the Department of Justice along with the Federal Trade Commission narrowed the possibilities of Antitrust enforcement in Vertical Integration cases in the Merger Guidelines of 1984.⁶⁷ Although the guidelines showed a number of cases in which a Vertical Integration, rejection of vertical mergers and tie-ups as compared with the 1960’s, are rare in the present days. Instead of blocking mergers, the enforcement now-days is directed towards imposing remedies when a vertical deal is noted as a potential harm to the market. Such was the approach held in both mergers: (1) Comcast and NBC, and (2) Ticketmaster and LiveNation. In both, the Department of Justice required some conditions for the mergers to take place.

e. E-commerce proving the Chicago School wrong

I. Sacrificing profits for dominance

⁶⁶ Hovenkamp, *Supra* note 48, at 983.

⁶⁷ U.S. Dep’t of Justice, Merger Guidelines (1984), *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>

Beginning with the market of retail for the sale of goods, which consists of a concentrated market, both Predatory Pricing and Vertical Integration can be in fact, ways of harming the market that do not have a strict control by Antitrust enforcers.

The case of Amazon becomes strongly important to demonstrate this point. Amazon was created in 1995. In a letter to shareholders after the company went public in 1997, Bezos wrote that he would “make investment decisions in light of long-term market leadership considerations rather than short-term profitability.”⁶⁸ In other words, Amazon would spend as much as it could to grab market share. “Over the next six years Amazon lost a staggering \$3 billion and investors barely winced.”⁶⁹ As of 2000, the company had not yet yield a profit, and rather, was pilling up losses. Nevertheless, investors always baked up the business because they trusted the business would took off some day once e-commerce became popular. As of today, the company has nearly the 44% of online retailing of goods and has made Jeff Bezos the richest man in the world.

But, what are the strategies that Amazon uses to achieve its huge market power? two reasons dazzle: (1) Amazon sell its products below its cost of acquiring or producing them by making use of their financial resources. (2) Amazon uses Prime to increase their number of customers, leaving rival manufacturers and retailers with only the possibility of becoming third-party sellers on Amazon’s platform.

⁶⁸ Jeffrey P. Bezos, Letter to Shareholders, Amazon.com, Inc. (Mar. 30, 1998), http://media.corporate-ir.net/media_files/irol/97/97664/reports/Shareholderletter97.pdf [<http://perma.cc/793G-YML7>]

⁶⁹ Olivia LaVecchia & Stacy Mitchell, Amazon’s Stranglehold: How the Company’s Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities, Inst. for Loc. Self-Reliance 10 (Nov. 2016), http://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf [<http://perma.cc/A4ND-2NDJ>].

Since the beginning of Amazon, one of the targets was the retail and sale of books. Since the beginning, Amazon has sold “tens or possibly hundreds of millions physical books at or below cost”.⁷⁰ “When Amazon introduced the Kindle e-book reader in 2007, it extended this practice to e-books, selling many titles for less than it was paying publishers.”⁷¹ This made Amazon acquire 90 percent of the market of e-books, that was driven down to 65 percent in 2010 because of the adoption of new policies that publishers demanded towards below-cost pricing. Nevertheless, Amazon regained its power when the Department of Justice sued the publishers for collusion. This market share combined with below cost pricing made competitors loss market share and profit, while driving out other competitors from the market. For instance, Borders Brooks filed for bankruptcy in 2014, and Barnes & Nobles closed dozens of stores and shifted resources away from its Nook reader.⁷²

This reflect that one of the underlying strategies of Amazon is sacrificing profits in exchange for expanding market share and acquiring dominance, even if this means disbursing large sums of money to assign them for investment.

Moving to the second reason, Amazon Prime also demonstrates Antitrust violations and artificial increases of market share. Amazon Prime offers its members free shipping deliveries within two days of ordering, and depending on location, within the same day, in exchange for 99 dollars a month. This attractive strategy permits customers to pay less than Amazon costs. Although it is a

⁷⁰ Letter from Authors United to William Baer, Assistant Attorney General for the Antitrust Division, *U.S. Department of Justice*, July 14, 2015.

⁷¹ “Cheap Words,” *The New Yorker*, Feb. 17, 2014.

⁷² “Is This the End for the Barnes & Noble NOOK?,” Daniel B. Kline, *The Motley Fool*, (Mar 11, 2016)

good “deal” for Amazon’s Prime customers, paying a monthly fee delimits the options of customers, who would rather take advantage of a prepaid delivery service instead of shopping through a rival. In fact, less “than 1 percent of Prime members visit competing sites while shopping on Amazon, and Prime members spend almost three times as much with the company as non-Prime customers do.”⁷³ In other words, Amazon prime creates a scenario of increased Switching Cost (Costs that a consumer incurs as a result of changing brands) to its Prime members.

