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BUYER POWER IN THE DIGITAL ECONOMY: THE  
CASE OF UBER AND AMAZON

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*Abuses of market power by the Big Tech companies have been an enforcement priority for antitrust authorities across the globe in recent years. The focus of enforcement has been abuses of market power on the seller's side. Buyer power abuses have hitherto received much less attention. This is largely because antitrust has always held a somewhat ambivalent attitude toward buyer power abuses. Analysis of such abuses has been mostly informed by the monopsony model, which only account for a small fraction of buyer power abuses by the digital behemoths. The remainder of buyer power abuses that arise in the bargaining context have often been dismissed on the grounds that antitrust has no business interfering with arms-length commercial transactions between two well-informed parties. This Article examines buyer power abuses in the digital context with the examples of Uber and Amazon. It argues that the digital setting has rendered the welfare effects of potential abuses by Uber more benign. It further argues that while some of Amazon's conduct may call for regulatory responses, antitrust may not be the appropriate tool to address it. New legislation may be needed.*

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#### INTRODUCTION

Digital economy issues have taken the field of antitrust by storm. Each of the GAFA or GAMA companies, Google, Apple, Facebook (since renamed Meta), and Amazon, has been the subject of an investigation or lawsuit on either side of the Atlantic. The theories of harm in these cases run the gamut. With Google, at least within the European Union (“EU”), the

focus has been on what has been termed self-preferencing conduct in its online services.<sup>1</sup> This refers to preferential treatment of Google’s own services on Google Search that allegedly helps Google to leverage its market position from search, where it is highly dominant, to adjacent or related markets, such as shopping comparison.<sup>2</sup> Apple has been sued by Epic Games in connection with its refusal to allow apps to conduct transactions with users outside of the App Store.<sup>3</sup> In a decision that is viewed as a partial victory for both parties, Judge Yvonne Gonzalez Rogers found that Epic Games failed to prove that Apple possesses monopoly power in the app store market, but prohibited Apple from continuing its prior practice of requiring all payments to be processed on its App Store under California state law.<sup>4</sup>

Meta has faced serious privacy issues. A German court held that Meta’s collection of user data was an abuse of dominance<sup>5</sup> and the European Commission has recently launched an investigation into whether an agreement between Google and Meta regarding online display advertising infringes EU competition law.<sup>6</sup> Lastly, Amazon’s policies on the Amazon Marketplace and its treatment of its sellers have attracted attention from regulators in both the United States and Europe. Both the U.S. Federal Trade Commission (“FTC”) and the European Commission have launched investigations into Amazon’s use of data from third-party sellers to give its own products an unfair advantage.<sup>7</sup> The Italian Competition Authority

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1. Case T-612/17, *Google LLC v. Comm’n*, ECLI:EU:T:2021:763 (Nov. 10, 2021).

2. *Id.* at ¶¶ 143–49.

3. *Epic Games, Inc. v. Apple Inc.*, 559 F.Supp. 3d 898, 923 (N.D. Cal. Sept. 10, 2021).

4. *Id.* at 922.

5. Adam Satariano, *Facebook Loses Antitrust Decision in Germany Over Data Collection*, N.Y. TIMES, June 23, 2020, <https://www.nytimes.com/2020/06/23/technology/facebook-antitrust-germany.html>.

6. European Commission Press Release IP/22/1703, *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google and Meta, in Online Display Advertising* (Mar. 11, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1703](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1703).

7. European Commission Press Release IP/20/2077, *Antitrust: Commission sends Statement of Objections to Amazon for the use of Non-public Independent Seller Data and Opens Second Investigation into its E-commerce Business Practices* (Nov. 10, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077) [hereinafter Eur. Comm’n]; Tyler

has imposed hefty fines on Amazon for coercing its third-party sellers to use Amazon's logistical services.<sup>8</sup>

What has thus far escaped the enforcers' attention is monopsony power or buyer power abuses. In one sense, this is hardly surprising. The law on seller-side monopolization is considerably more developed than that on buyer power abuses. The last prominent monopsonization case in the United States was *Weyerhaeuser v. Ross-Simmons*.<sup>9</sup> The case, which concerned predatory bidding, spawned a fierce debate about whether predatory bidding should be treated as the mirror image of predatory pricing and whether the analytical framework from *Brooke Group* should be applied to predatory bidding.<sup>10</sup> This debate, however, has relatively little salience to the digital economy; there have been few allegations of predatory bidding in the online world thus far. Predatory bidding is probably more likely to take place in the commodities markets.<sup>11</sup>

This does not mean that the digital economy is devoid of buyer power issues. Amazon has been accused of imposing unduly harsh contractual terms on its suppliers and third-party sellers. Some of these terms may have helped Amazon leverage its market position while some others are purely exploitative. Amazon has reportedly even forced its suppliers to sell it an equity stake.<sup>12</sup> Despite Epic Games' valiant effort to character-

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Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation into its Online Marketplace Led by the FTC and Attorneys General in New York and California*, INSIDER (Aug. 4, 2020, 7:36 PM), <https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>.

8. Adam Satariano, *Amazon is Fined \$1.3 Billion in Italy over Antitrust Violations*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/2021/12/09/business/amazon-italy-fine.html>; Elvira Pollina & Maria Pia Quaglia, *Italy Fines Amazon Record \$1.3 Bln for Abuse of Market Dominance*, REUTERS (Dec. 10, 2021, 5:28 PM), <https://www.reuters.com/technology/italys-antitrust-fines-amazon-113-bln-euros-alleged-abuse-market-dominance-2021-12-09/>.

9. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

10. *Id.* at 313.

11. Michael E. Haglund, *Weyerhaeuser's Aftermath: Increased Vulnerability of Resource-based Input Markets to Monopsony*, 53 ANTITRUST BULL. 411, 440-41 (2008).

12. Dana Mattioli, *Amazon Demands One More Thing from Some Vendors: A Piece of Their Company*, WALL ST. J. (June 29, 2021, 8:01 AM), <https://www.wsj.com/articles/amazon-demands-one-more-thing-from-some-vendors-a-piece-of-their-company-11624968099>.

ize Apple's conduct as exclusionary, Epic Games' ultimate gripe was that Apple imposes excessive charges for use of its App Store.<sup>13</sup> Given that Epic Games and other app developers are suppliers of apps, the dispute essentially amounts to a case about excessive low wholesale prices offered by Apple. Further back in time, Uber's treatment of its drivers captured much media attention. The question of whether Uber drivers constitute employees or subcontractors, and, if they count as employees, whether they should be allowed to unionize, generated significant controversy.<sup>14</sup> Uber has also been criticized for mistreating its drivers.<sup>15</sup> The wave of criticisms and lawsuits eventually forced Uber to grant its drivers better remuneration and to recognize its drivers as workers in some jurisdictions.<sup>16</sup>

These three instances of exercise of buyer power all raise interesting issues. The starting point of an economic analysis of buyer power issues has long been the classic monopsony model, under which the monopsonist must reduce demand in order to artificially suppress prices.<sup>17</sup> This will lead to a reduction in market output and a deadweight loss.<sup>18</sup> With the notable exceptions of commodities and labor markets, however, very few real-world markets fit into this model.<sup>19</sup> Uber's interaction with its drivers is possibly one of them. Application of

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13. Complaint at 1, *Epic Games, Inc. v. Apple Inc.*, 559 F.Supp. 3d 898 (N.D. Cal. 2021) (No. 20-5640) (noting "Apple exacts an oppressive 30% tax on the sale of every app.")

14. *People v. Uber Techs., Inc.*, 270 Cal. Rptr. 3d 290 (Ct. App. 2020); Adv. Mem. Off. Gen. Counsel, 367 N.L.R.B. (2019), <https://www.nlr.gov/case/13-CA-163062>.

15. Michael Sainato, "They Treat us like Crap": Uber Drivers Feel Poor and Powerless on Eve of IPO, *THE GUARDIAN* (May 7, 2019, 2:00 PM), <https://www.theguardian.com/technology/2019/may/07/uber-drivers-feel-poor-powerless-ipo-looms>; Kathianne Boniello, *Like Uber, Lyft, Ride-sharing App Via Accused of Mistreating Drivers*, *N.Y. POST* (Mar. 13, 2021, 7:54 PM), <https://nypost.com/2021/03/13/like-uber-ride-sharing-app-via-accused-of-mistreating-drivers/>.

16. Adam Satariano, *In a First, Uber Agrees to Classify British Drivers as "Workers"*, *N.Y. TIMES* (Mar. 16, 2021), <https://www.nytimes.com/2021/03/16/technology/uber-uk-drivers-worker-status.html>.

17. ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 41–45 (2010).

18. *Id.* at 45–48.

19. *Id.* at 172–204; Chris Doyle & Roman Inderst, *Some Economics on the Treatment of Buyer Power in Antitrust*, 28(3) *EUR. COMPETITION L. REV.* 210, 211 (2007).

the classic monopsony model to Uber will show whether and how the model needs to be adapted to the digital setting and whether such adaptations will alter the policy prescriptions for monopsonistic conduct in the online world.

Apple and Amazon's relationships with their suppliers, respectively, require a different theoretical model. Unlike the classic monopsony model, which is populated by atomistic sellers selling their supply at the prevailing market price, Apple and Amazon enjoy a more individual relationship with their suppliers where the wholesale price is set by bargaining conducted through all-or-nothing offers. The individual bargaining relationships mean that Apple and Amazon can push for lower prices without necessarily curtailing their demands. The all-or-nothing bargaining model is thus the relevant paradigm.

It will be didactic to examine how exercise of such bargaining power is affected by and adapted to the digital setting. Many of the accusations leveled at Amazon are not new. They have been previously leveled at powerful brick-and-mortar retailers such as Walmart in the United States and the big four supermarkets of Tesco, Sainsbury, Asda, and Morrisons in the United Kingdom. Walmart's buyer power abuses have generally not been subject to scrutiny in the United States, while the United Kingdom has resorted to industry codes of conduct to address the issue. These codes have not put an end to such abuses.<sup>20</sup> Does Amazon's digital setting render its bargaining power more problematic and warrant a different regulatory response? Or is it a case of old wine in new bottles?

This Article is divided into five Parts. After the Introduction, Part I provides an overview of buyer power and describes the three models of buyer power, monopsony power, bargaining power, and retailer gatekeeper power, which is a specific type of bargaining power. Part II explains the competitive harm of buyer power, namely the waterbed effect, quality erosion, increased concentration in the supply chain, creation of downstream market power, reduced investment incentives for upstream suppliers, and wealth transfer from sellers to powerful buyers.

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20. Sarah Butler, *Tesco Suppliers Say Retailer Worst at Following Grocery Code of Practice*, THE GUARDIAN (June 22, 2015, 8:02 AM), <https://www.theguardian.com/business/2015/jun/22/tesco-suppliers-say-retailer-worst-at-following-grocery-code-of-practice>.

After introducing the models of buyer power and the possible competitive harm of such power, Uber and Amazon will be discussed as illustrations of digital buyer power. Uber and Amazon are chosen because they exemplify the two essential models of buyer power of monopsony and the all-or-nothing bargaining model in the digital context. Part III discusses Uber as a digital monopsonist. It delves into Uber's technological capacity to monopsonize and the welfare effects of Uber's digital monopsony and concludes that the opportunity afforded to Uber to practice more precise price discrimination by virtue of its digital operation may in fact reduce the detrimental welfare effects of classic monopsony.

Part IV focuses on Amazon as a digital gatekeeper and examines Amazon's bargaining power vis-à-vis its suppliers and third-party sellers. It catalogs allegations of buyer power abuses perpetrated by Amazon, which include excessively low wholesale prices, Most Favored Nation ("MFN") clauses, unduly harsh contractual terms, tying, unfair competition with third-party sellers, and coerced investment. It asserts that apart from MFN clauses and tying, which readily fall within the ambit of existing antitrust law, the remaining abuses do not lend themselves to easy solution. The only practice the regulation of which rests on a solid theoretical basis and does not face insurmountable implementation obstacles is retroactive amendment of contractual terms. The remainder of Amazon's practices may require new legislation. Part V offers proposals for possible policy responses to these abuses.

## I.

### BUYER POWER—AN OVERVIEW

#### A. *Defining Buyer Power*

Whether unilateral buyer power abuses deserve special attention, or perhaps any attention, from antitrust has been the subject of a long-running debate. This is to be distinguished from buyer cartels, which raise different issues.<sup>21</sup> This Article is concerned with unilateral buyer power abuses.<sup>22</sup> Atomistic sell-

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21. BLAIR & HARRISON, *supra* note 17, at 107–12.

22. The term "monopsony power" will be used to refer to a particular kind of unilateral buyer power where the powerful buyer faces atomistic sellers, in contradistinction with all-or-nothing bargaining power, or bargaining power for short.

ers are arguably even more vulnerable than consumers. These sellers are more dependent on their buyers than consumers are on their sellers due to a variety of reasons such as sunk costs and relation-specific investments.<sup>23</sup> They are hence worthier of protection. Other scholars insist that “there is nothing special about market power on the buyer side of markets,”<sup>24</sup> and that there is no basis for different treatment of unilateral buyer power abuses beyond the traditional doctrines on vertical restraints and monopolization.<sup>25</sup> This Article does not aim to settle this debate, even though this Author is more sympathetic to the pro-interventionist views of the first group of scholars. Instead, this Article seeks to answer whether the terms of this debate need to shift as the economy continues to digitize.

Without attempting to decide whether atomistic sellers or final consumers are more deserving of protection, one implication that emerges in a comparison between seller-side market power and buyer power is that a much smaller market share is necessary to give a powerful buyer control over its suppliers.<sup>26</sup> To understand this, one must probe the notion of market power. Market power conveys the state of competition in the market, or, more precisely, the availability of alternatives. When it is said that a seller has limited market power, it means that there are ample reasonable substitutes available in the market which will prevent the seller from raising prices.<sup>27</sup> Likewise, when a buyer is said to have meagre buyer power, it indicates that there are alternative buyers available to absorb the seller’s supply.<sup>28</sup>

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23. Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563, 563 (2005).

24. Richard Scheelings & Joshua D. Wright, ‘*Sui Generis*’?: *An Antitrust Analysis of Buyer Power in the United States and European Union*, 39 AKRON L. REV. 207, 210 (2006).

25. *Id.* at 211–12.

26. See Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: the Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271, 314 (2008). Seller-side market power of course can be exercised vis-à-vis downstream firms that buy a product either as an input of production or for resale.

27. See LAWRENCE A. SULLIVAN, WARREN S. GRIMES & CHRISTOPHER L. SAGERS, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 32 (3d ed. 2016).

28. *Id.*



A seller and a final consumer seek different alternatives or substitutes when trying to circumvent market or buyer power. A final consumer purchases a product for personal consumption. At the final consumer level, it is rare for any buyer to account for a significant portion of the market demand. All that it takes for an individual consumer to defeat a seller's market power is an alternative supply of what she purchases for personal use. She also has the option of doing without the product. In contrast, a powerful buyer purchases supply for resale or as an input in its production. It is not uncommon for a buyer to absorb a substantial proportion of a seller's output. Walmart accounted for eleven to seventeen percent of the output of suppliers as prominent as Procter & Gamble, Kellogg, and Kraft.<sup>29</sup> When a seller seeks an alternative buyer, it needs to find one that can take over the previous buyer's purchases. If a buyer absorbs twenty percent of a seller's output, the seller will need to find other buyers to purchase that amount of output to defeat that buyer's exercise of buyer power. It goes without saying that it is much more difficult to find a buyer for twenty percent of one's output than another brand of smartphone. The seller does not have the option of abstention either. For a supplier that operates on slim margins, losing twenty percent or even ten percent of its sales could be a matter of the business' life or death. Therefore, in the *Toys 'R' Us* case, the court found that Toys 'R' Us had substantial buyer power over its suppliers even though it only bought twenty percent of all toys sold in the United States.<sup>30</sup>

To make matters worse, switching buyers can entail substantial costs. This is especially true if relation-specific investments are involved. If a particular buyer requires special packaging or logistical arrangement, it could be very difficult to switch buyers in the short term.<sup>31</sup> It is small surprise that the UK Competition Commission found that a market share of eight percent could be sufficient to give a retailer significant

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29. Christian Rojas, Nathalie Lavoie, & Shinn-Shyr Wang, *Buyer Power and Vertically Differentiated Retailers*, 10 J. AGRIC. & FOOD INDUS. ORG. 1, 1 (2012).

30. Carstensen, *supra* note 26, at 295.

31. See Ariel Ezrachi, *Unchallenged Market Power? The Tale of Supermarkets, Private Labels, and Competition Law*, 33 WORLD COMPETITION: L. & ECON. REV. 257, 266 (2010).

unilateral buyer power.<sup>32</sup> Even though this discussion does not settle the question of whether antitrust should scrutinize unilateral buyer power abuses in the digital economy, it does suggest that a much lower market share would suffice to confer meaningful unilateral buyer power. Market share is not the only relevant factor in determining unilateral buyer power. The elasticity of market supply and the elasticity of demand of the fringe buyers are also important considerations.<sup>33</sup>

A number of definitions have been offered by scholars and international organizations such as the Organization of Economic Co-operation and Development (“OECD”) for unilateral buyer power (heretofore “buyer power” for short). The exact language varies but all previously offered definitions encapsulate the idea that buyer power exists when a powerful buyer, by virtue of its position in the market, is able to command favorable or preferential supply terms that are not available to other buyers in a competitive market.<sup>34</sup> Warren Grimes defines buyer power as “the ability of a buyer to significantly influence the terms of a purchase for reasons other than efficiency.”<sup>35</sup> Roger Noll suggests that a powerful buyer can depress prices below the competitive level.<sup>36</sup> A powerful buyer may not only be interested in lower prices, or in lower prices alone. It may demand other favorable contractual terms as well.<sup>37</sup> Thus the OECD defines buyer power as “the situation which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or a service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a

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32. Paul W. Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L.J. 529, 535 (2005).

33. See Roger D. Blair & Jeffrey L. Harrison, *The Measurement of Monopsony Power*, 37 ANTITRUST BULL. 133, 146–47 (1992).

34. Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, 22 RSCH. IN L. & ECON. 17, 19 (2007); Maurice E. Stucke, *Looking at Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1516–17 (2013); Paul W. Dobson et al., *Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union*, 1 J. INDUS., COMPETITION & TRADE 247, 248–49 (2001).

35. Grimes, *supra* note 23, at 565.

36. See Roger G. Noll, “Buyer Power” and Economic Policy, 72 ANTITRUST L.J. 589, 589 (2005).

37. Dobson et al., *supra* note 34, at 248–49; Stucke, *supra* note 34, at 1516.

supplier more favorable terms than those available to other buyers.”<sup>38</sup>

The distinction between an exercise of buyer power and normal negotiations is that, in the presence of buyer power, the buyer is able to extract contractual terms that would not be available under normal competitive conditions.<sup>39</sup> The aforementioned definitions suggest that the focus is on the outcome of market interaction or negotiation and, in particular, whether the outcome deviates from some notional competitive outcome.<sup>40</sup> In the case of monopsonistic suppression of purchase price, a comparison is made against a competitive benchmark. In the case of other terms of supply, where it is difficult to postulate some hypothetical competitive terms of supply, the comparator would be “those [terms] available to other buyers or those that would otherwise be expected to be available under normal competitive conditions.”<sup>41</sup> The only basis upon which one can postulate such benchmark supply terms would be some notion of fairness, for example, under the unfair trade regulation of some jurisdictions.<sup>42</sup> The objectivity of conceptions of “fairness” when applied in this context is open to dispute. This debate is closely tied to the question of the feasibility of regulating contractual terms that are purely exploitative and not exclusionary in nature, which will have bearing on how some buyer power abuses by digital platforms should be regulated, if at all.

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38. Chen, *supra* note 34, at 19 (citing OECD, COMMITTEE OF EXPERTS ON RESTRICTIVE PRACTICES, BUYING POWER: THE EXERCISE OF MARKET POWER BY DOMINANT BUYERS 10 (1981)).

39. See PAUL W. DOBSON, MICHAEL WATERSON & ALEX CHU, *The Welfare Consequences of the Exercise of Buyer Power*, OFFICE OF FAIR TRADING 5–6 (Sep. 1998), [https://wrap.warwick.ac.uk/21/1/WRAP\\_Watson\\_of239.pdf](https://wrap.warwick.ac.uk/21/1/WRAP_Watson_of239.pdf).

40. Gordon Mills, *Buyer Power of Supermarkets*, 10 AGENDA: J. OF POL'Y ANALYSIS & REFORM 145, 145 (2003) (defining buyer power to refer to situations “when, for like transactions, it can obtain from a supplier terms that are more favourable (for the buyer) than those available to other buyers.”)

41. Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241, 245 (2008) (quoting ROGER CLARKE, STEPHEN DAVIES, PAUL W. DOBSON & MICHAEL WATERSON, BUYER POWER AND COMPETITION IN EUROPEAN FOOD RETAILING 2 (2002)).

42. Examples include Japan and Korea. The antitrust law of these jurisdictions, the Anti-Monopoly Act in Japan and the Monopoly Regulation and Fair Trade Act, both contain provisions that regulate unfair trade practices. Monopoly Regulation and Fair Trade Act (“MRFTA”), Law 3320/1980; Dokusenkinshi ho [Anti-Monopoly Law], Law No. 54 of 1947.

## B. Taxonomy of Buyer Power

### 1. Monopsony Power

There are two contexts in which buyer power is exercised. The first context is the classic monopsony model where a powerful buyer wields what is known as monopsony power.<sup>43</sup> In this model, the relevant parameter is price. The powerful buyer faces numerous atomistic sellers who are price-takers.<sup>44</sup> The powerful buyer alone faces the market supply curve, which means its demand will have a direct impact on the market price.<sup>45</sup> If the buyer wants a lower price, it can only do so by reducing its own demand. This results from the fact that the buyer must offer the same price for every unit of output it purchases.<sup>46</sup> When the powerful buyer reduces its demand, market output is lowered, resulting in a deadweight loss. Ultimately, a monopsonist exercises its market power by withholding demand, just like a monopolist exercises market power by withholding supply.<sup>47</sup>

Exercise of monopsony power is premised on a few conditions, which include situations in which “(i) the buyers contribute to a substantial portion of purchases in the market; (ii) there are barriers to entry into the buyer’s market; and (iii) the supply curves are upward sloping.”<sup>48</sup> Furthermore, when a monopsonist attempts to depress the market price by reducing its demand, the same price must apply to all of the units purchased.<sup>49</sup> In other words, the monopsonist is unable to resort to non-linear pricing.<sup>50</sup> The final two prerequisites are particularly important for monopsony power. It is only when the supply curve is upward sloping that the buyer faces a tradeoff be-

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43. See BLAIR & HARRISON, *supra* note 17, at 41–45.

44. *Id.* at 48.

45. See Ariel Ezrachi, *Buying Alliances and Input Price Fixing: In Search of a European Enforcement Standard*, 8 J. COMPETITION L. & ECON. 47, 48 (2012).

46. See BLAIR & HARRISON, *supra* note 17, at 42.

47. Chris Doyle & Roman Inderst, *Some Economics on the Treatment of Buyer Power in Antitrust*, 3, [https://www.wiwi.uni-frankfurt.de/profs/inderst/Competition\\_Policy/Articles%20and%20Book%20Chapters%20on%20applied%20Competition%20Economics/Some\\_Economics\\_06.pdf](https://www.wiwi.uni-frankfurt.de/profs/inderst/Competition_Policy/Articles%20and%20Book%20Chapters%20on%20applied%20Competition%20Economics/Some_Economics_06.pdf) (last visited Apr. 5, 2022).

