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Antitrust Issues with New-Age Industry Titan: A Case Study of FTC v Amazon



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Attack of New-Age Titan or Antitrust Activism: A Case Study of FTC v Amazon

by

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I hereby recognize and pledge to fulfill my responsibilities as defined in the Honor Code and to maintain the integrity of both myself and the College as a whole.

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Table of Contents

Chapter 1: Introduction -Antitrust, Digital Markets, and FTC's Lawsuit Against Amazon

Chapter 2: Competition Theory and Law in the United States

Chapter 3: Concerning Economic Trends in the Evolving Economy

Chapter 4: The Amazon Case

Chapter 5: Discussion of Precedent and Philosophy

Chapter 6: Future Research and Conclusion

Abstract

Over the past few decades, firms and markets have been revolutionized by the Internet and Information Communication Technology. The resulting advancements have redefined the characteristics of the economy, and have drawn attention to digital markets. As economic indicators have steadily become more alarming, legislators have increasingly sought to revitalize antitrust regulation to address new trends. The Federal Trade Commission's lawsuit against Amazon is pushing the limits of antitrust philosophy and the use of economic theory. This paper's objective is to analyze the applicability of antitrust theories to the case against Amazon and discuss different outcomes considering modern economic theory.

CHAPTER 1: Introduction - Antitrust, Digital Markets, and FTC's Lawsuit Against Amazon

Competition law is a relatively new regulation structure that has aimed to reel in big business and ensure effective market outcomes. Because of its recency and vague description in the United States, the intent, philosophy, and need for antitrust policy is highly controversial. The Chicago and Post Chicago Schools have dominated antitrust theory over the past few decades, with some influence from the Harvard School, but a new populist theory is gaining traction. These philosophies are actively reshaping how we approach antitrust law and will be critical to the future of competition and the economy in general.

Antitrust regulation has been at the forefront of policy conversations as legislators have become increasingly wary of economic indicators such as high rates of industry concentration, low rates of innovation, and the consolidation of wealth, among other factors. Due to these trends, many government officials, scholars, and more have questioned the adequacy of current legislation such as the scope of doctrine, the value of economic theory, and the framework of competition law in general. This issue has been magnified by the introduction of the Internet and Information Communication Technology (ICT), which has dramatically changed the structure of the digital economy. These concerns are especially prominent for the tech industry due to its size and societal influence. The status of technologically driven companies has led many people to become more concerned with the impact these firms have on the economy and society's welfare in general.

The topic of antitrust regulation and enforcement is particularly relevant because there is currently a wave of antitrust prosecutions against major tech companies like Amazon, Apple, Alphabet, and Meta. Spearheaded by current FTC chain Lina Khan, a new populist movement is challenging older schools of thought hoping to revitalize antitrust law. Amazon Inc. has found

itself challenged by this surge for enforcement and is currently being sued by the FTC and 17 states under Section 13b of the FTC Act and a handful of state laws to prevent noncompetitive practices described in Section 5a of the FTC Act and Section 2 of the Sherman Act.

The discussion of this topic is important because the results of this case, and others like it, will shape the precedent for a new era of the economy. It will also likely impact the philosophy driving future antitrust policy and the means of addressing welfare issues. The intersection of economics and the law will aid in more informed decisions that will improve society overall. Additionally, by continuing to develop economic theory, scholars can make sense of the impact different actors have on the economy. Overall, this case's implications on the law and economy are of utmost importance and should be thoroughly evaluated.

The research question addressed in this paper is as follows: What impact will the current philosophy of antitrust law in the United States have on complex digital companies like Amazon, and how can economic theory better advise legal proceedings? The second chapter begins by analyzing competition theory and providing a historical context of antitrust law in the United States. The third chapter addresses alarming economic indicators and characteristics of the digital economy. The fourth chapter explains Amazon Inc.'s history, complaints against the company, and the current lawsuit with the FTC. The fifth chapter provides context to relevant precedents, highlights key contemporary arguments, and discusses the implications for Amazon and future policy. Chapter six provides suggestions for further investigation and concludes the paper.

CHAPTER 2: Competition Theory and Law in the United States

The concept of competition is one of the most fundamental pieces of a healthy market economy. In competitive markets, private companies are encouraged to lower prices, innovate their products, improve working conditions, etc. to draw in demand. Naturally, markets often have failures and companies attempt to engage in various behaviors, like buying out or merging with smaller competitors, establishing noncompetitive agreements with others in the market, or unfairly leveraging positions of dominance, which can result in anti-competitive outcomes. The enforcement of competition law is commonly relied upon to promote competition and discourage malpractice.

Market theory and the resulting characteristics are key concepts that provide a base for antitrust jurisprudence. Markets are meant to supply scarce products to consumers in exchange for money through the price system. Price shifts can occur due to many independent decisions by consumers and sellers, which are reflected in supply and demand. Each actor is expected to behave in their best interest and maximize their welfare. The culmination of independent actions results in an equilibrium that sets prices and output at a "competitive level" determined by the market. Prices can shift based on supply factors (such as input costs) or demand factors (such as the price of substitutes) and are quantified by price elasticity, which explains the responsiveness of demand to changes in price (Gellhorn, 1975).

