

**THE HIDDEN COST OF CHEAP LABOUR: AN ANTITRUST REASSESSMENT BEYOND CONSUMER  
AND LABOUR LAW**

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**ABSTRACT**

*The article examines the intersection of labour issues with antitrust law, highlighting a shift from traditional consumer-focused perspectives. Historically, antitrust authorities have approached issues from the vantage of consumer protection, labour law, and human rights, often overlooking the antitrust implications of labour practices. Recently, however, there has been increased scrutiny on non-poach and non-compete agreements, with competition authorities drawing analogies between the labour market and retail markets, where workers are seen as products and companies as colluding entities.*

*This article advances the discussion by exploring a novel antitrust concern within the labour market. By analyzing recent controversies involving Dior and Armani, accused of exploiting workers through inhumane conditions and low wages, the authors argue that labour costs, an integral component of production costs, should also be examined under antitrust frameworks. Specifically, they propose that extremely low labour costs, which can significantly reduce production costs, should be scrutinized as a form of predatory pricing.*

*The authors suggest that current antitrust laws, which do not typically address such labour practices, should evolve to incorporate new tools to address these challenges. They draw comparisons with European antitrust approaches to propose potential solutions for integrating labour market concerns into traditional antitrust analyses.*

**Key Words:** Labour law, Consumer law, Competition law, Antitrust, Predatory pricing, Non-poaching agreement

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## 1. INTRODUCTION

The pursuit of low prices often conceals a troubling reality: many industries exploit labour to meet the relentless demand for cheap merchandise (Nair, 2016). Retailers, driven to lower costs, fragment their orders across multiple suppliers, undermining stable and ethical relationships (Costanza, 2020). This constant competition and erratic order volumes pressure suppliers to cut costs by underpaying workers and resorting to informal subcontractors, who impose even harsher conditions to keep up with rising demand and low prices (Pons-Vignon, 2011).

To grasp this dynamic, consider the recent allegations against Armani and Dior for exploiting workers in Italian factories while misleading customers about the ethical manufacturing of their products (Online Bureau, 2024). In this case, in its usual order of practice, the Italian Competition Authority (ICA) is focussing on consumer and labour rights, (Online Bureau, 2024). While labour and consumer law violations are serious, the authors highlight another often-overlooked concern: the economic antitrust angle in the labour market. **This aspect, though latent, is significant and frequently neglected by regulators.** The authors argue that antitrust concerns should extend beyond consumer welfare to include broader policy issues related to general welfare. They suggest that addressing these concerns through an antitrust lens from the outset is crucial.

In support of this argument, the authors draw on Indian, American, and European jurisprudence to advocate for a greater focus on antitrust issues in labour law. Their paper is structured as follows: Part II provides a brief history of the intersection between labour law and competition law, detailing how authorities have historically applied an antitrust perspective to labour issues and setting the stage for their argument. Part III examines the economic impact of cheaper labour costs, exploring how the labour market affects the product market. It argues that declining wages in the fashion industry present an antitrust issue alongside consumer and labour law concerns. The paper further proposes a test to reconcile antitrust considerations with consumer and labour law in the product market and analyses the creation of a new school of thought—referred to as ‘the European School,’ in addition to the Chicago and Harvard Schools. This approach aims to ensure that the hidden cost of labour as a component of pricing is no longer overlooked in investigations into corporate labour exploitation.

## 2. HISTORY OF COMPETITION LAW AND LABOUR LAW: WHERE THE REGIMES INTERSECT

### *a. Lower the Wage, Higher the Competition? Analyzing the China-India Case Study*

For years, China has dominated global trade and exports from developing countries, leveraging its inexpensive labour, among other factors, to solidify its position as the world's manufacturing powerhouse (Baldwin, 2024). However, in the 19th century, China was thought to have reached the Lewis turning point (the stage at which a country's surplus labour becomes scarce), where it exhausted its supply of cheap labour while maintaining near-constant real wages (Das & N'Diaye, 2013). Since China acceded to the World Trade Organisation (WTO) in 2001, real wages in the manufacturing sector have increased and now align with those in other low-cost Asian countries such as Thailand and the Philippines (Chandrashekhar, 2014).

