

# Yale University

## *Thurman Arnold Project*

Digital Platform Theories of Harm  
*Paper Series: 1*

---

### **AMAZON'S THEORY OF HARM**

May 2020

Désirée Klingler  
Jonathan Bokemeyer  
Benjamin Della Rocca  
Rafael Bezerra Nunes

## Abstract

---

Amazon is the world's largest online retailer, with offerings that expand to grocery, on-demand video, cloud services, and more. Leveraging Amazon's public filings, news articles, illustrious antitrust perspectives, peer-reviewed research, and precedent cases, we conclude that while the company offers many short term benefits—unparalleled convenience, short delivery times, low prices—its practices and underlying business model are concerning for the long-term wellbeing of consumers, complementary firms, and competitors. Altogether, the company's actions preempt both **platform competition**—competition between e-commerce platforms, such as shoes.com and diapers.com, and **brand competition**—competition between seller brands on Amazon and with seller sales channels like brand.com and nike.com.

As the platform host, Amazon is able to monitor traction and trends across its thousands of product categories. If a vendor performs well enough, Amazon is then able to produce its own private label version of the good, providing the same utility to the consumer at slightly lower prices. In these scenarios, other businesses undertake the risk and expend the costs associated introducing new products while Amazon is able to engage consumers of niche product categories effortlessly and cost effectively.

Amazon then engages in steering consumers to the products that are most profitable for the company, whether that is to first-party, third-party, or private label goods. Sellers on Amazon can choose between two business models: they can either be first-party sellers, where sellers act as wholesale suppliers to Amazon. Alternatively, in the third-party model the retailer sells products directly via the Amazon marketplace. As third-party sellers, the sellers can decide how they fulfill the products—through Fulfillment by Amazon (FBA), Fulfillment by Merchant (FBM), or Seller Fulfilled Prime (SFP). Our analysis is mainly concerned with the third-party seller model.

For private labels, which we hypothesize provide significant margins for Amazon, consider the following case: after introducing non-generic products similar to those of many small entrepreneurs, Amazon steers consumers to its high-margin offerings, placing them at the top of the search results page and awarding them highly influential “Amazon's Choice” or “Best Seller” badges. The company even influences the quantity and quality of customer reviews associated with its private labels through its Amazon Vine program, through which avid reviewers offer reviews in exchange for free goods. These product qualities—search page placement, badges, and customer reviews—are highly influential in driving conversion in the e-commerce setting.

But as the consumer is steered to these goods, it is not clear that she is worse off in the short term. Often, these goods are cheaper, while at the same time providing a similar utility to the customer. We argue, however, that depending on further evidence regarding the frequency and breadth of this conduct, she may be worse off in the long term due to market exit and competitive deterrence of many, small entrepreneurs and their product offerings.

Amazon's anticompetitive conduct manifests even after users choose which goods to buy. Often, Amazon's users purchase products sold by third-party vendors that Amazon has coerced, through illicit tying practices, into purchasing Amazon's own delivery services for order fulfillment. By offering benefits to vendors that use Amazon fulfillment, and threatening those that do not, Amazon locks companies into inefficient shipping arrangements, pushes up prices that face consumers, and stifles competition in the third-party delivery-services market.

amazon **batteries**

1-48 of over 10,000 results for "batteries"

Amazon Prime  
 prime  
 Eligible for Free Shipping  
 Free Shipping by Amazon  
 All customers get FREE Shipping on orders over \$25 shipped by Amazon

Amazon Pantry  
 pantry **A. Tying/bundling**

Department  
 Health & Household  
 AA Batteries  
 AAA Batteries  
 C Batteries  
 Household Batteries  
 D Batteries  
 - See more  
 Electronics  
 Batteries, Chargers & Accessories  
 Household Battery Chargers  
 Camera & Photo  
 Camera Batteries  
 Office Products  
 Computer Printer Parts & Accessories  
 - See All 17 Departments

Avg. Customer Review  
 ★★★★★ & Up  
 ★★★★★ & Up  
 ★★★★★ & Up  
 ★★★★★ & Up

Brand  
 AmazonBasics  
 Duracell  
 Energizer  
 Rayovac  
 Maxell  
 Powermax USA  
 ACDelco  
 Batteries  
 BATTERY  
 Eveready  
 Polaroid  
 Battery Tender  
 Optima

Battery Disposability  
 Single-Use  
 Rechargeable

Household Battery Type  
 Alkaline  
 Lithium  
 Nickel Metal Hydride  
 Lead Acid  
 Nickel Cadmium

From Our Brands  
 Our Brands

FSA or HSA Eligible  
 FSA or HSA Eligible

Amazon Global Store

Long-Lasting Power. Still Going  
 Shop Energizer

Energizer AA Batteries (24 Count), Double A Max Alkaline...  
 ★★★★★ 10,647

Energizer AAA Batteries (24 Count), Triple A Max Alkaline...  
 ★★★★★ 10,647

Energizer AA Batteries (48 Count), Double A Max Alkaline...  
 ★★★★★ 10,735

**B. Steering to other brands**

AmazonBasics AA 1.5 Volt Performance Alkaline Batteries - Pack of 48  
 ★★★★★ ~ 48,665  
 \$13.99 (\$0.29/Count)  
 Save 5% more with Subscribe & Save  
 -prime Get it as soon as Tue, May 12  
 FREE Shipping on orders over \$25 shipped by Amazon

Energizer AA Batteries (48 Count), Double A Max Alkaline Battery  
 ★★★★★ ~ 10,735 **D. MFN clauses**  
 \$20.49 (\$0.43/Count) ~~\$28.97~~  
 Save 5% more with Subscribe & Save  
 -prime Get it as soon as Tue, May 12  
 FREE Shipping on orders over \$25 shipped by Amazon

Energizer AAA Batteries (48 Count), Triple A Max Alkaline Battery  
 ★★★★★ ~ 4,092  
 \$20.49 (\$0.43/Count) ~~\$28.97~~  
 Save 5% more with Subscribe & Save  
 -prime Get it as soon as Tue, May 12  
 FREE Shipping on orders over \$25 shipped by Amazon

Energizer AA Batteries (24 Count), Double A Max Alkaline Battery  
 ★★★★★ ~ 10,647  
 \$16.02 (\$0.67/Count) ~~\$17.99~~  
 Save 5% more with Subscribe & Save  
 -prime Get it as soon as Tue, May 12  
 FREE Shipping on orders over \$25 shipped by Amazon

AmazonBasics AA 1.5 Volt Performance Alkaline Batteries - Pack of 48  
 ★★★★★ ~ 48,665  
 \$13.99 (\$0.29/Count)  
 Save 5% more with Subscribe & Save  
 -prime Get it as soon as Tue, May 12  
 FREE Shipping on orders over \$25 shipped by Amazon

AmazonBasics AAA 1.5 Volt Performance Alkaline Batteries - Pack of 36  
 ★★★★★ ~ 43,570  
 \$9.99 (\$0.28/Count)  
 -prime Get it as soon as Tue, May 12  
 FREE Shipping on orders over \$25 shipped by Amazon

**C. Steering to private labels**

**F. Cross-market subsidization**

Customers shopped Amazon's Choice for...  
 "batteries"  
 "batteries aaa"  
 "batteries 9 volt"  
 "duracell batteries"  
 "batteries d size"

AmazonBasics AA 1.5 Volt  
 AmazonBasics AAA 1.5 Volt  
 AmazonBasics 9 Volt Everyday  
 Duracell - CopperTop AA  
 AmazonBasics D Cell 1.5 Volt

**E. Squeezing out competitors**

Legend: Amazon's six anticompetitive conducts; green are the three conducts that limit brand competition; blue are the conducts that limit platform competition.

## Table of Contents

<b>I. Market Environment</b>	<b>4</b>
II. Amazon’s Conduct Limits Brand Competition	6
A. Tying and Bundling of Retail and Logistics Decreases Brand Competition	6
1. Market: E-Commerce and Shipping	6
2. Conduct: Tying and Bundling of Amazon’s Marketplace and Fulfillment Services	6
3. Harms: Higher Consumer Prices and Less Innovation	7
4. Law: Restraint of Trade and Exclusion	8
5. Data Request Wishlist	12
B. Steering and Preferred Listing Stifles Brand Competition	13
1. Market: Amazon as Essential Facility for Brands	13
2. Conduct: Preferred Listing of Badges and Sponsored Products	14
3. Harms: Higher Prices and Less Innovation	17
4. Law: Exclusion under Section 2 Sherman Act	17
5. Data Request Wishlist	18
<b>C. Self-Preferencing of Private Labels Reduces Brand Competition</b>	<b>19</b>
1. Conduct: Introducing Private Labels on the Basis of Sensitive Seller Data	19
2. Harm: Less Innovation and Fewer Consumer Choices	21
3. Law: Exclusionary Conduct under Section 2 Sherman Act	21
4. Data Request Wishlist	<b>23</b>
III. Amazon’s Conduct Forecloses Horizontal Platform Competitors	24
A. MFN and “Fair Pricing” Provisions Limit Competition with Platforms	24
1. Conduct: Clauses and Practices Limiting Price Competition	24
2. Harm: Increased Prices	24
3. Law: Price-Fixing, Exclusion and Coordination	25
4. Data Request Wishlist	27
B. Acquiring Horizontal Competitors Reduces Platform Competition	27
1. Conduct: Predation for Merger	27
2. Harm: Increased Prices, Less Innovation, Fewer Consumer Choices	28
3. Law: Predation and Exclusion under Section 2 Sherman Act	28
4. Data Request Wishlist	29
C. Amazon’s Ability to Subsidize Across Markets Excludes Platform Competitors	30
1. Conduct: Cross-Market Subsidization	30
2. Harm: Increased Prices and Less Innovation	31
3. Law: A Broader Theory of Recoupment	32
4. Data Request Wishlist	36
Supporting Figures	37

## I. Market Environment

In the United States, Amazon is the dominant force both in e-commerce generally and in the markets for many individual products. As of 2018, Amazon represented roughly 35% of total e-commerce sales in the United States,<sup>1</sup> and its market share is rapidly rising.<sup>2</sup> By the end of 2020, Amazon's share of all e-commerce is expected to reach 39%.<sup>3</sup> Its shares of many specific products are much higher. To illustrate, Amazon in 2018 accounted for roughly 57% of consumer-electronics sales, 62% of toys sales, and 46% of home-goods sales.<sup>4</sup> And according to one study, over half of all U.S. households subscribe to Amazon Prime.<sup>5</sup>

Defining the precise market in which Amazon operates, when it engages in anticompetitive behavior, is important for meeting the legal burdens of most antitrust claims. For antitrust purposes, courts define markets as sets of products that have “reasonable interchangeability,”<sup>6</sup> and they generally place the burden of defining the relevant market on plaintiffs.<sup>7</sup> Courts have not, however, articulated clear numerical thresholds for interchangeability.

The market-definition approach to adopt for Amazon cases depends on the type of harm alleged. There are two general approaches. First, for some allegations, such as anticompetitive mergers, the most promising method is to focus on the local or national markets for individual products sold on Amazon. This framework will fit neatly with the analytical tools agencies currently use for market definition. For any given product market, whether the relevant sellers also include brick-and-mortar retail—as opposed to only e-commerce vendors—is case-specific and will depend on the facts and circumstances. Generally, scholars have argued that the answer will vary based on preferences of consumers purchasing a given product and the product's characteristics.<sup>8</sup>

Second, for some harms that create one anticompetitive effect across many product lines, the relevant market extends e-commerce platforms and the e-commerce market generally. Amazon's tying practices

---

<sup>1</sup> Reaching a precise estimate is impossible without access to unpublished company information, but a reliable estimation methodology, which we draw from, is outlined here. Fareeha Ali, What Are the Top Online Marketplaces? *Digital Commerce 360* (March 10, 2020)

<https://www.digitalcommerce360.com/article/infographic-top-online-marketplaces/>.

<sup>2</sup> Matt Day & Jackie Gu, The Enormous Number Behind Amazon's Market Reach, *Bloomberg* (March 27, 2019), <https://www.bloomberg.com/graphics/2019-amazon-reach-across-markets/>.

<sup>3</sup> Dana Mattioli, Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products, *Wall Street Journal* (April 23, 2020) <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

<sup>4</sup> Day and Gu, *supra* note 2.

<sup>5</sup> Pymnts, Amazon Prime Subscriptions to Hit 50 Pct in US (March 12, 2019) <https://www.pymnts.com/amazon/2019/prime-memberships-us-households/>.

<sup>6</sup> The Supreme Court first articulated this standard in 1956. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

<sup>7</sup> See, e.g., *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).

<sup>8</sup> Hans w. Friederiszick & Ela Glowicka, *Competition Policy in Modern Retail Markets*, 2015 *Journal of Antitrust Enforcement* 1, 2-3 (2015); see also *Implications of E-Commerce for Competition Policy – Background Note*, OECD, para. 99 (2018) (arguing that e-commerce retail can be distinguished from offline sales because of consumers' preferences for convenience, e-commerce retailers' use of “one-stop shop” platforms, and retailer distribution costs).

present one example. As discussed below, Amazon ties vendor access to its online marketplace to vendors' purchase of its fulfillment and logistics services. With tying, therefore, Amazon exerts power in the market for e-commerce platform access—where it competes with companies like eBay, Walmart, and Sears—to elicit anticompetitive effects in markets for delivery fulfillment (which harm consumers). Online-marketplace access and delivery fulfillment are unified services that should clear the interchangeability hurdle.

Cases involving steering, a practice that also occurs throughout many lines of goods, could likewise be brought regarding e-commerce generally. However, this broader definition—which would extend to the online sales of many heterogeneous goods—is untested in courts and may run afoul of “reasonable interchangeability.” Lower courts, in the past, have found the digital sales of specific products to be distinct markets from sales of substitutes offered in brick-and-mortar stores.<sup>9</sup> No court, however, has conceptualized a market as including products conventionally understood to be so diverse as Amazon's total e-commerce offerings. To combat behaviors like steering, then, a more effective short-term strategy is likely litigation across a range of product lines such that Amazon's company-wide practices become untenable.

---

<sup>9</sup> See *United States v. H & R Block, Inc.*, 2011-2 Trade Cas. (deliberating over digital tax-preparation services).

