ARTICLE

ANTITRUST AND EMARKETS

Herbert Hovenkamp*

Most antitrust offenses require proof of the defendant's market power, or ability to control the market and raise prices above cost. For example, many exclusive contracts are harmless and lawful in competitive markets, but they can become anticompetitive when the firm imposing them has significant market power.

The internet has created a large commercial market that rightfully merits attention from antitrust and competition law authorities. Much of the popular press and even some antitrust decisions treat the internet as a market unto itself. Unfortunate dicta in the Supreme Court's Amex decision seemed to confirm this. The Court stated that "only other two-sided platforms can compete with a two-sided platform for transactions." For a few products this is true, but not for most others. The implications for market definition are staggering. For example, Amazon's share of e-commerce is around 40%, but its share of all commerce is 4%. So which is it?

It is long past time to "normalize" online markets by treating them as markets, no different in principle from other markets. They are factually distinctive in some ways, but all markets differ from one another in detail. The only way to determine the scope of a relevant antitrust market is to identify the particular product in question and then make the best measurements that the data permit concerning the range of effective substitutes from all sources, both demand and supply. Market definition in antitrust cases presents a question of fact. This makes empirical study of consumer behavior essential, including such things as the ease and frequency of consumer switching and the range of realistically available alternatives. When this is done it becomes clear that some antitrust markets are properly limited to e-commerce. Others are properly limited to traditional commerce. For a large group in the middle, however, the market includes both.

* James G. Dinan University Professor, University of Pennsylvania Carey Law School and the Wharton School. Thanks to Erik Hovenkamp, John Newman, and D. Daniel Sokol for comments.

TABLE OF CONTENTS

INTRODUCTION

Most antitrust offenses require proof of the defendant's market power, or ability to control the market and raise prices above cost.[1] For example, many exclusive contracts are harmless and lawful in competitive markets, but they can become anticompetitive when the firm imposing them has significant market power.

In antitrust litigation, market power is often estimated as a share of a "relevant market," or group of close substitutes. That makes it critical to measure the denominator of the fraction accurately. For example, Amazon has a roughly 40% share of "e-commerce," but only 4% of "commerce," which includes offline sales as well.[2] Which figure should count for the purposes of defining the market in which Amazon operates? Practices such as exclusive dealing, tying, most-favored-nation (MFN) agreements, mergers, joint ventures, or other rule of reason offenses can be antitrust violations when the firms involved have market shares in the 30% to 40% range, but not when their market share is 4%.[3] As the Supreme Court has often said, an antitrust market consists of the range of choices to which purchasers can "practicably turn for alternatives" in the event a particular choice becomes less attractive.[4]

The time has come for competition analysis of digital markets to be integrated into analysis of markets more generally. Failing to do so creates exaggerated impressions of the amount of power that e-commerce firms possess. The range over which different products and their methods of distribution compete with one another varies enormously. Any inquiry into the extent of the market must include questions about the competitive relationship among e-commerce firms with each other, as well as the extent of competition between e-commerce and offline firms. Online markets have been part of the commercial culture for three decades.[5] They need to be viewed as an integral part of a single marketplace.

Operationally, determining the relationship between offline and e-commerce resembles antitrust inquiries into the scope of geographic markets. Oftentimes,

---

1. *See* William M. Landis and Richard A. Posner, *Market Power in Antitrust Cases,* 94 HARV. L. REV. 937, 937-39 (1981). For more details on proof of antitrust offenses, see generally 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ch. 5 (5th ed. 2023).

2. Sara Lebow, *Amazon Accounted for 40% of eCommerce Sales, 4% of Retail Sales in 2023*, EMARKETER (Apr. 4, 2024), https://perma.cc/FDY3-JWPJ.

3. *E.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (tying and exclusive dealing lawful on market shares no higher than 30%).

4. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 619 (1974); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 359 (1963); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

5. The first reported online transaction occurred in August, 1994. *See* Michael Tefula, *A Brief History of E-Commerce*, MEDIUM (July 31, 2018), https://perma.cc/7JWR-9ZK8. Amazon was founded later that same year and eBay in 1995. *See* Colby Hopkins, *The History of Amazon and its Rise to Success*, MICH. J. ECON. (May 1, 2023), https://perma.cc/7JV6-NQXH.

the product sold in e-commerce and offline commerce is the same, but the question is the range of "locations" to which both consumers and suppliers can realistically turn, and where firms can hold one another's prices close to their costs. As one court put it, "The relevant geographic market inquiry focuses on that geographic area within which the defendant's customers who are affected by the challenged practice can practicably turn to alternative supplies if the defendant were to raise its prices or restrict its output."[6] For example, just as a consumer in search of a new wheelbarrow might visit two or more physical discount or hardware stores and compare products and prices, she might do precisely the same thing by comparing offerings at offline and online stores.

The rise of online commerce is hardly the first time a development in economics led to exaggerated early views about the distinctiveness of a particular portion or feature of the market. For example, the Harvard School was once obsessed with the unique attributes of both oligopoly[7] and product differentiation,[8] but both were eventually integrated into our general understanding of markets,[9] including the tools used to define markets when they are present.[10] The same can be said of contestable markets theory—once described as an "uprising" in industrial economics, but which has now merged to a large extent into the general landscape for evaluating market competition.[11]

Two prominent features of e-commerce are digital content and online transactions. Nevertheless, both digital and nondigital products are sold on the internet. For non-digital products, competition between offline and online commerce

---

6. E.g., E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc., 637 F.3d 435 (4th Cir. 2011). See PhantomALERT v. Apple, Inc., 762 F. Supp. 3d 8, 18 (D.D.C. 2025) (applying this methodology to smartphones).

7. *E.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 UNIV. PA. L. REV. 925, 932-33 (1979).

8. *See generally* Robert Rothschild, *The Theory of Monopolistic Competition: E.H. Chamberlin's Influence on Industrial Organisation Theory over Sixty Years*, 14 J. ECON. STUD. 34 (1987).

9. *See, e.g.*, John Maurice Clark, *Toward A Concept of Workable Competition*, 30 AM. ECON. REV. 241, 243-47, 253-56 (1940) (arguing for competition policy to be applied across a variety of market structures).

10. *E.g.*, Jonathan B. Baker & Timothy Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power* 10-12, 15-20 (Stan. L. & Econ. Olin Working Paper No. 328, 2006),
https://perma.cc/WSR4-9H56; Daniel L. Rubinfeld, *Market Definition with Differentiated Products: the Post/Nabisco Cereal Merger*, 68 ANTITRUST L.J. 163, 167-73 (2000); Carl Shapiro, *Mergers with Differentiated Products*, 10 ANTITRUST 23, 28-29 (1995). The hypothetical monopolist test (HMT) for market definition is particularly well suited to product differentiated markets. *See, e.g.*, Malcolm B. Coate & Jeffrey H. Fischer, *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*, 4 J. COMP. L. & ECON. 1031, 1031-33 (2008).

