

# Amazon's Antitrust Fair Play, a Transatlantic Evaluation

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*For the first time after a century, antitrust law has been making headlines around the country. Amazon, among other technological giants, finds itself in the middle of a cyclone against economic power. This article joins the endeavor of several scholars to understand Amazon's conduct, but through a different lens. It tries to see the big picture of Amazon's relevant market of operation, it evaluates indirect and potential competition and reaches the conclusion that the legendary e-retailer has a weak monopoly, if not any monopoly power. Subsequently, the article assesses several doctrines that could sanction Amazon's market conduct through comparative legal research between American and European law to reach the conclusion that a broad interpretation of the current theory would have an adverse impact on social welfare. What if Amazon is a fair market player after all?*

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## I. INTRODUCTION

Antitrust law has been making headlines today after almost a century.<sup>1</sup> Reasonably or populistically many political campaigns criticize the business behavior of the Big Tech, the four biggest technology companies, Google, Apple, Facebook and Amazon.<sup>2</sup> Voices in American and European societies have been recently echoing the disturbing concentration of power that these companies managed to achieve.<sup>3</sup> They point out several factors that should stimulate fear about the mighty power of technological giants and their potential to dominate future markets at the expense of social benefit. Antitrust law is presented as the ultimate weapon to restrain their evil wishes and ensure market prosperity through more fragmented markets.

Amazon finds itself in the eye of the modern antitrust cyclone. Questions on Amazon's conduct in both shores of the Atlantic are abundant and different. But all of them have a common point of reference. They are related to Amazon's dominant position in the e-commerce market and its increasing market power. The FTC and the European Commission are searching ways

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1. Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018).

2. Maggie Severns, *Warren Rakes in Tech Donations as She Pledges to Break up Donors' Companies*, POLITICO (Oct. 16, 2019, 1:49 AM), <https://www.politico.com/news/2019/10/16/warren-tech-donations-debate-048194> [https://perma.cc/85QM-3URP].

3. Kiran Stacey, Kadhim Shubber & Hannah Murphy, *Which Antitrust Investigations Should Big Tech Worry About?*, FIN. TIMES (Oct. 28, 2019), <https://www.ft.com/content/abcc5070-f68f-11e9-a79c-bc9acae3b654> [https://perma.cc/7YDR-GHR3].

to address these concerns and have initiated antitrust investigations.<sup>4</sup> They question Amazon's general market behavior focusing on the retailer's increased leverage power over wholesalers and its eagerness to forego profits in order to maintain dominance. They also question the use of big data through Amazon's comparison algorithm and the de facto exclusion of independent sellers from the top search results.

In the European Union, the investigation recently culminated to a statement of objections concerning the use of third-party sellers' data by Amazon. The European Commission accuses the online retailer for systematically relying on non-public data of independent sellers who sell on its marketplace. By having access on competing sellers' business secrets, Amazon can allegedly better position itself and directly compete in the market for online retail.<sup>5</sup> At the same time, the European Commission is going forward with a second, parallel investigation in Amazon's self-preferencing practices through the use of AI and the manipulation of results displayed on the "Buy Box."<sup>6</sup>

Is Amazon an antitrust problem? In the following pages, we will skeptically address these questions before concluding that the current antitrust framework should not condemn Amazon's business behavior. As these issues are global, our approach will be holistic. American and European competition authorities may use different words, but they speak the same language in terms of defining and condemning anti-competitive threats. The company's conduct is mainly examined under the legal rules prohibiting monopolies to abuse their power and destroy the function of the market. In the U.S., the Second Section of the Sherman Act penalizes any attempt or conspiracy to monopolize.<sup>7</sup> In the EU, it is Article 102 of the Treaty on the Functioning of the European Union (TFEU) that forbids dominant undertakings to abuse their power to the detriment of the internal market.<sup>8</sup>

Amazon is not itself an antitrust problem today. At first, the article demonstrates, through legal and economic arguments, that Amazon is not a

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4. European Commission Press Release IP/19/4291, Antitrust: Commission Opens Investigation Into Possible Anti-competitive Conduct of Amazon , (July 17, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291) [<https://perma.cc/VP2C-L5L3>]; Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials Over Marketplace*, BLOOMBERG (Sept. 11, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants> [<https://perma.cc/NQ4N-UNFG>].

5. European Commission Press Release IP/20/2077, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-public Independent Seller Data and Opens Second Investigation into Its E-commerce Business Practices (Nov. 10, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077) [<https://perma.cc/WHY8-6LQK>].

6. *Id.*

7. 15 U.S.C.A. § 2 (Westlaw through Pub. L. No. 116-169).

8. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326) 89.

monopoly or at least it is a weak monopoly with little market power. This is mainly because of the competitive pressures that the retailer faces from other market players. High levels of innovation in online markets make dominance contemporary, especially in the online retail sector where an abundance of smaller players is claiming Amazon's share. The levels of "competition-for-the-market" that Amazon faces by other Big Tech players that are in the process of investing in online retail expose Amazon even further against potential competitors. Besides, even if we adopt the position that the online retailer has a monopoly in some online markets, its behavior does not necessarily amount to monopolization. Examining the potential allegations under the essential facilities doctrine, predatory pricing and margin squeeze, we conclude that, either way, Amazon is "innocent" in the sense that it does not violate any current antitrust laws.

In this context, the article acknowledges that the current antitrust framework does not need fundamental changes in order to specifically capture Amazon's behavior. Amazon is an antitrust fair player. We cannot change the rules of soccer because some players are really good. Similarly, we cannot fundamentally change the framework of antitrust, because a company legally grew within the current system. Finally, antitrust law should not, even temporarily, sacrifice consumer welfare in order to protect the structure of the market. Antitrust law serves the people. The free market exists to the benefit of the people, not to the benefit of political control. We cannot forget social welfare and orchestrate an increase of prices in a quest for lower concentration that can be achieved through innovation and the self-corrective function of the market.

## II. THE LEGAL FRAMEWORK OF MONOPOLIZATION IN THE U.S. AND OVERSEAS

A monopolization conviction demands two elements: possession of monopoly power in a relevant market and a wrongful intent in the acquisition and maintenance of this power.<sup>9</sup> The Sherman Act makes it illegal "[to] monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" among the several States, or with foreign nations.<sup>10</sup> Similarly, in European terms, we need a dominant undertaking in a relevant market that abuses its dominance. More specifically, European competition law prohibits a company (undertaking) that has (a) dominant position (b) in the internal European market or a

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9. DOUGLAS F. BRODER, *US ANTITRUST LAW AND ENFORCEMENT: A PRACTICE INTRODUCTION* 86 (3d ed. 2016).

10. 15 U.S.C.A. § 2 (Westlaw through Pub. L. No. 116-169).

substantial part of it to (c) abuse it and cause adverse (d) effects on trade between member states.<sup>11</sup>

US and EU antitrust law share a common basis of defining monopolization or abuse of dominance. These rules are the sides of the same coin. However, there are also significant differences that make each process separate and unique. In order to analyze Amazon's conduct, it is imperative to understand how this common basis of defining violations works and how great is the impact of the differences between these two systems.

The rules on monopolization and abuse of dominance function almost identically. The key elements signaling the existence of potential violations are increased market power and an intentional effort to wrongfully acquire or maintain this power. We need a monopoly that monopolizes. A dominant undertaking that abuses its dominant position.

First, the prohibition of monopolization applies to monopolies. Monopolies have dominance in the relevant market, where they operate. Dominance is often illustrated by market share. U.S. practice demonstrates that a market share of at least 70-80% would be sufficient proof of monopoly power.<sup>12</sup> European standards are lower. The European Court of Justice finds that a market share between 40-50% is a "clear indication" that a company has acquired a dominant position in the market.<sup>13</sup> In any case, both jurisdictions are flexible on defining dominance. Even companies with market shares below 50% may be considered monopolies in the United States,<sup>14</sup> while in Europe a market share ranging from 25-40% may be monopolistic under exceptional circumstances.<sup>15</sup> These are cases of very high barriers to entry in the market and substantial divergence between the shares of the following competitors.

Merely achieving market dominance though is not penalized. There is a second element needed. Monopolies violate the Sherman Act only when they have wrongfully acquired their power. Dominant companies are sanctioned only if caught abusing their increased market influence. U.S. and EU law adopt common standards to define abuse. Caselaw in both recognizes distinguished specific exclusionary practices that fulfill this requirement.

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11. MORITZ LORENZ, AN INTRODUCTION TO EU COMPETITION LAW 189 (2013).

12. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945). *See also Exxon Corp. v. Berwick Bay*, 748 F.2d 937, 940 (5th Cir. 1984) ("[M]onopolization is rarely found when the defendant's share of the relevant market is below 70%.")

13. *Case C-62/86, AKZO v. Comm'n*, 1991 E.C.R. I-03359; *Case 85/76, Hoffman La Roche v. Comm'n*, 1979 E.C.R. 36.

14. *Hayden Pub. Co. v. Cox Broad. Corp.*, 730 F.2d 64 (2d Cir. 1984).

15. *Case C-250/92, Gettrup-Klim & Others Grovvareforeninger v. Dansk Landbrugs Grovvaarelskab*, 1994 E.C.R. I-5641.

US law famously underlines that there is no general obligation for monopolies to contract with their competitors.<sup>16</sup> Except from unique circumstances, especially where a longstanding agreement existed that was unreasonably terminated by the dominant company, monopolies are not required to facilitate transactions with their competitors.<sup>17</sup> European law also rejects such general obligation. However, a refusal to supply competitors when aiming at eliminating competition in a downstream market is considered an exclusionary abuse.<sup>18</sup> This practice is more frequent in vertically integrated markets, where the dominant undertaker acts both as a supplier and retailer in the downstream market. Does this look familiar to Amazon's practice?