A 2002-2009 empirical study by C.P. Chandrasekhar highlighted that China's wage levels were initially lower than India's (Chandrashekhar, 2014). By 2009, however, Chinese compensation costs had surged ahead (Chandrashekhar, 2014). Despite these increased costs, China's compensation remained lower than in many other regions, which, paradoxically, enhanced the competitiveness of countries like India (van Ark et al., 2010). Given the significant role of labour compensation costs in determining product competitiveness, this unusual shift in competitiveness raises questions. Chandrasekhar suggests that this change may be due to various factors, including infrastructural constraints and the strategic focus of businesses on competitive global markets (Chandrashekhar, 2014). To gain a deeper understanding of this shift and the variables affecting different aspects of the labour market, as well as the dynamics of wages and their impact on the product market, it is essential to examine the concept of 'monopsony' at this stage.

### *b. Understanding Monopsony in the Labour Market: The Rise of a Phenomenon Dismissed*

While the term 'monopsony' might be less familiar than 'monopoly,' it operates on a similar principle: a firm with monopsony power can pay lower prices for its inputs (Council of Economic Advisers, 2016). In the labour market, a monopsonistic employer can offer lower wages than would be seen in a competitive market without losing all its workers to other employers (Council of Economic Advisers, 2016). Like monopoly power, monopsony generally leads to economic inefficiency and results in a redistribution of income from workers to employers (Naidu & Dube, 2024).

Similar to the retail market, in the labour market, the forces of supply and demand dictate the price, output level, and quality of the input (Naidu & Dube, 2024). The interaction between workers and firms in a labour market is often governed by a bargaining process which directly impact the cost of the product/total labour cost (Naidu & Dube, 2024). The relative bargaining strength of the parties involved depends on their available options (Denk et al., 2019). For workers, outside options might include other potential employers offering higher wages or better conditions. Conversely, employers might have the option to hire other workers willing to accept lower wages. These outside options influence supply and demand, thereby affecting wages and employment levels (Denk et al., 2019).

In a perfectly competitive labour market, numerous workers and firms exist, with neither side holding significant bargaining power, leading to competitive wages that reflect workers' incremental contributions to production (Michaelides, 2010). Firms compete to attract the same pool of workers, meaning no firm can offer wages lower than its competitors without losing employees (Alderman & Blair, 2024). Consequently, competitive firms must align their wages with market rates, ensuring equal compensation for similarly productive workers in comparable roles (Alderman & Blair, 2024). In contrast, when barriers inhibit wage competition among firms, the market discipline that typically enforces wage standards is weakened (Alderman & Blair, 2024). When one side gains stronger bargaining power, wages diverge from competitive levels: stronger worker power leads to higher wages, while greater firm power results in lower wages. The latter of the two scenarios is known as monopsony power. In such scenarios, a monopsonistic firm faces a choice: it can either offer higher wages to attract workers or restrict employment to those willing to work for lower wages, thereby maintaining lower overall wage levels (Boal & Ransom, 1997).

The monopsonistic scenario is problematic for several reasons: *Firstly*, though this results in lower wages and increased profits for firms, it is inherently inequitable, especially since firm owners are generally wealthier than their employees. *Secondly*, lower wages reduce labour supply as workers are less inclined to work, which constrains output and economic growth, resulting in inefficiency (Manning, 2004). These two negative impacts of monopsony, inequality and inefficiency, often occur together, which suggests that addressing monopsony power will simultaneously enhance efficiency and reduce inequality (Council of Economic Advisers, 2016). Monopsony wage-setting in concentrated labour markets has also been shown to reduce wage levels and has been associated

with sluggish Gross Domestic Product (GDP) growth both in the United States (US) and the European Union (EU) (U.S. Department of the Treasury, 2022; Araki, 2022). Since both these implications align with improving the domestic market, it is important to note the concept's presence and evolution in both theoretical and practical contexts.

Well, not so long ago, economists largely dismissed the notion of monopsony in labour markets (Karatzas, 2009). In recent memory, academic economists and influential policymakers widely believed that minimum wage legislation was a misguided and even detrimental approach to assisting workers (Ashenfelter, 2010). Wage inequality was often attributed to temporary skill mismatches resulting from technological changes, with solutions typically involving investment in education rather than minimum wage regulations, collective bargaining, or labour law reforms (Ashenfelter, 2010). An antitrust response to labour market issues was considered unthinkable.

