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Retail Mergers, Markets, and the Rise of Amazon

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The retail industry has endured a variety of changes throughout the last two decades. One major disruption in this industry has been the rise of internet retailers like Amazon that have pushed traditional brick-and-mortar retailers to either adapt in order to compete, or risk a slow and painful retail death. Antitrust law should take into account the realities of the retail industry and with whom large brick-and-mortar retailers are actually competing against. One avenue that antitrust law can use to take this reality into account is in its approach towards reviewing retail mergers. An important part of assessing whether a merger will have an anti-competitive effect on a specific geographic market involves determining which retailers are included in that geographic market to begin with. This Note argues federal courts and the Federal Trade Commission (FTC) should include Amazon as a competitor when assessing the geographic market for major brick-and-mortar retailers like Walmart, Target, Staples, and Best Buy. As of November 2021, federal courts have not had a chance to substantively consider whether Amazon should be included in the geographic market for large brick-and-mortar retail mergers. To the extent that courts have tangentially touched the issue, it appears courts have been hesitant to include internet retailers in the same geographic market as brick-and-mortar retailers. The FTC, on the other hand, has had a mixed response to Amazon and internet retailers. Inevitably, major brick-and-mortar retail mergers will occur, such as the recently attempted Staples/Office Depot merger, which will require consideration by the FTC and, in some cases, federal courts. When these mergers occur, Amazon should be considered a competitor when the merging retailers' pricing and non-pricing conduct indicates that they consider Amazon a competitor.

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INTRODUCTION

The rise of online retailers has altered the way brick-and-mortar retailers¹ interact and compete. While Amazon, founded in 1994,² did not initially pose a significant threat to big brick-and-mortar retailers like Walmart and Target, it has since become a major disrupter in the retail industry. News of price wars and race-to-the-bottom pricing schemes³ have filled the front pages of retail news websites for years. Yet it is unclear whether federal courts and the Federal Trade Commission (FTC) have adjusted their analysis to account for the changed retail environment. Brick-and-mortar retailers like Walmart are no longer competing with just other brick-and-mortar retailers. Consumers now have the option to buy most products from Amazon with quick shipping and low prices. This has resulted in what some have called “doomsday” for traditional brick-and-mortar retailers.⁴ The retailers that are still standing have no choice but to compete with Amazon to stay in business.

Competition in brick-and-mortar retail has changed, and many brick-and-mortar retailers themselves have transformed into part-internet sellers. Antitrust law should acknowledge these changes when analyzing major brick-and-mortar retail mergers and determining the relevant geographic market that a merger affects. As of November 2021, the precise issue of whether internet retailers should be included in the geographic market of large brick-and-mortar retail mergers has yet to come to judges’ chambers. To the extent the FTC has encountered the issue, it has provided a mixed response—occasionally acknowledging the impact of internet competitors while, at other times, discounting their impact in the brick-and-mortar retail sector. However, federal courts and the FTC should take a closer look at the competitive pressures that modern-day internet retailers like Amazon put on major brick-and-mortar retailers when determining a relevant geographic market.

Part I briefly reviews the importance of determining the geographic market in antitrust merger analysis. Part II discusses the current mindset of federal courts when reviewing antitrust challenges to brick-and-mortar retail mergers, finding that federal courts have yet to be truly pressed on the specific issue of whether Amazon

1. A brick-and-mortar retailer is a retailer that has a physical location/storefront and is not limited to online sales. See *What Is a Brick-and-Mortar Store? 6 Types of B&M Businesses*, MASTERCLASS (Aug. 18, 2021), <https://www.masterclass.com/articles/brick-and-mortar-store-guide> [<https://perma.cc/LCU8-QHMN>].

2. Amazon was founded on July 5, 1994. Avery Hartmans, *Jeff Bezos Originally Wanted to Name Amazon ‘Cadabra,’ and 14 Other Little-Known Facts About the Early Days of the E-Commerce Giant*, INSIDER (July 2, 2021, 11:42 AM), <https://www.businessinsider.com/jeff-bezos-amazon-history-facts-2017-4> [<https://perma.cc/G8MT-RWEE>].

3. A race-to-the-bottom pricing scheme occurs when companies lower their prices in order to compete with other retailers in a cycle that eventually results in either cutting costs elsewhere, such as by reducing the quality of the products, or cutting profits. See Brian Jackson, *How a Race to the Bottom Hurts Your Business’s Bottom Line*, KINSTA (Nov. 29, 2022), <https://kinsta.com/blog/race-to-the-bottom/> [<https://perma.cc/C29Z-KZ6F>].

4. See, e.g., Jeremy Bowman, *Howard Schultz Is Calling for Doomsday in Retail. Here’s What It Means for Starbucks and Everyone Else*, THE MOTLEY FOOL (Dec. 20, 2016, 4:35 PM), <https://www.fool.com/investing/2016/12/18/howard-schultz-is-calling-for-doomsday-in-retail-h.aspx> [<https://perma.cc/2RJW-2JQ3>].

should be factored as a competitor in major brick-and-mortar retail mergers. Part II also reviews some relevant FTC determinations on the issue as well.

Part III argues courts should consider Amazon a competitor for major brick-and-mortar retailers like Walmart and Target, given the current state of the retail industry. Part IV considers this theory in the context of the most recent attempted Staples/Office Depot merger and argues Amazon should be considered a competitor in that market. Lastly, Part V acknowledges some limitations of this Note.

I. ANTI-TRUST AND HORIZONTAL MERGERS

One important goal of antitrust law is to regulate mergers in concentrated markets to prevent harmful anti-competitive behavior. Mergers are primarily addressed under section 7 of the Clayton Act, which prohibits mergers that may “substantially . . . lessen competition, or . . . tend to create a monopoly” in “any line of commerce or in any activity affecting commerce in any section of the country.”⁵ The FTC, the Department of Justice (DOJ), and private plaintiffs play an important role in enforcing these laws. Mergers exceeding a certain size are also subject to pre-merger review under the Hart-Scott-Rodino Act.⁶ To protect against anti-competitive mergers, the FTC can sue the merging parties in federal court to obtain a preliminary injunction against the merger, pending the FTC’s own administrative adjudication, under section 13(b) of the Federal Trade Commission Act (FTC Act).⁷ To establish a prima facie case against a horizontal merger, which is a merger of companies within the same industry/product market, the government or a private plaintiff must successfully “(1) defin[e] a relevant product market, (2) defin[e] a relevant geographic market, and (3) show[] undue concentration in that combined market.”⁸

An important, often outcome determinative, question addressed in merger cases is which market the merger will affect, and consequently, which competitors should be included in that market. The success of a merger often depends on how the relevant market is defined: a narrow market definition often results in a granted injunction against the merger, while a broad market often results in a successful

5. 15 U.S.C. § 18.

6. *Premerger Notification Program*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/premerger-notification-program> [<https://perma.cc/85J9-GKEB>] (last visited Feb. 19, 2023) (“[P]arties to certain proposed transactions must submit premerger notification to the FTC and DOJ[.] . . . [and] may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period.”); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1397 (codified as amended at 15 U.S.C. § 18a).

7. 15 U.S.C. § 53(b); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015).

8. *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 291 (D.D.C. 2020).

merger.⁹ Defining the geographic market, thus, is an important and early step courts take when analyzing the potential impact of a merger.¹⁰

In defining the geographic market, courts must take into account the “commercial realities of the industry.”¹¹ Determining the geographic market involves asking “where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.”¹² The Supreme Court, in *Tampa Electric Co. v. Nashville Coal Co.*, defined a relevant geographic market as “the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.”¹³ In other words, a relevant geographic market is “the area in which the goods or services at issue are marketed to a significant degree by the acquired firm.”¹⁴ Thus, a relevant geographic market includes “the geographic area in which the defendant competes in marketing its products or service.”¹⁵

Determining the geographic market for a merger is important in evaluating the success of the merger for antitrust purposes. As a result, correctly applying antitrust law to internet retailers like Amazon is necessary to effectively define the ever-changing retail industry. Whether courts effectively do this may impact the success of brick-and-mortar retailers, which may be merging as the sole means of keeping their businesses afloat.

A. The Internet

Despite the major role internet retailers play in the retail sector, not much has been written about their impact on antitrust merger analysis.¹⁶ One of the few articles addressing how courts should treat internet companies in antitrust market determinations is Charles Eblen’s *Defining the Geographic Market in Modern Commerce: The Effect of Globalization and E-Commerce on Tampa Electric and Its*

9. See Charles Carson Eblen, *Defining the Geographic Market in Modern Commerce: The Effect of Globalization and E-Commerce on Tampa Electric and Its Progeny*, 56 BAYLOR L. REV. 49, 54–55 (2004) (“Where a defendant can persuade the court that the defendant competes in a broader geographic market, there is a lower probability that the defendant’s alleged anticompetitive conduct will result in a violation of the antitrust laws. Conversely, a narrow, localized geographic market increases the odds that a defendant’s alleged conduct is anticompetitive.”).

10. *Sysco*, 113 F. Supp. 3d at 24 (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974)).

11. *Id.* at 48 (quoting *Brown Shoe v. United States*, 370 U.S. 294, 336–37 (1962)).

12. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 357–58 (1963).

13. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), *abrogated on other grounds by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); see also *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997) (“A geographic market is that geographic area ‘to which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition.’” (quoting *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994))).

14. *Sysco*, 113 F. Supp. 3d at 48 (quoting *Marine Bancorporation*, 418 U.S. at 620–21).

15. *Id.* at 24 (quoting *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004)).

16. See, e.g., Jared Kagan, Note, *Bricks, Mortar, and Google: Defining the Relevant Antitrust Market for Internet-Based Companies*, 55 N.Y.L. SCH. L. REV. 271, 272 (2010) (noting that as of 2010, courts had not yet considered how internet-based companies should be treated in antitrust’s relevant market analysis); Note, Leegin’s *Unexplored “Change in Circumstance”: The Internet and Resale Price Maintenance*, 121 HARV. L. REV. 1600, 1600–01 (2008) (discussing the impact of the internet on competition in the context of price fixing and minimum resale price maintenance).

Progeny.¹⁷ Eblen examined how, and to what extent, courts should consider internet competitors when analyzing competition in a brick-and-mortar market.¹⁸ He cautioned against overexpanding brick-and-mortar geographic markets because of internet competition.¹⁹ However, this was partly because the internet was not accessible to a majority of consumers (in 2004, only about 50% of consumers had access) and because some consumers preferred brick-and-mortar stores for security and other reasons.²⁰ Consequently, redefining local brick-and-mortar markets as national markets in response to internet retailers would be a mistake, according to Eblen, because “Internet competitors do not exert equal competitive pressure across all geographic and demographic areas.”²¹ Eblen proposed “that courts should not simply expand the geographic market where Internet competition is present, but rather . . . should calculate a brick and mortar geographic market first, and then add the effect of Internet competition proportionally.”²² By following Eblen’s proposed analysis, courts could avoid two potential dangers: “(1) expanding the geographic market definition in order to encompass Internet sellers, thereby capturing distant [and irrelevant] brick and mortar sellers . . . ; and (2) assuming Internet sellers exert equal competitive pressure in all geographic markets in which they compete.”²³

Today, there are far more internet users than in 2004, when the numbers were around 50%.²⁴ Moreover, the risks many consumers may have faced in 2004 with security issues in online shopping have generally dwindled as online shopping has become increasingly common and, at least with reputable merchants like Amazon, far more secure.²⁵ Consequently, Eblen’s reasons for cautioning against market overexpansion in 2004 are less relevant to a court’s determination of a brick-and-mortar retail merger’s geographic market today. Current antitrust market analysis should consider these shifts.

17. Eblen, *supra* note 9.

18. *Id.* at 80–81.

19. *Id.*

20. *Id.* at 81.

21. *Id.*

22. *Id.* at 82.

23. *Id.*

24. *Id.* at 84; Ani Petrosyan, *Number of Internet Users in the United States From 2018 to 2027 (in Millions)*, STATISTA (Aug. 31, 2022), <https://www.statista.com/statistics/325645/usa-number-of-internet-users/> [<https://perma.cc/F7WK-GU5M>] (“As of 2022, the United States had over 307 million internet users. This figure is projected to grow to 328 million internet users in 2027.”); *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> [<https://perma.cc/1B8L-ATWP>] (“Today, 93% of American adults use the internet.”).