11. *See* William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1, 1-3 (1982); William G. Shepherd, *"Contestability" vs. Competition*, 74 AM. ECON. REV. 572, 573-75 (1984) (on market definition and assessment of entry barriers in contestable markets).

is substantial: internet and offline transactions compete with each other, but to various degrees depending on the nature of the product. Further, consumer choice between online and offline commerce is largely unrestricted, and the boundaries are easily crossed: it is as easy for a consumer to select a bicycle or a toaster by comparing online and offline stores as it is to choose between competing physical stores located in two different shopping malls.

I. E-COMMERCE AND THE SCOPE OF THE MARKET

The internet has created a large commercial market that rightfully merits attention from antitrust and competition law authorities. But how distinctive is it? Much of the popular press and even some antitrust decisions treat it as a market unto itself.[12] An unfortunate statement in the Supreme Court's *Amex* decision needlessly added fuel to this. The Court stated that "[o]nly other two-sided platforms can compete with a two-sided platform for transactions."[13] That statement was dicta and appeared to state as a matter of law what is really a question of fact. In any event, it was also wrong. Competition between platform and non-platform sellers is undeniable. Tell the Yellow Cab drivers of Philadelphia that they do not compete with Uber,[14] or the many small traditional retailers who have been injured or even ruined by Amazon that it is not their competitor.[15] The empirical data indicate that Amazon (mainly online) and Walmart (mainly offline) treat one another as their principal competitor across thousands of products,[16] although each retailer almost certainly competes with several other on- and offline stores as well. If that is true, then any antitrust market definition of retail goods that includes Amazon but not Walmart, or vice-versa, is at least presumptively wrong.

The product landscape is immensely varied. Some online products do not face serious competition from traditional markets.[17] But they must be empirically identified. As the Supreme Court and lower courts have repeatedly confirmed, market definition is a question of fact.[18] The degree of competition between offline and online commerce can be addressed only on a product-by-product basis, and multiproduct firms often have widely differing market shares in different products. The implications are hard to overstate.

---

12. *E.g.*, Daniel Shvartsman, *Amazon: Facts and Statistics*, INVESTING.COM, https://perma.cc/2CAY-GLQB (last updated Feb. 20, 2025) (speaking of Amazon's "market share" by referring to its share of internet sales).

13. Ohio v. Am. Express Co., 585 U.S. 529, 546 (2018).

14. Phila. Taxi Ass'n v. Uber Techs., 886 F.3d 332, 342 (3d Cir. 2018).

15. *See, e.g.*, NATALIE BERG & MIYA KNIGHTS, AMAZON: HOW THE WORLD'S MOST RELENTLESS RETAILERS WILL CONTINUE TO REVOLUTIONIZE COMMERCE 82-92 (2d ed. 2022).

16. *See infra* notes 40-43 and accompanying text**.**

17. *See infra* notes 34-40 and accompanying text.

18. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 482 (1992); IGT v. Alliance Gaming Corp., 702 F.3d 1338, 1344 (Fed. Cir. 2012).

Further, the market power requirement attaches to *products*, not to firms. For example, while Microsoft is a larger firm by market cap than Alphabet, its Bing search engine owns roughly 6% of the general consumer search market in 2024, whereas Alphabet's Google search engine controls around 90% of that market.[19] Accordingly, a federal court ruled in August 2024 that Google had monopolized the search market by its exclusive dealing agreements for default status.[20] By contrast, Microsoft could not assert monopoly control through Bing. The same thing is true of smartphones: in a worldwide market of operating systems for handheld devices, Android claims roughly 71% of the market, Apple's iOS roughly 28%, and Microsoft .02%.[21] In particular, Amazon sells millions of products but has widely differing and mostly nondominant market shares in them: as an example, Spotify's market cap is about 4% the size of Amazon's (78 billion dollars compared to 2 trillion dollars) but Spotify's share of the music streaming market is more than double that of Amazon's.[22]

In its 1962 *Brown Shoe* decision, the Supreme Court outlined "reasonable interchangeability" as a test for a relevant market.[23] Under that test, most of the products which Amazon sells appear to compete with those sold by Walmart. In fact, many online products appear to compete with offline alternatives. As an example, consumers may purchase books and e-books interchangeably, and they can also alternatively stream movies, watch them in theatres, or on DVD players. E-books struggled to gain consumer acceptance for years, and then took off when Amazon developed its Kindle technology.[24] E-book market share now seems to have stabilized at about 21%, measured by units.[25] The literature also indicates that a sizeable number of readers multi-home among both types of books, making them reasonably interchangeable. Among those who read only one type, cloth books are still heavily favored over e-books.[26]

---

19. United States v. Google LLC, 747 F. Supp. 3d 1, 62-63 (D.D.C. 2024)

20. *Id.* at *74-75.

21. *Mobile Operating Sytems*, STATCOUNTER (last visited Sep. 18, 2024), https://perma.cc/EA5F-XMAG.

22. *See infra* note 31 and accompanying text.

23. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability . . . .").

24. Claire Cain Miller, *E-Books Top Hardcovers at Amazon*, N.Y. TIMES, Jul. 19, 2010, at B1 ("Amazon.com, one of the nation's largest booksellers, announced Monday that for the last three months, sales of books for its e-reader, the Kindle, outnumbered sales of hardcover books. In that time, Amazon said, it sold 143 Kindle books for every 100 hardcover books, including hardcovers for which there is no Kindle edition. The pace of change is quickening, too . . . . In the last four weeks sales rose to 180 digital books for every 100 hardcover copies. Amazon has 630,000 Kindle books, a small fraction of the millions of books sold on the site.").

25. *See* eBooks.com, *EBook Industry News Feed*, ABOUT EKOOKS (last visited Sept. 1, 2024), https://perma.cc/KQC4-5EZD.

26. *See Three-in-ten Americans now read e-books*, PEW RSCH. CTR. (Jan. 6, 2022), https://perma.cc/6A5W-TF7P (describing how 33% of Americans read both digital and print books, 32% read print books exclusively, 9% read digital books exclusively, and 23% read no books at all).

II. REASONABLE INTERCHANGEABILITY AND THE *CELLOPHANE* FALLACY

Does interchangeable usage mean that online and offline alternatives should be placed in the same relevant market for antitrust purposes? Not on that basis alone. The *Brown Shoe* decision was incorrect to state a "reasonable interchangeability" test without including an important limitation: whether the substitution of one alternative is sufficiently robust to hold the other alternative to a competitive price? Omitting this limitation is often called the "Cellophane Fallacy," named after a Supreme Court decision that erroneously concluded that cellophane, a recently-innovated product at the time, was not a relevant market because it could be used interchangeably with wax paper, wrapping paper, metal foils, or other flexible packaging materials.[27] The record also indicated, however, that cellophane was *already* being sold at a monopoly price.[28] When a monopolist increases its price to its profit-maximizing level, it leads to interchangeability because some customers will substitute away.[29] As a result, observed interchangeability may simply be evidence of market power that is already being exercised.