### III. AMAZON'S WEAK MONOPOLY

Examining Amazon's monopoly demands first and foremost an accurate definition of the market in which the retailer operates. A market definition that is too broad may misrepresent Amazon's actual power, while one that is too narrow would fail to evaluate the economically significant effect of the excluded competitors.

Accuracy is the key for defining the market. But accuracy presupposes accurate and abundant data that are not always available. This research will mainly try to point out specific categories of competitors that should be taken under consideration when defining Amazon's market of operation. Its power to attract consumers of products demonstrating high substitutability, jointly with the retailer's market share in online sales, lead to the conclusion that Amazon could only be a weak monopoly.

The legal test employed by courts and regulators in the United States for determining whether a firm is indeed a monopoly revolves around the concepts of market power, "the ability to raise prices above those that would be charged in a competitive market,"<sup>19</sup> and monopoly power, "the power to control prices or exclude competition."<sup>20</sup> Despite the conceptual nuances of the two formulations,<sup>21</sup> they will be used interchangeably as they both resonate with the economic concept of a monopoly. A monopoly has the ability

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16. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

17. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

18. *Case C-6/73, Istituto Chemioterapico Italiano & Com. Solvents v. Comm'n*, 1974 E.C.R. 18; *Case C-311/84, CBEM v. CLT & IPB*, 1985 E.C.R. 394.

19. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984).

20. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

21. There is no general consensus in the case-law that "market power" and "monopoly power" are one and the same. *See also* Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241 (1987).

to profitably increase price above competition. It has a dominant market position, “a position of economic strength”<sup>22</sup> that allows the company to act independently of the remaining market actors.

Amazon is undisputedly big, but is it big enough? Most academics, even the harshest critics, are cautious in reaching the conclusion that Amazon is a monopoly. They underline that the framework of dominance is narrow and in the era of the internet may not undisputedly capture Amazon’s conduct.<sup>23</sup> Other scholars point out that actually Amazon is not behaving as a monopolist seller tending to increase prices, but as “a monopsonist, a dominant buyer with the power to push prices down.”<sup>24</sup> In either way, such framing limits the scope for potential antitrust action against Amazon, especially in the absence of consumer harm.

In the next pages, we challenge whether Amazon enjoys sufficient market power in any of its key markets of operation. There are serious doubts whether they are a monopoly or otherwise a firm with a dominant position so as to necessitate any form of antitrust intervention. It is important to see the big picture and discuss all the actual and potential competitors that affect the market of e-retail. At first, our research will address the peculiarities of digital markets in general that influence the process of market definition. Subsequently, we analyze the direct competitors that should be taken under consideration as well as threats from potential competition. We then focus on the demand side and consumer loyalty in an effort to demonstrate how easy substitution may be.

#### A. THE PECULIARITIES OF DIGITAL MARKETS

Antitrust authorities in both shores of the Atlantic have adopted a two-step test to define markets, as illustrated in the 2010 Horizontal Merger Guidelines of the U.S. Department of Justice<sup>25</sup> and the Relevant Market Notice of the European Commission.<sup>26</sup> The key issue is to determine the interchangeability of the products or services offered by the firm under examination; the relevant inquiry can be assisted with quantitative tools, such as the

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22. Case C-27/76, *United Brands v. Comm’n*, 1978 E.C.R. 22.

23. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710, 802 (2017).

24. Paul Krugman, *Amazon’s Monopsony Is Not O.K.*, *N.Y. TIMES* (Oct. 19, 2014), <https://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html?auth=login-email&login=email> [<https://perma.cc/3UEJ-ZB7Y>].

25. U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* (2010), <https://www.justice.gov/atr/file/810276/download> [<https://perma.cc/Y6HS-AK24>] [hereinafter 2010 HORIZONTAL MERGER GUIDELINES].

26. European Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5 [hereinafter Relevant Market Notice].

SSNIP.<sup>27</sup> Once the market is defined, regulators need to establish that the firm holds a certain degree of power in the relevant market. They must produce evidence of market power. Market shares and the concentration in the market, an evaluation of potential competition and the assessment of buyer power are some of the tools that indicate dominance.

Although the above framework can sufficiently address the antitrust risks posed by the operation of big technology firms, defining markets in the digital age is hardly an easy task. The business model and product offerings of companies such as Google, Apple, Facebook, and Amazon are complex and intricate, so as to raise methodological challenges, which call for the careful consideration of regulators.<sup>28</sup> There are three main ways in which online platforms differ from their physical counterparts and implicate the assessment of their market power.

The first characteristic of big technology firms is that their key offerings tend to be structured as networks or *multi-sided platforms*. Such structure triggers indirect network effects. The platform's value increases with the number of its users. The winner takes it all. Once a company with an innovative platform reaches a tipping point, it captures the entire market and establishes dominance.<sup>29</sup> Consequently, the markets in question are usually highly concentrated with high barriers to entry. Due to this structure, entrance by a potential newcomer would require substantial investment.

Amazon's marketplace is a prime example of a multi-sided platform, as it requires both a large number of independent retailers, as well as, a large number of customers to be successful. The company has arguably built a lasting position in the e-commerce space, mainly thanks to the large volume of transaction-specific data that it has accumulated throughout its operations. Nevertheless, Amazon is not impervious to actual or potential competition. Moreover, its continued success is contingent on a supportive user base, whose loyalty is related to received benefits and cannot be taken for granted.

Second, it is very difficult to delineate exactly the market in which tech firms operate, because these companies are *typically active in multiple markets*. Although Amazon started and became known as an online merchant platform, today its business expands into a multitude of different segments, from e-commerce to digital streaming, cloud computing, and artificial intelligence. Furthermore, these *prima facie* unconnected businesses seem to be

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27. SSNIP stands for the small but significant and non-transitory increase in the price of a product or service that a "hypothetical monopolist" would impose. See 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 25, §4.1.3.

28. See Margrethe Vestager, Speech at the Chillin' Competition Conference: Defining Markets in a New Age (Dec. 9, 2019) (transcript available at [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en) [<https://perma.cc/YK3G-CZC7>]).

29. RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 11-12 (7th ed. 2012).



reinforcing one another by means of *feedback loop mechanisms*.<sup>30</sup> For example, Amazon's fulfillment advantage through Prime strengthens the latter's position as a leading online merchant, because of the convenience it affords to the end consumer. However, digital consolidation does not necessarily mean less competition for consumers, as technology conglomerates increasingly expand on the traditional competencies of one another.<sup>31</sup>

The flip side of this coin is that the market is defined in an overly broad manner, overlooking issues of actual concern. For example, Amazon arguably possesses significant market power in book retail, which comprises one of Amazon's oldest and more prominent businesses.<sup>32</sup> The examination of individual markets on a case-by-case basis goes beyond the scope of this exercise. It is vital to note, though, that power over a specific retail category does not equate to power over online retail at large. Such conduct would be an intentional "cherry-picking."<sup>33</sup>

Third, digital markets are characterized by *constant innovation and fluidity*. New products and services are frequently introduced, and consumer preferences shift quickly. Launched back in 1994, Amazon has been surprisingly persistent until today. This success can be attributed to the fact that throughout its history, the e-retailer has been smartly adapting to consumer preferences through expansion of operations and diversification: from bookseller, to online retailer and then to fully integrated consumer conglomerate providing a range of products and services. However, given the degree of innovation in the market, especially the one originating from Amazon's rivals in the technology space, the assumption that Amazon will continue to rank first in consumer preference in perpetuity appears to be an exercise in "monopoly fatalism."<sup>34</sup>

#### B. DIRECT COMPETITORS IN E-COMMERCE AND PHYSICAL RETAIL

As already noted, Amazon currently operates in at least three markets – e-commerce, cloud computing, and fulfillment. All three are sectors where

30. Vestager, *supra* note 28 ("[Big digital businesses provide] consumers with an ecosystem of services, that are all designed to work well.").

31. Yong Lim, *Tech Wars: Return of the Conglomerate - Throwback or Dawn of a New Series for Competition in the Digital Era?*, 19 J. KOREAN L. 47 (2017), [https://articles.ssrn.com/sol3/articles.cfm?abstract\\_id=3051560](https://articles.ssrn.com/sol3/articles.cfm?abstract_id=3051560) [<https://perma.cc/PY4K-HMTV>].

32. For example, in 2017, the European Commission found Amazon to be dominant in e-book retail. Summary of Commission Decision of 4 May 2017, 2017 O.J. (C 264) 6.

33. Annie Lowrey, *Amazon Is Not a Monopoly*, N.Y. MAG.: INTELLIGENCER (Oct. 10, 2014), <https://nymag.com/intelligencer/2014/10/amazon-is-not-a-monopoly.html> [<https://perma.cc/82A3-Z2S8>].

34. Ryan Bourne, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, CATO INST., (June 17, 2019), <https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism> [<https://perma.cc/XQ67-HGU7>].

Amazon must arguably face off powerful rivals. In cloud computing, Amazon Web Services (“AWS”) competes with service offerings by Google and Microsoft. As far as fulfillment is concerned, Amazon Prime stands up against UPS and FedEx but also the United States Postal Service. In e-commerce, Amazon’s signature market, players include an array of domestic and international household names from eBay, Target, Walmart and Best Buy to Alibaba and Rakuten.