These two reasons become more alarming when knowing that both offer a leverage for Amazon to charge retailers and manufacturers to establish their business as third-party sellers while receiving information from these competitors that could be further used to reaffirm Amazon’s dominance in the market.⁷⁴

All of these strategies, work as a form of Predatory Pricing that increased Amazon’s market share. Nevertheless, no single investigation has resulted in the liability of Amazon. Perhaps, one of the reasons why this occurs is the impossibility of tracking Amazon prices, which deters the possibility of a recoupment analysis required as a burden for the plaintiff to demonstrate Predatory Pricing. The difficulty of tracking prices is due to the constant change that Amazon makes on its prices. Some studies prove that Amazon changes its prices on an average of 2.5 million a day.⁷⁵ Also, even though there is no evidence that proves this idea as true, having several lines of business

⁷³ “These new stats about Amazon should make Google very nervous,” Jillian D’Onfrio, *Business Insider*, April 20, 2015.

⁷⁴ “See, Amazon and J&J Clash Over Third-Party Sales,” Serena Ng and Jonathan D. Rockoff, *Wall Street Journal*, (Nov. 10, 2013.)

⁷⁵ Roberto A. Ferdman, Amazon Changes Its Prices More than 2.5 Million Times a Day, Quartz (Dec. 14, 2013), <http://qz.com/157828/amazon-changes-its-prices-more-than-2-5-million-times-a-day> [http://perma.cc/W25A-EUNP].

facilitates recovering money by increasing in small amounts the prices of other goods. Finally, tailoring prices to individual consumers is also possible given the huge amount of Data recollected by the customers and its accuracy.⁷⁶ Tailoring prices makes the analysis difficult towards Predatory Pricing; the fact that some consumers are charged more than others does not lead to straightforward conclusions.

Changing of market within e-commerce, Uber is also a compelling case. In the same way as Amazon, Uber has worked at a loss. In fact, reports suggest that Uber had an operating loss of \$55.⁷⁷ But instead of discouraging shareholders investments and produce the withdrawal of them from the company, Uber have had great investment rates from shareholders, making the company worth \$51 billion in 2015.⁷⁸

II. Leveraging power

As stated before, the theory of leverage is based on the idea that the use of “monopoly in one market can strengthen a monopoly share in another market”⁷⁹. Generally, the cases of leveraging

⁷⁶ See Alexandra Alter, Your E-Book Is Reading You, Wall St. J. (July 19, 2012.), <http://www.wsj.com/articles/SB10001424052702304870304577490950051438304>

⁷⁷ See, e.g., Eric Newcomer, Uber Draws Fresh Amazon Comparisons as Growth Trumps Profit, Bloomberg (July 1, 2015, 12:30 AM), <http://www.bloomberg.com/news/articles/2015-07-01/uber-draws-fresh-comparison-with-amazon-as-growth-trumps-profit> [http://perma.cc/AYF9-9RJ7].

⁷⁸ See, Douglas MacMillan & Telis Demos, Uber Valued at More than \$50 Billion, Wall St. J. (July 31, 2015, 8:50 PM), <http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457> [http://perma.cc/T6GW-SY2J].

⁷⁹ Jennifer M. Clarke-Smith, The Development of the Monopolistic Leveraging Theory and Its Appropriate Role in Antitrust Law, 52 Cath. U. L. Rev. 179 (2003).

power are viewed through the lens of the Section 2 of the Sherman Act, which involves proving three things: "(1) monopoly power in one market, (2) the use of that power... to gain a competitive advantage in another distinct market, and (3) injury caused by the challenged conduct."⁸⁰

Traditionally, it was generally believed that leveraging monopoly power was possible in the framework of tying products. In this sense, tying a complementary product to a monopoly product would result in the creation of a second monopoly in the complementary product, which in overall, would lead to a reduced social welfare.

The critiques to the above approach, generally by scholars subscribed to 'The Chicago School', believed that the tying products cannot be charged above the marginal cost, at supracompetitive levels. This because an increase in the complementary products would lead to a decrease in the demand of the primary product. Put it differently, critiques argued that charging excessive prices on the complementary product would put the primary product monopoly market at risk. This idea was later expanded to Vertical Integrations, where, it was stated that owning two levels in the supply chain does not mean that one can expand the market power of one market using its market power in another market.⁸¹

More recent views disagree with the simplistic views of 'The Chicago School'. These sorts of ideas rely on the fact that companies are not always driven to profit maximizing, and rather, are

⁸⁰ Willman v. Heartland Hosp. E., 836 F. Supp. 1522, 1534 (W.D. Mo. 1993)

⁸¹ Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2081-87 (1999) (outlining the debate among economists as to whether leveraging can be economically beneficial; Louis Kaplow, *Extension of Power Through Leverage*, 85 colum. L. REV. 515, 515-17 (1985); see also Richard O. Zerbe, Jr. & Michael T Mumford, *Does Predatory Pricing Exist? Economic Theories and the Courts after Brooke Group*, 41 ANTITRUST BULL. 949, 981 (1996) (discussing the different standard used in evaluating leveraging claims and acknowledging criticism that suggests that leveraging claims are groundless).