Reasonable interchangeability indicates that two goods are in the same market only when both are being priced at close to the competitive level.[30] Testing whether conventional books are a competitively adequate substitute for e-books, or whether CDs compete with streamed music, is an empirical question. Intuitively, one might think that these older market alternatives are rarely able to force the internet version to its costs, but that needs to be proven. The case for placing Amazon and Walmart products in the same antitrust market is stronger: it is unlikely that either is charging a monopoly price for products that both of them sell, such as toothpaste or toasters, since each faces significant competition from a large number of online and offline alternatives. Nevertheless, that is a fact question that can be answered only on a product-by-product basis.

The Cellophane Fallacy is less likely to be a problem as the examined market is more competitive. For example, more than a half dozen online firms stream music. Spotify is the largest, controlling upwards of 30% of the market, but there

---

27. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400-403 (1956). On the cellophane fallacy and how antitrust analysis controls for it, see 2B AREEDA & HOVENKAMP, *supra* note 1, at ¶ 539 (5th ed. 2022). *See also* Lawrence J. White, *The Dead Hand of Cellophane and the Federal Google and Facebook Antitrust Cases: Market Delineation Will be Crucial*, 67 ANTITRUST BULL. 113, 114-15 (2022).

28. *See* George W. Stocking and Willard F. Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29, 34-35 (1955).

29. RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 128 (1976) (observing that "[r]easonable interchangeability at the current price but not at a competitive price level, far from demonstrating the absence of monopoly power, might well be a symptom of that power").

30. *See, e.g.*, F. William McElroy, *Alternatives to the U.S. Antitrust Agency Approach to Market Definition*, 11 REV. INDUS. ORG. 511, 513 (defining "reasonable interchangeability" as founded on "the inclusion of a substitute based on identification of an effective locus of competition with the original item").

are also Apple (13.7% market share), Tencent (13.4%), Amazon (13.3%), YouTube Music (8.9%), and other players.[31] This suggests that the online digital music streaming industry by itself is at least moderately competitive. However, around 16% of music sales continue to be of CDs (sold competitively both on- and offline). This places their usage well below that of Spotify, but greater than that of Apple, Amazon, or other platforms. At least presumptively, any antitrust analysis of competition in this industry should include CD sales given the product's reasonable interchangeability. It is possible that the music market is not yet in equilibrium and eventually streamed music will make the CD obsolete. Product differentiation and consumer preference make that unlikely: CDs continue to serve people who listen to music when online access is unavailable. Nevertheless, the eventual fate of CDs is a question of fact.

One can perform a similar analysis of something like online bicycle sales. At least two dozen major e-commerce retailers compete with one another.[32] Because purely digital bicycles do not exist, the competition here is in modes of distribution, but for the same physical product. In the aggregate, e-retailers make up about 35% of bicycle retailing, with the rest coming from traditional physical stores.[33] This suggests that the online portion of the bicycle market is performing competitively, but in-person sales continue to dominate. Any antitrust analysis of bicycle retailing on those facts should include in the market both online and offline sales. Doing that would not likely commit the cellophane fallacy in either direction because in most cases, both the online and offline segments of the market are competitively structured: It is unlikely that any particular bicycle seller is charging monopoly prices.

III. ASSESSING PRODUCT COMPETITION, ON- AND OFFLINE

The extent of competition between offline and online commerce differs for different products. At one extreme, e-commerce represents the entire market for a product such as consumer search, which is far superior to older search technologies which required printed indices. Today, even 80% of the people who shop in traditional physical stores conduct their product searches online.[34] The same thing is very likely true of social networking sites such as Facebook, Instagram, LinkedIn, or X. While social networks have existed since the beginning of human civilization,[35] it is unlikely that any of them can compete effectively with

31. See Fabio Duarte, *Music Streaming Services Stats (2024)*, EXPLODING TOPICS (last visited Sept. 15, 2024), https://perma.cc/67N9-3LPX.

32. *See Bicycles eCommerce Market in US. – Data & Trends – ECDB*, ECDB (last visited July 6, 2024), https://perma.cc/DS7Y-XQX8.

33. *Id.*

34. *See* Derek Andersen, *45 Statistics Retail Marketers Need to Know in 2024*, INVOCA: INVOCA BLOG (Nov. 9, 2023), https://perma.cc/PCW3-3WUM.

35. *See, e.g.*, Irad Malkin, Christy Constantakopoulou, & Katerina Panagopoulou, *Preface: Networks in the Ancient Mediterranean*. 22 MEDITERRANEAN HIST. REV. 1, 1-3 (2007).

digital sites, although that is also a question of fact.[36]

Other products have a distinctive online version, including e-books and media streaming of music, video content, and digital games. Nevertheless, each context presents a serious question concerning competition from offline alternatives. E-books compete with paper books, streamed music competes with CDs, and video with DVDs and movie theaters. Online game streaming competes with game cartridges or other physical media. Yoga instruction through paid or free online sites competes with yoga classes in a studio. One writer estimates that between half to 70% of yoga is practiced at home with online instruction.[37] Whether either studio or online yoga has a sufficient presence to hold the other one to the competitive price is ultimately a question of fact.

Determining whether the digital and traditional versions of these products compete with one another requires evidence about consumer and supplier substitution between the versions, as well as costs and margins. That is, the extent of competition between online and offline alternatives is assessed with the same empirical tools that are used in conventional market delineation.

At the opposite extreme from purely digital commodities, some products and services can only be provided in real space. For example, while you can schedule a massage online, the actual service must be in person. That is also true of haircuts and a wide range of medical and other business services. For most of these, determining market definition very likely does not require a detailed inquiry about online alternatives.

The Cellophane Fallacy analysis does provide one warning: placing two goods with different inputs or cost structures into the same market simply because customers use both is risky. You can use both wax paper and cellophane to wrap your peanut butter sandwich, just as you can either walk to work or take the subway. However, these pairs of products are made with very different technologies and use very different inputs in their production. As a result, they have different costs, and further, different ratios of fixed to variable costs. Customers may be switching from one to the other only because one of them is already being sold at the monopoly price.

The fixed cost issue is important because digitization can give sellers a strong cost advantage, particularly at high levels of output. The cost of producing and selling an additional digital unit is very low and there are few capacity limits. For example, once a book or a video has been reduced to digital form, the cost of sending it to one new customer is practically zero and the product can be sold an unlimited number of times: in fact, ebook sellers often charge a price of zero for books such as classics whose copyrights have expired.[38] By contrast, a

---

36. *See*, Diana Mok, Barry Wellman, and Ranu Basu, *Did Distance Matter Before the Internet?: Interpersonal Contact and Support in the 1970s*, 29 Social Networks 430, 433-35, 452-54 (2007).

37. Brian Aganad, *The State of the 2023 Yoga Industry*, ASANA ACADEMY (last visited Feb. 26, 2025), https://perma.cc/X23T-BTLA.

