

AMAZON DOESN'T HAVE AN ANTITRUST
PROBLEM: AN ANTITRUST ANALYSIS OF
AMAZON'S BUSINESS PRACTICES

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I. INTRODUCTION 387

II. CURRENT EVENTS 389

III. THE PURPOSE OF ANTITRUST LAWS 391

IV. EVALUATING MARKET POWER 393

 A. *Product Market* 394

 B. *Geographic Market* 400

V. MONOPOLIES 403

VI. ANTICOMPETITIVE BEHAVIORS..... 404

 A. *Prices*..... 404

 B. *Consumer Choice*..... 408

VII. CONSUMER WELFARE..... 409

VIII. CONCLUSION..... 412

I. INTRODUCTION

Amazon is the world’s largest online retailer.¹ Its credentials do not stop there: Amazon is also the world’s third largest retailer,

1. Nisha Tiku, *How to Curb Silicon Valley Power—Even with Weak Antitrust Laws*, WIRED (Jan. 1, 2018), <https://www.wired.com/story/how-to-curb-silicon-valley-power-even-with-weak-antitrust-laws/>.

the third largest streaming media company, and the largest cloud-computing provider.² While Amazon started as an online book seller, it has quickly become a one-stop shop for a wide variety of items, such as clothes, movies, and deer-repelling wolf urine.³ Consequentially, Amazon now captures nearly one out of every two dollars Americans spend online.⁴ The Amazon Empire has continued to grow through a variety of acquisitions to expand its sales online and off.⁵ Amazon's rising significance in the world economy has led to growing antitrust concerns from consumers, businesses, and economists.⁶ Despite the public outcry, when evaluating Amazon under United States antitrust laws, it is difficult to find a problem.

This note explores whether Amazon has engaged in anticompetitive behavior that would violate antitrust regulations, the purpose of American antitrust law compared to EU law, how market power is defined, and whether Amazon's practices harm consumer welfare. Ultimately, Amazon does not

2. See *id.* (stating that Amazon is the "third-largest streaming media company" and the "largest cloud-computing provider"); Lauren Gensler, *The World's Largest Retailers 2017: Amazon & Alibaba Are Closing In on Wal-Mart*, FORBES (May 24, 2017, 7:00 AM), <https://www.forbes.com/sites/laurengensler/2017/05/24/the-worlds-largest-retailers-2017-walmart-cvs-amazon/#251a407a20b5> (stating that Amazon is "the world's third largest retailer").

3. See Courtney Palis, *Amazon's Weirdest Products: 10 Absurd Items You Can Actually Buy*, HUFFINGTON POST (Feb. 15, 2012, 11:48 AM), https://www.huffingtonpost.com/2012/02/14/amazons-weirdest-products_n_1276750.html (stating that Amazon sells "wolf-urine"); Elizabeth Winkler, *Can Amazon Do with Clothes What It Did with Books?*, WALL ST. J. (Jan. 3, 2018, 9:55 AM) <https://www.wsj.com/articles/can-amazon-do-with-clothes-what-it-did-with-books-1514991301> (noting that while first an online book seller, Amazon now sells "clothes" and "movies").

4. Olivia LaVecchia & Stacy Mitchell, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities* 4, INST. LOC. SELF-RELIANCE (Nov. 2016), https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

5. See generally *Amazon Strategy Teardown: Amazon's Barreling into Physical Retail, Financial Services, Healthcare, and AI-Led Computing*, 2018 CBINSIGHTS 1–22, <https://www.cbinsights.com/research/report/amazon-strategy-teardown/> (discussing the financial acquisitions that Amazon has made in retail, logistics, consumer technology, cloud computing, and most recently, media, and entertainment).

6. See Spencer Soper, *Amazon's Expansion Plans Raise Antitrust Concerns*, BLOOMBERG (July 14, 2017, 12:15 PM), <https://www.treasuryandrisk.com/2017/07/14/amazons-expansion-plans-raise-antitrust-concerns/?t=ford&slreturn=20180909161225> ("Amazon's proposed acquisition of Whole Foods raises important questions concerning competition policy . . .").

have an antitrust problem.

II. CURRENT EVENTS

Amazon's size has become a political debate. Donald Trump claimed in 2016 that Amazon has a "huge antitrust problem."⁷ He is not the only one concerned with Amazon's size. An article from *The New Republic* proclaimed that Amazon had become a monopoly and "must be stopped."⁸ Congress now has an Antitrust Caucus, which in December 2017 introduced a bill sponsored by democrat Keith Ellison that would require the Department of Justice and the Federal Trade Commission to conduct annual retrospective studies of how approved mergers impacted prices, jobs, wages, and local economies.⁹ From both sides of the aisle, concern grows over whether Amazon and other companies are violating antitrust laws.¹⁰

Amazon has been acquiring businesses since 1998.¹¹ Amazon purchased IMDb (less known by its full name the Internet Movie Database), Quidsi, and Zappos, an online shoe and apparel retailer.¹² Amazon has purchased websites that help drive consumers to their products, such as Goodreads, a book review website, and Twitch, a streaming platform where people watch

7. *Trump Says Amazon Has a 'Huge Antitrust Problem,'* CNBC (May 13, 2016), <https://www.cnbc.com/2016/05/13/trump-says-amazon-has-a-huge-antitrust-problem.html> ("Donald Trump said . . . that Amazon, the world's biggest online retailer, has a "huge antitrust problem.").

8. See generally Franklin Foer, *Amazon Must Be Stopped*, NEW REPUBLIC (Oct. 9, 2014), <https://newrepublic.com/article/119769/amazons-monopoly-must-be-broken-radical-plan-tech-giant> (explaining how Amazon developed into a modern monopoly, and if not stopped, the company will hold intolerable economic and cultural sway).

9. See Merger Retrospective Act, H.R. 4538, 115th Cong. § 2 (2017) (listing the content of the reviews to include price of products, competition in the affected market, reductions in employment, and average salary).

10. See Leandra Bernstein, *Does the Government Have an Antitrust Case Against Amazon, Google, and Facebook?*, ABC WJLA (Sept. 10, 2018), <https://wjla.com/news/nation-world/does-the-government-have-an-antitrust-case-against-amazon-google-and-facebook> (describing how politicians on both sides of the aisles raise concerns about the consolidation of economic power of Facebook, Google, and Amazon).

11. Kristen Prior, *A History of Amazon's Acquisitions*, TECHCO. (May 23, 2016, 11:00 AM), <https://tech.co/history-amazon-acquisitions-2016-05>.

12. See Mental Floss UK, *11 Companies You Might Not Realize Are Owned by Amazon*, MENTAL FLOSS (Mar. 24, 2017), <http://mentalfloss.com/article/90915/11-companies-you-might-not-realize-are-owned-amazon> (listing companies that Amazon has purchased including IMDb, Zappos, and Quidsi, a company that sells pet supplies).

others play video games.¹³ In June 2017, Amazon acquired Whole Foods, marking its first reach into brick-and-mortar commerce.¹⁴ Gene Munster, an analyst at Loup Ventures, predicted Amazon would next acquire Target in 2018.¹⁵ He theorized Target would be an attractive choice to continue Amazon's move into physical stores and capture more parents as customers.¹⁶ This theory reflects how analysts have come to regard Amazon: as a giant that will only continue to grow.