Moreover, the reluctance to use antitrust law as a tool for regulating wages and employer monopsony power is notable, particularly given that antitrust laws have historically been used to oppose and undermine labour movements (Marinescu & Posner, 2020). The lack of antitrust enforcement in labour markets is partly due to the antagonism that labour unions have felt towards these laws (Marinescu & Posner, 2020). Naidu, Posner, and Weyl highlight the obstacles workers face in pursuing antitrust actions, such as low damage awards for individual claims and difficulties in class action lawsuits (Naidu et al., 2018). Labour unions, which are better positioned to navigate these challenges and advocate for favourable public policies, including antitrust reforms, have largely opted not to pursue this route (Naidu et al., 2018). Their avoidance of antitrust advocacy suggests a significant aversion to these laws.

However, there is now growing discussion among scholars about employing antitrust law to counteract employer wage-setting power (Dimick, 2023). This shift is noteworthy, and though not the first, one of the most influential pieces of research in this context is the work by Professors Piketty and Saez on income inequality in the United States, which challenged the traditional supply and demand model by suggesting that minimum wages might not lead to reduced employment as previously thought (Piketty & Saez, 2003). Their study argued that employers exercise significant wage-setting power, creating a “monopsonistic” labour market where wages are set below competitive levels, leading to a lower labour supply and reduced output (Piketty & Saez, 2003). Contrary to conventional wisdom, minimum wages could thus increase employment and enhance market efficiency (Piketty & Saez, 2003). Recognizing that employers wield market power in

labour markets as much as they do in product markets opens the door to applying an antitrust approach to labour market regulation.

*c. Antitrust Tools in Action: A New Approach to Labor Market Regulation*

To study the regulation of the labour market with antitrust mechanisms, a few important trends must be examined. *Firstly*, consider the scenario of a merger to demonstrate the relevance and under-representation of antitrust considerations in labour issues (Dimick, 2023). An Issue Brief from the Council of Economic Advisors, US, reported that while antitrust laws do apply to reductions in competition for employees resulting from mergers, just as they do to reductions in product market competition, there have been few merger complaints citing employment monopsony as a reason for challenging transactions (Council of Economic Advisers, 2016). The Issue Brief argues that this might be because mergers that raise concerns about labour market monopsony are also likely to raise issues regarding product market competition, an area with more established legal precedents (Council of Economic Advisers, 2016). Even when the harms in product and labour markets do not overlap, antitrust authorities are mandated to protect competition in both spheres.

*Secondly*, labour market ‘dynamism’ (the frequency of changes in employment relationships) has been a prevalent trend for several decades in countries like India (Anant, 2006). Referring back to the initial example, fast fashion is a major arena in which this trend is reflected. Here, casual labour is more common than permanent positions (Vaidyanathan, 2020). Many fashion firms exploit India’s cheap labour to lower production costs and boost profit margins. Brands such as Gucci, Saint Laurent, Louis Vuitton, Fendi, Christian Dior, Burberry, Mulberry, Marks & Spencer, Tesco, Sainsbury’s, and Ralph Lauren, among others, hire skilled craftsmen and embroiderers in India at wages that often rival or fall below those of unskilled workers (Whiteside, 1979). This employment comes with minimal social security and job stability (Vaidyanathan, 2020). ‘India’s low wages and lax labour laws, coupled with widespread corruption and inefficiencies in inspections and scarcity of labour unions, make it an attractive destination for foreign brands seeking to outsource (Araki, 2022). This is highly indicative of a monopsonistic labour market dynamic.

Economic theory demonstrates that firms with monopsony power tend to hire fewer workers at lower wages compared to a competitive labour market (Araki, 2022). The trade-off for these firms is that while they lose potential output and revenue, they save significantly on costs by paying reduced wages (Araki, 2022). An important consequence of this is that monopsonistic employers

can be encouraged to hire more labour if their ability to set wages below competitive levels is restricted, for example, through collective bargaining agreements or minimum wage laws (Dimick, 2023). Additionally, limited competition in a labour market can facilitate collusion among employers, either implicitly or explicitly, allowing a few employers to coordinate their actions (Dimick, 2023). This collusion might involve agreements not to hire each other's workers or coordinating wage offers to avoid competitive bidding (Dimick, 2023).