38. For example, Amazon sells at least one version of Jane Austen's *Price and Prejudice*

conventional book or DVD must be manufactured, shipped, and inventoried by a retailer. Each copy incurs these additional costs, whether or not royalties are due. This can make market definition questions complex, although it is no reason simply to assume that the internet version is a market unto itself. It certainly creates advantages, however, for purely digital products sold in e-commerce, such as ebooks or streamed digital content.

Finally, a broad middle range of products are sold in identical form in both e-commerce and traditional commerce. These include small appliances, a great deal of clothing, tools, household goods, home electronics, bicycles, sporting, gardening, office equipment, and numerous other things.[39] Viable sellers provide these goods both on- and offline: for example, you can purchase a toaster or a Bluetooth speaker in a physical shop or else on the internet. While the products are the same, distribution differs, as does consumer behavior. Some customers purchase in physical shops exclusively, others in e-commerce exclusively, and yet others alternate between them. One study shows that a significant number of Amazon customers engage in comparison shopping, and that the range of comparisons includes both offline and alternative internet sellers.[40] A study by Profitero also found that over a three-month period Walmart and Amazon had identical prices for a large list of branded products 70% of the time, suggesting that they track one another's prices closely. For each, the other is a principal competitor.[41]

For some products, such as groceries, e-commerce faces substantial resistance even though the products are sold in both online and offline stores. Many customers prefer to purchase most of their groceries in face-to-face transactions. As a result, online grocers have struggled. For example, both Walmart and Amazon are general retail merchandisers who sell groceries. Walmart (mainly offline) has a significantly smaller market cap than Amazon (mainly online).[42]

---

at a price of zero. *Pride and Prejudice – Kindle edition by Austen, Jane. Literature & Fiction Kindle eBooks @ Amazon.com*, AMAZON (last visited Mar. 2, 2025), https://perma.cc/X544-2YH3 (archived Mar. 2, 2025).

39. CONSUMERS INT'L & INT'L INST. FOR SUSTAINABLE DEV., E-COMMERCE AND PRODUCT SUSTAINABILITY INFORMATION: AN OVERVIEW OF POLICIES AND PRACTICES 24-25 (2023).

40. *See* JOHN DAVIES ET AL., COMPASS LEXECON, SURVEY EVIDENCE ON USER MULTI-HOMING IN ONLINE RETAIL BUSINESSES 3, 11 (2022), https://perma.cc/6NHS-CV4T (archived Mar. 2, 2025) (noting that 57% of respondents did intra-internet comparison shopping, and 23% also compared with "physical shops"); *see also* GEOFFREY A. MANNE, INT'L CTR. FOR L. & ECON., GERRYMANDERED MARKET DEFINITIONS IN FTC V. AMAZON 4 (2024), https://perma.cc/YD4S-7FZF (archived Mar. 2, 2025) (discussing competition between off- and online sales).

41. *See* Mike Black, *Amazon and Walmart Solidify Their Price leadership Heading into the Holidays*, PROFITERO (Nov. 15, 2023), https://perma.cc/ZE6J-HDXZ (archived Mar. 2, 2025).

42. Amazon's market cap is about 2.2 trillion dollars, while Walmart's is about 790 billion dollars. *Largest retail companies by market cap*, COMPANIESMARKETCAP (last visited Mar. 2, 2025), https://perma.cc/G9X8-SN7V (archived Mar. 2, 2025).

Nevertheless, Walmart sells eight times as many groceries as Amazon does.[43]

Another phenomenon related to many of these products in the middle is high elasticity of supply, which refers to the rate at which firms can enter or expand into a new market segment in response to favorable opportunities there. Elasticity of supply is as relevant to market definition as is elasticity of demand: for example, an old economy firm can be expected to expand into e-commerce when it anticipates higher returns there. Just as higher prices or poorer terms induce customer migration away from a seller, they also induce alternative sellers to come in.

Elasticity of supply can refer to a firm's expansion into a new product[44] or a new geographic region.[45] It also includes expansion from offline into online commerce,[46] or vice-versa. While online sellers' expansion into offline commerce is not as common, it does occur—as when Amazon acquired Whole Foods.[47] Expansion that crosses the old-commerce/e-commerce line has come to be known among retailers as "Bricks and Clicks."[48] One study indicates that an offline seller's expansion into online sales almost always increases welfare.[49] That is not surprising, because output-expanding activity is generally welfare enhancing. Particularly in antitrust, a reduction in market wide output is usually associated with competitive harm.[50] Among the larger traditional firms that have migrated across the old-commerce/e-commerce line and now have a dual presence are retailers as diverse as Wal-Mart, Amazon, Macy's, and Target (general merchandise), Warby-Parker (eye wear), Barnes and Noble (books), Office Depot (office equipment and supplies), KB Toys (children's toys), Rite-Aid (drugs), and REI and Dick's (sporting goods, clothing, and bicycles).[51]

---

43. *See*, Zachary Russell, *Walmart Led Grocery Dollar Share in 2023, Followed by. . .*, CHAIN STORE AGE (Mar. 7, 2024), https://perma.cc/A4CW-RQC9 (archived Mar. 2, 2024) (showing that 23.6% of 2023 grocery spending was captured by Walmart and that 3.1% of the same market was captured by Amazon and its subsidiary, Whole Foods).

44. *E.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 572-74(1967) (cataloguing Procter & Gamble's expansion in the household products industry through entering the bleach market with its acquisition of Clorox).

45. *E.g.*, George Hay, John C. Hilke, & Phillip B. Nelson, *Geographic Market Definition in an International Context*, 64 Chi.-Kent L. Rev. 711, 714-15, 727 (1988).

46. *See, e.g.*, Jeffrey T. Prince, *The Beginning of Online/Retail Competition and its Origins: An Application to Personal Computers*, 25 INT'L J. INDUS. ORG. 139, 140-43 (2007) (outling the history of computer retailers expanding from conventional into online sales).

47. *See* Nick Wingfield & Michael J. de la Merced, *Amazon to Buy Whole Foods for $13.4 Billion*, N.Y. TIMES, June 16, 2017, at A1.

48. *See* Monica J White, *What is the Bricks-and-Clicks Business Model?*, PAY.COM (Feb. 20, 2023), https://perma.cc/7T5V-DWJY (archived Mar. 2, 2025).

49. Weixing Ford, Yixiu Li & Jie Zheng, *Numbers of Bricks and Clicks: Price Competition Between Online and Offline Stores*, 75 INT'L REV. ECON. & FIN. 420, 429 (2021) ("[C]onsumers are always worse off when there is no online store compared to when there is one online store, which implies that introducing an online store into the market is beneficial to consumers who are originally in a market with all offline stores.").

50. *See* Herbert Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1070-1072 (2024)

51. *See* Dennis Herhausen et al., *Integrating Bricks with Clicks: Retailer-Level and*

Analysis of market definition also provides some insights into how market concentration should be measured, particularly about the extent to which online sales often serve to *de*concentrate markets. That is especially true of this middle range of products that have robust sales from both online and offline vendors. Market concentration is measured for antitrust purposes by identifying the market's boundaries and then determining the number of firms in it and their size distribution.[52] Notwithstanding some controversy, this measure remains central to the antitrust evaluation of mergers.[53] But who is in the market? For example, when online sellers are added to the number of traditional bicycle retailers in Ithaca, New York, the number of firms becomes larger and market concentration falls. If Ithaca contains six traditional bicycle sellers, adding a dozen internet sellers who ship there could reduce concentration by two-thirds, depending on how many bicycles each one sells.