concentrated an increasing its output, its total amount of sales, and accelerating its growth. In general manner, the scholars subscribed to this view argue that leveraging power through vertical integration can be acquired through raising the entry barriers for non-dominant competitors, in the sense that strategic behavior can take the form of advertising, investment, product selection, or other activities that raise the cost of doing business or deter entry.⁸²

Amazon case can demonstrate that the third view is accurate. Using Amazon as an example again will demonstrate that e-commerce, and specifically the Online Retail of goods market is harmful for consumers. In the previous subsection I explained that Amazon uses its big market share and its Marketplace horizontally against third-party sellers who use Amazon's market place to sell and market their products, and by this, Amazon reaffirm his position horizontally. But its leverage power does not end there; Amazon also uses its leverage power vertically to reaffirm its position horizontally.

As of 2015, Amazon incremented the market share in its narrow market within e-commerce. This market share also incremented the number of delivery services that delivery companies such as UPS or FedEx had to perform. In other words, Amazon became essential as a near monopsony for

⁸² See Blair & Esquibel, *Some Remarks on Monopoly Leveraging*, 40 **ANTITRUST BULL.** 371, 373 (1995). (arguing that monopoly leveraging causes welfare losses); Lombardo, by the Second Circuit, but it was later rejected by other circuits); J. Neil Lombardo, *Resuscitating Monopoly Leveraging: Strategic Business Behavior and Its Implications for the Proper Treatment of Unilateral Anticompetitive Conduct Under Federal Antitrust Laws*, 41 *ST. LOUIS L.J.* 387, 406-08 (1996) (stating that "strategic behavior... can be used by a firm with monopoly power in one market to place its rivals in a second market at a competitive disadvantage" and further that "this type of unilateral anticompetitive behavior stems from the abuse of the monopolist's power to control price in the first market"); see also Feldman, *supra* note 133, at 2106 (claiming that monopoly leveraging can damage competition because a monopolist may leverage "to prevent erosion of its primary monopoly")

the functioning of those delivery businesses that were now enlarging their profits.⁸³ This made Amazon acquire a huge bargaining power, and ultimately, allowed Amazon in obtaining discounts in the prices that those companies were charging. This decrease reflected on the final prices Amazon was charging to its consumers. Obviously, third-party sellers did not have the same advantage; delivery prices for these sellers remained, and even increased, reflecting in their ultimate price of the goods and making them more expensive than those sold by Amazon directly. This gave a two-fold advantage to Amazon towards its competitors: (1) Better prices and purchase conditions for itself (2) Worse prices and purchase conditions for its competitors. This outcome was recently named the “waterbed effect”.⁸⁴

Amazon took advantage of the situation and created new services with the purpose of charging third-party sellers for the transmission of the delivery advantages that Amazon had. These services took the name of Fulfillment-by-Amazon, and basically consisted on permitting third-party sellers to save their merchandise in Amazon’s storage warehouses and giving those goods the same treatment as Amazon’s goods by packaging shipping them in the same way, by giving them the same advantages of free shipping available to Prime customers, and by being in charge of Customer Services.⁸⁵

⁸³ See Paul Cole, Should You Use Amazon Discounted UPS Shipping?, SellerEngine (2012), <http://sellerengine.com/should-you-use-amazon-discounted-ups-shipping> [http://perma.cc/54ND-B2WH]

⁸⁴ See Paul W Dobson and Roman Inderst, *The Waterbed Effect: Where Buying And Selling Power Come Together*, (March. 10. 2008)

⁸⁵ See Help Grow Your Business with Fulfillment by Amazon, <https://services.amazon.com/fulfillment-by-amazon/benefits.html>

All of the above explained, combined with the continuing expansion of Amazon's infrastructure raises the entry barriers for new competitors who would want to copy Amazon's business and advantages. Nevertheless, by the current position of Antitrust, those barriers are not enforceable since are capital requirements and economies of scale that reflect the "objective technical demands of production and distribution".⁸⁶

In recent days the situation has become more alarming because Amazon is launching its own delivery service in Los Angeles. If this delivery services becomes successful (which I think is likely probable, due to the huge financial backup Amazon has, and the policy of aggressive investment) Amazon will expand their delivery services as much as to compete directly with UPS and FedEx.⁸⁷ If achieved, Amazon would materialize one of the concerns of Structuralists with the appearance of perhaps a good casebook example of leverage theory: Amazon using its market share and brand name obtained in the retail market, to domain the distribution market. Perhaps foreclosure would also be present since Amazon is willing to incur in loss of profits in exchange for market dominance. In this sense, it is illogical to maintain the position that vertical integration is and will be enforced only if it allows a firm to hike its prices to consumers, when the question should be if as a matter of public policy, it is desired that one company acquires dominance in all the different stages and levels of the chain of supply.