## II. Amazon’s Conduct Limits Brand Competition

### A. Tying and Bundling of Retail and Logistics Decreases Brand Competition

#### 1. Market: E-Commerce and Shipping

Amazon violates antitrust law, first, by conditioning vendor access to its online marketplace upon their purchase of its order fulfillment and logistics services. For these violations, the market in which Amazon exerts market power is the market for access to online retail platforms—here, Amazon’s “tying” market. Courts adjudicating tying cases, as discussed below, generally require a showing of market power in the “tying” market to find a violation. Amazon’s share in the online-retail platform market is conceptually equivalent to its share in total U.S. e-commerce. This value, as discussed above, will reach about 40% by 2020—more than enough for Amazon to coerce vendors into purchasing its fulfillment services.

Amazon’s share in the “tied” market, that of e-commerce shipping, is also substantial (and liable to grow as long as its tying continues). Amazon’s logistics services account for about 12% of e-commerce delivery.<sup>10</sup>

#### 2. Conduct: Tying and Bundling of Amazon’s Marketplace and Fulfillment Services

Amazon’s online retail dominance has given it significant influence over the delivery sector, to the point where today, it is fully vertically integrated into delivery. In its earlier years, Amazon leveraged its shipping volume to secure favorable terms (discounts of up to 70%)<sup>11</sup> from third-party delivery companies like UPS and FedEx. Over time, Amazon invested its accumulated assets into creating Fulfillment By Amazon (FBA)—Amazon’s vertically-integrated fulfillment network—to obviate the need for third-party delivery services. Established in 2006, FBA allows third-party sellers to store their products in Amazon warehouses, at which point Amazon becomes responsible for packaging the products, shipping them to consumers, and providing follow-up customer service. In some instances, FBA uses UPS and FedEx services for its shipping.<sup>12</sup>

Amazon’s investments in FBA have, overall, increased shipping efficiency in the short term. Since 2010, Amazon has poured \$13.9 billion into building warehouses, opening more than 180 centers across the globe.<sup>13</sup> Fulfillment centers now fall within 20 miles of 31% of the U.S. population and 60% of its core base of same-day shipping buyers.<sup>14</sup> Amazon currently owns over 4,000 trucks and has signed contracts for

---

<sup>10</sup> Armstrong & Associates, E-commerce Logistics in the United States (2018) <https://static1.squarespace.com/static/5b675bb07c9327bf727e589b/t/5b6890eb70a6ad890e054186/1533579509208/E-Commerce+Sample.pdf>.

<sup>11</sup> Stephanie Clifford & Claire Cain Miller, Wal-Mart Says ‘Try This On’: Free Shipping, *New York Times* (November 11, 2010) <https://www.nytimes.com/2010/11/11/business/11shipping.html>.

<sup>12</sup> Nick Statt, Amazon is delivering half its own packages as it becomes a serious rival to FedEx and UPS: Amazon Logistics keeps growing at a rapid clip (December 13, 2019) <https://www.theverge.com/2019/12/13/21020938/amazon-logistics-prime-air-fedex-ups-package-delivery-more-than-50-percent>.

<sup>13</sup> Daniella Kucera, Why Amazon Is on a Building Spree, *Bloomberg* (August 29, 2013) <https://www.bloomberg.com/news/articles/2013-08-29/why-amazon-is-on-a-warehouse-building-spree>.

<sup>14</sup> Jillian D’Onfro, Here Are All of Amazon’s Warehouses in the US, *Business Insider* (March 24, 2015) <http://www.businessinsider.com/how-many-fulfillment-centers-does-amazon-have-in-the-us> [permanent link: <https://perma.cc/TF8G-BJ72#ixzz3f3AX8zda>].

fleets of ships, airplanes, and drones.<sup>15</sup> Amazon also grants Prime members extra benefits when they purchase goods delivered with FBA—for instance, guaranteed free 2-day shipping and hassle-free returns.

Selling FBA under normal market conditions should be profitable for Amazon. It has secured low shipping prices in its agreements with UPS, and its market power lets it charge high fees for its services. Nevertheless, Amazon pressures companies to use FBA by tying access to the Amazon online marketplace to FBA purchases. This poses long-term harm to all parties—consumers, competitors, and complementors (e.g., third-party delivery services).

Amazon pressures companies to buy FBA, in part by creating advantages for merchants who use the service. Amazon gives these merchants' products a number of essential "tags"—Amazon quality guarantee, 2-day shipping, Prime-eligible<sup>16</sup>—that boosts sales. Amazon also backstops FBA users against fulfillment mishaps (insulating them from negative buyer ratings), provides them fee waivers for their first year of FBA use, and allegedly boosts their sales by making their products more likely to "win" the "Buy Box."<sup>17</sup> In practice, this means some merchants have little choice but to purchase FBA if they wish to sell products on Amazon, as customers may rarely look outside the Buy Box to find cheaper sellers. Companies have also reported direct coercion into purchasing FBA. Amazon has allegedly suspended, or threatened to suspend, non-FBA users whose products experience minor shipping errors, regardless of merchant fault.<sup>18</sup>

### 3. ***Harms: Higher Consumer Prices and Less Innovation***

This tying behavior, first, **harms vendors** whose products are cheaper to fulfill without FBA. One seller has reported that its products are, on average, 35% more expensive to ship through FBA than alternative fulfillment options.<sup>19</sup> The main reason for this is that Amazon can mark up the costs of delivery, due to its market power. Amazon's frequent FBA price increases—including hikes this year as high as 15% for some goods—likely mean that FBA commonly costs more than alternatives, particularly for small businesses.<sup>20</sup> Tying also makes merchants reliant on a competitor, Amazon, for logistics services. This increases Amazon's control over how merchants operate their businesses and puts merchants' reputations at risk in the event of Amazon fulfillment mishaps.

Second, this behavior **harms consumers** directly. Amazon's coercive tying lets it raise its fulfillment prices above competitive levels and prevents vendors from finding cheaper delivery options for their products. Today, despite frequent FBA rate hikes, over 70% of Amazon marketplace vendors sell most of their products with FBA, up from 40% in 2016.<sup>21</sup> These greater costs will flow through to higher consumer prices for certain products. And depressed competition among third-party delivery services also stifles innovation within the delivery industry, leading to worse long-term fulfillment outcomes.

---

<sup>15</sup> Robin Lewis, Amazon's Shipping Ambitions Are Larger than It's Letting On, *Forbes* (April 1, 2016) <http://www.forbes.com/sites/robinlewis/2016/04/01/planes-trains-trucks-and-ships>.

<sup>16</sup> FeedAdvisor: Fulfillment by Amazon (FBA), <https://feedvisor.com/university/fulfillment-by-amazon/>

<sup>17</sup> Amazon Tying Complaint (November 2019), at 28-29.

<sup>18</sup> *Id* at 30-31.

<sup>19</sup> *Id* at 35.

<sup>20</sup> Amazon FBA Fees in 2020 Are Going Up a LOT, *Ecomcrew* (2019) <https://www.ecomcrew.com/amazon-fba-fee-increases-for-2020/>.

<sup>21</sup> Marketplaces Year In Review 2018, *Marketplace Pulse* (2018)

<https://www.marketplacepulse.com/marketplaces-year-in-review-2018#fba>.

Importantly, there is ground to believe that these tying practices—and their effects on prices and consumers—represent antitrust violations even beyond their legal characterization as tying. Amazon’s tying can push the delivery costs, and overall costs, of particular goods to excessive levels. EU courts widely recognize excessive pricing as an inherent antitrust abuse. U.S. courts treat excessive prices more permissively, as a sometimes-necessary component of economic innovation.<sup>22</sup> However, when excessive prices shut vendors out of national markets and stifle delivery innovation, those prices clearly contravene antitrust principles. Amazon’s market power and access to resources also rebuts any presumption that high FBA prices now further its innovation.

Economic logic, further, suggests that the foregoing harms outweigh any efficiencies gained from Amazon’s tying. Amazon’s investments in fulfillment capabilities have created a service that, for some products, produces superior delivery results. But Amazon does not need to tie its services to marketplace access to capture these benefits. As discussed below, vendors on Amazon’s marketplace have every incentive to select the most efficient fulfillment method for their particular product, be that FBA or a third-party service. (And for many products, this method is likely *not* FBA.) Further, as the dominant player in an established market (e-commerce), Amazon is not substantially vulnerable to reputational damage from small numbers of delivery mishaps—even if some vendors *did* use non-FBA fulfillment methods that create worse delivery outcomes.

#### **4. Law: Restraint of Trade and Exclusion**

Tying practices can be challenged under both sections 1 and 2 of the Sherman Act.<sup>23</sup> Tying violates Section 1’s prohibition on restraint of trade and refusal to deal. Courts have also held that, in some circumstances, tying and bundling arrangements violate Section 2’s antimonopoly protections, regardless of the volume of trade subject to restraint.

The legal analysis of tying under both sections is similar—as the D.C. Circuit remarked in *United States v. Microsoft*, the “prudential concerns relevant” to both sections here are “the same.”<sup>24</sup> And in general, tying arrangements violate antitrust law *per se* if they meet five main legal burdens: (1) a “separate products” test for the tying and tied products, (2) a “not insignificant” amount of interstate commerce affected, (3) the presence of an actual tying arrangement, (4) compelled purchase of the tied product through market power in the tying product, and (5) the absence of any legitimate business purpose for the tying arrangement. Each burden is discussed below.

##### **1. Tying/Tied Product Market Definition**

The “separate products” test asks whether the tied products are in fact separate markets, or really one market for a single good. Amazon’s marketplace and FBA services should easily clear the “separate products” hurdle. Courts have taken *ad hoc* approaches to this test, but in *Jefferson Parish*, the Supreme Court wrote that it hinges on (1) “the character of the demand for the two items” and (2) whether the products “were

---

<sup>22</sup> See Raphael De Coninck, Excessive Prices: An Overview of EU Law and National Case Law, *Concurrences* (2020) <https://www.crai.com/sites/default/files/publications/Excessive%20Prices-%20Foreword.pdf> (discussing the United Brands standard and comparing U.S. and E.U. law).

<sup>23</sup> See Competition and Policy: Single-Firm Conduct Under Section 2 of the Sherman Act, in *Section 2 Report*, Department of Justice (2015) [permalink: [https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681\\_chapter5.pdf](https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter5.pdf)].

<sup>24</sup> *United States v. Microsoft Corporation*, 253 F.3d 34, at 35 (D.C. Cir. 2001).

distinguishable in the eyes of buyers.”<sup>25</sup> Each factor weighs in favor of viewing Amazon’s two products as separate.

The products are distinguishable, for one thing, because vendors are billed separately for FBA and marketplace access. Amazon charges all vendors for access to its marketplace, and service plans incorporate a mix of flat and variable fees;<sup>26</sup> FBA’s pricing schemes are distinct. The *Jefferson Parish* Court similarly looked to differential billing to find two products separate. Further, companies pay FBA fees per unit sold, meaning that FBA and marketplace access are not sold “as a unit with fixed proportions”—another factor courts have looked to.<sup>27</sup> The character of demand for each service also differs. That thirty percent of Amazon vendors sell most of their products without FBA—despite pressures to do otherwise—demonstrates separate demand for these services.<sup>28</sup>

## 2. Not Insignificant Amount of Interstate Commerce Affected

Amazon will easily meet this criterion, as it is meant to insulate from antitrust law only *de minimis* market volumes. The Supreme Court ruled in 1962 that a \$60,000 market was “not insubstantial.”<sup>29</sup>

## 3. Presence of an Actual Tying Arrangement

To find a tying violation, courts require that the defendant, through some mechanism, actually ties together the purchases of its two products. Amazon’s coercion and financial pressure to buy FBA fulfill this requirement. Amazon will argue its practices do not constitute tying because it lacks any formal contract—which tying-law violators frequently use—to condition marketplace access upon FBA use. But courts do not require contracts or other explicit directives to find a tying violation. Rather, the prohibition on tying extends to “requirement[s] to purchase the tied product” that are “achieved indirectly by financial inducements,” and courts have treated explicit and indirect tying practices similarly.<sup>30</sup> One illustrative case is *Zenith Radio Corp.*, which dealt with the bundling of copyright licenses. The Supreme Court stated here that the defendant was barred from “conditioning *directly or indirectly* the grant of a license... upon the taking of a license under any other patent.”<sup>31</sup>

## 4. Market Power and Compelled Purchases

Courts also require, separately from the existence of a tying arrangement, that tying violators exercise market power in the tying market to enforce their tie. There are two ways to demonstrate Amazon’s market power: through a *per se* showing based on market share, or through a rule of reason analysis weighing direct and indirect evidence. The rule of reason approach is the most promising here, and both approaches are discussed below.

---

<sup>25</sup> *Jefferson Parish*, at 19.

<sup>26</sup> How to Sell on Amazon in 2020: Setup, Fees, and Strategy, *Intuiti* (March 2, 2020)

<https://tinuiti.com/blog/amazon/sell-on-amazon/>.

<sup>27</sup> *Arlie Mack Moore et al. v. Jas. H. Matthews & Co. et al.*, 550 F.2d 1207, 1215 (9th Cir. 1977).

<sup>28</sup> Companies whose products are more cheaply shipped via FBA alternatives, as discussed *supra*, further have a clear economic incentive to demand these services separately.

<sup>29</sup> *See United States v. Loew's Inc. et al.*, 371 U.S. 38, 49 (1962).

<sup>30</sup> Richard Gilbert & Carl Shapiro, Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No’s Meet the Nineties, *Brookings Papers: Microeconomics* (1997) 283, 317.

<sup>31</sup> *Zenith Radio Corp. v. Hazeltine Research inc.*, 395 U.S. 100, 133-4 (1969) (emphasis added).

*Per se showing:* Courts may make a *per se* finding of market power if respondent has sufficiently high market share within the relevant market. There is no specific threshold for carrying this burden, and the share required for a *per se* ruling will vary by case. Amazon’s roughly 40 percent share of total e-commerce, however, stands a good chance of failing to clear the *per se* bar. Although at least one court has found a 26 percent share sufficient to infer market power,<sup>32</sup> others have found shares of roughly 70 percent adequate to create this inference for pleading purposes.<sup>33</sup> This would presumably be a lower bar than that needed for a *per se* market-power finding in full proceedings.