E-commerce is not the only industry with an increasing concentration of wealth in one or more companies. In 2000, the U.S. beer market had twenty-two players.¹⁷ In 2012, the number had reduced to four.¹⁸ Together, they controlled three-fourths of all sales in the U.S., and almost half of beer sales globally.¹⁹ Other industries are just as concentrated. In 2016, 90% of new online ad dollars went to Google and Facebook.²⁰ Eighty percent of airplane seats are sold by only four airlines.²¹ Oxfam, an international confederation of twenty NGOs, released a report with an infographic showing that after a series of acquisitions, ten companies own almost every large food and beverage brand in the world.²² To understand why nothing is being done in response, we have to understand the purpose and limits of antitrust.

13. *Id.*

14. See Nick Turner et al., *Amazon to Acquire Whole Foods for \$13.7 Billion*, BLOOMBERG (June 16, 2017, 8:06 AM), <https://www.bloomberg.com/news/articles/2017-06-16/amazon-to-acquire-whole-foods-in-13-7-billion-bet-on-groceries> (discussing how Amazon's acquisition of Whole Foods Market in June 2017 will extend Amazon's online reach into hundreds of physical stores "brick-and-mortar industries").

15. Gene Munster, *8 Tech Predictions for 2018*, LOUP VENTURES (Jan. 1, 2018), <http://loupventures.com/8-tech-predictions-for-2018/>.

16. *Id.*

17. Jeff Spross, *What Beer Reveals About Monopoly Power*, WEEK (Nov. 9, 2017), <https://theweek.com/articles/736059/what-beer-reveals-about-monopoly-power>.

18. *Id.*

19. *Id.*

20. Tiku, *supra* note 1.

21. Susan Carey & Brent Kendall, *Alaska Air-Virgin America Merger Gets U.S. Approval*, WALL ST. J., <https://www.wsj.com/articles/justice-department-close-to-approving-alaska-air-virgin-america-deal-1481031602>. (last updated Dec. 6, 2016, 4:45 PM).

22. See Beth Hoffman, *See Behind the Brands* 1, 8 (OxFam, Briefing Paper 166, Feb. 26, 2013), <https://www.oxfam.org/sites/www.oxfam.org/files/bp166-behind-the-brands-260213-en.pdf> (explaining that products once produced by smaller companies are now owned by the Big 10).

III. THE PURPOSE OF ANTITRUST LAWS

Antitrust laws are the “Magna Carta of free enterprise.”²³ Despite the lofty praise, laymen and judges misconceive what antitrust laws actually say. Antitrust law is the promotion of competition through restraints on unlawful methods, namely monopolies and cartels.²⁴ Antitrust law relies on the idea that “unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while . . . providing an environment conducive to the preservation of our democratic political and social institutions.”²⁵ In short, it is the theory that free competition leads to the best results.

While antitrust law protects and promotes competition, it is inherently focused on consumer welfare; “[t]he touchstone is consumer good.”²⁶ Antitrust law exists for “competition, not competitors.”²⁷ It does not exist to make things easier for small businesses, nor does it exist to protect businesses from aggressive competition. The FTC plainly explains “competition is tough, and sometimes businesses fail” because “[t]hat is the way it is in competitive markets.”²⁸ Consequently, antitrust regulators focus on eliminating anticompetitive behaviors, such as increased prices, reduced quality, or reduced consumer choice—all things that theoretically, should not happen in a free market.²⁹

Ironically, antitrust “regulation” really is not regulation at all. Its purpose is not to intervene and dictate what businesses do. Instead, it exists to restore the free market so it can continue

23. *U.S. v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

24. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 1, 4–5 (5th ed. 2009).

25. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

26. *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9th Cir. 2011).

27. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

28. FED. TRADE COMM’N, *FTC FACT SHEET: ANTITRUST LAWS: A BRIEF HISTORY* 1–2, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf (last visited May 20, 2019).

29. *See Tunis Bros. Co., v. Ford Motor Co.*, 952 F.2d 715, 728 (3rd Cir. 1991) (discussing that the harm to the competitive landscape can be proved by demonstrating the effect on prices, quantity, or quality “of goods or services”).

functioning as its meant to: on its own, with little interference.³⁰ Adam Smith is the symbol of free market economics, yet he even seemed wary about leaving businesses to their own devices: “People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”³¹ By preventing anticompetitive behavior, antitrust law is able to protect consumers from these conspiracies.³²

The European Union’s competition law shares the objective of promoting consumer welfare; however, it is not the center stage as in America.³³ The EU’s central goal is the integration of different nations into a common market.³⁴ The EU is more concerned about “fairness” for nation states and opportunities for small and medium-size companies.³⁵ While perhaps not the singular goal, the desire to protect consumers is still present in the EU, and explicit devotion to consumer welfare has grown in the past ten years.³⁶ The European Commission stated consumer welfare as the goal of competition law in both its Merger Guidelines and in its Article 82 Guidance.³⁷

“With regard to exclusionary abuses the objective of Article 82 is the protection of competition on the market

30. *Antitrust and Democracy: Adam Smith Was Right*, MOGINRUBIN LLP (June 15, 2008), <https://moginrubin.com/antitrust-democracy-adam-smith-right/#>.

31. ADAM SMITH, *THE WEALTH OF NATIONS* 145 (Liberty Classics 1981) (1776); Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 LOY. L. REV. 33, 35 (2010) (discussing how iconic symbol, Adam Smith, is a frequent point of reference in many conversations on free markets). However, it should be noted that despite Adam Smith’s distaste for monopolies, he seemed dubious about the efficacy of antitrust law. In the next sentence, he goes on to say, “It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice.” *Id.*

32. *Antitrust and Democracy: Adam Smith was Right*, *supra* note 30.

33. Eleanor Fox, *US and EU Competition Law: A Comparison*, in *GLOBAL COMPETITION POLICY* 339, 340 (Edward M. Graham & J. David Richardson eds., 1997).

34. Siim Kallas, Vice President, Eur. Comm’n, *Unleashing the Potential of Rail in the EU: Speech at the CER 25th Anniversary* (June 17, 2013).

35. Fox, *supra* note 33, at 340.

36. Victoria Daskalova, *Consumer Welfare in EU Competition Law: What Is It (Not) About?*, 11 COMPETITION L. REV. 133, 133 (2015).

37. See *id.* at 145 (discussing how the Commission presented consumer welfare as the goal of EU merger policy, even though there is no explicit mention of consumer welfare as the goal in the Merger Regulation); 2004 O.J. (C 31/03) 3, 8 (noting that the possible anti-competitive effects of horizontal mergers include the customer’s ability to protect themselves against price increases).

as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.”³⁸

IV. EVALUATING MARKET POWER

Antitrust analysis requires evaluating market power.³⁹ Market power is the ability of a firm, or group of firms, to raise prices above the competitive level without losing sales, all other things being equal.⁴⁰ Market power is bad when used to allow companies to take advantage of consumers. Competition is good because businesses lower prices to win sales from their competitors. When only one company is offering a necessary or coveted product, consumers are more or less forced to keep buying the product from that sole provider, even when the price rises. Antitrust policy is, therefore, designed to prevent companies from acquiring, maintaining, or using market power.⁴¹

Market power, alone, is not illegal. However, once a firm begins to act anticompetitively—for example, by raising prices, limiting choices, or excluding its competitors and harming consumers in some other way—antitrust law has been violated.⁴²

Market power depends on a variety of factors.⁴³ A firm's market share in a precisely defined market can indicate market power; however, there is no number that proves a firm is too big. Some courts suggest a 30% market share is enough to infer

38. DG COMPETITION, EUR. COMM'N, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES para. 4. (2005), <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

39. See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981) (“Finding a violation of the Sherman Act requires an initial determination that the defendant . . . has a high degree of market power.”).

40. Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 370 (1998).

41. ABA SEC. ANTITRUST L., MARKET POWER HANDBOOK: COMPETITION LAW & ECONOMIC FOUNDATIONS, at ix. (2d ed. 2012).

42. See FED. TRADE COMM'N, *Anticompetitive Practices*, <https://www.ftc.gov/enforcement/anticompetitive-practices> (last visited Feb. 9, 2019) (noting that the FTC generally pursues anticompetitive conduct, such as business practices that reduce competition and lead to higher prices, as violations of the Federal Trade Commission Act).

43. See Landes & Posner, *supra* note 39, at 944 (noting that the firm's market power can be determined by combining the firm's market share with other factors).

market power; another has suggested 40%.⁴⁴ Market power also depends on the number of alternative, substitute products available to consumers (elasticity of demand) and the increase in output by competitor firms resulting from an increase in the price of the product (elasticity of supply).⁴⁵ If consumers can instead, switch to a different product when the price of their ideal purchase rises, the firm lacks market power. Firms also lack market power if a price increase will cause new companies to enter the market in the hope of making a profit. When a firm misuses its market power, consumers are taken advantage of, and other companies are unable to enter the market and improve the situation. Everyone loses, except the company running the show.⁴⁶

To define market share, antitrust regulators must define the relevant market.⁴⁷ The market is broken into product market and geographic market.

A. *Product Market*

One way to define relevant market is by product. Under this definition, all firms that sell interchangeable products are considered to be within the same product market.⁴⁸ The products do not need to be perfect substitutes, they just need to be

44. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984) (noting that the Court of Appeals recognized that a 30% market share was sufficient); *but see Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004) (suggesting a 40% share is necessary).

45. See Landes & Posner, *supra* note 39, at 944 (noting that a business's market power can be derived from the market share with other factors such as elasticity of demand and elasticity of supply).

46. See Matt Petryni, *What Is Meant When a Firm Has No Market Power*, CHRON.COM, <https://smallbusiness.chron.com/meant-firm-market-power-33204.html> (last visited Feb. 9, 2019) (explaining that when a single company dictates the market price, it faces less competition due to other companies' entry barriers into the market, and that it can more easily raise prices without losing its customers).

47. See Matthew Lane, *Antitrust in 60 Seconds: Market Definition*, DISRUPTIVE COMPETITION PROJECT (Sept. 5, 2018), <http://www.project-disco.org/competition/090518-antitrust-in-60-seconds-market-definition/#.W9DvKhNKglU> (explaining that a relevant market needs to be defined so that market shares can be determined).

48. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (stating that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it").

reasonably similar so an increase in the price of one product would affect sales of the others.⁴⁹ This definition makes sense for companies that specialize in one type of product or service, such as oil, steel, or railway travel. It is more difficult to apply this concept to an e-commerce mega retailer like Amazon.

The difficulty faced when applying these concepts to e-commerce retailers like Amazon is not the first time that a change in the retail landscape has made product market difficult to discern. The definition of a product market was the focus of *FTC v. Staples*. Office Depot and Staples entered into an agreement to merge, but the FTC challenged the deal.⁵⁰ The respondents argued the product market was the sale of office supplies, but the FTC argued the product market was more accurately the sale of consumable office supplies from office superstores.⁵¹ This definition excluded capital goods, such as computers, office furniture, or fax machines, and included products that consumers buy recurrently from superstores, such as paper or pens.⁵² This seems like a minor difference, but it was key in determining whether the merger would be anticompetitive. By defining the product market as “office supplies,” Office Depot and Staples together made up only 5.5% of the total sales in North America.⁵³ The Court noted that the office supplies sold had a high degree of “functional interchangeability”: it makes no difference to a consumer if she is buying a notebook from Office Depot, Staples, or another store.⁵⁴

The Court also noted that submarkets can exist within product markets, and pose problems that require antitrust attention.⁵⁵ By defining the market as office supplies sold at office superstores, the FTC presented evidence that in areas where Staples faced no office superstore competition, prices were 13%

49. *Malaney v. UAL Corp.*, 434 Fed. Appx. 620 (9th Cir. 2011).

50. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1069 (D.D.C. 1997).

51. *Id.* at 1073.

52. *Id.*

53. *Id.*

54. *Id.* at 1074.

55. *See id.* at 1075 (explaining that “[t]he Supreme Court has recognized that within a broad market, ‘well-defined submarkets may exist,’” which must be examined when mergers take place to determine if there is a reasonable probability that the merger will substantially lessen competition).

higher than in areas where it competed with Office Depot and OfficeMax.⁵⁶ Evidence also demonstrated that Office Depot's prices were over 5% higher in markets where it faced no competition from other office superstores.⁵⁷ Despite selling substitutable products that could be purchased in other stores, the evidence showed that prices for Office Depot and Staples products were only affected by competition from other office superstores, and not from online orders or other big box retailers like Walmart.⁵⁸ By defining the product market narrowly as a consumable office supplies from office superstores, the Court concluded the merger would result in anticompetitive behavior in the form of higher prices and would harm consumer welfare.⁵⁹

Amazon's product market is particularly difficult to define. It sells a wide range of products, from books, to clothes, to food, to furniture. It sells audiobooks through Audible.com, has its own music streaming service, and produces its own online media content through Amazon Prime. It offers credit cards to Prime members that give them cash back on exclusive Amazon purchases.⁶⁰ It is unclear what Amazon really is: a retailer, a content provider, a financier?

Amazon has been named in antitrust suits before, but for specific product markets—and it was not the bad guy. In *United States v. Apple*, Apple and five of the country's largest book publishers joined forces to raise and fix e-book prices.⁶¹ In November 2009, Amazon held 90% of the e-book sales market, partly because of its introduction of the Kindle and because of its flat rate of \$9.99 for e-books.⁶² Amazon's marketing and range of products helped the company succeed with consumers. The defendants argued that because they were unable to compete with Amazon, they had to find a way to raise e-book prices so they

56. *Id.*

57. *Id.* at 1076

58. *Id.* at 1077.

59. *Id.* at 1080, 1091.

60. Paul Soucy, *New Card: 5% Back at Amazon, Rewards Everywhere Else*, NERDWALLET (Nov. 1, 2018), <https://www.nerdwallet.com/blog/credit-cards/amazon-new-prime-rewards-card/>.

61. *United States v. Apple*, 791 F.3d 290, 296 (2d Cir. 2015).