Policy interventions and practices resembling collusion and abuses of dominant positions include:

1. *Non-Solicit Agreements*: In “non-solicit” or “no-cold-calling” agreements, employers agree not to actively seek out employees from other companies with job offers. These agreements can be sector-wide or involve just a few parties and can be bilateral or multilateral, affecting either one party or both. (Dentons Link Legal, 2024).
2. *Non-Compete Agreements*: Employers may use non-compete clauses in employment contracts to limit 'workers' employment options after leaving their current job. This unilateral action shifts bargaining power in favour of employers, independent of market concentration (Lavetti, 2021).
3. *Information Sharing*: This involves the exchange of sensitive information regarding employee terms and conditions between businesses. These generally take place informally in the form of verbal agreements or general practices but can equally constitute infringements of antitrust laws (Cooley, 2023).
4. *No-Poach Agreements*: In no-poach agreements, employers agree not to hire each other's employees, ranging from explicit no-hire clauses to coordinated policies on hiring, pay, and benefits. This collusion, often hidden from workers, resembles horizontal market allocation but on the demand side (Saveri Law Firm, 2023).

Out of the above, no-poach agreements, specifically, have had their own set of criticisms due to their economic impacts (Aresu, 2024). *Firstly*, wage-fixing and no-poach agreements depress wages and benefits for employees. Wage-fixing sets wages at monopsony levels, reducing labour demand and output while increasing consumer prices. No-poach agreements stifle labour market dynamism, negatively impacting compensation and productivity. *Secondly*, by curtailing wage competition, no-poach agreements prevent firms from offering higher wages to attract or retain employees. Typically secret, these agreements leave workers unaware and unable to negotiate for better compensation, increasing search costs and reducing incentives for training. *Thirdly*, no-

poach agreements hinder the efficient allocation of skilled employees, limiting productive firms' ability to attract talent and stifling innovation, as employees are less likely to move to firms where they can add the most value.

Across Europe, several notable no-poach case studies have surfaced in the past half-decade itself. In the EU, competition authorities classify naked no-poach agreements as market-sharing cartels and regard them as "by object" restrictions of competition (Aresu, 2024). Such agreements might theoretically qualify for an exemption under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), but if they do not meet the necessary conditions, they are generally considered void and subject to fines (*Treaty on the Functioning of the European Union*, 1958, art. 101(3)).

Moreover, the Portuguese competition authority uncovered a cartel among clinical laboratories for COVID-19 tests, which included an agreement not to hire workers (Rafferty, 2022). Additionally, the Portuguese Professional Football League and 31 clubs were fined €11.3 million for agreeing not to hire football players who had terminated their contracts due to COVID-19 (Portuguese Competition Authority, 2022). In Lithuania, the competition authority fined the Lithuanian Association of Real Estate Agencies and its members for including a no-poach clause in their code of ethics (*KT News*, 2022). Similarly, in Romania, an investigation was launched into no-poach practices involving Renault Technologie and other companies in the automotive engineering sector (Romanian Competition Authority, 2022). Furthermore, Spain's Catalan competition authority also examined no-poach agreements among members of the Association of Independent Private Schools (Posner, 2023).

Another significant development was in the United Kingdom (UK) in February 2023, when the Competition and Markets Authority (CMA) issued new guidance against anti-competitive agreements in labour markets (UK CMA, 2023). This marked the CMA's first explicit guidance on applying antitrust law to labour issues, emphasizing that collusion among employers regarding both freelancers and permanent staff is illegal and can lead to serious consequences (UK CMA, 2023). The CMA identified three main types of anti-competitive behaviours in labour markets, described as forms of business cartels: no-poaching agreements, wage-fixing agreements, and information sharing. This follows the CMA's increased focus on this issue in July 2022, when it investigated possible wage-fixing among sports broadcasters concerning freelance pay rates (UK CMA, 2024).