25. See Marc Summe, *Have Online Payments Become Safer Than Offline?*, WIRED (2014), <https://www.wired.com/insights/2014/12/have-online-payments-become-safer-than-offline/> [<https://perma.cc/5CF4-WRQJ>] (“Online transactions are more popular and secure than ever before, thanks to advancements in digital payments technology, demographic shifts, and the evolving cyber-security landscape.”); Lance Whitney, *Consumers Like the Benefits of Online Shopping Despite the Security Risks*, TECHREPUBLIC (Nov. 18, 2021, 6:23 AM), <https://www.techrepublic.com/article/consumers-like-the-benefits-of-online-shopping-despite-the-security-risks/> [<https://perma.cc/TT9E-ZQQG>] (“[T]he consumers polled still seem to feel safe shopping in the virtual world. A full 58% said they believe their personal data is protected online.”).

Internet competitors present a unique issue for antitrust because they are not rooted in any particular geographic market and often impact many markets at once. This presents a distinct scenario for geographic market analysis in antitrust. While this issue has been discussed in some form by some scholars, the precise role of Amazon in antitrust merger analysis in the twenty-first century has yet to be addressed.

II. WHAT COURTS DO AND DON'T DO

An overview of current case law shows that federal courts have not yet grappled with the issue of whether to include Amazon and online retailers in brick-and-mortar geographic markets. On the other hand, the FTC has made some mention of internet competitors in its administrative decisions throughout the years. The lack of mergers amongst large brick-and-mortar retailers since the rise of Amazon has likely resulted in few opportunities for federal courts to address the impending antitrust dilemma.

A. A Review of Relevant Federal Court Decisions

As of November 2021, there have not been any cases where a federal court has considered whether Amazon was a competitor when determining the relevant geographic market for a large brick-and-mortar retail merger. This conclusion is based on searches conducted for reported and unreported federal cases on Westlaw and LexisNexis (Lexis). Table 1 presents the initial searches conducted and their accompanying results.

I ran searches on both Westlaw and Lexis from October 21, 2021, to October 27, 2021, as well as on November 11, and 16, 2021. The initial searches used the “Citing References” (or “Citing Decisions” on Lexis) feature for section 7 of the Clayton Act, 15 U.S.C. § 18. Section 7 of the Clayton Act was used as an anchor for the searches because it is the most commonly used statute section for merger injunction requests.²⁶ The search terms used are shown in Table 1. I chose these search terms based on which brick-and-mortar retailers Amazon most likely competes with. These retailers were primarily chosen based on their likely overlap in product selection with Amazon.

Lexis’s Citing Decisions also included results for administrative decisions from the FTC, which increased its number of results relative to Westlaw’s. Aside from references to the FTC’s decision in the Dollar Tree/Family Dollar Stores merger, which will be discussed later in this Part, no cases were found involving a court explicitly including, or excluding, Amazon in the relevant market for a retail merger.

26. See *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/LBN6-J4FM>] (last visited Feb. 19, 2023).

Table 1: Data from Case Research on Westlaw and LexisNexis Platforms

Search Terms Used to Filter Results:	Total Results on Westlaw / [# of Cases Where Court Considered, or Should Have Considered, Amazon]	Total Results on Lexis / [# of Cases & Administrative Decisions Where Court/FTC Considered, or Should Have Considered, Amazon]
“Amazon”	10/[0]	26/[0]
“Walmart”	3/[0]	13/[1] (<i>Dollar Tree/Family Dollar Stores</i>)
“Wal-mart”	41/[0]	55/[0]
“Target”	356/[0]	538/[1] (<i>Dollar Tree/Family Dollar Stores</i>)
“K-mart”	18/[0]	19/[0]
“Sears”	92/[0]	115/[0]
“BestBuy”	2/[0]	5/[0]
“Best Buy”	6/[0]	17/[0]
“Staples”	49/[0]	99/[1] (<i>Dollar Tree/Family Dollar Stores</i>)
“Office Depot”	8/[0]	19/[0]
mass /1 (marketer merchandiser merchant retailer)	25/[0]	“Mass” /1 “marketer”: 1/[0] “Mass” /1 “merchandiser”: 6/[0] “Mass” /1 “merchant”: 1/[0] “Mass” /1 “retailer”: 0/[0]

In addition to utilizing the Citing References/Decisions of the Clayton Act, I also ran regular database searches for federal cases (reported and unreported), using the following search terms:

- (1) Search terms: antitrust and (“relevant market” /p “amazon” /p “retail”)²⁷
- (2) Search terms: antitrust and (“relevant market” /p (walmart wal-mart) /p “retail”)²⁸
- (3) Search terms: antitrust and market and (amazon /p disciplin!)²⁹
- (4) Search terms: antitrust and “relevant market” “amazon” “retail”³⁰

Ultimately, these searches also proved generally unfruitful. However, the fourth search found *McDonough v. Toys “R” Us, Inc.*³¹ While *McDonough* is outside the context of mergers and thus not precisely on point, it is an example of a court’s acknowledgment of the competitive impact of internet retailers like Amazon on brick-and-mortar retailers.³²

In *McDonough*, the district court acknowledged the price effects that internet retailers had on brick-and-mortar baby product retailers by noting that Babies “R” Us (BRU) “fac[ed] stiff competition from internet retailers offering steep discounts.”³³ The internet retailers could do so because “[w]ithout the operating costs associated with brick-and-mortar stores, internet retailers [could] offer huge discounts that other retailers [could not] match.”³⁴ The court found that BRU faced pressure because “[w]hen some sellers begin discounting, others must eventually lower their prices to remain competitive.”³⁵ Consequently, *McDonough* presents an example of a court acknowledging that internet retailers may place competitive pressure on brick-and-mortar retailers.

In addition to the searches conducted above, I ran searches using the Citing References of the three cases listed below. These specific cases were chosen because they, directly or indirectly, involved retailers and an antitrust issue (albeit, not all merger-related). In all three searches, the Citing References were filtered by “retail” to narrow the results to only retailers.

1. *Newcal Industries, Inc. v. Ikon Office Solution*³⁶: 183 case results
2. *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*³⁷: 16 case results
3. *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*³⁸: 40 case results

27. Produced two case results on both Westlaw and Lexis.

28. Produced seven case results on both Westlaw and Lexis.

29. Produced two case results on both Westlaw and Lexis.

30. Produced seventy-six case results in Westlaw and sixty-seven results in Lexis. I found *McDonough v. Toys “R” Us, Inc.*, 638 F. Supp. 2d 461 (E.D. Pa. 2009), under both searches.

31. *McDonough*, 638 F. Supp. 2d 461.

32. *Id.* In *McDonough*, the court declined to include Amazon in its benchmark for determining damages “because Amazon does not maintain brick-and-mortar stores.” *Id.* at 490 n.20. The case is discussed further in Section III.C.

33. *Id.* at 466.

34. *Id.* at 468.

35. *Id.* at 484.

36. 513 F.3d 1038 (9th Cir. 2008).

37. 967 F. Supp. 2d 1347 (N.D. Cal. 2013).

38. 615 F.3d 412 (5th Cir. 2010).

These searches also did not produce any new, relevant results. All in all, the search for cases where federal courts actively considered whether Amazon should be treated as a competitor in a relevant market for a retail merger was unsuccessful. While some courts appear to have grappled with the issue of internet competitors within broader antitrust doctrine, there do not appear to be any cases where courts have considered Amazon's impact on the relevant market for brick-and-mortar retail mergers.

B. A Review of Relevant FTC Decisions

The FTC, similarly, has not fully addressed the precise role of Amazon in its analysis of geographic markets for brick-and-mortar retail mergers. However, in some situations the FTC has considered the role of internet retailers more broadly.

For these results, I filtered the Citing References/Decisions of section 7 of the Clayton Act using the keywords listed in Tables 1 and 2 in both Westlaw and Lexis. These results were further filtered by the "Administrative Decisions" tab on Westlaw. The results from Lexis are located in Table 1 in the previous Section. These searches were conducted from October 21, 2021, to October 27, 2021.

Table 2: Data from Agency Research on Westlaw

Search Terms Used to Filter Results:	Total Results on Westlaw / [# of Administrative Decisions/Guidance where FTC Considered, or Should Have Considered, Amazon]
"Amazon"	30/[0]
"Walmart"	29/[4] (<i>Dollar Tree/Family Dollar Stores</i>)
"Wal-mart"	72/[4] (<i>Dollar Tree/Family Dollar Stores</i>)
"Target"	820/[4] (<i>Dollar Tree/Family Dollar Stores</i>)
"K-mart"	24/[3] (<i>Dollar Tree/Family Dollar Stores</i>)
"sears"	47/[0]
"BestBuy"	2/[0]
"Best Buy"	11/[0]
"Staples"	147/[2] (<i>Dollar Tree/Family Dollar Stores</i>)
"Office Depot"	23/[0]
mass /1 (marketer merchandiser merchant retailer)	100/[4] (<i>Dollar Tree/Family Dollar Stores</i>)

In addition to the case research done via the Citing References/Decisions feature of Westlaw and Lexis, I also reviewed the FTC's and DOJ Antitrust Division's websites.³⁹ A search of the DOJ's website did not produce any new, relevant decisions regarding Amazon. However, searching the FTC's website under "Cases and Proceedings" revealed *F.T.C. v. Toys "R" Us, Inc.*, and searching in the "Closing Letters" page revealed the FTC's decisions in the OfficeMax/Office Depot merger and the Federated Department Stores, Inc./May Department Stores Company merger.

Although not specific to Amazon, the FTC has on occasion considered the role of online retailers in merger (and non-merger) decisions. Examples of this can be found in the 2015 Dollar Tree/Family Dollar Stores merger, *F.T.C. v. Toys "R" Us, Inc.* (non-merger), the 2005 Federated Department Stores, Inc./The May Department Stores Company merger, and the 2013 Office Depot/OfficeMax merger.

1. Dollar Tree/Family Dollar Stores Merger

In 2014, the discount retailer Dollar Tree, Inc. proposed a merger with its competitor Family Dollar Stores, Inc.⁴⁰ The FTC filed a complaint against the merger in 2015, arguing the merger would violate section 5 of the FTC Act as well as section 7 of the Clayton Act.⁴¹ The FTC argued the relevant product market was "[d]iscount general merchandise retail stores," which included "small-format, deep-discount retailers that sell an assortment of consumables and non-consumables . . . at prices typically under \$10 (i.e., dollar stores) and the retailer Walmart."⁴² In certain geographic areas, the FTC argued the market may be as "broad as the sale of discounted general merchandise in retail stores (i.e., discount general merchandise retail stores as well as supermarkets . . . mass merchandisers, and discount specialty merchandise retail stores)."⁴³ However, the FTC asserted that the overall geographic market was local.⁴⁴ Upon investigation, the FTC issued a consent order requiring Dollar Tree to divest 330 Family Dollar stores to Dollar Express LLC as a condition of the merger.⁴⁵

39. *Antitrust Case Filings*, U.S. DEP'T OF JUST., <https://www.justice.gov/atr/antitrust-case-filings> [<https://perma.cc/DL3Q-5ZET>] (last visited Feb. 19, 2023); *Legal Library: Cases and Proceedings*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings> [<https://perma.cc/5MU2-J6L3>] (last visited Feb. 19, 2023); *Legal Library: Closing Letters*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/commission-closing-letters> [<https://perma.cc/A35F-EZCW>] (last visited Feb. 19, 2023).

40. Complaint ¶ 4, *Dollar Tree, Inc.*, 160 F.T.C. 449 (2015) (No. C-4530), <https://www.ftc.gov/system/files/documents/cases/150702dollartreecmpt.pdf> [<https://perma.cc/8RNB-ESNW>].

41. *Id.* ¶ 12.

42. *Id.* ¶ 5.

43. *Id.* ¶ 6.

44. *Id.* ¶ 8.