62. *Id.* at 299.

could be profitable.⁶³ This was not a compelling argument—and a direct violation of §1 of the Sherman Act.⁶⁴

In *United States v. Apple*, it was clear that the product market at issue was e-books. When arguing that Amazon has an antitrust problem, a clear product market must be defined.⁶⁵ Amazon has a larger share of some markets than others. Amazon clearly dominated the e-book market in 2007.⁶⁶ Antitrust law characterizes a monopoly as a market share of over 80%, a benchmark Amazon had blown by.⁶⁷ Other categories of products are far less concerning. Amazon only held 6.6% of the apparel market as of January 2017.⁶⁸ Amazon's acquisition of Whole Foods sent people into a frenzy as they cried "monopoly," but Amazon and Whole Foods combined only comprise 1.4% of the grocery market.⁶⁹ Amazon Instant Video reaches 33% of homes in the U.S., but this pales in comparison to Netflix's 75%.⁷⁰ None of these submarkets seem compelling choices to define an antitrust issue.

Unless there is a clear anticompetitive issue afoot in a defined submarket, it seems wiser to define Amazon's product market as a whole: retail e-commerce. In 2016, global e-commerce sales were

63. See *id.* at 303–04 (describing that publishers must switch all of their other e-book retailers to an agency pricing model, and consequently Apple would not need to compete with Amazon).

64. *Id.* at 335.

65. See Lane, *supra* note 47 (noting that the market definition, proved by products in the market and geography that contains the market, is a crucial part in building many antitrust cases).

66. *Apple*, 791 F.3d at 342.

67. See *id.* at 342 (explaining that "Amazon's 90 percent market share constituted a monopoly under antitrust law," because a substantial monopoly has a market share of over 80 percent).

68. Hayley Peterson, *Amazon Is Getting Closer to Crushing America's Biggest Clothing Stores*, BUS. INSIDER (Jan. 14, 2017, 8:23 PM), <http://www.businessinsider.com/amazon-becomes-the-biggest-clothing-retailer-in-the-us-2017-1>.

69. See Christina Cheddar Berk, *Amazon and Whole Foods Control over a Sliver of the Grocery Market—For Now*, CNBC (June 16, 2017, 12:23 PM), <https://www.cnbc.com/2017/06/16/amazon-whole-foods-control-only-silver-of-the-grocery-market-for-now.html> ("Whole Foods and Amazon are smaller still, with Whole Foods controlling a 1.2 percent stake and Amazon with a 0.2 percent share, which add to 1.4% of the grocery market.").

70. Sarah Perez, *Netflix Reaches 75% of US Streaming Service Viewers, But YouTube Is Catching Up*, TECHCRUNCH (Apr. 10, 2017), <https://techcrunch.com/2017/04/10/netflix-reaches-75-of-u-s-streaming-service-viewers-but-youtube-is-catching-up/>.

\$1.9 trillion.⁷¹ In the U.S. that year, retail e-commerce hit \$201 billion.⁷² The top company was Amazon, comprising \$79.3 billion, roughly 39.5% of the U.S. market share. It was followed by Walmart, with 6.7%, and Apple, with 5.97%.⁷³ Some courts have suggested that over 30% of the market share could determine market power, so Amazon's size in the retail e-commerce might draw concern.⁷⁴ Globally, almost half of retail e-commerce sales come not from the U.S., but from China, where Amazon has not made an impact. Amazon holds less than 1% of China's e-commerce market.⁷⁵ Consequently, Amazon has switched gears and is hoping to gain market share in India, but it has not shown any significant market power there.⁷⁶

There are other problems with defining retail e-commerce as an entire product market. The distinction between retail and retail-done-online is shrinking.⁷⁷ Traditional retailers know they have to offer an online option, even if they want to continue selling products in physical stores. Mega-retailers like Walmart, Staples, and Target have rolled out online shopping services—because they knew they had to, if they wanted to compete in a changing

71. *Worldwide Retail Ecommerce Sales Will Reach \$1.915 Trillion This Year*, EMARKETER (Aug. 22, 2016), <https://www.emarketer.com/Article/Worldwide-Retail-Ecommerce-Sales-Will-Reach-1915-trillion-This-Year/1014369>.

72. Arthur Zaczkiewicz, *Amazon, Wal-Mart Lead Top 25 E-commerce Retail List*, WOMEN'S WEAR DAILY (Mar. 7, 2016), <http://wwd.com/business-news/financial/amazon-walmart-top-ecommerce-retailers-10383750/>.

73. *See id.* (noting that Amazon's e-commerce sales are \$79.3 billion while Wal-Mart has \$13.5 billion (6.7% of Amazon's e-commerce sales) and Apple totals \$12 billion (5.97% of Amazon's e-commerce sales)).

74. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 7 (1984) (discussing that 70% of patients enter hospitals outside of East Jefferson, as such the market share alone was insufficient to infer market power).

75. Jeff Dunn, *Amazon Is Still Getting Dominated in China*, BUS. INSIDER (Feb. 22, 2017, 2:59 AM), <http://www.businessinsider.com/amazon-market-share-china-alibaba-jd-chart-2017-2>.

76. *See* Jason Del Ray, *Jeff Bezos Just Promised to Pour \$3 Billion More into Amazon India*, VOX (June 8, 2017), <https://www.vox.com/2016/6/8/11883372/jeff-bezos-billion-amazon-india> (reasoning that Amazon's announcement to increase its investment in India indicates the company's substantial interest in that market).

77. *Gap Between Online and Offline Commerce Is Shrinking*, EMARKETER (Oct. 10, 2016), <https://www.emarketer.com/Article/Gap-Between-Online-Offline-CommerceShrinking/1014575>.

retail market.⁷⁸ Retailers across the board have made the switch to selling online, and the top U.S. retail e-commerce market shareholders have some surprising companies, such as Nordstrom at the tenth highest market share holder, Gap at number twelve, and Victoria's Secret at number twenty three.⁷⁹ These retailers maintain traditional stores, while also engaging in e-commerce.

The strangest twist is online retailers are now going the other way and opening brick-and-mortar stores. Companies like Warby Parker, an online glasses seller; Rent The Runway, a rental service for designer dresses; and Birchbox, a monthly makeup subscription service, have all announced plans to open physical stores as part of their growth strategy.⁸⁰ Not only is Amazon now playing in the traditional retailer landscape with Whole Foods, it has opened its own brick-and-mortar. It has plans to open other types of stores, from electronics stores mimicking Apple, to furniture stores with augmented reality showrooms that allow shoppers to see how the furniture would look in their homes.⁸¹ This sounds like a fun and sort of strange growth plan many would not mind coming to fruition, but it further complicates how we define Amazon's product market. With the convergence between e-commerce and traditional retail, there may no longer be a meaningful difference in defining Amazon's reach as purely retail e-commerce. Amazon may be operating in retail in general,

78. See Jessica Tyler, *We Visited a Walmart and a Target Store to See Which One Is Better Prepared to Take On Amazon, and the Winner Was Clear*, BUS. INSIDER (Aug. 22, 2018), <https://www.businessinsider.com/walmart-and-target-compared-pictures-details-2018-3> ("Walmart and Target are both fighting to keep up with Amazon. One way that both big-box stores are doing this is by shifting their e-commerce strategies to make the transition between in-store and online shopping more seamless.").

79. Zaczekiewicz, *supra* note 72.

80. Elizabeth Weise, *Online Retailers Getting Physical*, USA TODAY (Nov. 6, 2015), <https://www.usatoday.com/story/tech/2015/11/06/amazon-brick-and-mortar-bonobos-modcloth/75235308/>.