This analysis focuses on online retail, in which Amazon has long been widely perceived as synonymous with e-commerce.<sup>35</sup> Moreover, given the tension between e-commerce and traditional, “brick-and-mortar” shopping, it is important to consider the competition that Amazon is facing from physical retailers. The company has undoubtedly built capabilities in other industries that reinforce their success as an online retailer, such as cloud computing (AWS) or fulfillment (Prime). These points of strength cannot be forgotten in the process of calculating Amazon’s market power.

Starting with general market shares will give us at first an idea of the current state of online retail, despite the limitations of relying on them as a proxy for market power.<sup>36</sup> As already discussed, courts in the United States generally require a share of at least 70-80% in the relevant market to support a finding that a firm is a monopoly;<sup>37</sup> in Europe, the threshold is lower, as a monopoly can be presumed when the firm has a share above the range of 40-50%.<sup>38</sup>

Some widely reported numbers reveal that Amazon fails or, at the very least, struggles to meet the above thresholds. In 2018, analysts estimated Amazon’s market share to be 49.1% of the U.S. e-commerce market, positioning it way ahead of industry runner-up, eBay (6.6%).<sup>39</sup> Nevertheless, a similar estimate for 2019 was revised downwards to 38% after Amazon publicized

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35. *Amazon’s Amazing Ambition*, THE ECONOMIST (Feb. 24, 2000), <https://www.economist.com/special-report/2000/02/24/amazons-amazing-ambition> [<https://perma.cc/QB7Y-PWVN>].

36. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 950 (1981) (“[E]xclusive and uncritical focus on market share data tends to produce an exaggerated approach of market power.”).

37. See cases cited *supra* note 12.

38. Case C-62/86, *AKZO Chemie BV v. Comm’n of the European Cmty.*, 1991 E.C.R. I-03359; Case 85/76, *Hoffmann-La Roche & Co. AG v. Comm’n of the European Cmty.*, 1979 E.C.R. 00461.

39. Ingrid Lunden, *Amazon’s Share of the US E-commerce Market is Now 49%, or 5% of All Retail Spend*, TECH CRUNCH (July 13, 2018), <https://techcrunch.com/2018/07/13/amazons-share-of-the-us-e-commerce-market-is-now-49-or-5-of-all-retail-spend> [<https://perma.cc/3TTW-Q7X7>].

additional third-party sales figures.<sup>40</sup> The incident highlights the inherent difficulties in quantifying market shares of online platforms and the tendency to overestimate the strength of firms that base their competitive advantages on network effects.

Evaluating the potential of direct competitors is perhaps a more meaningful way to assess the extent of Amazon's market power compared to market shares, whose calculation can be inaccurate and prone to erroneous premises. The first and most straightforward source of competitive pressure comprises online platforms with significant scope and scale. A household name that immediately springs to mind is eBay, the platform whose initial focus was on online auctions. In addition, Amazon faces competition from well-established retail players which have transitioned to e-commerce: Target, Walmart and, Best Buy, in particular, are reported to be doing particularly well.<sup>41</sup> Most of these businesses are newer players in online retail and have an excellent potential to grow at Amazon's expense. Notably, more than 35% of Amazon's independent sellers planned to expand to Walmart and almost 30% planned to expand to eBay in 2018.<sup>42</sup>

Additionally, defining the market as general e-retail does not correspond completely to Amazon's business model. Amazon is far from being the Everything Store. The platform does not sell cars, pets, or alcohol/spirits.<sup>43</sup> Even within the same product category, Amazon does not carry the full range of potentially available products because of either regulatory constraints or supplier business decisions. For example, a high-end clothes retailer might find it more profitable not to place its products on Amazon, for reasons associated with brand reputation.<sup>44</sup> It is indicative that, among others, actual competitors include specialized online retailers such as Etsy, an online

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40. Matt Day & Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% From 47%*, BLOOMBERG (June 13, 2019), <https://www.bloomberg.com/news/articles/2019-06-13/emarketer-cuts-estimate-of-amazon-s-u-s-online-market-share> [<https://perma.cc/QY82-QGYU>].

41. Mallika Mitra, *Many Retailers Continue to Lose Against Amazon. But Not Target and Best Buy, Investor Says*, CNBC (Nov. 29, 2019), <https://www.cnbc.com/2019/11/29/best-buy-and-target-persist-as-other-retailers-lose-to-amazon.html> [<https://perma.cc/Q2LK-LBZB>].

42. Rani Molla & Jason Del Rey, *A Fifth of Professional Amazon Merchants Sell More than \$1 million a Year — Double the Share from Last Year*, VOX: RECODE (May 23, 2018), <https://www.vox.com/2018/5/23/17380088/amazon-sellers-survey-third-party-marketplace-walmart-ebay> [<https://perma.cc/G2PP-ELY3>].

43. Quentin Fottrell, *10 Things You Can't Buy on Amazon*, MKT. WATCH (Sept. 2, 2013), <https://www.marketwatch.com/story/10-things-you-cant-buy-on-amazon-2013-08-27> [<https://perma.cc/TL5Q-BX4Z>].

44. In November 2019, footwear retailer Nike announced the interruption of its collaboration with Amazon. Analysts have speculated it was because of counterfeits. Eben Novy-Williams & Spencer Soper, *Nike Pulling Its Products From Amazon in E-Commerce Pivot*, BLOOMBERG (Nov. 12, 2019), <https://www.bloomberg.com/news/articles/2019-11-13/nike-will-end-its-pilot-project-selling-products-on-amazon-site> [<https://perma.cc/TK5T-EC8R>].

platform with a fashion/art focus, which exert pressure on the individual markets that Amazon operates in.

The entry of Target and Walmart into online retail and their increasing adoption of omni-channel strategies reveals a second category of competitors to Amazon: brick-and-mortar retailers. These competitors are using their physical stores as inventories and points of distribution. Despite the trend of consolidation in traditional retail, the industry is far from dead.<sup>45</sup> Traditional retailers are not only retailers of interchangeable products, but they also enhance their online capabilities through their physical stores. They remain a threat to Amazon as long as consumer preferences are relevant. Consumers may be searching for specific products or have preferred ways of shopping. Either way, it is not unconceivable that shopping online or in-store for the same product are interchangeable solutions for them. A good number of consumers would probably avoid buying their groceries or office supplies online if their price were increased by 10%. This effect can be even greater in impulse purchases.

Finally, a third category of established competitors with the potential to upset Amazon's dominance in online retail includes international competition. As online retail becomes increasingly globalized and innovations in fulfillment enable one to view the relevant market within an international spectrum, the existence of strong foreign competition could prove a challenge to Amazon's growth. In early 2019, the company significantly downsized its e-commerce operations in China because it could not compete with the flexible fulfillment offered by local powerhouses, such as JD.com and Alibaba.<sup>46</sup> The latter has been often dubbed by the press as the "Amazon of China" given that its growth trajectory closely follows Amazon's.<sup>47</sup>

Likewise nicknamed the "Amazon of Japan,"<sup>48</sup> Rakuten became known as an online merchant platform before diversifying into additional services. In recent years, the company has pursued an aggressive acquisitions strategy, through which it intends to strengthen its global presence. Its U.S. operations

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45. See, e.g., Steve Dennis, *Physical Retail: Definitely Different, Far From Dead*, FORBES (July 6, 2017), <https://www.forbes.com/sites/stevendennis/2017/07/06/physical-retail-definitely-different-far-from-dead/#21b5e1575a28> [<https://perma.cc/67VC-KYLX>].

46. Shannon Liao, *Amazon Admits Defeat Against Chinese E-commerce Rivals Like Alibaba and JD.com*, THE VERGE (Apr. 8, 2019), <https://www.theverge.com/2019/4/18/18485578/amazon-china-marketplace-alibaba-jd-e-commerce-compete> [<https://perma.cc/4HZA-ET5M>].

47. Trefis Team & Great Speculations, *Is Alibaba Really The Amazon Of China?*, FORBES (Sept. 24, 2019), <https://www.forbes.com/sites/greatspeculations/2019/09/24/is-alibaba-really-the-amazon-of-china/#5163cc2a12c0> [<https://perma.cc/5HAK-5UVZ>] (noting that Amazon is a bigger company by all metrics).

48. Miguel Helft, *Borrowing From Amazon's Playbook, Rakuten Aims For Global Dominance*, FORBES (Aug. 8, 2017), <https://www.forbes.com/sites/miguelhelft/2017/08/08/borrowing-from-amazons-playbook-rakuten-aims-for-global-dominance/#128eb19c8104> [<https://perma.cc/256E-GDF2>].

include, among others, online retail, e-commerce analytics and fulfillment services.<sup>49</sup>

### C. POTENTIAL COMPETITION, BIG TECH AND THE POWER OF BIG DATA

In determining whether a firm holds sufficient market power, both the 2010 Horizontal Merger Guidelines and the Relevant Market Notice take into consideration potential competition. The extent to which potential competition constitutes a threat for incumbent firms is necessarily related to the conditions of entry.<sup>50</sup> A firm's market power is severely restricted in cases where entry is timely, likely and sufficient.<sup>51</sup>

Amazon itself cites potential competition as a key threat to its operations and appears fearful of small, innovative start-ups. In Amazon's 2019 Form 10-K, the first business risk identified was intense competition, especially as a result of "the development of new business models and the entry of new and well-funded competitors."<sup>52</sup> After all, the cost of establishing a new e-commerce platform is arguably not prohibitive; everyone can establish their own e-shop, provided that they possess some algorithmic expertise and content development skills.