48. ROGER CLARKE ET AL., BUYER POWER AND COMPETITION IN EUROPEAN FOOD RETAILING 12 (2002).

49. Chen, *supra* note 34, at 22.

50. *Id.*

tween quantity and price.<sup>51</sup> This tradeoff would not exist if the buyer faced a perfectly elastic supply curve. The hallmark of monopsony power is “the depression of quantity purchased by a buyer.”<sup>52</sup> The harmful welfare effects and deadweight loss only materialize because a monopsonist must offer the same price for all units purchased under linear pricing.<sup>53</sup> The welfare analysis would be different if price discrimination or other forms of non-linear pricing such as two-part tariffs were possible.<sup>54</sup> The requirement of linear pricing is not a prerequisite for monopsony power itself, but the condition for the harmful welfare effects of such power.

The welfare effects of monopsony power are not affected by the competitiveness of the downstream market. Deadweight loss results regardless of the degree of competitiveness of the downstream market.<sup>55</sup> The only determinant is whether linear pricing applies. The effect on consumers, however, *would* depend on the degree of competitiveness of the downstream market. If the downstream market is competitive and the monopsonist is a price taker in that market, other sellers should be able to fill any supply gap left by the monopsonist due to its curtailed purchase of the upstream input.<sup>56</sup> There should be no immediate impact on the price and output in the downstream market.<sup>57</sup> Alternatively, if the monopsonist has market power in the downstream market, the monopsonist would be able to raise prices by reducing downstream output.<sup>58</sup> This would create deadweight loss in the downstream market as well, which would be doubly harmful to consumers.<sup>59</sup> There is, hence, no reason to believe that the lower input prices will be passed on to consumers in the form of lower prices for the final product, which is often invoked to defend the exercise of buyer power.<sup>60</sup> The best-case scenario for final

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51. *Id.*

52. Chen, *supra* note 41, at 243.

53. Chen, *supra* note 34, at 34.

54. *Id.* at 22, 34.

55. *Id.*

56. James Mellso & Kevin Counsell, *Assessing the Implications of Upstream Buyer Power on Downstream Consumers*, ANTITRUST INSIGHTS, 4 (2009).

57. Carstensen, *supra* note 26, at 282.

58. Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 305–06 (1991).

59. Carstensen, *supra* note 26, at 282–83.

60. Noll, *supra* note 36, at 606.

consumers would seem to be no change in price and output in the final product market. Zhiqi Chen argues that even if the upstream buyer and seller are able to use efficient contracts to minimize deadweight loss, monopsony power would still yield no benefit to final consumers.<sup>61</sup>

In addition to the deadweight loss resulting from a reduction in the output of the monopsonized input, welfare loss also results from inefficient substitution of imperfect substitutes.<sup>62</sup> Assuming that there are imperfect substitutes for the monopsonized input, the monopsonist may make the substitution after cutting back on the monopsonized input. Production of the downstream output will become less efficient.<sup>63</sup> Meanwhile, the lower price of the monopsonized input may cause other downstream competitors to make inefficient substitution for that input, again rendering their production of the downstream output less efficient. Such inefficient substitutions may cause the downstream product to be under-supplied, resulting in higher prices for the final consumers.<sup>64</sup> In light of all these distortions in both the upstream and downstream markets, Roger Blair and John Lopatka advocate for the condemnation of anticompetitive practices that lead to monopsony pricing.<sup>65</sup>

## 2. *Bargaining Power (in All-or-Nothing Negotiations)*

Monopsony power is rare in practice. Unilateral buyer power in most real-world cases involves a superior bargaining position in bilateral negotiations. Exercising superior bargaining power allows the powerful buyer to reduce prices without suppressing its demand.<sup>66</sup> The powerful buyer does so by issuing an all-or-nothing offer, which pushes the seller onto an all-or-nothing supply curve<sup>67</sup> where quantity and price are no longer necessarily negatively correlated.<sup>68</sup> A powerful buyer

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61. Chen, *supra* note 34, at 28.

62. Noll, *supra* note 36, at 595.

63. *Id.*

64. *Id.* at 596.

65. Roger D. Blair & John E. Lopatka, *Predatory Buying and the Antitrust Laws*, 2008 UTAH L. REV. 415, 444 (2008).

66. Stefan Thomas, *Ex Ante and Ex Post Control of Buyer Power*, in *ABUSIVE PRACTICES IN COMPETITION LAW* 283, 288 (Fabiana Di Porto & Rupperecht Podszun eds., 2018).

67. Blair & Harrison, *supra* note 58, at 317–18.

68. Thomas, *supra* note 66, at 289.

can pursue four strategies to inflict its bargaining power: “take it or leave it” offers, threats of selective withholding of demand for less critical products, buyer-demanded exclusivity, and buyer-demanded tying practices.<sup>69</sup>

Sellers are susceptible to all-or-nothing offers in several scenarios. The first scenario is where supply is so inelastic that a powerful buyer can reduce its purchase price by demanding non-cost justified discounts without reducing its quantity of purchase.<sup>70</sup> The second scenario is where the seller has expended significant sunk costs in the supply relationship.<sup>71</sup> If the seller has made specific investments to create tailored packaging or special logistical arrangements for a particular buyer, the seller will likely tolerate a substantial price reduction before abandoning the supply relationship. The third scenario is where significant economies of scale in production or a high minimum efficient scale persist.<sup>72</sup> A seller may be loath to lose scale and push up its costs of production across the board by losing sales to a powerful buyer. And where significant fixed costs exist which can only be recouped when production operates at a sufficient scale, a seller may also try to avoid losing sales to avoid dipping below the minimum efficient scale. The final and a likely scenario is where the demand side of an input is concentrated while the supply side exhibits product differentiation.<sup>73</sup> In a market with low entry barriers where each supplier charges a price equal to their long-run average cost,<sup>74</sup> a powerful buyer can extend all-or-nothing offers at a price above the marginal cost but below the long-run average cost.<sup>75</sup> Most suppliers would have the incentive to accept the offer so long as marginal cost is covered.<sup>76</sup> These four scenarios are not mutually exclusive. It is possible for a market to combine economies of scale and inelastic demand, or significant sunk costs on the part of the seller with a high minimum efficient scale.

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69. Ioannis Kokkoris, *Buyer Power Assessment in Competition Law: A Boon or a Menace?*, 29 *WORLD COMPETITION* 139, 142 (2006).

70. Thomas, *supra* note 66, at 288.

71. Grimes, *supra* note 23, at 567.

72. Carstensen, *supra* note 26, at 300.

73. Noll, *supra* note 36, at 610.

74. *Id.*

75. *Id.* at 611.

76. *Id.*

Negotiations may not be confined to price. A powerful buyer can exercise its bargaining power to obtain favorable contractual terms on other parameters. The OECD thus describes the exercise of buyer power as a situation where a buyer “can credibly threaten to impose a long term opportunity cost (i.e. harm or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself.”<sup>77</sup> This captures the notion that buyer power in a bilateral bargaining context is ultimately about a comparison of what economists have called “outside-option payoff” or “disagreement payoff.”<sup>78</sup> This payoff refers to what the party would stand to lose if the negotiation fails. As Ariel Ezrachi suggests, in the bargaining context, “lower prices are obtained by the threat of shifting demand, rather than the actual withholding of demand.”<sup>79</sup> The party that stands to lose less or has more readily available alternatives would wield greater bargaining power.

The existence of greater competition on one side of the market will give the counterparty greater bargaining power, all else being equal, as it means that the counterparty will have more alternatives to turn to.<sup>80</sup> Size can cut both ways as far as bargaining power is concerned.<sup>81</sup> A large share on the buyer’s side of the market gives the buyer greater leverage, as the withdrawal of a large portion of demand from a seller is more likely to jeopardize the seller’s economic viability.<sup>82</sup> But such share also makes the threat of withdrawal less credible when the seller knows that the buyer has no meaningful alternative source of supply to replace itself. A large buyer, however, may be better positioned to sponsor new market entry given the size of its order, which would allow the entrant to cover more

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77. Org. for Econ. Coop. & Dev. [OECD], *Buying Power of Multiproduct Retailers*, at 281 (1998), <https://www.oecd.org/competition/abuse/2379299.pdf>.

78. Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 Wis. L. Rev. 331, 338 (2008).

79. Ezrachi, *supra* note 45, at 50.

80. Scheelings & Wright, *supra* note 24, at 220.

81. Walter Beckert, *Empirical Analysis of Buyer Power*, 3–4 (Ctr. for Microdata Methods & Prac., Working Paper No. CWP17/09, 2009), <https://www.econbiz.de/Record/empirical-analysis-of-buyer-power-beckert-walter/10003854239>.

82. Dobson & Inderst, *supra* note 78, at 339–40.



of its fixed costs.<sup>83</sup> When a powerful buyer holds an edge in bargaining power over a seller, it is said to possess “all-or-nothing bargaining power” or “bargaining power” for short. John Kirkwood defines bargaining power as “the power to obtain a concession from another party by threatening to impose a cost, or withdraw a benefit, if the party does not grant the concession.”<sup>84</sup>

The welfare consequences and consumer impact of bargaining power are less obvious, at least in the short term. If output level remains the same following the price reduction, and the seller does not adjust the prices it charges other buyers, exercise of bargaining power will usually only result in a wealth transfer from the seller to the powerful buyer.<sup>85</sup> The welfare effect is purely redistributive.<sup>86</sup> This will be especially true if the seller can resort to non-linear pricing or two-part tariffs, which would allow the buyer to extract surplus from the seller without affecting the per-unit wholesale price.<sup>87</sup> This led Richard Scheelings and Joshua Wright to assert that antitrust has no role to play in regulating bargaining between sellers and buyers, arguing that these are merely routine commercial transactions where the negotiating parties strive for the best bargain for themselves.<sup>88</sup> Similarly, Chris Doyle and Roman Inderst contend that in a bilateral negotiation setting, “the exercise of buyer power should be seen as leading primarily to the realisation of individual discounts.”<sup>89</sup>

In fact, some have gone so far as to suggest that exercise of bargaining power can be welfare-enhancing.<sup>90</sup> They argue that the only reason the seller can reduce prices in response to the powerful buyer’s demand is that the seller commands at

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83. *Id.* at 339.

84. Chen, *supra* note 41, at 244.

85. Ezrachi, *supra* note 45, at 50–51.

86. See Roger D. Blair & Jessica S. Haynes, *Monopsony, monopsony power, and antitrust policy*, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW, 249 (Einer Elhauge ed., 2012); see also Blair & Harrison, *supra* note 58, at 318.

87. See Chen, *supra* note 34, at 22.

88. See Scheelings & Wright, *supra* note 24, at 242–43.

89. Chris Doyle & Roman Inderst, *Some economics on the treatment of buyer power in antitrust*, 2007 EUR. COMPETITION L. REV. 210, 212 (2007).

90. See, e.g., Ariel Ezrachi & Koen De Jong, *Buyer power, private labels and the welfare consequences of quality erosion*, 2012 EUR. COMPETITION L. REV. 257, 258 (2012).

least some market power and the current price is supra-competitive.<sup>91</sup> Therefore, a powerful buyer flexing its muscles merely pushes the wholesale price back or closer to the competitive level. While that would no doubt ameliorate allocative efficiency loss, whether consumers will benefit would depend on whether the powerful buyer passes its savings on to consumers, an unlikely outcome absent competitive pressure in the downstream market.<sup>92</sup>

### 3. *Retailer Gatekeeper Power*

One species of bargaining power in all-or-nothing negotiations which has attracted considerable attention across jurisdictions is retailer gatekeeper power. This form of buyer power is also of greatest interest at present as digital platforms such as Amazon have often been described as gatekeepers as well. In the pre-digital world, retailer gatekeeper power most often arose in the context of the grocery market: Walmart in the case of the United States,<sup>93</sup> the big four grocery stores in the United Kingdom,<sup>94</sup> and Woolworths and Coles in Australia.<sup>95</sup>

An FTC report distinguishes between three types of buyer power: monopsony power, buyer power without monopsony [bargaining power], and gatekeeper power.<sup>96</sup> The report notes that bargaining power can also be subsumed under the rubric of the gatekeeper power of multi-brand retailers.<sup>97</sup> One

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91. *Id.* at 258.

92. *See* Chen, *supra* note 34, at 35–36.

93. *See generally* Albert A. Foer, *Mr. Magoo Visits Wamart: Finding the Right Lens for Antitrust*, 39 CONN. L. REV. 1307 (2007).

94. *See generally* UK COMPETITION COMM., THE SUPPLY OF GROCERIES IN THE UK MARKET INVESTIGATION (2008), [https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235418mp\\_/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep\\_pub/reports/2008/fulltext/538.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235418mp_/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf).

95. *See* Barbara Jedlickova, *Vertical Issues Arising from Conduct Between Large Supermarkets and Small Suppliers in the Grocery Market: Law and Industry Codes of Conduct*, 36(1) EUR. COMPETITION L. REV. 19, 20 (2015).

96. *See* FED. TRADE COMM., REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY, 8 (2001), [https://www.ftc.gov/sites/default/files/documents/reports/report-federal-trade-commission-workshop-slotting-allowances-and-other-marketing-practices-grocery/slottingallowancesreportfinal\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/report-federal-trade-commission-workshop-slotting-allowances-and-other-marketing-practices-grocery/slottingallowancesreportfinal_0.pdf).

97. *See id.* at 58.

way to understand the relationship between the latter two is that the role of a gatekeeper as a critical retail outlet gives the retailer particularly strong bargaining power in bilateral negotiations with its suppliers.<sup>98</sup> The nature of the bargaining power is the same but exercised in the specific context of retail, and, very often, grocery retail.

Retailers, especially grocery retailers, occupy a gatekeeper role for several reasons. First, these retailers play three important and often overlapping roles vis-à-vis their suppliers. The retailer is a customer, a competitor, and a supplier or seller to its suppliers all at once.<sup>99</sup> A retailer is obviously a customer when it purchases goods from the suppliers. A retailer is a competitor when it offers its own private label products in competition with its suppliers' products.<sup>100</sup> Lastly, a retailer serves as a supplier when it sells shelf space to suppliers in exchange for listing fees or slotting allowances.<sup>101</sup> They also sell in-store promotional opportunities to suppliers.

The role of retailer as a competitor is particularly critical to its gatekeeper power because it significantly increases its outside-option payoff in its negotiation with suppliers. With the exception of "must stock" brands that consumers follow across retailers, private label products render a brand much more fungible to the retailer.<sup>102</sup> If the negotiation breaks down, the retailer can quickly replace that supplier's products with in-house products instead of scrambling to find another supplier.<sup>103</sup> Private label products hence give a retailer considerable leverage over its suppliers. An empirical study in Germany confirms this, although the study suggests that the positioning of the private label products vis-à-vis the national brands makes a critical difference in their contribution to the retailer's bargaining power.<sup>104</sup>

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98. *See id.*

99. Dobson, *supra* note 32, at 531.

100. *Id.* at 536.

101. *See generally* Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 421 (2007).

102. *See* Dobson, *supra* note 32, at 535.

103. *See* Grimes, *supra* note 23, at 581.

104. *See* Michaela Draganska, Daniel Klapper & Sofia B. Villas-Boas, *A Larger Slice or a Larger Pie? An Empirical Investigation of Bargaining Power in the Distribution Channel*, 29 MKTG. SCI. 57, 59, 68 (2010).

Retailers' multitude of roles gives them considerable leverage over their suppliers. Paul Dobson explains that "the combination of suppliers' dependency on and insecurity about retaining contracts [ ] allows retailers to exploit the interaction of these three roles, leaving suppliers little or no room for maneuver in negotiations."<sup>105</sup> Grimes describes this power in more concrete terms when he states that "control of what items will be carried, how much shelf space they will be given, how prominently they will be displayed, and whether they will be priced or marketed aggressively gives the large multi-brand retailer substantial leverage in dealing with even the largest producers of strong brands of consumer products."<sup>106</sup>

Another reason that retailers serve as gatekeepers is that many consumers are more loyal to the retailers than to product brands.<sup>107</sup> This is especially true in the grocery context.<sup>108</sup> While much of antitrust tends to subscribe to an inter-brand primacy model of consumer behavior under which consumers are supposed to attach primary importance to brands, in many contexts consumers are more wedded to their retailers, especially multi-brand retailers.<sup>109</sup> Considerable evidence supports the fact that, with the exception of "must stock" brands, consumers would rather switch brands within store than switch stores within brand.<sup>110</sup> A retailer would thus suffer relatively little consequence if it chooses to delist a recalcitrant supplier.<sup>111</sup> Meanwhile, large retailers control a supplier's access to final consumers.<sup>112</sup>

Perhaps more related to the point of relative bargaining power, rather than the retailer's gatekeeper status, even though the two are inextricably related, is the fact that a retailer is much more important to a supplier than vice versa. Sheer math supports this view. A multi-brand retailer such as a

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105. Dobson, *supra* note 32, at 531.

106. Grimes, *supra* note 23, at 579.

107. See Thomas K. Cheng, *A Consumer Behavioral Approach to Resale Price Maintenance*, 12 VA. L. & BUS. REV. 1, 20–21 (2017).

108. See Dobson, *supra* note 32, at 535.

109. See generally Cheng, *supra* note 107, at 20–31 (discussing the Inter-Retailer Primacy Model, where consumers choose the retailer first, then browse for brands).

110. See Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143, 157–58 (1985).

111. Dobson, *supra* note 32, at 533.

112. See Carstensen, *supra* note 26, at 277.

supermarket carries thousands, if not tens of thousands of brands, none of which will account for more than a few percent of the retailer's sales at most. A supplier sells to a much smaller number of retailers, some of which are likely to account for a significant proportion of overall sales. The relationship between Procter & Gamble and Walmart vividly illustrates this. As of mid-2000s, Procter & Gamble, which is Walmart's largest supplier, accounts for two percent of Walmart's sales, while Walmart is responsible for eighteen percent of Procter & Gamble's revenue.<sup>113</sup> A retailer hence does not need any particular supplier to survive, not even one as large as Procter & Gamble. The reverse, however, is not true. Even a supplier as large as Procter & Gamble probably could not remain profitable without Walmart.

The same situation is observed in the United Kingdom, where even the very largest suppliers only account for less than roughly three percent of a major grocery retailer's sales, while forfeiting sales to one of the top four supermarkets will cut a supplier's revenue by at least ten to thirty percent.<sup>114</sup> Because a supplier cannot remain profitable after losing ten or twenty percent of revenue, retailers hold significant bargaining power over their suppliers notwithstanding the fact that such bargaining power is achieved at a much lower market share than is typically necessary for a seller to be found dominant.<sup>115</sup> The European Commission found that a twenty-two percent share of overall revenue is sufficient to render a retailer indispensable to a supplier<sup>116</sup> and some have suggested as low as ten percent or even eight percent of revenue would be sufficient for indispensability.<sup>117</sup>

Moreover, it is possible for multiple retailers to possess bargaining power over the same set of suppliers at the same time because a supplier needs access to multiple retailers to

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113. Foer, *supra* note 93, at 1312.

114. Dobson, *supra* note 32, at 534.

115. MYRIAM VANDER STICHELE & BOB YOUNG, THE ABUSE OF SUPERMARKET BUYER POWER IN THE EU FOOD RETAIL SECTOR PRELIMINARY SURVEY OF EVIDENCE, 15 (2009), <https://www.somo.nl/wp-content/uploads/2009/03/The-Abuse-of-Supermarket-Buyers-Power-in-the-EU-Food-Sector.pdf>.

116. Thomas, *supra* note 66, at 289.

117. See VANDER STICHELE & YOUNG, *supra* note 115, at 15; Grimes, *supra* note 23, at 563–64.

stay profitable.<sup>118</sup> Retailers are likely to hold even greater bargaining power when production exhibits significant economies of scale, which means that losing output forces the supplier to operate inefficiently by raising per-unit cost of production.<sup>119</sup> Overall, the magnitude of retailer gatekeeper power depends on a number of factors including “the size of the retailer relative to the size of the supplier, the absolute size of the retailer and supplier, and the supply of competing products (including own-label and branded items) that compete with the supplier’s product.”<sup>120</sup>

Retailers’ gatekeeper power allows them to extract favorable price and supply terms from their suppliers. These terms include listing fees and slotting allowances, retroactive discounts on goods sold, unreasonably high contributions to retailer promotion, delayed payment, and others.<sup>121</sup> In addition to extracting financial benefits from the suppliers, some of these contractual terms also shift the financial risks in the supply relationship to the suppliers, perhaps unfairly and excessively so in the eyes of some commentators. Retailers may force suppliers to accept return of unsold goods.<sup>122</sup> They may demand compensation for products that fail to meet sales expectations.<sup>123</sup> They may extort retrospective discounts from the suppliers on a variety of grounds not provided for in the supply contract.<sup>124</sup> They may also make delinquent payments, often significantly past the contractually stipulated payment date, knowing that the supplier would not sue or terminate the supply relationship.<sup>125</sup>

## II.

### COMPETITIVE HARM OF BUYER POWER

Exercise of buyer power can lead to a range of competitive harm. Apart from the price and welfare effects noted previously, further competitive harm includes the waterbed effect,

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118. Carstensen, *supra* note 26, at 291.

119. *Id.* at 290.

120. Paul W. Dobson & Ratula Chakraborty, *Buyer Power in the U.K. Groceries Market*, 53 ANTITRUST BULL. 333, 337–38 (2008).

121. Dobson, *supra* note 34, at 249.

122. *Id.* at 269.

123. *Id.*

124. *Id.*

125. *See id.*

quality erosion, increased concentration in the supply chain, creation of downstream market power, reduced incentives to invest for upstream suppliers, and wealth transfer from the seller to the buyer. These will be explained in this Part.

#### A. *Waterbed Effect*

The welfare effect of bargaining power would be significantly more harmful if the seller raises the prices that it charges other smaller buyers after offering discounts to the powerful buyer. Such price discrimination would favor the powerful buyer in the downstream market.<sup>126</sup> Discrimination may not be confined to the wholesale price. Smaller buyers can be discriminated against by being denied favorable product allocation, delivery terms, or certain attractive package sizes or promotional packaging.<sup>127</sup> This phenomenon is labeled as the “waterbed effect.”<sup>128</sup>

The nature and the mechanism of the waterbed effect is controversial. Some have questioned why the seller would wait until the powerful buyer has demanded a price cut to raise prices on the smaller buyers.<sup>129</sup> In other words, if the seller had the ability to do so, it should have done so long ago. Others have questioned whether the seller is positioned to price discriminate.<sup>130</sup> If the seller is barely breaking even due to a lack of market power, it would be unable to implement price discrimination. David Mills provides an explanation for this conundrum. He argues that the root cause of the waterbed effect, in many cases, is increasing marginal cost.<sup>131</sup> Mills postulates that the emergence of a powerful buyer demanding discounts from the seller will have no effect on other buyers if the seller’s marginal costs are constant. If, however, the seller exhibits increasing marginal costs, the powerful buyer’s demand for a discount “triggers a price increase for

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126. Dobson & Inderst, *supra* note 78, at 346.

127. NAT’L GROCERS ASS’N, *Buyer Power and Economic Discrimination in the Grocery Aisle: Kitchen Table Issues for American Consumers* 10 (2021), <https://www.nationalgrocers.org/wp-content/uploads/2021/03/NGA-Antitrust-White-Paper25618.pdf>.

128. Carstensen, *supra* note 26, at 298.

129. Thomas, *supra* note 66, at 293.

130. Dobson & Inderst, *supra* note 78, at 342.

131. David S. Mills, *Buyer Power and Industry Structure*, 36 REV. INDUS. ORG. 213, 219 (2010).

remaining small buyers because supplying more output to the dominant buyer increases the incremental cost of supplying the rest.”<sup>132</sup> Rising marginal cost means that some units are cheaper for the seller to produce than others. If the cheaper units must be sold to the powerful buyer, the remaining buyers are left purchasing the more expensive ones, which necessitates a price increase. The powerful buyer essentially pushes the other buyers up on an upward-sloping marginal cost curve. Alternatively, Peter Carstensen argues that if a seller needs to recoup substantial fixed costs, lower prices for one buyer would require the seller to raise prices on other buyers so that fixed costs are recouped overall.<sup>133</sup> The waterbed effect requires all the buyers to compete in both the upstream and the downstream markets.<sup>134</sup> It “relies on the interaction of buyer and seller power.”<sup>135</sup> It would not arise if some of the downstream competitors obtain their input from another market or use another input for production.