The basic assumptions of supply, demand, and pricing operate differently depending on the type of market that firms are operating within. Markets with large numbers of buyers and sellers with little variance in quality or price are known as perfectly competitive markets. The key characteristics of this market are as follows: entry into the market is relatively easy and will occur due to high margins of profit, firms are price takers who set quantity in response to the market instead of controlling prices, and firms are encouraged to maximize efficiency as a means

of making a profit. The opposite end of the competition spectrum is a monopolistic market where a single seller produces a unique product that is incredibly challenging to replicate. This structure leads to high barriers to entry, a lack of substitutes, and lower outputs, allowing firms to be profit-maximizing - the practice of raising prices to the highest tolerable level. Most real-world markets fall between these two extremes as a monopolistic competition or oligopoly market. Monopolistic competition defines a market where many sellers have similar products that are distinguishable by brand. The resulting characteristics are nonprice competition such as advertising or product quality, higher input costs, lower output, and normal profits. An oligopoly is the most important market theory for antitrust regulation because it reflects the tendency of markets to develop into a few interdependent firms. Oligopolies don't lower prices because firms anticipate a response from rivals; instead, they compete indirectly by minimizing input prices and utilizing nonprice competition. Oligopolies operate in a game theory situation where they reach an equilibrium between competition and monopolistic pricing depending on how each firm responds.

The structure of markets is critical in competition analysis because it reflects the market power, or the degree of influence a firm has in a market compared to other firms. Many legislators throughout history have been concerned about the ability of larger firms to manipulate market outcomes, especially when they don't face much competition and receive abnormal returns. This position and the wealth it provides further raise concerns when companies leverage their power to influence other areas of society including labor markets and political discussions. To address this threat, politicians in the late 1800s created competition laws hoping to protect markets and prevent large companies from having undue influence on society.

Competition law in the United States was established to combat "trust" agreements created to link firms' interests, dodge regulation, and maximize market power in major industries that excelled during the Industrial Revolution. The federal government passed the first prominent piece of antitrust legislation in 1890 titled the Sherman Antitrust Act due to failures in state corporate and common law to effectively regulate corporations. The act prohibited any agreement that restrained commerce and the attempt to monopolize, allowing the Department of Justice (DOJ) to prosecute violators through civil or criminal suits.

The early years of competition law, known as the Gilded Age, were defined by a strict literalist interpretation of the Sherman Act, which largely cracked down on price-fixing deals and prioritized the prevention of trade restraint. Thus, the law largely targeted multistate cartels because it refused to allow collaboration between firms horizontal to each other. This interpretation led to a significant increase in consolidation because firms could avoid prosecution by combining into larger corporations. Therefore, firms at the same production level combined to control prices (horizontal integration) and merged with production tiers to expand supply chain control (vertical integration). The widespread adoption of this strategy became known as the "Great Merger Movement" and raised discontent among the public. President Theodore Roosevelt responded by challenging some titans of industry through the Sherman Act, which was largely successful despite claims that the act's scope didn't apply to mergers.

In response to application issues, the Progressive Era of antitrust emerged prioritizing a more loose interpretation of the Sherman Act known as the "rule of reason". The rule of reason allows certain restraints on trade as long as they have a reasonable explanation and weren't primarily intended to restrict trade. This philosophy allowed the court to consider the competitive outcomes of agreements and information sharing between companies as long as it didn't lead to

price fixing. Additionally, President Woodrow Wilson's administration passed the FTC Act and Clayton Act during this time; thus, expanding the reach of competition authorities by establishing another enforcement agency and further outlining anticompetitive conduct. Wilson's campaign advisor and Supreme Court appointee Louis D. Brandeis was, and still is an important figure in antitrust philosophy who favored the break up of monopolies and decentralized economic power. Overall, this era was defined by the Court's openness to potential pro-competitive outcomes of information sharing and firm collaboration with the more flexible rule of reason but still maintained that price fixing was illegal.

The Great Depression stalled the newly found enthusiasm for competition regulation and instead inspired state-approved cartels and control of certain markets. The New Deal pushed this philosophy through the National Industrial Recovery Act in 1933 giving President Franklin Delano Roosevelt the ability to exempt companies from antitrust laws and enact taxes to fund public projects. The Supreme Court shot down the act in 1935 which led to FDR's notorious court-packing plan which inevitably failed but, prompted a shift in perspective towards allowing state regulation of prices through the Robinson-Patman Act and case law precedents. The second part of the New Deal Era revitalized antitrust activity to a new extreme driven by the head of the DOJ Antitrust Division, Thurman Arnold. He expanded the department's budget and staffing by 500% then aggressively prosecuted big businesses such as the Aluminum Co. of America (Alcoa). This action was inspired by the newly developed interventionist approach known as the Harvard School which suggested courts should make rules to prevent overly significant barriers to entry. The Harvard School focused on market share and structure to determine competitive theories of harm (Sawyer, 2019).