Were a tying case brought regarding specific product lines, though, Amazon’s shares in some goods markets could easily suffice for a *per se* market-power finding. As discussed *supra*, Amazon has shares upwards of 60 percent in markets for toys, and a comparable share in the market for books.

*Rule of reason:* Market power entails that a firm can increase its profits (and harm consumers) by raising prices above competitive levels. Without a *per se* showing of Amazon’s market power, there are two categories of evidence that weigh in favor of finding market power.

- Direct evidence of specific companies coerced into buying FBA
- Direct or indirect evidence of Amazon’s ability to raise FBA prices above competitive levels without losing market share

The November 2019 complaint, as discussed *supra*, offers testimony from a company that, because of Amazon’s tying, bought FBA in lieu of cheaper, better-quality alternatives. In the company’s words, it “has, on more than one occasion, rejected superior offers from nascent competitors in the fulfillment market.”<sup>34</sup> Interviews with other companies would likely discover more such evidence. This is particularly true because, as discussed above, to have a meaningful chance of selling their products on Amazon many vendors *must* purchase FBA—in order to win the Buy Box, etc.

There is also macro-level evidence that Amazon can raise FBA fees without sacrificing market share. In recent years, Amazon has consistently raised FBA fees for some goods by 15% year-over-year.<sup>35</sup> Amazon also charges significant fees and penalties beyond the headline price numbers. For example, it imposes “strict” packaging preparation requirements on vendors—charging penalties to violators and waiving requirements for a price—which raises vendors’ average costs.<sup>36</sup> Nevertheless, majority-FBA sellers have skyrocketed over the past two years from 40% to 70% (see above).

In demonstrating Amazon’s market power, it is helpful to distinguish Amazon’s market from that in *Jefferson Parish*, where the Court declined to find that a hospital possessed market power in local markets for anesthesia. The Court relied on findings that buyers were (1) unaware of the price differentials between the seller’s product and substitutes and (2) unable to judge product quality.<sup>37</sup> It is implausible that either

---

<sup>32</sup> *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 341 (2d Cir. 2003).

<sup>33</sup> *Hewlett-Packard Co. v. Boston Scientific Corp.*, 77 F.Supp.2d 189, 195-6 (D. Mass. 1999); see also Amazon Tying Complaint (November 2019), 26.

<sup>34</sup> *Id.* at 28.

<sup>35</sup> Amazon FBA’s Largest Ever Fee Increase Coming in 2018—How Will It Affect You? *Ecomcrew* (March 10, 2018) <https://www.ecomcrew.com/amazon-fba-fee-increases-for-2018/>; see also Amazon FBA Fees in 2020 Are Going Up a LOT.

<sup>36</sup> Hadleigh Reid, Understanding Fulfillment Costs on Amazon: An Explanation of FBA Fees, *DCL* (April 7, 2020), <https://dclcorp.com/blog/amazon-fulfillment/amazon-an-explanation-of-fba-fees/>.

<sup>37</sup> *Jefferson Parish*, at 27-8.

condition applies to Amazon vendors. Companies selling on Amazon can access internal company cost data, the advertised terms of logistics providers,<sup>38</sup> and third-party analyses of the logistics industry.<sup>39</sup> They have strong profit incentives to locate the cheapest fulfillment options available—and the quality of their choices will become immediately apparent once customers request customer service, and offer feedback, if deliveries go awry.

#### 5. No Legitimate Business Purpose

Defendants can prevail against tying claims by demonstrating a legitimate business purpose for tying, which cannot be achieved by other reasonable means. There is no exhaustive list of business-purpose defenses available, but courts have generally understood a legitimate purpose to entail a “substantial hardship apart from the loss of the [tied product] sales.”<sup>40</sup> Below are two business-purpose defenses Amazon is likely to raise and reasons they are insufficient to justify its tying.

##### a) Amazon has an interest in tying if it provides better outcomes for consumers.

Courts have considered maximizing consumer surplus a valid justification before.<sup>41</sup> There are two responses. First, whether Amazon FBA provides better outcomes is an empirical question, and the November 2019 complaint gives reason to think it often does not. The complainant finds that nearly all other fulfillment services provide either cheaper or faster delivery of its product than Amazon—whose own delivery times on average *exceed* its two-day delivery guarantee.<sup>42</sup> Second, conceptually, even if Amazon FBA is often more efficient than third-party delivery services, Amazon should not adopt a rigid, platform-wide policy of coercing vendors into buying it. Market forces will achieve the consumer benefits Amazon (arguably) seeks because vendors, whose reputations depend on timely delivery, have every incentive to select optimal fulfillment services. And Amazon could correct any market failures through less restrictive means than tying. For instance, it could ban from its platform any individual third-party fulfillment services with a track record of poor conduct. It could also subsidize FBA for all sellers while collecting an across-the-board fee, regardless of the shipping options sellers choose.

##### b) Amazon has an interest in tying to avoid risking its reputation as a reliable vendor.

Courts have held before that reputation protection may be a legitimate purpose for tying. The archetypical case is *Jerrold Elecs. Corp.* (1961), where the Supreme Court upheld the tying of exclusive installation-service contracts to the sale of certain TV antennas. However, the Court permitted tying here because antennas were a “new industry” where an early “wave of system failures” would have been “disastrous” for

---

<sup>38</sup> Amazon Shipping & FBA Excel Fees Calculator for 2020, *Ecomcrew* (January 20, 2020) <https://www.ecomcrew.com/amazon-selling-fees/>.

<sup>39</sup> *See, e.g.*, Barbara Krasnoff, The Best E-Commerce Fulfillment Services, *PC Magazine* (July 20, 2019) <https://www.pcmag.com/picks/the-best-e-commerce-fulfillment-services>; *see also* Brian Berry, How to Calculate Fulfillment Cost Per Order, *F. Curtis Barry and Company* (2020) <https://www.fcbco.com/blog/calculate-fulfillment-cost-per-order>.

<sup>40</sup> *See, e.g. Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d, 655 (1st Cir. 1961) cert denied.

<sup>41</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001) (considering “consumer surplus” and “consumer choice” as justifications for tying, in deciding whether to adopt a *per se* rule for software/hardware tying).

<sup>42</sup> Amazon Tying Complaint (November 2019), at 35.

the vendor.<sup>43</sup> It also treated “many” unsuccessful self-installations—absent any tying—as a near factual certainty, and it noted the vendor faced immediate financial risks from failed installations.<sup>44</sup> None of these characteristics obtain for Amazon—an established household name, with the financial wherewithal to sustain any marginal reputational damage, and whose own fulfillment would be substituted only for superior services. (Consumers particularly worried about non-FBA deliveries also remain free to buy Amazon’s own labels.) *Jerrold*, moreover, distinguished permissible reputation-protection from tying merely to retain goodwill,<sup>45</sup> which is impermissible and more akin to what Amazon’s tying would attempt to do here.

The empirical points and less restrictive means for Amazon to achieve its objectives, discussed above, also apply to this defense. In addition to those alternative means, Amazon could also jointly manage its and its vendors’ reputations by publicizing information about vendors’ fulfillment performances.

**5. Data Request Wishlist**

Business Processes	Data
<ul style="list-style-type: none"> <li>- Amazon correspondence with vendors regarding suspension of their full access to its marketplace for issues related to third-party logistics and fulfillment</li> <li>- Amazon’s internal evaluations or assessments of third-party logistics services</li> </ul>	<ul style="list-style-type: none"> <li>- Costs, delivery time, and error rate of fulfillment for FBA versus other logistics providers, broken down by product and by region (include breakdown of fees for shipping-related services, like packaging and labeling)</li> <li>- Recent cost changes in Amazon FBA versus other fulfillment providers, by product size or other classification</li> <li>- Percentage of orders for which Amazon actually meets shipping-time guarantees</li> <li>- User satisfaction ratings for similar products shipped by FBA versus other providers</li> <li>- Percentage of third-party fulfillment providers’ revenues from Amazon orders versus other e-commerce orders</li> </ul>

<sup>43</sup> *Jerrold Elecs. Corp.*, 187 F. Supp. 545, aff’d, 365 U.S. 567, 557 (1961).

<sup>44</sup> *Id.* at 557.

<sup>45</sup> *Id.* at 561; see also Christian Ahlborn, David S. Evans, & A. Jorge Padilla, The Antitrust Economics of Tying: A Farewell to Per Se Illegality, 49 *Antitrust Bulletin* 287 (2004) [permalink: <https://www.justice.gov/atr/antitrust-economics-tying-farewell-se-illegality>].

## B. Steering and Preferred Listing Stifles Brand Competition

### 1. Market: Amazon as Essential Facility for Brands

#### *E-commerce Market Share*

Across many different product lines on its online marketplace, Amazon employs various tactics to steer consumers towards purchasing the specific sellers' goods, within each individual product's market. These steering violations occur throughout the broader e-commerce market, in which Amazon's market share is now about 40%. However, as discussed above, a legal challenge to tying oriented around anticompetitive effects in the broader e-commerce market might not meet courts' market-definition requirement of "reasonable interchangeability," discussed above. Tying cases, therefore, may also be brought pertaining to markets for discrete goods sold on Amazon's platform, where Amazon accounts for a large portion of sales across the U.S.

#### *Amazon as Essential Facility*

What is an essential facility? The 7th Circuit understands under essential facility that "a business holds a monopoly of some essential facility that other businesses need in order to compete."<sup>46</sup> The European Commission has defined essential facilities as a "facility or infrastructure which is necessary for reaching customers and/or enabling competitors to carry on their business."<sup>47</sup> Amazon is such an essential facility. For many vendors, Amazon is the only platform for reaching customers at scale. Other platforms like eBay or Walmart have comparatively small market shares in the online retail market, 5% and 7% respectively, as compared to Amazon's share of around 50%. Hence, Amazon not only reaches more customers, but also has more sellers on its platform. While Amazon had 100 million Amazon Prime memberships in the US in 2019,<sup>48</sup> it hosted almost 2.5 million active sellers in the US the same year.<sup>49</sup>

While the Supreme Court has not recognized the essential facilities doctrine yet,<sup>50</sup> lower U.S. courts and the European Commission support the doctrine. The essential facilities doctrine imposes a duty on the monopolist to give competitors access to the facility "that is deemed necessary for effective competition." See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). This doctrine was expressed most clearly in the 7th Circuit's opinion in *MCI Communications v. AT&T* (1983) which stated that there are four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.<sup>51</sup>

---

<sup>46</sup> *MCI Communications v. AT&T* (1983), at note 25.

<sup>47</sup> Directorate-General for Competition, Glossary of terms used in EU competition policy (July 2002), at 18, <https://op.europa.eu/en/publication-detail/-/publication/100e1bc8-ccc3-4f65-9b30-e232ec3064d6>.

<sup>48</sup> Don Reisinger, Amazon Prime Has More Than 100 Million U.S. Subscribers, *Fortune* (January 17, 2019) <https://fortune.com/2019/01/17/amazon-prime-subscribers/>.

<sup>49</sup> Maryam Mohsin, 10 Amazon Statistics You Need to Know in 2020 (29 August, 2019) <https://www.oberlo.com/blog/amazon-statistics>.

<sup>50</sup> See *Verizon Communications v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>51</sup> Matthew Lane, What is the "Essential Facilities Doctrine" in the U.S.? (April 2, 2018) <http://www.project-disco.org/competition/040418antitrust-in-60-seconds-what-is-the-essential-facilities-doctrine-in-the-u-s/>.

Amazon fulfills all those criteria. (1) It has factual monopoly power in the online retail market. (2) As the past years have shown, it is practically impossible for other platforms like Walmart or eBay to duplicate the facility, offering the same features as Amazon. One reason might be the large customer and retailer base, which creates re-enforcing network effects. While the retail customer base is rather dispersed, customers using Amazon Web Services (AWS) are more concentrated. Apple is one of Amazon's biggest AWS customers.<sup>52</sup> Having Apple on board certainly helps to strengthen reputation and reinforce market power. On the retailer side,<sup>53</sup> Amazon's largest retailers in the United States are Pharmapacks<sup>54</sup> (selling make-up remover, face cream, mouth wash, etc. for \$ 140,000 per year), AnkerDirect<sup>55</sup> (selling USB chargers in the amount of \$80,000 a year) and Zappos<sup>56</sup> (selling shoes in the amount of \$65,000 per year). Another reason that imposes a challenge to other platforms to duplicate Amazon is the large product range (over 12 million products) that Amazon offers.<sup>57</sup> (3) Amazon can refuse access or terminate each seller's account without giving any reasons or notice. As Amazon's market share grows, its cross-platform network effects also increase. These network effects constitute barriers to entry to other platforms that would compete by offering the same services. It also constitutes barriers to entry to individual sellers who aim at selling on their own website, given direct competition with Amazon's platform and absence of the latter's network effects. (4) And finally, Amazon is also able to provide the facility, which is Amazon's business model. As the past has shown, the Amazon marketplace is scalable to include many different products, to provide access to a large consumer and seller base and to deliver the products in time.

## **2. Conduct: Preferred Listing of Badges and Sponsored Products**

### **1. Amazon's Search Engine Results Page**

According to a 2014 study, more than 67% of all clicks on search engine results pages go to the top five listings.<sup>58</sup> Research shows that websites on the first search engine results page receive almost 95% of web traffic,<sup>59</sup> leaving only 5% for remaining search results pages.

---

<sup>52</sup> John Koetsier, Report: Apple Is One Of Amazon's Biggest Customers, Spending Over \$350 Million Per Year, *Forbes* (Apr 22, 2019) <https://www.forbes.com/sites/johnkoetsier/2019/04/22/report-apple-is-one-of-amazons-biggest-customers-spending-over-350m-per-year/#7b85f04511c4>.

<sup>53</sup> Andy Goldman, The World's Top Amazon Marketplace Sellers 2020, *Webretailer* (January 2020), <https://www.webretailer.com/b/top-amazon-marketplace-sellers/#/>.

<sup>54</sup> Pharmapacks @ Amazon.com,

[https://www.amazon.com/s?me=ASEVS99O6FS73&\\_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&linkId=9b9fa30a42546455d7d5da39ae59b4f7&marketplaceID=ATVPDKIKX0DER&tag=webretailer0f-20](https://www.amazon.com/s?me=ASEVS99O6FS73&_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&linkId=9b9fa30a42546455d7d5da39ae59b4f7&marketplaceID=ATVPDKIKX0DER&tag=webretailer0f-20).