Amazon in particular has significantly reduced concentration in many markets, because it often becomes an additional formidable seller in whatever retail market is being examined.[54] A small town with two hardware stores considered alone is a duopoly. But if one throws Amazon into the mix these two stores may lack significant market power. In that case, how should we treat a merger of the two physical stores? If Amazon is their strongest competitor, they may acquire no power whatsoever to increase price, even though they are involved in a merger to monopoly if one looks only at the physical stores. That is not likely to be the case of a merger between two hospitals, which do not have online alternatives.

One way of identifying market boundaries is the hypothetical monopolist test (HMT), which tries to determine from substitution data the smallest grouping of sales capable of sustaining a monopoly price. Using the HMT generally involves observing a firm's price increase in the product (or location) under consideration, and using empirical data to estimate how many sales the firm loses

---

Channel-Level Outcomes of Online-Offline Channel Integration, 91 J. RETAILING 309, 309-10 (2015); Erik Maier et al., *Financial Consequences of Adding Bricks to Clicks*, 40 INT'L J. RSCH. MARKETING 609, 609-10, 625 (2023); *see also* DELOITTE, GLOBAL POWERS OF RETAILING 2023: REVENUE GROWTH AND CONTINUED FOCUS ON SUSTAINABILITY 7-12, 40-52(2023), https://perma.cc/KRX8-UQVA (archived Mar. 2, 2025) (documenting the extent to which major traditional retailers have moved into online commerce).

52. *See* 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 930-931 (4th ed. 2016).

53. *See* Herbert Hovenkamp and Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 1997-2000 (2018).

54. *See, e.g.*, Dana M. Williams, *Power Accrues to the Powerful: Amazon's Market Share, Customer Surveillance, and Internet Dominance*, *in* THE COST OF FREE SHIPPING: AMAZON IN THE GLOBAL ECONOMY 35, 37 (Jake Alimohamed-Wilson & Ellen Reese eds., 2020) ("Amazon aims to *become* the marketplace, not simply dominate it . . . . [I]ts goal is not simply vertical integration, wherein all aspects of production, distribution, and sale are influenced, if not controlled, by a single economic actor. While Amazon is pursuing vertical integration, it also seeks control over the very fabric of commerce, to become the one-stop-shop for all online trade.").

and the effects on profits, and to which alternative sellers they go.[55] While the HMT is data intensive, when the data are available it gives a more accurate picture of market definition than alternatives.

The HMT does not distinguish between off- and online sales. If a large number of customers of an offline seller move to an online seller in response to a price increase, that online seller should be included in the market under the same metrics that we would apply to movement between two different offline sellers. The same thing is true in reverse. For a seller faced with the prospect of lost sales from a price increase, the nature of the firm that takes them does not matter. With the HMT one can examine markets where the pricing data are available and estimate the extent of competition between online and offline sales, as well as among firms within each category. That is, it provides a direct and quantifiable metric for the Supreme Court's definition of a market as the range of products to which a customer can "practicably turn for alternatives."[56]

IV. ARE ONLINE MARKETS COMPETITIVE?

Overall, internet markets are as competitive as old economy markets. Seven years of annual studies of one seller, Amazon, finds its prices across a large range of products to be lower than those of other offline and online sellers.[57] Entry into online markets is also typically easier than entry into traditional markets, because the facilities needed in traditional commerce are typically more costly and specialized.[58] The entry barrier question considers the extent to which firms will enter the market for a particular product as the prices of incumbents rise above cost.[59] Finally, e-commerce also has a clear advantage in both the cost and efficacy of consumer search.[60] The customer at a bicycle store who does not see

55. *See* 2B AREEDA & HOVENKAMP, *supra* note 1, at ¶¶ 530, 536-538 (5th ed. 2023). *See generally* Malcolm B. Coate & Jeffrey H. Fischer, *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*, 4 J. COMPAR. L. & ECON. 1031 (2008).

56. *See supra* note 4 and accompanying text.

57. *See* Black, *supra* note 41; *see generally* PROFITERO, PRICE WARS: 2023 U.S. EDITION (2023).

58. *See* Fahri Karakaya & Michael J. Stahl, *After Market Entry Barriers in E-Commerce Markets*, 10 J. ELEC. COM. RSCH. 130, 131 (2009); Michael E. Porter, *Strategy and the Internet*, 79 HARV. BUS. REV. 62, 66 (2001); Soumava Bandyopadhyay, *Competitive Strategies for Internet Marketers in Emerging Markets*, 11 COMPETITIVENESS REV. 16, 16 (2001) (citing low entry barriers in internet commerce).

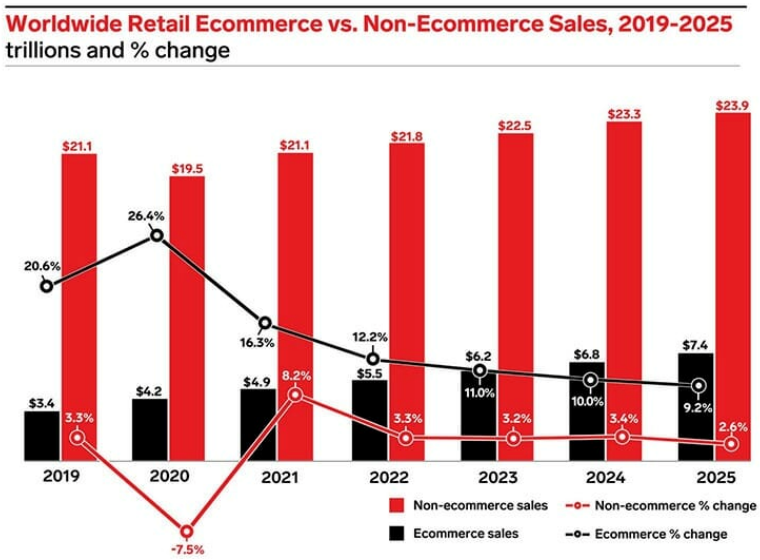
59. *See* 2B AREEDA & HOVENKAMP, *supra* note 1, at ¶ 420c (5th ed. 2024) (accepting the Bain definition of entry barrier as a factor that permits incumbent firms "persistently [to] raise their prices above a competitive level without attracting new firms to enter the industry") (quoting JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 5 (1956)).

60. *See, e.g.*, Yu-Ping Chiu, *Exploring Why People Spend More Time Shopping Online than in Offline Stores*, 95 COMPUTS. HUM. BEH. 24, 24-26 (2019); Brian Ratchford et al., *Online and Offline Retailing: What We Know and Directions for Future Research*, 98 J. RETAILING 152, 155, 161-62 (2022).

something that meets her expectations can drive or walk to a different store. The internet commerce buyer can escape with a mouse click.[61] As for concentration, that all depends on the number of relevant sellers, both off- and online, who compete with one another.