Due to growing frustration with interventionist antitrust enforcement, a new perception of antitrust policy known as the Chicago School became the driving philosophy of competition. The Chicago School believed markets were largely self-correcting and criticized government intervention for perpetuating inefficiencies and weakening US firms. This idea prioritized consumer welfare and proof of harm rather than market structure alone. Because the School only identified explicit behavior as anti-competitive, few actions other than monopoly-inducing mergers or price fixing could be prosecuted. Furthermore, Chicago scholars expressed skepticism around dominant firm conduct and believed that predatory pricing and other alleged conspiracies were implausible for firms to accomplish effectively (Kovacic, 2003). This perception allowed for a more permissive view of behavior and raised evidence requirements for prosecutions of the Sherman Act.

The modern era of antitrust has become more critical of the Chicago approach claiming that the simplistic view of competition fails to acknowledge a more complex anti-competitive strategy. The Post-Chicago School builds on the previous philosophy by prioritizing consumer welfare while incorporating newer economic concepts such as industrial organization and game theory. These concepts have encouraged courts to take deeper dives into cases regarding positions of dominance and monopolization (Lancieri et al., 2022).

Since the establishment of the Sherman Act, scholars have questioned congressional intent for the law application, which has led to various enforcement approaches throughout the past century. Throughout the last century, competition legislation has taken many different forms and focuses including protecting small businesses, promoting economic efficiency, consumer welfare, and more (Sawyer, 2019). The various perspectives are relevant in understanding the establishment of competition law, and the evolution of policy analysis over time.

The core of antitrust legislation in the United States consists of the Sherman Act, the Federal Trade Commission Act, and the Clayton Antitrust Act. As mentioned above, the Sherman Act prohibits restraints on trade and the attempt to monopolize a market. The Federal Trade Commission Act established the FTC as a regulatory enforcement agency of antitrust that could establish rules that prevent unfair or deceptive practices, conduct investigations into business operations, and make recommendations to the public and Congress. Finally, the Clayton Antitrust Act empowers the Commission to review and prevent unlawful contracts and mergers. Eventually, it was amended by the Robinson-Patman Act, which expanded enforcement to discriminatory pricing and product promotion (Staff, 2022). These three acts are the base legislation that has set the precedent for competition regulation in the United States.

The Sherman Act and Federal Trade Commission Act are pertinent to the FTC's complaint against Amazon, so a deeper investigation of the legislation is valuable. The Sherman Act has two distinguished sections applicable to defining anticompetitive behavior. Section 1 addresses unlawful agreements between firms through two lenses of analysis: the per se rule and the rule of reason. Price fixing, collective boycotts, rigging bid processes, and dividing a market are all covered by the per se violation and are automatically deemed anticompetitive if explicitly written. This behavior can also be anticompetitive if an unwritten agreement comes with evidence of plus factors, which suggest malpractice such as acting against your economic interest, having opportunities or motives to collude, or sudden behavioral changes. The other lens of Section 1, the rule of reason, is more complex and covers agreements such as tying products (bundling), exclusivity deals, "Most Favored Nations" clauses, and more. When these agreements are being analyzed, the court must determine the relevant market, the defendant's market power, and resulting anticompetitive effects. If each step is accomplished, the defendant

must prove that the behavior has a pro-competitive rationale (Miller, 2024). Section 2 of the Sherman Act covers the attempt to monopolize and maintain monopoly power. It is legal to have a monopoly in the United States but, firms cannot engage in exclusionary conduct that leverages monopoly power. The interpretation of Section 2 requires the court to find that the defendant has monopoly power in a market and willfully maintains it. A market is defined as a group of firms or products in a region that compete with each other and are interchangeable. Significant market power is commonly defined as at least a 50% share of a given market while 70% and above is almost certainly a monopoly. Monopoly power is explained by the ability to exclude competition and raise prices without losing sales. Behaviors by a monopolist that can be defined as exclusionary include refusals to deal, MFN clauses, exclusivity contracts, predatory pricing, and more (Miller, 2023).

The relevant sections of the Federal Trade Commission Act referenced in the FTC's lawsuit against Amazon are Section 13(b) and Section 5(a). Section 13(b) allows the FTC to pursue injunctions to address violations of the FTC Act. This means that the FTC seeks to legally prohibit companies from engaging in behavior defined in Section 5(a) as "unfair or deceptive acts", similar to those outlined in the Sherman or Clayton Act (Federal Trade Commission, 2022).

CHAPTER 3: Concerning Trends in the Evolving Economy

The modern demand for greater attention to antitrust legislation and enforcement in the United States derives from various economic issues that have been in the spotlight for the past few decades. In the US, consolidation is irrefutable as two-thirds of the 893 industries analyzed from 1997 to 2007 had become more concentrated, and the top four firms in each market

increased their share by 5% on average. Additionally, innovation by new firms seems to be slowing down because of this concentration and is primarily driven by predominant "superstar firms". Profits are also reaching unprecedented levels as markups have increased by nearly 50% in the last 40 years (Wessel, 2018). Problematic economic indicators are arising in tandem with the rise of tech giants that rely on the characteristics of the digital economy to survive. These newly evolved technologies open the door for new business strategies that can be challenging to regulate such as data use, algorithmic pricing/machine learning, and more. Therefore, a deep understanding of the digital economy and its structure is important to explain new business practices and their impact on the general economy.