Furthermore, price discrimination by the seller could set off a vicious cycle where the powerful buyer reduces prices in the downstream market, thereby expanding its sales, while the smaller buyers lose sales after being forced to raise their retail prices due to the wholesale price increase.<sup>136</sup> A reduced demand from the smaller buyers for the upstream input may further increase their wholesale prices, making it harder for them to compete in the downstream market.<sup>137</sup> Consequently, their market share shrinks over time and they could eventually be forced out of the market.<sup>138</sup> Stefan Thomas calls this the spiral effect.<sup>139</sup> Whether this vicious cycle will materialize depends on the relative strengths of the buyers in the downstream market.<sup>140</sup> Market exit is likely only if a significant disparity exists between the various buyers’ bargaining power such that the

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132. *Id.*

133. Carstensen, *supra* note 26, at 284.

134. See Roman Inderst & Tommaso M. Valletti, *Buyer Power and the Waterbed Effect*, 59 J. INDUS. ECON. 1, 2 (2011).

135. Dobson & Inderst, *supra* note 78, at 348.

136. *Id.* at 347–48.

137. Noll, *supra* note 36, at 611.

138. Dobson & Inderst, *supra* note 78, at 345.

139. Thomas, *supra* note 66, at 293.

140. Chen, *supra* note 34, at 36.



powerful buyer can obtain a sufficient cost advantage to squeeze out downstream rivals.<sup>141</sup>

In the short term, the waterbed effect may benefit consumers if the powerful buyer reduces its retail prices to take market share away from rivals.<sup>142</sup> Meanwhile, the smaller buyers may face conflicting incentives with respect to their own retail prices. On the one hand, higher input prices may push them to raise downstream prices.<sup>143</sup> On the other hand, these firms may be prevented from raising prices by the powerful buyer's downstream price reductions.<sup>144</sup> The relative strength of these two competing effects is difficult to predict.<sup>145</sup> In fact, the waterbed effect could be so strong that the powerful buyer need not reduce its prices to steal customers from its rivals. It can instead accomplish the same by maintaining its pre-existing prices as rivals are forced to raise their retail downstream prices.<sup>146</sup> In such case, consumers are harmed because the waterbed effect raises the prevailing price in the downstream market.<sup>147</sup> Moreover, the long-term effect of the waterbed effect is not confined to price and could also lead to loss in product variety and distortion of investment decisions.<sup>148</sup>

The waterbed effect has empirical support. Doyle and Inderst point to evidence that suppliers do seek better terms from smaller buyers to make up for lost profit resulting from concessions made to a more powerful buyer.<sup>149</sup> Further evidence reveals that a significant portion of sellers reduce the quality of their services to smaller buyers once a large buyer demands better or additional services.<sup>150</sup> Several theoretical models bolster the case for the waterbed effect<sup>151</sup> and the subsequent spiraling effect that further strengthens the powerful

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141. *Id.* at 35.

142. Dobson & Inderst, *supra* note 78, at 335.

143. *Id.* at 352.

144. *Id.*

145. *See id.*

146. *See id.* at 351–52.

147. Inderst & Valletti, *supra* note 134, at 2.

148. Dobson & Inderst, *supra* note 78, at 352.

149. *Id.* at 343.

150. *Id.*

151. *See generally* Inderst & Valletti, *supra* note 134. *But see* Zhiqi Chen, *Dominant Retailers and the Countervailing-Power Hypothesis*, 34 *RAND J. ECON.* 612 (2003).

buyer.<sup>152</sup> Nonetheless, the UK Competition Commission has failed to find evidence of the waterbed effect in the highly concentrated grocery market in the United Kingdom.<sup>153</sup>

### B. *Quality Erosion*

Ariel Ezrachi and Koen de Jong contend that buyer power can lead to quality erosion in supply. They argue that when the supplier's margin is squeezed too hard by the powerful buyer, the supplier may have incentives to cut costs by lowering product quality,<sup>154</sup> especially when such quality erosion cannot be readily discerned.<sup>155</sup> Substantial quality erosion could even cancel out any price reduction that may have occurred.<sup>156</sup> The supplier will only resort to quality reduction if it believes that the powerful buyer will not detect such reduction.<sup>157</sup> Otherwise, the supplier may instead victimize other buyers to the extent that these buyers are unable to detect quality deterioration.<sup>158</sup> This amounts to a quality waterbed effect. Instead of increasing price, buyer power reduces quality. Whether this will trigger the spiral effect discussed in Section A depends on whether consumers can readily detect the quality deterioration. If so, the quality deterioration of competing buyers' products will drive consumers to the powerful buyer, lifting its market share.

An economic model by Pierpaolo Battagalli, Chiara Fumangalli, and Michele Polo lends support to this quality erosion hypothesis. They note that exercise of buyer power may influence the supplier's quality choice and reduce the supplier's incentive to engage in quality improvement.<sup>159</sup> The situation presents a classic hold-up scenario where suppliers are reluctant to engage in quality improvement for fear that its investment would be appropriated by the powerful buyer.<sup>160</sup>

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152. See generally Roman Inderst, *Leveraging Buyer Power*, 25 INT'L. J. INDUS. ORG. 908 (2007).

153. See UK COMPETITION COMM'N, *supra* note 94, at 87–92.

154. Ezrachi & De Jong, *supra* note 90, at 258.

155. *Id.*

156. *Id.* at 259.

157. *Id.*

158. *Id.*

159. Pierpaolo Battagalli, Chiara Fumagalli & Michele Polo, *Buyer Power and Quality Improvements*, 61 RSCH. ECON. 45, 47 (2007).

160. *Id.*

The buyer lacks the mechanism to credibly commit itself to refrain from appropriation. In fact, they argue that this may ultimately harm the powerful buyer as a deterioration in quality may drive consumers away from the market generally, leaving the powerful buyer with a larger slice of a smaller cake.<sup>161</sup> Thus, exercise of buyer power harms consumers and total welfare and may undermine the powerful buyer as well.

### C. *Increased Concentration in the Supply Chain*

Exercise of buyer power may also increase concentration in the supply chain. As a powerful buyer continues to squeeze supplier margin, some suppliers would rather exit the market than reinvest.<sup>162</sup> The National Grocers Association reports that exercise of buyer power has led to consolidation in the supply chain.<sup>163</sup> In particular, it notes that the private label sector has rapidly consolidated.<sup>164</sup> For instance, there is only one private label manufacturer of canned soup.<sup>165</sup> Consolidation has also occurred in other sectors such as canned fruit, pasta, snacks, and paper products.<sup>166</sup>

This consolidation has reduced the manufacturing capacity in the private label sector and inadvertently created a waterbed effect in the supply of private label products. The remaining private label manufacturers tend to prioritize the orders of the large retailers, forcing small retailers to pay higher prices or leaving their orders unfulfilled altogether.<sup>167</sup> Even if private label manufacturers continue to supply the small retailers, per-unit costs increase and the competitiveness of their products is reduced.<sup>168</sup> This results in a particular private-label waterbed effect, or the “direct waterbed effect.”

If suppliers deny small retailers of their private label products, small retailers will lose bargaining power.<sup>169</sup> These retailers no longer have a readily available alternative if negotiations with a brand supplier fail, allowing the advantaged supplier to

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161. *Id.*

162. Thomas, *supra* note 66, at 314.

163. NAT'L GROCERS ASS'N, *supra* note 127, at 13.

164. *Id.* at 14.

165. *Id.*

166. *Id.*

167. *Id.*

168. *See id.*

169. *Id.*

raise wholesale prices against the small retailers.<sup>170</sup> This can be referred to as the “indirect waterbed effect,” as the increase in wholesale prices is the indirect consequence of the cessation of supply by the private label manufacturers. Either type of waterbed effect, direct or indirect, could set off the spiral effect previously described.

An obvious challenge to this line of argument is that the powerful buyer has no incentive to condone greater supplier concentration.<sup>171</sup> More powerful suppliers may demand higher prices or drive harder bargains against the buyer.<sup>172</sup> From the powerful buyer’s perspective, it would prefer to squeeze the suppliers to the maximum extent without causing any exit. The powerful buyer may be able to accomplish this balancing act in a world of perfect information.<sup>173</sup> The reality, however, is more complicated. The suppliers may have the incentive to bluff and claim that the proffered margin is too low for survival. The powerful buyer will be suspicious in anticipation of such claims. If the buyer miscalculates and mistakes a genuine claim of supplier hardship for a bluff, the buyer may accidentally drive a supplier out of business. This kind of miscalculation is more than theoretical, and one cannot assume that buyer rationality or self-interest will necessarily forestall buyer-induced increases in supplier concentration.

Alternatively, a large retailer may be unperturbed by increased concentration in the supply chain either because alternative suppliers exist or because the retailer is so powerful that it does not fear supplier concentration. For example, Walmart’s suppliers have reportedly been forced out of business due to unprofitability of supplying Walmart.<sup>174</sup> Walmart seems unconcerned, perhaps because of its overwhelming buyer power. Similarly, the abundance of third-party sellers eager to sell on Amazon gives Amazon license to churn through them.<sup>175</sup> Ultimately, the huge number of potential sellers avail-

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170. *Id.*

171. Blair & Harrison, *supra* note 58, at 319.

172. *Id.* at 324.

173. *Id.*

174. Thomas A. Piraino Jr., *A Proposed Antitrust Approach to Buyers’ Competitive Conduct*, 56 HASTINGS L.J. 1121, 1123 (2005).

175. STACY MITCHELL, RON KNOX & ZACH FREED, REPORT: AMAZON’S MONOPOLY TOLLBOOTH (2020), [https://ilsr.org/amazons\\_tollbooth/](https://ilsr.org/amazons_tollbooth/).

able to Amazon ameliorates any fears of increased supplier concentration.

#### D. *Creation of Downstream Market Power*

Exercise of buyer power may also exacerbate downstream market power to the extent that the same upstream buyers compete in the downstream market.<sup>176</sup> This follows from the direct and the indirect waterbed effects discussed in Part II. The direct waterbed effect, either in the private label or the general context, will raise wholesale prices for the smaller retailers.<sup>177</sup> Given that multi-brand retailers sell numerous brands, and tens of thousands of brands in the case of supermarkets, direct waterbed effect in a limited number of brands is unlikely to affect a retailer's viability. If the effect is widespread, however, the death spiral may ensue. A powerful buyer can be expected to exert its bargaining power against every susceptible supplier and has no incentive to spare any particular supplier.<sup>178</sup> Therefore, it is reasonable to assume that the waterbed effect will be widespread and the spiral effect more plausible than it may initially seem.

The indirect waterbed effect, found only in the private label context, is unlikely to force a retailer to exit the market on its own. It is, however, likely to exacerbate the pressure exerted on the smaller retailers by the direct waterbed effect. Direct and indirect waterbed effects may, together, create such a hostile operating environment for smaller retailers that they will be forced to leave the market. While highly advantageous to the large retailer, consumer harm will result when the large retailer takes advantage of its newly found market power to raise prices.

#### E. *Reduced Investment Incentives for Upstream Suppliers*

Short of driving suppliers out of the market, exercise of buyer power can still harm competition by reducing these suppliers' incentive to invest in product improvement, product development, brand building, and other value-enhancing activities. These can occur for one of two reasons. The first rea-

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176. Stucke, *supra* note 34, at 1524.

177. *Id.* at 1552.

178. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 775 (2017).

son is that lower margin may leave suppliers with less funds to invest in such activities. The second reason is due to opportunistic behavior by the powerful buyer.<sup>179</sup> A supplier may plan to make an investment that is profitable *ex ante* and enter into a contract with a retailer accordingly. After investment is made and the costs are sunk, the powerful buyer will have strong incentives to engage in *ex post* opportunistic behavior to change the contractual terms retrospectively.<sup>180</sup> Mindful of the possibility of such buyer hold-up, the supplier will be hesitant to invest in the first place.<sup>181</sup> Such a scenario is far from purely academic. Experience tells us that powerful retailers regularly impose retrospective amendment of contractual terms to the detriment of the suppliers.<sup>182</sup>

Supplier investment may be deterred not only by *ex post* financial exploitation, but also by direct copying or imitation by the retailer. If a supplier perceives a high risk that the retailer will copy its product design and replicate the product to compete with the supplier, the supplier will be reluctant to invest in product improvement or development.<sup>183</sup> The buyer need not get its hands dirty. It can out-source product development to private label manufacturers. Investment in product development can be subject to *ex post* hold-up because the supplier is susceptible to opportunistic behavior once the initial R&D costs are sunk.<sup>184</sup> Amazon has reportedly engaged in precisely this kind of opportunistic behavior in India, appointing a private label manufacturer to copy the designs of some of the most popular products on its Marketplace.<sup>185</sup>

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179. Peter Davis & Alan Reilly, *The UK Competition Commission's Groceries Market Investigation: Market Power, Market Outcomes and Remedies* 1, 16–17 (July 16, 2009), <https://ageconsearch.umn.edu/record/53210/files/Peter%20Davis%20Beijing%20Paper%20-final.pdf>.

180. *Id.*

181. Thomas, *supra* note 66, at 310.

182. Dobson, *supra* note 32, at 532.

183. Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618, 2623 (2018); see Davis & Reilly, *supra* note 179, at 17.

184. See Thomas, *supra* note 66, at 311.

185. Aditya Kalra & Steve Stecklow, *Amazon Copied Products and Rigged Search Results to Promote Its Own Brands, Documents Show*, REUTERS (Oct. 13, 2021, 11:00 AM), <https://www.reuters.com/investigates/special-report/amazon-india-rigging/>.

Commentators have argued that two factors may help to minimize hold-up or at least mitigate its effect.<sup>186</sup> The first factor is that supplier investment in product development also benefits the retailer to the extent that it increases product sales or raises the product price.<sup>187</sup> The retailer will get a share of the increased sales. There is hence a tradeoff between short-term profit and long-term detriment.<sup>188</sup> In a world of perfect information, a powerful buyer would exercise its power up to the point where investment incentives become impaired. Beyond that point, the buyer must balance the extra profit that it makes by depressing supplier margin and the lost profit from reduced product innovation. A powerful buyer would only push beyond that threshold when the former outweighs the latter. The second factor concerns reputational effects, particularly the retailer's reluctance to be labeled as a serial opportunist.<sup>189</sup> Reputational effects, however, would only be effective if suppliers have a meaningful choice of retailers. An essential retailer which every supplier must sell to will not be constrained by reputational effects. Such is reportedly the case for Amazon.<sup>190</sup> Meaningful choice may also be absent if opportunistic behavior is prevalent among retailers. Some conduct, such as *ex post* financial exploitation in the form of delayed payments, may be so common that suppliers cannot realistically avoid it.<sup>191</sup>

#### F. *Wealth Transfer from Sellers to Buyers*

Finally, wealth transfer from sellers to buyers is one of the more controversial effects that may result from the exercise of buyer power. Wealth transfer is arguably not a competitive harm as it does not entail distortion or restriction of competi-

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186. Davis & Reilly, *supra* note 179, at 17.

187. *Id.* (noting that “[i]t is in retailers’ long-term interests that suppliers invest and innovate”).

188. *Id.*

189. Davis & Reilly, *supra* note 179, at 17.

190. MITCHELL, KNOX & FREED, *supra* note 175.

191. Eugene Kim, *Some Amazon Sellers Are Outraged Over a New Payment Policy Designed to Attract More Corporate Buyers*, CNBC (Aug. 21, 2018, 8:14 PM), <https://www.cnbc.com/2018/08/21/amazon-corporate-buyers-longer-terms-some-sellers-upset.html>.

tion, but rather just results in less surplus for the seller.<sup>192</sup> This is especially true in the case of bargaining power in all-or-nothing negotiations, where reduction in output level is not required. By making an all-or-nothing offer, a powerful buyer can extract a lower price from sellers without reducing its demand and extract surplus from its sellers without causing any allocative inefficiency.<sup>193</sup> Commentators have argued that such wealth transfer is of no concern to antitrust law.<sup>194</sup> Moreover, in the case of all-or-nothing negotiations, the wholesale price splits the surplus between the seller and the buyer. To say that there is a wealth transfer from the seller to the buyer suggests that there is an objectively optimal split of surplus, which necessitates the ascertainment of a fair wholesale price. Such concepts simply do not exist in antitrust law.<sup>195</sup>

Grimes argues that the debate about whether antitrust should be concerned with this wealth transfer is, in a sense, less important because most exercises of buyer power create other competitive harm or loss in aggregate welfare.<sup>196</sup> While this may be true, the argument sidesteps the issue of whether antitrust should pay heed to wealth transfer independent of other competitive harm. Grimes asserts that “[i]f monopsony abuses are truly the mirror image of monopoly abuses, the focus for buyer power ought not to be on consumers as atomistic buyers, but on the atomistic sellers forced to accept less than a competitive price,”<sup>197</sup> and that “[r]ecognizing the legitimate interests of atomistic sellers in free and fair competition is not a policy for Luddites, but a progress-friendly and forward-looking vision that players of all sizes have an opportunity to enter and compete in a market.”<sup>198</sup>

Unfortunately, Grimes’ assertions do not fully address the detractors’ objections. First, while it may be possible to justify

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192. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 74–77 (1982).

193. Thomas, *supra* note 66, at 299.

194. *Id.* at 306; Scheelings & Wright, *supra* note 24, at 223.

195. Thomas, *supra* note 66, at 299 (noting that “the antitrust laws lack any standard for the definition of ‘supplier harm’. It is unclear how the price of a certain good can be determined to be appropriate, just, fair, or sufficiently high in order not to ‘harm’ the supplier.”).

196. Grimes, *supra* note 23, at 569.

197. *Id.* at 573.

198. *Id.* at 575.



the need for special protection of atomistic sellers such as small-time farmers or labor,<sup>199</sup> the sellers in many all-or-nothing negotiations are not atomistic. These sellers may be dwarfed by retail giants such as of Walmart and Amazon, but their business may still be sizable.<sup>200</sup> If atomistic is understood in an absolute rather than a relative or comparative sense, no persuasive argument exists for extending special protection to these suppliers simply because they are smaller than the giant retailers. Second, no workable standard guides the inquiry into when an unfair or unjustified wealth transfer has taken place, which, as suggested earlier, requires a determination of the fairness of the wholesale price.<sup>201</sup> A fairness assessment need not be confined to the wholesale price, it can be applied to other non-price contractual terms as well. There are no clear standards of fairness for these terms either. While retroactive amendment of contractual terms may be objectionable as an instance of opportunistic behavior, no reasonable basis exists upon which to delineate the boundary of acceptability for contractual terms agreed upon by the parties *ex ante* in open negotiations. Accordingly, prohibiting exercises of buyer power on the grounds of pure wealth transfer seems untenable.

This discussion is salient in examining Amazon's treatment of third-party sellers. Many sellers on Amazon Marketplace are not manufacturers or product developers.<sup>202</sup> Rather, they are merely resellers of products sourced elsewhere.<sup>203</sup> In the case of resellers, an exercise of buyer power against them should not lead to the waterbed effect, quality erosion, or reduced investment incentives. Resellers do not engage in production. Nor do they make investment in production facilities or product development. And to the extent that these resellers are numerous and largely fungible, no danger of increased supplier concentration exists. In any case, Amazon's buyer

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199. See BLAIR & HARRISON, *supra* note 17, at 172.

200. Foer, *supra* note 93, at 1312–13.

201. See generally Pinar Akman & Luke Garrod, *When Are Excessive Prices Unfair?*, 7 J. OF COMPETITION L. & ECON. 403, 418 (2011).

202. See discussion *infra* Part IV.A.

203. Jennifer Rankin, *Third-Party Sellers and Amazon - a Double-Edged Sword in E-Commerce*, THE GUARDIAN (June 23, 2015, 9:31 AM), <https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact>.

power should allow Amazon to withstand a significant degree of supplier concentration, casting doubt upon any basis for intervening in Amazon's exploitation of these sellers.

### III.

#### UBER AS A DIGITAL MONOPSONIST

##### A. *An Overview of Two-sided Platforms*

It is superfluous at this day and age to note that digital platforms such as Amazon and Apple App Store are two-sided platforms. The undisputed nature of their designations as two-sided platforms notwithstanding, the definition of two-sided platforms remains controversial.<sup>204</sup> Benjamin Hermalin and Michael Katz note that “[a]n unusual feature of two-sided markets is that there is no consensus regarding what they are.”<sup>205</sup> In *Ohio v. American Express Co.*, the Supreme Court defined two-sided platforms as firms that “offer[ ] different products or services to two different groups who both depend on the platform to intermediate between them.”<sup>206</sup> The Court proceeded to observe that one of the distinguishing features of these platforms is indirect network effects.<sup>207</sup> Other commentators generally agree on the central importance of these effects to two-sided platforms.<sup>208</sup> According to Alexei Alexandrov, George Deltas, and Daniel F. Spulber, this means that “[t]heir pricing policies and strategic interaction on one side of the market are necessarily connected to pricing and strategic interaction on the other side of the market.”<sup>209</sup> Jean-Charles Rochet and Jean Tirole define two-sided platforms by their ability to resolve ex-

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204. Ben Bloodstein, *Amazon and Platform Antitrust*, 88 *FORDHAM L. REV.* 187, 192 (2019).

205. Benjamin E. Hermalin & Michael L. Katz, *What's So Special About Two-Sided Markets?*, in *TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS*, 111 (Martin Guzman ed., 2018).

206. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018).

207. *Id.*

208. Marc Rysman, *The Economics of Two-Sided Markets*, 23 *J. ECON. PERSPS.* 125 (2009); David S. Evans, *The Antitrust Economics of Two-Sided Markets*, 19 *YALE J. ON REGUL.* 335 (2002); Jay Pil Choi, *Tying in Two-Sided Markets with Multi-Homing*, 58 *J. INDUS. ECON.* 607, 608 (2010); Lapo Filistrucchi, Damien Geradin & Eric van Damme, *Identifying Two-Sided Markets*, 36 *WORLD COMPETITION* 33, 37–38 (2013).

209. Alexei Alexandrov, George Deltas & Daniel F. Spulber, *Antitrust and Competition in Two-Sided Markets*, 7 *J. COMPETITION L. & ECON.* 775, 779 (2011).

ternalities that prevent efficient contracting by users on both sides.<sup>210</sup> The first externality that platforms must resolve is the need initially to attain a critical mass of users on both sides of the platform.<sup>211</sup> The second externality concerns pricing, more particularly, how platforms should allocate the overall price of the platform between the two sides.<sup>212</sup> Overcharging one side of the platform can have grave consequences as the loss of customers on one side will, in turn, lead to customer defection on the other side of the platform.<sup>213</sup>

Ben Bloodstein classifies two-sided platforms into three types: transaction platforms, ad-sponsored or media platforms, and software platforms. Some complex, vertically integrated platforms, including Amazon, Google, and Facebook, combine all three types.<sup>214</sup> Transaction platforms are platforms that allow buyers and sellers of goods or services to meet and transact.<sup>215</sup> Uber is a prime example of a digital transaction platform. In the pre-digital age, supermarkets and classified ads would serve as paradigmatic transaction platforms. Ad-sponsored or media platforms are platforms where one side consists of advertisers. Indirect network effects on these platforms are uni-directional: while the advertisers are concerned with the number of users on the other side of the platform, the users are indifferent to the amount of advertising.<sup>216</sup> In fact, users probably prefer less or no advertising. It is information that is primarily exchanged on these platforms. The platforms offer a service that attracts users, such as entertainment or social media, and present to those users advertising information from the advertisers. Transactions between the advertisers and the users are consummated off the platform. Lastly, well-known software platforms, including Windows, Mac OS, iOS, and Android, probably need no introduction. Computer

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210. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 649 (2006).