<sup>55</sup> Ankerdirect @ Amazon.com,

[https://www.amazon.com/s?me=A294P4X9EWVXLJ&\\_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&linkId=9b9fa30a42546455d7d5da39ae59b4f7&marketplaceID=ATVPDKIKX0DER&tag=webretailer0f-20](https://www.amazon.com/s?me=A294P4X9EWVXLJ&_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&linkId=9b9fa30a42546455d7d5da39ae59b4f7&marketplaceID=ATVPDKIKX0DER&tag=webretailer0f-20).

<sup>56</sup> Zappos @ Amazon.com,

[https://www.amazon.com/s?me=AH1YFAUS3NHX2&\\_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&linkId=9b9fa30a42546455d7d5da39ae59b4f7&marketplaceID=ATVPDKIKX0DER&tag=webretailer0f-20](https://www.amazon.com/s?me=AH1YFAUS3NHX2&_encoding=UTF8&camp=1789&creative=9325&linkCode=ur2&linkId=9b9fa30a42546455d7d5da39ae59b4f7&marketplaceID=ATVPDKIKX0DER&tag=webretailer0f-20).

<sup>57</sup> TouchPoints, How Many Products Does Amazon Carry?

<https://retailtouchpoints.com/resources/how-many-products-does-amazon-carry>.

<sup>58</sup> Madeline Jacobson, How Far Down the Search Engine Results Page Will Most People Go? (November 5, 2015)

<https://theleverageway.com/blog/how-far-down-the-search-engine-results-page-will-most-people-go/>.

<sup>59</sup> Lauren Kaye, 95 percent of web traffic goes to sites on Page 1 of Google SERPs (June 21, 2013)

<https://www.brafton.com/news/95-percent-of-web-traffic-goes-to-sites-on-page-1-of-google-serps-study/>.

This setup is useful for Amazon given typical consumer search behavior: about 70 percent of the word searches done on Amazon’s search browser are for generic goods (asking for ‘running shoes’ rather than ‘Nike’ for example).<sup>60</sup> Such word searches by consumers allow it to position its private-label products at the top of the results page. Further, it has the emails of the consumers who performed searches and can reach out to them directly to drive consumers to return to the marketplace.

While it is true that physical retailers offer their own versions of generic goods, the difference with Amazon is the scale at which it operates and the sophistication of the data that it collects. Unlike brick-and-mortar retailers, who are merely able to track sales, Amazon has control over a host of other valuable data points; e.g., what users search for, what products they return to, what they keep in their baskets, what they’ve viewed, but abandoned, etc.<sup>61</sup> And while some of this data is also available to big brands selling on Amazon’s platform through its **Amazon Retail Analytics Premium** program, it is very expensive to sign on, with vendors paying up to 1 percent of their wholesale cost of goods sold to Amazon or a minimum of \$100,000 per month. Under this program, participants’ exposure to valuable customer data is also limited since Amazon is able to actively select which of its data is provided to members and which is withheld. With its data, Amazon is able to conduct regional or one-day price tests, dropping the cost of its goods in certain markets to discover at which specific prices customers purchase items.

The company is also privileged in terms of its influence over customer reviews. “Amazon can analyze reviews and figure out why customers were dissatisfied with a certain product,” said Cooper Smith, an analyst at research firm Gartner L2. “Amazon can then turn around and create a private label for a similar product but improve upon it based on what customers say.” Perhaps more concerning, the company has engaged in shaping the quantity, quality, and distribution of its reviews through **Amazon Vine**, an in-house program for encouraging customer review activity on many of its private-label goods. Within the program, active reviewers on the Amazon marketplace are invited to participate, agreeing to write evaluations on Amazon’s site in exchange for free products. An analysis of more than 1,600 products across ten of Amazon’s private-label brands, including **AmazonBasics**, showed that about half had Vine reviews. Of those 835 products, more than half of the first 30 reviews were from the Vine program, according to ReviewMeta.com, an online tool that helps customers identify inauthentic reviews.<sup>62</sup> The act of soliciting reviews in exchange for free goods is critical given the influence that customer reviews have on online shoppers’ propensity to purchase.

## 2. Amazon’s Badges and Labels

Amazon has engaged in steering shoppers to its own goods or to high-paying sellers, often times departing from its original position as being an impartial, ‘may-the-best-product-win’ distribution partner (i.e., democratizing retail, benefiting small vendors)<sup>63</sup> to now competing directly with those same vendors. Lower prices are not the only thing driving consumers to these products. Amazon is utilizing the disparate forms of intelligence gained from its powerful marketplace machine—optimizing word-search algorithms,

---

<sup>60</sup> Julie Creswell, How Amazon Steers Shoppers to Its Own Products, *New York Times* (June 23, 2018)

<https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>.

<sup>61</sup> As one analyst said of Amazon employees, “They’re data scientists. They know what people want and they’re going to mop it up.” Nick Bravo, Amazon Private Labels Threaten Manufacturers, *Trendsource* (July 5, 2016) <http://trustedinsight.trendsource.com/trusted-insight-trends/amazon-private-labels-threaten-manufacturers>.

<sup>62</sup> Julie Creswell, How Amazon Steers Shoppers to Its Own Products, *New York Times* (June 23, 2018)

<https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>.

<sup>63</sup> See also Lina M. Khan, Amazon’s Antitrust Paradox.

analyzing competitors' sales data, using its customer review networks—to steer shoppers to its private labels—a product category that we hypothesize as having the largest margins for the company. As a novel example, it leverages its voice-recognition technology to steer consumers to its products. When consumers ask **Amazon's Alexa** to buy batteries, they get only one option: **AmazonBasics**.<sup>64</sup>

Amazon also behaves in an exclusionary manner when deciding product order on search results pages. For example, if you were to search for batteries, you would likely see a large sponsor ad at top—for which, big brands, such as Duracell, pay up to six figures per month—closely followed by AmazonBasics batteries, which are flagged with badges that denote them as “**Best Seller**” or “**Amazon's Choice**,” two highly influential badges for driving onsite conversion. The underlying parameters of the two badges are not fully transparent and have led to speculations in the market. While the “Best Seller” badge strongly relies on past sales, and is therefore less susceptible to Amazon's influence, the parameters that lead to “Amazon's Choice” are highly controversial.<sup>65</sup> According to Business Insider, the badge mainly relies on the following parameters: low return rate, high customer ratings and best-seller ranking.<sup>66</sup> Other possible factors are image size and quality, low price, and fast shipment.<sup>67</sup> Most of these factors are critical because they are susceptible to influence by Amazon. For example, customer ratings can be influenced by the Amazon Vine program (discussed below). Similarly, the Best Seller rank is determined by Amazon. Shipment by FBA is also treated preferentially over third-party delivery shipment.

The third category of products that appears high on the first search engine results page (SERP) are “**Sponsored Products**.” Sponsored products are products for which the third-party seller pays a fee each time a customer clicks on the link—hence, simple ads.<sup>68</sup> To become a Sponsored Product, products must be eligible for the Buy Box.<sup>69</sup> To be eligible for the **Buy Box** (the yellow box where it says “add to cart”), third-party sellers have to meet multiple factors—again, not fully transparent—that are set by Amazon. According to insiders the most important conditions for Buy Box eligibility are: fulfilment method, either by FBA, Fulfilment by Merchant (FBM) or Seller-Fulfilled Prime (SFP), fast shipping, high stock availability, good customer feedback, and low price.<sup>70</sup> However, it is important to note that the lowest price will not guarantee the inclusion into the Buy Box.<sup>71</sup> Similar as with the other two labels, Amazon exerts a lot of power on the inclusion (or exclusion) of sellers into the Buy Box and therewith on Sponsored

---

<sup>64</sup> *Id.*; see also Amazon, AmazonBasics,

<https://www.amazon.com/stores/AmazonBasics/AmazonBasics/page/947C6949-CF8E-4BD3-914A-B411DD3E4433>.

<sup>65</sup> Dennis Green, Here's what it means when an item is marked 'Amazon's Choice' (Aug 4, 2018)

<https://www.businessinsider.com/what-is-amazons-choice-2018-5>.

<sup>66</sup> Dennis Green, Here's what it means when an item is marked 'Amazon's Choice' (Aug 4, 2018)

<https://www.businessinsider.com/what-is-amazons-choice-2018-5>.

<sup>67</sup> RepricerExpress, 21 Ways to Rank Your Products Higher on Amazon (last visited May 6, 2020)

<https://www.repricerexpress.com/rank-your-products-higher-on-amazon/>; Marc Schenker, Amazon SEO: How to Rank Highly for Amazon Searches (August 27, 2019),

<https://www.wordstream.com/blog/ws/2018/05/17/amazon-seo>.

<sup>68</sup> Amazon Advertising, Sponsored Products, [https://advertising.amazon.com/products/sponsored-products?ref=selld\\_s\\_acq\\_1478168135&ld=NSGoogle](https://advertising.amazon.com/products/sponsored-products?ref=selld_s_acq_1478168135&ld=NSGoogle).

<sup>69</sup> Amazon Advertising, Sponsored Products, [https://advertising.amazon.com/products/sponsored-products?ref=selld\\_s\\_acq\\_1478168135&ld=NSGoogle](https://advertising.amazon.com/products/sponsored-products?ref=selld_s_acq_1478168135&ld=NSGoogle).

<sup>70</sup> 21 Ways to Rank Your Products Higher on Amazon, *RepricerExpress* (last visited May 6, 2020),

<https://www.repricerexpress.com/rank-your-products-higher-on-amazon/>.

<sup>71</sup> Amazon Buy Box: the ultimate guide, *Repricer Blog* (last visited May 6, 2020)

<https://blog.repricer.com/resources/amazon-buy-box-ultimate-guide/>.

Products. Amazon considers its FBA as best-in-class in terms of shipping time and sets high standards to qualify for SFP.<sup>72</sup> “A FBM seller would need to be enrolled in SFP or have excellent scores in all other areas, as well as significantly lower price, to outrank FBA vendors.”<sup>73</sup> Also, as mentioned in the next section, customer feedback is to a large degree administered by Amazon over Amazon Vine.

Included is a use case containing steering tactics by Amazon to preference its own products:

**Generic Toaster Search:** When a consumer searches for “toaster” on Amazon’s search engine, she is directed, by default, to a listing of “featured” products. These search results include AmazonBasics along with other large names in home appliances, such as Cuisinart—carriers who most certainly paid for such positioning. In this view, Amazon steers consumers to its own toasters as Cuisinart’s price is hidden. Please see the corresponding supporting figure (Figure 2A) to view the associated search page. Only upon reading through a long list of filters on the left pane and by selecting the ‘Below \$25’ filter consumers are directed to toasters that are truly competitive to the AmazonBasics toaster. In Figure 2B, you will notice that the Hamilton Beach toaster, which was originally very low on the search results page, is in many ways better for consumers than is the AmazonBasics toaster (same rating and functionality, but 20% cheaper and arrives 3 days earlier).

### 3. Harms: Higher Prices and Less Innovation

In recent years, Amazon has engaged in steering consumers either to high-paying sellers or to its own products in novel ways. For one, it privileges its own goods when customers buy via voice command (through Alexa). For another, it indirectly steers shoppers to products through influencing search results page placement, awarding desirable product badges, and affecting the quantity and quality of customer reviews on specific products (through Amazon Vine). We recognize that Amazon often directs consumers to the cheapest and/or highest-rated products, creating efficiencies in the short term. These efficiencies are enjoyed by consumers who are provided products that meet their immediate needs in a time sensitive fashion.

However, we doubt that the same customers who enjoy said efficiencies are better off in the long run. The steering and preferred listing to high-paying sellers leads to foreclosure, excluding third-party vendors from level competition. Either the sellers sell less after being pushed down the results list, or they need to pay more for better services like FBA or ads, resulting in lower margins. Why is this important? Amazon.com is a sales channel that not only competes with brands *on* the platform but also with the brands’ sales channels. Each brand.com site, while small, is a horizontal competitor to amazon.com. If consumers liked and used them all, the consumer would not need amazon.com. Hence, by steering consumers away from these brands and their associated websites, Amazon forecloses smaller brands and their websites from the online retail market one by one. This leads to a ‘death by a thousand cuts,’ ultimately leading to less horizontal competition in the long run, which will likely **increase prices for consumers**. It also **stifles innovation** offered by new seller entry and their websites and **lowers the degree of consumer choice**.

### 4. Law: Exclusion under Section 2 Sherman Act

In US antitrust law, here are two broad classes of anticompetitive conduct: collusion and exclusion. While collusion involves a group of firms cooperating with one another to restrict their own output, exclusion involves a firm raising the costs or reducing the revenues of competitors in order to induce the competitors

---

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

to raise their prices, reduce output, or exit from the market.<sup>74</sup> Utilizing either collusive or exclusionary practices, the firm can achieve or maintain market power. Section 2 of the Sherman Act focuses on exclusionary conduct, i.e., conduct that creates or maintains monopoly power by disadvantaging and harming competitors.<sup>75</sup>

Through its badges and the Buy Box, Amazon has the power to exclude smaller sellers from competition by favoring products from high-paying third-party sellers. By listing high-paying third-party sellers on the first search engine results page and squeezing other third-party sellers to subsequent pages, Amazon effectively reduces horizontal competition. A crucial element of Amazon’s unlawful behavior is that a competitive price is not necessarily the most important parameter for Amazon’s badges or the Buy Box, but other factors, such as FBA and high customer ranking are more important. While quality competition is a legitimate economic behavior, the aforementioned quality features are all controlled by Amazon—be it FBA or customer ratings, which are orchestrated through Amazon Vine. By excluding its competitors (third-party sellers) from competition, Amazon monopolizes or at least attempts to monopolize the online retail market.

**5. Data Request Wishlist**

Business Processes	Data
<ul style="list-style-type: none"> <li>- Search results page algorithm details; product placement inputs</li> <li>- Amazon Vine member rewards, incentives, and responsibilities; how does Amazon protect reviewer independence</li> <li>- Criteria for awarding “Amazon’s Choice”, “Best Seller” and Buy Box</li> <li>- Amazon’s profit from selling own private labels versus fees from third-party sellers</li> </ul>	<ul style="list-style-type: none"> <li>- Conversion details on products with “Amazon’s Choice” and “Best Seller” badges v. those without (within first 10 items on the search results page)</li> <li>- How often a search results ends in a purchase (random sample of 10 days within last year); % of sales that were Amazon’s Choice / Best Seller</li> <li>- Amazon’s profit from own private labels and profit from third-party seller fees (including sponsored products, and FBA)</li> </ul>

<sup>74</sup> Steven Salop, Exclusionary conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard, 73 *Antitrust Law Journal* (2006) 311-374, 311,

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1197&context=facpub>.