Nonetheless, e-commerce can be at a disadvantage for other products: for example, where the consumer wants to examine the good itself before making a purchase. The significance of this varies with the product and almost certainly helps account for consumer reluctance to buy certain groceries online. There's no way to sniff the cantaloupe before buying it. The extent of this advantage over e-commerce, which is heavily product-specific, is reflected in the market shares of online vs. offline sales.

E-commerce has also been growing much faster than traditional commerce. While e-commerce sales remain a minority of total sales, the growth *rate* of e-commerce has remained consistently larger over time, in a range of roughly three or three and a half to one. This chart plots both absolute size and comparative growth rates from 2019 to 2025:[62]



61. *See* HERBERT HOVENKAMP, TECH MONOPOLY 69-74 (2024).

62. Martin Luenendonk, *The Ultimate List of Online Retail Statistics (2025)*, FOUNDERJAR (last visited Mar. 3, 2025), https://perma.cc/T9QQ-LH3J (archived Mar. 2, 2025) (citing BLAKE DROESCH, EMARKETER, US ECOMMERCE BY CATEGORY 2022: AUTOMOTIVE AND GROCERY POISED FOR SIGNIFICANT GROWTH (2022)). The 2019-2021 period shows the effects of the COVID-19 pandemic, during which a great deal of business shifted from traditional transactions to online sales; the e-commerce growth rate thereafter has remained consistently higher. For data back to 2000, see MANNE, *supra* note 40, at 4. *See also* Ratchford et al., *supra* note 60, at 152 ("[A]lthough online retailing still represents only a modest slice of total retail sales, due to its much faster growth compared to that of brick-and-mortar retailing, which grew 2% in 2019, online retailing drives a large percentage of the total retail growth.").

Trade continues to shift from traditional brick-and-mortar sales to the internet, and with fair consistency other than a temporary but sizeable bump in the internet's favor during the height of the Covid era (2020-2021). Market expansion overall is more rapid in e-commerce than in traditional commerce.

Markets are not immune from antitrust enforcement simply because they are fast growing, but neither should they be the subject of fanciful reaches to find violations. Rapid growth and other evidence of economic vitality also provide a warning about structural relief, namely breakups. It is one thing for an antitrust-mandated breakup to lead to better performance (for example, increased output, lower prices, or more innovation) in a stagnant market subject to oligopoly, collusion, or lack of innovation. There are few places to go but up. But when a market is already performing better than others, coming up with a structural remedy shown by evidence to increase output, decrease prices or encourage innovation is hazardous at best.

V. ONLINE-SPECIFIC APPROACHES TO REGULATION AND ANTITRUST

This brief excursion through antitrust market analysis also indicates that the European Digital Markets Act (DMA)[63] and the proposed American Innovation and Choice Online Act (AICOA)[64] are wrong to focus exclusively on internet commerce. Competition occurs where it does. Statutes should either address all of it or alternatively target a particular industry that is functioning less well and requires special intervention. When it comes to competition policy, that is clearly not online commerce. These two provisions in fact target the best performing part of the market for the harshest treatment.

The DMA and AICOA resemble subsidies more than market-correcting regulation: they bolster traditional commerce by placing unjustified burdens on e-commerce. It is like placing a heavy tax on digital cameras in order to protect the producers of film cameras. As one example, "self-preferencing" may or may not be a problem worth regulatory attention, but it is at least as prominent in offline commerce as it is online.[65] Antitrust litigation that is focused exclusively on internet commerce threatens the same thing, and can end up hobbling online firms in order to protect offline competitors.

Issues pertaining to market scope are relevant to much of the current government antitrust litigation against digital platforms. In some cases, involving such entities as Facebook or Google Search, the product content is uniquely digital, and the relevant markets are properly limited to e-commerce. Of course, issues may remain concerning which of many firms *within* the digital marketplace, such as X, LinkedIn, YouTube, Yahoo, or TikTok, are in the relevant market.

---

63. Regulation (EU) 2022/1925, of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1.

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

65. *See* Herbert Hovenkamp, *Antitrust and Self-Preferencing*, 38 ANTITRUST 5, 8-9 (2023).

Questions of market definition should address the full range of firms that are capable of stealing sales from one another, or of firms that are readily capable of expanding in response to higher profits in a particular area.

By contrast, several cases charging Amazon with increasing *product* prices illustrate overly myopic market definitions. As noted earlier, while Amazon controls roughly 40% of "e-commerce," that amounts to only about 4% of "commerce."[66] So the issue of market control is critically dependent on market definition. In one private monopolization action charging Amazon with practices that raised consumer prices, the court accepted the plaintiff's market definition of "U.S. retail e-commerce."[67] The court's action was on a motion to dismiss, without fact findings, and its market analysis was thin. But why should an antitrust relevant market be limited to e-commerce when most of the seller's products are sold interchangeably in offline commerce as well? For most of the products it sells, Amazon simply has no power to raise prices – something that would be clear if the market were properly defined. While Amazon does sell some products that are strictly in e-commerce, such as music, video, and game streaming, Amazon holds a nondominant share in them. One possible exception is e-books. Another is audiobooks, where a court recently sustained a private antitrust complaint limited to that product.[68]

A second error in the complaint is that market power attaches to products, not to firms. The plaintiff's complaint alleging a market of "retail e-commerce" was equivalent to alleging a relevant market of "everything Walmart sells." Most of the many items covered by that market definition do not compete with each other. Multiproduct sellers have different market shares in different products as well as different margins. Further, the complaint and the decision both ignored the frequency of entry and rate of growth. The United States alone has nearly three million online sellers, entry and exit are revolving doors, and sales are increasing rapidly.[69] As a general matter, markets subject to frequent entry and rapid expansion are not good candidates for antitrust offenses that depend on market power, such as monopolization.[70]

In August 2024, a District of Columbia court followed this decision in sustaining a complaint under a state antitrust law whose interpretation purports

66. *See supra* note 2 and accompanying text.

67. Frame-Wilson v. Amazon.com, Inc., 591 F. Supp. 3d 975, 989 (W.D. Wash. 2022).

68. Reiss v. Audible, Inc., No. 1:24-CV-05923 (JLR), 2025 WL 1654643 (S.D.N.Y. June 11, 2025).

69. *How Many Etailers Are in the US?*, ETAILINSIGHTS (last visited Mar. 3, 2025), https://perma.cc/RRG7-WC3Y (archived Mar. 3, 2025).