81. David Morris, *Amazon Is Exploring More Brick-And-Mortar Retail Concepts*, FORTUNE (Mar. 26, 2017), <http://fortune.com/2017/03/26/amazon-retail-concepts>.

where it would only hold roughly 2.8% of the market share.⁸² From antitrust regulation standards, that number is not significant.

A product market can be classified in many ways. Amazon's market could be defined as one of products it sells, as retail e-commerce, or as retail in general. The best option for pursuing an antitrust argument against Amazon would likely be to classify its product market as retail e-commerce, so it clears the loose 30% market share suggestion for implying market power. Still, with the changing retail landscape, it is not a perfect fit.

B. Geographic Market

Market share also depends on the relevant geographic market.⁸³ While product market focuses on substitutable products, the geographic market includes where consumers would turn to purchase a relevant product if the firm at issue attempted to raise prices.⁸⁴ The area in which a company sells its products is usually not the relevant geographic market.⁸⁵ With antitrust law being consumer focused, the analysis of relevant geographic area is similarly focused on where consumers would turn to do their shopping.⁸⁶ This could be the same as a firm's service area, if there exist other options in the service area for consumers to purchase from, or it could be a completely different geographical space.⁸⁷

82. See Eugene Kim, *Every Big Box Retailer Should Be Terrified by This One Chart*, BUS. INSIDER (May 12, 2016), <http://www.businessinsider.com/e-commerce-share-of-retail-industry-2016-5>; Rani Molla, *Amazon Could Be Responsible for Nearly Half of U.S. E-commerce Sales in 2017*, VOX (Oct. 24, 2017), <https://www.vox.com/2017/10/24/16534100/amazon-market-share-ebay-walmart-apple-e-commerce-sales-2017> (noting that as of 2016, retail e-commerce comprised only 7.2% of the retail market, and Amazon held roughly 39.5% of the e-commerce market share).

83. See *E.I. du Pont de Nemours v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011) (stating that the market definition depends on the relevant geographic market).

84. See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (reasoning that the relevant market area consists of the area in which the seller operates and the area in which buyers can practicably turn for alternatives).

85. See *E.I. du Pont de Nemours*, 637 F.3d at 441 (reasoning that the relevant geographic market focuses on the area in which customers can find substitute products).

86. *Id.*

87. See *id.* at 442–43 (listing several factors that may be considered in determining the relevant geographic market).

This concept makes sense for evaluating antitrust concerns in a traditional retail landscape. If there is only one shoe store in the tristate area, that company dominates the geographic market share. However, for e-commerce, the situation is different. Different companies are effectively right across the street from each other.⁸⁸ This means the relevant geographic market is much larger than in traditional business. If a consumer in Ohio dislikes the prices on Amazon, she can check Walmart.com or eBay. With e-commerce, geographic boundaries are broken down. It matters less and less where a company is and where its competitors are because every store is simultaneously everywhere for every consumer. This is theoretically good news for consumers because it should be harder for one company to acquire market power and utilize it by raising prices. However, it also means it is increasingly difficult to build an antitrust case against a company that operates with widespread geographic lines if it does behave anticompetitively.

The geographic market for e-commerce might not be as far reaching as one might expect. While the Internet has allowed the development of a global marketplace, products and services are differentiated in different countries, even when sold by the same company. Amazon does not offer a Prime Video service in China like in the United States.⁸⁹ Different products are available in different countries due to distribution requirements. While a company may technically sell products globally, the relevant geographic market may, nevertheless, not be the entire world because a geographic market is defined relative to a relevant product market.

It also may not make a substantive difference whether a company's geographic market is another country. Domestic

88. See Ajeet Khurana, *Advantages of E-Commerce over Traditional Retail*, BALANCE SMALL BUS. (May 13, 2018), <https://www.thebalancesmb.com/advantages-of-ecommerce-1141610> (reasoning that e-commerce dissolves the geographic limitations associated with brick and mortar stores).

89. Patrick Frater, *Why China Is Absent from Amazon Prime Video's Global Rollout*, VARIETY (Dec. 14, 2016), <http://variety.com/2016/digital/asia/why-china-is-absent-from-amazon-prime-videos-global-rollout-1201941851>.

antitrust laws are designed to protect American consumers.⁹⁰ Antitrust laws have been repeatedly interpreted by courts to only protect American interests.⁹¹ Moreover, some even argue that anticompetitive behavior abroad will actually benefit the American economy.⁹² In theory, if firms are acting monopolistically, they are unlikely to reinvest their profits in their own economy, and will instead want to invest in new markets they can target—lucky us!⁹³ There is little incentive or ability to attempt to regulate international antitrust concerns.

With all this in mind, Amazon's relevant geographic market for retail e-commerce is not global, even though it sells products abroad. Amazon's geographic market must be confined to the U.S.⁹⁴ While service area is not always the relevant geographic market, in Amazon's case, it likely is. Amazon sells everywhere in the U.S., and consumers have the option to switch to purchasing from another retail e-commerce competitor, such as Walmart.com, should Amazon attempt to exert its market power. This makes it difficult to find any anticompetitive issue with Amazon's behavior. Consumers still appear to have many other online options despite where they live. With the rise of the internet, geography has become less of an issue for antitrust analysis.⁹⁵

90. See FED. TRADE COMM'N., *supra* note 28, at 1 ("The Clayton Act helps protect American consumers by stopping mergers or acquisitions that are likely to stifle competition.").

91. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 207–08 (1968); *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 211 (1945).

92. See David E. Behrman, *Defining International Geographic Markets in American Antitrust Suits*, 33 STAN. L. REV. 1069, 1071–72 (1981) (reasoning that foreign cartels would likely result in increased output to U.S. markets, making these markets more competitive).

93. *Id.* at 1071.

94. See generally Jared Kagan, *Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies*, 55 N.Y.L. SCH. L. REV. 271, 288–89 (2010/11) (analyzing the relevant market for online marketplaces like Amazon).

95. See Maryan M. Chirayath, *Oh Canada!: Antitrust Geographic Market Definition and the Reimportation of Prescription Drugs*, 46 B.C.L. REV. 1027, 1053–54 (2005) (reasoning that the internet allows companies to expand their geographic market).

V. MONOPOLIES

If Amazon's relevant product market is defined as retail e-commerce, it holds nearly 40% of the market share.⁹⁶ Disregarding the issue of geographic market, one could argue that Amazon has sufficient market power based on its market share. However, being big is not necessarily bad. Market power is only problematic if it is exercised in an anticompetitive way.

Shockingly, despite their bad reputation, monopolies are not inherently evil, either. The legal definition of monopoly power refers to a larger share than market power.⁹⁷ How large a market share is needed to be dubbed a "monopoly" is unclear. The market share must be greater than 60%.⁹⁸ Other courts have suggested greater than 75%.⁹⁹ Regardless of where the benchmark is set in this range, Amazon falls substantially short in retail e-commerce—Amazon is not a "monopoly," according to the legal definition. Even with a substantial market share in retail e-commerce, Amazon has done nothing wrong by just being "big."