<sup>75</sup> *Id.*

## C. Self-Preferencing of Private Labels Reduces Brand Competition

### 1. Conduct: Introducing Private Labels on the Basis of Sensitive Seller Data

#### 1. Riskless Product Introduction

Amazon has influenced the ecommerce industry in a way that allows it to collect and exploit information that undermines its competition. And while competitors are aware of this perverse structure, they realize that, in order to succeed in the current online retail environment, they must sell through Amazon to achieve desired sales volume and delivery norms (e.g., 2 days or fewer, hassle-free returns, etc.). They are also aware that, in selling through Amazon, they offer their data and competitive metrics to their biggest rival. Amazon is privileged in this setup as it can either produce its own version of strong performers or simply buy them out. In either case, it is able to participate in business lines that are already proven successful, while outsourcing initial development costs and uncertainties. As a result, its bets are less risky than those of its competitors.

Amazon has affirmed that using individual third-party seller data to develop the business strategies of its own products is against its policies. Nate Sutton, an Amazon associate general counsel, told Congress in July, “we don’t use individual seller data directly to compete” with businesses on the company’s platform. Nevertheless, interviews with over 20 former employees have revealed that it uses such data to decide what prices to charge, which features to copy or whether to enter a product segment.<sup>76</sup> While the company has cited its restrictions for keeping **private label** executives from accessing marketplace seller data, interviews with former employees conclude that such rules are not enforced internally, and that using such data is common practice and openly cited in category planning meetings.

In addition, Amazon acknowledged that it allows its employees to access what it calls “aggregated data”, data relevant to more than one seller, which does not reveal individualized patterns of behavior per seller. Nonetheless, the distinction makes less sense when there are fewer third-party sellers in category; and, in addition, aggregated data can still give an anti-competitive advantage to Amazon, by showing what product segments are in high demand, and which features they possess, depending on what is considered “aggregated”.

While it is common practice for physical retail players, such as grocery chains and drug stores, to develop and sell their own versions of popular products in order to enjoy higher margins, the difference with Amazon is the breadth and depth of the data to which it is privy and the limitations associated with stocking and shelf space. Further, these physical retailers typically create private labels of generic categories, rather than copy-cat versions of products created by small entrepreneurs. Below, we elaborate on this distinction and flesh-out the harms associated with each.

#### 2. Generic Products versus Niche Products

When observing Amazon’s use of information privileges to drive its internal product development decisions, we found that two private label product types have emerged, each with varying levels of corresponding harm to consumers: (1) **standard or generic products**, such as batteries, diapers, toilet paper, etc. and (2) **niche products**, such as toys, organizers, clothing, etc.

---

<sup>76</sup> Dana Mattioli, Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products, Wall Street Journal, *Wall Street Journal* (April 23, 2020) <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

a. Introduction of Generic Products is Harmless

In many instances, Amazon has leveraged the aforementioned information privileges to produce strong-performing products itself. Since 2009,<sup>77</sup> Amazon has been quietly introducing its own private-label goods—typically unglamorous products, such as power cables or batteries—at prices lower than those of competitors. For example, the company entered the battery market, offering its private-label batteries at a 30% discount from those of brand-name competitors, such as Energizer and Duracell.<sup>78</sup> In doing so, it was able to capture a third of the online market for batteries in a matter of months.

Within these product spaces, the potential harm to consumers is likely **low**. As little speculation exists for these products in terms of demand, reach, or product-market fit, these introductions are somewhat anticipated by e-commerce or retail customers. Subsequent product innovations or varieties are not as likely as these long-standing product types tend to exhibit mature qualities. Such product introductions can be observed by brick & mortar stores for decades, at stores such as CVS or Target, where generic private labels thrive, and do so in a competitive manner. Our rationale for describing this action is to illustrate how the introduction of these undifferentiated products have led to a similar application for introducing private labels in differentiated, niche categories—an area in which consumer harm is anticipated in the long term.

b. Introduction of Niche Products is Harmful

Amazon leverages information privileges to inform its product introduction decisions in its development of niche private labels as well; evolving from its introduction of generic labels (described above), Amazon began expanding into other markets. Today, it offers private-label goods in over 3,000 product types under disposable names such as Spotted Zebra (kid’s clothes), Good Brief (men’s underwear), Wag (dog food) and Rivet (home furnishings), quietly broadening into categories with proven track records. Given that nearly one-half of online shopping in the US will be conducted on Amazon within the next 2 years, analysts predict that the in-house brand opportunity for Amazon will be over \$25 bb within the next 4 years.<sup>79</sup> In these markets, others spent capital and time performing market research to determine areas of opportunity. Others undertook the risk associated with developing, marketing, and distributing their products to consumers. Amazon is able to benefit from the costs and risk undertaken by others.

The implications of this activity extend beyond the current third-party sellers on Amazon today. We argue that these information asymmetries will result in an **underinvestment problem** within the United States as investors are able to view past Amazon riskless product introductions and foresee similar introductions in the future. With fewer firms investing in small-to-medium sized CPG vendors, fewer sellers will enter the market altogether. The result: a **long-term decline in innovation and fewer products from which consumers can choose**.

Included are two illustrative use cases of riskless product introduction of niche products:

---

<sup>77</sup> Spencer Soper, Got a Hot Seller on Amazon? Prepare for E-Tailer To Make One Too, *Bloomberg* (April 20, 2016) <https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too>.

<sup>78</sup> Julie Creswell, How Amazon Steers Shoppers to Its Own Products, *New York Times* (June 23, 2018) <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>.

<sup>79</sup> *Id.*

***Pillow Pets:*** Consider the introduction of Amazon’s “Pillow Pets”—stuffed animal pillows modeled after NFL mascots: for several months, a third-party merchant introduced its pillows to the Amazon marketplace, selling around 100 pillows per day. As Amazon noticed increases in purchasing traction in advance of the holiday selling season, it approached the manufacturer itself, ultimately offering Pillow Pets at the same price, while giving its own pillows featured placement onsite. Subsequently, the competitor merchant’s sales dropped to only 20 pillows per day<sup>80</sup> as consumers were driven to the preferred listed products.

***Car Trunk Organizers:*** More recently, Amazon employed a similar strategy, boxing-out Fortem, a third-party seller of car trunk organizers, with its own version of the product. Driven by input from internal Amazon employees and Fortem leaders, the WSJ concluded that Amazon is leveraging its data to work backwards in terms of pricing to make product development decisions; that is, by knowing Amazon’s profit-per-unit, the company could ensure that prospective manufacturers could deliver a higher margin on an Amazon-branded competing product before committing to it. This past year, Amazon launched three trunk organizers (see Figure 3), following Fortem’s proven introduction in 2016 and strong track record since. These AmazonBasics versions are listed higher on the search page and have overtaken Fortem in terms of sales volume.

## **2. Harm: Less Innovation and Fewer Consumer Choices**

For all of the aforementioned Amazon decision points—purchasing from the supplier directly, producing goods on their own, approaching manufacturers directly—other sellers bear the initial costs and the uncertainties around introducing new products. Amazon is able to pick and choose which products it sells once their success has been tested and confirmed on the platform. We recognize that under this strategy (monitoring traction, cheaply producing goods, steering consumers to new products, and ultimately passing-on low prices to consumers) Amazon creates efficiencies in the short term.

However, we believe that customers are likely to be harmed when taking a long-term view. The subsequent harm to consumers, while less evident, comes from a reduction in long-term competitive forces, particularly in niche product categories. As discussed, this is possible from two angles: existing, small entrepreneurs being **forced out of the market** due to Amazon’s exclusionary conduct OR **deterred entry** of such players due to an underinvestment in smaller companies as investors become aware of Amazon’s competition tactics. The latter stifles innovation and lessens the degree of consumer choice. In the future, Amazon may use this market structure to adjust to monopoly pricing in certain product categories to recoup some of its losses connected to below-cost pricing or loss-leading.

## **3. Law: Exclusionary Conduct under Section 2 Sherman Act**

The introduction of Amazon’s own private labels on the basis of sensitive seller data is an anticompetitive conduct that may be enhanced by steering consumers to its own labels. Nonetheless, although it is very likely that the two things (third-party data collection to introduce private labels and steering) under Amazon’s current practices will come together, this is not a necessary condition for the harms of both practices to occur. Those harms are independent but may be intensified one by the other.

To date, no antitrust complaint against steering and preferred listing through an online platform has been filed in the United States. The closest case is the **Google Shopping case** decided by the European Commission in June 2017. In this case, the European Commission has fined Google €2.42 billion for

---

<sup>80</sup> Lina M. Khan, Amazon’s Antitrust Paradox, 126 *Yale Law Journal* 3 (2017), 564-907, <https://www.yalelawjournal.org/note/amazons-antitrust-paradox>.

*abusing its market dominance* as a search engine by giving an illegal advantage to Google's own comparison shopping service.<sup>81</sup> Commissioner Margrethe Vestager said: "Google's strategy for its comparison shopping service wasn't just about attracting customers by making its product better than those of its rivals. Instead, Google abused its market dominance as a search engine by promoting its own comparison-shopping service in its search results and demoting those of competitors." Google's illegal conduct under EU antitrust rules was that "it denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation."<sup>82</sup>

Amazon's steering conduct falls under **exclusionary conduct** of Section 2 of the Sherman Act. It harms horizontal competition among brands by leveraging its dominant position as a platform service and essential facility to dominate niche markets. Amazon is able to spot niche products which are gaining traction through its data analytics, adjust its products accordingly without the need to incur similar costs, and then interest copycat products which are able to partially or completely *foreclose* the product sellers who created, introduced and sold the product initially. As Amazon is growing to become a monopolist in the e-commerce market (while it already is having monopoly power in some sectors, like e-books, and niche markets like trunk organizers), new producers will be dissuaded from entering the market.

### ***Evidence for Monopoly Power***

Amazon has far more available data than mortar-and-brick stores, given the size of their marketplace, which is only possible due to its nature as an online platform service. It does not have the same limits of shelf-storage that mortar-and-brick stores do. "Searchability" in a vast inventory is less of a problem in digital stores. This enables Amazon to harness data from a far bigger variety of products segments and respective substitutes in each of them.

Because Amazon controls the platform, it will continuously increase its bargaining power in respect to individual retailers which will increasingly have no online alternative other than selling their products through the marketplace, while, simultaneously, offering their data for free to their potential competitors. Amazon's platform character as an essential facility explains why product developers subject themselves to the risk of exploitation.

### ***Amazon as Essential Facility***

While all aspects of the essential facilities character of the platform are present in the case of steering, they are also manifested in its data collection dimension. For the criteria of essential facility doctrine see *MCI Communications v. AT&T* (1983). (1) Amazon controls its system of data collection, because all the data is produced by behavior engaged on its platform. (2) Amazon's third-party competitors cannot practically or reasonably duplicate Amazon's data-collection infrastructure, the essential facility. (3) Amazon is able to exclude competitors from using the facility, in this case access to data. This data is not only related to their products' own costs, but also to their performance in the marketplace and consumer behavior. (4) Amazon can easily provide such data to third-party sellers, as it already does in respect to some data it decided to sell them.

---

<sup>81</sup> European Commission, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017)

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1784](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784).

<sup>82</sup> *Id.*

4. Data Request Wishlist

Business Processes	Data
<ul style="list-style-type: none"><li>- Criteria for producing a private label of generic goods</li><li>- Criteria for producing a private label of niche goods</li><li>- Protections (internal policies) in place to guard seller data from Amazon employees</li></ul>	<ul style="list-style-type: none"><li>- Top 25 AmazonBasics product data over last 5 years: sales, costs, conversion</li><li>- Non-Amazon product data for closest 3 competitors to Top 25 provided: sales, conversion</li></ul>

### III. Amazon’s Conduct Forecloses Horizontal Platform Competitors

#### A. MFN and “Fair Pricing” Provisions Limit Competition with Platforms

##### 1. Conduct: Clauses and Practices Limiting Price Competition

In December 2018, Senator Blumenthal<sup>83</sup> has called the public’s attention to Amazon’s most favored nation clause (MFN), which required the third-party sellers on Amazon to ensure that “the purchase price and every other term of sale . . . is *at least as favorable* to Amazon Site users as the most favorable terms via *Your Sales Channels*” (emphasis added).<sup>84</sup> In March 2019, Amazon silently dropped the MFN clause, most likely as a reaction to the sudden public attention.<sup>85</sup> However, Amazon has not given up on discriminating its competitors. On March 19, 2020, a class of sellers filed a new complaint against Amazon’s “fair pricing” provision, which essentially enforces the no longer-existent MFN clause with penalties against sellers who offer their products on a competing retail e-commerce channel *at a lower price* than on Amazon.<sup>86</sup> The penalties encompass excluding the seller from Amazon’s Buy Box or suspending or terminating the seller’s account with Amazon.<sup>87</sup>

Due to its market power, Amazon can force the merchants to sign these kinds of agreements. By asking the same prices, the sellers cannot offer more favorable pricing on their *own retail website* (brand.com), such as nike.com or cliniq.com, even though their costs for selling products on their own website might be lower due to lower shipping or administration costs. Having to offer the same price on Amazon as on its own retail website makes running an own retail website much less attractive, especially for small and medium-sized retailers. While this kind of practice might not affect large sellers like Nike, it will certainly deter brand investment into sales channels of smaller brands. By penalizing small buyers and making them drop their own retail channels, Amazon slowly but steadily decreases competition from other platforms.

The same holds true for *other online platforms* like eBay or Jet (Walmart). By setting price ceilings for merchants, the merchants cannot sell their products cheaper on other platforms. This hurts other online platforms since many of them, such as eBay, likely experienced greater sales volume before Amazon introduced its MFN practices (at a time in which their sellers were able to enjoy full pricing freedom). Now the sellers on these platforms have to offer their products for identical (or higher) prices as they have listed on Amazon. The result: competing platforms are no longer differentiated from Amazon, especially those that were originally low-cost providers.