45. *Dollar Tree, Inc.*, 160 F.T.C. 449 (2015); Press Release, Dollar Tree, Inc., Dollar Tree Completes Divestiture of 330 Family Dollar Stores to Dollar Express (Nov. 2, 2015), https://corporate.dollartree.com/_assets/_b69262fb6c34dc4cc07e684ba0fc2af8/dollartreeinfo/news/2015-11-02_Dollar_Tree_Completes_Divestiture_of_330_Family_114.pdf [<https://perma.cc/H9GB-N6RK>].

In the FTC's analysis of the proposed consent order, it noted in a footnote that although it chose to include mass merchandiser Walmart in the product market for "[d]iscount general merchandise retail stores," online retailers should not be included in that market.⁴⁶ The FTC noted,

Online retailers are not participants in the relevant product market. The primary appeal of dollar stores is the combination of value and convenience they offer consumers. Given the time required to process and ship items ordered online, Internet retailers are less convenient shopping options for consumers looking to make an immediate purchase on a fill-in trip.⁴⁷

Although not explicitly mentioning Amazon, the FTC acknowledged the potential competition that online retailers pose to general merchandisers and sought to distinguish that competitive pressure by looking to a non-price factor like shipping speed.

2. Toys "R" Us, Inc.

Toys "R" Us, Inc. presents another scenario where the FTC acknowledged the competitive pressures of online retailers on brick-and-mortar retailers.⁴⁸ In *Toys "R" Us, Inc.*, the FTC reassessed a prior consent order and prohibition placed on Toys "R" Us in 1998.⁴⁹ Because of anti-competitive conduct that Toys "R" Us had been involved in during 1996, the FTC issued a consent order which required Toys "R" Us to cease and desist from certain actions with manufacturers, such as agreeing to limit supply, refusing to sell toys to other toy discounters or coercing a manufacturer to do such a thing, and encouraging a supplier to give Toys "R" Us information about sales or shipments to any toy discounters.⁵⁰

In 2014, Toys "R" Us filed a petition to reopen and modify the 1998 consent order.⁵¹ It argued that other large retailers had overtaken Toys "R" Us in sales rankings and that "it ha[d] lost significant market share in the toys markets," which made the prior order unnecessary.⁵² The FTC agreed that the circumstances of the market had changed since 1998.⁵³ It noted that "Walmart and Target ha[d] overtaken [Toys "R" Us] in competitive strength and market share."⁵⁴ Moreover, in addition to Walmart and Target, the FTC found that Toys "R" Us successfully showed that it now faced "significant competition from online firms."⁵⁵ It found that "[o]nline sales, as a proportion of total toy sales, ha[d] almost tripled between

46. Dollar Tree, Inc. and Family Dollar Stores, Inc.; Analysis of Proposed Consent Orders to Aid Public Comment, 80 Fed. Reg. 42,810, 42,812 (Fed. Trade Comm'n July 20, 2015), 2015 WL 4386394.

47. *Id.*

48. Toys "R" Us Inc., No. 9278, 2014 WL 1630469 (Fed. Trade Comm'n Apr. 11, 2014).

49. *Id.* at *1.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *3-4.

54. *Id.* at *3.

55. *Id.*

2002 and 2012.”⁵⁶ As a result, Toys “R” Us no longer had the market share and power that it did when the FTC issued its consent order in 1998. The FTC granted Toys “R” Us’s petition to reopen and modify the prior order.⁵⁷

Although *Toys “R” Us, Inc.* did not analyze the retail market in the context of a merger, the decision is still an important acknowledgment by the FTC that online retailers can put real competitive pressure on brick-and-mortar stores. This reasoning could be imported into the FTC’s market analysis for brick-and-mortar retail mergers as well.

3. Federated Department Stores, Inc./The May Department Stores Company Merger

In 2005, the FTC allowed a merger to go through between Federated Department Stores, Inc. (which owned Macy’s and Bloomingdale’s) and The May Department Stores Company (which owned department stores like Robinson-May).⁵⁸ In its closing statement on the merger, the FTC discussed the rapidly changing retail industry and its effect on the department store market.⁵⁹ The FTC concluded that department stores were no longer their own “distinctive market niche.”⁶⁰ Rather, “they now face[d] pressures both from ‘above’ and ‘below’ even in the same mall, [and] not to mention [from] mass market, mail order, and Internet alternatives.”⁶¹ In its discussion of these changes, the FTC explicitly noted the addition of Amazon to the changing retail market.⁶² The FTC went on to define the relevant product market as “all department stores and all specialty stores that collectively sell substantially similar products to those offered by Federated and May,” and the geographic market as “at least as large as a[] [metropolitan statistical area], but [possibly] larger in some areas”⁶³ The FTC’s explicit mention of internet competitors (and Amazon, specifically) in its discussion of the changing retail industry suggests that the FTC was thinking of Amazon as a budding retail competitor from as early as 2005.

4. Office Depot/OfficeMax Merger

In 2013, the FTC reviewed Office Depot, Inc.’s acquisition of OfficeMax, Inc. and again acknowledged the competitive pressure online retailers posed to

56. *Id.*

57. *Id.* at *4.

58. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, FTC File No. 051-0111 (2005), https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-federated-department-stores-inc.may-department-stores-company/050830stmt0510001.pdf [<https://perma.cc/ED87-TZ3K>]; *see also* Press Release, Fed. Trade Comm’n, FTC Issues Statement on Closure of Federated/May Investigation (Aug. 30, 2005), <https://www.ftc.gov/news-events/press-releases/2005/08/ftc-issues-statement-closure-federatedmay-investigation> [<https://perma.cc/RS25-MXW9>].

59. Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Company, No. 051-0111, *supra* note 58, at 2.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 3–4.

brick-and-mortar retailers.⁶⁴ Office Depot and OfficeMax, two of the three largest office supply retailers, successfully merged in 2013, despite Staples and Office Depot's failed attempt at a merger back in 1997.

In the FTC's concluding letter on the merger, it discussed how its "current investigation ha[d] shown that the market for the sale of consumable office supplies ha[d] changed significantly" since the 1997 case.⁶⁵ As a result, the merger between Office Depot and OfficeMax did not pose a significant risk to the market that would necessitate blocking the merger.⁶⁶ The FTC found that the market for retail office supplies was much broader than it was in 1997 because (1) customers rely more on regular brick-and-mortar retailers (like Walmart or Target) for office supplies than office supply superstores, and (2) the "explosive growth of online commerce, which has had a major impact" on the office supplies market.⁶⁷ The FTC further found that "[c]ompany documents show[ed] that [office supply superstores] are acutely aware of, and feel threatened by, the continued growth of online competitors, most notably Amazon."⁶⁸ Online retailers' competition "has caused [office supply superstores] to respond with new pricing practices and other strategies."⁶⁹ The stores are "often pressured to match [the] lower online prices [from online retailers] in their stores."⁷⁰

The Office Depot/OfficeMax merger decision was an explicit acknowledgement by the FTC of the competitive pricing impact that Amazon, and internet retailers more broadly, have on brick-and-mortar retailers like Office Depot and OfficeMax. Although the FTC limited its opinion to the facts before it,⁷¹ the letter appears to be one of the first major occurrences of the FTC acknowledging Amazon's role in brick-and-mortar retail markets.

C. Examples of Cases Where Amazon Should Have Been Considered a Competitor

Since the rise of Amazon, there have been few major brick-and-mortar retail mergers that have resulted in a public written decision from a court or the FTC. However, the Dollar Tree/Family Dollar Stores merger is one where Amazon could have been considered a competitor in the FTC's market analysis.

In the 2015 Dollar Tree/Family Dollar Stores merger,⁷² the FTC ultimately decided the product market of "[d]iscount general merchandise retail stores"

64. Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC File No. 131-0104 (Nov. 1, 2013), https://www.ftc.gov/system/files/documents/public_statements/statement_commission/131101officedepotofficemaxstatement.pdf [<https://perma.cc/57HM-B7PM>]; see also Press Release, Fed. Trade Comm'n, FTC Closes Seven-Month Investigation of Proposed Office Depot/OfficeMax Merger (Nov. 1, 2013), <https://www.ftc.gov/news-events/news/press-releases/2013/11/ftc-closes-seven-month-investigation-proposed-office-depotofficemax-merger> [<https://perma.cc/FNX2-JTKN>].

65. Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., No. 131-0104, *supra* note 64, at 1.

66. *Id.*

67. *Id.*

68. *Id.* at 1–2.

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 3.

72. See *supra* Section II.B.1 for a more detailed discussion of this case.

included mass merchandiser Walmart, but not any online retailers.⁷³ The FTC's reasoning against including online retailers boiled down to their inconvenience and inability to fulfill consumers' immediate purchase needs.⁷⁴ In the case of Amazon, however, this may no longer be the case in some locations. Some analysts have already predicted that dollar stores would start to face competitive pressure from Amazon after Amazon removed its twenty-five-dollar cart minimum for free one-day shipping.⁷⁵ Others have argued that if Amazon could figure out how to "quickly deliver products to discount shoppers in safe and cost-effective ways, there could be some competitive pressure" for dollar stores.⁷⁶ But, Amazon has immensely expanded its shipping capabilities throughout the years. As a result, in some geographic markets, it is now capable of offering same-day shipping and the ability for customers to pick up certain items at an Amazon Locker nearby.⁷⁷ Amazon also offers two-hour shipping via "Prime Now" on select items.⁷⁸ In addition to faster shipping, Amazon operates three different types of physical Amazon stores for consumers to shop at,⁷⁹ making the inconvenience of online

73. Complaint, *supra* note 40, ¶ 5.

74. Dollar Tree, Inc. and Family Dollar Stores, Inc.; Analysis of Proposed Consent Orders to Aid Public Comment, 80 Fed. Reg. 42,810, 42,812 n.5 (Fed. Trade Comm'n July 20, 2015).

75. Blake Droesch, *Dollar Stores Continue to Endure the Retail Apocalypse, for Now*, INSIDER INTEL: EMARKETER (Oct. 29, 2019), <https://content-na1.emarketer.com/dollar-stores-continue-to-endure-the-retail-apocalypse-for-now> [<https://perma.cc/3DTH-M3L7>]; Leo Sun, *Amazon Declares War on Dollar Tree and Dollar General: Analysis*, USA TODAY (Oct. 22, 2019, 1:56 PM) <https://www.usatoday.com/story/money/2019/10/22/amazon-free-one-day-shipping-dollar-stores/40345677/> [<https://perma.cc/7B4C-JVBA>].

76. See Suman Bhattacharyya, *A 'Savvy Operator': Why Dollar General Dominates the Discount Retail Category*, DIGIDAY (Apr. 15, 2019), <https://digiday.com/retail/savvy-operator-dollar-general-dominates-discount-retail-category/> [<https://perma.cc/44Y6-F9CN>] ("According to Morningstar analyst Zain Akbari, if large brands like Walmart or Amazon can figure out how to quickly deliver products to discount shoppers in safe and cost-effective ways, there could be some competitive pressure on the horizon for discount players like Dollar General.").

77. See Meira Gebel, *What Is Amazon Locker? How to Use the Free and Convenient Delivery Pick-up System*, INSIDER: REVIEWS (June 17, 2021, 3:47 PM), <https://www.businessinsider.com/guides/tech/amazon-locker> [<https://perma.cc/PSL6-HRPL>]; *Amazon Same-Day Delivery*, AMAZON, <https://www.amazon.com/b?ie=UTF8&node=21382124011> [<https://perma.cc/YSQ9-43UP>] (last visited Feb. 19, 2023); Andrew Murphy & Gene Munster, *Walmart Needs to Dump Amazon's Playbook*, DEEPWATER ASSET MGMT. (June 13, 2019), <https://deepwatermgmt.com/walmart-needs-to-dump-amazons-playbook/> [<https://perma.cc/LNA9-7S42>] ("Marketplace Pulse research estimates Walmart currently offers 130k products for 1-day delivery compared to Amazon at 10M. This gap will widen in the months ahead given Amazon's upcoming significant investments in 1-day delivery.").