It is not a surprise that Amazon's claims on facing intense competition are treated with skepticism. First, unlike any other online retailer, Amazon possesses a comprehensive distribution network with fulfillment centers as its spokes. Such a logistics advantage is simply impossible to replicate overnight. Most importantly, however, Amazon enjoys unmatched access to millions of consumer transaction-specific data, accumulated throughout its operation. It is arguably data that fuels a simultaneous awe and fear vis-à-vis the online retailer's alleged online hegemony. Commentators suggest that this is what has enabled Amazon to maintain market leadership by constantly tailoring its offerings to consumer preferences.<sup>53</sup>

For these reasons, a more credible threat to Amazon could take the form of supply-side substitution. The Relevant Market Notice expressly recognizes such competitive constraints when producers of other services "are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to

49. *About Us – Americas*, RAKUTEN (2017), <https://global.rakuten.com/corp/about/company/americas.html> [<https://perma.cc/GHT7-4JUC>].

50. Relevant Market Notice, *supra* note 26, §24.

51. 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 25, §9.

52. U.S. SECS. & EXCH. COMM'N, No. 000-22315, Form 10-K 6, AMAZON (2019), <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/bed19367-fa6b-41ff-a973-df19510b0bba.pdf> [<https://perma.cc/M7QK-7CZN>] [hereinafter, "Amazon Form 10-K"].

53. See, e.g., Jon Markman, *Amazon Using AI, Big Data To Accelerate Profits*, FORBES (June 5, 2017), <https://www.forbes.com/sites/jonmarkman/2017/06/05/amazon-using-ai-big-data-to-accelerate-profits/#7660b7f26d55> [<https://perma.cc/PLA9-UP7M>].

small and permanent changes in relative prices.”<sup>54</sup> Under the 2010 Horizontal Merger Guidelines, supply-side substitution has to meet the timeliness, likelihood and sufficiency test delineated above. In other words, assuming that firms like Facebook and Google decided to expand into online merchant services, would such a strategy make sense? In addition, how fast would it be implemented and what would be its probability of success?

It is not difficult to imagine why a scenario where Facebook and Google decide to enter the e-commerce space would be a nightmare for Amazon. Both firms are behemoths in the online market for knowledge. As a result of their operation, they act as the custodians of an unimaginable amount of user data. In this sense, Amazon's historic accumulation of transaction-specific data does not act as a barrier to entry, as would be the case for other entrants. Although the data-based competitive advantage enjoyed by Facebook and Google is primarily premised on social networking and web searching respectively, the two firms could extend it to e-commerce virtually overnight given that they already possess the requisite financial and technical resources.<sup>55</sup>

Furthermore, much like Amazon, Facebook and Google are already established network platforms whose structures can enable the rapid build-up of an advantage in knowledge focused on consumer transactions. Simply put, the fact that these companies already possess enormous amounts of user data means that they would not start a potential e-commerce venture from scratch. Interacting with the existing data volume, each new transaction would exponentially accelerate Facebook and Google's navigation of the e-commerce sector learning curve.

Another aspect of the latent competition between the technology giants in the e-commerce space can also be evidenced by the fact that both Facebook and Google maintain active service offerings that target consumer transactions. Although the exact degree to which Facebook Marketplace and Google

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54. Relevant Market Notice, *supra* note 26, §20.

55. In 2017, Amazon, Google and Facebook ranked among the top twenty corporate R&D investors in the United States. Amazon led the list with \$22.6 billion in R&D spending, closely followed by Google (Alphabet) in second place (\$16.6 billion) and Facebook in the thirteenth (\$7.8 billion). *See also* Rani Molla, *Amazon Spent Nearly \$23 Billion on R&D Last Year — More than Any Other U.S. Company*, VOX: RECODE (Apr. 9, 2018), <https://www.vox.com/2018/4/9/17204004/amazon-research-development-rd> [<https://perma.cc/2QKM-8VCS>].

Shopping can triumph over Amazon's platform is unclear,<sup>56</sup> their existence arguably provides consumers with credible alternatives.<sup>57</sup>

Finally, these potential competitors can be stronger than Amazon in locating consumer needs earlier and tailoring their offerings. They offer an alternative model, where the sale will be directed from your personal communication or online research. They are able to locate the customer's need before Amazon. In a simple example: Amazon can sell an umbrella if the customer enters the website and types "umbrella" or a related product, like "rain boots". Facebook can send an umbrella advertisement and sell an umbrella through Facebook shopping because a user is chatting with a friend about the bad weather tomorrow. Google, finally, could sell an umbrella because a user checked tomorrow's weather forecast. These are different – yet powerful – ways to understand customer's needs as early as they arise. Furthermore, each could translate into strong competitive advantages for potential competitors.

The idea that large technology companies, such as Facebook or Google, are latent sources of substantive competitive pressure vis-à-vis Amazon seems to resonate with antitrust regulators. In 2017, the European Commission imposed a €2.42B fine on Google for promoting its own shopping comparison service at the top of search results. Although the Commission drew a distinction between shopping comparison markets, such as Google Shopping, and merchant platforms, such as Amazon and eBay,<sup>58</sup> it ultimately noted that shopping comparison services would be close competitors to merchant platforms under a broader market definition and that anti-competitive conduct in either market could affect the state of play in the other.<sup>59</sup>

#### D. HOW LONG CAN AMAZON'S WEAK DOMINANCE LAST?

Amazon's self-branding revolves around being the "Earth's most customer-centric company."<sup>60</sup> Such characterization is significant because it reflects the importance of customers in Amazon's long-term viability. As a two-sided platform, Amazon requires both a strong customer base and a strong independent seller base to be successful; migration of either category (as a result of higher prices or poor contractual terms) to another platform

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56. Shep Hyken, *Look Out, Amazon, Here Comes Google*, FORBES (May 20, 2018), <https://www.forbes.com/sites/shephyken/2018/05/20/look-out-amazon-here-comes-google/#1fed8bdd2985> [<https://perma.cc/3ZQU-PJ6R>].

57. Daisuke Wakabayashi & Karen Wise, *Attention, Amazon Shoppers: Google Wants Some of Your Spending Money*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/technology/google-shopping-amazon-rivalry.html> [<https://perma.cc/4VYR-6T5B>].

58. Council Regulation 1/2003 of June 27, 2017, AT.39740, Google/Comparative Shopping (27 June 2017), §246 (EC).

59. *Id.* §638.

60. Amazon Form 10-K, *supra* note 52, at 3.

would effectively compromise its business. Mass independent seller migration is an unlikely scenario to the extent visibility on Amazon Marketplace is a competitive advantage. The same cannot be said for the consumer side, especially in the case of an increase in Amazon's prices.

Network theory often uses the concept of multi-homing to determine how easy it is for users on either side of a two-sided platform to switch to a rival platform. Amazon allows its consumers a substantial degree of multi-homing. Consumers would have no significant cost of switching to a rival platform like eBay, Etsy or any other online merchant website if Amazon were to raise prices on Marketplace. In switching between platforms, customers face little costs such as spending time to set up a profile or foregoing the convenience of navigating Marketplace and the benefits of Prime delivery. In fact, contrary to the popular intuition,<sup>61</sup> sources indicate that even suppliers that are active on Amazon enjoy a wide margin of multi-homing opportunities.<sup>62</sup>

Consumers are generally sensitive to potential price increases. This is particularly true for products which are price elastic, such as the majority of goods falling under Amazon's best-selling categories: books, clothing, shoes and jewelry, electronics, home equipment and toys. Although we carried no study estimating the anticipated consumer behavior in the event of a significant increase in the price of such goods, we strongly believe that the average online shopper would prefer to exchange same-day Prime delivery with a lower price in another website.

Indeed, in early 2018, when Amazon announced a 20% hike in its annual Prime membership (from \$99 to \$119) of its domestic customers, there was substantial backlash from online shoppers, with as many as 59% declaring that they would not renew their subscriptions once they expired.<sup>63</sup> It is noted that the last revision of Prime membership fees took place in 2014 and is indicative of how infrequently Amazon raises the prices of its own products. This also resonates with the fact that the company has built a reputation based on the low prices of the products featured in its Marketplace,<sup>64</sup> a feature not traditionally associated with a monopolist's behavior.

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61. See, e.g., Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11 INT'L. ECON. & ECON. POLICY 49 (2014).

62. Molla & Del Ray, *supra* note 42 (stating that 80% of Amazon merchants are also active in other platforms, such as eBay and Walmart).

63. Jeb Su, *Exclusive: 60% Of U.S. Amazon Customers Will Not Renew Their Prime Membership, Poll Reveals*, FORBES (May 9, 2018), <https://www.forbes.com/sites/jeanbaptiste/2018/05/09/exclusive-60-of-amazon-customers-will-not-renew-their-prime-membership-poll-reveals/#2461bd8f5c0d> [<https://perma.cc/S874-RZ2J>].

64. See, e.g., Russel Brandon, *The Monopoly-Busting Case Against Google, Amazon, Uber and Facebook*, THE VERGE (Sept. 5, 2018) <https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook>



Overall, those who argue in favor of increased antitrust scrutiny against Amazon effectively fail to answer a key question: how is Amazon exactly hurting consumers today at least from a pricing perspective? So far, Amazon has been synonymous with low prices and more product innovation. If Amazon is somehow planning to harm consumers in the immediate or distant future, it cannot be possibly confirmed on the basis of the evidence available today.