211. Jonas Wanner, Carsten Bauer & Christian Janiesch, *Two-Sided Digital Markets: Disruptive Chance Meets Chicken or Egg Causality Dilemma*, 2019 IEEE 21ST CONFERENCE ON BUSINESS INFORMATICS 335, 336 (2019), <https://ieeexplore.ieee.org/document/8808087>; Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713, 715–16 (2019).

212. Bloodstein, *supra* note 204, at 189.

213. *Id.* at 194.

214. *Id.* at 200.

215. *Id.* at 198.

216. *Id.* at 199.

or smartphone users populate one side of the platform while app or software developers sit on the other side.<sup>217</sup>

### B. *Digital Monopsony*

As previously suggested, monopsony power is rare in fact and is most likely to be present in an agricultural or labor market. For example, monopsony power may exist in the case of a large food processor or buyer of a perishable agricultural product<sup>218</sup>, a professional sports league<sup>219</sup> or a single large employer in a small town.

As it turns out, monopsony power can also be observed in the case of several digital platforms, including ride sharing apps such as Uber and Lyft and food delivery apps such as DoorDash and Grubhub. While not the only employer of drivers or delivery workers in their respective geographic markets and thus not textbook monopsonists, these companies are very large and powerful buyers dealing with numerous atomistic sellers of labor services.<sup>220</sup> Recall the prerequisites for monopsony power: (i) the buyer contributes to a substantial portion of purchases in the market; (ii) barriers to entry into the buyer's market; and (iii) an upward-sloping supply curve. In the case of Uber and DoorDash, each contributes to a substantial portion of purchases in the relevant labor market<sup>221</sup>, prospective entrants into the respective markets of ride sharing apps and food delivery apps face significant barriers to en-

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217. *Id.* at 199–200.

218. BLAIR & HARRISON, *supra* note 17, at 11–12.

219. *Id.* at 10–11.

220. Ignacio Herrera Anchustegui & Julian Nowag, *Buyer Power in the Big Data and Algorithm Driven World: The Uber & Lyft Example*, CPI ANTITRUST CHRON., Sept. 2017, at 4, <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/09/CPI-Anchustegui-Nowag.pdf>.

221. *How many rideshare drivers are there in the US?*, ZIPPPIA (June 29, 2022), <https://www.zippia.com/answers/how-many-rideshare-drivers-are-there-in-the-us/>; Dee-Ann Durbin, *Despite GrubHub and Uber Eats, restaurants still hiring for deliveries — and may offer drivers a better gig*, CHICAGO TRIBUNE (Sept. 5, 2019), <https://www.chicagotribune.com/business/ct-biz-grubhub-restaurant-delivery-jobs-20190904-xjfi26tpqbe4lgpkeo5z5srndy-story.html>.

try,<sup>222</sup> especially in view of recent market consolidation,<sup>223</sup> and the labor supply curve in each market is upward-sloping (the offer of a higher wage attracts greater supply).<sup>224</sup>

The welfare effects of a classic monopsony are a lower output level and resultant deadweight loss.<sup>225</sup> Price increases for the final product are contingent on the degree of competition in the downstream market. In the case of a competitive downstream market, price and output may remain the same. Conversely, if the powerful buyer has market power in the downstream market, prices will likely go up.

Whether these conclusions hold where the monopsonist is a digital platform, such as Uber, remains an interesting question. One key distinction between these digital platforms and the classic offline monopsonist is the former's ability to engage in price discrimination. While price discrimination in the case of digital platforms is not perfect, evidence suggests that Uber, for example, is capable of offering highly personalized pricing under its so-called "Hell" program.<sup>226</sup> The welfare calculus of monopsony changes fundamentally where the buyer is able to offer different prices to individual drivers and it is no longer necessary to reduce overall demand to depress the purchase price.

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222. *Rideshare Insurance: Key Barrier To Entry And Eventual Profit Driver For Uber And Lyft*, SEEKING ALPHA (Oct. 6, 2020), <https://seekingalpha.com/article/4377832-rideshare-insurance-key-barrier-to-entry-and-eventual-profit-driver-for-uber-and-lyft> (noting rideshare insurance as a key barrier to entry for Uber's competitors); Viktor Hendelmann, *Uber's 4 Biggest Competitive Advantages*, PRODUCT MINT (last accessed Nov. 3, 2022), <https://productmint.com/uber-competitive-advantage/> (noting network economies and branding as some of Uber's key competitive advantages).

223. The market share of competitors of Uber and Lyft is essentially negligible. See *Market share of the leading ride-hailing companies in the United States from September 2017 to July 2021*, STATISTA (Sept. 2022), <https://www.statista.com/statistics/910704/market-share-of-rideshare-companies-united-states/>. The food delivery app market is also highly concentrated, with DoorDash at forty-five percent, Uber Eats at thirty percent, and Grubhub at roughly twenty percent. David Curry, *Grubhub Revenue and Usage Statistics (2022)*, BUS. OF APPS (Sept. 6, 2022), <https://www.businessofapps.com/data/grubhub-statistics>.

224. This is evident from the rationale behind surge pricing employed by Uber.

225. BLAIR & HARRISON, *supra* note 17, at 43–48.

226. Anchustegui & Nowag, *supra* note 220, at 2.

### C. *Uber's Technological Capacity to Monopsonize*

Uber's Hell program uses algorithms to personalize the incentives offered to its drivers.<sup>227</sup> The main purpose of the program is not to exercise monopsony power. Instead, the Hell program targets Uber drivers who also drive for a competitor. The program has three components: (1) the collection and combination of data, (2) the identification of drivers who are also driving for competitors, and (3) targeted incentives for these drivers.<sup>228</sup> Initially, information is collected on the availability of drivers in a geographic area who offer their services via a competitor. The data are then combined with the data of drivers who offer their services via Uber in the same geographic area and time frame. By combining these two data sets collected over a long period, Uber can algorithmically identify multi-homing drivers. In the final step, Uber treats these drivers more favorably compared to other drivers. To entice multi-homing drivers to drive exclusively for Uber, these drivers would receive more offers to pick up passengers and special bonuses if the target number of rides per week is met.<sup>229</sup> These drivers may also be offered better prices.<sup>230</sup> All this occurs with no knowledge on the part of the drivers.<sup>231</sup>

The technical feasibility of personalized pricing, or first-degree price discrimination, has been widely debated. The debate has mostly centered on the consumer side.<sup>232</sup> Undoubtedly, some platforms already engage in third-degree price discrimination based on address, type of smartphone used, and other personal attributes.<sup>233</sup> Platforms have also used cookies to track browsing history and price discriminate on such ba-

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227. *Id.* at 3.

228. Anchustegui & Nowag, *supra* note 220, at 2.

229. Mariella Moon, *Uber's "Hell" Program Tracked and Targeted Lyft Drivers*, ENGADGET.COM (Apr. 13, 2017, 3:32 AM), <https://www.engadget.com/2017/04/13/uber-hell-program-lyft-drivers>.

230. In the case of Uber this is done by lowering the fee that Uber charges drivers.

231. Anchustegui & Nowag, *supra* note 220, at 3.

232. See generally Salil Mehra, *Price Discrimination-Driven Algorithmic Collusion: Platforms for Durable Cartels*, 26 STAN. J.L. BUS. & FIN. 171 (2021); Michal S. Gal, *Algorithms as Illegal Agreements*, 34 BERKELEY TECH. L.J. 67 (2019); Axel Gaultier, Ashwin Ittoo & Pieter Van Cleynenbreugel, *AI Algorithms, Price Discrimination and Collusion: A Technological, Economic and Legal Perspective*, 50 EUR. J.L. & ECON. 405 (2020).

233. Gaultier, Ittoo & Van Cleynenbreugel, *supra* note 232, at 409.

sis.<sup>234</sup> In fact, some consumers report being offered lower prices by Amazon after deleting their cookies or browsing history.<sup>235</sup> Customer identification and segmentation is made easier by clustering algorithms, which group customers with a similar willingness to pay.<sup>236</sup>

Still, some distance remains between price discrimination based on clusters or rough demographic groups and truly personalized pricing, with opinions differing on the feasibility of the latter. Salil Mehra believes that platforms already possess the capability to gauge a consumer's willingness to pay and implement first-degree price discrimination.<sup>237</sup> Michal Gal asserts that "as more data are gathered about each consumer's preferences, a personalized 'digital profile' can be created through the use of algorithms that calculate and update consumers' elasticity of demand in real time."<sup>238</sup> Axel Gaultier, Ashwin Ittoo, and Pieter Van Cleynbreugel are less sanguine about the technical capability of algorithms and argue that, at the moment, there is no strong evidence that finer-grained price discrimination is implemented against consumers.<sup>239</sup>

Whatever the current technical limits of pricing algorithms, some industry experts believe that personalized pricing is the future. Jonathan Cave observes that machine learning is, in principle, capable of achieving something close to first-degree price discrimination.<sup>240</sup> The CEO of Safeway notes that it is only a matter of time before shelf prices become obsolete and personalized pricing turns into a reality.<sup>241</sup> Yet not all hope is lost for the consumers. Despite her faith in the capability of pricing algorithms, Gal downplays the impending threat of personalized pricing, arguing that reputational risks will deter the platforms.<sup>242</sup> Price discrimination has faced public

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234. *Id.* at 409.

235. *Id.* at 408.

236. *Id.* at 412.

237. Mehra, *supra* note 232, at 175.

238. Gal, *supra* note 232, at 91.

239. Gaultier, Ittoo, & Van Cleynbreugel, *supra* note 232, at 415.

240. Jonathan Cave, *Can Machines Learn Whether Machines Are Learning to Collude?*, in *INTERNET SCI.: 6TH INT'L CONF., INSCI 2019* 133, 134 (Samira El Yacoubi, Franco Bagnoli & Giovanna Pacini eds., 2019).

241. Terrell McSweeney & Brian O'Dea, *The Implications of Algorithmic Pricing for Coordinated Effects Analysis and Price Discrimination Markets in Antitrust Enforcement*, 32 *ANTITRUST* 75, 77 (2017).

242. Gal, *supra* note 232, at 92.

backlash in the past.<sup>243</sup> Gal further suggests that consumers can protect themselves with anonymous browsing.<sup>244</sup>

Uber appears more capable, relative to other digital platforms, of offering personalized pricing. Mehra notes that “given enough data, Uber could estimate an individual consumer’s demand curve, and thereby gauge its willingness to pay.”<sup>245</sup> While Mehra may have slightly overstated the case, there are reasons to believe that Uber can target its drivers more accurately than can other digital platforms. Uber can track a driver’s willingness to drive at different times of the day and determine how that willingness changes in reaction to the availability of surge pricing, weather conditions, road conditions, and other factors.<sup>246</sup> Further, Uber can track how long a driver is willing to stay idle before picking up a ride.<sup>247</sup> The Hell program indicates that Uber can identify with considerable accuracy multi-homing drivers and predict their willingness to drive for Uber.<sup>248</sup> Uber could presumably obtain even more information about a driver’s willingness to drive in response to different fare levels if it was willing to release an estimated fare in advance of driver acceptance of a ride. At the moment, drivers only find out about the destination in advance in some jurisdictions such as California.<sup>249</sup> In many instances, the drivers only find out about the destination after they have accepted the ride.<sup>250</sup> Fares are calculated after the

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243. *Id.*

244. *Id.*

245. Mehra, *supra* note 232, at 184.

246. Sarah Holder, *For Ride-Hailing Drivers, Data is Power*, BLOOMBERG (Aug. 22, 2019, 12:03 PM), <https://www.bloomberg.com/news/articles/2019-08-22/why-uber-drivers-are-fighting-for-their-data>.

247. *See id.*

248. Anchustegui & Nowag, *supra* note 220, at 2.

249. Carolyn Said, *Uber May Stop Letting Drivers See Destinations and Name Prices*, S.F. CHRON. (Apr. 6, 2021, 6:13 PM), <https://www.sfchronicle.com/business/article/Uber-may-stop-letting-drivers-see-destinations-16078491.php>; Sasha Lekach, *Uber’s New Driver Features Could Mean More Destination Discrimination*, MASHABLE (Dec. 4, 2019), <https://mashable.com/article/uber-driver-california-changes-destination-discrimination>.

250. Adam Tuss, *Uber Drivers Stiff Passengers After Finding Out Final Destination*, NBC4 WASH. (Dec. 28, 2016, 10:03 AM), <https://www.nbcwashington.com/news/local/uber-drivers-stiff-passengers-after-finding-out-final-destination-2/127513/>; Tina Bellon, *Uber Revamps Driver Pay Algorithm in Large U.S. Pilot to Attract Drivers*, REUTERS (Feb. 25, 2022, 8:20 PM), <https://>



trip based on the distance traveled and time taken,<sup>251</sup> although Uber has reportedly launched pilot programs which allow drivers to see the destination and pay before accepting a ride.<sup>252</sup> Nonetheless, it is fair to assume that Uber possesses sufficient information about its drivers to engage in reasonably refined price discrimination. Moreover, the fact that Uber drivers are compensated on a per trip basis, as opposed to an hourly basis or even a monthly basis, gives Uber significant room to individualize compensation. In a way, compensation of Uber drivers is, by definition, personalized according to factors such as how much she drives, how many trips she accepts, and the time of the day she drives. Even if Uber falls short of first-degree price discrimination, its pricing model is a far cry from the single equilibrium price offered by a classic monopsonist.

The defense mechanisms identified by Gal are not available to Uber drivers. Personalized pricing against Uber drivers is unlikely to cause a public outcry nor do Uber drivers have the option to interact with Uber anonymously. Further, Uber can seek additional assistance from increasingly powerful pricing algorithms. The OECD notes that these algorithms “allow for constant adjustment and optimization of individual prices based on many factors, including available stock and anticipated demand.”<sup>253</sup> Using a huge volume of data, pricing algorithms learn through trial and error to discern patterns and formulate optimal pricing.<sup>254</sup> These algorithms are automated and require no human intervention, which means they can constantly adjust prices based on changing conditions.<sup>255</sup>

Uber is also likely to face fewer technical challenges compared to a digital platform attempting to price discriminate against its consumers. First, determining a consumer’s willingness to pay requires a high dimensionality of data, much of

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[www.reuters.com/business/autos-transportation/exclusive-uber-revamps-driver-pay-algorithm-large-us-pilot-attract-drivers-2022-02-26/](https://www.reuters.com/business/autos-transportation/exclusive-uber-revamps-driver-pay-algorithm-large-us-pilot-attract-drivers-2022-02-26/).

251. *How Much Can Drivers Make With Uber?*, UBER, <https://www.uber.com/hk/en/drive/how-much-drivers-make/> (last visited Apr. 7, 2022).

252. Bellon, *supra* note 250.

253. OECD, ALGORITHMS AND COLLUSION: COMPETITION POLICY IN THE DIGITAL AGE 16 (2017), [www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm](http://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm).

254. *Id.*

255. *Id.*

which is often incomplete.<sup>256</sup> Determining a driver's willingness to drive should require a relatively smaller set of information about the drivers. Because Uber would collect the information itself, an incomplete data set should not be a problem. Second, much of the consumer data from third-party online sources is unlabeled, which greatly impedes supervised learning by pricing algorithms.<sup>257</sup> Supervised learning requires annotated data, yet manual annotation is costly and error prone.<sup>258</sup> Again, because Uber will be collecting most of the driver data itself, the problem of unlabeled data is unlikely to arise. Third, it is well noted that most retailers lack the appropriate technical infrastructure, such as electronic price tags, that is needed to gauge consumers' willingness to pay.<sup>259</sup> Given that Uber conducts all its interaction with its drivers through smartphones, the lack of technical infrastructure should be irrelevant.

#### D. *Welfare Effects of Digital Monopsony*

Even if Uber is not able to engage in fully personalized pricing, it can closely tailor driver compensation, with an increasing degree of individualization over time. As previously noted, the possibility of individualization fundamentally changes the welfare calculus of digital monopsony. Recall that classic monopsony leads to a lower level of output and deadweight loss, and the degree to which consumer prices remain stable or increase depends on the state of downstream competition. Textbook economics suggests that the efficiency loss of price discrimination decreases as it approximates first-degree price discrimination.<sup>260</sup> Market outcome with first-degree price discrimination mirrors that under perfect competition.<sup>261</sup> The only difference is that producer surplus is fully

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256. Gaultier, Ittoo, and & Van Cleynenbreugel, *supra* note 232, at 421.

257. *Id.* at 422.

258. *Id.*

259. WERNER REINARTZ ET AL., PRICE DIFFERENTIATION AND DISPERSION IN RETAILING 17 (2018), [https://marketing.uni-koeln.de/sites/marketingarea/user\\_upload/Price\\_Differentiation\\_and\\_Dispersion\\_in\\_Retailing\\_Whitepaper\\_Einzelseiten\\_Version\\_1\\_ohne\\_letzte\\_Seite.pdf](https://marketing.uni-koeln.de/sites/marketingarea/user_upload/Price_Differentiation_and_Dispersion_in_Retailing_Whitepaper_Einzelseiten_Version_1_ohne_letzte_Seite.pdf).

260. See JOHN BLACK, NIGAR HASHIMZADE & GARETH MYLES, A DICTIONARY OF ECONOMICS 483, 692 (5th ed. 2017).

261. Daniel L. White & Michael C. Walker, *First Degree Price Discrimination and Profit Maximization*, 40 S. ECON. J. 313, 313–14 (1973).

extracted by the price-discriminating monopsonist.<sup>262</sup> The deadweight loss disappears as there is no restriction of output. A price-discriminating monopsonist need not resort to demand depression to obtain lower prices. In fact, the closer the monopsonist approaches perfect price discrimination, the more benign are the welfare effects.<sup>263</sup> While personalized pricing against customers is controversial, price discrimination by a digital monopsonist is much less objectionable. If monopsony is unavoidable in any event, it may as well be implemented with perfect price discrimination.

The benign welfare effects upstream do not mean that consumers are necessarily indifferent to digital monopsonies. As mentioned earlier, consumer prices may rise if downstream competition is weak, which is probably not the case for Uber as it faces keen competition from Lyft, at least in the United States.<sup>264</sup> However, now that the digital monopsonist need not suppress its demand for the upstream input, drivers in Uber's case, it may no longer have an incentive to raise prices in the downstream market. The monopsonist may not be able to increase downstream prices without curtailing its output, which may require the digital monopsonist to leave some input unused. This would require Uber to deliberately fail to match a rider with a driver to create scarcity. Given that Uber is still subject to competition by other ride sharing apps and taxis, deliberate failure to match riders with drivers would likely push riders to its competitors. Thus, the risk of increased downstream prices is likely lower in the case of a digital monopsonist as compared to a brick-and-mortar monopsonist.

Most of the competitive harm discussed in Part II has little application in the case of Uber's digital monopsony. Given that these are individual drivers instead of suppliers, the waterbed effect is not applicable, with the caveat that multi-homing drivers may raise wage demands for Uber's competitors, such as Lyft, in response to the lower wages offered by Uber. Given that the drivers wield little bargaining power, such a scenario seems unlikely. Quality erosion, increased con-

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262. BLACK, HASHIMZADE & MYLES, *supra* note 260, at 692.

263. Hal R. Varian, *Price Discrimination and Social Welfare*, 75 AM ECON. REV. 870, 871 (1985).

264. See Janine Perri, *Uber vs. Lyft: Who's Tops in the Battle of U.S. Rideshare Companies*, BLOOMBERG SECOND MEASURE (June 15, 2022), <https://secondmeasure.com/datapoints/rideshare-industry-overview/>.

centration in the supply chain, and reduced investment incentives by suppliers are also irrelevant. The equivalent of these competitive effects in this context would be reduced incentives to train as drivers and reduced incentives to invest in a nicer vehicle, for example. In the context of professional athletes or physicians, a monopsony may lead to under-investment to train to acquire the requisite skills or professional qualifications. The required training can be very time-consuming and costly. The situation is different for Uber drivers. Most people do not learn how to drive specifically to become an Uber driver and do not invest in improving their driving skills to become a better Uber driver. In fact, few specific investments are required to become an Uber driver. Therefore, in the case of Uber, reduced incentives to train can be discounted.

The relevance of reduced incentives to make vehicle investment depends on the proportion of drivers who buy or, more probably, rent a car to serve as an Uber driver. For casual car owners who work as an Uber driver part-time to earn supplemental income, this effect has no application. For those who invest in their car for the specific purpose of driving for Uber, the reduced incentives could be an important issue. Thankfully, the quality, or at least the make, of one's car is listed on the Uber app before a rider places an order. The issue of undetected quality reduction discussed by Ezrachi and de Jong is hence unlikely to arise. Poor safety maintenance could be at issue, which should be reflected in a driver's rating over time. Wealth transfer from the seller to the buyer, or in this case, from Uber drivers to Uber, would arise in any exercise of buyer power and deserves attention only if wealth transfer is deemed a valid ground for antitrust intervention, an assertion rejected previously.

Lastly, creation of downstream market power could arise and prove to be an important concern if Uber's monopsony power is exercised for an exclusionary purpose. The competitive effects of monopsony power would be much less benign if the individual targeting of drivers comes with an exclusionary element, as in the case of the Hell program. Evidence suggests that the Hell program's main purpose is to allow Uber to lock in its drivers by offering them personalized financial incen-

tives.<sup>265</sup> To the extent that Uber succeeds in denying competitors such as Lyft access to drivers, the Hell program may harm competition and consumers alike and deserves antitrust scrutiny, but probably as an exclusionary conduct rather than a buyer power abuse.

#### IV.

##### AMAZON AS A DIGITAL GATEKEEPER

###### A. *Digital Gatekeepers*

Both supermarkets and digital marketplaces, such as Amazon, are two-sided platforms. Amazon is in fact a vertically integrated platform. Amazon's Marketplace is a transaction platform that allows more than two million third-party sellers to sell to consumers,<sup>266</sup> accounting for sixty percent of Amazon's overall sales.<sup>267</sup> Marketplace also serves as an ad-sponsored platform by hosting ads on its website for third-party products.<sup>268</sup> Advertising is an increasingly important source of revenue for Amazon.<sup>269</sup> Lastly, Amazon provides a software platform through its Kindle device and accompanying app, which connects publishers and readers.<sup>270</sup> Amazon's business goes significantly beyond its platform. In addition to being a technology company, it is also a logistics company, an advertising platform, a movie studio, a streaming service, a health care provider, a surveillance machine, and a data harvester.<sup>271</sup> Ac-

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265. Thomas K. Cheng & Julian Nowag, *Algorithmic Predation and Exclusion*, 28 *FORDHAM J. CORP. & FIN. L.* — (forthcoming 2022).

266. Lauren Rosenblatt, 'Sold by Amazon' Program Shut Down After WA Attorney General's Antitrust Investigation, *THE SEATTLE TIMES* (Jan. 26, 2022, 6:20 PM), <https://www.seattletimes.com/business/sold-by-amazon-program-shut-down-after-wa-attorney-generals-antitrust-investigation/>.

267. Chris Shipferling, *What Could the Senate's Tech Antitrust Bill Mean for Amazon Sellers?*, *FORBES* (Mar. 4, 2022, 7:00 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/04/what-could-the-senates-tech-antitrust-bill-mean-for-amazon-sellers/?sh=3079460366c2>.