Research of the past few decades reflects consistently growing concentration levels in roughly 75% of US industries. Grullon et al. use the Herfindahl-Hirschman Index (HHI), the most common measure of industry concentration, in the United States between 1972-2014 through the Compustat database. It includes 71 industries and uses sales data to measure the concentration. They found that industry concentration remained low through the mid-1990s before steadily growing from 1997-2014 (Grullon et al.). The growth in concentration is correlated with higher corporate profitability and abnormal returns in stock. They also theorize that companies experience greater returns from horizontal mergers due to larger market power allowing for significant markups (Grullon et al.). Theoretically, higher profit margins and greater market concentration are detrimental to consumers as a whole and could be an explanation for modern economic struggles.

Profits and markups of firms have continued to rise over the past 40 years according to (De Lecker et al., 2020). They utilize firm data of all publicly traded firms and census data of manufacturing, retail, and wholesale trade private firms to analyze market power and the

resulting profit markups from some period on. From 1980 to 2014, markups rose from 21% to 61% and profit rates increased from 1% to 6% (De Lecker et al.). A common explanation is that input costs have risen, causing firms to increase markups accordingly. However, the researchers find that markups have exceeded the cost increases. The researchers also found that the rise in markups is primarily driven by the upper end of the distribution, while the median remained unchanged. This suggests that this trend is being pushed by dominant firms, reinforcing concerns surrounding big business.

Other significant reflections of competition issues are decreasing innovation rates and investment concentration towards larger firms. According to (Olmstead-Rumsey, 2019), innovation boomed in the 1990s, driven by smaller firms who invested heavily in new ICT technologies but was followed by a steep drop-off in the early 2000s. When they analyzed the trends in the 1990s and 2000s respectively, they found that the decline in patent quality of laggard firms is responsible for approximately 40% of the rise in market concentration. They also found that while laggard firms were innovating less frequently, large firms began to increase their investment in innovation, explaining the development of superstar firms. These findings are consistent with those of (Zheng, 2022), who find that multiple US industries have experienced increased concentration of research and development (R&D) rates, contributing to the success of predominant firms. Overall, industry concentration, profit margins, and innovation trends point toward economic consolidation as the primary driver of many issues today.

One of the leading explanations for changes in economic indicators is the widespread structural change in the economy due to the eruption of the internet and information technology known as the Digital revolution (or Fourth Industrial Revolution). The digital economy benefits from characteristics such as network effects (both direct and indirect) and the collection of data

which reshape how businesses address classic economic problems like market organization, meeting consumer demand, and generating value. These qualities cause digital markets to have high barriers to entry and create winner-take-most scenarios due to economies of scale and scope. The technology industry has largely benefited from this shift as new-age titans of the internet are now the 5 most valuable companies in the world based on market capitalization. Because of their prominence in modern society, Apple, Alphabet, Microsoft, Amazon, and Facebook have been at the forefront of antitrust concerns (. While each company has its distinct approach, many commonalities arise from their behavior, which speaks to the changes in digital markets.

A network effect, or externality, is the self-perpetuating culmination of information that becomes increasingly more appealing as additional people, organizations, and other actors are involved. Direct network effects describe this phenomenon with digital companies like Facebook where the application's draw becomes stronger as more peers use it. Indirect network effects explain how many digital firms operate as platforms by connecting buyers and sellers to a common space. Marketplaces, like Amazon's market, are a type of platform that provides a digital space for buyers and sellers to connect at cheaper rates than traditional means of economic organization (Eichlin, 2019). The multisided nature of the platforms and marketplaces allows firms to profit from interacting with both sides of the market. For instance, digital markets can extract value from sellers through contractual agreements of sale on the marketplace while also profiting from the buyer traffic that sellers create.

Platforms also provide massive informational advantages through the collection and application of data. Large datasets allow companies to improve their quality of service and expand the application to areas they know to be profitable. Access to machine learning also

dramatically impacts a firm's success in digital markets because AI can analyze data in real time and quickly suggest advantageous action. These features reinforce the quality of platform markets and create customer lock-in due to high information and switching costs. Therefore, companies with access to data and information technologies have a distinct advantage in appealing to customers and are difficult to dislodge without comparable technology.

The impact of network effects and access to ICT cannot be understated as it inherently changes the dynamics of competition. Other notable qualities arise in digital markets like dramatic economies of scale and scope because there is little cost to increasing data access. The digital economy also revolutionized the concept of barriers to entry as companies now develop large bodies of data to shape their practices that others can't access. This makes digital markets winner-take-most scenarios that contribute to improved circumstances for predominant firms. Predominant firms can more easily expand into adjacent markets and establish themselves as superstar firms (Parker, 2020). These factors significantly contribute to digital businesses being highly influential and create opportunities to engage in newly plausible behaviors that harm customers on both sides of the market.