⁸⁶ Eisner, *Supra* note at 26.

⁸⁷ See David Piersen, *Amazon reportedly launching a delivery service for businesses*, (Feb. 9. 2018), <http://www.latimes.com/business/technology/la-fi-tn-amazon-delivery-20180209-story.html>.

III. The importance of Data

As the Federal Trade Commission highlighted, we are in the era of ‘Big Data’. “Now days, thanks to the proliferation of smartphones, computers, and Internet connectivity, the amount of consumer data flowing throughout the economy continues to increase rapidly.”⁸⁸ But what is ‘Big Data’? It can be defined as the “technological ability to capture, aggregate, and process and ever-greater volume, velocity, and variety of Data.”⁸⁹

In recent discussions, scholars have pointed out the economic value of ‘Big Data. Some commentators and scholars have labeled ‘Big Data’ as the oil of the new era. In part because it “can guide the development of new products and services, predict the preferences of individuals, help tailor services and opportunities, and guide individualized marketing.”⁹⁰ Now days, ‘Big Data’ is considered as a commodity that “spawns lucrative, fast growing industry” which are Online Platforms in General. In recent discussions it is even stated that ‘Big Data’ creates a circle in the sense that Online Platforms benefit by collecting more data, which amplifies their scope to “improve its products, which attracts more users, generating even more data, and so on.”⁹¹

⁸⁸ Paul Lugard and Lee Roach, *The Era of “Big Data” and EU/U.S. Divergence for Refusals to Deal*, Antitrust, Vol. 31, No. 2 (2017)

⁸⁹ U.S. Exec. Office of The President, *BIG DATA: Seizing Opportunities, Preserving Values 2* (2014) https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

⁹⁰ U.S. Federal Trade Commission Report, *Big Data: A Tool For Inclusion or Exclusion?* at i (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

⁹¹ *The world’s most valuable resource*, The Economist (May 6, 2017).

In summary, three competitive advantages can be highlighted towards 'Big Data' recollection: (1) it provides information to Online Platforms about consumer preferences which if used, can help an online platform to improve their products and services. (2) It helps Online Platforms to provide a tailored advertisement and maintain user loyalty. This because the more a person use an Online Platform, the more data is recollected by the Online Platform, and hence, extracting consumer preferences which in turn, increases the switching costs and maintaining customer loyalty. (3) It helps Online Platforms explore new business models or opportunities by giving Online Platforms the information of what are the customers' needs and preferences.

Both examples used throughout this article, Uber and Amazon, work to proof this idea. Starting with Uber, it is stated that their platform is basically used in Uber's advantage in three ways. First, its platform provides a Surge Pricing method, which allows the presence of more drivers in areas where they are more needed. In this sense, making both end consumers happy: drivers are happy to charge more money for their service, while consumers are happy to receive a service when needed. Within Surge Pricing Method, Uber utilizes Data in "predictive and a reactive way". "For instance, Uber can predict where there is likely to be a high demand and roughly what that demand is likely to be thanks to historical data."⁹² Through the prediction of when drivers are needed, Uber's platform can attract more drivers to that area to provide a better service for passengers.

Second, Uber's platform uses passenger's review to evaluate the overall performance of their drivers, and by this, it creates a threshold of a 'clear imperative' to treat customers well. The

⁹² Julien Beccu, *Investigation on how Uber Uses its Data*, Innovation Enterprise (November 16,2017), <https://channels.theinnovationenterprise.com/articles/big-data-at-uber>

threshold is that any driver with an overall of less than 4.6/5, is threatened to be kicked out of Uber's platform.⁹³

Third, Uber's Platform uses traffic Data, to predict the best routes based on congestion and traffic flow. This helps to make every journey as quick and easy as possible. In this manner, passengers are generally satisfied with the service because they know that they are taking the optimal route to their final destination.⁹⁴

In the other hand, Amazon's platform takes a step further. Amazon tailors its advertising and offering of products through data recollection of prior activity.⁹⁵ Among other things, Amazon uses data information of time on sites spent by customers, duration of view, links clicked and hovered over, shopping cart activity and wish lists. Recently, Amazon has filed a patent for a method of anticipatory shipping, this means, that prior from customers actually buying the product, Amazon's platform decides to ship the product depending on the likeliness that exists that a customer would buy a determined product. This patent application received the name of "method and system for anticipatory package shipping".⁹⁶

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Sapna Maheshwari, *As Amazon's Influence Grows, Marketers Scramble to Tailor Strategies* (July 31, 2017), *The New York Times*, <https://www.nytimes.com/2017/07/31/business/media/amazon-advertising.html> ("We can see the entire customer-decision journey, and that's what's unique," Mr. Dallaire said. "We can help a brand if they're selling their products on Amazon understand when a customer is exposed to an ad and, when they clicked on an ad, if they bought something, and then we can help them tailor their marketing messages and their creative to each different step.")