A relevant issue to consider is whether the future will be equally as bright for Amazon as the present. There are already indications that the excitement of the Amazon box coming to your house is kind of dwindling off as, in 2018, the frequency of people buying items on Amazon six times or more per month fell by 50% and Walmart emerged as a powerful rival.<sup>65</sup> While assessing the strength of such preliminary evidence, it is worth noting that it is not safe to make assumptions as to Amazon's persistent dominance in any market.

While trying to predict the future is a highly speculative inquiry, anti-trust history offers plenty of examples of firms whose dominance was perceived, back in the day, to be perpetual and yet the relevant claims proved to be wrong.<sup>66</sup> Coincidentally, most of these firms were active in markets that, much like e-commerce platforms, were based on network effects and "winner-takes-all" outcomes such as infrastructure and telecommunications.

One of the best examples illustrating this trend is Microsoft, whose diversified pursuits caught the attention of regulators over both sides of the Atlantic in the early 2000s. Internet Explorer, Microsoft's flagship product, was once considered as the "golden standard" in internet browsing and became the focal attention point in the much-contested Microsoft monopolization case in the United States.<sup>67</sup> Today, Internet Explorer appears to be a relic of the past. It has been long surpassed in popularity by Chrome, Safari and

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[<https://perma.cc/YE3F-5Y5E>] (noting that Amazon's "laser focus on consumer benefit" usually means lower prices).

65. Lauren Thomas, *Walmart Appears To Be Gaining Ground Against Amazon*, CNBC (Nov. 4, 2019), <https://www.cnbc.com/2019/11/04/walmart-appears-to-be-gaining-ground-against-amazon.html> [<https://perma.cc/R4TL-DUW7>].

66. Bourne, *supra* note 34 (overviewing the examples of the Great Atlantic & Pacific Tea Company, Myspace, Nokia, Kodak and iTunes).

67. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). In the European Union, a well-known abuse of dominance case against Microsoft focused on tying of the Windows Media Player to the Windows software. In 2013, the European Union fined Microsoft again another \$731 million in another case involving Internet Explorer and its alleged tying to Windows. Antitrust Procedure, Council Regulation (EC) No. 1/2003 of 06 Mar. 2013, art. 23(2)(c), 2013 O.J. (C 2013).

Firefox,<sup>68</sup> whereas Microsoft itself has interrupted its development in favor of its new Microsoft Edge.<sup>69</sup>

Likewise, the history of retail demonstrates that disruption is more than possible in a market segment. Traditional brick-and-mortar once faced competition from large department stores and malls, as the industry became increasingly consolidated. The latter faced new threats with the advent of the internet and the increasing popularity of online shopping. Recently, most experts consider eBay to be a stronger player in the nascent e-commerce space than Amazon.<sup>70</sup> While many consider Amazon to be invincible in e-commerce, the risk of potential competition identified in the company's 2019 Form 10-K remains omnipresent. What will be the next frontier in online retail? Could it be closer than people can imagine?

#### IV. THE INSUFFICIENCY OF MONOPOLIZATION STANDARDS TO PENALIZE AMAZON'S CONDUCT

There is hardly convincing evidence demonstrating that Amazon is a monopoly. But an intense market segmentation and a focus on specific products could possibly render Amazon a monopoly especially in remote local markets without substantial physical retailers and in which prime one-day delivery is vital for consumers. Even if this is the case, a monopolization conviction could hardly be adopted under the current antitrust framework.

There is widespread belief though that Amazon is not a fair player. What are they doing wrong, or incomparably well, in the online market that could be considered unlawful monopolization under the American rule of reason or the European prerequisites for abuse of dominance? The critics do not focus on one specific conduct. They locate many instances of Amazon's behavior that may result in antitrust violations. They argue that the combination of these actions, the general behavior, accompanied with Amazon's increased market power could amount to unlawful monopolization.

In the following pages, we examine potential theories that could apply in case Amazon was found to be a monopoly. We conclude that Amazon's behavior could not be condemned under the current framework. In particular, it is important to take a look at three relevant theories: the denial of access to essential facilities, predatory pricing and marginal squeeze. American and

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68. Erick Schonfeld, *Since March, Internet Explorer Lost 11.4 Percent Share To Firefox, Safari And Chrome*, TECH CRUNCH (July 5, 2009), <https://techcrunch.com/2009/07/05/since-march-internet-explorer-lost-114-percent-share-to-firefox-safari-and-chrome/> [<https://perma.cc/TJ28-KU7Y>].

69. Tom Warren, *Microsoft Really Doesn't Want You To Use Internet Explorer Anymore*, THE VERGE (Feb. 8, 2019), <https://www.theverge.com/2019/2/8/18216767/microsoft-internet-explorer-warning-compatibility-solution> [<https://perma.cc/Y6PE-CA3G>].

70. Adam Cohen, *eBay's Bid To Conquer All*, TIME (Jan. 28, 2001), <http://content.time.com/time/magazine/article/0,9171,97068,00.html> [<https://perma.cc/S7J7-LWJT>].

European doctrine address these issues similarly, under common norms and criteria.

A. WHAT IS AMAZON DOING WRONG?

Firstly, let us examine the spectrum of potential allegations. The main concern is about the way Amazon harvests and uses big data. The European Commission suspects that the giant retailer uses client data as an exclusionary tool against independent sellers.<sup>71</sup> Amazon's "Buy Box" is a key tool in the platform's success. Once a consumer looks for a product, the "Buy Box" makes a suggestion that is tailored to his profile. When both Amazon and an independent seller provide the same product, almost 80% of the time, Amazon's product will make it to the top.<sup>72</sup> Even when other sellers have lower prices for the same product, Amazon may still be the first suggestion. Moreover, Amazon can use big data to trace the best-selling products of independent sellers and replicate them at a lower price. Since the consumers are predominantly, almost at 90%, driven by the "Buy Box" winner,<sup>73</sup> this manipulation of the algorithm's results may amount to a denial to independent sellers to properly use an essential facility.

Second, Amazon is *eager to undertake losses and forego profits* in order to achieve entrance in new markets or attack other online competitors. One instance is the company's business plan for the market of e-books and e-book readers. Amazon introduced the Kindle, an e-book reader in 2007. It also contracted with publishers to provide them with electronic copies of their printed books at wholesale prices. Amazon adopted a pricing business plan to penetrate the new e-book market. It established a maximum price of \$9.99 for best-sellers and lower prices for other books. The endeavor was a success. E-book revenue in North America vastly increased from \$70 million in 2007 to \$140 million in 2008.<sup>74</sup> In 2009, the company announced further discounts on the price of the Kindle (from \$279 to \$259).<sup>75</sup> Critics underline though that Amazon's e-book prices were frequently under cost, raising concerns of a potential predatory intent. However, the Second Circuit evaluated Amazon's behavior as procompetitive in the context of a case against Apple and

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71. European Commission Press Release IP/20/2077, *supra* note 5.

72. Loren Baker, *Amazon's Search Engine Ranking Algorithm: What Marketers Need to Know*, SEARCH ENGINE J. (Aug. 29, 2018), <https://www.searchenginejournal.com/amazon-search-engine-ranking-algorithm-explained/265173> [<https://perma.cc/KXU5-QBDH>].

73. *Understanding and Winning the Buy Box*, MERCH. WORDS (Aug. 29, 2019), <https://www.merchantwords.com/blog/amazon-disruption-buy-box> [<https://perma.cc/S3NK-RE8X>].

74. *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

75. Bobbie Johnson, *Amazon Busts Through Recession with Profit Surge*, THE GUARDIAN (Oct. 23, 2009), <https://www.theguardian.com/technology/2009/oct/23/amazon-profits> [<https://perma.cc/W9MC-KXP6>].

their “iBook store,” recognizing the unusual and unique features of the nascent e-book market.<sup>76</sup>

Another instance of Amazon’s eagerness to lose in order to establish dominance relates to their conduct against Quidsi, another online retailer that denied an acquisition offer in 2009. Amazon instantly adopted an aggressive pricing plan on diapers, Quidsi’s best-selling product. They reduced prices by 30% and offered free prime delivery service for one year. Quidsi’s growth was undermined and they soon agreed to merge with Amazon. FTC cleared the merger.<sup>77</sup> Today, more than ten years after the incident, prices in diapers have increased by 10% and free delivery has been reduced to three months.<sup>78</sup> Yet prices remain at lower levels compared to 2009.

Finally, another aspect of Amazon’s conduct that has raised concerns is the company’s *leverage power over suppliers*. Amazon is a tough negotiator. It can put pressure on vendors and achieve low wholesale prices thanks to their data-collecting algorithms. Amazon’s market knowledge enables it to make products in-house, giving them the upper hand in contract negotiations.<sup>79</sup> At the same time, achieving lower supply prices allows them to compete aggressively in the retail market. Under these circumstances, independent sellers operating in Amazon’s platform are largely disadvantaged, finding themselves occasionally in actual inability to compete on prices.

B. EXCELLENCE IN BIG DATA GATHERING IS NOT A PROHIBITED DENIAL OF ACCESS TO AN “ESSENTIAL FACILITY”

Freedom of contract is the foundation of entrepreneurship, the vehicle to conduct private business and an important constitutionally protected right.<sup>80</sup> But such an unlimited freedom may have detrimental social effects and distort the free market when there is evident inequality between the contracting parties and a wrongful anticompetitive intent. The constitutional protection of the freedom of contracts may undergo limitations, one of which derives from the application of antitrust law. Section 2 of the Sherman Act and Article 102 TFEU are sources of such limitations.