A similar positive trend is evident in the US, where most big brands have come under scrutiny and even been penalized for indulging in non-poach agreements, from McDonald's to Burger King, and Google to Apple (Dorminey, 2024; Papsun, 2022; Whitney, 2015). Most recently, in January 2023, the Federal Trade Commission (FTC) issued a notice of proposed rulemaking (NPRM) aimed at banning employers from using non-compete clauses with their employees (Morgan Lewis, 2024). The proposed rule would mandate that employers eliminate any existing non-compete agreements by the compliance date specified in the final rule (Morgan Lewis, 2024).

Global dynamics reflect how current practices align with economic theories more often than not. Nevertheless, the authors' focus remains specifically on how the exploitation of cheap labour affects competitors in the product market by driving down costs excessively. The authors will now present the most important part of this article, which offers a new perspective for regulators on analyzing antitrust law in the labour market.

### **3. EXPLORING THE ECONOMIC IMPACT OF ANTITRUST LAWS ON THE LABOR MARKET**

#### *a. Cost Price: The Deal Maker*

In this part of the article, the authors provide a new interpretation of antitrust law in relation to labour issues. The discussion and relevance of the Harvard and Chicago Schools cannot be overlooked when considering antitrust interpretations. In giving the new interpretations, the authors would take a leaf out of the main thrust of the Chicago schools, which avers that “the end goal of competition law is consumer welfarism.” In his highly influential work, *The Antitrust Paradox*, Robert Bork asserted that the sole normative objective of antitrust should be to maximize consumer welfare, best pursued through promoting economic efficiency (Khan, 2017). Although Bork used “consumer welfare” to mean “allocative efficiency,” courts and antitrust authorities have largely measured it through effects on consumer prices (Khan, 2017). Here, the effect of this interpretation on consumer prices is that the lowest price a player can offer will dominate the market. The Chicago School argues that this is how competition should operate (Khan, 2017).

When we talk about lower prices, the first and foremost aspect which draws the ire of regulators is “predatory pricing” (Giocoli, 2014). Today, enforcement of this concept is well-established in global competition jurisprudence. As a result, each player aims to sell products at the lowest price possible, just above the threshold of predatory pricing.

While calibrating predatory pricing, the main consideration is comparing the selling price with the cost price, which involves assessing the price offered to consumers and the price that competitors must contend with (Bhattacharjea, 2018). Consider two players: one produces a pair of shoes for \$100, while the other's cost is \$110. The first player sells the shoes at \$112, which is not considered predatory pricing and represents a 12% profit. Two scenarios might occur: the second player either matches the \$112 price, resulting in negligible profits, or sets a price just slightly above, say, at \$115. In the latter scenario, traditional views on competition would not typically raise concerns about anti-competitive behaviour.

The authors propose an alternative perspective on this situation. They argue that from the Chicago School's viewpoint, one key aspect of competition law is that a player can price a product as low as possible while still competing with other players, thus increasing overall market competition in the market (Khan, 2017). However, the condition is that achieving the lowest price and reaping profits must result from business strategy and acumen. In the Chicago School and modern competition law, every player tries and must try for a 'price cut.' Therefore, if we consider the selling price of two players to be constant, for instance, because the price has to be matched, then it is the cost price that makes or breaks the game for a player.

Taking a cue from the above example, if the second player tries to sell the shoes at the same price, they will soon fall significantly behind in profits, creating a large gap between the two entities. This could lead to a monopoly in the shoe market if the lower profits compel the second player to cease production and exit the market. This would eventually create a monopoly (assuming only two players are present in the product market). Looking closely at this example, it is evident that the cost price compelled the second player to earn lower profits and eventually exit the market. So, the question is: does competition law apply to the cost price? **Is there cost price scrutiny under the investigation of predatory pricing?**

*b. Labour Cost: A Key Component of the Price Cost*

Before elucidating the central idea of this article, it is imperative to trace the journey of the ideas discussed so far. We have seen that antitrust law was initially ignored when addressing labour issues (Grimes, 2024). Over time, authorities began using antitrust tools to consider labour as the "product itself" (Grimes, 2024). This interpretation led to the enforcement of cases involving non-poach and non-compete agreements, such as cartels or refusal-to-deal cases in the product market (Aresu, 2024). However, no competition watchdog has yet considered labour from the perspective

of being “one of the components of the cost price of the product” (Online Bureau, 2024) The authors contend that antitrust issues should be examined from the economic perspective of labour rather than focusing solely on it.