⁹⁶ Praveen Kopalle, *Why Amazon's Anticipatory Shipping Is Pure Genius*, *Forbes* (Jan 28, 2014), <https://www.forbes.com/sites/onmarketing/2014/01/28/why-amazons-anticipatory-shipping-is-pure-genius/#25b53554605e>

The benefits that can be derived from the patent granting, would result in monopoly gains: “Predicting customers’ orders could increase sales and potentially reduce shipping, inventory and supply chain costs.”⁹⁷

Now that has been established the importance of Data, I will proceed now to explain how data can be used in anticompetitive way to harm the market and making a firm’s market share in a relevant market increase.

It is generally argued that ‘Big Data’ recollection increases barriers to entry to potential competitors in Online markets/platforms. “New entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies.”⁹⁸

The situation becomes more alarming when Online Platforms can access data from third-party competitors. This is the case of Amazon, where the access the company has of the third-party sellers who sell their products through Amazon’s market place, provides an incentive for Amazon in engaging in the sale of trending goods and/or services. Also, it gives Amazon the incentive of listing their products first in the market place, making the Amazon’s products to run out of stock first.

Big Data could also enhance market power in the sense that “higher revenues earned by larger undertakings could fuel higher investments (such as new algorithms, new functionalities, entry on

⁹⁷ Lance Ulanoff, *Amazon Knows what you want before you buy it*, Mashable (Jan 21, 2014), <https://mashable.com/2014/01/21/amazon-anticipatory-shipping-patent/#iZpqb8G7Tiqw>

⁹⁸ Jay Modrall, *Big Data and Algorithms: Focusing the Discussion*, Oxford Law (Jan 15, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/01/big-data-and-algorithms-focusing-discussion>

adjacent markets, etc.), thus attracting even more customers and more data. Such a trend could harm competition by converging towards a monopolization of data-related markets.”⁹⁹

Another concern that arises because of ‘Big Data’ recollection is market transparency. While in general terms, market transparency is considered to generate procompetitive effects because it allows consumers to compare prices, or characteristics of competing goods, market transparency can enhance tacit or explicit collusion.

This has helped Uber, who recently has launched a new fare system, that by using data, calculates what a customer is willing to pay. This system is called “route-based pricing”. Having price transparency, Uber is aiming on calculating what customers are willing to pay before the switch to another Ride-sharing App.¹⁰⁰ Even though is not prohibited, can be harmful to the market because it is possible that segments who are overcharged may switch to other competitors Apps, but, segments who are charged in a “competitive” price, or undercharged (predatory pricing) will not be decreased and rather, will be increased. Ultimately, this will prove that Online Platforms are creating new forms of antitrust violations because, transparency of markets where always believed to decrease prices.

⁹⁹ Bruno Lasserre & Andreas Mundt, *Competition Law And Big Data: The Enforcers’ View*, Italian Antitrust Review N.1 (2017)

¹⁰⁰ Eric Newcomer, *Uber Starts What it thinks you’re Willing to pay*, Bloomberg (May 19, 2017), <https://www.bloomberg.com/news/articles/2017-05-19/uber-s-future-may-rely-on-predicting-how-much-you-re-willing-to-pay>

5. Colombia's Legal System: How Predatory Pricing and Vertical integration are conceived.

Before starting to explain the basics of the Colombian Law, it is important to clarify that an analysis towards the market structure of e-commerce or 'Big Platforms' in Colombia is not pertinent because the market is just recently starting to develop.

The Colombian Competition Law is derived from the Constitution, which provides in its article 88 that the right of free economic competition is a collective right. Furthermore, this system is comprised in basically three Laws: (1) Law 155 of 1959, (2) Decree 2153 of 1992 (Decree), and (3) Law 1340 of 2009 (Law 1340). With regard to Predatory Pricing, the applicable law is the Decree, while with regard to vertical integration the applicable law is the Law 1340.

Within the scope of the Decree there are three types of anticompetitive behavior: (1) Agreements, (2) Acts, and (3) Abuse of Dominant Position.

(I) Predatory Pricing

Predatory pricing is defined in the Decree as the “decrease in prices below their costs when they are intended to eliminate one or several competitors or to prevent the expansion of these.”¹⁰¹

¹⁰¹ Decree 2153 of 1992, by which the Superintendence of Industry and Commerce is restructured and other provisions are issued, December 30, 1992, DO 40.704

Even though this definition is straightforward, the analysis behind a Predatory Pricing claim is very complicated because of the lack of a body of solid doctrine by the Superintendence of Industry and Commerce (SIC), which is the main authority in Competition Law.

To this day, the jurisprudence of the SIC is really scarce. Only two cases touch on the issue of Predatory Pricing. Below, a brief description of the two cases, and on the ideas of the concept of Predatory Pricing is given.