268. MITCHELL, KNOX, & FREED, *supra* note 175.

269. *Id.*

270. Bloodstein, *supra* note 204, at 200.

271. Sara Morrison, *The True Cost of Amazon's Low Prices*, *Vox* (Jan. 13, 2022, 9:00 AM), <https://www.vox.com/recode/22836368/amazon-antitrust-ftc-marketplace>.

cordingly, Amazon has been called the “everything company.”<sup>272</sup>

Both brick-and-mortar supermarkets and Amazon are retailer gatekeepers that wield significant bargaining power in all-or-nothing negotiations with suppliers and transactional counterparties. Gatekeeper power in the supermarket context has been discussed previously in Part I. Every factor that allows these supermarkets such as Walmart and the big four in the United Kingdom to perform gatekeeping functions applies to Amazon as well.

At the outset, it is important to distinguish between two types of sellers on Amazon.<sup>273</sup> The first type are suppliers, just the same as those that supply the brick-and-mortar supermarkets and retailers.<sup>274</sup> These include developers and manufacturers of products with their own recognized brands such as FarberWare, the kitchenware manufacturer.<sup>275</sup> These suppliers may sell their goods to Amazon directly which, in turn, resells the goods to final consumers.<sup>276</sup> This represents the standard wholesale-retail relationship in which Amazon performs the role of the traditional retailer. These sellers are known as first-party sellers and their products are labeled as “Ship from and sold by Amazon.com.”<sup>277</sup> Alternatively, they may sell their goods as third-party sellers in Amazon Marketplace directly to consumers with the goods delivered by the supplier itself or by Amazon.<sup>278</sup> The products are labeled as “Ship from and Sold

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272. Clare Duffy, *Amazon Is Everywhere. Here's How the US Could Break It Up*, CNN BUS. (July 28, 2021, 8:35 AM), <https://edition.cnn.com/2021/07/28/tech/amazon-antitrust-house-bills-issues/index.html>.

273. It is important to note that there seems to be many ways to classify sellers on Amazon.

274. Jennifer Robinson, *How Can Third-Party Sellers Make Money and Sell on Amazon?*, SAGESELLER (Feb. 18, 2021), <https://sageseller.com/blog/how-can-third-party-sellers-make-money-on-amazon>.

275. Eugene Kim, *As Amazon's Dominance Grows, Suppliers Are Forced to Play by Its Rules*, CNBC (Dec. 21, 2017, 6:30 PM), <https://www.cnbc.com/2017/12/21/as-amazons-dominance-grows-suppliers-are-forced-to-play-by-its-rules.html>.

276. Robinson, *supra* note 274.

277. Hillary Hoffower, *Fake Products Sold by Places like Walmart or Amazon Hold Risks of Everything from Cyanide to Rat Droppings — Here's How to Make Sure what You're Buying Is Real*, INSIDER (Mar. 29, 2018, 2:23 PM), <https://www.businessinsider.com/how-to-find-fake-products-online-shopping-amazon-ebay-walmart-2018-3>.

278. *Id.*

by . . . Third-Party Seller” when the third-party seller handles the delivery itself and “Sold by . . . Third-Party Seller and Fulfilled by Amazon” when the delivery is handled by Amazon’s logistics service.<sup>279</sup>

The second type of sellers is resellers. These sellers do not produce their products.<sup>280</sup> Instead, they source products from manufacturers, suppliers or other sources and resell them to consumers with Amazon serving as a conduit between the supplier and consumers.<sup>281</sup> These resellers are designated as third-party sellers on Amazon<sup>282</sup> and have different types of business models, including wholesale, private label, and retail arbitrage.<sup>283</sup> The wholesalers purchase products from the manufacturers or distributors in bulk and then sell them on to final consumers, as is the case for most brick-and-mortar retailers.<sup>284</sup> The private label resellers source their own private label products directly from factories, often in China, and resell them to consumers.<sup>285</sup> Finally, the retail arbitrageurs source their products online or from local stores and resell them on Amazon at higher prices to make a profit.<sup>286</sup>

In sum, suppliers as traditionally understood can be either first-party sellers or third-party sellers while resellers are invariably third-party sellers on Amazon. As far as the Amazon ecosystem is concerned, the relevant distinction is whether the product is sold by Amazon directly or by a third party. For the purpose of this Article, however, the focus is on whether the products are developed and produced by the seller. The potential competitive harm that could arise from Amazon’s exercise of buyer power is different for the suppliers and the resel-

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279. *Id.*

280. Robinson, *supra* note 274.

281. *Id.*

282. *Ordering from a Third-Party Seller*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GEF528GN65XSJ7V8#:~:text=third%2Dparty%20sellers%20are%20independent,through%20the%20Amazon%20checkout%20process> (last visited Dec. 13, 2022).

283. Owen Cusworth, *The 3 Types of Sellers on Amazon and How They Make a Profit*, MEDIUM: THE STARTUP (Aug. 5, 2021), <https://medium.com/swlh/the-3-types-of-sellers-on-amazon-and-how-they-make-a-profit-4f34f67327af>.

284. *Id.*

285. *Id.*

286. Christine Gerzon, *Amazon Arbitrage: How It Works and How You Can Earn from It*, ECOMCREW (July 31, 2022), <https://www.ecomcrew.com/amazon-arbitrage/#whatis>.

lers because the latter do not develop their own products. The common terminology in the Amazon ecosystem, however, is third-party sellers. Amazon does not differentiate between branded third-party sellers and reselling third-party sellers. All of Amazon's third-party seller policies that may constitute buyer power abuses apply to both. Therefore, for the sake of simplicity, this Article will refer to resellers as third-party sellers. Branded third-party resellers are implicitly excluded from the term third-party seller when discussing competitive harm of buyer power abuses.

Similar to the traditional supermarkets, Amazon performs multiple roles. For one, Amazon is a customer of suppliers when it sources products from them. Amazon hosts third-party sellers on its Marketplace. Amazon also competes with some of these sellers by offering private label products.<sup>287</sup> Amazon is in an even more advantageous position in its competition with the suppliers because it knows more about its customers as compared to traditional supermarkets.<sup>288</sup> Amazon's customer information allows it to predict consumer preference and demand more accurately. Amazon does not sell shelf space to suppliers or third-party sellers by charging listing fees or slotting allowances. Instead, Amazon sells advertising, promotion, and logistical services known as Fulfillment by Amazon ("FBA").<sup>289</sup> As discussed below, sellers that purchase advertising on Amazon obtain preferential placement in search results. Advertising and promotional charges and fees for FBA thus effectively function, though not explicitly, as slotting allowances.

Suppliers and third-party sellers are no less reliant on Amazon than are suppliers on traditional supermarkets. If anything, Amazon commands an even larger market share than does the biggest brick-and-mortar retailer, Walmart. Amazon Marketplace reportedly holds a forty percent market share in e-commerce, leading the closest contender, Walmart, by thirty-

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287. Kalra and Stecklow, *supra* note 185.

288. See Mike Sands, *How Amazon Is Minting a New Generation of Customer-Data-Obsessed Companies*, FORBES (Mar. 2, 2018, 10:21 AM), <https://www.forbes.com/sites/mikesands1/2018/03/02/how-amazon-is-minting-a-new-generation-of-customer-data-obsessed-companies/?sh=202d7e8228ed>.

289. Amy E. Shehan, *Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 GA. L. REV. 1215, 1219–20 (2019).



three percent.<sup>290</sup> This figure refers to all goods bought and sold online, rather than individual product categories such as grocery or toys, where Walmart allegedly holds a twenty percent market share.<sup>291</sup> In a lawsuit brought by the Washington D.C. Attorney General, reportedly the first major antitrust suit against Amazon in the United States,<sup>292</sup> the complaint claimed that seventy-four percent of consumers go directly to Amazon when seeking to purchase a specific product.<sup>293</sup> As such, one can only imagine suppliers' reliance on Amazon for online sales.

The situation is worse for third-party sellers, who face even greater disparity in brand recognition. While consumers recognize and feel attached to a supplier's brand, third-party sellers are essentially fungible. In the eyes of consumers, only reliability and price matter. For a third-party seller that uses FBA, the only relevant attribute is price. The fungibility of third-party sellers means they are even more reliant than suppliers on Amazon and maintain worse bargaining positions vis-à-vis Amazon. In fact, Amazon exacerbates these sellers' dependence by cajoling them to use FBA. This means that apart from ownership of the produced good, essentially everything involved in a sale by a third-party seller is handled by Amazon.<sup>294</sup>

In view of the foregoing, it is clear that Amazon performs an equal, if not a greater, retailer gatekeeper function as compared to traditional supermarkets. Amazon possesses a great deal of buyer power vis-à-vis its suppliers and third-party sellers, as confirmed by media reports,<sup>295</sup> and has exercised this

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290. Morrison, *supra* note 271.

291. Grimes, *supra* note 23, at 580.

292. Joshua Nelson, *Amazon antitrust suit expanded to wholesale operations*, JURIST (Sept. 15, 2021, 12:43 PM), <https://www.jurist.org/news/2021/09/amazon-antitrust-suit-expanded-to-wholesale-operations>.

293. Gilad Edelman, *A New Antitrust Case Cuts to the Core of Amazon's Identity*, WIRED (May 25, 2021, 4:56 PM), <https://www.wired.com/story/amazon-antitrust-lawsuit-cuts-to-core-of-identity>.

294. Karen Weise, *Prime Power: How Amazon Squeezes the Businesses Behind Its Store*, N.Y. TIMES (Dec. 19, 2019), <https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html>; *see also* AMAZON, *FBA storage and fulfillment fees*, <https://sell.amazon.com/fulfillment-by-amazon> (last visited Apr. 19, 2022).

295. Kalra & Stecklow, *supra* note 185, at 27; MITCHELL, KNOX & FREED, *supra* note 175, at 25.

power to drive hard bargains.<sup>296</sup> The range of reported conduct includes charging excessive fees (or referral fees), prohibiting third-party sellers from selling goods at a lower price on other platforms, imposing unduly harsh contractual terms, alleged tying by requiring third-party sellers to use FBA and purchase advertising, using unfair methods to compete with its own third-party sellers such as outright design copying, using algorithms to steer customers to its own products (otherwise known as self-preferencing in the EU), and misusing sellers' sales data (which was the subject of an EU investigation), and even compelling suppliers to sell an equity stake to Amazon, which will be discussed subsequently.

### B. Amazon's Gatekeeper Bargaining Power

Buyer power abuses by retailer gatekeepers were prevalent in the pre-digital age.<sup>297</sup> While some jurisdictions such as the United Kingdom and Australia have adopted sector-specific codes of conduct,<sup>298</sup> the United States has taken a relatively hands-off approach. Private label products are widespread, and Amazon is certainly not the first retailer to introduce them. As far as this Author is aware, no jurisdiction has ever penalized a retailer solely for introducing such products. If antitrust authorities have largely ignored buyer power abuses by powerful brick-and-mortar retailers, is there any justification for a different approach with respect to digital gatekeeper platforms? Is there anything unique about digital gatekeepers that bestows their conduct with greater anticompetitive potential on the buyer-side of the market?

To answer these questions, three issues require investigation: (1) whether buyer power needs to be measured differently for digital gatekeeper platforms; (2) whether digital gatekeeper power is stronger or more durable than its brick-and-mortar counterpart; and (3) whether the competitive harm of buyer power abuses identified in Part II are equally applicable to digital gatekeepers.

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296. Mattioli, *supra* note 12, at 4.

297. Foer, *supra* note 93, at 1312–13.

298. Groceries Supply Code of Practice 2009, ¶ 16 (UK), <https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice>; *Competition and Consumer (Industry Codes—Food and Grocery)* (Cth) reg 2015 sch 19 (Austl.).

The first issue to explore is whether, and how, measurement of buyer power may differ for digital gatekeepers as compared to brick-and-mortar gatekeepers. As far as this Author is aware, digital buyer power is a relatively unexplored issue in the literature. In terms of seller-side market power, Alexandrov argues that “[i]n two-sided markets, firms typically intermediate between buyers and sellers, so that market power measures must reflect firms’ interaction both with buyers and with sellers.”<sup>299</sup> In two-sided markets, market definition needs to take into account prices charged on both sides of the market.<sup>300</sup> Likewise, assessment of market power also requires us to account for the firm’s pricing power on both sides of the market. If a platform cannot raise prices on one side of the market without cutting prices on the other side, it is unlikely to possess market power.

This presents a conundrum. A one-sided firm usually faces suppliers on one side and customers on the other side. Seller-side market power is measured on the customer side and buyer power on the supplier side. For a two-sided platform that sells on both sides, such as a credit card service provider selling payment services to card users and transaction processing to merchants, Alexandrov suggests that one needs to consider its pricing power and hence market share on both sides of the market to determine its seller-side market power.<sup>301</sup> This is consistent with the Supreme Court’s decision in *American Express*. There, the Court held that the fact that American Express may have acted anticompetitively on one side of the market does not end the inquiry.<sup>302</sup> One needs to consider the other side of the market to complete the analysis.<sup>303</sup> If one needs to consider both sides to assess seller-side market power, however, it is not clear on which side of the market buyer power should be measured. One possibility is that buyer power needs to be measured on both sides just like seller-side market power. Alternatively, perhaps seller-side market power and buyer power are one and the same concept for digital platforms.

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299. Alexandrov, *supra* note 209, at 775.

300. *Id.* at 775.

301. *Id.* at 782.

302. *Ohio v. American Express*, 138 S. Ct. 2274, 2287 (2018).

303. *Id.*

Two-sided firms can be classified as symmetrical or asymmetrical. Symmetrical firms are those two-sided firms that have the same kind of interaction with their counterparties on both sides. In the case of credit cards, the credit card company *sells* services to both the card users and the merchants. When the two-sided firm is *selling* on both sides, it makes sense to consider its pricing power on both sides of the market when determining its seller-side market power. The firm needs both sides of the market to function and neither side is more important than the other.

Asymmetrical firms are those two-sided firms that interact differently with their counterparties on the two sides. In other words, they *buy* on one side and *sell* on the other. For example, Uber *buys* labor services from its drivers on one side of the market and *sells* those services to riders on the other side. Because it does not charge a price on both sides, there is no need to consider its pricing power on both sides of the market to determine its seller-side market power. Its buyer power is ascertained on the driver side while its seller-side market power is considered on the rider side. As for Amazon, its buyer power is measured by examining its interaction with its suppliers or third-party sellers, and its seller-side market power is encapsulated by its pricing power over the final consumers who purchase goods on Amazon.

In a way, symmetrical two-sided firms are the genuine two-sided platforms and present the thorniest issues in terms of market definition and measurement of market power. Newspapers and media companies also fall within this category in addition to credit card companies. Newspapers sell papers to readers and advertisements to advertisers. Asymmetrical two-sided firms are two-sided in the sense that they exhibit cross-market indirect network effects, but they do not present the theoretical difficulties in terms of market definition and assessment of market power as do symmetrical two-sided firms. There are distinct buyer and seller sides. For asymmetrical two-sided firms like Amazon, buyer power can be measured from its interaction with the suppliers and the third-party sellers.

The second issue is whether digital gatekeepers such as Amazon have stronger or more durable buyer power than their brick-and-mortar counterparts. Recall that bargaining power in the all-or-nothing context ultimately comes down to

the outside-option payoff of the two parties.<sup>304</sup> The lower the payoff, the less bargaining power one has. To put it differently, bargaining power comes down to whether, and what, alternatives exist for replacing the negotiation counterparty. In the case of retailer gatekeeper power, bargaining power is determined based on the options available to the supplier to replace a retailer and vice versa. This, in turn, depends on the absolute and relative size of the retailer and the supplier, the ability of the retailer to obtain supply to replace a supplier, the competitive position of the retailer and the supplier in their respective markets, and relative customer recognition.<sup>305</sup> If consumers are more attached to the retailer than to the brands, the retailer is more indispensable. If the opposite is true, suppliers will have greater bargaining power.

Multiple factors suggest that Amazon wields even greater bargaining power than the likes of Walmart in the offline world. Despite the size of Walmart and some of the other brick-and-mortar retailers, Amazon is even bigger. As of the time of writing, Amazon is the fifth largest corporation in the world by market capitalization.<sup>306</sup> Walmart is the sixteenth largest by the same metric.<sup>307</sup> In terms of absolute and relative size of the counterparties, Amazon is extraordinary. Though, beyond a certain point, further increase in size is unlikely to give the retailer additional advantage.

In terms of a counterparty's replaceability, it is again important to distinguish between suppliers and third-party sellers. Third-party sellers are the easier case. As mentioned earlier, these sellers are essentially fungible in the eyes of Amazon and consumers.<sup>308</sup> Because they do not produce their own goods and merely source goods from suppliers, they can be easily replaced. Third-party sellers are not present in offline retail. The absence of these sellers in brick-and-mortar retail implies that Amazon possesses greater bargaining power. As for the suppliers, they can be replaced either by another brand or private label products. While the availability of alternative brands should not differ between the online and offline

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304. Thomas, *supra* note 66, at 288.

305. Dobson & Chakraborty, *supra* note 120, at 337–38.

306. *Largest Companies by Market Cap*, <https://companiesmarketcap.com/> (last visited Apr. 6, 2022).

307. *Id.*

308. *See supra* Part IV.A.

worlds, Amazon may be able to push its private label products over branded products more effectively than do its brick-and-mortar counterparts. Amazon possesses more data about the products it sells, and more importantly, significantly more data about its customers, than do brick-and-mortar retailers.

Studies show that Amazon has deployed pricing algorithms since 2015.<sup>309</sup> One study found that more than one-third of the 1,600 bestselling products on Amazon adopted algorithmic pricing in 2015.<sup>310</sup> Sophisticated algorithmic pricing requires a considerable amount of customer data.<sup>311</sup> Amazon may not yet have enough data to implement personalized pricing, the pinnacle of algorithmic pricing, but it certainly knows a great deal about the preferences and shopping habits of its customers.<sup>312</sup> As a result, Amazon can formulate more effective strategies with respect to its private label products than can its offline rivals. To be sure, Amazon does not offer private label products in every product category but, to the extent it does offer such products, it can replace branded products relatively easily, especially by using search algorithms to steer customers to its own products.<sup>313</sup>

In terms of their respective competitive positions vis-à-vis suppliers and relative customer recognition, a direct comparison between Amazon and brick-and-mortar retailers is difficult. The brick-and-mortar retailers and the digital retailers may operate in different product markets, even though the overlap is increasing and the line between online and offline retailing is diminishing. Many brick-and-mortar retailers also

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309. Le Chen et al., *An Empirical Analysis of Algorithmic Pricing on Amazon Marketplace*, PROCEEDINGS OF THE 25TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 1339 (2016); Daisuke Wakabayashi, *Does Anyone Know What Paper Towels Should Cost?*, N.Y. TIMES (Feb. 27, 2022), <https://www.nytimes.com/2022/02/26/technology/amazon-price-swings-shopping.html>; Kathy Kristof, *How Amazon Uses "Surge Pricing," Just Like Uber*, CBS NEWS (July 24, 2017, 10:08 AM), <https://www.cbsnews.com/news/amazon-surge-pricing-are-you-getting-ripped-off-small-business/>; Emilio Calvano et al., *Algorithmic Pricing What Implications for Competition Policy?*, 55 REV. OF INDUS. ORG. 155, 156 (2019).

310. Chen et al., *supra* note 309.

311. Gaultier, Ittoo & Van Cleynenbreugel, *supra* note 232, at 412.

312. Wakabayashi, *supra* note 309.

313. Kalra & Stecklow, *supra* note 185.

compete in the e-commerce market,<sup>314</sup> while Amazon only has a limited presence in offline retail, with less than one hundred physical locations at present (without including Whole Foods).<sup>315</sup> Moreover, the relevant geographic market for brick-and-mortar retailers is, by nature, local or regional, whereas the geographic market for online retail is national or global.

Available information suggests that Amazon's competitive position is comparable to, or stronger than, Walmart's. Amazon and Walmart accounted for nearly identical percentages of retail sales in the United States in 2020, with Walmart at 9.5% and Amazon at 9.2%.<sup>316</sup> As mentioned earlier, Amazon accounts for forty percent of the e-commerce market.<sup>317</sup> Walmart's corresponding market share in brick-and-mortar retail is likely lower.<sup>318</sup> If even an eight or ten percent market share gives a retailer significant bargaining power vis-à-vis its suppliers, Amazon's share in the e-commerce market allows it to overwhelm any supplier in contractual negotiations, a reality that copious media reports confirm.<sup>319</sup>

Another related factor to consider is relative customer recognition, which is contingent on their competitive positions. A retailer that is more readily recognized by consumers is likely to occupy a stronger competitive position. Amazon and Walmart are each household names and no evidence suggests that one receives greater customer recognition than the

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314. The Economist Intelligence Unit, *Brick-and-Mortar Retailers Fight Back: Winning Strategies to Compete with Online-only Players*, <https://www.mastercard.com/sites/default/files/2018-09/brick-and-mortar-retailers-fight-back.pdf> (last visited Apr. 7, 2022).

315. AMAZON, *Amazon Physical Stores Locations*, <https://www.amazon.com/find-your-store/b/?node=17608448011> (last visited Apr. 7, 2022).

316. *Amazon and Walmart are Nearly Tied in Full-Year Share of Retail Sales* (Mar. 11, 2021), <https://www.pymnts.com/news/retail/2021/amazon-walmart-nearly-tied-in-full-year-share-of-retail-sales>.

317. Morrison, *supra* note 271.

318. *Who are the top 10 Grocers in the United States?*, <https://www.foodindustry.com/articles/top-10-grocers-in-the-united-states-2019/> (last visited Apr 7, 2022); Melissa Repko, *Walmart drew one in four dollars spent on click and collect — with room to grow in 2022*, CNBC (Dec. 30, 2021, 7:00 AM), <https://www.cnn.com/2021/12/30/walmart-drew-one-in-four-dollars-on-click-and-collect-market-researcher.html>; Jinjoo Lee, *Walmart Gets Back to Basics*, WALL ST J. (May 18, 2021, 1:41 PM), <https://www.wsj.com/articles/walmart-gets-back-to-basics-as-grocery-sales-grow-11621353489>.

319. Mattioli, *supra* note 12; MITCHELL, KNOX & FREED, *supra* note 175.

other. One distinction between Amazon and Walmart, in terms of customer recognition, is, again, the existence of third-party sellers. These sellers command little brand name recognition and merely convey goods. While some suppliers may be able to leverage their brand recognition to resist retailer bargaining power, third-party sellers are completely at the mercy of Amazon.

Overall, it seems that Amazon's bargaining power vis-à-vis its suppliers is at least comparable to, or even greater than, that of the largest brick-and-mortar retailers such as Walmart. Amazon's bargaining power vis-à-vis third-party sellers is overwhelming. The purpose of this inquiry is not to compare Amazon and Walmart for its own sake but, rather, to illustrate the advisability of intervention against Amazon's buyer power abuses. Given the result of this comparison, it seems that if intervention against buyer power abuses by dominant brick-and-mortar retailers is defensible, there exist equally strong, if not stronger, grounds to act against Amazon. The greater is Amazon's buyer power, the more likely it is that its buyer power abuses would cause competitive harm, and the lower the risks that intervention would be frivolous.

### C. *Buyer Power Abuses by Amazon*

The buyer power abuses of which Amazon has been accused are too many to be fully catalogued in this Article. These allegations can be grouped into six categories: (1) excessively low purchase prices; (2) unduly harsh contractual terms; (3) MFN clauses, often the platform's countermeasure to its suppliers' reaction to its demands for low prices; (4) tying; (5) unfair competition with its own suppliers, and (6) coerced investment. The first two categories of abuse are clearly exploitative in nature, as they amount to extraction of surplus from Amazon's suppliers and third-party sellers. MFN clauses and tying are exclusionary practices. MFN clauses render it impossible for competitors and potential new entrants to compete with Amazon by undercutting Amazon's prices.<sup>320</sup> Tying threatens to leverage Amazon's market power in the online marketplace to related markets such as logistics and online advertising. Amazon's alleged conduct that constitutes unfair

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320. Pinar Akman, *A Competition Law Assessment of Platform Most-Favored-Customer Clauses*, 12 J. COMPETITION L. & ECON. 781 (2016).



competition falls beyond the scope of traditional competition law and would mostly be regulated as unfair trade practices. Coerced investment does not lend itself to an obvious classification, as it could be considered an instance of surplus extraction (although in this instance the surplus is not extracted from a target's profit but from its share capital).