Even when a company is large enough to constitute a monopoly, it is not necessarily breaking the law.¹⁰⁰ It is only violating the law when a company uses its size to exclude competitors and inflate prices; this is when monopolies cross the line.¹⁰¹ It can be difficult to judge what is exclusionary behavior for monopolies, though, and what is just their regular course of

96. See Molla, *supra* note 82 (noting that Amazon held 38% market share of e-commerce sales in 2016).

97. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (reasoning that proving monopoly power requires something greater than what is needed to prove market power).

98. See *Cohlmlia v. St. John Med. Ctr.*, 693 F.3d 1269, 1283 (10th Cir. 2012) (noting that market shares less than 50% or 60% do not constitute monopoly power).

99. See *Kolon Indus. Inc. v. E.I. du Pont de Nemours*, 748 F.3d 160, 174 (4th Cir. 2014) ("Although there is no fixed percentage market share that conclusively resolves whether monopoly power exists, the Supreme Court has never found a party with less than 75% market share to have monopoly power.").

100. See *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 447–48 (2009) ("Simply possessing monopoly power and charging monopoly prices does not violate § 2.").

101. See JANICE RUBIN, CONG. RESEARCH SERV., RL33708, THE DISTINCTION BETWEEN MONOPOLY AND MONOPOLIZATION IN ANTITRUST LAW 2–3 (2006), <https://www.everycrsreport.com/files/20061023RL33708bd841668b7cc0d1ce1a33cf16082662fd6257ae6.pdf> (reasoning that size alone does not violate antitrust law and that the focus is on specific competitive harms such as controlling prices or excluding competition).

business. For example, exclusive contracts with suppliers are not exclusionary behavior, even though they make it more difficult for other competitors within a market.¹⁰² Courts even encourage cut-throat business behavior, based on the idea that consumers will be the ultimate beneficiaries of a healthy competitive landscape.¹⁰³ As long as a company is big, and not bad, size is not as significant an issue as people initially assume it to be.

VI. ANTICOMPETITIVE BEHAVIORS

There are several different ways that companies can exert market power to hamper competition and decrease consumer welfare. A company can increase prices, reduce consumer choice, restrict output, or decrease quality.¹⁰⁴ Amazon is most often accused of exhibiting anticompetitive behavior with its pricing tactics and by reducing consumer choice in the marketplace.¹⁰⁵ However, Amazon's business strategy has only improved consumer welfare.¹⁰⁶

A. Prices

When a company becomes large enough that it is able to

102. See FED. TRADE COMM'N, *Exclusive Dealing or Requirements Contracts*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or> (last visited Feb. 9, 2019) (reasoning that exclusive contracts can be used to reduce competition but are generally legal).

103. See R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 696 (7th Cir. 2006) ("Yet as we remark frequently in antitrust litigation, 'cutthroat competition' is a term of praise rather than condemnation.").

104. ORG. ECON. CO-OPERATION & DEV. [OECD], GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 12 (1993), <http://www.oecd.org/regreform/sectors/2376087.pdf> (noting that anticompetitive practices refers to higher prices, reduced output, and less consumer choice without necessarily providing goods and services of higher quality).

105. See Ashlee Kieler, *Authors, Booksellers Call for Investigation into Amazon's Alleged Anti-Competitive Business Practices*, CONSUMERIST (July 14, 2015), <https://consumerist.com/2015/07/14/authors-booksellers-call-for-investigation-into-amazons-alleged-anti-competitive-business-practices/> (noting that authors and book publishers have accused Amazon of anticompetitive business practices such as predatory pricing and strong-arm tactics against publishers, reducing consumer choice).

106. See Robert D. Atkinson, *Amazon/Whole Foods: What Me Worry*, TRUTH ON THE MKT. (Aug. 28, 2018), <https://truthonthemarket.com/2018/08/28/amazon-whole-foods-what-me-worry/> (arguing that the Whole Foods and Amazon merger improved consumer welfare by lowering prices and incentivizing competitors to offer more perks).

increase prices without losing consumers, it can signal anticompetitive behavior.¹⁰⁷ However, Amazon's prices are remarkably low.¹⁰⁸ Amazon's prices are set by an algorithm that either matches or beats prices from other stores.¹⁰⁹ It finds the lowest price per unit per ounce for a product, and applies it across the same type of goods sold on Amazon.¹¹⁰ Amazon is continuously trying to beat its competitors, even to the point of not earning a profit on certain items.¹¹¹ For the time being, this practice is great news for consumers. Why would any shopper drag himself to the store when he can order from Amazon without leaving the house and save money?

In fact, Amazon's prices are so low that it has been accused of predatory pricing tactics.¹¹² Predatory pricing is a form of anticompetitive behavior that occurs when a company charges a price below cost until other businesses are forced to leave the market because they can no longer compete.¹¹³ After the competition is reduced, the firm can then raise its prices to higher levels than before.¹¹⁴ Predatory pricing is difficult to discern from other pro-competitive business behaviors, such as loss leading, where a business sells certain products at a loss to attract

107. See FED. TRADE COMM'N, *supra* note 42 (noting that the FTC generally pursues anticompetitive conduct, such as business practices that reduce competition and lead to higher prices, as violations of the Federal Trade Commission Act).

108. See Sandra Latham, *Amazon vs. Walmart vs. Jet: Who Is the Cheapest?*, CHEAPISM (July 17, 2017), <https://blog.cheapism.com/walmart-vs-amazon-vs-jet-17056/> ("Amazon had the lowest prices overall, beating Walmart and Jet by a little over 5 percent.").

109. Jason Del Rey, *Amazon and Walmart Are in an All-Out Price War That Is Terrifying America's Biggest Brands*, VOX (Mar. 30, 2017), <https://www.vox.com/2017/3/30/14831602/amazon-walmart-cpg-grocery-price-war>.

110. *Id.*

111. *Id.*

112. See Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 789 (2017) (suggesting that Amazon utilizes predatory pricing tactics).

113. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (noting that the essence of predatory pricing is when a business rival has priced its products in a manner that eliminates competition, and thereby gains and exercises control over prices).

114. *Id.*

customers for other products.¹¹⁵

Predatory pricing has been viewed skeptically by courts because in the short-term the practice benefits consumers.¹¹⁶ Everyone likes low prices. It is not clear that a business has a devious plan to exclude competition and take advantage of buyers by just lowering prices. In the long run this behavior may not be beneficial to consumers, but courts are loath to speculate: “it is beyond the practical ability of courts to identify those rare cases without creating an impermissibly high risk of deterring legitimate procompetitive behavior of price-cutting.”¹¹⁷

Those who argue that Amazon engages in predatory pricing point out that Amazon is infamously unprofitable.¹¹⁸ Amazon has posted significant net losses in its operating history, from losing \$39 million in 2012 to \$241 million in 2014.¹¹⁹ However, these losses were not solely due to Amazon’s low prices and they are no longer occurring. 2014 was a tumultuous year for Amazon after its Fire Phone flopped and it had to cut the cost in half, resulting in a \$170 million loss.¹²⁰ In the same year, Amazon acquired the streaming website Twitch for \$970 million.¹²¹ Also, despite offering low prices, Amazon does not keep unprofitable products

115. See Nate Hoffelder, *Loss Leaders, Predatory Pricing, and Why Amazon Isn't the Defendant Today*, DIGITAL READER (July 10, 2013), <https://the-digital-reader.com/2013/07/10/loss-leaders-predatory-pricing-and-why-amazon-isnt-the-defendant-today/> (defining loss leading and predatory pricing).