Digital markets have various theories of harm that arise from digital approaches to addressing fundamental economic issues like pricing. Two main problematic pricing strategies arise in digital markets: price parity (MFN) clauses and algorithmic pricing. Price parity clauses are agreements between platforms and sellers that products won't be sold on other platforms for a lower rate. These agreements can limit price competition between different platforms and decrease firm entry because of the resulting lock-in of prices. Algorithmic pricing brings distinct problems to the marketplace as sellers can more accurately estimate a customer's willingness to pay for a product leading to lower levels of customer surplus. By combining the higher levels of

price discrimination with machine learning, algorithmic pricing can also lead to indirect collusion in which prices are artificially inflated by monitoring other platform's pricing strategies. This strategy is incredibly challenging to regulate because there isn't explicit communication between companies that proves collusion yet pricing practices reflect inflated levels.

Another significant theory of harm is the degradation of product quality and fewer incentives to innovate for incumbent firms. Most quality harms are intertwined with data use and pushing certain products through advertised prioritization. The availability of digital firms to access data allows the company to analyze and control what users interact with. Data collection raises a major issue of privacy protection and opens the door for sharing customer information. This can have many problematic consequences such as discriminatory advertising among other harms to consumers. In addition to inferior product quality, innovation by incumbent firms can become harmful if the firm innovates intending to raise barriers to entry instead of creating niche, new products. If incumbent firms drive innovation, dominant companies become harder to dislodge and could cause the degradation of innovation quality. The value of ICT has undoubtedly reshaped the economy's structure and has created new challenges for firms and legislators alike.

CHAPTER 4: The Amazon Case

Amazon has rapidly grown into a new-era titan over the past three decades. It was founded in 1994 by Jeff Bezos who wanted to establish an internet retail company and utilized the book market as his entry point. His ambition was immediately apparent as he named his company Amazon, alluding to the importance of the Amazon River, and made their mantra "Get

big fast" to drive his company's behavior. A year after the company was founded, Amazon launched its website that prioritized ease of experience for online shopping and had distinct advantages over traditional brick-and-mortar stores. A few of these advantages include their location, in Seattle Washington where there is no sales tax, more diversified inventory, and the convenience of being accessible anytime, anywhere with an internet connection.

Amazon immediately made a splash with its revolutionary online retail experience and decided to release an Initial Public Offering (IPO) in 1997, raising over fifty million dollars by the end of that year. The company continued to expand its user base through various initiatives like Amazon Associates, allowing sellers to add links to their products and reviews on Amazon, Amazon.com Advantage, which focused on sales of independent booksellers, and zShops, which established a new marketplace to sell additional products. Before 2000, Amazon entered numerous other product markets like toys, electronics, home improvement, furniture, and kitchenware while expanding its distribution centers throughout the US and parts of Europe.

The dot-com bubble threatened many digital companies, and investors questioned whether Amazon would survive because it was operating at a loss while heavily reinvesting into company operations. However, Amazon came out of this period even stronger than before as it continued to gain new customers, began operating in Japan and France, and released Amazon Marketplace which offered free shipping for orders over $100. The company restructured its operations by establishing a more experienced executive team that addressed inefficiencies throughout the business model. This reset was just the beginning of Amazon's dramatic growth.

Over the next two decades, Amazon continued to extend its reach by entering additional markets such as digital media, digital devices, fashion, groceries, healthcare, outdoor and sports, beauty, and more. The company accomplished this expansion by acquiring other companies and

launching many new products. Some of Amazon's most notable acquisitions include Brilliance Audio, leading to the establishment of Prime Music, Twitch streaming services, Diapers.com, food retailer Whole Foods, online pharmacy Pillpack, robot production Kiva Systems, and more. Amazon also released popular tech-based products including the Kindle Fire, Fire TV Stick, Alexa, and Echo (Wells, 2019). All these products were largely successful and further cemented their role as an e-commerce giant.

Amazon's critical business feature has always been its services that complement the marketplace. One of its most prominent services is Amazon Prime, a two-day delivery service guarantee for eligible products through an annual subscription. After its release, the use of Prime exploded, reaching over a hundred million members by 2019. This encouraged Amazon to continue adding features to the Prime subscription such as Prime Video and Music, and discounts on eligible products. Another key service Amazon developed was Fulfillment by Amazon (FBA), which allows third-party sellers to obtain Prime status through Amazon's shipping and return guarantees by utilizing their distribution centers. Another highly profitable feature, Amazon Web Services (AWS) was developed in 2002 when Amazon released product data to third-party sellers. This service provides business data products such as storage and retrieval. This service alone has been critical to Amazon's growth as a company accounting for much of its operating income.