The authors argue that while antitrust discussions on labour typically address non-poaching agreements and their impacts, this analysis usually emphasizes the overall investment in compensation and the total cost to the company (CTC). It often overlooks how labour costs factor into the final product’s economic equation. Recognizing that labour costs are a significant component of the final product’s cost structure is crucial. By examining antitrust concerns through this broader economic lens, a more comprehensive understanding can be gained of how these issues affect labour markets and the economic dynamics of the products and services involved.

Even Italy’s most recent court findings against luxury fashion titans Dior and Armani reflect similar dynamics (Online Bureau, 2024). The two fashion brands have been thrust into the spotlight for their suppliers having been implicated in egregious worker exploitation and mistreatment (Online Bureau, 2024). The allegations against the fashion giants have come in waves. In April 2024, allegations emerged against an Armani subsidiary after a court revealed that the company had outsourced production to Chinese suppliers with Italian factories where workers were paid as little as €2-3 (\$2.16-3.25) per hour for gruelling 10-hour days, often working seven days a week (Supply ChainBrain, 2024). These bags, purchased by Armani subcontractors at €93 each, were sold to the brand for €250 and ultimately retailed to consumers for €1,800 (Supply ChainBrain, 2024). A Milan court criticized Giorgio Armani Operations for negligently enabling a cost-cutting production system that ignored legal and labour standards. By June 2024, Dior faced judicial scrutiny in Milan for failing to address labour exploitation in its Italian supply chain, with authorities citing inadequate measures to prevent such abuses (Danziger, 2024). By July 2024, similar concerns arose, with reports indicating that the companies’ handbag production was subcontracted to Chinese firms that breached numerous ethical labour standards (Online Bureau, 2024). Workers at these facilities, owned by Chinese entities and linked to Dior, were found to have been subjected to unsafe working conditions, including the removal of safety equipment from machines and being forced to live and sleep in the factories (Online Bureau, 2024).

The recent investigation by ICA into the conditions at Armani and Dior’s factories, alongside the substantial markups on their handbags, is just another instance of a longer tale of human exploitation by the fast fashion industry (Pons-Vignon, 2011). The ICA examines whether these

luxury brands misled consumers by promoting their products as exemplars of “craftsmanship and excellence” while potentially exploiting cheap labour (Pons-Vignon, 2011). This is not the first instance of major fashion brands facing allegations of labour exploitation and human rights abuses (Whiteside, 1979). In 2023, similar concerns were raised about H&M, Primark, and Zara regarding the exploitation of workers in Bangladesh (Clean Clothes Campaign, 2024). Additionally, labourers in Mumbai, India, particularly embroiderers, have suffered from poor working conditions for decades (Schultz et al., 2020).

Such issues involve a complex interplay of legal violations, including labour regulations and consumer protection. From a labour rights perspective, relevant labour laws, such as India’s Contract Labour (Regulation and Abolition) Act of 1970 and other labour regulations, come into play. From a consumer rights perspective, buyers have a right to be informed that their products have not been produced through unethical practices (The Contract Labour (Regulation and Abolition) Act, 1970; OECD, 2024). Misleading claims, including those related to greenwashing, also fall under scrutiny (OECD, 2024). ESG (Environmental, Social, and Governance) standards are crucial in this context, as they ensure transparency and accountability in corporate practices (Suleymanova, 2021). When consumers expect that the premium they pay for high-end products reflects ethical production practices as implicitly outlined in a corporation’s ESG policy, any deviation from this can be addressed under consumer protection laws, such as the Consumer Protection Act, 2019 in India (Consumer Protection Act, 2019).

### *c. The Scrutiny of Cost Price under Predatory Pricing*

So far, it has been observed that when there is a significant gap between the cost price and the selling price of luxury brands due to extremely low payments to labour, the issues raised or the laws under which these activities can be addressed are primarily consumer and labour laws. While these approaches are necessary, the authors argue that such activities also violate antitrust laws.

In the preceding paragraphs, the dynamics of cost price were explored, raising the question: Is there cost price scrutiny in the investigation of predatory pricing? This part of the article addresses that question.