116. See *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 453 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318–19 (2007); *Brooke Grp. Ltd.*, 509 U.S. at 223.

117. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 275 (3d Cir. 2012).

118. See Greg McFarlane, *Amazon Never Makes Money but No One Cares*, INVESTOPEDIA, <https://www.investopedia.com/stock-analysis/031414/amazon-never-makes-money-no-one-cares-amzn-aapl-wag-azo.aspx> (last updated Mar. 14, 2014); Graham Ruddick, *Will Amazon Ever Be Profitable?*, TELEGRAPH (July 25, 2014), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/10990659/Will-Amazon-ever-be-profitable.html>.

119. See *Amazon.com Inc.: Morningstar Rating*, MORNINGSTAR, <http://financials.morningstar.com/ratios/r.html?t=AMZN> (last visited Feb. 9, 2019).

120. See AMAZON, INC., FORM 10-K: ANNUAL REP. 28 (2014), <https://www.sec.gov/Archives/edgar/data/1018724/000101872415000006/amzn-20141231x10k.htm> (noting that Amazon recorded \$170 million in charges related to Fire phone inventory and supplier commitment costs).

121. *Id.* at 53.

for sale for long.¹²² Amazon warns suppliers when their products are in danger of getting eliminated from the website so it can negotiate for a lower price.¹²³ Unlike what is characteristic of predatory pricing, Amazon has no intention of sacrificing profits on its sales to eliminate its competition. If it cannot make money on a supplier's product, it simply stops carrying that product.¹²⁴ Additionally, Amazon is no longer "unprofitable." As of April 2017, Amazon turned a profit for eight straight quarters.¹²⁵ Its 2016 net profit was \$2.37 billion, a 300% increase from 2015.¹²⁶ Amazon is not sacrificing itself in the short-term with its low prices.

Amazon's low prices are not predatory. They are actually driving competition. Walmart is striving to beat everyone on price online, including Amazon.¹²⁷ Walmart wants the lowest price on 80% of its items.¹²⁸ If Amazon is trying to run out its competition, it has not succeeded. So far, the pro-competitive effects of Amazon's tactics have only benefitted consumers. Some businesses may be lost in the Amazon vs Walmart price war, but antitrust laws are only concerned about exclusion to the extent that consumers are harmed.¹²⁹

Of course, these price cuts must come from somewhere, and it is the suppliers who suffer. However, once again, there is nothing per se illegal occurring. Negotiating for a low price from suppliers is not illegal: "A firm that has substantial power on the buy side of the market (i.e., monopsony power) is generally free to

122. See Del Rey, *supra* note 109 (noting that unprofitable items on Amazon are in jeopardy of being removed from the site).

123. *Id.*

124. See *id.* (stating that products may be removed from Amazon's website due to profitability issues).

125. Jason Del Rey & Rani Molla, *Amazon Just Turned a Profit for the Eighth Straight Quarter*, VOX (Apr. 27, 2017), <https://www.vox.com/2017/4/27/15451726/amazon-q1-2017-earnings-profits-net-income-cash-flow-chart>.

126. See AMAZON, INC., FORM 10-K: ANNUAL REP. 17 (2016), <https://www.sec.gov/Archives/edgar/data/1018724/000101872417000011/amzn-20161231x10k.htm>; see AMAZON, INC., FORM 10-K: ANNUAL REP. 17 (2015), <https://www.sec.gov/Archives/edgar/data/1018724/000101872416000172/amzn-20151231x10k.htm> (stating that Amazon's net profit for 2015 was \$596 million).

127. Del Rey, *supra* note 109.

128. *Id.*

129. See *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9th Cir. 2011) (highlighting the importance of consumer welfare under antitrust law).

bargain aggressively when negotiating the price it will pay for goods and services.”¹³⁰ It may feel unfair, but Amazon is not breaking any laws by negotiating.

B. Consumer Choice

An antitrust violation may arise when an activity unreasonably restricts the number of choices that would have otherwise been available to a consumer.¹³¹ Again, antitrust regulators have to determine whether a reduction in choice is simply indicative of a competitive market or if it is anticompetitive.¹³² A plaintiff has to allege facts that establish that the firm acted in a manner that robbed the buyer of its choice of product.¹³³ As long as a consumer can still choose the product, antitrust laws are not violated.

Amazon sells practically everything. Its portfolio of products and services is extremely diverse, encompassing everything from grocery stores to Cloud storage.¹³⁴ However, consumers in the retail e-commerce market are still free to choose where they want to spend their money. Buyers can shop at Amazon, Walmart, or their local grocery store. Amazon has done nothing to force consumers to buy from them. They have created different products and services that are attractive, such as Amazon Fresh, a grocery delivery service, or Amazon Prime, which offers two-day shipping, but none of these developments have done anything to shut out competition from the marketplace.

Instead, we have seen a surge of innovation to compete effectively with Amazon. Nearly all retailers now offer online shipping. Traditional box stores like Walmart and Target are scrabbling for ways to remain competitive against Amazon—but

130. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 103 (3rd Cir. 2010).

131. Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 182 (2007).

132. See *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) (arguing that plaintiffs failed to prove that the reduction in choice resulted from anticompetitive practices).

133. See *id.* (reasoning that the plaintiff needed to show actual anticompetitive effect regarding the reduction in choice).

134. Karl Russel & Ashwin Seshagiri, *Amazon Is Trying to Do (and Sell) Everything*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/interactive/2017/06/16/technology/all-things-amazon-does.html>.

that is a good thing. Walmart has expanded its online retail by purchasing Jet, an ecommerce website focusing on bulk buys, and has taken on Prime with free two-day shipping for orders over \$35.¹³⁵ This is great news for customers, who now have one more option for online shopping. In addition to free two-day shipping, Walmart also offers same day store pickup for orders.¹³⁶ Target has acquired Shipt, a same day delivery platform, and has followed Walmart's lead by offering same day pickup.¹³⁷

Instead of reducing consumer choice, Amazon has motivated other businesses to stay competitive. In the process, it has given consumers more options for online retail.

VII. CONSUMER WELFARE

Antitrust laws are focused on consumer protection. Consumer welfare has not decreased because of any of Amazon's actions; instead, Amazon has largely improved shopping for buyers by offering shoppers lower prices and increased convenience. Amazon is a big player in many different product segments. Because of its influence, it has revolutionized the shopping experience, causing other companies to either rise to the challenge or step aside. All of these changes have been largely positive. Is there any consumer who actually dislikes the convenience of a one-click order arriving at her home the next day?

Amazon's influence is not confined to the online retail world. Many industries are changing because of Amazon. In December, CVS announced its \$69 billion merger with the health insurance

135. Seth Fiegerman, *Walmart Buying Jet.com for \$3.3 billion to Take On Amazon*, CNN (Aug. 8, 2016), <http://money.cnn.com/2016/08/08/technology/walmart-jet-deal-amazon/index.html>; Tonya Garcia, *Wal-Mart Ends ShippingPass, Launches Free Two-Day Shipping*, MARKETWATCH (Jan. 31, 2017), <https://www.marketwatch.com/story/wal-mart-ends-shippingpass-pilot-launches-free-two-day-shipping-2017-01-31>.