The first case in this matter is contained in the Resolution No. 30835 of 14 of December, 2004. In this case the SIC pronounced itself creating two contributions:

- 1) “As you can see, the norm represses the behavior of the economic agent who, pre-determined by the power that he holds in the market, decides to reduce the prices of their products below the level of their costs, using this strategy as a mechanism of predation, which allows them to eliminate or keep their competitors at bay. With this, under the sophism of perceiving cheaper prices, it causes a strong grievance to the market in general, by canceling the sources of competition, by who has the financial capacity to withstand transitory losses, encouraged by the subsequent reward of an economic environment without rivals, being that the true mobile of its procedure.”¹⁰²

¹⁰² Resolution No. 30835 [Superintendence of Industry and Commerce], “By which the closure of an investigation is ordered” December 14, 2004.

- 2) “The definition of the behavior requires a comparison between the sale prices and the average cost, the latter, coming from dividing the costs incurred by the company in the execution of its corporate purpose, by the number of units produced.”¹⁰³

In the first contribution, the SIC established that in order to have a valid claim of Predatory Pricing, the alleged infringer must have a dominant position in a determined market added to the financial capacity of suffering transitory losses in order to gain share power.

In the second contribution, the SIC specified that the cost that should be considered is the average cost that includes all disbursements in which the company incur to achieve its corporate purpose. In this manner, the costs to be considered depends on the industry and on the alleged infringer. Not all industries incur in the same costs and not all companies incur in the same costs.

The second case is reflected on two resolutions of the SIC (No. 222624 of 2005, and No. 3370 of 2006) and a decision of the Administrative Tribunal of Cundinamarca. This because the case was controversial, and the alleged infringer tried to appeal twice. The resolutions will be mentioned in the explanation of the Law, while the ruling of the Tribunal will only be mentioned in the critique.

In the resolutions, the SIC sustained that Predatory Pricing had two elements, one objective element, and one subjective element. Following previous doctrine, the SIC sustained that the objective element consists on establishing that the infringer must establish a price below the average total cost, which includes the fixed and variable costs. In the other hand, the subjective

¹⁰³ *Id.*

element is fulfilled if it is proven that the intention of the infringer was to exclude competitors from the market or prevent their expansion.

Now, having the status quo of the law of Predatory Pricing, is important to analyze how this law would come into play in the case of insertion of 'Big Platforms' into Colombia.

First of all, it seems that the law of Colombia is fit to treat an insertion of 'Big Platforms' in the market because no requirement of potential recoupment exists. Nevertheless, the fact that it is required that the infringer has the financial capacity of withstanding transitory losses can create trouble. For example, an argument can still be made by companies that operate by a loss, and that appear like that in their financial statements, that there is no financial capacity of withstanding transitory losses, while the reality is that there is a large list of potential investors that make the price of the stock rise. In this sense, it is better to only stick with the "Objective Element" established by the second pack of resolutions, where the only requirement is the decrease of the price below the average total costs in which a company incurs.

Problems can also arise with the second requirement. The fact that the Decree, as well as the SIC are requiring that the Plaintiff proves the intention of the infringer to take competitors out of the market, or the intention to prevent their expansion can become a very heavy burden for a Plaintiff that wants to prove Predatory Pricing. The fact that Amazon has an algorithm that changes the prices and the offers to different clients, makes the search for clues obsolete, since the argument that Amazon gives primacy to its products it's not always true.

Additionally, the fact that these elements are not flexible and do not admit proof in the contrary, makes the law rigid and perhaps makes the law ban conducts that are in fact competitive rather than anticompetitive. In the ruling of the Tribunal dated 4 of March 2010, the appellant Cadbury Adams proves that during the alleged period of predation, the company did not gain any power nor in market share, and rather, it lost position in the market while other competitors gain more market share and power. This proves that the best solution for e-commerce companies and ‘Big Platforms’ is to establish a rebuttable presumption where if there is a configuration of the price below the average total costs there is a predation. But the only ways to rebut this presumption must be the proof that no increase in the market share has resulted, that a decrease in the market share has resulted, or that no barriers of entry including economies of scale, capital requirements, and product differentiation are created by the alleged infringement.

(II) Vertical Integration

Vertical Integration in Colombia is defined as “integration between different companies that belong in different levels of production and/or distribution but that do belong on the same value chain.”¹⁰⁴

The Law 1340 consecrates obligations to companies who are going to integrate, and who fulfill other conditions of size and market share. Article 9 of the Law 1340, that regulates article 4 of the Law 155 of 1959 provides that companies that “belong to the same value chain”¹⁰⁵ have the

¹⁰⁴ Superintendence of Industry and Commerce, Guide for Businesses Integration, available at http://www.sic.gov.co/recursos_user/documentos/publicaciones/Guia_Integraciones_VF_Para_Publicacion.pdf

¹⁰⁵ Law 1340 de 2009, “By means of which regulations on competition protection are issued”, July 24, 2009, DO 47.420

obligation to inform the SIC, for further evaluation and analysis of anticompetitive harm, about their plans to integrate when they have together more than 20% of market share and:

1. “When, jointly or individually considered, they have had during the fiscal year prior to the projected operation, operational revenues in excess of the amount established by the Superintendence of Industry and Commerce in minimum monthly legal wages in effect, or
2. When, at the end of the fiscal year prior to the projected operation, they have, jointly or individually considered, total assets greater than the amount established by the Superintendence of Industry and Commerce in minimum monthly legal wages in effect.”¹⁰⁶

In the other hand, the same article establishes that in case the companies are meeting one of the two conditions, but their market share is inferior to 20%, the obligation that arises is simply to notify. When this happens, the integration is understood to be authorized without the necessity of an analysis by the SIC. In this manner, companies who do not satisfy any of the conditions, nor the market share can integrate without a notice to the SIC.

This mechanism proves that the SIC, even though not expressly, believe on similar ideas to those proposed by structuralism. The fact that market share and size of the company are considered to evaluate integrations in general, proves that SIC is interested in evaluating market structure

¹⁰⁶ *Id.*

because it recognizes that market structure can act as an incentive for its players to engage in anticompetitive conducts for more share gains.

However, the criteria used by the SIC does not contain conditions to inform nor to notify in the cases where an integration would mean gains in data collection, and in mixture of algorithms which are used as fundamental pieces for 'Big Platforms' businesses, and which can be used easily as tools for anticompetitive behavior.

Furthermore, the SIC recognizes that vertical integrations between companies, deals with products which are complementary with each other, and recognizes that "it can improve the efficiencies of the companies involved, although they can also unduly restrict competition."¹⁰⁷ The SIC also recognizes that some vertical integrations are of anticompetitive nature because they create great barriers to entry.

Barriers of entry are defined by the SIC as "as the factors that prevent that the entry of new companies to a certain market becomes lucrative"¹⁰⁸, or as "additional production costs that a company that seeks to enter into a market must bear and that are not bared by the companies that are already established in it."¹⁰⁹ Nevertheless, the SIC has been reluctant to stick with only one definition because in words of the SIC "different definitions make it possible to have different

¹⁰⁷ Superintendence of Industry and Commerce, Analysis Guide for Business Concentration, available at <http://www.sic.gov.co/sites/default/files/files/Guia%20Concentraciones%20Empresariales%2004-11-15.pdf>

¹⁰⁸ Superintendence of Industry and Commerce, *supra* nota at 104

¹⁰⁹ *Id.*

opinions regarding a specific type of entry barriers and / or to ignore some kinds of barriers to entry.”¹¹⁰

Nevertheless, in the recent instructive of goods and services for the use of technology, the SIC recognizes as barriers to entry the capital requirements, the economies of scale, and the advantages of differentiation of the products of the competitors that are already established in the market.

Because of this recognition, the SIC has banned some vertical integrations between companies alleging that the integration creates additional burden for potential competitors because of the extreme capital requirements they would have to engage to have a similar business and to acquire a sustainable market share.¹¹¹

With these fundamentals of Competition laws, as a general matter, it seems that the SIC is fit to study ‘Big Platforms’ businesses and its competition implications. Nevertheless, it seems that more theory needs to be evaluated, such as the possibility of individual vertical integration (Big Platforms companies tend to integrate themselves and acquire market power in complementary markets), and the theories of leverage and foreclosure as ways in which a ‘Big Platform’ can take advantage of the market share in one market to gain market share in a complementary market. In addition, the SIC and Colombian scholars should recognize that the ‘Big Data’ recollection provides ‘Big Platforms’ the tool necessary to gain market power, and within, to gain a huge

¹¹⁰ *Id.*

¹¹¹ *See, e.g.*, Resolution 21345 [Superintendence of Industry and Commerce], July 16, 2007 (the SIC banned a vertical integration because of “important entry barriers to the primary market not only for the initial investment levels, but also for the considerable period of time that must be taken into account to enter the market.”)

bargain power that serves as an artificial bridge to create monopoly gains, and to exclude competitors in complementary markets upstream and downstream. Similarly, there is the need to introduce the system concepts such as the waterbed effect and switching costs that widens up the knowledge of competition authorities about the possible harms that Big Platforms can cause to complementary markets.

G) Possible Solutions for Big Platforms in the Colombian Law

The possible solutions for a better Competition enforcement towards ‘Big Platforms’ companies can be narrowed to two solutions or models. The first solution would be to govern ‘Big Platforms’ through competition, by the reinforcement of the structuralism approach to Competition Policies. The second solution would be to regulate the market of ‘Big Platforms’ and accept its oligopolistic or monopolistic structure.

i. Governing the ‘Big Platform’ markets through competition

The first step to govern ‘Big Platform’ markets is through competition. In my line of thinking, this would mean reinforcing the ideas of structuralism in order to preserve competitive processes and avoiding structures that would encourage anticompetitive behavior.