To fully understand the legal implications of low prices, it is necessary to grasp the concept of predatory pricing. Although the article does not focus on any specific jurisdiction, recent inquiries in European countries concerning luxury brands offer a relevant context. According to Richard Whish’s definition under European Competition Law: *“The idea of predatory price cutting is*

*simple enough: that a dominant firm deliberately reduces prices to a loss-making level when faced with competition from an existing competitor or a new entrant to the market; the existing competitor having been disciplined, or the new entrant having been foreclosed, the dominant firm then raises its prices again, thereby causing consumer harm.”* (Whish & Bailey, 2011)

For many years, Bork and his proponents have argued that predatory pricing is not practical because a market player must endure losses over a long period, and the player will not enjoy monopoly profits for long until competitors exit the market. Additionally, if it is easy for any firm to exit, the market structure allows for new entrants to enter while the monopolist attempts to reap monopoly profits. However, this position has largely changed. The practice of predatory pricing is now considered to infringe **Article 102 of the Treaty on the Functioning of the European Union (TFEU)**.

Today, every market player clearly understands that it cannot sell products at prices lower than the cost price without attracting the regulator’s scrutiny. Therefore, the new tactic practised under the guise of business endeavour is “reducing the cost price of the product” to a competitive level. The authors do not suggest that players cannot reduce the cost price; in fact, this is a legitimate way to create a profitable business without engaging in anti-competitive conduct.

However, the authors assert that this steep cost reduction must also stem from the player’s skill. To illustrate, the authors contend that, as seen in the aforementioned examples, luxury products—being dominant players in the market—can exploit their influence to bypass labour laws and subject workers to squalid conditions. These dominant players often operate in an oligopoly, with many options to replace a labourer with another; thus, workers become dependent on them for employment. In such situations, these players may abuse their dominant position by offering extremely low wages.

Before going into the explanation, for the sake of the reader’s clarity, here are a few definitions to understand the analysis. Predatory pricing as mentioned above occurs when a dominant company deliberately sets its prices below cost to force competitors out of the market or discourage new entrants, with the ultimate goal of raising prices once competition has been eliminated (Whish & Bailey, 2011).

Similarly, Predatory Labour Cost refers to the deliberate suppression of wages or the imposition of exploitative working conditions to undercut competitors or create high barriers to entry (Gürkaynak & Özgümüş, 2024). By artificially lowering labour costs to an unsustainable level,

this practice distorts fair market wages and undermines healthy competition. (Whish & Bailey, 2011).

From an economic standpoint, predatory labour cost can be examined in a manner similar to predatory pricing, where a firm lowers prices below its average variable cost (AVC) to eliminate competition. In this case, a firm engages in predatory labour cost when its wage expenditure per unit of output drops below a sustainable labour AVC, i.e. the minimum level at which competitors can operate while adhering to fair labour standards. If a firm artificially suppresses wages beyond this threshold, it can create conditions where ethically operating competitors cannot remain viable. This can ultimately reduce market competition and pave the way for monopolistic control, as illustrated in the shoe-maker example. Returning to the same, Player A, who is abusing their dominant position by paying extremely low wages, produces the same quality shoe at \$100 and sells it for \$112. In contrast, Player B, who adheres to basic labour laws, produces the same shoe at \$110. Reiterating the earlier assertions, this ongoing practice would likely drive Player B out of the market. This example clearly demonstrates that such conduct—predatory pricing in the form of reducing labour costs i.e predatory labour cost to an extremely low level—is a clear case of anti-competitive behaviour.

*d. The Test to be Undertaken*

But for this to happen in real-life scenarios, competition authorities must change the way they view labour issues, and, most importantly, there must be an adoption of the new idea that predatory pricing can also be examined through the lens of cost price. So far, the definition of predatory pricing involves comparing the product's cost price and selling price. The new approach to predatory pricing should include a detailed investigation of how a player has reached a particular price, followed by a comparison with the average cost price of other players.

From an EU legal standpoint, predatory pricing is addressed under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission's Guidelines on the enforcement of Article 82 of the EC Treaty outline two key criteria for identifying predatory pricing: (i) sacrifice and (ii) anti-competitive foreclosure.

The 'sacrifice' element requires the European Commission to evaluate whether a dominant firm has incurred avoidable losses by reducing prices or increasing output over a specific period. This assessment helps determine whether the firm is intentionally pricing below cost to eliminate competition. However, in the present scenario, firms remain highly profitable due to significantly

reduced cost prices. The prevailing industry selling price allows them to generate substantial profits, ultimately leading to the exclusion of competitors from the market.