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76. *Apple, Inc.*, 791 F.3d at 290.

77. *Proposed Acquisition of Quidsi, Inc. by Amazon.com, Inc.*, File No. 1110031, FED. TRADE COMM’N (Mar. 23, 2011), [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/amazon.com-inc./quidsi-inc./110323amazonthomas.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/amazon.com-inc./quidsi-inc./110323amazonthomas.pdf) [<https://perma.cc/L89U-N4RV>].

78. Thud Rueter, *Amazon Tweaks Its Diaper Program, Moms Vent and a Competitor Pounces*, DIGIT. COM. 360 (Feb. 13, 2017), <https://www.digitalcommerce360.com/2012/02/23/amazon-tweaks-diaper-program-moms-vent-competitor-pounces/> [<https://perma.cc/232M-CW4K>].

79. Shoshanna Delventhal, *Amazon Forces Suppliers to Play by Its Rules*, INVESTOPEDIA (Dec. 4, 2019), <https://www.investopedia.com/news/amazon-forces-suppliers-play-its-rules/> [<https://perma.cc/ZDA4-UF39>].

80. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

As already noted, U.S. law rejects any general obligation for monopolies to contract with their competitors. On the same page, European law also does not adopt a general duty to deal with competitors.<sup>81</sup> In exceptional cases, however, a refusal to supply a competitor may be considered an exclusionary abuse.<sup>82</sup> In this context, the “essential facilities” doctrine flourished. This theory sanctions the denial to allow a competitor to use a business facility that is essential for any company in order to enter the market. In practice, the doctrine has been mainly applied to cases involving crucial infrastructure like stadiums, railroads and telecommunication networks.

American courts have been very conservative in adopting this doctrine. In *Hecht*, the Circuit Court sanctioned a contractual clause prohibiting any other team from using the only football stadium in Washington, DC.<sup>83</sup> Facilities that are (a) economically infeasible to duplicate and denying access to which would cause (b) severe handicap on potential entrants, are essential for competition. Thus, a dominant competitor must provide access if this is not (c) impractical for its business. Subsequently, the court reaffirmed the doctrine and lowered the standard in a case concerning AT&T's denial to allow MCI to interconnect with its local network.<sup>84</sup> A monopoly violates its obligation to provide access to an essential facility if allowing its use is at least feasible.

Later on, however, the circuit court clarified that the obligation to provide access to an essential facility does not entail an obligation to provide *a specific quality of service to your competitor*. The boundaries of the “essential facilities” doctrine have been drawn in *Trinko*.<sup>85</sup> The Second Circuit clarified that the theory applies only when there is “unavailability” of access. On the contrary, providing low-level services to the competitors that have access to the facilities is not exclusionary.

In Europe, the requirements to apply the “essential facilities” doctrine are vastly similar. In the landmark *McGill* case,<sup>86</sup> the European Court of Justice sanctioned three television broadcasters denying to share the data of their future tv program with a magazine publisher. The publisher wanted to create an inclusive weekly tv guide with all the channels' programs. Their actual goal was to continue publishing their own separate programs and stop the circulation of the inclusive guide. There was a denial of access to an essential

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81. Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443 (2002).

82. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (for the formulation of the standard in the United States); Case C-6/73, *Istituto Chemioterapico Italiano & Commercial Solvents v. Comm'n*, 1974 E.C.R. 18; Case C-311/84, *CBEM v. CLT & IPB*, 1985 E.C.R. 394 (for Europe).

83. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977).

84. *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

85. *Verizon Commc's Inc. v. Trinko, LLP*, 540 U.S. 398 (2004).

86. Judgment of the Court of 6 April 1995, C-241/91 P, *RTE and ITP v. Commission*, ECLI:EU:C:1995:98.

facility because the competitors (a) controlled the only source of television program data and (b) they excluded, through denial, everyone from a downstream or secondary market (c) without justification.

Considering Amazon's data manipulation allegations under this case law makes it hard to attest any violation. Amazon has an *open policy for independent sellers*. Additionally, it allows them to join their exclusive "Amazon Prime" distribution network, albeit at a price.<sup>87</sup> The "Fulfillment-by-Amazon" tool allows any seller to benefit from the platform's supply chain and delivery network, increasing its profit by almost 30%. In principle, there is no restriction precluding access to the platform.

Amazon also rejects the allegation of algorithmic bias that favors its generic products. They support that the winner of the "Buy Box" is determined on the basis of a variety of criteria, not price alone. Relevance to the search query, availability, selection and sales history are important variables that influence the algorithm's results.<sup>88</sup> But even if bias exists and it aggravates the selling environment of independent sellers, no violation would be proved, because the essential facilities doctrine does not oblige firms to provide services of specific quality to their competitors.

Some legal scholars support a *broader interpretation of the essential facilities doctrine* in view of the special features of the online retail market and the crucial role of big data and tailored advertising for sales.<sup>89</sup> They argue that network effects, switching costs and lock-in turn digital markets into markets of high concentration.<sup>90</sup> The ability of technology firms to acquire start-ups abnormally reduces market competition, namely small innovative firms that would threaten the established players. In this context, they suggest loosening the essential facilities doctrine, in order to stimulate competition between the existing firms in the market and penalize *prima facie* unlawful conduct of the Big Tech firms that seems to disadvantage their competitors.

First and foremost, this technical approach aims to cure problems related to market structure and forgets consumer welfare entirely. These arguments do not include any analysis on the cost that the consumers would pay if antitrust regulation was broadly applied to Amazon's aggressive pricing. Critics agree that prices will inevitably rise, as the most competing market actors will have to face antitrust prosecution. If Amazon is obliged to share

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87. STEVE WEBER, *SELL ON AMAZON: A GUIDE TO AMAZON'S MARKETPLACE, SELLER CENTRAL, AND FULFILLMENT BY AMAZON PROGRAMS* (2008).

88. Amazon, *Optimize Your Product Discoverability*, AMAZON SELLER CENTRAL (2019), <https://sellercentral.amazon.com/gp/help/external/10471> [<https://perma.cc/Q4WR-SLXE>].

89. Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011 (2000); Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105 (2010).

90. Inge Graef, *Rethinking the Essential Facilities Doctrine for the EU Digital Economy*, 53 REVUE JURIDIQUE THEMIS 33 (2019).

on equal terms and at no significant profit their big data, their greatest sustainable competitive advantage prices could rise as a result of the conduct of the benefitting market players and at the expense of consumers. Such broad interpretation of antitrust standards would brutally violate freedom to conduct business in an online environment without counteroffering a concrete beneficial purpose.

Additionally, these theories seem not to conceive correctly the actual situation in the online retail market. Even if it was true that Amazon has the “lion’s share” of such market, that does not mean that the market is resistant. On the contrary, low barriers to entry are a crucial factor affecting competition. Almost 80% of the independent sellers operating on Amazon’s platform have a second online shop at another platform.<sup>91</sup> At the same time, two other tech giants have already created their own marketplaces. Google Shopping and Facebook Marketplace are promising new entrants capable of restraining Amazon’s power and vastly increasing competition. Amazon may be dominant today, but tomorrow is uncertain. It would be a strategic mistake to weaken one of the big online players through regulation, as of this moment.

In sum, an expansive application of the “essential facilities” doctrine to stimulate competition in the online market does not seem a rational regulatory choice. The market is transforming fast and dominance should not be taken for granted. Rush solutions will not create more competition. They will annihilate the greatest social benefit of the online retail era, low prices for consumers, in the name of an uncertain endeavor against concentration.

#### C. NEGATIVE PRICES AND THE “PREDATORY PRICING” DOCTRINE

Another typical allegation against Amazon focuses on the platform's low prices and eagerness to forgo profits. Is Amazon a predator? Does the online retailer sell below cost with a dangerous probability to recoup later after pushing competition out of the market?

In the United States, predatory pricing claims follow the landmark case law in *Brooke Group v. Brown & Williamson Tobacco*.<sup>92</sup> Plaintiffs must prove that the predator is pricing its products (1) below an appropriate measure of its rival’s costs, with (2) a reasonable prospect, or, under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

These two requirements are consistent with the goal of U.S. antitrust law to protect competition rather than competitors and are examined cumulatively. The regulators are mainly concerned that *policing predatory pricing may discourage desirable price competition* and deprive consumers of the

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91. Molla & Del Ray, *supra* note 42.

92. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

benefits of lower prices. While price cuts may cause competitors to lose profits, they would simultaneously benefit consumers, as long as, they are above predatory levels. Thus, to safeguard competition on merit, the law should only condemn price cutting to the below-cost level. Similarly, the recoupment test enables enforcement activities not to sanction conduct that merely eliminates certain competitors,<sup>93</sup> but would not harm consumer welfare.

Although the test remains well-established, defining the appropriate measure of cost is still a challenging endeavor. The Supreme Court has declined to state which of the various cost measures is relevant to the examination of predatory pricing. The courts have been mostly influenced by the *Areeda-Turner* test,<sup>94</sup> which considers marginal cost as the most relevant cost when a firm is deciding whether it would increase or decrease output. However, given the extreme difficulty in ascertaining marginal cost, *average variable cost* is considered a reasonable proxy.<sup>95</sup>

In the EU, predatory pricing is similarly examined as an exclusionary practice of dominant undertakings. In *AKZO Chemie BV v. Commission*,<sup>96</sup> the ECJ established two criteria for predatory pricing. First, prices below average variable cost by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive.<sup>97</sup> Second, prices below average total cost, but above average variable cost, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.<sup>98</sup>

A company is a predator if there is dangerous probability to recoup its losses. For a recoupment to occur, the plaintiff must demonstrate that there is *likelihood* that the predatory scheme would cause a subsequent increase in prices above a competitive level. This increase must be sufficient to compensate for the amounts expended on the predation. The test requires an estimation of the cost of the alleged predation and a close analysis of the scheme, the structure, and conditions of the relevant market.<sup>99</sup> Nevertheless, when the first requirement of *Brooke Group* has not been satisfied, the examination of the recoupment is moot.