Concerning Predatory Pricing, structuralism would be based on focusing on the first and objective element of Predatory Pricing. This would mean, focusing only on the pricing below the total

average cost to establish a rebuttable presumption on the defendant of Predatory Pricing. This would allocate the burden of proof to the party who has in his power more information and proof about the business.

Second, advocate for structuralism would mean to eliminate the requirement for the Plaintiff to prove the intention of eliminating competition from the market or to gain market share. It's important to remember that proving the intention of a 'Big Platform' is most likely to be a difficult task, since the businesses' algorithms are fast, and tracking down signs or indications of intent to eliminate competition require constant monitoring of the platform.

Finally, a structuralism approach would require forgetting about the first opinion of the SIC, where it states that Predatory Pricing is made by "who has the financial capacity to withstand transitory losses."¹¹² This conception can create a defense for 'Big Platforms' that operate to a loss because they would argue easily that they are not capable of withstanding transitory losses, and hence the pricing is competitive.

Moving to vertical integration, a structuralism approach would recognize the possibility of individual integration of companies and the recognition of theories such as leverage and foreclosure. These policies prevent that companies with great market share use their dominance in one market to achieve dominance in complementary market and in that way, harming the entire value chain.

¹¹² Superintendence of Industry and Commerce, *supra* note at 102.

In the other hand, it would be better to require the duty to inform or to notify, depending on the size of the companies, the integration between companies who are dealing with Big Data recollection and algorithms, since Data is a new tool that can be used to affect the market, and to obtain monopoly gains. The precision of the data recollection makes 'Big Platform' businesses indispensable for other businesses and for consumers in general.

Another possibility to ban discrimination against business owners that use Big Platforms for the exploitation of their business, is the application of the "doctrine of the essential facilities" which the SIC has recognized but not developed in a large degree. An essential facility is "means that providing a service is substantially more difficult without access to it (...), and that the monopolistic owner of this infrastructure would find it profitable to impose at least a small but significant and non-transitory price increase on the competitive level to access this infrastructure."¹¹³ The position of the SIC in almost all the cases is not to impose the doctrine of essential facilities because of the profound fear that imposing this doctrine would result in the discouragement of businesses. Nevertheless, the SIC established situations where the doctrine will come to play:

- "that the 'investigated' company controls an essential facility;
- that the 'facility' to which access is sought is indispensable or objectively necessary for a competitor, current or potential, in the sense that it cannot be reasonably duplicated by the competitor;
- that the 'investigated' company denies access to the competitor;

¹¹³ OECD. "*Principles of Competition in essential facilities*". Base document DAF / COMP / LACF (2010) 10 (August 2010), p. 12

- that there is no objective justification for denying access to the essential facility; Y
- hat denying access to the essential facility leads to the elimination of effective competition in the relevant market.”¹¹⁴

By an exercise of reading of the exceptional cases in which the essential facilities doctrine come into play, it seems that the law by itself is not very clear, and that future interpretations are needed. Nevertheless, it can be interpreted that ‘Big Platforms’ are essential given the need that some businesses have in order to make profits.

ii. Accepting the monopolistic nature and regulating the market through regulation

Given that Big Platforms are essential to the internet market structure as well as the internet economy, a good solution for anticompetitive harm is through regulation. A good regulation for a ‘Big Platform’ market would require two types of policies: (1) non-discrimination in price and in service, and (2) setting limits on rate setting.

A nondiscrimination policy would ban Big Platforms to use their algorithms in their favor and disadvantage others such as third party-sellers that use platforms for the maintenance of their business. Furthermore, this approach would lead Big Platforms amplify to multiple lines of business without the concern of artificial gains of market share and the tendency of dominance. This policy would also ban Big Platforms from preventing an open and free access to its platform or marketplace.

¹¹⁴ Resolution 56488 [Superintendence of industry and Commerce] By which the closure of an investigation is ordered, September 27, 2013.

In the other hand, a rate-setting policy would be to put a ceiling or a limit of charge to Big Platform services. Nevertheless, the way to establish a limit is by taking into account a “fair return” rate, in which the regulation recognizes and analyzes what would be fair price range taking into account the amount of investment a ‘Big Platform’ for their business.

H) Conclusion

Throughout this essay, I tried to prove that the “consumer welfare” framework established by antitrust enforcers is not sufficient to business models of the new era of technology. I took e-commerce as an example to prove that Big Platform companies have the capacity to engage in anticompetitive activities that are difficult to track. These companies are aiming for a total dominance in the long run, and shareholders seem patient with the results in profits that these companies are getting.

It is important that enforcers take into account more factors than just price and outcome when analyzing ‘consumer welfare’. They should remind that also quality of goods or services, variety and options for consumers, and innovation are also important. Enforcers should also consider capital requirements and economies of scale as proper entry barriers. Failing to consider them as entry barriers deters antitrust enforcement which ultimately deters competition, which is the sole purpose of Antitrust Laws and the reason why they were created.