##### 2. Harm: Increased Prices

By limiting third-party seller’s ability to charge lower prices on their own websites and on other platforms, prices for consumers are substantially higher. In the class action of March 2020 by sellers against Amazon, *the merchants were able to show the price increase* of Amazon’s MFN and “fair pricing” provision. If

---

<sup>83</sup> Richard Blumenthal, Letter to FTC (December 19, 2018) <https://www.blumenthal.senate.gov/imo/media/doc/12.19.18%20-%20FTC%20-%20Price%20Parity.pdf>.

<sup>84</sup> *Frame-Wilson et al. v. Amazon* Complaint (March 19, 2020), at 6.

<sup>85</sup> Makena Kelly, Amazon silently ends controversial pricing agreements with sellers (March 11, 2019) <https://www.theverge.com/2019/3/11/18260700/amazon-anti-competitive-pricing-agreements-3rd-party-sellers-end>.

<sup>86</sup> *Frame-Wilson et al. v. Amazon* Complaint (March 19, 2020), at 46.

<sup>87</sup> *Id.* at 6.

Amazon’s two million sellers were allowed to compete on price outside the Amazon platform, the price of the same products would have been substantially lower, both on other platforms and on retailers’ own websites (see the following chart).<sup>88</sup>

Category	Amazon v Other Two-Sided Platforms	Amazon v Retailers’ Own Websites
Books / Music / Video	3.5%	17.6%
Computer / Electronics	6.9%	17.6%
Health and Beauty	0.4%	8.7%
Home and Kitchen	9.1%	13.6%
Clothing and Accessories	3.2%	13.6%
Home Improvement Tools	2.7%	13.0%
Sports and Outdoors	2.7%	13.0%
Toys and Games	4.4%	13.6%
Food and Beverages	6.9%	17.6%
Office Products	6.9%	17.6%
Other	8.8%	19.8%
<b>Average</b>	<b>5.6%</b>	<b>15.9%</b>

Source: Amazon MFN/Fair Pricing Complaint (March 2020)

Plaintiffs estimated that Amazon caused between \$50 and \$170 billion in actual damages. Considering only the impact of permitting Amazon’s third-party sellers to sell at lower prices *on other two-party platforms*, e.g., eBay, where it costs them less to sell, the market prices for the same product would have fallen on average by 5.6%. Considering the full competitive impact of Amazon’s third-party sellers selling lower-priced goods *on their own websites*, market prices would have fallen on average by 15.9%.<sup>89</sup>

Additionally, Amazon’s MFN and “fair pricing” provisions may also create coordinated effects among other platforms. eBay and other platforms may look at Amazon’s fees and charge the same fees and prices. This in turn will limit competition among platforms even more.

### 3. Law: Price-Fixing, Exclusion and Coordination

#### 1. Horizontal Price Fixing and Exclusion

US authorities and courts have recognized MFN clauses as violation of antitrust laws in two instances. In the complaint of *United States v. Blue Cross Blue Shield of Michigan* (2010) the DOJ outlined how the MFN clause between the insurance company and hospitals was illegal. Because of its market power, Blue Cross could require hospitals to charge other insurers either more or at least as much as they charge Blue Cross.<sup>90</sup> By doing so, it excluded Blue Cross’ competitors and raised prices of Blue Cross’ competitors.<sup>91</sup> The DOJ dropped the case in light of a new law banning health insurers from using MFN clauses.<sup>92</sup> A case that has been litigated and confirmed by a District Court is the eBooks Apple case. See *United States v.*

<sup>88</sup> *Id.* at 16.

<sup>89</sup> *Id.*

<sup>90</sup> *United States v. Blue Cross Blue Shield* Complaint (2010), at 3-4.

<sup>91</sup> *Id.* at 1.

<sup>92</sup> DOJ Ends Blue Cross Antitrust Suit After Favored Nations Ban, *Law360* (March 25, 2013)

<https://www.law360.com/articles/427200/doj-ends-blue-cross-antitrust-suit-after-favored-nations-ban>.

*Apple* (2013). The publishers and Amazon agreed to match in Apple's iBookstore any lower retail price of a new book release offered by any other retailer.<sup>93</sup> This clause raised prices for eBooks and therewith harmed consumers. The District Court Judge held that the MFN clause between Apple, the publishers and Amazon was in violation of Section 1 Sherman Act.

With regard to limiting platform competition, the Swedish competition authority has investigated and settled a case against Booking.com, one of the largest European online hotel booking websites in 2013. The authorities investigated the platform for infringement of anticompetitive agreements (similar to Section 1 Sherman Act).<sup>94</sup> As one of the first cases, the competition authority was investigating how the MFN clause between booking.com and the hotels were hurting competition with other platforms, mostly hotel websites. According to the investigations, the MFN clause was disallowing hotels to charge lower prices and thereby raising prices for consumers.

In 2019, the European Commission has investigated and fined Google for abusing its market dominance (similar to Section 2 Sherman Act) by imposing restrictive clauses in contracts with third-party websites that prevented Google's rivals from placing their search adverts on these websites.<sup>95</sup> Also, in July 2019 the German antitrust authorities have settled a case against Amazon.de for abuse of dominant market power (similar to Section 2 Sherman Act) for its cumbersome Business Solution Agreement (BSA). Amazon was investigated for abusing its dominant power by placing burdensome provisions on third-party sellers. In the settlement, Amazon agreed to extend the seller termination period from 0 to 30 days, to provide sellers access to the Amazon Vine customer rating program, to allow jurisdiction in seller countries instead of Luxembourg, to allow lower quality product images on Amazon than on seller sites and to allow sellers to object to customer returns.<sup>96</sup>

Similarly, with its MFN clause and the penalties against sellers, Amazon does not only engage in unlawful price fixing, but also increases prices of its competitors to supra-competitive levels.<sup>97</sup> This not only excludes retailers own online sales channels, but also limits competition from other two-sided platforms like eBay or Walmart. By using its market power, Amazon can monopolize the online retail market and exclude other platforms from competition.

## 2. Coordination among other Platforms

In addition, MFN clauses and "fair pricing" provisions may create coordinated effects among *other platforms*, which are horizontal competitors. While parallel conduct or tacit collusion is legal under the Sherman Act, coordination in restraint of trade is not lawful. Because we have, or at least have had, a written agreement between Amazon and its sellers about the price level, this kind of agreement would be per se illegal. But even without such agreement, the penalties of Amazon may have significant anticompetitive effects against other platform competitors under the rule of reason. As the plaintiffs in the class action were able to show, the provisions and penalties set in place by Amazon were able to increase prices by a small

---

<sup>93</sup> *United States v. Apple*, 12 Civ 2826 (2013), at 52.

<sup>94</sup> *Swedish Competition Authority v. Booking.com* (2013), at 2.

<sup>95</sup> European Commission, Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising (March 20, 2019)

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1770](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770).

<sup>96</sup> Bundeskartellamt (German Competition Authority), Settlement Agreement with Amazon (July 17, 2019) [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5).

<sup>97</sup> *Frame-Wilson et al. v. Amazon* Complaint (March 19, 2020), at 8-9.

but significant percentage of 5% as compared to other platforms like eBay and 15% as compared to the seller’s own websites.<sup>98</sup> Hence, the enforcement of the “fair pricing” provision by Amazon creates coordination among horizontal platform competitors and is in violation of Section 1 Sherman Act.

#### 4. Data Request Wishlist

Business Processes	Data
<ul style="list-style-type: none"> <li>- Mechanisms and frequency of Amazon penalizing sellers for not obeying “fair pricing” provisions</li> <li>- Magnitude of price increase of products on other platforms that are <i>not</i> on Amazon or <i>before</i> they joined Amazon</li> </ul>	<ul style="list-style-type: none"> <li>- <i>Account terminations</i> for disobeying “fair pricing” provision over the last 3 years</li> <li>- <i>Buy Box exclusions</i> for disobeying “fair pricing provision” over the last 3 years</li> <li>- <i>Seller statements</i> about being excluded from the account or Buy Box for disobeying “fair pricing” provision</li> <li>- Seller prices on own sales channels and other platforms <i>before</i> joining Amazon or of seller who are <i>not</i> on Amazon (so called class products)</li> </ul>

## B. Acquiring Horizontal Competitors Reduces Platform Competition

### 1. Conduct: Predation for Merger

Amazon also engages in predatory acquisitions by allegedly engaging in predatory pricing. Take the disconcerting merger between Amazon and Diapers.com, a former competitor to the Amazon marketplace. During the late 2000s, Jeff Bezos made an offer to buy the company following onsite diaper traction and profitability. When Diapers.com executives refused, Amazon began rapidly dropping diaper prices. It also introduced its own line of diapers, under the name ‘Amazon Mom’. Executives from Diapers.com stated that the only way to sustain low prices in-line with Amazon Mom was by selling at a loss, which Quidsi, the parent company, estimated to be as high as \$100 million every three months.<sup>99</sup>

As Quidsi’s customer base plummeted, the company finally sold out to Amazon, returning to the original M&A proposal, but under less favorable terms. As Brad Stone pointed out in his book, “the sale was made largely out of fear that Amazon would drop prices further.”<sup>100</sup> In economic theory, this strategy is known as “predation for merger”, developed in the 1980s by Saloner.<sup>101</sup> The idea is that the acquiring firm may

<sup>98</sup> *Frame-Wilson et al. v. Amazon* Complaint (March 19, 2020), at 16.

<sup>99</sup> Brad Tuttle, It’s Target Versus Amazon in the Battle for Moms, *Business Time* (September 26, 2013) <https://business.time.com/2013/09/26/its-target-versus-amazon-in-the-battle-for-moms/>.

<sup>100</sup> Brad Stone, The Secrets of Bezos: How Amazon Became the Everything Store, *Bloomberg* (October 10, 2013) <https://www.bloomberg.com/news/articles/2013-10-10/jeff-bezos-and-the-age-of-amazon-excerpt-from-the-everything-store-by-brad-stone>.

<sup>101</sup> Garth Saloner, Predation, Mergers, and Incomplete Information, 18 *RAND Journal of Economics* 2 (1987) 165-186.

expand its output to signal that it is a low-cost rival and thereby improve takeover terms. This tactic increases industry concentration by eliminating and then deterring entry.

While this case represents an extreme example of coercive behavior, Amazon is deploying a like strategy across many other well-performing product categories. As the platform host, Amazon monitors traction, sales, and trends across its thousands of product categories. If a vendor performs well enough, Amazon is able to then either produce its own private label good that provides the same utility to the consumer at a fraction of the cost, or to simply buy-out the competing platform, as was the case with Diapers.com.

## **2. Harm: Increased Prices, Less Innovation, Fewer Consumer Choices**

This tactic becomes more salient as Amazon grows in size and breadth, diversifying outward into many distinct industries, some of which actively subsidize others for the umbrella company (covered in more detail within the proceeding cross-market subsidization section). Suppose Amazon were to become even more prevalent as an ecommerce platform after iterations of buy-and-squash tactics, similar to the Diapers.com situation. The company would then be positioned to engage in recoupment, rebalancing some of the costs incurred in achieving such a position by way of monopoly-like pricing. Provided that Amazon has spent millions developing its fulfillment network and, in the process, redefined consumer standards, such as two-day shipping, entry barriers in this scenario would be significantly high, preventing other platform entrants. This lack of competition would allow for Amazon to adjust its prices upward. Under these conditions, consumers would pay more to obtain goods purchased online across all product categories. Furthermore, excluding maverick competitors, such as diapers.com, will decrease consumer choice and more importantly, reduce innovation.

## **3. Law: Predation and Exclusion under Section 2 Sherman Act**

Amazon has been cutting prices on certain products in order to foreclose competitors and absorb their demand in an attempt to monopolize those markets. Together with Amazon's market power in e-commerce, this conduct falls under exclusionary conduct of Section 2 Sherman Act. Alternatively, the predation for merger tactics of Amazon (pricing below costs and recouping) may also fall under the predatory pricing doctrine, as described in the following.

### **1. Predation for Merger**

Predatory pricing falls under section 2 of the Sherman Act. In *Brooke Group v. Brown & Williamson Tobacco*,<sup>102</sup> the Supreme Court has defined two conditions that must be satisfied: a) that prices were below "appropriate measure" of defendants' cost in the short term; and b) that the defendant had a "dangerous probability of recouping its investment in below-cost prices."<sup>103</sup> In Amazon's case, predatory pricing was a strategy for acquiring diapers.com, also known as predation for merger. By lowering its prices, Amazon was signaling that it is a low-cost rival and was thereby able to improve takeover terms and eliminate the new entrant.

**Pricing below cost:** Although in the diapers.com case, Quidsi argued that it needed to sell at loss to compete with Amazon's products, it is not clear whether Amazon was selling diapers below its marginal cost (or

---

<sup>102</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>103</sup> *Id.*

average variable cost). To find out, authorities would need to request such data from Amazon (see data request wishlist).

Overall, Amazon’s engagement in radical price-cutting will likely be perceived as a signal to third-party entrants that Amazon is a low-cost producer and aggressive acquirer in the market in which it has reduced the price below cost.<sup>104</sup> These reputational benefits will spill over to other markets once individual retailers are aware of Amazon's capacity to exclude and acquire competitors, which will allow Amazon to gain market share and profits in other markets.

**Recoupment:** After acquiring diapers.com, Amazon allegedly decreased its discounts on diapers, interrupted temporarily new subscriptions to its Amazon Mom program, and when Amazon restarted admitting new members, it further reduced its discounts.<sup>105</sup> Once Amazon becomes a monopolist in the particular retail product market, in this case e-commerce for diapers, it will be able to further increase prices and recoup its investment.

This section focused on what courts have traditionally understood as recoupment period—the action of recouping losses in a different time period after total or partial foreclosure. Due to Amazon’s platform character, facilitator in a two-sided market, Amazon can also access other forms of “recoupment,” which will be discussed in the next section on cross-market subsidization.

## 2. Exclusionary Conduct

Even in scenarios in which Amazon has not cut prices below marginal costs, Amazon’s predation for merger tactics are foreclosing horizontal competition. By being in the strong position Amazon is right now (with a market share of around 50%), it can effectively foreclose competitor platforms from specific online markets, like online baby products. It does so by lowering prices (not necessarily below marginal costs) and by later acquiring the competitors that went out of business because of Amazon's predation tactic. This not only excludes existing players but also shields the market from new entrants (nascent competition). This behavior, in combination with Amazon’s market power, qualifies as exclusionary conduct that is illegal under Section 2 of the Sherman Act.