78. Shefali Kapadia, *Walmart Adds 2-Hour Delivery Service*, SUPPLY CHAIN DIVE (May 1, 2020), <http://supplychaindive.com/news/walmart-2-hour-delivery-last-mile/577183/> [<https://perma.cc/7SMA-QSSS>].

79. Until recently, Amazon had five types of physical stores: Amazon Books, Amazon 4-Star, Amazon Fresh, Amazon Pop Up, and Amazon Go. See Jeffrey Dastin, *Amazon to Shut Its Bookstores and Other Shops as Its Grocery Chain Expands*, REUTERS (Mar. 2, 2022, 6:26 PM), <https://www.reuters.com/business/retail-consumer/exclusive-amazon-close-all-its-physical-bookstores-4-star-shops-2022-03-02/> [<https://perma.cc/LKW4-MHKL>]; *Physical Retail*, AMAZON, <https://www.aboutamazon.com/what-we-do/physical-retail> [<https://web.archive.org/web/20220927165600/https://www.aboutamazon.com/what-we-do/physical-retail>] (last visited Sept. 27, 2022). It now, however, has consolidated its stores into three types: Amazon Go, Amazon Fresh, and Amazon Style. *Amazon Physical Stores Locations*, AMAZON, <https://www.amazon.com/find-your-store/b/?node=17608448011> [<https://perma.cc/2QRD-SUP9>] (last visited Feb. 19, 2023). It is estimated that Amazon operates

shopping inapplicable in many locations. These features allow Amazon to offer many of the same benefits of instant gratification that a consumer shopping at a Walmart or a Dollar Tree would get, but often without the hassle of physically going to the store.

Amazon also shares with Walmart many of the same features that the FTC utilized to justify the inclusion of Walmart in the dollar-store market. In its decision to include Walmart, the FTC argued that “[a]lthough Walmart does not provide the same kind of convenience as that of dollar stores given its less-accessible locations, larger store footprints, and greater assortment of products, Walmart nevertheless competes closely with dollar stores by offering a comparable or better value to consumers in terms of pricing.”⁸⁰ If the FTC was willing to compromise on convenience to include Walmart in the relevant market, it could be argued that there is little reason for it to have excluded the entirety of online retailers and other mass merchandisers like Target. Walmart and Amazon actively compete with each other in both their pricing and non-pricing practices.⁸¹ As a result, it would make sense to also include Amazon in many of the same retail markets that Walmart is included in.

Moreover, Amazon’s shipping capabilities were not as advanced in 2015 when the Dollar Tree/Family Dollar Stores merger occurred. Had the merger occurred today, the FTC would also need to consider Amazon as a formidable competitor for dollar stores if the FTC intends to include Walmart in the market as well. The inclusion of Walmart in the market expands the market definition to the point where inclusion of online retailers like Amazon becomes necessary to accurately reflect the competitive market.

On balance, federal courts have not had a chance to consider Amazon a competitor when determining the relevant market for brick-and-mortar retail mergers. The virtually nonexistent discussion of online competitors in federal cases has likely been a result of the lack of major retail mergers in the last decade since Amazon has risen to prominence. On the other hand, the FTC has, on occasion, mentioned and discussed online retailers in its merger decisions. Although it has not always been inclined to include or consider internet retailers in its market evaluations for mergers, the FTC has at least mentioned the relevance and potential impact that online retailers can pose to brick-and-mortar stores. As Amazon continues to gain control over the retail industry, there remains more room for courts and the FTC to consider the real competitive threat online retailers like Amazon pose to brick-and-mortar retailers.

over 500 physical stores in the United States (including Whole Foods). Russell Redman, *Amazon Physical Stores Notch Another Double-Digit Sales Gain in Q1*, SUPERMARKET NEWS (Apr. 29, 2022), <https://www.supermarketnews.com/retail-financial/amazon-physical-stores-notch-another-double-digit-sales-gain-q1> [https://perma.cc/TXG3-7QMW].

80. Dollar Tree, Inc. and Family Dollar Stores, Inc.; Analysis of Proposed Consent Orders, 80 Fed. Reg. at 42,811.

81. See discussion *infra* Part III.

III. WHAT COURTS SHOULD CONSIDER WHEN DETERMINING A GEOGRAPHIC MARKET FOR RETAIL MERGERS

Up until today, courts, and to a lesser extent the FTC, have not considered whether Amazon should be included in the relevant geographic market for retail mergers alongside brick-and-mortar retailers like Walmart and Target.⁸² However, courts should be factoring major internet retailers like Amazon as competitors when determining the geographic market for retail mergers in the product markets that these retailers compete in. This is because retail customers are generally sensitive to price, and major retailers like Walmart compete with Amazon on pricing. Moreover, many major retailers consider Amazon a competitor and have adopted policies to better compete with Amazon on features beyond just pricing. All in all, these factors weigh in favor of courts treating Amazon as a competitor in the brick-and-mortar retail market.

A. The Rise of Amazon in Retail

Amazon has been on the rise since its creation in 1994. What was once a mere online bookseller has now become a major retailer, competing head-to-head with the likes of Walmart, Target, and Best Buy.

As of 2020, it is estimated there are two hundred million Amazon Prime members worldwide.⁸³ Of these members, 65% are said to come from the United States.⁸⁴ In 2019, it was estimated there were about 105 to 115 million Amazon Prime members in the United States—approximately 82% of households.⁸⁵ Although Amazon Prime members on average spend more at Amazon than non-members, Amazon Prime members' spending has increased throughout the years.⁸⁶ A 2019 study found that, on average, Prime members spent about \$1,400 per year at Amazon, whereas non-members spent \$600 per year.⁸⁷ The longer a

82. See *supra* Part II; see also Kagan, *supra* note 16 (finding that, as of 2010, courts had not yet considered this issue when defining markets for internet retailers); Eblen, *supra* note 9, at 82 (finding that, as of 2004, courts had yet to determine how to define the market where “internet sellers compete with traditional brick and mortar sellers”).

83. Daniela Coppola, *Amazon Prime—Statistics & Facts*, STATISTA (Nov. 17, 2022), <https://www.statista.com/topics/4076/amazon-prime/#topicOverview> [https://perma.cc/MQF6-BWVT].

84. *Id.*

85. April Berthene, *82% of US Households Have an Amazon Prime Membership*, DIGIT. COM. 360 (July 11, 2019), <https://www.digitalcommerce360.com/2019/07/11/82-of-us-households-have-a-amazon-prime-membership/> [https://perma.cc/C7TN-TJRL]; Stephanie Chevalier, *Number of Amazon Prime Members in the United States as of December 2019*, STATISTA (May 4, 2022), <https://www.statista.com/statistics/546894/number-of-amazon-prime-paying-members/> [https://perma.cc/D6HY-5DAN]. This is an increase from 2019's ninety-five million and 2016's sixty-three million subscribers. See *id.*; Stacy Mitchell & Olivia Lavecchia, *Report: Amazon's Monopoly*, I.L.S.R.: INST. FOR LOC. SELF-RELIANCE (Nov. 29, 2016), <https://ilsr.org/amazons-monopoly/> [https://perma.cc/HDV7-NZ6E] (“Already, 63 million Americans, representing about half of all households, are enrolled in Prime.”).

86. *Amazon Prime Membership Growth Slows*, CIRP: CONSUMER INTEL. RSCH. PARTNERS LLC (July 20, 2018), <https://www.cirpllc.com/blog/2018/9/25/amazon-prime-membership-growth-slows> [https://web.archive.org/web/20190715120238/https://www.cirpllc.com/blog/2018/9/25/amazon-prime-membership-growth-slows].

87. Chevalier, *supra* note 85.

consumer is a Prime member, the more money they spend annually at Amazon.⁸⁸ From June 2020 to June 2021, consumers overall spent more than \$610 billion at Amazon, whereas Walmart had sales of only about \$566 billion.⁸⁹ Relatedly, a 2018 global study found that 79% of respondents had purchased from Amazon within the last six months.⁹⁰

As of August 2021, Amazon is now the world's largest retail seller (outside of China), surpassing Walmart.⁹¹ Amazon captures more than 70% of online transactions in fifteen out of twenty-three major product categories.⁹² According to the D.C. Office of the Attorney General, Amazon controls 50-70% of all online retail sales in the United States, "dominat[ing] the online retail sales market."⁹³ This exemplifies the continuing rise of Amazon's power: in 2016, it had about 43% of all online retail sales, and in 2015 it had captured only 33% of all U.S. online purchases (up from 25% in 2012).⁹⁴

Amazon's control over the e-commerce market continues to increase, as its sales continue to grow.⁹⁵ As of June 2022, Amazon's share of U.S. retail e-commerce sales was 37.8%.⁹⁶ Prior to that, however, Amazon's share had increased from 39.8% in 2020⁹⁷ to 41% in 2021.⁹⁸ This leaves Amazon with the largest market share of retail e-commerce sales as of 2022, with Walmart, Apple, and eBay trailing behind.⁹⁹ By some estimates, in 2020 Amazon had a 9.2% share of the overall retail

88. *Amazon Prime Membership Growth Slows*, *supra* note 86.

89. Karen Weise & Michael Corkery, *People Now Spend More at Amazon than at Walmart*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/technology/amazon-walmart.html> [<https://perma.cc/SYC7-D7MP>].

90. METAPACK, 2018 STATE OF ECOMMERCE DELIVERY 9 (2018).

91. Weise & Corkery, *supra* note 89.

92. Stacy Mitchell, Ron Knox & Zach Freed, *Report: Amazon's Monopoly Tollbooth*, I.L.S.R.: INST. FOR LOC. SELF-RELIANCE (July 28, 2020), https://ilsr.org/amazons_tollbooth/#_ftnref2 [<https://perma.cc/TR9S-SHXQ>] (citing Press Release, Jumpshot, An eCommerce Year in Review: Jumpshot Reveals Retail Winners, Losers and Amazon Data Report (Jan. 31, 2019)).

93. Complaint ¶¶ 1, 16, District of Columbia v. Amazon.com, Inc., No. 2021 CA 001775 B (D.C. Super. Ct. May 25, 2021), <https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint.pdf> [<https://perma.cc/S5WE-M2C4>] ("Amazon is estimated to have between 50-70% of the market share of the online retail sales market. By contrast, the next two largest retail platforms—Walmart.com and eBay—have only around 5% of the market each.")

94. *Amazon Accounts for 43% of US Online Retail Sales*, INSIDER (Feb. 3, 2017, 9:12 AM), <https://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2> [<https://perma.cc/5QFH-4MXE>].

95. Blake Droesch, *Amazon Dominates US Ecommerce, Though Its Market Share Varies by Category*, INSIDER INTEL.: EMARKETER (Apr. 27, 2021), <https://content-na1.emarketer.com/amazon-dominates-us-ecommerce-though-its-market-share-varies-by-category> [<https://perma.cc/ZK87-8APK>].

96. Stephanie Chevalier, *Market Share of Leading Retail E-commerce Companies in the United States as of June 2022*, STATISTA (Aug. 26, 2022), <https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/> [<https://perma.cc/736E-VZ9K>].

97. Droesch, *supra* note 95.

98. Suzy Davidkhanian, *US Retail Spending Jumped Nearly 16% This Year Despite Inflation, Supply Chain Woes*, INSIDER INTEL.: EMARKETER (Oct. 27, 2021), <https://content-na1.emarketer.com/us-retail-spending-jumped-this-year-despite-inflation-supply-chain-woes> [<https://perma.cc/CHB7-TNNW>].

99. Chevalier, *supra* note 96.

market, which rivaled Walmart's 9.5% share.¹⁰⁰ This was a sharp increase from Amazon's 6.8% share of retail sales in 2019 (versus Walmart's 8.9% share), and Amazon's 5% share in 2018.¹⁰¹ In 2015, Amazon had only a 3% share of retail sales.¹⁰²

In 2020, Amazon accounted for 3.3% of total consumer spending in the United States, whereas Walmart accounted for only 3.1%.¹⁰³ Amazon's role in the retail industry has increased significantly since the early 2000s, and it plays an increasingly competitive role in both the brick-and-mortar and e-commerce retail spheres.