Amazon is not unfamiliar with complaints and legal issues as they have been prosecuted for business practices based on competitive issues and otherwise. Amazon first experienced an antitrust investigation from the European Commission in June 2015 related to Most Favored Nation clauses for e-book companies. The EC determined that price parity agreements hindered competition by limiting innovation and price competition from other services. Amazon

committed to stop enforcing the clauses, allow sellers to terminate their contracts that contain MFN clauses, and stop including these agreements in new contracts (European Commission, 2017). The EC followed through on another complaint against Amazon in July 2019 when they investigated the company's use of seller data. The EC determined that Amazon had a monopoly in the French and German online markets for third-party sellers. The European Commission also decided that Amazon was abusing its position by analyzing nonpublic data for Amazon Retail while self-prioritizing its products or those who use Prime. To settle the case, Amazon committed to not use nonpublic seller data for its retail products, display two Buy Boxes to avoid bias, be more transparent about logistic services, and allow buyers and sellers to connect independently to handle shipping. (European Commission, 2022)

Because of increased attention from Europe and other complaints about its business practices, Amazon became a focal point for researchers and legislators alike. At the forefront of this criticism is now FTC Commissioner Lina Khan. When she was in Law School at Yale University, she published an article titled "Amazon Antitrust Paradox" claiming that the current standing of competition law wasn't equipped to handle the giant and action must be taken to address these gaps as well as Amazon's power (Khan, 2017). Amazon's conflict with legislators came to a peek when Lina Khan was appointed Commissioner of the FTC and a looming lawsuit was imminent.

On September 23, 2023, the FTC and 17 states filed a lawsuit against Amazon for violating the Federal Trade Commission Act claiming that it illegally maintained monopoly power in the online superstore market and the online marketplace services market by utilizing anticompetitive strategies that inflated prices and stifled innovation. The lawsuit outlines the two relevant markets in the United States reflecting Amazon's valuation in General Merchandise

Value (GMV) as 82% of the online superstore market and 71% of the online marketplace services market. The suit states that Amazon abused its position by manipulating seller prices with MFN clauses and prioritizing prime status while degrading transaction quality by pushing advertisements, and self-preferencing (Farronato et al., 2024).

Amazon explicitly used price parity agreements until 2019 when they faced pressure from US legislators who called attention to the practice, which was already banned in the EU. The FTC claims that price parity is still implicitly enforced through Amazon's control of search results allowing it to bury products that don't align with this concept. This conduct will be challenging for the FTC to prove since it is no longer formally in practice but is still valuable to consider overall because of potential price inflation consequences. Again, the EU has already banned this practice which should lead the US lawmakers to question its validity.

Another claim about the company leveraging its position comes from tying the Fulfillment by Amazon (FBA) service with Prime eligibility. This business practice is effective because Prime status is highly coveted due to the prioritization of applicable products and the reputational benefits of guaranteeing fast and reliable shipping (guaranteed by FBA services). From 2019-2023, the only way for sellers to obtain the Prime badge was by using the FBA agreement. Amazon also offers Seller Fulfilled Prime (SFP) which can give sellers a Prime badge after a 30-day trial period using other fulfillment services. However, this was only available from 2015-2019 and again after the FTC filed its claim against Amazon in 2023.

Amazon's advertising practices are one of the main complaints about degrading the quality of service as they allegedly prioritize extensive advertisements in search results. Excessive advertisements can bury organic results and increase the costs for sellers who want to be seen on Amazon's marketplace because they are incentivized to pay for ad preference to reach

consumers who buy easily available products. Competitive concerns arise when ad preference is coupled with the fact that Amazon is also a retailer in their marketplace. This means that they are essentially inflating the input cost of direct competitors. Amazon's search function also allows it to prioritize its retail products. Amazon has a variety of search prioritization functions such as the best sellers badge, frequently bought together suggestions, and the Prime badge. These suggestions allow Amazon to manipulate search results and give preferential treatment to its products in search results.

Another massive issue in the FTC's lawsuit is Amazon's "Project Nessie" which is their algorithmic pricing system that can change the price of their products at any given time. Amazon began experimenting with this concept in the early 2010s as they monitored the response of other online retailers to an increase in pricing on Amazon. They found that many other companies would match their increased prices meaning that Amazon could raise prices with little resistance or repercussions. This project has been turned on and off numerous times throughout the past decade based on external factors. The use of this algorithm raises concern about Amazon's efforts and ability to control prices, potentially inflating them for their benefit.

Amazon responded to the FTC's complaint by submitting a motion to dismiss where they contest the antitrust claims, stating that their practices are the "essence of competition". The motion has since been denied but captures Amazon's response to the FTC's claims against them. In the motion, the company explains that they have publicly aimed to have low prices and innovate their business experience to provide the best quality product for their customers. They contend that they have not committed anti-competitive behavior or harmed their consumers and, claim they are being treated as a scapegoat who is being prosecuted for issues across the entire economy because of their size alone. They counter the claim of monopolization stating that they

compete with thousands of small and large retailers, and cannot be confined to a single "online superstore" market. They continue to defend the prioritization of feature products in the "Buy Box" because they choose featured products based on their low cost, which was encouraged in United States v. Amex. They defend themselves further explaining that the Prime badge is meant to ensure the quality of their service and was never intended to be bundled with fulfillment by Amazon. Amazon states that its retail pricing practices have continually lowered prices to match those of sellers. The motion to dismiss contests the applicability of the Sherman Act because of insufficient evidence and claims that they cannot be prosecuted by the FTC Act alone.