## 4. Data Request Wishlist

Business Processes	Data
<ul style="list-style-type: none"> <li>- Criteria for acquiring a competing vendor</li> </ul>	<ul style="list-style-type: none"> <li>- Costs and prices of private label diapers at the time of the Diapers.com case</li> <li>- Costs and average prices of private label goods; goal of determining below cost pricing and subsequent market exit</li> </ul>

<sup>104</sup> Garth Saloner, Predation, Mergers, and Incomplete Information, 18 *RAND Journal of Economics* 2 (1987) 165-186.

<sup>105</sup> Lina M. Khan, Amazon’s Antitrust Paradox, 126 *Yale Law Journal* 3 (2017) 770.

## C. Amazon's Ability to Subsidize Across Markets Excludes Platform Competitors

### 1. Conduct: Cross-Market Subsidization

Viewing Amazon's pricing strategies across all of its businesses, it becomes clear that the company leverages its advantages from one sector to boost its positioning in another. Only recently Amazon started to leverage its profits from its successful Amazon Web Services (AWS), its cloud computing business,<sup>106</sup> to subsidize its international retail business, which is still running at a loss. The chart below illustrates this phenomenon with e-commerce revenues growing exponentially from the late 2000s while profits remain virtually zero over the same period<sup>107</sup> (see Figure 4).

Jeff Bezos himself stated that Amazon makes decisions and tradeoffs different from some companies. "At this stage, we choose to prioritize growth because we believe that scale is central to achieving the potential of our business model."<sup>108</sup> This strategy has been supported by Amazon's management over and over again. For example, Amazon's Fulfillment services with 2-day shipping helps the company to reach an unmatched scale in the e-commerce market. With its sophisticated network, it is able to achieve high utilization, avoid stockouts, and attain near-perfect on-time delivery. Competitors hoping to enter struggle to compete with these fast and cheap shipping promises to customers. Amazon is now at a point where it can leverage this infrastructure to increase competitor dependence on the platform through tying arrangements spanning across various markets (e.g., Fulfillment by Amazon, PrimeVideo, etc.).

Amazon's most influential example in achieving an efficient scale was its creation of Amazon Prime, the company's loyalty program. Originally priced at \$79, the program guaranteed 2-day delivery for goods purchased by members along with a wide array of other non-related services, such as music streaming and Prime Video. In line with the aforementioned strategy, Amazon lost money on Prime. In 2011, it was estimated that each Prime subscriber costs Amazon at least \$90 a year—\$55 in shipping, \$35 in digital video—and that the company therefore took an \$11 loss annually for each customer.<sup>109</sup> In the meantime, this service became indispensable for its users: approximately 49% of its customers use Amazon Prime. Today, Amazon has started to reap the benefits: Prime members spend more onsite—an average of \$1,500 annually, compared to \$625 spent annually by non-Prime members.<sup>110</sup> A former Amazon Prime employee stated, "It was never about the \$79. It was really about changing people's mentality so they wouldn't shop anywhere else."<sup>111</sup>

---

<sup>106</sup> Cloud Unit Pushes Amazon to Record Profit, *Wall Street Journal* (April, 28, 2016)

<https://www.wsj.com/articles/amazon-reports-surge-in-profit-1461874333>.

<sup>107</sup> Amazon's Profits, Ben-Evans (August 2013) <http://ben-evans.com/benedictevans/2013/8/8/amazons-profits>

[<http://perma.cc/G5JC-7XBL>]; Amazon.com Inc., MarketWatch,

<http://www.marketwatch.com/investing/stock/amzn/historical>

<sup>108</sup> Lina M. Khan, Amazon's Antitrust Paradox, 126 *Yale Law Journal* 3 (2017) 564-907.

<sup>109</sup> Stu Woo, Amazon 'Primes' Pump for Loyalty, *Wall Street Journal* (November 14, 2011)

<http://www.wsj.com/articles/SB10001424052970203503204577036102353359784>

<sup>110</sup> Chad Rubin, The Evolution of Amazon Prime and Their Followed Success (March 31, 2016)

<http://www.skubana.com/e-commerce-trends/evolution-of-amazon-prime> [<http://perma.cc/T9ET-C6V8>].

<sup>111</sup> Alex Shephard, Inside Amazon Prime's Price Hike (May 2, 2018)

<https://newrepublic.com/article/148212/inside-amazon-primes-price-hike>.

This mentality illustrates how Amazon’s cross-market expansion may be harmful to consumers in the long run. With such breadth, Amazon is able to raise entry barriers (through superior logistics, aggressive loss leading, bundling, etc.) to anticompetitive levels, stifling potential competition by companies who seek entry into a single market. Further, Amazon’s choices position the company in a way that allows it to control the manner in which its competitors conduct business (e.g., through tying arrangements under FBA). These factors can lead to lack of consumer choice through preempting competition or forcing exit. They may also result in a lessening of product innovation or price competition through increased entry barriers, thereby causing fewer market players.

## **2. Harm: Increased Prices and Less Innovation**

Amazon extends its platform, logistics services and retailing market share by prioritizing expansion of market share over profit, relying both on cross-subsidization and investors’ confidence. It prioritizes growth over profit by using loss-leading strategies in certain products (e.g., bestseller eBooks; kindle, amazon prime, diapers, echo dot) and by initially focusing on quality of its platforms/logistics service over immediate profits.

Cross-market subsidization enables Amazon to sustain price wars over long periods of time. Amazon’s increasing size and diversification across sectors deters new entrants in e-commerce in sectors where they can anticipate that Amazon will soon enter or has already established itself. These price wars may occur with pricing below or above marginal cost. Opaqueness over Amazon’s cost structure, difficulties in market definition (e.g., what are the costs of Amazon Prime) and in determining the prices of individual products, which may fluctuate over time, makes it difficult to infer whether Amazon is engaging in predatory pricing (price below marginal cost/average variable cost). This should not deter further investigations into Amazon's pricing strategies.

Because below-cost pricing may be difficult to prove and is disliked by courts, the theory described below departs from traditional predation, relaxing its requirements and targeting some of its acknowledged undervalued aspect.<sup>112</sup> First of all, it is necessary to adapt the recoupment prong of the predatory pricing theory to the context of e-commerce platforms, which operate in different markets and are able to recoup prices not only in different markets, but also from their two-sided marketplace. Amazon is able to recoup from subsidized prices through at least three different venues: (1) raise prices or reduce quality of their own products in the same or in other markets (traditional recoupment); (2) increase prices of platform service (for retailers); (3) increase its market share of the platform service (through direct gains by selling platform/logistic services and advertisement).

This exclusionary conduct is an attempt to monopolize and is in violation of Section 2 of the Sherman Act. Amazon is likely to create harm to consumers by squashing third-party sellers which have no other platform as feasible alternative. This likely produces higher price to consumers (static harm); and less diversity in the long run by deterring entry, once only consolidated brands can sustain lower prices and competition with amazon’s alternative products (dynamic harm).

---

<sup>112</sup> The Supreme Court acknowledges that predatory pricing theory may be undervalued: “the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209 (1993), p. 223.

### 3. Law: A Broader Theory of Recoupment

The theory of exclusionary cross-subsidization relies on exclusionary pricing but aims at relaxing the requirements for traditional predatory pricing theory. As discussed above, in the cases *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,<sup>113</sup> *Cargill, INC. v. Monfort of Colorado, INC.*,<sup>114</sup> and *Brooke Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,<sup>115</sup> the Supreme Court has established for predatory pricing, two conditions must be satisfied: a) that prices are below “appropriate measure” of defendants’ cost in the short term; and b) that the defendant has a “dangerous probability of recouping its investment in below-cost prices.”<sup>116</sup> In other words: “the predator short-run loss is an investment in prospective monopoly profits.”<sup>117</sup>

The recoupment requirement is a feasibility test in which the court inquires if the predatory strategy is economically plausible given the defendant's position and the market circumstances. In order for this to be the case, the “predator must be able to absorb the market shares of its rivals once prices have been cut.”<sup>118</sup> In addition, there must be barriers to entry to the market enabling the predator to sustain supra-competitive prices over time. For the Amazon case, consider the following conditions:

#### 1. Pricing below Cost

Amazon has allegedly charged e-books, Kindle, diapers, Amazon echo dot, Amazon Prime subscription fee below cost. Also, antitrust agencies should investigate the pricing and cost of Amazon’s logistics and shipping services over time. This service offering (more products eligible for fast shipping, reduction of shipping time) has potentially sustained cross-product subsidization in early years in order to lock customers in while expecting to raise logistic service prices once they achieve a dominant position. This is a condition worthy of investigation, but not necessary for the arguments developed in the sections below. The most relevant aspect is the exclusionary character of the pricing strategy which aims at foreclosing competition and deterring entry.

#### 2. Likelihood of Absorbing Competitor’s Consumer Base

Amazon's dominant position in the e-commerce market suggests that if it forces retailers to exit the market, it has a reasonable chance of absorbing their market share. This risk is even more prevalent in markets where differentiation of products is difficult and where price is the major factor impacting consumption—mostly for smaller brands.

The likelihood of absorbing competitors’ consumer base is increased due to high barriers to entry to the e-commerce and online fulfilment market. Amazon can poach consumers by selling substitute products or by selling the platform service to an alternative supplier. There are high costs to enter the platform e-commerce market due to first mover and network effects. There are also low exit costs, since the companies can easily divest their assets or sell it directly to Amazon, as the *diapers.com* case shows.

---

<sup>113</sup> 475 U.S. 574 (1986).

<sup>114</sup> 479 U.S. 104 (1986).

<sup>115</sup> 509 U.S. 209 (1993).

<sup>116</sup> 509 U.S. 209, 224 (1993).

<sup>117</sup> Kenneth G. Elzinga & David E. Mills, Testing for Predation: Is Recoupment Feasible?, 34 *Antitrust Bulletin* (1989) 870.

<sup>118</sup> 479 U.S. 104, 119 (1986).

### 3. Exclusionary Cross-Subsidization

#### a. Exclusionary Pricing

There are additional barriers to entry created by cross-subsidized bundling. Take the case of Amazon Prime, which currently has more than 112 million Prime users.<sup>119</sup> If its costs could not be covered by the fee its charges to its members, then there would be no economic sense for pricing below cost. Amazon expected correctly that prime members would feel more inclined to increase or realize their online shopping on Amazon due to direct benefits from the program (faster delivery, discounts, reward program) and in an effort to optimize their costs (“I already paid the membership fee, so I should make the best use of it.”)

Amazon Prime’s below-cost pricing can be analogized to a form of exclusionary pricing through package discounts.<sup>120</sup> For example, with Prime Video (to which each Amazon Prime member has access to) Amazon directly competes with Hulu and Netflix, which have smaller numbers of subscribers in the U.S. Amazon was able to initially charge lower Prime subscription fees and lock in consumers by cross-subsidizing the service from other profits. This an indirect form of offering anticompetitive package discounts. There is harm to competition when Firm X excludes an equally efficient competitor by offering a product A below cost, which was also offered by Firm Y, and bundles it with product B (not offered by Firm Y). Amazon may offer product A (streaming service) and product B (e-commerce products/delivery) with large benefits to consumers, i.e. lower subscription fees and better retailing prices and delivery terms. By offering below-cost prices for Prime subscriptions that are subsidized by its e-commerce profits, Amazon has an anti-competitive advantage over equally efficient video-streaming competitors which cannot cross-subsidize their businesses through other revenue streams. Prime increases barriers to entry to e-commerce by locking in consumers, and thereby harms competition in the video-streaming services market. To give another example, the effective tying of FBA and marketplace serves as a barrier to entry for logistic services to the *de facto* new market of logistics/marketplace services.

On one hand, the Amazon Prime bundle is a case in which a current monopolist in a primary market can use a complementary product to preserve its monopoly position by deterring future entry in the primary market. Amazon Prime with Prime Video’s discounts and delivery benefits are a means to enhance Amazon's platform position by locking in consumers and altering their e-commerce purchasing habits. On the other hand, Amazon Prime, both with its Prime Video and its FBA benefits, is also a case of a monopolist bundling services where it leverages its monopoly power in the primary market to gain entry into a new emerging market. Hence, Amazon can leverage its position as a monopolist e-commerce platform to dominate video streaming and logistic markets.<sup>121</sup>

The rationale is similar to famous tying cases, like *Microsoft v. European Commission* in 2007, where the European Commission fined Microsoft for abuse of dominant position by bundling its operation system with its media player. The decision required, among other things, that Microsoft produced a version of its operation systems without the above-mentioned bundling.<sup>122</sup>

---

<sup>119</sup> Don Reisinger, Amazon Prime’s numbers (and influence) continue to grow, *Fortune* (January 16, 2020) <https://fortune.com/2020/01/16/amazon-prime-subscriptions/>.

<sup>120</sup> Herbert J. Hovenkamp, The Law of Exclusionary Pricing, *Competition Policy International* 2 (2006) 21.

<sup>121</sup> Dennis W. Carlton et al., The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, 33 *RAND Journal of Economics* 2 (2002) 194-220.

<sup>122</sup> *Microsoft Corporation v. European Commission*, T-201/04 (2007) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004TJ0201>.

#### b. Broader Recoupment

As mentioned above, Amazon can recoup losses from exclusionary cross-subsidization through different venues: raise price/ reduce quality of their own products/services, increase service fee for retailers; or increase market share of the platform service by selling platform/logistic services and advertisement.