B. Consumer Behavior

Amazon's competitiveness is significant for antitrust purposes only if consumers actually care about prices. A relevant geographic market includes places where a consumer could turn to as a substitute provider for products if the merging parties decide to raise prices.¹⁰⁴ Thus, the inclusion of Amazon in the geographic market for brick-and-mortar retailers like Walmart would be less appropriate if consumers did not care about price and would not move to another store even if prices increased.

However, consumers are willing to switch retailers for cheaper prices, making the inclusion of Amazon in the geographic market for retail mergers appropriate. In general, studies have found that consumers are willing to substitute in-person shopping with online shopping in certain product groups.¹⁰⁵ Further, consumers are willing to move away from shopping in person at brick-and-mortar stores for cheaper prices and fast delivery: 53% of consumers say they are willing to buy something online instead of in person because of free shipping.¹⁰⁶ Moreover, 60% of consumers in 2021 found direct home delivery a good enough reason to purchase an item online instead of in store.¹⁰⁷ In a 2021 global survey of twenty thousand

100. *Amazon and Walmart Are Nearly Tied in Full-Year Share of Retail Sales*, PYMNTS (Mar. 11, 2021), <https://www.pymnts.com/news/retail/2021/amazon-walmart-nearly-tied-in-full-year-share-of-retail-sales/> [<https://perma.cc/3RNR-THL5>].

101. *Id.*; Emily Dayton, *Amazon Statistics You Should Know: Opportunities to Make the Most of America's Top Online Marketplace*, BIG COM., <https://www.bigcommerce.com/blog/amazon-statistics/> [<https://perma.cc/TZA9-NJP8>] (last visited Feb. 19, 2023).

102. *Amazon and Walmart Are Nearly Tied in Full-Year Share of Retail Sales*, *supra* note 100.

103. *Id.*

104. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (“[T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.”), *abrogated on other grounds by* *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *see also* *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).

105. *See* Jesse W.J. Weltevreden, *Substitution or Complementarity? How the Internet Changes City Centre Shopping*, 14 J. RETAILING & CONSUMER SERVS. 192, 193–94, 205 (2007).

106. Global Web Index, *Commerce 31* (2020), <https://www.gwi.com/hubfs/Downloads/Commerce%20Flagship%20Report%20-%20GWI.pdf> [<https://perma.cc/TQ3R-X5G8>].

107. Alexander Kunst, *Drivers of Online Purchases in the U.S. 2021*, STATISTA (Aug. 24, 2021), <https://www.statista.com/forecasts/997240/drivers-of-online-purchases-in-the-us> [<https://web.archive.org/web/20210921125138/https://www.statista.com/forecasts/997240/drivers-of-online-purchases-in-the-us>] (survey of 5,713 U.S. residents, aged 18–64).

consumers, 50% noted convenience as the reason why they shop online, while 49% shopped online because of cheaper prices.¹⁰⁸

A 2021 study of one thousand U.S. adults found that 47% of respondents shop at Amazon for competitive prices.¹⁰⁹ Additionally, in a 2020 study of two thousand U.S. adult internet users, 49.2% of respondents signaled price as the reason why they purchased products on Amazon, while 79.8% pointed to fast and free shipping.¹¹⁰ In 2018, 64% of respondents in a 3,975-person survey pointed to price as their motive for shopping at Amazon.¹¹¹ Moreover, consumers are also willing to shop elsewhere for cheaper prices. In the same 2018 survey, 81% of respondents noted that cheaper prices would push them to shop at another retailer (either online or in person).¹¹² A 2020 study of over fourteen thousand internet users throughout the United States, United Kingdom, Australia, Germany, Spain, France, and Netherlands, found that 68% of respondents would shop at retailers other than Amazon because of price.¹¹³ The next most important factor in consumers' shopping decisions was delivery: 27% of respondents would shop elsewhere because of convenient delivery options.¹¹⁴ This all suggests that price still holds power over consumers' decisions on where to shop, and that consumers are generally willing to shop elsewhere if the price is right.

Additionally, consumers are often choosing between Amazon and other large retailers when making their shopping decisions. A 2021 survey of over 5,500 digital buyers in the United States asked whether the respondents "considered making a purchase[,] or compared prices with [other retailers] during Amazon Prime Day."¹¹⁵ Twenty-seven percent of respondents considered purchasing from Walmart and

108. Stephanie Chevalier, *Leading Reasons Why Consumers Worldwide Chose to Shop Online in 2021*, STATISTA (July 26, 2021), <https://www.statista.com/statistics/676358/reasons-online-shoppers-prefer-to-shop-online/> [<https://perma.cc/2UWH-GTG4>]; see also SIMON KEMP, DATA REPORTAL, DIGITAL 2021 JULY GLOBAL STATSHOT REPORT 172 (2021), <https://datareportal.com/reports/digital-2021-july-global-statshot> [<https://perma.cc/AH75-GYD4>] (finding that coupons and discounts drive 39.6% of consumers to shop online).

109. *What's Driving Shoppers to Amazon?*, RETAILWIRE (Nov. 19, 2021), <https://www.retailwire.com/discussion/whats-driving-shoppers-to-amazon/> [<https://perma.cc/4DN6-RXNB>].

110. Stephanie Chevalier, *Reasons for Internet Users in the United States to Shop on Amazon as of January 2020*, STATISTA (Feb. 22, 2022), <https://www.statista.com/statistics/670499/us-amazon-usage-reason/> [<https://perma.cc/39RL-F26X>].

111. *Here's Why People Shop on Amazon—And Why They'd Shop Elsewhere Too*, MKTG. CHARTS (Feb. 27, 2018), <https://www.marketingcharts.com/industries/retail-and-e-commerce-82536> [<https://perma.cc/3ARQ-LCAK>].

112. *Id.*

113. Wunderman Thompson, *Reasons Internet Users Worldwide Would Shop at Other Retailers Over Amazon, March 2020*, INSIDER INTEL.: EMARKETER (Apr. 30, 2020), <https://chart-na1.emarketer.com/237081/reasons-internet-users-worldwide-would-shop-other-retailers-over-amazon-march-2020-of-respondents> [<https://perma.cc/399U-HF95>].

114. *Id.*

115. Numerator, *Other Retailers Where US Digital Buyers Considered Making a Purchase or Compared Prices with During Amazon Prime Day, June 2021 (% of Respondents)*, INSIDER INTEL.: EMARKETER (June 22, 2021), <https://chart-na1.emarketer.com/248784/other-retailers-where-us-digital-buyers-considered-making-purchase-compared-prices-with-during-amazon-prime-day-june-2021-of-respondents> [<https://perma.cc/N7V7-ZBUZ>].

14% compared Walmart's prices to Amazon's.¹¹⁶ Similarly, 21% of respondents considered purchasing from Target instead, and 11% compared Target's prices to Amazon's.¹¹⁷ These consumers actively compared Amazon's and other retailers' prices when making purchase decisions. Thus, price is an important factor that can drive consumers away from shopping at traditionally brick-and-mortar retailers like Walmart and towards online retailers like Amazon.

These studies and data points all strongly suggest consumers still care about price when shopping from retailers, including Amazon. However, price may matter less when it comes to loyalty programs like Amazon's Prime membership. Prime members tend to be more likely to spend at Amazon, often to justify their purchase of the Prime membership to begin with.¹¹⁸ Moreover, some consumers turn to Amazon first for their product searches, undercutting the price-comparison process, with consumers starting and ending their product search on the same platform.¹¹⁹ A recent study found that 61% of consumers begin their search on Amazon, while only 32% start on Walmart.com.¹²⁰

While loyalty to Amazon may prevent some consumers from actively comparing prices among retailers, that still leaves at least a fourth of consumers who nonetheless begin their product search elsewhere. For these consumers, the competitive pricing between these retailers matters and can determine where their money goes.¹²¹ For many consumers, Walmart, Target, and Best Buy act as their backup retailers had they not shopped at Amazon.¹²² Thus, the difference for many

116. *Id.*

117. *Id.*

118. See Dayton, *supra* note 101.

119. See Sara Lebow, *Over 60% of US Online Shoppers Start Their Product Search on Amazon*, INSIDER INTELLIGENCE: EMARKETER (Aug. 9, 2022), <https://www.insiderintelligence.com/content/online-shoppers-search-on-amazon> [<https://perma.cc/73X9-F9Q6>] (“When it comes to online shopping, 61% of US consumers begin their product hunt on Amazon, close to half on a search engine like Google, and 32% on Walmart.com.”); *Most U.S. Consumers Would Purchase on Amazon Before Other E-Commerce Sites*, FEEDVISOR STUDY FINDS: THREE-FOURTHS OF CONSUMERS GO TO AMAZON WHEN THEY ARE READY TO MAKE A PURCHASE, FEEDVISOR (Mar. 19, 2019, 12:00 PM), <https://www.globenewswire.com/news-release/2019/03/19/1757273/0/en/Most-U-S-consumers-would-purchase-on-Amazon-before-other-e-commerce-sites-Feedvisor-study-finds.html> [<https://perma.cc/7N5G-B9W5>]; Spencer Soper, *More Than 50% of Shoppers Turn First to Amazon in Product Search*, BLOOMBERG (Sept. 26, 2016, 9:01 PM), <https://www.bloomberg.com/news/articles/2016-09-27/more-than-50-of-shoppers-turn-first-to-amazon-in-product-search> [<https://perma.cc/EA2U-5MXM>]; Complaint, *supra* note 93, ¶ 16 (“Sixty-six percent of consumers start their search for new products on Amazon, and a staggering 74% go directly to Amazon when they are ready to buy a specific product. Given its ubiquitous presence in the online retail sales market, Amazon’s business practices and decisions have an outsized effect on the U.S. economy.”); *Amazon Accounts for 43% of US Online Retail Sales*, *supra* note 94.

120. Lebow, *supra* note 119.

121. See also Note, *supra* note 16, at 1601 (“Competing prices are readily available to consumers, who increasingly take advantage of price information in their purchasing.”); *id.* at 1613 (“Consumers identify the Internet as a way to find low prices, and studies have shown that Internet consumers are price sensitive.” (citing Judith Chevalier & Austan Goolsbee, *Measuring Prices and Price Competition Online: Amazon.com and BarnesandNoble.com*, 1 QUANTITATIVE MKTG. & ECON. 203, 220 (2003))).

122. See Don Davis, *Most Amazon Shoppers Have Eyes Only for Amazon*, DIGIT. COM. 360 (Nov. 3, 2021), <https://www.digitalcommerce360.com/article/amazon-prime-membership/> [<https://perma.cc/P9AC-NMZ5>] (finding that 22% of recent Amazon shoppers would have shopped at Walmart, had they not purchased at Amazon. Target, eBay, and Best Buy were other follow-up choices).

consumers between shopping at a brick-and-mortar retailer and shopping online at Amazon comes down to pricing and delivery. As a result, antitrust law should still care about price-sensitive consumers and the competition between Amazon and other retailers in the retail market.

C. Amazon's Pricing Effect on Retailers

Amazon should be included in the geographic market for other major retailers in part because Amazon and these retailers actively compete on pricing. Amazon's prices constrain both brick-and-mortar retailers and their related e-commerce sites.

Scholars have considered the broader question of whether internet retailers affect the prices of brick-and-mortar retailers to varying degrees. General research has found that internet competitors affect the price of brick-and-mortar retailers by creating lower prices and greater product variety.¹²³ Others have noted how the internet has made price competition more important and salient.¹²⁴ Internet competition can erode local market power, causing "lower prices at stores that do not have an Internet presence."¹²⁵

The FTC's 2003 wine study, discussed in depth by Charles Eblen, found banning interstate wine purchases (acquired through internet sellers) "diminish[e] consumer welfare by increasing prices, decreasing selection, and for those consumers who value time, removing the time efficiencies the Internet create[d]."¹²⁶ Moreover,

[t]he FTC found that if McClean wine consumers were able to purchase wine over the Internet, depending on the shipping method chosen, they could save between 8-13[%] per bottle on wines priced over twenty dollars and between 20-21% per bottle on wines priced over forty dollars. Additionally, 15[%] of the bottles available on the Internet were not available at any brick and mortar seller within a ten mile radius of McClean, Virginia.¹²⁷

Eblen concluded that although the wine report's full focus was not on the internet's impact on the geographic market definition for mergers, its findings helped show the "practical and economic benefits Internet competition adds to the marketplace."¹²⁸

123. Eblen, *supra* note 9, at 85 ("While there are differences in opinion, most scholars conclude that Internet sellers generally create lower prices and greater product variety. Added variety and lower prices effectively expand the geographic market by enticing customers to reach geographic markets which they would not otherwise have accessed."); *see also* Note, *supra* note 16, at 1613-14 ("Prices at purely online retailers tend to be lower than Internet prices available at retailers using a combination of online and brick-and-mortar sales." (citing Xing Pan, Brian T. Ratchford & Venkatesh Shankar, *Price Dispersion on the Internet: A Review and Directions for Future Research*, 18 J. INTERACTIVE MKTG. 116, 117-25 (2004))).