The European authorities do not require that recoupment is substantiated to establish a predatory pricing claim. Instead, the ability to recoup

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93. ORG. FOR ECON. COOP. & DEV., PREDATORY FORECLOSURE 2004 (2004), <http://www.oecd.org/daf/competition/abuse/34646189.pdf> [<https://perma.cc/C4FY-EAWA>].

94. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practice Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698-99 (1975).

95. *Brooke Grp. Ltd.*, 509 U.S. at 209 (for an application of average price cost in *Brooke Group*). Nevertheless, as indicated by the Tenth Circuit in *United States v. AMR Corp., American Airlines Inc.*, 335 F.3d 1109 (10th Cir. 2003), there may be other relevant cost measures when courts need the flexibility and the court refused to dictate a definitive cost measure for all cases.

96. C-62/86, *AKZO Chemie BV v. Commission*, 1991 E.C.R I-03359 .

97. *Id.* § 71.

98. *Id.* § 72.

99. *Brooke Grp. Ltd.*, 509 U.S. at 209.



losses can be a key component when assessing the alleged predator's strategy.<sup>100</sup> When prices are set *below average variable cost*, there is a rebuttable presumption that the dominant firm incurred losses in order to exclude the targeted competitors. In that case, the burden of proof would be shifted to the dominant firm to provide justification for its below-cost prices. If prices are above average variable cost but *below average total cost*, the regulators may also consider the pricing behavior problematic if there is evidence demonstrating that the dominant firm has a predatory intent and its pricing behavior is part of a predation. Such evidence may include direct intent, data that the pricing only makes commercial sense as part of a predatory strategy, and the actual or likely exclusion of competitors.<sup>101</sup>

Some scholars, whose work has been said to represent a "populist" antitrust wave,<sup>102</sup> suggest an inversion of the burden of proof in the application of the recoupment test, especially for the online sector in the U.S. They suggest a *presumption of predation* every time a dominant technology company reduces prices below cost.<sup>103</sup> These critics imagine an antitrust future outside the Chicago School, where consumers benefit is not an antitrust priority, but the protection of the structure of the market becomes the main objective of governmental authorities.

Such suggestion would have detrimental effects for consumers and, ultimately, for the structure of the market. Price competition would be unjustifiably discouraged and low prices, the main benefit that online shopping brought, would be artificially eliminated. At the same time, lower price competition would either make online market actors compete on other benefits or not compete at all. In both cases, an important factor of a market's self-regulation would have been nullified, leading to higher market concentration. In Amazon's case, as distribution is a key element for the online retailer, the suggestion to reduce price competition through a presumption of predation would actually reinforce the technology giant's alleged monopoly. The efficient Amazon Prime distribution network is far more difficult to duplicate than the low prices on the platform.

The European Union has looser standards on recoupment and, as discussed, adopts such a presumption of predation. In the EU, this strategy did not have a very strong impact on price competition, as it would in the United States. American companies would face more pressure to reduce prices if such presumption was adopted. Enforcement of European competition law is centralized in Europe and assigned to the European Commission. Consumers or competitors cannot force the enforcement of the antitrust laws at the EU

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100. Howard Rosenblatt, Héctor Armengod & Andreas Scordamaglia-Tousis, *Post Danmark: Predatory Pricing in the European Union*, EUR. ANTITRUST REV. 21, 21-25 (2013).

101. LORENZ, *supra* note 11, at 234.

102. A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. (2020) (forthcoming), [https://articles.ssrn.com/sol3/articles.cfm?abstract\\_id=3519523](https://articles.ssrn.com/sol3/articles.cfm?abstract_id=3519523).

103. Khan, *supra* note 23.

level – only before national courts and under specific circumstances. Thus, the dangers of frivolous lawsuits and an explosion of litigation every time a price reduction is decided are not as frequent as they could be in the U.S. Besides, the assessment framework on pricing below different average cost metrics is uniformly applied in 102 TFEU cases and is not a specific policy tool adopted only against the Big Tech companies.

Another standard that could sanction Amazon's behavior under the current antitrust framework is the multi-market recoupment theory. This theory suggests that predation can occur in one market and recoupment can occur in another market. This situation is common where consumers are not able to switch to other suppliers when faced with a price increase. Lock-in effects between the predating market and the recoupment market must exist, or the recoupment market may be highly concentrated. At the same time, the predatory company must have very strong monopoly power in the recoupment market, which is likely in complementary product markets, substitute product markets, and replacement markets.<sup>104</sup>

Could this also be the case in two-sided markets, such as Amazon Marketplace? Could Amazon predate in the price of products sold to consumers and recoup through the high prices charged to independent sellers operating in the platform? The answer is negative. It is established case-law that there is only one market in two-sided platforms,<sup>105</sup> which is the market of online sales mediation in Amazon's case.

Under this framework and without an expensive interpretation, it would be hard to conclude that Amazon is engaging in predatory pricing. The critics have predominantly focused on Amazon's behavior in the e-book market as an example of predation. However, data and facts do not support such a conclusion: overall, Amazon's e-book business was profitable.<sup>106</sup> Predatory pricing can only be detrimental to competition when the dominant firm is able to exclude equally efficient competitors out of the relevant market, and selling below cost is logically incompatible with making profits within the sale product lines. In addition, the FTC recognized that the nascent e-book market had special characteristics, justifying the adoption of an aggressive pricing strategy.<sup>107</sup>

Besides, Amazon was operating on both the connected markets of e-books and e-book readers. Amazon had just launched Kindle and priced it at

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104. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013).

105. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

106. Dan Frommer, *Amazon Sold 500,000 Kindles In 2008 -- Citi (AMZN)*, BUS. INSIDER (Feb. 3, 2009), <https://www.businessinsider.com/2009/2009/2/amazon-sold-500000-kindles-in-2008> [<https://perma.cc/4ZP4-NSHE>] (“Amazon could get relatively similar profits for each e-book sold that it currently gets for physical books.”).

107. *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

\$400.<sup>108</sup> When consumers purchased the Kindle reader, they did not consider its price only. Rather, consumers would consider the whole life cycle of the device, as well as e-book prices on the platform. Therefore, Amazon was not merely competing with other book retailers or e-book retailers on e-book prices; the competition was, instead, on e-book readers and e-books as a whole. Claiming that Amazon was selling below cost only because the e-books were inexpensive does not capture the whole picture.

In addition, even in the e-book and e-reader market, Amazon has and is still facing potential competition from new market entrants. Since Amazon's first launch of Kindle, other market players have entered the market to compete with Amazon, including Smashwords in 2008, Apple in 2009, Blurb in 2009, and Rakuten in 2012. Amazon and these four e-book providers now represent the top five market players<sup>109</sup>. Entry barriers, such as technological or financial investments, are relatively low. As observed by Commissioner Rohit Chopra, "[t]oday's economy is also more financialized, leading managers of both small and large enterprises to be more responsive to incentives driven by Wall Street and the capital markets."<sup>110</sup>

Finally, the Quidsi incident is a strong indicator that Amazon is not powerful enough to recoup if they would price below cost. Ten years after the hostile acquisition of Quidsi and the prices in diapers are still 10% lower than before the acquisition. If this was below cost pricing, today Amazon would have suffered losses at this product line. Neither Amazon could have recouped by charging higher prices on the supplementary service of "Amazon family" that offers free deliveries and additional discounts to new parents.<sup>111</sup> As noted above, the service is now sold only at a price 10% higher compared to the pre-acquisition period. The theory of recoupment demands that the increase in price is significant enough to compensate the predatory investment and make a considerable profit from the exclusion of the target.

In sum, there is not enough evidence that would sanction Amazon's behavior under the predatory pricing doctrine. The extent to which Amazon is pricing below cost is arguable, and there is limited scope for recoupment in the evolving market of e-commerce.

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108. David Pogue, *An E-Book Reader That Just May Catch On*, N.Y. TIMES (Nov. 22, 2007), <https://www.nytimes.com/2007/11/22/technology/personaltech/22pogue.html> [<https://perma.cc/7PU7-HG29>].

109. *E-Book Market – Growth, Trends, and Forecasts (2020 - 2025)*, MORDOR INTEL. (2019), <https://www.mordorintelligence.com/industry-reports/e-book-market> [<https://perma.cc/E3AD-A3AE>].

110. Rohit Chopra, *Statement of Commissioner Rohit Chopra Regarding the Request for Comment on Vertical Merger Guidelines*, FED. TRADE COMM'N (2020), <https://www.ftc.gov/public-statements/2020/01/statement-commissioner-rohit-chopra-regarding-request-comment-vertical> [<https://perma.cc/9REJ-EWAN>].

111. *Help: Get Up To 20% Off Diapers, Baby Food, and More*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=202029440> [<https://perma.cc/L7WX-QQLV>].