1. *Excessively Low Purchase Prices*

The first two categories of abuses are exploitative in nature. The first category is the classic monopsony abuse of offering excessively low purchase prices. Its main purpose is to extract surplus from the supplier. The practice is similar to the imposition of unduly harsh contractual terms in its chiefly exploitative aim. Ultimately many contractual terms can be translated into monetary terms such that imposition of unduly harsh contractual terms is tantamount to demanding a lower price.

The excessively low purchase prices are manifested differently for the suppliers and the third-party sellers. For the suppliers, it appears as the usual low wholesale prices. The National Grocers Association ("NGA") reports that Amazon has extracted significantly lower wholesale prices from suppliers than those offered to independent grocers.<sup>321</sup> Oftentimes, Amazon's wholesale prices are lower than the independent grocers' retail prices.<sup>322</sup> The NGA describes an anecdote in which "one NGA member tried to offer diapers to an employee at cost, only to learn that the employee was paying a lower price for diapers on Amazon than the NGA member was paying at wholesale."<sup>323</sup> To the extent that the low wholesale prices offered to Amazon eats into a supplier's margin and undermines its profitability, it may need to raise prices on other buyers to recoup its losses, triggering the waterbed effect discussed in Part II.A.

Amazon has a different relationship with the third-party sellers. Amazon does not take ownership of the goods. Instead, it provides these sellers with access to final consumers. It resembles a supplier selling its products on consignment at a supermarket or department store except that, with Amazon, the

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321. NAT'L GROCERS ASS'N, *supra* note 127, at 12.

322. *Id.*

323. *Id.*

goods are not physically transferred to Amazon unless the seller uses FBA.<sup>324</sup> Amazon makes money from the third-party sellers by charging a commission, known as the “referral fee,” from their sales. The fee has been described as “a tax no seller can avoid.”<sup>325</sup> The referral fee varies by product category. The standard rate is fifteen percent.<sup>326</sup> For some products, such as cameras and consumer electronics, the rate is lower at eight percent.<sup>327</sup> For other products, such as clothing, the rate is higher at seventeen percent.<sup>328</sup> The standard rate of fifteen percent has remained the same since the inception of the Amazon Marketplace in 2000, despite the astronomical expansion of Marketplace’s business volume over the years.<sup>329</sup>

Amazon’s extraction does not end with referral fees. Two optional services, if used, will improve a seller’s positioning on the site significantly: advertising and FBA. Amazon offers sellers its own warehousing and logistical services.<sup>330</sup> Advertising has become an increasingly important part of Amazon’s business and takes up an increasing amount of space on its search result page.<sup>331</sup> Amazon pressures third-party sellers to use these services by demoting in the search results those that do not.<sup>332</sup> Together, the fees and charges could amount to thirty percent of a third-party seller’s sales.<sup>333</sup> Fees charged to third-party sellers generated \$120 billion of revenue for Amazon in 2020.<sup>334</sup> Amazon’s profit margin on third-party fees is at about twenty percent, which is four times higher than its profit mar-

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324. AMAZON, *Fulfillment by Amazon*, <https://sell.amazon.com/fulfillment-by-amazon> (last visited Apr. 7, 2022).

325. MITCHELL, KNOX & FREED, *supra* note 175.

326. AMAZON, *Selling on Amazon Fee Schedule*, <https://sellercentral.amazon.com/gp/help/external/200336920> (last visited Apr. 6, 2022).

327. *Id.*

328. *Id.*

329. MITCHELL, KNOX & FREED, *supra* note 175.

330. Pamela Danziger, *Amazon’s Third-Party Marketplace Is Its Cash Cow, Not AWS*, FORBES (Feb. 5, 2021), <https://www.forbes.com/sites/pamdanziger/2021/02/05/amazons-third-party-marketplace-is-its-cash-cow-not-aws/?sh=7ebc504621c0>.

331. Jordan Novet, *Amazon has a \$31 billion a year advertising business*, CNBC (Feb. 3, 2022), <https://www.cnbc.com/2022/02/03/amazon-has-a-31-billion-a-year-advertising-business.html>.

332. MITCHELL, KNOX & FREED, *supra* note 175.

333. *Id.*

334. Danziger, *supra* note 330.

gin from its own retail sales.<sup>335</sup> Finally, this business is essentially risk-free for Amazon. Amazon bears none of the costs of product development, sourcing, marketing, and promotion, nor is it exposed to the risk of failure. It makes money whenever a third-party seller makes a sale.

Evidence suggests that the largest beneficiary of third-party sales on Amazon is Amazon itself. Stacy Mitchell, Ron Knox and Zach Freed observe a high churn of third-party sellers on Amazon over time. In other words, most sellers do not last very long on Amazon. Two-thirds of the revenue earned by third-party sellers is attributed to those sellers which joined the site within the last three years.<sup>336</sup> Sellers that have been on the site for more than five years account for only ten percent of overall revenue.<sup>337</sup>

Amazon's offering excessively low wholesale prices and charging excessively high referral fees would constitute an exercise of buyer power in the classic sense and may trigger all the competitive effects highlighted in Part II, including the waterbed effect, quality erosion, increased concentration in the supply chain, creation of downstream market power, reduced investment incentives by upstream suppliers, and wealth transfer.

Unlike the situation of Uber drivers, where most of these effects have little salience, they are genuine concerns in Amazon's case. It is again important to distinguish between suppliers and third-party sellers. While these effects can afflict suppliers, they have little application to third-party sellers, which do not develop and manufacture products. Third-party sellers do not have direct control over the quality of the products they sell. They do not invest in product development and there can be no issue with increased concentration as these sellers are numerous and fungible and entry barriers into this market are low. The only remaining effect is wealth transfer, which is universal in every instance of exercise of buyer power. Thus, to the extent that Amazon's buyer power is more targeted at third-party sellers than the suppliers, its exercise may have fewer deleterious effects.

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335. MITCHELL, KNOX & FREED, *supra* note 175.

336. *Id.*

337. *Id.*

## 2. *Unduly Harsh Contractual Terms*

Secondly, and related to excessive pricing, is the exploitative abuse of imposing unduly harsh contractual terms. Amazon is not singularly guilty of this practice. For example, supermarkets have long been accused of the same.<sup>338</sup> These terms include a unilateral right to amend or terminate the contract without the counterparty's consent, forced arbitration, delayed payments, and other highly unfavorable terms. The imposition of such harsh contractual terms is a direct manifestation of Amazon's buyer power, the sole purpose of which is to extract the most advantage from the counterparty.

For one, Amazon may impose delayed payment terms on its suppliers. The standard payment term is reportedly ninety days.<sup>339</sup> A supplier needs to offer a half percent discount if it wishes to accelerate the payment term by fifteen days to seventy-five days, and a one percent discount for a further reduction of fifteen days to sixty days.<sup>340</sup> Suppliers need to pay for the privilege of getting paid at a reasonable time. Amazon's use of forced arbitration clauses, which makes it impossible for its suppliers and third-party sellers to band together to pursue redress against Amazon, has also faced scrutiny.<sup>341</sup> An Amazon third-party seller has specifically stated that he is prevented by this clause from bringing an antitrust claim against Amazon.<sup>342</sup> Unfortunately, the enforceability of class action waivers has been confirmed by the Supreme Court.<sup>343</sup> Unsurprisingly, Amazon has been described by Joe Hansen, a co-founder of BuyBox Experts, an Amazon account management and brand-

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338. Dobson, *supra* note 34, at 257–58; Mills, *supra* note 40, at 151–52.

339. Edward Devlin, *Amazon grocery suppliers protest new terms on Vendor Central platform*, THE GROCER (Mar. 5, 2021), <https://www.thegrocer.co.uk/finance/amazon-grocery-suppliers-protest-new-terms-on-vendor-central-platform/653897.article>.

340. *Id.*

341. Annie Palmer & Lauren Feiner, *DC attorney general goes after Amazon's first-party business in amended antitrust complaint*, CNBC (Sept. 13, 2021, 10:55 AM), <https://www.cnbc.com/2021/09/13/dc-attorney-general-targets-amazon-first-party-business-in-amended-antitrust-complaint.html>.

342. Spencer Soper, *Amazon is accused of forcing up prices for independent merchants in antitrust complaint*, L.A. TIMES (Nov. 8, 2019, 11:46 AM), <https://www.latimes.com/business/technology/story/2019-11-08/amazon-antitrust-complaint>.

343. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

ing consultant, as the “toughest negotiator” in all of retail, online and offline.<sup>344</sup>

Other contractual terms imposed by Amazon on its suppliers and third-party sellers would strike most as unduly harsh or unfair as well. In the brick-and-mortar context, slotting allowances, delayed payment, and the constant threat of delisting prevail. In addition, there are regular demands for retroactive discounts, rebates, and additional payments for “advertisements, promotions, new store openings, remodeling of stores, [and] use of packing boxes”<sup>345</sup> that were not stipulated in the original supply agreement.<sup>346</sup> Retailers are notoriously secretive about their contractual arrangement with suppliers, which are often protected by confidentiality obligations. Amazon is no exception.<sup>347</sup>

A case in the Paris Commercial Court lifted this shroud of secrecy, shedding light on Amazon’s contractual practices. The Court found these clauses unfair under French law governing unfair commercial practices and ordered Amazon to amend the offending terms within 180 days.<sup>348</sup> The offending clauses run the gamut. One clause gives Amazon the right to amend the contract and its policies at any time, at its entire discretion without consulting or giving notice to the counterparty.<sup>349</sup> Another clause gives Amazon the right to suspend or terminate the contract or stop providing service at any time for any reason and with immediate effect, so long as notice is given.<sup>350</sup> Yet another clause empowers Amazon to restrict or suspend supplier access to any of Amazon’s websites or delay or suspend its sales at its entire discretion.<sup>351</sup> Finally, another clause absolves Amazon from any liability for damage

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344. Kim, *supra* note 275.

345. VANDER STICHELE & YOUNG, *supra* note 115, at 17.

346. *Id.*

347. *Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon’s online marketplaces*, BUNDESKARTELLAMT (July 17, 2019), [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17\\_07\\_2019\\_Amazon.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html).

348. Marie-Laure Pidoux & Claire Bouchenard, *Amazon fined €4 million for breach of unfair contract terms rules*, OSBORNE CLARKE (Oct. 28, 2019), <https://marketinglaw.osborneclarke.com/general/amazon-fined-e4-million-breach-unfair-contract-terms-rules>.

349. *Id.*

350. *Id.*

351. *Id.*

caused to a supplier's good due to Amazon's mishandling in storage or delivery.<sup>352</sup>

These clauses deprive suppliers and third-party sellers of security in their relationships with Amazon and allow Amazon to sever its relationship with any supplier or third-party seller immediately and for any or no reason. This puts enormous pressure on the suppliers and the third-party sellers to yield to Amazon's demands. In the brick-and-mortar context, the suppliers' chief fear is the constant threat of immediate delisting.<sup>353</sup> Such a threat is particularly disruptive and potent if the supplier has made relation-specific investments in order to serve a certain retailer. Precisely for this reason, the United Kingdom and Australia impose certain procedural due process requirements for delisting of suppliers in the grocery market context.<sup>354</sup> The EU has adopted regulation with a similar effect.<sup>355</sup>

It is unclear whether antitrust law has any role to play in regulating unduly harsh contract terms. Imposing such terms itself does not seem exclusionary. Regulating excessively low purchase prices and the imposition of unduly harsh contractual terms would be a direct affront to pure buyer power, given the absence of competitive effects. It is truer in the case of policing contractual terms because a supplier generally does not react to harsh contractual terms by imposing harsher terms on other buyers. Unduly harsh contractual terms do not trigger the competition-distorting waterbed effect that excessively low prices sometimes do. Nor is it clear that these terms will inflict the competitive harm delineated in Part II. While some of the terms, such as retroactive discounts or rebates and additional fees and charges, are financial in nature and may produce the same financial impact on the sellers as excessively low wholesale prices, others, such as forced arbitration, do not. It is difficult to argue that these clauses lead to quality erosion or reduced investment incentives for upstream suppliers.

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352. *Id.*

353. VANDER STICHELE & YOUNG, *supra* note 115.

354. Groceries Supply Code of Practice 2009 (UK), *supra* note 299, ¶ 16 (UK); *Competition and Consumer (Industry Codes—Food and Grocery)*, *supra* note 299, at 19.

355. Commission Regulation 2019/1150, of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service, art. 4, 2019 O.J. (L 186) 58.

Perhaps because of this lack of competitive effect, most jurisdictions have chosen to regulate unduly harsh contractual terms through other laws. As mentioned earlier, the United Kingdom and Australia have resorted to sector-specific codes of conduct.<sup>356</sup> In addition, laws govern unfair contract terms that specifically apply to small businesses and unconscionable business conduct in Australia.<sup>357</sup> France has applicable laws as well, as illustrated in the Paris Commercial Court case referenced in this Part. Lastly, the EU has adopted Regulation 2019/1150 that endeavors to promote fairness and transparency for businesses users on online platforms.<sup>358</sup> The Regulation requires an online intermediary to provide a specific period of notice and an opportunity to appeal through an internal complaint-handling process before terminating a supplier.<sup>359</sup> It also requires an online intermediary to provide reasons before restricting or suspending a supplier's access to the platform.<sup>360</sup> While the specific details may vary, most of these laws, regulations, and codes of conduct focus on similar issues.

### 3. *MFN Clause/Fair Pricing Policy*

Thirdly, suppliers may respond to the low wholesale prices required by a powerful buyer by raising prices on other buyers, triggering the waterbed effect. Because of the different ways in which third-party sellers interact with Amazon, these sellers do not raise prices on other buyers. Instead, they may lower their prices on other platforms.<sup>361</sup> This is the opposite of the waterbed effect. As opposed to harming other buyers, the third-party sellers' response, in this instance, disadvantages Amazon and enhances competition. Amazon tries to forestall

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356. Groceries Supply Code of Practice 2009 (UK), *supra* note 298, ¶ 16; *Competition and Consumer (Industry Codes—Food and Grocery)* (Austl.), *supra* note 299, at 19.

357. Competition and Consumer Act 2010 (Cth) sch 2 (Austl.).

358. Commission Regulation 2019/1150, of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation service, art. 4, 2019 O.J. (L 186) 58.

359. *Id.*

360. *Id.*

361. *Germany and United Kingdom: Antitrust Cases against Amazon formally closed*, EUROPEAN COMMISSION NETWORK (May 2013), [https://ec.europa.eu/competition/ecn/brief/05\\_2013/amaz\\_deuk.pdf](https://ec.europa.eu/competition/ecn/brief/05_2013/amaz_deuk.pdf).

this by imposing a price parity provision, under which sellers are not allowed to sell their products significantly more cheaply elsewhere.<sup>362</sup> This policy was officially rescinded, first in the EU in 2013 after the authorities in the United Kingdom and Germany launched an investigation into such policy<sup>363</sup> and then in the United States in 2019 when the FTC threatened to do the same.<sup>364</sup> Amazon has adopted something more subtle, the Fair Pricing Policy.

Under the Fair Pricing Policy, instead of an outright prohibition, a third-party seller will suffer a plethora of negative consequences if Amazon detects lower prices of a seller's products elsewhere. These include demotion in the search results, removal of the Prime badge, and forfeiture of the all-important "Buy Now/Add to Cart" button on its product page.<sup>365</sup> In the extreme case, the seller can be ejected from the platform completely.<sup>366</sup> The "Buy Now/Add to Cart" button is critical to a third-party seller's profitability and survival. Reportedly, eighty-two percent of Amazon's sales and an even higher percentage of mobile purchases are made through this "buy box."<sup>367</sup> Although it is still possible to make sales without the box, the alternative process is cumbersome enough to put off most consumers.<sup>368</sup> Third-party sellers argue that the Fair Pricing Policy is equivalent in effect to the rescinded price parity provision.<sup>369</sup>

Amazon has defended this Policy by arguing that the third-party sellers have the right to set prices for their products and that Amazon should have the right to *not* highlight products that are not priced competitively.<sup>370</sup> They further argue that the Policy helps to ensure that consumers will obtain the

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362. Bloodstein, *supra* note 204, at 209–10.

363. *Amazon to alter pricing policy for traders*, BBC (Aug. 29, 2013), <https://www.bbc.com/news/business-23881202>.

364. Hirsh Chitkara, *Amazon may face antitrust court battle over fair pricing*, PROTOCOL (Mar. 15, 2022), <https://www.protocol.com/bulletins/amazon-pricing-antitrust>.

365. Edelman, *supra* note 293.

366. Chitkara, *supra* note 364.

367. Eyal Lanxner, *The Amazon Buy Box: How It Works for Sellers, and Why It's So Important*, BIGCOMMERCE, <https://www.bigcommerce.com/blog/win-amazon-buy-box/#what-is-the-amazon-buy-box> (last visited Apr. 6, 2022).

368. *Id.*

369. Edelman, *supra* note 293.

370. Palmer & Feiner, *supra* note 341.



lowest prices possible on Amazon.<sup>371</sup> While this may be true, Amazon achieves this not by driving down the prices on its website, but by preventing price cuts on other platforms, which is hardly pro-competitive.

The exclusionary potential of Amazon's policy is clear. While it ensures that Amazon always offers the lowest prices, it eliminates the incentives of third-party sellers to reduce prices elsewhere. This also eliminates the incentives of other platforms to lower commission fees because doing so would not translate into lower product prices.<sup>372</sup> Given Amazon's prominence in e-commerce, other websites or new entrants will almost certainly have to undercut Amazon to attract sellers and customers. The policy has effectively foreclosed this avenue for potential new entrants and competitors. A former third-party seller on Amazon declares that "[b]ecause of its size and strength, and because sellers can't keep their prices low on their own channels, Amazon is literally inflating the entire on-line economy".<sup>373</sup>

The Fair Pricing Policy constitutes an MFN clause or, as according to Pinar Akman, a price matching guarantee.<sup>374</sup> The critical difference between these two is that MFN clauses allow a buyer to protect itself by making sure that it receives the cheapest price from a seller.<sup>375</sup> In the supply context, a retailer would usually demand an MFN clause to extract a favorable wholesale price. The impact of such clauses on consumers is indirect. In contrast, a price matching guarantee ensures price parity among sellers. It protects a seller's interest by guaranteeing that no one else can or will offer a lower price.<sup>376</sup> It usually arises in the context of consignment sales or through an agency model, where the price-setting power ultimately lies with the supplier and not the retailer.<sup>377</sup> This is true in Ama-

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371. Mike Leonard, *Amazon Loses Antitrust Ruling in Consumer 'Fair Pricing' Case*, BLOOMBERG LAW (Mar. 15, 2022, 12:39 PM), <https://news.bloomberglaw.com/antitrust/amazon-loses-antitrust-ruling-in-consumer-fair-pricing-case>.

372. Edelman, *supra* note 293.

373. *Id.*

374. Akman, *supra* note 320, at 786.

375. *Id.* at 781–82.

376. *Id.* at 789.

377. *How to create a listing on Booking.com*, HOSTHUB (Aug. 10, 2021), <https://www.hosthub.com/guides/how-to-create-a-listing-on-booking-com/>;

zon's case and a slew of cases in Europe involving hotel booking websites.<sup>378</sup> The impact of such guarantees on consumers is direct. The clauses practically ensure alignment of prices across all platforms and sales channels and remove all incentives for competing platforms to reduce their commission or fees, as any reduction will have no impact on the final price. Strictly speaking, MFN clauses are not a typical buyer power abuse. They are, however, very often imposed by a powerful buyer or platform eager to shield itself from price competition.

The Fair Pricing Policy has already attracted antitrust scrutiny and was implicated in two lawsuits. In one suit brought in a state court, Judge Hiram Puig-Lugo of the Superior Court of the District of Columbia granted Amazon's motion to dismiss a complaint brought by the Washington D.C. Attorney General.<sup>379</sup> Meanwhile, Judge Richard Jones of the U.S. District Court for the Western District of Washington allowed a proposed class action brought by consumers over this policy to go forward.<sup>380</sup> Judge Jones distinguished Amazon's policy from similar fair pricing agreements that have been upheld by other courts in the past on the ground that it requires third-party sellers to raise the price of products sold on cheaper alternative platforms.<sup>381</sup>

A policy similar to the Fair Pricing Policy, but which applies to Amazon's suppliers or first-party sellers, is called the "Minimum Margin Agreement,"<sup>382</sup> under which a supplier guarantees Amazon a minimum profit or is obliged to account for the shortfall with the delivery of additional products.<sup>383</sup> It has been alleged that this policy has the same effect as the Fair Pricing Policy by eliminating the suppliers' incentives to allow their goods to be sold at a lower price elsewhere.<sup>384</sup> Doing so

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*How to List on Expedia — Step-by-Step Guide*, HOSTAWAY, <https://www.hostaway.com/how-to-list-on-expedia-step-by-step-guide/>.

378. Akman, *supra* note 320, at 796–97, 800–03.

379. Rhea Binoy, *U.S. court dismisses D.C. antitrust lawsuit against Amazon*, REUTERS (Mar. 21, 2022, 6:12 AM), <https://www.reuters.com/business/retail-consumer/us-court-dismisses-dc-antitrust-lawsuit-against-amazon-2022-03-19/>.

380. Leonard, *supra* note 371.

381. *Id.*

382. Palmer & Feiner, *supra* note 341.

383. Nelson, *supra* note 292.

384. Palmer & Feiner, *supra* note 341.

would cause Amazon to cut its prices, which would lower Amazon's margin and force the supplier to make up the shortfall. Suppliers can forestall price cutting on other platforms by raising their wholesale prices. The "Minimum Margin Agreement" effectively gives suppliers a contractual incentive to set in motion the waterbed effect. This practice was also covered by the suit brought by the Washington D.C. Attorney General.<sup>385</sup>

#### 4. *Tying*

The fourth category of potential abuse is tying. Tying refers to Amazon's coercing or cajoling its third-party sellers to purchase advertising and logistical services from it. The obvious anticompetitive concern here is Amazon leveraging its market power in e-commerce into related markets such as logistics and online advertising.

Numerous reports describe Amazon's tactic of making it highly advantageous for sellers to buy advertisements and use FBA, which has allowed FBA to grow rapidly in recent years. Amazon, reportedly, delivers half of the items ordered on its site, up from fifteen percent two years prior, and has surpassed the U.S. Postal Service in the market for large e-commerce parcel.<sup>386</sup> It delivered one-fifth of all e-commerce deliveries in 2019 and is expected to surpass UPS and Fedex in 2022.<sup>387</sup> This is hardly surprising given that eighty-five percent of the top 10,000 sellers on Amazon rely on Prime shipping, which is delivered by FBA.<sup>388</sup> Given Amazon's market share in online retail overall, this surely represents a very high volume of parcels.