124. Note, *supra* note 16, at 1612.

125. *Id.* at 1614 n.109.

126. Eblen, *supra* note 9, at 85; FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf [<https://perma.cc/WDN4-T6VE>].

127. Eblen, *supra* note 9, at 84-85 (citations omitted).

128. *Id.* at 85.

The Eastern District of Pennsylvania in *McDonough v. Toys “R” Us, Inc.* also acknowledged the impact of internet retailers on the pricing of brick-and-mortar stores.¹²⁹ Although not a case about mergers, the *McDonough* court acknowledged the price effects that internet retailers had on brick-and-mortar baby product retailers.¹³⁰ The court noted Babies “R” Us (BRU) began “facing stiff competition from internet retailers offering steep discounts.”¹³¹ Moreover, “[w]ithout the operating costs associated with brick-and-mortar stores, internet retailers can offer huge discounts that other retailers cannot match.”¹³² As a result, “BRU began facing tough price competition from internet retailers.”¹³³ The court found that “[w]hen some sellers begin discounting, others must eventually lower their prices to remain competitive,” and this was the pressure BRU faced.¹³⁴ The record even included correspondence between BRU and other brick-and-mortar baby product retailers, discussing worries about the pricing of internet competitors.¹³⁵ Thus, *McDonough* presents an example of a court accepting the premise that internet retailers compete and can have price disciplining effects on brick-and-mortar retailers.

Ultimately, plenty of support exists for the idea that internet retailers generally have a pricing effect on brick-and-mortar stores. While these studies are not specific to Amazon, their analysis and takeaways can be imported into our understanding of how Amazon affects other retailers’ prices and pricing decisions. Some means of showing how Amazon price disciplines major retailers is through price matching policies and the declining price gap between Amazon and retailers like Walmart throughout the years.

1. Price Matching

One way retailers compete with Amazon on prices is through broad price matching policies. Almost all of the large brick-and-mortar retailers are willing to match Amazon’s prices if shown by a customer.¹³⁶ This means that retailers are willing to go as low as Amazon on prices to make a sale.

As Amazon became a stronger competitor, more retailers began adopting price matching policies. For instance, in 2012, Target offered to price match other retailers (including Walmart.com, Amazon.com, and Bestbuy.com) for the first

129. *McDonough v. Toys “R” Us, Inc.*, 638 F. Supp. 2d 461 (E.D. Pa. 2009). This case is also discussed in *supra* Section II.A.

130. *McDonough*, 638 F. Supp. 2d at 466.

131. *Id.*

132. *Id.* at 468.

133. *Id.*

134. *Id.* at 484.

135. *See id.* For example, in correspondence BRU was found telling fellow brick-and-mortar retailers: “With this being offered over the internet, it effects [sic] our entire chain of stores If we fail to compete successfully, we could face lower sales and . . . be compelled to offer greater discounts to our consumers.” *Id.* (citation and internal quotation marks omitted).

136. *See* Ruth Umoh, *10 Brick-and-Mortar Stores that Will Match Lower Prices Found on Amazon*, CNBC: MAKE IT (July 15, 2018, 10:01 AM), <https://www.cnbc.com/amp/2018/07/10/10-stores-that-will-match-amazons-lower-prices.html> [<https://perma.cc/JZL4-HMEW>]; Maryalene LaPonsie, *10 Retailers that Offer Price Adjustments*, U.S. NEWS (Dec. 21, 2020, 10:53 AM), <https://money.usnews.com/money/personal-finance/spending/articles/retailers-that-offer-price-adjustments> [<https://perma.cc/M4MN-CUH9>].

time.¹³⁷ However, this program was limited to just the holiday season (November to December).¹³⁸ Even so, the decision to price match Amazon in 2012 was greatly debated internally at Target.¹³⁹ Fast forward to 2013, Target expanded its online retailer price matching policy to a year-round policy.¹⁴⁰ Target's online competitor list continued to expand in 2015 to include twenty-nine websites.¹⁴¹

Although Walmart started offering a similar form of holiday price matching as early as 2005,¹⁴² it began offering a "Savings Catcher" application in 2014, which would refund customers the difference between what they paid at Walmart and the price a competitor advertised.¹⁴³ Even though Walmart ended its Savings Catcher program in 2019, it still matches prices with Amazon on Walmart.com and Jet.com.¹⁴⁴ Similarly, Best Buy began permanently price matching retailers (including Amazon) in 2013.¹⁴⁵ Interestingly, Amazon does not offer any price matching options, instead claiming that it actively checks competitors' prices at all

137. Press Release, Target, Target Unveils New Price Match, Exclusive Gifts and Digital Offerings for the Holiday Season (Oct. 17, 2012), <https://corporate.target.com/press/releases/2012/10/target-unveils-new-price-match-exclusive-gifts-and> [<https://perma.cc/64EH-S773>].

138. *Id.*

139. Paul Ziobro, *Target Expands Online Price-Match Policy to Include Amazon, Wal-Mart*, WALL ST. J. (Sept. 30, 2015, 2:04 PM), <http://www.wsj.com/articles/target-expands-online-price-match-policy-to-include-amazon-wal-mart-1443636271?mod=mktw> [<https://perma.cc/Q3AJ-UY3E>].

140. Press Release, Target, Target Announces New Year-Round Price Match of Online Retailers (Jan. 8, 2013), <https://corporate.target.com/press/releases/2013/01/target-announces-new-year-round-price-match-of-onl> [<https://perma.cc/B66E-E2Z5>].

141. Ziobro, *supra* note 139.

142. Press Release, Walmart, Wal-Mart Commits to Delivering the Unbeatable Value Customers Expect on Black Friday (Nov. 20, 2005), <https://corporate.walmart.com/newsroom/2005/11/20/wal-mart-commits-to-delivering-the-unbeatable-value-customers-expect-on-black-friday> [<https://perma.cc/94SF-GK7Q>]; *see also* Press Release, Walmart, Walmart Statement Regarding Online Price Match Policy (Nov. 19, 2014), <https://corporate.walmart.com/newsroom/2014/11/19/walmart-statement-regarding-online-price-match-policy> [<https://perma.cc/4H9P-GAXE>].

143. Press Release, Paul Hatch, Dir. of Brand Strategy, Walmart, Savings Catcher Compares Competitors' Prices. You Save. (Mar. 24, 2014), <https://corporate.walmart.com/newsroom/innovation/20140324/savings-catcher-compares-competitors-prices-you-save> [<https://perma.cc/7XBR-HAKC>]; Press Release, Walmart, Walmart Statement Regarding Online Price Match Policy, *supra* note 142.

144. Hayley Peterson, *Walmart Is Getting Rid of Price-Matching—and Customers Are Furious*, INSIDER (Mar. 18, 2019, 11:41 AM), <https://www.businessinsider.com/walmart-savings-catcher-price-match-tool-2019-3> [<https://perma.cc/KU2E-W9UR>]; LaPonsie, *supra* note 136.

145. Press Release, Best Buy, Best Buy Ends 'Showrooming' with Low Price Guarantee (Feb. 15, 2013), <https://corporate.bestbuy.com/best-buy-ends-showrooming-with-low-price-guarantee/> [<https://web.archive.org/web/20210928204938/https://corporate.bestbuy.com/best-buy-ends-showrooming-with-low-price-guarantee/>]; *see also* Abram Brown, *Best Buy Price-Match Guarantee: A Smart, but Very Late Salvo Against Showrooming*, FORBES (Feb. 19, 2013, 11:24 AM), <https://www.forbes.com/sites/abrambrown/2013/02/19/best-buys-price-match-gauruntee-a-smart-but-very-late-salvo-against-showrooming/?sh=b17fb9228965> [<https://perma.cc/VGV5-DGC6>] ("The price-match is a salvo aimed directly at Amazon.com, Walmart.com and Target.com and the like.").

times.¹⁴⁶ This may also be a result of Amazon's advanced bot-system, which already actively monitors and adjusts prices daily.¹⁴⁷

While price matching is important for showing how retailers like Walmart and Target are willing to match prices with Amazon, use of price matching programs by consumers tends to be limited. It is likely that because of the procedural inconvenience (e.g., having to submit documentation for price matching within fourteen days of a purchase), many consumers do not actually take advantage of these broad price matching policies.¹⁴⁸ As a result, although many retailers are willing to match Amazon on prices, this phenomenon is dependent on consumers actually taking advantage of such policies.

Through price matching policies, brick-and-mortar retailers are able to compete with Amazon by allowing consumers to push back on prices instead of just walking away to a competitor. Price matching policies also show that many major retailers are willing to compete in pricing when it matters. In theory, this should equalize prices across retailers, including Amazon. However, because many consumers do not actually utilize the price matching programs, the price gap between brick-and-mortar retailers and Amazon continues to persist in some form.

2. *The Decreasing Price Gap Between Brick-and-Mortar Retailers and Amazon*

Another indication that Amazon has begun price disciplining some large brick-and-mortar retailers is the decreasing price gap throughout the years between Amazon and certain retailers. In general, the price gap between Amazon and retailers like Walmart has been decreasing over time. The rise of "retail price wars" further exemplifies this pricing battle. The decreasing price gap, more relevant in some product groups than others, suggests that retailers try to compete with Amazon's prices in certain categories of products. The best representative of this pricing battle is Walmart, which, of all the major brick-and-mortar retailers, has the closest price differential with Amazon.¹⁴⁹

Gathering pricing data on major retailers as an outsider can be difficult, as most companies do not disclose their pricing strategies. Nevertheless, Table 3 represents an estimate of the price differentials between Amazon and Walmart/

146. *Price Matching*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=G9EAYKPV5YYDB8P7> [<https://perma.cc/W6PY-26EX>] (last visited Feb. 21, 2023).

147. See, e.g., Roberto A. Ferdman, *Amazon Changes Its Prices More than 2.5 Million Times a Day*, QUARTZ (Dec. 14, 2013), <http://qz.com/157828/amazon-changes-its-prices-more-than-2-5-million-times-a-day> [<https://perma.cc/W4G6-RVRS>] ("Over the past 12 months alone, Amazon has increased its number of daily price changes ten-fold, Profitero noted."); Jennifer Straley, *Amazon, Walmart Ready for Battle in Holiday 'Price Wars'*, WINSIGHT GROCERY BUS. (Nov. 17, 2020), <https://www.winsightgrocerybusiness.com/retailers/amazon-walmart-ready-battle-holiday-price-wars> [<https://perma.cc/X2UM-CP2A>].

148. See George Anderson, *Target Takes Price-Matching to a Whole New Level*, RETAILWIRE (Oct. 1, 2015), <https://www.retailwire.com/discussion/target-takes-price-matching-to-a-whole-new-level/> [<https://perma.cc/7SG9-WTEY>] ("According to a *Minneapolis Star Tribune* report, fewer than five percent of consumers ask merchants to match prices because of the perceived hassle in doing so.")

149. See, e.g., PROFITERO, PANDEMIC PRICE WARS (2020), <https://f.hubspotusercontent10.net/hubfs/9094310/Reports/11-20%20Report%20-%20Pandemic%20Price%20Wars%20-%20US.pdf> [<https://perma.cc/8Y8H-P4SP>]; Straley, *supra* note 147.