70. *See, e.g.*, Anti-Monopoly, Inc. v. Hasbro, Inc., 958 F. Supp. 895, 903-05 (S.D.N.Y. 1997), *aff'd*, 130 F.3d 1101 (2d Cir. 1997), *cert. denied*, 525 U.S. 813 (1998) (holding that even if "board games" rather than "toys" was a relevant market, frequent entry by small entrepreneurs undermined any inference of market power to be drawn from Hasbro's 70% market share); Ind. Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989) (ruling that ease of entry undermined monopolization claim against Kroger). *See also* 2B AREEDA & HOVENKAMP, *supra* note 1, at ¶¶ 420-423 (5th ed. 2024).

to follow federal antitrust law.[71] A few months later another decision denied most of a motion to dismiss the Federal Trade Commission's case against Amazon. The court credited two alleged markets: an "online superstore market" and a "market for online marketplace services."[72] It offered virtually no analysis concerning the viability of these groupings of sales as a relevant market. Once again, this was a motion to dismiss; however, the Supreme Court's *Twombly* decision requires the plaintiff to plead sufficient facts to indicate a properly defined market capable of sustaining monopoly prices.[73] In any event, at a later stage, they will need to be proven.

The second alleged market of "online marketplace services" may represent a testable grouping of sales depending on the extent to which "online" services are the same across diverse products but distinctive from similar services in traditional commerce. Display on the Amazon website seems distinctive from display in a physical store, although entry also seems easy. Whether advertising, shipping, transaction processing, or other services are sufficiently distinctive to permit purely online services to be priced monopolistically remains a question of fact. It would also require proof that these services could not readily be duplicated by a rival or potential rival.

The first alleged relevant market in the FTC complaint, "online superstores," references the threat of higher *product* prices, and these depend on Amazon's degree of power in the market for any particular product. The court quoted a portion of the complaint: "'Amazon deploys a series of anticompetitive practices that suppress price competition and push prices higher across much of the internet by creating an artificial price floor and penalizing sellers that offer lower prices off Amazon'—known as Amazon's 'anti-discounting strategy.'"[74]
Whether Amazon can push higher prices "across much of the internet" depends on the extent to which the affected products are insulated from offline competition. For a purely digital product such as streaming, which may face little competition from offline alternatives, that strategy seems plausible, although Amazon's share of streaming would still have to be tested against streaming by its digital rivals. As noted previously, Amazon does not have a dominant share in music streaming, where it is smaller than market leader Spotify.[75] In video streaming it is smaller than the market leader, Netflix.[76]

---

71. District of Columbia v. Amazon.com, Inc., 320 A.3d 1073, 1076 (D.C. 2024) (sustaining claims that Amazon's practices "led to increased prices across online marketplaces").

72. Fed. Trade Comm'n v. Amazon, No. 2:23-cv-01495-JHC, 2024 WL 4448815 (W.D. Wash. Sept. 30, 2024).

73. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). On *Twombly*'s requirements for pleading market definition and market power, see 2B AREEDA & HOVENKAMP, *supra* note 1, at ¶ 531 (5th ed. 2024).

74. Fed. Trade Comm'n v. Amazon, No. 2:23-cv-01495-JHC, 2024 WL 4448815 at *1 (W.D. Wash. Sept. 30, 2024) (quoting Amended Complaint at 85, 87, Fed. Trade Comm'n v. Amazon, No. 2:23-cv-01495-JHC (W.D. Wash. Sept. 30, 2024)).

75. *See supra* note 22 and accompanying text.

76. *See* Ana Durrani, *Media Streaming Stats You Should Know*, FORBES (last updated Aug. 15, 2024), https://perma.cc/J9UK-G32Z (archived Mar. 3, 2025) (showing Netflix with

But what about toasters, bicycles, screwdrivers, tennis shoes, or the millions of other tactile products that Amazon sells in competition with offline as well as online sellers? These would have to be tested over the full range of sellers who are currently selling them or can easily do so in response to a price increase. Further, there is no way to address these allegations in some alleged single "market" for everything Amazon sells. The extent to which Amazon competes with offline sellers in a particular product must be addressed in the same way that we always address market power issues in other cases: on the basis of each individual product, where Amazon's competitive strength varies widely from one product to the next. For example, it might plausibly monopolize the market for e-books, where its market share of around 60% is substantial.[77] However, its share of consumer electronics is 12%, smaller than both that of Walmart and Best Buy.[78] Its market shares for large kitchen appliances are mostly under 5%, although they run higher for freezers.[79] Its market share for groceries is less than 3%, including the 1.8% sold by its mainly offline subsidiary Whole Foods.[80]

The alleged relevant market in the Amazon cases was both too broad and too narrow. It was too broad because it lumped together numerous different and noncompeting goods in which Amazon had widely different market shares, for the simple reason that the same seller sold them. It was too narrow because it then limited the relevant market to online sales without considering the extent to which most of the covered products competed with offline sales.

This double error is particularly troublesome for rule of reason offenses such as most-favored-nation agreements (MFNs), which many of the Amazon cases challenge. An MFN is a supplier's commitment that it will give a reseller terms at least as favorable as those offered to competing sellers[81] When such agreements are imposed by a nondominant seller, they are always procompetitive (output increasing): for example, a retailer may not be willing to add a product or maintain investment in it without assurance that the supplier is not selling it cheaper to a competing seller. As a result, MFNs either encourage reseller entry or enable them to continue carrying a product or committing more resources to it.[82] Once a firm becomes dominant in a particular product, however, its motives

---

roughly 247 million users, Amazon with roughly 200 million, and Disney+ with roughly 150 million, amongst statistics for other streaming services).

77. *See* Sarah Yoo, *Amazon Ebook Market Share 2017-2024*, PUBLISHDRIVE (Apr. 29, 2024), https://perma.cc/S7B9-GVYN (archived Mar. 3, 2025).

78. These figures are as of December 2023. *See* Ashley Jefferson, *Consumer Electronics Market: Top Brands & Retailers in 2023, Retail Sales Data & Trends*, OPENBRAND (Dec. 18, 2023), https://perma.cc/9N2Z-K3HD (archived Mar. 3, 2025).

79. *See How Amazon is Infiltrating the Large Appliances Category*, YIPITDATA (Feb. 14, 2024), https://perma.cc/L75A-SK5P (archived Mar. 3, 2025) (showing sales and market share data for the large appliances industry from 2021 to 2023).

80. Alex Fitzpatrick & Erin Davis, *The most popular grocery stores in the U.S.*, AXIOS (Apr. 20, 2023), https://perma.cc/AK2D-BP64 (archived Mar. 3, 2025).

81. 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1807b2 (5th ed. 2024) .

82. *See id.* at ¶ 1807 (5th ed. 2024) (vertical MFNs); 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2202 (5th ed. 2024) (horizontal MFNs); *see also In re* Blue

become more complex: it may also use MFNs to limit the growth of rival resellers. In all events, MFNs are assessed under the rule of reason, and a product-specific inquiry into market power is essential.[83] The relevant market allegations in these complaints make that impossible.

One might object that a product-specific inquiry into Amazon's power would be extremely costly, given the large number of products that Amazon sells. But that is in fact the point: substantial market power must be proven. Even when the stakes are low, such as a $100 fine, we do not ticket every car just because the average speed is ten miles above the limit and it costs less to ticket everyone. Writing a ticket requires a specific showing of a violation. In the case of a practice such as an MFN, when its own market position is small Amazon has a strong and procompetitive interest in assurance that a supplier is not selling elsewhere at a lower price. A high product-specific share should be a threshold to further inquiry. Very likely, that will be true in only a small number of cases, but that is simply evidence that the market power requirement is working the way it should be. Not everyone is a monopolist, and firms can be monopolists in one of their products but not others.