CHAPTER 5: Discussion of Precedent and Philosophy

Undoubtedly, antitrust case precedent will be relevant in the district court's analysis of Amazon's conduct. While many other tech companies face similar complaints, there is little precedent in the United States to guide proceedings against technological giants. No case is overtly alike but, two decisions have comparable characteristics and will influence the court's interpretation of competition law. The main point of reference for network cases comes from the DOJ's lawsuit against Microsoft in 2001 which is widely regarded as a landmark case. The other important point of reference will be Ohio v. American Express because of the case's focus on multisided markets. The outcome and implications of these cases are critical considerations when reviewing new cases against big tech.

Microsoft Inc., like tech companies today, faced widespread competition criticism on multiple occasions in different jurisdictions. The company had been under fire from the DOJ starting in the early 1990s but, was settled in 1995 agreeing that Microsoft must stop using zero-marginal price contracts with computer manufacturers that required them to pay Microsoft

every time a sale was made, regardless of whether the computer used Microsoft's software. It was also determined that Microsoft could not create licensing agreements contingent upon purchasing another product. The DOJ complained that Microsoft broke the decree by bundling Internet Explorer with the Windows operating system. The formal claim alleged that Microsoft violated Section 2 of the Sherman Act, had a monopoly in the personal computer and operating systems market, and illegally maintained its power through contractual agreements meant to hinder competition and the unjust bundling of products.

In this case, the DOJ had to prove anticompetitive behavior through the benchmarks in the rule of reason. The judge found that Microsoft was guilty of almost all of the claims brought by the DOJ including that they had a monopoly in the operating systems market for Intel comparable PCs because they have substantial market share, and maintained their market power through barriers to entry that run on the windows system, which excluded rivals, stifling innovation, and harmed consumers. They were also found to have unlawful contractual agreements but weren't guilty of hindering Netscape, their main competitor. The remedies in this case were that Microsoft couldn't contractually bundle its services or create exclusivity contracts, and had to share technical information with customers (Economides, 2001). These findings are important to the case against Amazon because, the prosecution will likely face a similar burden of proof, where they must first define the market that Amazon has a monopoly, reflect their monopoly power, and then reflect attempts to monopolize. Similarly, Amazon is facing complaints about bundling their services with additional claims captured under the rule of reason such as MFN clauses.

In Ohio v American Express, Visa, Mastercard, and American Express were challenged due to their non-discriminatory provisions that prevented merchants from offering deals to

customers for using certain payment methods. The Department of Justice and 17 states sued the credit card companies for violating Section 1 of the Sherman Act through anti-steering contracts. Visa and Mastercard settled with the DOJ out of court which required them to allow merchants to offer discounts for using cheaper card options, communicate payment preferences to customers, and disclose merchant costs from credit card networks. American Express went to trial and lost the original case in the District Court because the court determined that these contracts raised supplier prices. However Amex. then won their appeal and the subsequent Supreme Court trial (Ohio v. American Express Co.).

The key takeaway from the Supreme Court case with Amex. is that future cases involving two-sided markets require the plaintiff to prove harm to merchants and consumers using the rule of reason. In this case, the plaintiff failed to do so because they only focused on the outcomes on one side of the market (Hausfeld, 2018). While this case doesn't closely resemble Amazon's, it is still important to consider because of the multi-sided nature of the defined market. Considering the implications of the American Express case, the FTC must reflect harm to both the seller and consumer sides of the defined market. The FTC addresses this in their lawsuit explaining that Amazon harms sellers through increased fees and consumers through the degradation of product quality. These two cases will continue to influence the proceedings of the lawsuit against Amazon shaping how the parties and judge will interpret antitrust laws.

The results of the Amazon case and others like it will be formative for the future of antitrust policy in the United States. Therefore, it is important to consider the case through the lens of various modern antitrust theories and consider which philosophy is most supported by contemporary economics. As previously mentioned the prevalent schools of thought include the Chicago School, the Post-Chicago School, and the New-Brandeisians. The future of antitrust

interpretation will balance different theories emphasizing the Post-Chicago School and will be challenged by the populists.

The Chicago School has undeniably impacted antitrust law because it pushed policy to be more "scientific" by drawing on economic theory and establishing the Consumer Welfare Standard. The standard is based on consumer surplus and its main goal is economic efficiency. The theory is based on the perfect competition model and rejects models of imperfect competition such as monopolistic competition and oligopoly models. This simplistic view of markets suggests that the economy is largely self-correcting and that regulation would disrupt natural markets by favoring certain interest groups over others. Largely, this perspective is outdated as economic theory acknowledges that most markets are different and have some degree of imperfection due to variance in economies of scale, imperfect information, barriers to entry, etc. This philosophy is important to maintain because of its focus on empirical economic analysis however, its simple definitions of markets and theories of harm don't transition well to the digital era.