Target from approximately 2014 to 2021. Walmart and Target were chosen as competitors in the analysis below because (1) there is immense overlap in their product selections relative to more specialized retailers,¹⁵⁰ (2) all three share a “mass merchandiser” label which makes Walmart and Target clearer competitors with Amazon than smaller retailers, and (3) the availability of data between Amazon and Walmart/Target was greater compared to other retailers. These three factors ultimately resulted in the inclusion of only Walmart and Target in the pricing analysis below.

A majority of the data in the tables below were acquired through e-commerce analytics firm Profitero’s annual “price wars” studies, which it began conducting around 2014.¹⁵¹ Unless otherwise noted, the data used in the tables below are drawn from Profitero’s studies throughout the years. The reason Profitero’s studies were relied on is primarily because of consistency (the reports are conducted almost annually) and the relatively large dataset they utilize relative to other price comparison studies. As a result, Profitero’s studies appeared to be the best publicly available data.

150. See *The Amazon vs. Walmart Playbook*, FEEDVISOR, <https://feedvisor.com/resources/marketplace-fees-policies/amazon-vs-walmart-web-book/?aliId=eyJpIjojXC9JMlcyY3B5cEtZRGFNZ04iLCJ0IjoicmN0M09BTm4xUGdubVlzODY5U3BwQT09In0%253D> [https://perma.cc/S67J-8663] (last visited Feb. 21, 2023).

151. See generally *Research & Reports*, PROFITERO, <https://www.profitero.com/resources/reports> [https://perma.cc/E5Z4-JL7E] (last visited Feb. 21, 2023).

Table 3: Price Differentials Between Amazon and Retailers (On Average)

	2014	2016	2017	2018	2019	2020	2021
% that Walmart's prices were higher than Amazon's	9% higher ¹⁵²	3% higher ¹⁵³ (Market Track)	3% higher ¹⁵⁴ 0.3% higher (Market Track) ¹⁵⁵	2.3% higher ¹⁵⁶	4.1% higher ¹⁵⁷	4 ¹⁵⁸ -5% higher ¹⁵⁹	4% higher ¹⁶⁰
% that Target's prices were higher than Amazon's	10% higher ¹⁶¹	N/A	16.9% higher ¹⁶²	11.9% higher ¹⁶³	10.6% higher ¹⁶⁴	10 ¹⁶⁵ -13% higher ¹⁶⁶	15% higher ¹⁶⁷

152. Glenn Taylor, *Walmart Prices Close in on Amazon Just in Time for Holiday 2017*, RETAIL TOUCH POINTS (Nov. 27, 2017, 6:51 PM), <https://retailtouchpoints.com/features/news-briefs/walmart-prices-close-in-on-amazon-just-in-time-for-holiday-2017> [<https://perma.cc/Z6XW-NL4S>].

153. Nandita Bose, *Exclusive: Cyber Monday Showdown—Wal-Mart Closes in on Amazon in Online Price War*, REUTERS (Nov. 27, 2017, 10:06 PM), <https://www.reuters.com/article/us-walmart-onlineprices-amazon-exclusive/exclusive-cyber-monday-showdown-wal-mart-closes-in-on-amazon-in-online-price-war-idUSKBN1DR0I6> [<https://perma.cc/XNT9-FDZZ>] (gathering data from December 7, 2015, to November 21, 2016).

154. Taylor, *supra* note 152.

155. Bose, *supra* note 153 (gathering data from November 22, 2016, to November 7, 2017).

156. Andria Cheng, *Walmart May Be Catching Up to Amazon on Prices but Still Has a Ways to Go*, *Study Shows*, FORBES (Nov. 9, 2018, 8:30 AM), <https://www.forbes.com/sites/andriacheng/2018/11/09/amazon-holiday-ecommerce-walmart-target-kroger-grocery-home-depot/?sh=7dcfe4c72521> [<https://perma.cc/MX7B-Q9JX>].

157. Kim Souza, *The Supply Side: Amazon Remains Low-Price Leader Online Against Competitors*, TB&P (Dec. 8, 2019, 2:02 PM), <https://talkbusiness.net/2019/12/the-supply-side-amazon-remains-low-price-leader-online-against-competitors/> [<https://perma.cc/7MYX-7WXP>].

158. PROFITERO, *supra* note 149, at 6.

159. PROFITERO, PRICE WARS: 2021 U.S. EDITION 4 (2021), <https://f.hubspotusercontent10.net/hubfs/9094310/Reports/Profitero-PriceWars2021U.S.Edition.pdf> [<https://perma.cc/PP6X-X8HX>].

160. *Id.*

161. Daphne Howland, *Walmart Narrows Price Gap with Amazon*, RETAIL DIVE (Nov. 27, 2017), <https://www.retaildive.com/news/walmart-narrows-price-gap-with-amazon/511675/> [<https://perma.cc/8QZL-V6QC>]; Kim Souza, *Profitero: Amazon Leads Online Price War in Non-Consumables, Walmart.com a Close Second*, TB&P (Oct. 30, 2017, 1:42 PM), <https://talkbusiness.net/2017/10/profitero-amazon-leads-online-price-war-in-non-consumables-walmart-com-a-close-second/> [<https://perma.cc/53ZN-9LST>].

162. Howland, *supra* note 161; Souza, *supra* note 161.

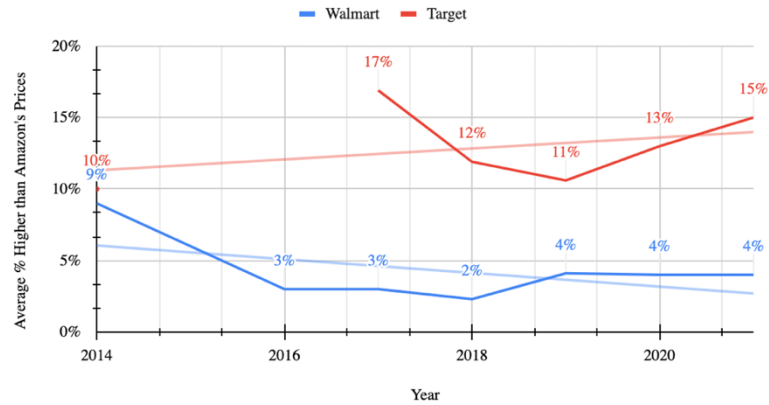
163. Cheng, *supra* note 156; *Amazon Maintains Major Price Lead over Other Online Retailers*, BUS. WIRE (Nov. 8, 2018, 7:00 AM), <https://www.businesswire.com/news/home/20181108005394/en/Amazon-Maintains-Major-Price-Lead-Online-Retailers> [<https://perma.cc/56SE-98DQ>].

164. Souza, *supra* note 157.

165. PROFITERO, *supra* note 149, at 6.

166. PROFITERO, *supra* note 159.

167. *Id.*



Graph 1: Price Differentials with Amazon

In addition, Tables 4 and 5 compare prices between Amazon and Walmart/Target in two specific product categories. Household supplies and beauty products were chosen as the two categories compared because of how common they are and the relative availability of pricing information on them. For these tables, all data was gathered from Profitero's price studies (to the extent available).

Table 4: Household Supplies (Price Comparison with Amazon)

	2017	2018	2019	2020	2021
Walmart's Prices	2.6% higher ¹⁶⁸	6.3% higher ¹⁶⁹	3.5% higher ¹⁷⁰	4% higher ¹⁷¹	3% higher ¹⁷²
Target's Prices	N/A	9.3% higher ¹⁷³	N/A	13% higher ¹⁷⁴	10% higher ¹⁷⁵

168. Daphne Howland, *Walmart Now Price Matching Amazon on 53% of Products*, RETAIL DIVE (Apr. 4, 2018), <https://www.retaildive.com/news/walmart-now-price-matching-amazon-on-53-of-products/520577/> [<https://perma.cc/5PL8-93XD>].

169. Cheng, *supra* note 156.

170. Souza, *supra* note 157.

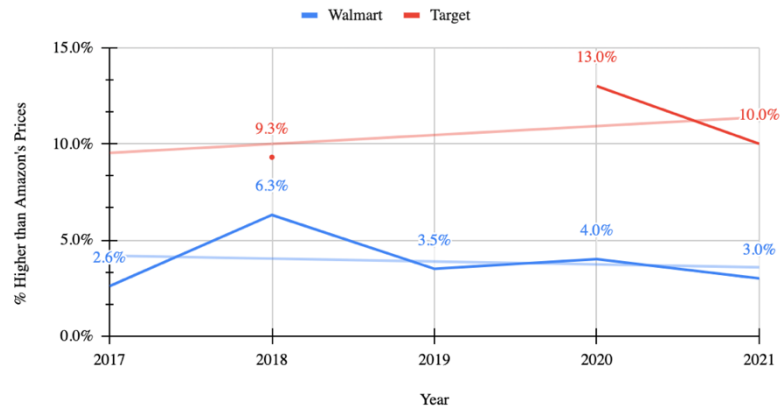
171. PROFITERO, *supra* note 149, at 5.

172. PROFITERO, *supra* note 159, at 6.

173. Cheng, *supra* note 156.

174. PROFITERO, *supra* note 149, at 5.

175. PROFITERO, *supra* note 159, at 6.



Graph 2: Price Differentials with Amazon in Household Products

Table 5: Beauty Products (Price Comparison with Amazon)

	2014	2017	2018	2019	2020	2021
Walmart's Prices	14% higher ¹⁷⁶ 10% higher ¹⁷⁷	1% lower (in Oct.) ¹⁷⁸ 4.7-5% higher (in Sept.-Nov.) ¹⁷⁹	5.1% higher ¹⁸⁰	7.7 ¹⁸¹ -8% higher ¹⁸²	0% difference ¹⁸³	1% higher ¹⁸⁴
Target's Prices	N/A	6.7-7% higher ¹⁸⁵	2.6% higher ¹⁸⁶	2.2% higher ¹⁸⁷	22% higher ¹⁸⁸	26% higher ¹⁸⁹

176. Souza, *supra* note 161.

177. Jannie Cahill, *New Profitero Study Reveals Amazon Is Winning the Online Price War—But Walmart Is on the Offensive*, PROFITERO (Oct. 30, 2017), <https://www.profitero.com/blog/2017/10/new-profitero-study-reveals-amazon-is-winning-the-online-price-war-but-walmart-is-on-the-offensive> [<https://perma.cc/ZJ6H-YURX>].

178. Souza, *supra* note 161.

179. *Walmart Closing Grocery Price Gap With Amazon*, PROGRESSIVE GROCER (Feb. 26, 2018), <https://progressivegrocer.com/walmart-closing-grocery-price-gap-amazon> [<https://perma.cc/9VRD-QL9H>]; Jannie Cahill, *Walmart Online Grocery Prices Edge Closer to Amazon, Intensifying the Grocery Wars*, PROFITERO (Feb. 27, 2018), <https://www.profitero.com/press-releases/press-release/walmart-online-grocery-prices-edge-closer-to-amazon-intensifying-the-grocery-wars> [<https://perma.cc/TBZ4-ESGE>]; Russell Redman, *Amazon Holds Slim Lead in Online Grocery Pricing*, SUPERMARKET NEWS (Apr. 4, 2018), <https://www.supermarketnews.com/online-retail/amazon-holds-slim-lead-online-grocery-pricing> [<https://perma.cc/Q935-CD4C>].

180. Cheng, *supra* note 156.

181. Profitero, *Price Comparison of Beauty Products at Select US Digital Retailers vs. Amazon, July–Sep 2019 (% Difference vs. Amazon)*, INSIDER INTEL.: EMARKETER (Oct. 29, 2019), <https://chart-na1.emarketer.com/231840/price-comparison-of-beauty-products-select-us-digital-retailers-vs-amazon-july-sep-2019-difference-vs-amazon> [<https://perma.cc/P2KT-CXKW>]; Souza, *supra* note 157.

182. PROFITERO, *supra* note 149, at 6.

183. *Id.*

184. PROFITERO, *supra* note 159, at 6.

185. *Walmart Closing Grocery Price Gap with Amazon*, *supra* note 179; Redman, *supra* note 179.