Aggregations of complementary products in the same store can raise unique issues. The cost of joint provision may be lower or customer appeal higher when a single store sells two or more goods. For example, in its first *Staples* decision the district court found that "office superstores," which sell a large range of office equipment and supplies, were a relevant market.[84] The court looked at evidence that Staples charged lower prices when it was in close proximity to another office superstore such as Office Depot, than when it was the only such store in the area.[85] In that case the acquired asset was the entire store, not individual products.[86] Nonetheless, customers presumably were willing to pay more for individual products when the same store also sold a full range of other office goods.[87]

Such product aggregations may particularly have value in brick-and-mortar stores because the costs of consumer movement are higher in them. For example, there may be an advantage to selling a printer and a computer in the same physical store when both are on a customer's shopping list. That would

---

Cross Blue Shield Antitrust Litig. MDL 2406, 85 F.4th 1070, 1085-87, 1102 (11th Cir. 2023), *cert. denied sub nom.* Behenna v. Blue Cross Blue Shield Ass'n, 144 S. Ct. 2686 (2024), and *cert. denied sub nom.* Home Depot U.S.A., Inc. v. Blue Cross Blue Shield Ass'n, 144 S. Ct. 2687 (2024) (approving antitrust settlement governing MFNs in health insurance); United States v. Apple, Inc., 791 F.3d 290, 339 (2d Cir. 2015) (condemning horizontal MFN); Starr v. Sony BMG Music Ent., 592 F.3d 314, 319, 326-27 (2d Cir. 2010) (citations omitted) (similar); Willamette Dental Grp., P.C. v. Or. Dental Serv. Corp., 882 P.2d 637, 642-44 (Or. App. 1998) (upholding MFN under state antitrust provision); *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 166 F. Supp. 3d 654, 663, 679-80 (E.D. La. 2016) (discussing evidentiary significance and proof of MFN).

83. 11 AREEDA & HOVENKAMP, *supra* note 81, at ¶ 1807b2.

84. Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1077-79 (D.D.C. 1997).

85. *Id.* at 1084.

86. *Id.*

87. *Id.*

certainly be the case for a couple of two dollar items. Once someone is in the store, the cost of driving to a different store for an uncertain result could matter. Whether that carries over to e-commerce is an empirical question, but one about which there is substantial doubt. For example, suppose a customer wanted to purchase both a printer and a computer. A particular internet seller carries both but the printer is being offered at a suspiciously high price. Would the customer purchase it simply because she was also getting the computer there, or would she at least exercise an additional mouse click to look at an alternative? That is another question of fact.

As noted previously, Amazon is the lowest price seller for thousands of tested items, particularly in comparison to Walmart.[88] Further, it appears that Amazon regards Walmart as its closest rival.[89] That indicates that the smallest grouping of sales capable of sustaining a monopoly price is at least one online store (Amazon) and one offline store (Walmart), but there are also many others.

The antitrust concept of "cluster markets" does sometimes permit grouping noncompeting goods into a single antitrust market for litigation purposes.[90] For example, there is a solid rationale for grouping "hospital services" into a market even though individual services, such as surgery and anesthesia, do not compete with one another. One needs the hospital to supply these services; the cost of obtaining separate supply for surgery and anesthesia would be inordinately high.[91] The general rationale for clustering is that there are serious cost or quality advantages to grouping a set of noncompeting goods or services under a common provider *and* these services cannot readily be supplied independently by multiple firms. Under that rationale, the second *Staples* decision found office superstores to be a relevant cluster market for wholesale business-to-business (B2B) customers when only the superstores could "meet the needs" of these customers.[92] A case can also be made that social network sites such as Facebook or X are cluster markets: users value not only the availability of individual services, such as the ability to post videos, photos or messages, but the aggregation itself is also valuable, leaving users to navigate among them.[93]

---

88. *See* Black, *supra* note 41; *see also* Kathryn Pomroy, *Amazon vs. Walmart: Who Has the Cheapest Prices?*, KIPLINGER (last visited Mar. 3, 2025), https://perma.cc/BW4H-VSDU (archived Mar. 3, 2025) ("Profitero compared non-sale prices of approximately 14,000 items across various leading online retailers. The report concluded that Amazon had lower prices vs. Walmart and 12 other U.S. retailers, including Best Buy, Chewy, CVS, Dick's Sporting Goods, Gamestop, GNC, The Home Depot, Kohls, Lowes, Macy's, Nordstrom, Petco, PetSmart, Target, Ulta, Walgreens, Walmart and Wayfair.").

89. *See supra* note 16 and accompanying text.

90. *See* Ian Ayres, *Rationalizing Antitrust Cluster Markets*, 95 YALE L.J. 109, 109-110 (1985).

91. *See* Herbert Hovenkamp, *Digital Cluster Markets*, 2022 COL. BUS. L. REV. 246, 255 (2022).

92. Fed. Trade Comm'n v. Staples, Inc., 190 F. Supp. 3d 100, 113 (D.D.C. 2016); *see id*. at 117 (discussing office superstores as a cluster market).

93. *See* Herbert Hovenkamp, *Digital Cluster Markets*, 2022 COLUM. BUS. L. REV. 246, 253-55 (2022).

But this is not Amazon, at least for most products. For example, a customer seeking to outfit a kitchen can readily buy the toaster from Amazon, the blender from Target's online store, and the microwave from a brick-and-mortar department store. She is not like the hospital patient who, as a practical matter, must obtain the surgery and the anesthesiology in the same place. That is to say, something does not become a cluster market simply because the seller offers multiple products. To be sure, clustering may apply to certain groups of Amazon products, such as its Kindle readers and digital book formats, but these would have to be identified and proven.

CONCLUSION

Online markets need to be normalized and integrated into the general fabric of antitrust market analysis by treating them as markets, no different in principle from other markets. They are factually distinctive in some ways, but all markets differ from one another in detail.[94]

The only way to determine the scope of a relevant antitrust market is to identify the product in question and then make the best assessment that the data permit concerning the range of substitutes from all sources that can limit that product's prices to its costs. For a wide range of products customers are able to substitute easily among multiple sellers, both on- and offline. In many cases sellers have the ability to do the same. When the range of such choices is sufficiently large, durable monopoly prices will be difficult to achieve.

To return to an earlier point, one important feature of market definition in antitrust cases is that it is a question of fact. This makes careful study of consumer and producer behavior respecting specific products essential, including the scope and frequency of switching and the range of available alternatives. The purpose of competition is to break down barriers, and that includes the barriers between old and new commerce.

94. *See* Richard Schmalensee, *Do Markets Differ Much?*, 75 AM. ECON. REV. 341, 342-43 (1985).