FBA was introduced in 2006. Though few sellers signed up for it initially. Many of them preferred to use alternative warehouse operators and parcel carriers.<sup>389</sup> By now, FBA has become highly successful, reportedly accounting for half of Amazon's revenue from third-party sellers.<sup>390</sup> Amazon achieved this not by offering a superior service at a lower price; FBA often charges higher rates than its competitors.<sup>391</sup>

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385. *Id.*

386. MITCHELL, KNOX & FREED, *supra* note 175.

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

Amazon predictably denied the allegation, arguing that comparable logistics options are often fifty to eighty percent more expensive.<sup>392</sup> This, however, is contradicted by a third-party seller, who indicated that FBA fees increased by twenty percent between 2015 and 2019 and were thirty-five percent more expensive than comparable services.<sup>393</sup> Amazon grew FBA by using heavy-handed tactics to push its third-party sellers to use it. Amazon has allegedly embedded a preference for FBA users in its algorithm that allocates the all-important “Buy Box,” which essentially amounts to a default seller designation for a particular product, among the sellers.<sup>394</sup> The European Commission is investigating Amazon for this practice.<sup>395</sup> Amazon has denied this allegation, retorting that the more favorable rankings for products using FBA are not the result of bias but a reflection of FBA’s reliability.<sup>396</sup> This denial is contradicted by the decision of the Italian Competition Authority, which fined Amazon almost \$1.3 billion for favoring users of FBA on its website.<sup>397</sup> In its decision, the Italian authority required Amazon to give third-party sellers who do not use FBA the same sales and visibility opportunities.<sup>398</sup>

Amazon has also strategically curtailed the Seller Fulfilled Prime (“SFP”) program. Under this program, a seller can earn the Prime badge if it can meet the two-day shipping commitment offered to Prime members using outside parcel delivery services.<sup>399</sup> The Prime badge is very important because shipping is free for Prime members and Prime products receive preferential treatment in the allocation of the “Buy Box.”<sup>400</sup> Starting in late-2019, Amazon began pressuring sellers to switch to FBA by making it increasingly difficult to stay within SFP. It threatened to revoke the Prime badge for minor fail-

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392. Soper, *supra* note 342.

393. *Id.*

394. MITCHELL, KNOX & FREED, *supra* note 175.

395. Alina Selyukh, *Amazon Faces Antitrust Charges From European Regulators*, NPR (Nov. 10, 2020, 8:56 AM), <https://www.npr.org/2020/11/10/879643610/amazon-faces-antitrust-charges-from-european-regulators>.

396. Victor Malachard, *5 things you need to know about the Amazon antitrust probe*, NOZZLE (Feb. 9, 2022), <https://insights.nozzle.ai/amazon-antitrust-probe>.

397. Satariano, *supra* note 8.

398. *Id.*

399. MITCHELL, KNOX & FREED, *supra* note 175.

400. Morrison, *supra* note 271.

ures.<sup>401</sup> It imposed a more onerous on-time delivery rate of 98.5 percent on SFP sellers as compared to the 83.4 percent mark that Amazon's own FBA achieves.<sup>402</sup> Failure to achieve this rate would result in the forfeiture of the Prime status.<sup>403</sup> Finally, during the holiday season in 2019, it categorically required its sellers to use FBA.<sup>404</sup>

Perhaps the most sinister aspect of Amazon's conduct regarding FBA is that Amazon charges a much higher rate for products ordered from other platforms.<sup>405</sup> For many small sellers, it is simply not cost-effective to maintain multiple warehousing and delivery capacities. Such is especially the case when some sellers reportedly generate at least eighty-one percent of their revenue from Amazon.<sup>406</sup> Given that sellers are practically required to use FBA in order to sell on Amazon, one can imagine that most of them rely on FBA to fulfill their entire logistics needs. Amazon, however, charges a much higher rate for delivering a product ordered on other sites such as eBay. It reportedly charges sixty-six percent more for delivering a shirt or a book ordered from eBay as opposed to its own website.<sup>407</sup> This has the predictable impact of pushing customers to Amazon. eBay loses customers not due to its inefficiency, but due to its lack of logistics service. This aspect of Amazon's conduct is clearly exclusionary, and the applicable theory of harm is not premised on leveraging. Rather it is an instance of Amazon resorting to tying to protect its own market power in the primary market.

Amazon's attempt to leverage its position in online retail to other lines of business is not limited to logistics. It has replicated the same strategy in advertising.<sup>408</sup> Most of its advertisements are sponsored brand and product advertisements interspersed in its organic search results.<sup>409</sup> Amazon began its digital advertising business in 2012, but only began to focus on it

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401. MITCHELL, KNOX, & FREED, *supra* note 175.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. Chitkara, *supra* note 364.

407. MITCHELL, KNOX, & FREED, *supra* note 175.

408. Morrison, *supra* note 271.

409. MITCHELL, KNOX, & FREED, *supra* note 175.

in recent years.<sup>410</sup> It has increased the amount of resources devoted to advertisements and reduced that dedicated to search results.<sup>411</sup> As a result, an increasing proportion of product page views come through ad clicks.<sup>412</sup> Sellers are under enormous pressure to advertise because failure to do so may cost them favorable rankings in the search results.<sup>413</sup> Amazon's algorithms create a positive feedback loop for advertised products; the algorithms rank products with greater sales higher.<sup>414</sup> Once a seller advertises a product, which brings in some initial sales, Amazon's algorithms rank it higher, which gets the product more customer attention, which begets more sales, so on and so forth. In fact, it has been reported that Amazon required a third-party seller to spend \$1.8 million on advertising before it would address the seller's counterfeit problem.<sup>415</sup> Amazon has predictably denied the allegation.<sup>416</sup>

Amazon has gone one step further and pursued the strategy of tying FBA and advertising together with its coveted "Buy Box." In order to advertise a product, a seller must have secured a "Buy Box" for it, which, in turn, is partly dependent on the seller using FBA.<sup>417</sup> Amazon secures customers for FBA by taking advantage of sellers' desire to advertise their products to jumpstart the positive feedback loop, which ties sellers more tightly to Amazon by making sales through other platforms more costly. Sellers become increasingly reliant on Amazon, which makes them more susceptible to its bargaining power and exploitation.

The correct characterization of this conduct depends on the counterparty at issue. If these requests were made to a supplier, they would constitute reciprocal dealing because Ama-

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410. *A Short History Of Amazon Advertising Part 1: 2012 – 2016*, PODEAN, <https://www.podean.com/a-short-history-of-amazon-advertising-part-1-2012-2016> (last visited Apr. 7, 2022).

411. MITCHELL, KNOX & FREED, *supra* note 175.

412. *Id.*

413. MORTISON, *supra* note 271.

414. MITCHELL, KNOX & FREED, *supra* note 175.

415. Molly Wood, *Amazon hasn't had much antitrust scrutiny compared to other tech giants. That may be about to change.*, MARKETPLACE (Apr. 21, 2021), <https://www.marketplace.org/shows/marketplace-tech/amazon-hasnt-had-much-antitrust-scrutiny-compared-to-other-tech-giants-that-may-be-about-to-change>.

416. *Id.*

417. MITCHELL, KNOX & FREED, *supra* note 175.

zon is essentially conditioning its purchase from a supplier on the supplier's purchases of advertising and logistical services. In the case of a third-party seller, the conduct amounts to tying because Amazon ties the sale of its Marketplace platform services with its advertising and FBA. Given that much of the conduct seems to be targeted at third-party sellers—a supplier's products are delivered by Amazon by default—the ensuing analysis will treat Amazon's conduct as tying.

Whether Amazon's conduct amounts to tying depends on whether the pressure it exerts on suppliers to use FBA amounts to coercion under tying law. Flat-out compulsion would certainly constitute coercion. The case is not as clear for Amazon's other tactics involving the "Buy Box" and the Prime badge. Amazon's FBA practice has apparently not drawn the attention of U.S. antitrust enforcers apart from an FTC investigation into Amazon's treatment of third-party sellers, the scope of which has not been made public and may cover these practices.<sup>418</sup> It has, however, attracted the scrutiny of the European Commission. On November 10, 2020, the European Commission announced an investigation into Amazon's conduct of pressuring sellers to use FBA through its manipulation of the "Buy Box" algorithm and its control over access to Prime users.<sup>419</sup> An EU investigation into Amazon's practice is arguably facilitated by the developing EU jurisprudence on self-preferencing emanating from its case against Google.<sup>420</sup> Coercion is not needed to establish self-preferencing.<sup>421</sup> The only penalty decision for Amazon's tying practices this Author is aware of is the Italian Competition Authority's decision mentioned in the Introduction.<sup>422</sup>

In the United States, where the jurisprudence on self-preferencing is yet to develop and may never take hold—as the FTC's abandoned investigation into Google's self-preferencing suggests—the coercion requirement under tying law may require reconsideration, at least as applied to digital plat-

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418. Annie Palmer, *What the EU's investigation of Amazon means for U.S. anti-trust probes*, CNBC (Nov. 11, 2020), <https://www.cnbc.com/2020/11/11/eu-investigates-amazon-what-it-means-for-us-antitrust-probes.html>.

419. Eur. Comm'n, *supra* note 7.

420. Case T-612/17, *Google LLC v. Comm'n*, ECLI:EU:T:2021:763 (Nov. 10, 2021).

421. *Id.* at ¶¶ 513, 51843.

422. Satariano, *supra* note 8.

forms. In the context of a single discrete transaction between a seller and a buyer, the only way to force the buyer to take both the tying and the tied products may be through outright coercion by bundling both products. When the transaction is between a digital platform and its suppliers and third-party sellers, and perhaps even customers, the multi-faceted interaction with these parties affords the platform numerous pressure points. None of the individual tactics, on their own, would amount to coercion. For example, it will be explained in the following Part that sellers that do not use FBA are more likely to face competition from Amazon's private label products, which does not exhibit sufficient compulsion to qualify as coercion. Given the multitude of levers at Amazon's disposal and the high degree of seller dependence on Amazon, which already renders the sellers more susceptible to pressure, Amazon can force suppliers and third-party sellers to succumb without resorting to outright coercion as understood in tying law. The pressure on the counterparty, however, is no less real.

In short, in the context of digital platforms, coercion must be assessed holistically. Individual tactics cannot be viewed in isolation. It is only by adopting a more flexible understanding of coercion that tying law can have meaningful and effective application to digital platforms. Amazon is not the only digital platform that raises this issue. Google, among other platforms, also shines a spotlight on the definition of coercion under tying law through its self-preferencing practices.

##### 5. *Unfair Competition with Third-Party Sellers*

The fifth category of abuse pertains to Amazon's competitive interaction with its third-party sellers, in particular, through the introduction of its own private label products. Amazon is not the only purveyor of private label products. As previously mentioned, some third-party sellers source their own private-label products directly from manufacturers and sell them on Amazon as well.<sup>423</sup> The dynamics and significance are entirely different, however, when Amazon introduces its private label-products to compete with its sellers. While much of this conduct amounts to unfair competition or unfair trade practices in some jurisdictions, it is probably legal in the United States.

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<sup>423</sup> See Part IV.A.



It is financially beneficial for a retailer to develop private label products. A retailer achieves a higher margin from private label products as compared to branded products.<sup>424</sup> A portion of branded product profits go to the manufacturer as brand premium. There is no brand premium for a private label product; most of the profit goes to the retailer. Suppliers earn much less from these products because their role in supply is largely fungible.<sup>425</sup> Furthermore, private label products greatly increase the retailer's bargaining power vis-à-vis a supplier. The existence of private label products increases the outside-option payoff for retailers in their negotiation with suppliers, allowing them to drive harder bargains.<sup>426</sup>

In the brick-and-mortar context, the retailer has many ways to promote its own private label products over branded products. It can give its own products more advantageous shelf space.<sup>427</sup> It can leverage sales data and other information, such as information regarding promotional campaigns of branded products, for the benefit of its own products.<sup>428</sup> Finally, because the retailer ultimately controls the pricing of the products it sells, it can always structure the pricing to give its own products an edge.<sup>429</sup>

The promotion of private label products may appear beyond reproach. After all, antitrust law seldom penalizes a firm for introducing a new product into the market. Courts are loathe to second guess a firm's decision to introduce new products.<sup>430</sup> A range of competitive harm, however, has been attributed to private label products. It has been said that their proliferation reduces product variety.<sup>431</sup> In the extreme case, lesser branded suppliers may be eliminated from the market, leaving only one branded supplier and private label products

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424. Ezrachi, *supra* note 31, at 261.

425. Grimes, *supra* note 23, at 578.

426. Ronald W. Cotterill, *Antitrust Analysis of Supermarkets: Global Concerns Playing Out in Local Markets*, 50 *AUSTL. J. AGRIC. RES. ECON.* 17, 24 (2006).

427. VANDER STICHELE & YOUNG, *supra* note 115, at 26.

428. William H. Borghesani, Jr., Peter L. de la Cruz & David B. Berry, *Food for Thought: The Emergence of Power Buyers and its Challenge to Competition Analysis*, 4 *STAN. J.L. BUS. & FIN.* 39 (1999).

429. Ezrachi, *supra* note 31, at 259.

430. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

431. VANDER STICHELE & YOUNG, *supra* note 115, at 29.

in the market.<sup>432</sup> It has also been said that their proliferation renders price comparison between retailers more difficult as there are fewer common products sold by different retailers.<sup>433</sup> Lastly, aggressive promotion of these products may deter product innovation. Suppliers will have scant incentives to engage in product development if they know that their profit will be quickly eroded by copycat private label products.<sup>434</sup> These competitive harms, however, have yet to be recognized by US antitrust law.

There have been reported instances of Amazon copying a supplier's product and offering it as a private label product. According to the U.S. House Antitrust Subcommittee, a third-party seller reported that he was forced to close down his business after Amazon copied his products "down to the color palette" and effectively killed his products by taking away the "Buy Box" and undercutting him on price.<sup>435</sup> Aside from style piracy, Amazon has attempted to tilt competition with its own third-party sellers in its favor in other ways. Amazon has been accused of misusing sales data from these sellers to aid in the sale of its private label products.<sup>436</sup> Amazon initially denied these accusations in sworn testimony to the U.S. Congress, pointing to a company internal policy against such misuse.<sup>437</sup> Amazon, however, launched an internal probe after the veracity of the testimony was challenged by the Wall Street Journal.<sup>438</sup>

The European Commission finds that "very large quantities of non-public seller data are available to employees of Amazon's retail business and flow directly into the automated systems of that business, which aggregate these data and use them to calibrate Amazon's retail offers and strategic business decisions to the detriment of the other marketplace sellers."<sup>439</sup> A similar charge has been leveled at supermarkets in the

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432. Borghesani, Jr., de la Cruz & Berry, *supra* note 428, at 43; Ezrachi, *supra* note 31, at 261.

433. VANDER STICHELE & YOUNG, *supra* note 115, at 29.

434. Ezrachi, *supra* note 31, at 260.

435. Palmer, *supra* note 418.

436. Cecilia Rikap, *Amazon: A Story of Accumulation through Intellectual Rentiership and Predation*, 26 COMPETITION & CHANGE 436, 448-49 (2020).

437. Sonnemaker, *supra* note 7.

438. *Id.*

439. Eur. Comm'n, *supra* note 7.

past.<sup>440</sup> Amazon, however, can do more by steering customers to its own products through its algorithms.<sup>441</sup> One recent study found that Amazon manipulates its search results to favor its own products<sup>442</sup> and senior executives are informed about it.<sup>443</sup> Again, Amazon has denied this allegation.<sup>444</sup> This resembles a supermarket giving its private label products more prominent shelf space, only that Amazon's practice is even more effective.

The best illustration of Amazon's heavy-handed tactics to compete with its third-party sellers can be found in India, one of Amazon's priority markets and where the company struggled to make inroads.<sup>445</sup> Amazon's internal documents illustrate "how Amazon's private-brands team in India secretly exploited internal data from Amazon.in to copy products sold by other companies, and then offered them on its platform."<sup>446</sup> As part of this strategy, Amazon created the Solimo brand.<sup>447</sup> In this instance, not only did Amazon copy the design, it even "planned to partner with the manufacturers of the products targeted for copying" after learning that these manufacturers used a unique process that enhanced the product's quality.<sup>448</sup> Separately, Amazon copied the exact measurements of a competitor's shirts after discovering that its customers strongly preferred its competitor's cutting.<sup>449</sup> Amazon used a technique called "search seeding" to boost the rankings of Solimo products in its search results.<sup>450</sup> It also made use of internal sales data of competing brands on its website to advantage its own

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440. VANDER STICHELE & YOUNG, *supra* note 115.

441. MITCHELL, KNOX & FREED, *supra* note 175.

442. Jon Swartz, *Amazon has mostly avoided antitrust scrutiny, but that may change in 2022*, MARKETWATCH (Jan. 1, 2022), <https://www.marketwatch.com/story/amazon-has-mostly-avoided-antitrust-scrutiny-but-that-may-change-in-2022-11640641305>.

443. Kalra & Stecklow, *supra* note 185.

444. Morrison, *supra* note 271.

445. Manish Singh, *Forget winning, can Amazon survive in India?*, TECHCRUNCH+ (Jan. 26, 2021), <https://techcrunch.com/2021/01/25/india-plays-hardball-with-amazon>.

446. Kalra & Stecklow, *supra* note 185.

447. Reiley Pankratz, *Duty to Disclose: Amazon's E-Commerce Platform, Private-Label, and the Need for Disclosure*, 30 KAN. J.L. & PUB. POL'Y 162, 162 (2020).

448. Kalra & Stecklow, *supra* note 185.

449. *Id.*

450. *Id.*

products.<sup>451</sup> In fact, its own employees have accused Amazon of using proprietary data from third-party sellers to gain a competitive edge, despite the company's protestations to the contrary.<sup>452</sup>

Amazon's design piracy is not confined to its own third-party sellers. It extends to its competitors, especially those that refuse to abide by Amazon's wishes. Williams-Sonoma, a furniture and home design retailer, sued Amazon for copying the design of its chairs, lamps, and other products for an Amazon private label brand called Rivet.<sup>453</sup> Allbirds, a sustainable footwear and apparel brand, accused Amazon of copying the design of its wool shoe and producing it with cheaper material after Allbirds refused to sell its products on Amazon.<sup>454</sup> When Quidsi, the baby care online retailer, refused Amazon's overtures to acquire it, Amazon copied Quidsi's products and sold them at a lower price, eventually bankrupting Quidsi and forcing it to sell up.<sup>455</sup>

Feng Zhu and Qihong Liu conducted a robust empirical study of Amazon's private label strategy. Their study covered fifty-eight million products in four categories.<sup>456</sup> They found that Amazon introduced private label products against three percent of the products in these four categories over a ten-month period,<sup>457</sup> a significant percentage over such a short period of time. This comports with the observations of the third-party sellers themselves, half of which reported that Amazon sold competitive products.<sup>458</sup> In fact, evidence suggests that competition with Amazon is viewed by many sellers as inevitable.<sup>459</sup> Zhu and Liu further found that Amazon "is more

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451. *Id.*

452. *Id.*

453. Taylor Telford, *Williams-Sonoma sues Amazon over knockoffs and "strikingly similar" products*, WASH. POST (Dec. 19, 2018), <https://www.washingtonpost.com/business/2018/12/19/williams-sonoma-sues-amazon-over-knockoffs-strikingly-similar-products/>.

454. Elizabeth Segran, *Allbirds to Amazon: Don't steal our design, steal our sustainable practices*, FAST CO. (Sep. 23, 2019), <https://www.fastcompany.com/90407744/allbirds-to-amazon-dont-steal-our-design-steal-our-sustainable-practices>.

455. Rikap, *supra* note 436, at 449.

456. Zhu & Liu, *supra* note 183, at 2626.

457. *Id.* at 2620.

458. Rosenblatt, *supra* note 266.

459. *Id.*

likely to enter the spaces of products with higher sales and better reviews and that do not use Amazon's fulfillment service"<sup>460</sup>, and "that Amazon is less likely to enter product spaces that require greater seller effort to grow."<sup>461</sup> As previously noted, Amazon also pressures third-party sellers to use FBA.<sup>462</sup> Zhu and Liu concluded that Amazon's entry into a product space discourages a seller from pursuing further growth on the platform<sup>463</sup> and that Amazon's entry does not increase consumer satisfaction with the products.<sup>464</sup>

Available recourse against Amazon's unfair competitive practices seems limited. Its myriad competitive harm notwithstanding, challenging private label products under existing antitrust law is unlikely to succeed. It would be difficult to convince a court on either side of the Atlantic that it is anticompetitive to introduce a new product, albeit a copycat one, into the market. Meanwhile, design copying can be challenged under intellectual property law. Regulating the misuse of proprietary data, at least on the other side of the Atlantic in Europe, appears to have traction. Amazon's misuse of third-party seller data to favor itself is currently the subject of an investigation by the European Commission.<sup>465</sup> Further, a bipartisan group of lawmakers in the U.S. House of Representative has proposed legislation seeking to address this "unfair" competition between Amazon and its third-party sellers.<sup>466</sup> Using an algorithm to favor its own products constitutes self-preferencing, which the General Court affirmed as an infringement of Article 102 of the Treaty on the Functioning of the European Union.<sup>467</sup> Nonetheless, such practice is likely legal under U.S. antitrust law, especially when the conduct cannot be analogized to tying.

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460. Zhu & Liu, *supra* note 183, at 2620.

461. *Id.*

462. *See supra* Part V.C.4.

463. Zhu & Liu, *supra* note 183, at 2634.

464. *Id.* at 2632.

465. Eur. Comm'n, *supra* note 7.

466. Duffy, *supra* note 272.

467. Case T-612/17, Google LLC v. Comm'n, ECLI:EU:T:2021:763, ¶ 70 (Nov. 10, 2021).

## 6. *Coerced Investment*

The last category of abuse is less common but perhaps the most surprising and indicative of Amazon's overwhelming buyer power. Amazon has reportedly demanded an equity stake of up to twenty percent from its suppliers. Amazon has entered into a dozen deals with publicly traded companies for the right to buy their shares at below-market prices.<sup>468</sup> In addition, Amazon has entered into more than seventy-five deals for equity stakes in privately held companies over the last decade.<sup>469</sup> Amazon apparently has been making such demands for a decade but has stepped up the practice.<sup>470</sup> In its March 2021 quarterly report, Amazon reported its stock warrants at \$2.8 billion.<sup>471</sup>

These deals are often contingent on the amount of business given by Amazon to the supplier. For example, its deal with Startek Inc., a Colorado-based call center company, stipulates that Amazon will receive the right to acquire 19.9 percent of the company's shares if its business with Startek reaches \$600 million before January 23, 2026.<sup>472</sup> The business target in its deal with SpartanNash, a Michigan-based groceries supplier that supplies the Amazon Fresh arm, was \$8 billion worth of groceries in seven years.<sup>473</sup> The various actual and potential equity stakes in these companies amount to billions of dollars.<sup>474</sup>

Amazon has focused on a number of business types, ranging from natural gas to call centers. The targets include SpartanNash, Startek, Clean Energy Fuels Corp., a natural gas supplier to Amazon,<sup>475</sup> and Air Transport Services Group and Atlas Air Worldwide Holdings, which lease aircraft to FBA.<sup>476</sup>

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468. Mattioli, *supra* note 12.

469. *Id.*

470. *Id.*

471. Amazon.com, Inc., Quarterly Report (Form 10-Q) (Apr. 30, 2021).

472. StarTek, Inc., Current Report (Form 8-K) (Jan. 24, 2018).

473. SpartanNash Co., Warrant to Purchase Common Stock (Exhibit 10.2) (Oct. 7, 2020).

474. Mattioli, *supra* note 12.

475. Bus. Wire, *Clean Energy Signs Agreement with Amazon for Low and Negative Carbon RNG*, BLOOMBERG (Apr. 19, 2021, 6:00 AM), <https://www.bloomberg.com/press-releases/2021-04-19/clean-energy-signs-agreement-with-amazon-for-low-and-negative-carbon-rng>.