The Post-Chicago School built on the efforts of the Chicago School but, was more flexible and accepting of new economic concepts such as game theory. They still prioritize economic welfare like the Chicago School and focus on explicit behavior instead of market structure. However, this school acknowledges the logic behind anticompetitive behavior like the sustainability of cartels and predatory pricing, which isn't possible in Chicago's framework (Yoo, 2020). This philosophy was largely responsible for the findings in the Microsoft case and will likely influence Amazon's case as well (Hovenkamp, 2001). While it may not encompass as many topics and behaviors as the populist perspective, the Post-Chicago School's use of the

welfare standard combined with acceptance of new economic theory will allow it to evolve into more concrete analyses in the future.

Neobrandeisians are on the more extreme side of antitrust policy wishing to push antitrust law back to enforcing social and economic goals. They reject the consumer welfare model and believe that free markets are not naturally occurring because no market operates outside the law. It has taken influence from the Harvard School in considering market structure but believes that the role of antitrust extends beyond economic outcomes. It prescribed that the government has an interventionist role in antitrust and that public interest, such as labor market outcomes or the impact on small businesses, should be included in decisions (Glick, 2023). The populist philosophy will continue to challenge the status quo and inspire change among legislators but will only experience moderate success due to the distinct lack of empirical support (Lamoreaux, 2019). Neobrandeisians will progress in expanding the application of the law but require more than anecdotal evidence of historical successes to solidify populist interpretation.

There are many different ways scholars suggest addressing complaints about antitrust policy. Those who identify with more laissez-faire philosophies are skeptical of any kind of intervention because they are wary of overregulation; however, Amazon probably won't get out of this lawsuit unscathed. More moderate suggestions include defining market-specific rules such as regulations surrounding data use or defining platforms as public utilities (Greenfield, 2020). Some have even suggested the creation of an economic constitution to set established rules of trade that clarify recurring issues (Munger, 2022). These outcomes are the most plausible as they address complaints of lacking antitrust without causing irreparable damage to Amazon. Some extreme populists feel that companies defined as monopolies should be broken up such as preventing Amazon Retail from selling their products on Amazon Marketplace. Nevertheless,

this remedy is not overly common and would be an uncharacteristic step away from the past decades of regulation.

The Federal Trade Commission's case against Amazon is unique because they're approaching it through the FTC Act citing harms defined in the Sherman Act. Realistically, the circumstances of Amazon's case are similar to precedent cases other than the FTC seeking injunctive relief. This means they will attempt to address gaps in competition law rather than, or in addition to, specific remedies for Amazon itself. The Commission will likely utilize this approach to outlaw MFN clauses, as the European Commission has already done, and further develop regulation around digital markets similar to the EC's Digital Markets Act. Considering case precedent and a greater desire for antitrust intervention, Amazon will likely be found guilty of monopolization resulting in new legislation for digital markets.

CHAPTER 6: Conclusion and Future Work

The economy has experienced dramatic structural changes with the development of ICT technology and the widespread use of the Internet over the past 30 years. Technology-driven companies, like Amazon, have taken advantage of digital markets and are now some of the wealthiest companies in the world. During this time, economic indicators in the United States have signaled increasing concentration levels for markets, wealth, and investment. These trends have attracted the attention of scholars and legislators seeking to address the issues that have arisen since the digital economy emerged.

Antitrust legislation has been at the forefront of policy discussions because enforcement has been more lax since the influential Chicago school, and some see it as a cause for the rise of

tech giants. A growing number of people now feel that more regulation is necessary to prevent malpractices and inequities that have come with these major companies. In response, the government pursued several antitrust lawsuits against Amazon, Apple, Facebook, and Google.

The FTC's lawsuit against Amazon will be an extensive case spanning many years. It contests Amazon's alleged abuse of a dominant position that harms both buyers and sellers through the degradation of quality, search preferencing, excessive advertisements, seller fees, price parity agreements, and other similar behaviors. While there are many explanations for these practices and trends, Amazon will likely face injunctions from the FTC at the end of this case. Antitrust philosophy has taken many forms and focuses throughout its history in the United States, but is now largely dominated by the Post-Chicago school and a rising populist movement. These schools will significantly impact the results of Amazon's case and the following policy changes.

Future work addressing the role of antitrust in digital markets should continue by including new developments such as game theory, industrial organization, or behavioral economics. These theories should be applied to antitrust cases to create other measures of competitive harm to go with the welfare standard. The expanded use of economic theory in antitrust law will address some complaints of older schools by ensuring a more encompassing evidence-based approach. Other important considerations for future research on antitrust and the digital economy should focus on mergers and acquisitions, business dynamism, and the means other jurisdictions use to address similar issues.

Competition law in the United States has a robust history with its fair share of controversy and celebration. Issues of scope and application still haunt the field, but the modern era has revitalized the desire to address these issues and improve policy. Studying this structure

is critical in addressing anti-competitive behavior and greater inequities and must be prioritized to determine the reach of regulation. Scholars and legislators must determine if competition law is best suited to handle economic legal issues, or if additional legislation would be more effective.

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