As far as ‘sacrifice’ is concerned, the authors suggest that while assessing the harm, the new approach must include the percentage of profits derived from an uncompetitive cost price. The analysis of predatory pricing should not only investigate the difference between the selling price and cost price, where a firm incurs temporary losses to foreclose the market, but also consider scenarios where high profits are sufficient to foreclose competition. This includes examining the average cost price and the factors contributing to it, such as predatory labor costs.

One may argue that if labour laws were strictly enforced, there would be no need for competition intervention from regulators, and the authors agree with this point. However, the grim reality is that this does not happen. When it does not, it constitutes a violation of labour laws through the payment of extremely low wages to workers. The offender should be punished not only under labour laws but also under competition law.

Another way to understand the antitrust concern is that, by engaging in such conduct, the dominant player infringes on the basic human rights of workers and is thus punished under labour laws. These practices also harm consumers, warranting penalties under consumer laws. However, the competitor of the dominant firm is impacted even more severely than the general consumer. This type of practice violates neither the Chicago School nor the Harvard School of thought. However, it still constitutes an attack on the market player, potentially driving them out of competition and thereby violating competition law in the traditional sense. Therefore, this conduct must be investigated under competition law, as per the aforementioned analysis.

#### **4. SCOPE FOR NEW INTERPRETATIONS: AN ANALOGY WITH THE EUROPEAN SCHOOL**

So far, the crux of this article has been to expand the interpretation of competition law. The philosophy that competition law exists to unleash the potential of all players by protecting them from monopolistic or monopsonistic market structures and the unsolicited conduct of other players has many supporters. However, in modern times, it is not enough to analyze this issue solely through the lens of the Harvard School, which focuses on market structuralism. This approach is more useful in the digital market, where the concept of “winner takes all” prevails” (Sipe, 2003). Also, if scrutiny is conducted through the lens of the Chicago School, proponents of Robert Bork’s theory and the adherents of the antitrust paradox would only analyze the rate card of the end

product, which does not occur in either the digital market or traditional brick-and-mortar markets. In fact, the focus is on how low the price can go (Sipe, 2003).

In such a scenario, players might opt for tactics that help them escape legal scrutiny, allowing them to engage in conduct that erodes competition in the market like a proverbial termite. This conduct is so latent that it does not fit within the jurisprudence of traditional predatory pricing, where the dominant player pushes competitors out of the market by incurring losses and then recoups after attaining a monopoly.

In this new form of predatory pricing, the dominant player's conduct causes the competitor's profits to shrink daily, potentially leading the competitor to exit the market by indulging in predatory labour cost.

At a time when antitrust academia's interest is heavily focused on the activities of Big Tech, this article serves as a reminder of the need for new interpretations in the brick-and-mortar market and new tools for antitrust law.

One of the suggestions for the new tool is that another school of thought that could be useful and is closest to the new interpretation of the authors is the European School. The European School, like the Chicago School, discusses the market and calibrates its efficiency by the total producer and consumer surplus. Both are largely based on market economics, but there is a distinction as well. The distinction or divergence lies in the interest in social equality (EE&MC, 2016).

Furthermore, consider some important insights from the Competition Competence Report (2016). It highlights that within the European School of thought, social equality is attained by valuing the wealth gains of both producers and consumers equally (EE&MC, 2016). Proponents believe that the benefits of the market must be distributed equitably within society (EE&MC, 2016). These 'rules of the game' are incorporated into EU competition law, which functions as **a pillar of the "social market economy" concept by aligning economic policy with social policy objectives** (EE&MC, 2016). **The report also notes that: "In the European School, the well-being of people includes, besides price elements, a holistic perception of consumer utilities and preferences. Interests of the 'average consumer' or citizen lie at the heart of the European School"** (EE&MC, 2016).

Therefore, the authors suggest that any new interpretation by regulators examining cases in the labour market using the new tool analyzed in the article could draw inspiration from the European School of the "Social Market Economy." This approach extends beyond just "consumers" to

include citizens, such as workers in factories, who are a necessary variable cost component of the end product.

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