D. STRONG RELATIONSHIPS WITH WHOLESALERS AND THE THEORY OF "MARGIN SQUEEZE"

Amazon is a massive retailer that has increased bargaining power against its suppliers. It can buy at significantly low prices because the use of data helps it to accurately predict its inventory needs and the market demand for its products as well as to buy at low prices. Bigness, indeed, is not a curse. However, vertical integration of a massive retailer like Amazon could trigger anticompetitive effects. For instance, Amazon can make access to its platform too expensive for independent sellers, squeezing their profits and making it impossible for them to compete with Amazon's products.

A margin squeeze refers to the situation "when there is such a narrow margin between an integrated provider's price for selling essential inputs to a rival and its downstream price that the rival cannot survive or effectively compete."<sup>112</sup> Therefore, three elements must be fulfilled to recognize a market squeeze. First, the input provided by upstream firm must be essential, with no good economic substitutes. Second, the upstream firm must sell that input to one or more downstream firms, which will use it to produce a downstream product or service. Third, the upstream firm also directly competes in that downstream product or service market.<sup>113</sup>

Amazon has a "dual role" in its marketplace, where it sells products on its website as a retailer, and it provides a marketplace where independent sellers can sell products directly to consumers.<sup>114</sup> In this respect, Amazon has been criticized for using its platform power to "squeeze" third-party sellers' margins. Specifically, Amazon allegedly charges third party sellers high fulfillment and advertising fees. As the platform operator, the tech company does not need to pay, or pays only a relatively lower price equal to its operation cost. Meanwhile, Amazon is also actively engaging in retail sales in its marketplace by vigorously matching and even undercutting independent sellers on products. This indicates that the third-party sellers' margins would likely be restricted.

However, as revealed by OECD's study on margin squeeze, different jurisdictions have not reached a consensus as to whether and how to regulate margin squeeze from an antitrust law perspective. Commonly debated questions include whether margin squeeze should be regarded as a stand-alone form of abuse and what would be the appropriate test to determine whether such abusive conduct has actually occurred.

In the absence of a duty to deal, the U.S. Supreme Court has rejected margin squeeze as a stand-alone claim. In *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, it held that "[i]f a firm has no antitrust duty to deal with its

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112. ORG. FOR ECON. COOP. AND DEV., MARGIN SQUEEZE 2009 (2009), <http://www.oecd.org/regreform/sectors/46048803.pdf> [<https://perma.cc/45B3-FEHW>].

113. *Id.*

114. European Commission Press Release IP/19/4291, *supra* note 5.

competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous,” unless the plaintiff can claim a predatory pricing abuse.<sup>115</sup> When there is a duty to deal, it is unclear whether margin squeezes are or should be recognized as a distinct form of anticompetitive conduct under the U.S. antitrust law.<sup>116</sup> However, in response to the OECD Secretariat’s inquiry, the U.S. seems to suggest that where there is a duty to deal, such margin squeeze behavior may be caught by the “refusal to deal” doctrine. The margin squeeze as a standalone antitrust doctrine is highly costly.<sup>117</sup>

Conversely, EU competition law recognizes margin squeeze as a standalone abusive conduct under Article 102 TFEU. In a recent appeal decision, the General Court of the European Union indicated that an abusive margin squeeze exists when the spread between the upstream wholesale price charged by the dominant firm to the platform users and the downstream retail price charged to its own customers is either negative or insufficient for an equally efficient competitor. Due to this situation, the competitors were unable to cover the increased cost to supply its own products or services on the downstream market at a competitive price.<sup>118</sup> The upstream input of the dominant firm should be “objectively necessary for competitors to be able to compete effectively on the downstream market.”<sup>119</sup> This would practically happen if the use of Amazon’s platform or the use of Amazon’s data were absolutely essential for competition in online retail.

But is Amazon’s input in the upstream market necessary and indispensable? It seems highly unlikely. Only crucial infrastructures that are hard to duplicate may qualify as essential facilities for a downstream market. It is noted that European courts have only applied this theory in the context of telecommunication networks, the operators of which were also providers of communication services. In Amazon’s case, where e-commerce can hardly be regarded as a separate product market, it would be even harder to conclude that its Marketplace constitutes an essential facility for third party sellers. As discussed in detail, sellers have multiple alternatives in selling their produces, including eBay, Walmart’s online website, and physical stores. Many retailers admit that only a small part of their sales comes from Amazon buyers.<sup>120</sup>

In few words, the theory of margin squeeze presupposes the existence of an input that is as essential as an essential facility. The internet provides

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115. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009).

116. ORG. FOR ECON. COOP. & DEV., *supra* note 112, at 241.

117. *Id.* at 246.

118. Case T-827/15, Deutsche Telekom AG v. Comm'n, EUR-Lex CELEX LEXIS 930 (Dec. 13, 2018).

119. Org. for Econ. Coop. and Dev., *supra* note 112, at 256.

120. Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, WALL ST. J. (Jan. 14, 2015, 6:30 PM), <https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220> [<https://perma.cc/6QX4-FZ9M>].

great opportunities of duplication especially by other technology companies that are potential competitors to Amazon. Besides, if Amazon charged too high of prices for merchants to make any profit, one would observe an out-flow of merchants from the platform, rather than an increase in the number of merchants that use it.

## V. CONCLUSION

Looking at the big picture, an independent evaluation of Amazon's behavior leads to the conclusion that the technology giant abides by antitrust fair play. Obviously, there might be individual illegal conducts of Amazon that the article doesn't touch. What we have instead focused on are the main points of the recent critique against the company. In our view, these pertain to either incidents of market conduct that actually stimulates competition, or the enjoyment of Amazon's lawfully gained business success through market craft and vision.

This research on Amazon's behavior started with the market definition and observed that Amazon is not a monopoly or, at least, a powerful monopoly with undisputed market power. Defining online markets is a challenging process because of network effects, feedback loop mechanisms, and constant innovation. Online markets are fluid and tech companies are operating in multiple, complementary sectors. It is an over-simplification to consider the e-commerce based only on online sales within the U.S. or EU. Geography-wise, it is important to consider worldwide competition, including all the online retailers delivering at a specific area and not only the American platforms. Additionally, since interchangeability between online and physical retail is not a myth, but a daily reality, it is important to consider brick-and-mortar as competitor, especially in big cities, where switching implies minimal time and transaction costs, due to the physical presence of multiple retailers. In particular, physical retailers that operate online platforms enjoy a competitive advantage of using their outlets as inventories and distribution centers.

The most important factor that undermines Amazon's dominance, however, is potential competition. On the one hand, many foreign platforms are investing in American and European markets, and many physical retailers capitalize on their brand by selling online. On the other hand, other members of the Big Tech are hungry for Amazon's piece of the pie. Facebook has already invested in online retail and Google is super-dominant in the market of comparative shopping research. These two giants are actually competing with Amazon for the market of e-retail and not in the market of e-retail. They offer an alternative model, where the sale will be directed from your personal communication or online research. They can grow stronger than Amazon, because they will be able to locate the customer's need before them. The ability to identify demand before it actually exists is arguably not only a

strong competitive advantage but the holy grail for any retailer; the quest for it will thus increase, rather than restrict potential competition.

Furthermore, even if Amazon were not found to be a dominant undertaking, this research evaluated the suggestions on alternative interpretation of antitrust theories that would condemn Amazon's conduct. Traditional theory is not enough to sanction Amazon. The essential facilities doctrine penalizes only the denial of access to the facility, not the denial to use an online platform on equal terms with the platform owner. The "Fulfillment-by-Amazon" tool allows every independent seller to use the platform, at a price without commonly-known exemptions.

This price, though, could trigger a margin squeeze for independent sellers. The margin squeeze doctrine balances between a monopoly's right to profit from its business success and its obligation not to foreclose access to a market. But a margin squeeze can be adopted only if the access to the upstream input, the online platform and the data, is necessary to compete. A closer look at the state of the market demonstrates that Amazon's platform is not essential for a competitor to enter and profit from e-commerce. The cost of duplication is not forbidding. There are many platforms that are already operating in the market and independent sellers tend to maximize their profit by leveraging their presence in these platforms. Neither Amazon.com nor the data that the company collected throughout years are indispensable to compete. Data can be bought elsewhere. Google, Facebook, Yahoo sell data and tailored advertising to potential competitors against Amazon. A broad interpretation expanding the current doctrine in online markets, where innovation has been temporarily staggered, overlooks the fluidity of the online market, the power of potential competition, and the need to stimulate instead of discouraging innovation. Most notably, it overlooks the fact that Amazon benefits consumers and made products cheaper around the globe.

Finally, any efforts to condemn Amazon's behavior under an expansive interpretation of the predatory pricing theory would endanger social welfare in the long run. Under the current framework, Amazon's profits in the market of e-books and many other product lines makes it difficult to prove that the tech company sells below average variable cost. At the same time, proving that Amazon is able to recoup is even more difficult. In this context, adopting a presumption of predation for tech companies every time they drop prices under average variable cost would be a step in the wrong direction for the American antitrust authorities. The protection of antitrust laws is granted to anyone alleging an antitrust injury. The danger of frivolous lawsuits would be greater than in Europe, and the effect on price competition would be detrimental.

Many scholars understand Amazon's conduct as *sui generis* and start a quest to find interpretive ways to regulate the retailer's behavior. Without prejudice to other forms of harm that Amazon's "bigness" could entail in societal or cultural terms, critics fail to persuade that a fundamental change

of antitrust norms is justified. They fail to substantiate their claims with adequate, non-self-conflicting financial data. Businesses are not angels. Amazon is a successful profit-making business, not a charity. Besides that, Amazon is an antitrust fair player. If concentration in e-retail market seems currently high, it is the self-regulatory power of the market and potential competition that will balance the books sooner than later.