**The first venue** for recoupment is by charging monopoly prices for the same product, once the monopolist has excluded competition. Besides this intra-market recoupment, below-cost pricing may be part of a strategy to build reputational effects that deter expansion of a current competitor or new entries in a market different from the product sold at loss. This produces static harms to consumer welfare by price increase and dynamic harms to innovation by deterring entrants in the long term. Courts have acknowledged that recoupment can occur across markets. The 10th Circuit recognized that a firm might engage in predation in one market in order to deter competitor expansion to another market.<sup>123</sup> The 3rd Circuit affirmed that predation applies when a monopolist operates in several markets because it can reduce prices below-cost in a few markets and reap the benefits in other markets.<sup>124</sup>

**The second venue** for recoupment, which is particular to the case of two-sided markets, is by increasing prices for third-party sellers. Amazon can increase its profits on the supplier-side of the two-sided market while at the same time charging prices below-cost to consumers. In this scenario, Amazon is able to squeeze out retail competitors and increase the market share of its private labels, while simultaneously recouping its losses from new consumers. By increasing fees, Amazon is also increasing the cost of direct competitors. Third-party sellers keep selling their products on the marketplace because of the increased cross-platform network effects due to a large consumer base. This has anticompetitive effects by excluding lower-cost producers, by deterring intra and extra-market entry and potential innovation, and by enabling Amazon to charge monopoly prices intra-market in the long run.

**The third venue** for recoupment is by enhancing profits related to Amazon' platform business. Amazon has become one of the largest advertising companies in the U.S. The (increasing) size of its market share in e-commerce is what enables the growing advertisement business model. If Amazon is able to attract additional consumers to the platform, by charging below-cost lower prices in one market, it may recoup that loss by attracting new third-party sellers in another market (increasing the volume of platform/delivery fees), and it may recoup losses through revenue from advertisement (volume/price fees). This conduct will likely harm consumer welfare for the same reasons as the former mechanisms.

These additional venues for recoupment allow Amazon to sustain lower prices for longer periods of time and attempt to monopolize individual retailing markets, while also strengthening its dominant position as an e-commerce platform.

#### 4. Efficiencies

Amazon is able to sell and offer services (e.g., Amazon Prime) at a lower price in the short-term. It may even be able to sell certain products at lower prices for longer periods of time. Nevertheless, Amazon's practice will likely stifle innovation of e-commerce platform services, given the network effects that are intensified by selling products below costs. These factors likely disadvantage new entrants into the market

---

<sup>123</sup> *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1549 n.6 (10th Cir. 1995); DOJ, Section 2 report. Chapter 4, 68.

<sup>124</sup> ... "the predator needs to make a relatively small investment (below-cost prices in only a few markets) in order to reap a large reward (supra-competitive prices in many markets)." DOJ, Section 2 report, Chapter 4.

for e-commerce platforms. Amazon is also likely to squeeze out lower-cost producers, once it is artificially deflating its own cost and inflating those of competitors. Moreover, as the network effects increase, Amazon will be uniquely positioned to charge monopoly prices in e-commerce and in platform services by charging higher fees for logistics and advertising.<sup>125</sup>

### ***Cross-Subsidization under the AmEx Case***

These harms and efficiencies can also be analyzed under the AmEx case, which requires to analyze the net value of benefits and harms of both sides of the market, including consumers and sellers. *See Ohio et al. v. American Express Company et al.*, 585 U.S. (2018).

As already discussed above, Amazon marketplace, FBA, and Prime Video are different markets, which are being tied and bundled. Amazon marketplace facilitates display and access of products from suppliers to consumers. FBA, which is not necessarily connected with the marketplace, as we discussed under tying, is a market for logistics. Prime Video participates in the market for online video streaming.

In Amazon's marketplace, the demand on one side of the platform is more elastic than on the other side. It is easier to recoup by squashing suppliers because they are more dependent on being on Amazon given its current dominant position. If Amazon were to raise fees for consumers, they could more easily switch to an alternative e-commerce platform. Thus, by not raising fees on the user side, Amazon is able to keep a broader customer base which has indirect network effects for retailers. Therefore, the fact the transactions on the marketplace have not reduced shows that Amazon is able to exploit the elasticity of third-party sellers' demand charging higher prices in its tied markets.

Who is harmed and who benefits from the efficiencies of Amazon's higher FBA fees in case this is the venue for recoupment? There are distributional effects that need to be analyzed. Higher fees induce higher product prices and harm all consumers. If Amazon were to argue that those fees are reinvested in its FBA and Prime loyalty program, the consumers who use those services would receive those benefits. However, even if that is the case, non-Prime members will likely be harmed by the higher prices because they do not receive the benefits that are given to Prime users. When consumers realize that they can receive those cross-subsidized benefits without facing any harms, this will likely to reinforce Amazon Prime's dominance.

### ***Cross-Subsidization when AmEx does not apply***

Independent from the discussion of the AmEx case, Amazon's conduct would still be a cross-subsidization among different tied markets. Amazon charging higher FBA fees to sponsor Prime Video is a different business model from producing video content and selling it on the platform. This subsidization across different markets reinforces the distributional effects and incentivizes consumers to use both services in order to receive the benefits of being a member.

---

<sup>125</sup> The argument presented in this section applies to companies that cross-subsidize their business, while also incurring in exclusionary conduct, like predatory pricing and other forms of exclusionary pricing (anticompetitive bundled package discounts). Cross-subsidization is not anti-competitive *per se*, but only in the case of a dominant firm using that conduct to foreclose efficient competitors which do not operate in these different markets or that cannot cross-subsidize their businesses. In that regard, the now disseminated practice of focusing on achieving massive scale and depending on venture capital in order to sustain losses for long periods of time waiting for market maturation is also not *per se* anticompetitive. The same argument presented here applies if venture capital cross-subsidization is connected with other types of conduct which are designed or have the effect of excluding efficient competitors (e.g. cross-subsidized bundling).

#### 4. Data Request Wishlist

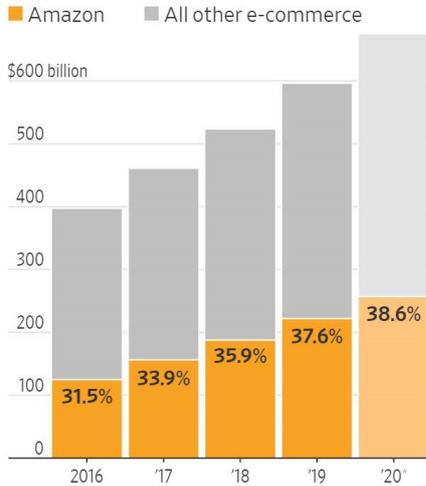
Business Processes	Data
<ul style="list-style-type: none"><li>- Criteria and algorithms for pricing products</li><li>- Internal criteria for expansion into other markets</li><li>- Internal criteria for acquiring targets</li></ul>	<ul style="list-style-type: none"><li>- Average variable cost and average total cost data for select products and services (e.g., private labels, Kindle, Amazon Prime and Echo dot) over time</li><li>- Advertising fees and revenue across markets</li><li>- Investment in FBA and Prime loyalty program</li></ul>

# Supporting Figures

**Figure 1: Amazon Share of US Ecommerce Market, 2016-2020**

## Online Giant

Amazon accounts for more than one-third of all U.S. e-commerce.



Source: Wall Street Journal

**Figure 2: Generic Search for a Toaster**

(A) Default set to “Featured” excludes viable AmazonBasics competitors

1-24 of over 6,000 results for Home & Kitchen : "Toaster"

Sort by: Featured

**AmazonBasics** 2-Slice, Extra-Wide Slot Toaster with 6 Shade Settings, Black  
 \$22.99  
 Prime FREE Delivery Sat, May 2

Toasters 2 slice Best Rated Prime Wide Slot Stainless Steel 2-Slice Toaster with 7 Shade Settings & Removable Crumb Tray &...  
 \$30.99 \$34.99  
 FREE Delivery for Prime members  
 Only 2 left in stock - order soon.

Cuisinart CPT-180P1 Metal Classic 4-Slice toaster, Brushed Stainless  
 ~\$52.99

**Editorial recommendations**  
 By TechGearLab | Onsite Associates Program

**The Best Toasters**  
 Feb 6, 2020 - 4 Recommendations  
 After testing 25 toasters in the last 4 years, we found the 3 most popular of 2020.

**Editors' Choice**  
 Best Overall Toaster

**Best Value**  
 Best Buy for Great Toast

(B) Upon filtering for “Under \$25”, superior product offerings revealed: Hamilton Beach Toaster providing the same functions as the AmazonBasics toaster, but offered at a 20% discount and arriving 3 days earlier

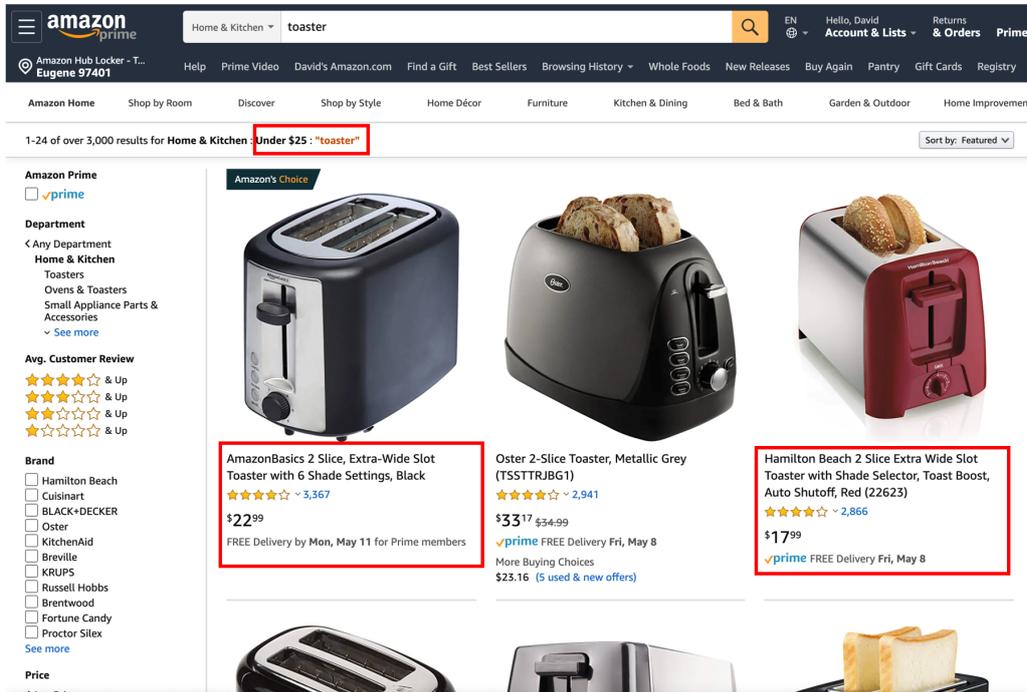
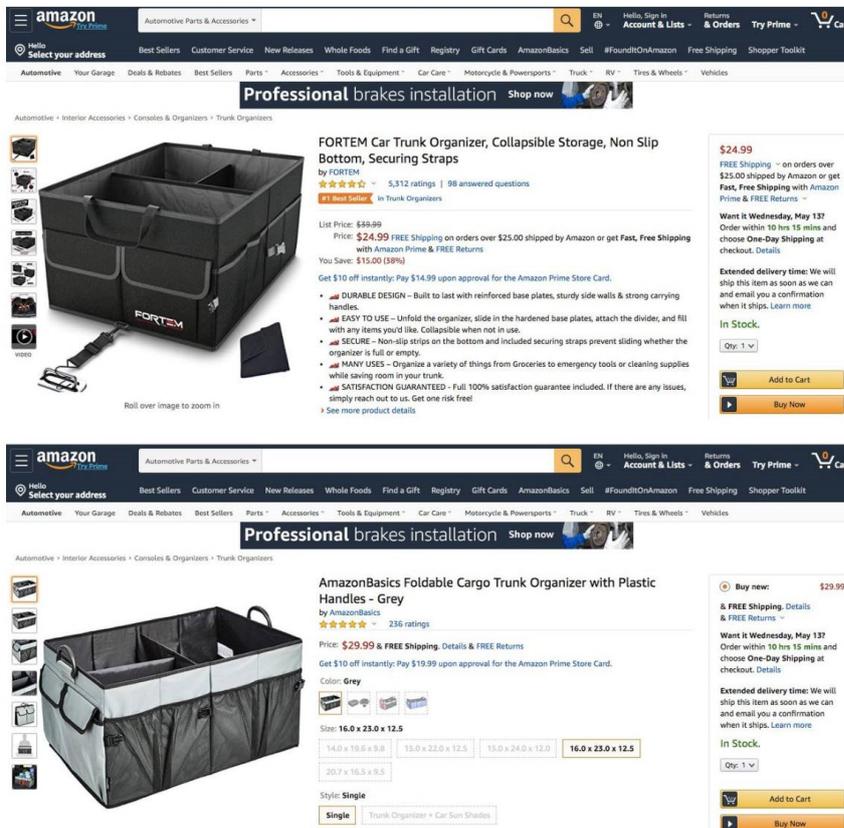


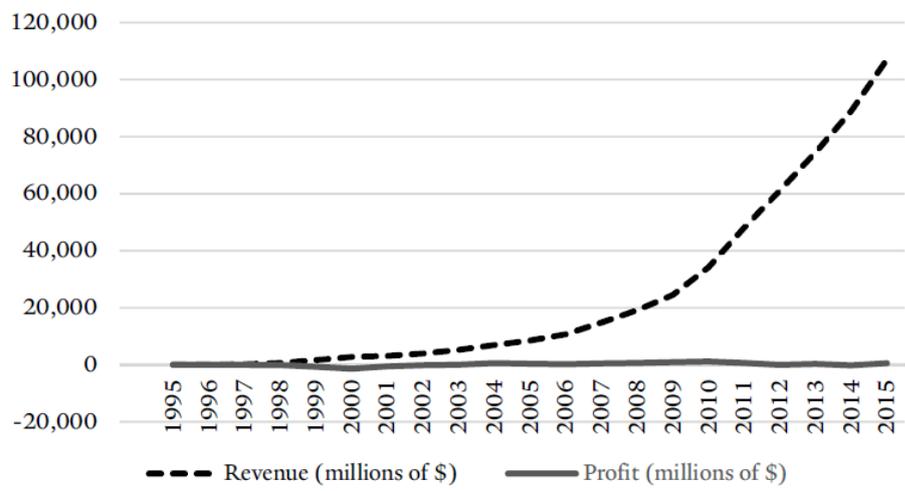
Figure 3: Amazon’s Introduction of AmazonBasics version of the Fortem Trunk Organizer



A Fortem car-trunk organizer sold on Amazon.com, on top, and a competing AmazonBasics version also available on the site.

Source: Wall Street Journal

**Figure 4:** Amazon Consolidated Revenues and Profits, 1995-2015



Source: MarketWatch