476. Mattioli, *supra* note 12; *Atlas Air Worldwide Announces Agreement With Amazon To Provide Air Transport Service*, <https://www.atlasairworldwide.com/>

The investments are significant. Some deals turn Amazon into the company's largest shareholder.<sup>477</sup> Other deals give Amazon the right to nominate a director to the board.<sup>478</sup> Finally, other deals give Amazon the right of first refusal in the event the applicable company receives an acquisition offer.<sup>479</sup>

Executives at these companies acquiesced to Amazon's demand because "they felt they couldn't refuse Amazon's push for the right to buy the stock without risking a major contract."<sup>480</sup> An Atlas executive noted that "[t]here was definitely a sense that if it wasn't agreed to there wouldn't be a deal".<sup>481</sup> Even Amazon's own executives acknowledged that these deals were "unfair and one-sided", noting the suppliers' lack of choice and "that most of the upside went to Amazon."<sup>482</sup> Amazon's apparent rationale is that a supply relationship with Amazon can prove lucrative and provide a significant boost to the company's share prices, and Amazon should be entitled to a share of the upside.<sup>483</sup> Amazon was often right. Atlas' share price increased by twenty-seven percent the day its deal with Amazon was announced.<sup>484</sup> The corresponding jump for SpartanNash's shares was twenty-six percent.<sup>485</sup> Amazon does not seem interested in direct control over its suppliers. It apparently never exercised its right to nominate a director to At-

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2016/05/atlas-air-worldwide-announces-agreement-amazon-provide-air-transport-service/ (last visited Apr. 14, 2022).

477. Mattioli, *supra* note 12.

478. Matt Day, *Amazon Spends \$131 Million for Stake in Cargo Airline ATSG*, BLOOMBERG (Mar. 8, 2021, 12:29 PM), <https://www.bloomberg.com/news/articles/2021-03-08/amazon-spends-131-million-for-stake-in-cargo-airline-atsg>.

479. Chandini Monnappa, *Amazon moves against Future Group over Reliance deal*, REUTERS (Oct. 7, 2020, 11:43 AM), <https://www.reuters.com/article/india-reliance-amazon-com-idINKBN26S2MJ>.

480. Mattioli, *supra* note 12.

481. *Id.*

482. *Id.*

483. *Id.*

484. Fred Imbert, *Atlas Air shares fly high on Amazon deal announcement*, CNBC (May 5, 2016, 5:21 PM), <https://www.cnbc.com/2016/05/05/atlas-air-shares-fly-high-on-amazon-deal-announcement.html>.

485. Zacks Equity Rsch., *SpartanNash Deepens Ties With Amazon, Issues Stock Warrant*, NASDAQ (Oct. 12, 2020, 10:08 AM), <https://www.nasdaq.com/articles/spartannash-deepens-ties-with-amazon-issues-stock-warrant-2020-10-12>.

las' board and when Amazon exercised its warrants for nine percent of Atlas' shares, it quickly sold them.<sup>486</sup>

As far as this Author is aware, this kind of conduct has no current label under antitrust law. It can perhaps be called coerced investment. While heavy-handed, perhaps shockingly so, coerced investment is unlikely to exert competitive harm or distort competition in a meaningful way, unless Amazon uses its equity stakes to cause its suppliers to withhold supply to rival platforms. Such exclusionary uses of Amazon's equity stakes in suppliers has not been reported to date. There is hence no valid grounds for antitrust intervention. Similar to excessive pricing and imposition of unduly harsh contractual terms, this type of conduct seems to be purely exploitative in nature in that its only impact is a wealth transfer from the seller to the buyer. In the case of excessive pricing, wealth is transferred to the buyer through artificial suppression of the purchase price, lowering the seller's profit from the sale. In the case of coerced investment, wealth is transferred from the seller's shareholders to the buyer through share dilution. The impact on the seller is arguably less direct in the case of coerced investment, but no less tangible.

## V.

### POSSIBLE POLICY RESPONSES

Of the six categories of buyer power abuses allegedly committed by Amazon—excessively low purchase prices, unduly harsh contractual terms, MFN clauses, tying, unfair competition with third-party sellers, and coerced investment—two of them, MFN clauses and tying, can be readily addressed under existing antitrust law as exclusionary practices. Plaintiffs of course are not certain to prevail, but they at least have a valid cause of action under antitrust law. Further consideration is required for excessively low purchase prices, unduly harsh contractual terms, unfair competition with third-party sellers, and coerced investment. Apart from unfair competition with third-party sellers, the remaining abuses entail direct supplier exploitation.

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486. Mattioli, *supra* note 12.



### A. *Supplier Exploitation*

Supplier exploitation is, by its very nature, objectionable. Unless the three exploitative abuses can be shown to lead to the competitive harms delineated in Part II, the only basis upon which they can be condemned is their wealth transfer effect. It was previously argued that wealth transfer is not an appropriate basis for antitrust intervention. Excessively low purchase prices and coerced investment plausibly lead to quality erosion, increased concentration in the supply chain, and reduced investment incentives for upstream suppliers, especially when the equity stake involved is as substantial as twenty percent, as has been reported.<sup>487</sup> It is not clear whether these kinds of competitive harm justify antitrust regulation of essentially exploitative conduct. The U.S. Supreme Court announced in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* that antitrust law has no role to play in a monopolist's charging of excessively high prices against consumers, declaring that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."<sup>488</sup> Justice Scalia went so far as to suggest that monopoly pricing should be welcomed. It is generally agreed that exploitation of final consumers is beyond the purview of antitrust law.

Proponents of antitrust regulation of supplier exploitation may highlight two important differences between consumer exploitation and supplier exploitation. First, consumer exploitation is pure exploitation in that there is no possible competitive harm. The only undesirable consequence is wealth transfer from final consumers to the seller. Supplier exploitation, in contrast, may distort upstream competition. While the strength of the causal link between the two is open to dispute, a theoretical basis for such a link is clear. Second, all-encompassing digital platforms, such as Amazon, are much harder to dislodge than their brick-and-mortar counterparts because of network effects and data advantages.<sup>489</sup> The digital

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487. *Id.*

488. *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

489. Bloodstein, *supra* note 204, at 196.

context alters the nature of the buyer power abuses and renders intervention more justifiable.

Importantly, unduly harsh contractual terms may have a less direct and tangible causal link to the competitive harm delineated in Part II, unless the term has substantial financial impact on the supplier's operation. Therefore, regulation of such contractual terms based on these effects is difficult to justify. Jurisdictions such as the EU, United Kingdom, and Australia have adopted fairly wide-ranging regulation of unfair contract terms between large retailers or platforms and their suppliers outside of antitrust.<sup>490</sup> It is doubtful whether the United States has any appetite to go down the same path. The basis for this kind of regulation would involve some notion of unfairness, oppressiveness, or unconscionability. The United States has generally been cautious about embarking on this kind of regulation, especially in the business-to-business context.<sup>491</sup> The question is whether the digital context justifies a more interventionist approach.

#### B. *A Case for Digital Exceptionalism?*

One common argument for regulation of supplier exploitation is that the digital context justifies more intervention. This argument could be valid for two reasons. The first is that buyer power in the digital context is more durable and, therefore, results in a greater need for antitrust intervention to correct market distortions. The second is that the same conduct in the digital context has greater competitive impact which calls for more urgent redress.

Much has been said about the special nature of market power in the digital economy, how network effects render the

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490. Groceries Supply Code of Practice 2009, SI 16 (UK), <https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice>; *Competition and Consumer Act 2010* (Cth), sch. 2 (Austl.).

491. Luke R. Nottage, *Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts*, 26 VICTORIA U. WELLINGTON L. REV. 247, 258–59 (1996); Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants*, 62 BUS. L. 209, 211–12 (2006); Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 663 (2008); Yee Wah Chin, *What Role for Abuse of Superior Bargaining Position Laws?*, 256 N.Y.L.J. 1 (2016).

market power of the Big Tech firms impregnable, and how “big data” allows these firms to monitor competitive threats and respond nimbly.<sup>492</sup> While these arguments are at least partially true, they do not necessarily support more active intervention against supplier exploitation. Durability of market power may substantiate a more robust approach against exclusionary conduct, which entrenches a monopolist’s market power.<sup>493</sup> Exploitative conduct, however, does not contribute to a monopolist’s market power or buyer power for that matter; it is an exploitation of this power, as the term implies. Policing against such conduct does not augment the contestability of the market. If exploitation of monopoly or buyer power is objectionable, whether the power is more or less durable should make scant difference. If antitrust law condones such exploitation, it should not matter even if such power is immutable and unmovable.

Further, it is not obvious that supplier exploitation should be particularly harmful in the digital setting. A digital platform likely has other ways to exploit a supplier because of the encompassing interaction between them. A digital platform knows significantly more about a supplier’s operation and its customers as compared to a brick-and-mortar supermarket by virtue of the data at the digital platform’s disposal. Regardless of the number of avenues for exploitation, the extent of exploitation is limited by the amount of buyer power. At a certain point, exploitation will lead to the outside-option payoff becoming attractive enough for the supplier to walk away. Ultimately, the means of exploitation matter less than the amount which the platform extracts from the supplier. Demanding a price twenty percent below the competitive level or a twenty percent equity stake hurts a supplier the same regardless of whether the buyer is digital or brick-and-mortar. In other words, the fact that the exploitation is perpetrated by a digital platform should not make a difference.

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492. Cristian Santesteban & Shayne Longpre, *How Big Data Confers Market Power to Big Tech: Leveraging the Perspective of Data Science*, 65 ANTITRUST BULL. 459 (2020); *Abuse of Dominance in Digital Markets*, ORG. ECON. COOP. & DEV. (2020), <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf>; Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051 (2017).

493. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §§ 6.2a–6.2b (4th ed. 2011).

Nor is it likely to be the case that quality erosion, increased concentration, or reduced investment incentives caused by supplier exploitation will be worse in the digital context. There is no reason to believe that suppliers to a digital platform are more vulnerable to these types of competitive harm. After all, many of these suppliers supply to both digital platforms and brick-and-mortar retailers. The suppliers are the same, it is the retailer that is different. One may argue that detection of deteriorated quality may be more difficult in the digital context because consumers do not get to inspect the product on the spot. Therefore, it may be easier for a supplier to get away with quality erosion when the product is sold online. The importance of on-the-spot inspection is likely overstated, however, given Amazon's liberal return policy and the availability of customer reviews and ratings.<sup>494</sup> Poor quality will be known even if the product is sold online.

Therefore, a persuasive justification for adopting a different approach to regulating supplier exploitation in the digital economy is lacking. Excessive pricing, either high or low, has been immune from antitrust scrutiny mainly because effective regulation would require a reliable test for determining the excessiveness of the price.<sup>495</sup> Regulation of coerced investment would require a determination of whether the proposed investment terms are excessively advantageous to the buyer. This would require an assessment of whether the exercise price of the warrant is set excessively low, which may in turn necessitate an evaluation of the reasonableness of subsequent movement in stock prices. The only way to sidestep this determination is to prohibit investment by a buyer in a supplier, which would be an overly draconian measure. Unduly harsh contractual terms have been allowed because of the difficulty in defining and calibrating unfairness, oppressiveness, or unconscionability and the general belief that antitrust has no business interfering with contractual terms reached by two businesses in the

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494. AMAZON, *Returns and Refunds*, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GNW5VKFXMF72FFMR> (last visited Apr. 8, 2022).

495. Akman, *supra* note 201; Massimo Motta & Alexandre de Stree, *Excessive Pricing in Competition Law: Never say Never?*, in *THE PROS AND CONS OF HIGH PRICES* 14 (Konkurrensverket ed., 2007); Bruce Lyons, *The Paradox of the Exclusion of Exploitative Abuse*, in *THE PROS AND CONS OF HIGH PRICES* 65 (Konkurrensverket ed., 2007).

commercial context.<sup>496</sup> These policy implementation difficulties are substantial, if not insurmountable. If any arguments justify non-intervention under antitrust law in the brick-and-mortar context, such arguments equally apply to the digital economy.

C. *A Special Case for Retroactive Contractual Amendments*

Retroactive discounts and retroactive imposition of other disadvantageous terms may require special attention, whether online or offline, as such amendments are particularly pernicious and disruptive to suppliers. First, from the fundamental perspective of the spirit of a contract, it is plainly objectionable to allow one party to retroactively alter the contractual terms absent the counterparty's consent.<sup>497</sup> The parties agreed to the terms of the transaction in advance and should abide by them. Detractors may argue that this is fundamentally a problem for, and should be left to, contract law. Contract law, however, is unlikely to provide a satisfactory solution. Many supply contracts give the buyer the power to retroactively amend contract terms without consent.<sup>498</sup> The buyer is thus merely exercising its contractual right and has not committed a breach. Second, and more importantly, even if retroactive amendment constitutes a breach of contract, the supplier is unlikely to sue the powerful retailer. If the supplier were free to stand up for itself, it probably would not have accepted the contractual term in the first place. This Author has argued that in Japan, abuse of superior bargaining position regulation, which scrutinizes retroactive contractual amendments, is most justified as a supplemental contract enforcement mechanism when one of the contractual parties is unable to protect its own interests under contract law.<sup>499</sup>

Second, such retroactive contractual amendment is highly inefficient. It deters investment by the supplier, especially of

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496. Scheelings & Wright, *supra* note 24, at 211–14.

497. See generally Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919); Peter A. Alces, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1100–01, 1141–42 (2010).

498. VANDER STICHELE & YOUNG, *supra* note 115, at 17.

499. Masako Wakui & Thomas K. Cheng, *Regulating Abuse of Superior Bargaining Position under the Japanese Competition Law: An Anomaly or a Necessity?*, 3 J. ANTITRUST ENF'T 302, 329–33 (2015).

the relation-specific kind.<sup>500</sup> A supplier will be hesitant to make investments when it cannot be sure of the return, especially when these buyers account for such a great proportion of the suppliers' business. Long-term investments are difficult to plan when one's future financial situation is uncertain. It was argued previously that investment in product development can be subject to *ex post* hold-up because the supplier is susceptible to opportunistic behavior once the initial R&D costs are sunk.<sup>501</sup> Reduced product development is clearly welfare-reducing. Recall the economic model by Battagalli, Fumangalli, and Polo that illustrates the classic hold-up scenario where suppliers are reluctant to engage in quality improvement for fear that its investment would be appropriated by the buyer.<sup>502</sup>

Retroactive contractual amendment is the perfect hold-up mechanism for relation-specific investments. To the extent that a buyer demands special packaging or logistical arrangements or other kinds of relation-specific investments, the supplier is especially vulnerable to hold-up through retroactive contractual amendment. The supplier may have agreed to make those investments under the original terms, which would have allowed the supplier to recoup its investments. Once the investments have been made, the buyer turns around and demands a lower price or more rebate, denying the supplier the opportunity to recoup. If the supplier has a choice about these investments in the future, it may refuse to make them.

Therefore, prohibiting contractual clauses that allow one party to retroactively alter the contractual terms without consent is justified both in the online and offline contexts. Additionally, regulating retroactive contractual amendments does not suffer from the same implementation difficulties as other kinds of supplier exploitation prohibitions. The scope of prohibition is very clear-cut. Such prohibition is not subject to ambiguity or matter of degree. Further, it is unnecessary to determine whether the purchase price is excessively low, the investment terms are excessively advantageous, or a particular contractual term is unfair, oppressive or unconscionable. Regulation consists of a simple ban on retroactive amendment of contractual terms without mutual consent. Contractual parties

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500. *Id.* at 326–27.

501. *See* Part II.B.

502. Battigalli, Fumagalli & Polo, *supra* note 159, at 47.

do not have any sound justification for demanding such amendment rights given that contracts are based on mutual consent.

Regulating retroactive contractual amendment is beyond the ambit of antitrust law. Some sort of sector-specific code of conduct as exists under UK or Australian law would be needed if regulatory action is deemed necessary. The Australian Food and Grocery Code of Conduct, which is a voluntary industry code, prohibits the unilateral alteration of a contractual term in the supply agreement without the supplier's consent.<sup>503</sup> This, however, still leaves the possibility of coerced consent. The UK Groceries Supply Code of Practice, formally known as The Groceries (Supply Chain Practices) Market Investigation Order 2009, goes one step further. Section 3(1) of the Code of Practice states that "a Retailer must not vary any Supply Agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement."<sup>504</sup> Even a request for consent is prohibited under the Code. Section 3(2) further specifies that retroactive amendment would only be allowed if the "specific change of circumstances (such circumstances being outside the Retailer's control) that will allow for such adjustments to be made" is clearly and unambiguously set out in the supply agreement.<sup>505</sup> The provisions in these two Codes of Conduct are straightforward, which suggests that regulating retroactive contractual amendment is not exceedingly difficult or complicated.

#### D. *Unfair Competition with Third-Party Sellers*

As for unfair competition with third-party sellers, the introduction of private label products is likely to be beyond the purview of antitrust law. Design copying or piracy is best left to intellectual property law. If the product design at issue is not protected by intellectual property law or the copying at issue is deemed insufficient to infringe the protection, that should be the end of the matter. Antitrust should not unilaterally expand the scope of intellectual property protection.

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503. *Competition and Consumer (Industry Codes—Food and Grocery)* (Austl.) *supra* note 299, at 9.

504. Groceries Supply Code of Practice 2009 (UK), *supra* note 298.

505. *Id.*

Misuse of supplier data and preferential treatment by the gatekeeper's algorithm amount to instances of conduct where intervention may be warranted, although not necessarily through antitrust law. Platforms such as Amazon usually grant themselves extensive rights to use third-party data for a variety of purposes, including to compete with the third-party seller itself.<sup>506</sup> So Amazon's actions are likely well within the law and compliant with relevant data regulation (and no comprehensive U.S. federal data privacy regulation exists anyway). While refusing to share data in one's exclusive possession has been held to violate antitrust law in the past<sup>507</sup>, use of data in one's legal possession to extract a competitive advantage is unlikely to be deemed an antitrust violation under existing law. Cases such as *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* and *Pacific Bell Telephone Co. v. Linkline Communications* have firmly established that absent a duty to deal, a monopolist has no duty to provide adequate assistance to rivals.<sup>508</sup> Therefore, failure to provide rivals the same data access is unlikely to implicate antitrust law. As for preferential treatment by algorithm, unless it can be somehow framed as a tying claim, which would be a difficult task, it is likely to be beyond the scope of antitrust as well. There is also no general antitrust duty to accord equal or fair treatment between a competitor's product and one's own product. If these kinds of conduct are deemed undesirable, as seems to be the consensus, sector-specific legislation like the EU Digital Markets Act may be needed.

The EU Digital Markets Act, which regulates digital platforms and gatekeepers and which is being finalized at the time of writing<sup>509</sup>, is an example of such legislation. According to the European Commission's legislative proposal document,

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506. Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020), [https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015?mod=Article\\_inline;%20https://www.cnbc.com/2020/04/23/wsj-amazon-uses-data-from-third-party-sellers-to-develop-its-own-products.html](https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015?mod=Article_inline;%20https://www.cnbc.com/2020/04/23/wsj-amazon-uses-data-from-third-party-sellers-to-develop-its-own-products.html).

507. *Associated Press v. United States*, 326 U.S. 1 (1945).

508. *Verizon Commc'ns., Inc. v. Law Off. of Curtis Trinko, LLP*, 540 U.S. 398, 410 (2004); *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 450 (2009).

509. *Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/news/>



Article 6(1) (a) of the proposed Act will stipulate that a digital gatekeeper shall “refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users.”<sup>510</sup> Article 6(1) (d) will further stipulate that a digital gatekeeper shall “refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and nondiscriminatory conditions to such ranking.”<sup>511</sup>

Alternatively, and more radically, the Ending Platform Monopolies Act, which is currently in the U.S. House, would split Amazon into two websites and compel Amazon to divest its own products.<sup>512</sup> A divestiture would, of course, solve the problem once and for all but the likelihood of the proposal’s adoption is admittedly low.<sup>513</sup> Amazon warned the bill might force it to shut its Marketplace.<sup>514</sup> A better and more pragmatic approach for U.S. legislators is to aim for something along the lines of the EU Digital Markets Act. The American Innovation and Choice Online Act is currently in front of the U.S. Senate Judiciary Committee.<sup>515</sup> If passed, the Act would prohibit Amazon from giving preference to its own products<sup>516</sup> or requiring sellers to purchase other services in order

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en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users (last visited Apr. 6, 2022).

510. *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=EN>.

511. *Id.*

512. Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2022). See also Ann Palmer, *Amazon launches website to go on the offensive against Congress’ antitrust tech bills*, CNBC (Aug. 20, 2021), <https://www.cnbc.com/2021/08/20/amazon-launches-website-to-warn-sellers-about-antitrust-bills.html>.

513. Cat Zakrzewski et al., *With clock ticking, battle over tech regulation intensifies*, WASH. POST (June 27, 2022, 7:00 AM) <https://www.washingtonpost.com/technology/2022/06/27/antitrust-tech-battle-congress/>.

514. Duffy, *supra* note 271.

515. American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022).

516. *Id.* § 3(a)(1).

to be included in the Marketplace.<sup>517</sup> Amazon would also not be able to place its private label products at the top of the search results.<sup>518</sup> The Act has received support from the Department of Justice.<sup>519</sup> Unsurprisingly, Amazon is vigorously fighting the Bill.<sup>520</sup> At the time of writing, the Bill is out of the Senate Judicial Committee<sup>521</sup> but has not received a floor vote.<sup>522</sup> The prospects of passing the Bill are apparently poor. Senate Majority Leader Chuck Schumer told proponents that he would not bring the Bill to the floor unless proponents can show that they have secured the necessary sixty votes.<sup>523</sup>

A recent, and surprising, development could render moot the discussion concerning regulation of Amazon's private label business. Reportedly, Amazon has drastically reduced the number of private label products it carries and may exit the private label business altogether to alleviate regulatory pressure.<sup>524</sup> In short, Amazon may decide that its profits from private label business are not worth all the regulatory attention.

#### CONCLUSION

Buyer power abuses by digital platforms have received little attention under antitrust law. This Article has attempted to fill the gap in the literature by examining two types of buyer power in the digital context, Uber's digital monopsony and Amazon's gatekeeping power. It argues that the possibility of

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517. *Id.* § 3(a)(5).

518. Hal Singer, *Congress must call Amazon's bluff on antitrust*, ROLL CALL (Jan. 28, 2022), <https://rollcall.com/2022/01/28/congress-must-call-amazons-bluff-on-antitrust/>.

519. U.S. Dep't of Just., Opinion Letter on American Innovation and Choice Online Act, <https://buck.house.gov/sites/buck.house.gov/files/2022.03.28-OUT-Nadler%20et%20al.-DOJ%20Views%20Letter-S.%202992%20and%20H.R.%203816.pdf>.

520. Morrison, *supra* note 271.

521. Janet H. Cho, *Senate Panel Advances Antitrust Bill Aimed at Apple, Amazon, and Google*, BARRON'S (Jan. 20, 2022), <https://www.barrons.com/articles/senate-antitrust-bill-apple-amazon-google-51642718598>.

522. Ryan Tracy, *Antitrust Bill Targeting Amazon, Google, Apple Gets Support From DOJ*, WALL ST. J. (Mar. 28, 2022), <https://www.wsj.com/articles/doj-backs-antitrust-bill-targeting-amazon-google-apple-11648519385>.

523. Chitkara, *supra* note 364.

524. Dana Mattioli, *Amazon Has Been Slashing Private-Label Selection Amid Weak Sales*, WALL ST. J. (July 15, 2022), <https://www.wsj.com/articles/amazon-has-been-slashing-private-label-selection-amid-weak-sales-11657849612>.

more precise price discrimination may, in fact, reduce the harmful welfare effects of monopsony power and render Uber's digital monopsony less problematic. It further contends that Amazon's gatekeeper power may even exceed that of brick-and-mortar retail giants such as Walmart. It examines the six categories of buyer power abuses allegedly committed by Amazon, and notes that MFN clauses and tying are already subject to antitrust enforcement. Regulation of supplier exploitation presents perhaps insurmountable implementation difficulties and, in any event, should not be addressed by antitrust law. Regulation of retroactive contractual amendments, in contrast, do not share these difficulties and can be effectively regulated. Strong policy arguments support prohibiting such retroactive conduct. Lastly, new legislation is necessary to address misuse of third-party seller data and algorithmic self-preferencing to the extent such practices are deemed worthy of regulation.