136. Garcia, *supra* note 135.

137. Matthew Boyle, *Target to Buy Shipt for \$550 Million in Challenge to Amazon*, BLOOMBERG (Dec. 13, 2017), <https://www.bloomberg.com/news/articles/2017-12-13/target-to-buy-shipt-for-550-million-in-bet-on-same-day-delivery>.

company Aetna.¹³⁸ This plan was spurred by Amazon acquiring licenses to become a wholesale pharmaceutical distributor.¹³⁹ The effects of these industry changes are obviously still unknown, but Amazon's ability to spur even innovation in the healthcare industry is impressive. Efficiencies, such as wider choice, greater access, or increased innovation, can help refute a claim of damaging anticompetitive effects.¹⁴⁰ Amazon has caused the competition to heat up in various markets, but it has not done anything to damage consumer welfare.

It is possible that the effects of Amazon's low prices, instant gratification, and wide-reaching influence may turn out to damage consumer welfare in the long run. No one has a crystal ball: Amazon could outcompete Walmart, and once the competition is gone, raise prices. Similarly, consumers are now accustomed to quick shipping. Once Amazon has eliminated the competition, it could raise rates for Prime and harm consumer welfare. However, antitrust analysis is confined to the present, not the future.¹⁴¹ Antitrust regulators are looking for actual violations of laws, not speculations that someday, a company could decide to switch strategies and do something bad.¹⁴² The

138. *CVS Health to Acquire Aetna: Combination to Provide Consumers with a Better Experience, Reduced Costs and Improved Access to Health Care Experts in Homes and Communities Across the Country*, CVS HEALTH (Dec. 3, 2017), <https://cvshhealth.com/newsroom/press-releases/cvs-health-acquire-aetna-combination-provide-consumers-better-experience>.

139. See Sara Sjolín, *CVS-Aetna Merger 'Makes a lot of Sense' as Amazon Enters the Market - Analysts Assess the Deal Talk*, MARKETWATCH (Oct. 29, 2017), <https://www.marketwatch.com/story/cvs-aetna-merger-makes-a-lot-sense-as-amazon-enters-market-analysts-assess-the-deal-talk-2017-10-27> (reasoning that the merger between Aetna and CVS would be a strategic move to compete with Amazon, and stating that the merger proposal was brought on by an expectation that Amazon would be entering the pharmaceutical industry).

140. See David Balto, *The Efficiency Defense in Merger Review: Progress or Stagnation?*, 2001 ANTITRUST L. 74, 74 (analyzing efficiency claims based on production, distribution, innovation, and purchasing).

141. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (stating that an injury must be actual and imminent).

142. See Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n, *The Forward-Looking Nature of Merger Analysis Advanced Antitrust* U.S. 4 (2014) (reasoning that antitrust enforcers have used rigorous fact-finding and analysis to sift out speculation).

focus is what is happening to consumers right now.¹⁴³ Currently, Amazon is not doing anything wrong. At least, not from an antitrust perspective.

There are undoubtedly reasons to be upset with Amazon. The internet is filled with stories about what it is like to work for Amazon. Employees in Germany were written up for being unproductive and speaking to each other in passing or pausing at the conveyer belt to catch their breath.¹⁴⁴ UK distribution center employees were given boots to wear that gave them blisters.¹⁴⁵ In a particularly infamous and heinous report, during the summer of 2011 in Pennsylvania, ambulances were stationed near the Amazon distribution center to rush employees to the hospital after they suffered from heat stroke.¹⁴⁶ Obviously, none of this is good, but all of it is outside the scope of antitrust law.

Amazon has also made it difficult for small businesses to compete. An owner of a pet store in Indianapolis, IN reports that while customers come into his business to learn about products, they do not buy from him—they purchase from Amazon because the prices are lower.¹⁴⁷ Losing these small businesses can impact communities.¹⁴⁸ EU antitrust law is much better suited to dealing with this problem because EU rules are designed to ensure “fair and equal conditions for businesses, while leaving space for . . . the development of small businesses.”¹⁴⁹ In contrast, American

143. See Rachel Abrams, *Antitrust in the Age of Amazon*, N.Y. TIMES (May 12, 2016), <https://www.nytimes.com/2016/05/13/business/office-depot-staples-merger-antitrust-amazon.html> (quoting Deborah Feinstein, the Director of the FTC's Bureau of Competition, confirming that the FTC was “look[ing] at a very short time horizon because consumers can be injured in the meantime”).

144. Simon Head, *Worse than Wal-Mart: Amazon's Sick Brutality and Secret History of Ruthlessly Intimidating Workers*, SALON (Feb. 23, 2014), https://www.salon.com/2014/02/23/worse_than_wal_mart_amazons_sick_brutality_and_secret_history_of_ruthlessly_intimidating_workers/.

145. *Id.*

146. *Id.*

147. Ian Altman, *Is Amazon Killing Small Businesses?*, FORBES (Oct. 27, 2015), <https://www.forbes.com/sites/ianaltman/2015/10/27/what-amazon-is-doing-to-small-businesses/#777e65552d4>.

148. See Ben Schiller, *Is Amazon Killing Jobs and Destroying Communities?*, FAST CO. (Dec. 2, 2016), <https://www.fastcompany.com/3066110/is-amazon-killing-jobs-and-destroying-communities> (stating that monopolies can hurt competition, kill jobs, and harm communities).

149. *Competition*, EUR. UNION, https://europa.eu/european-union/topics/competition_en (last visited Feb. 9, 2019).

antitrust rules repeatedly state the law is not for protection of other businesses, just consumers.¹⁵⁰ Amazon may have more of a problem in international communities, especially within the EU. However, in America, crushing your competition is not a problem unless you are hurting the consumer.

VIII. CONCLUSION

Despite how frequently people claim Amazon has an antitrust problem, it is difficult to see how Amazon harms consumer welfare. Antitrust law exists to protect consumers, while also restoring the market's ability to operate freely. Amazon has incredible influence on other businesses, but the evidence suggests this influence has not translated to market power. Amazon holds a large share of the retail e-commerce market. However, being big is not necessarily bad. Amazon's market share only becomes an issue for antitrust regulators when it begins to have anticompetitive effects. So far, we have not seen consumers harmed. Amazon's prices are low but other companies are still able to compete. Amazon has not restricted consumer choice; instead, it has inadvertently increased choice by motivating companies to expand their services to match Amazon's. At present, Amazon does not have an antitrust problem. Rather, it has, in fact, improved consumer welfare in numerous markets.

150. See Abbot B. Lipsky, Jr., *Protecting Consumers by Promoting Competition*, FED. TRADE COMM'N (Mar. 6, 2017), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/03/protecting-consumers-promoting-competition> (explaining how the FTC's enforcement of antitrust laws protect consumers); U.S. DEPT OF JUSTICE, *Antitrust Enforcement and the Consumer*, <https://www.justice.gov/atr/antitrust-enforcement-and-consumer> (last updated Dec. 18, 2015) (stating that antitrust laws protect competition and, in turn, benefit consumers); Marvin Ammori, *Monopolies: Antitrust Law Protects Consumers, Not Competitors*, WIRED (Oct. 16, 2012) (arguing that antitrust law is intended to protect consumers as opposed to businesses).