186. Cheng, *supra* note 156.

187. Profitero, *supra* note 181; Souza, *supra* note 157.

188. PROFITERO, *supra* note 149, at 5.

189. PROFITERO, *supra* note 159, at 6.



Graph 3: Price Differentials with Amazon in Beauty Products

Profitero's price data suggests brick-and-mortar retailers like Walmart and Target have, to varying degrees, competed with Amazon on prices at different points in the last decade. Based on this limited data, two trends appear: (1) the price differential trendline for Walmart relative to Amazon (indicated by the light blue lines in the graphs) has decreased since 2014 and (2) the price differential trendline for Target (indicated by the light red lines in the graphs) has increased over time. While the continuing existence of a price gap between Walmart/Target and Amazon may suggest there has been no price disciplining, the fact that the gap between some retailers and Amazon has been decreasing (in some product categories more than others) suggests that there has been some effect on prices. Assuming Amazon has not been raising its prices, the decreasing price differentials between retailers like Walmart and Amazon throughout the years suggest that Walmart has been responsive to Amazon's prices.

First, both on average and in the categories of household goods and beauty products, Walmart's price differential with Amazon has decreased. What started off as an average 9% differential between Walmart and Amazon's prices in 2014 now hovers around 4%.¹⁹⁰ The decreasing trendline is also visible in the price differentials for beauty products, while not as pronounced in the household goods category. This suggests Amazon's level of competitiveness with retailers may vary depending on the product category. One potential reason retailers like Walmart may choose to compete with Amazon in pricing in certain categories of goods, and not in others, may be because of consumers. Retailers may choose to have lower prices on the products that consumers have a more elastic demand for, and would thus be willing to shop around for, versus essential goods where consumer demand is more inelastic, and thus consumers may be less attentive to price differences than with elastic goods. Here, for example, beauty products may be seen as more of an elastic good, whereas household items tend to contain necessities that consumers generally must buy.

190. Taylor, *supra* note 152; PROFITERO, *supra* note 159.

Nevertheless, Walmart has sought to close its price gap with Amazon in many product categories. In 2017, Walmart was matching Amazon's prices on 53% of its products.¹⁹¹ The closing in of price differentials¹⁹² between Amazon and Walmart throughout the years strongly suggests Walmart has been both affected by Amazon's prices and has been responsive to those prices as well. To further support this conclusion, Walmart has been relatively vocal about its competitiveness with Amazon and its desire to maintain the lowest prices. For instance, at a summit in 2017, Walmart made a presentation to some of its brands, informing them that it "want[ed] to have the lowest price on 80% of its sales."¹⁹³ At least to Walmart, Amazon has been a formidable foe that Walmart seems willing to fight until the end.

The trendline for Target, on the other hand, has not presented the same overall decreasing price differential as Walmart versus Amazon. While it appears that, at some points throughout the last decade, Target has competed closely with Amazon on prices (in particular from 2017 to 2019), Target's goals post-2019 appear to have shifted away from having lower prices. This may seem odd, given the similarities between Target and Walmart. But, Profitero's analysts offer some explanations for this shift: Target's reliance on its loyal shoppers, "premium brand perception,"¹⁹⁴ and "strategic positioning based on differentiated and exclusive products."¹⁹⁵ Nevertheless, Target has, at times throughout the decade, been competitive with Amazon on prices, and still remains competitive in certain product categories. For instance, according to Profitero's 2021 report, the price differential between Amazon and Target on baby products was only 6%.¹⁹⁶ The price differential in household products similarly decreased from 13% in 2020, to 10% in 2021.¹⁹⁷ Relatedly, a 2018 study conducted by an online research team for Clark Howard found that Target was "getting aggressive on price . . . [with] household essentials and other consumer products, matching, nearing or beating Walmart.com on several items compared."¹⁹⁸ Given how close Walmart's prices have been to Amazon's, this suggests a relatively small gap between Target and Amazon as well. Thus, it would be inaccurate to completely write off Target as a competitor for now. While this trend may continue to change in the future, the price differentials arguably remain close enough for the time being to continue watching this relationship.

191. Howland, *supra* note 168.

192. See, e.g., Howland, *supra* note 161 ("Walmart is closing the pricing gap with Amazon, according to a study by retail data analytics firm Market Track . . ."); see also *Walmart Closing Grocery Price Gap With Amazon*, *supra* note 179 ("The online price gap for groceries between Walmart and Amazon has narrowed dramatically, new research from Profitero found.").

193. Jason Del Rey, *Amazon and Walmart Are in an All-Out Price War that is Terrifying America's Biggest Brands*, VOX (Mar. 30, 2017, 1:44 PM), <https://www.vox.com/2017/3/30/14831602/amazon-walmart-cpg-grocery-price-war> [<https://perma.cc/ER66-NRH7>].

194. PROFITERO, *supra* note 149, at 6.

195. PROFITERO, *supra* note 159, at 4.

196. PROFITERO, *supra* note 159, at 4.

197. *Id.* at 6–7.

198. Daphne Howland, *Target Narrows Pricing Gap with Walmart*, RETAIL.DIVE (July 5, 2018), <https://www.retaildive.com/news/target-cpg-prices-narrow-in-on-walmart/527123/> [<https://perma.cc/S9JB-QAUG>].

Relatedly, Profitero has identified an increasing trend of specialty retailers “resist[ing] price wars” with Amazon.¹⁹⁹ In Profitero’s 2020 report, for instance, it identifies specialty retailers like Best Buy, Macy’s, and Wayfair as examples of companies that had resisted competing with Amazon on price. Instead, these companies have chosen to focus on their services, selections, and convenience to preserve profit margins.²⁰⁰ While some retailers have given up on competing solely on price with Amazon, this should not, in and of itself, necessitate keeping Amazon out of their geographic market completely. Specialty retailers still compete with Amazon in other ways, such as through membership/loyalty programs, marketplaces, promotions, and shipping, which are discussed later in this Part.²⁰¹

Finally, in addition to the pricing trends presented by Profitero’s data, examples of active retail “price wars” throughout the holiday seasons also show the pricing impact that Amazon can have. For example, a 2009 New York Times article chronicles Walmart, Target, and Amazon’s “price war” over books and other appliances²⁰²:

Last Wednesday, Wal-Mart dropped the price of the [Easy-Bake Oven] to \$17, from \$28, as part of its “Black Friday” deals. Later the same day, Amazon cut its price, which had also been \$28, to \$18 The companies then began jousting over the prices of DVDs Wal-Mart offered a \$15 gift card with a purchase of the new video game Call of Duty: Modern Warfare 2 and Amazon matched soon after Wal-Mart and Amazon then both offered the Xbox 360 gaming console for \$199 with a \$100 gift card thrown in. Last week, they both began offering the new Palm Pixi phone for around \$30 nearly \$175 off the suggested retail price.²⁰³

Further, in 2013, Best Buy announced to its investors that it was willing to take a profit loss in order to sharply cut prices during the holidays to compete with Walmart, Target, Amazon, and others.²⁰⁴ In 2011, Best Buy offered “heavy Black Friday promotions and free holiday shipping on all Internet purchases,” but at the cost of its profit margins for that year.²⁰⁵ In 2021, both Walmart and Target announced big sale events occurring the day before Amazon Prime Day in an effort

199. PROFITERO, *supra* note 149, at 3.

200. *Id.* at 3–4, 7.

201. *See infra* Section III.D.2.

202. Brad Stone & Stephanie Rosenbloom, *Price War Brews Between Amazon and Wal-Mart*, N.Y. TIMES (Nov. 23, 2009), <https://www.nytimes.com/2009/11/24/business/24shop.html> [<https://perma.cc/9H7N-KW7M>].

203. *Id.*

204. Drew FitzGerald & Paul Ziobro, *Price War Looms for Electronics*, WALL ST. J. (Nov. 20, 2013, 3:12 PM), <https://www.wsj.com/articles/price-war-looms-for-electronics-1384906675> [<https://perma.cc/4MJG-D3G2>].

205. Miguel Bustillo, *Best Buy Pays Price to Rival Amazon*, WALL ST. J. (Dec. 14, 2011), <https://www.wsj.com/articles/SB10001424052970203518404577096160252527328> [<https://perma.cc/HJG7-PPGQ>].

to divert sales.²⁰⁶ While longer term trends in pricing data are important and likely more probative of price disciplining than mere holiday price wars, these “price wars” still exemplify the existing tension between major retailers and Amazon, visible from as early as 2009.

Some retailers, like Walmart, are willing to subsidize third-party vendors’ costs in order to lower costs for consumers. For instance, in 2019, Walmart announced a new pricing program that lowered prices for consumers on third-party vendor products in the marketplace without decreasing the amount that would go to the vendors.²⁰⁷ Thus, Walmart subsidized the difference itself in an effort to better position itself for the holiday shopping season.²⁰⁸ Walmart’s move was said to be in response to a similar program conducted by Amazon earlier that year.²⁰⁹

The data from 2014 to 2021 gathered by Profitero suggests major brick-and-mortar retailers like Walmart—and to a lesser extent, Target—have been competing with Amazon on pricing. Assuming the decreasing price differential is not a result of another factor, such as Amazon increasing its prices, this data suggests big brick-and-mortar retailers like Walmart are, or at some point in the last decade have been, price disciplined by Amazon. If this is true, then Amazon should be included in these retailers’ geographic markets when courts are analyzing retail mergers. This theory, however, may be more limited for specialty retailers, which recently have become more price resistant to Amazon. While pricing is important, these specialty retailers have, in some cases, turned to other avenues of competition to best Amazon in the market.

D. Amazon’s Non-Pricing Effect on Brick-and-Mortar Retailers

Aside from pricing, many brick-and-mortar retailers also treat Amazon as a major competitor in different ways. This treatment is shown through listing Amazon as a competitor on official records and filings, adopting competitive practices that rival Amazon’s, and growing through vertical acquisitions of other companies.

1. Retailers’ Official Records and Filings

One way that retailers indicate they compete with Amazon is through listing Amazon as a competitor on official documents like 10-K filings for the U.S. Securities and Exchange Commission (SEC). While listing Amazon as a competitor may not be sufficient, in and of itself, to establish that the companies compete, some courts have noted that it can be a useful factor in favor of establishing competition. For example, the court in *Delco LLC v. Giant of Maryland, LLC* noted that although “self-serving ‘conclusory statements’ by market

206. Maria Monteros, *Target, Walmart Announce Overlapping Sales Events to Rival Amazon*, RETAIL DIVE (June 3, 2021), <https://www.retaildive.com/news/target-walmart-announce-overlapping-sales-events-to-rival-amazon/601231/> [https://perma.cc/8MXR-TV67].

207. Matthew Boyle & Bloomberg, *Walmart’s New Pricing Program Ramps Up Holiday Shopping War with Amazon*, FORTUNE (Oct. 14, 2019, 7:56 PM), <https://fortune.com/2019/10/14/walmart-amazon-holiday-price-wars/> [https://perma.cc/56YX-25YL].

208. *Id.*

209. *Id.*

participants are of little value in defining the product market[,] . . . courts regularly take account of industry participants' perspectives on who their competitors are in order to shed light on the interchangeability of the products they offer."²¹⁰ Consequently, in *Delco*, the court relied in part on a supermarket's inclusion of Walmart and Save-A-Lot in its "2007 competition" list in determining that the relevant market was not just limited to supermarkets alone.²¹¹ Thus, brick-and-mortar retailers listing Amazon as a competitor in their official documents can be probative evidence in favor of including Amazon as a competitor in a relevant geographic market. This evidence can also be helpful when evaluating the entire competitive landscape amongst brick-and-mortar retailers and internet retailers like Amazon.

Retailers like Target,²¹² Staples,²¹³ and Office Depot²¹⁴ all list Amazon as either a competitor or as part of a "peer group" in their 10-K filings. Target, for example, began including Amazon in its "peer group" beginning in 2013.²¹⁵ Target's "peer group" analysis compares total returns for stockholders, and Target notes that the peer group consists of retailers "which are large and meaningful competitors."²¹⁶ Similarly, Office Depot, which began listing Amazon in its 10-Ks in 2013 as well, specifically notes that it experiences "strong competitive pressures from large Internet providers such as Amazon," and that "[t]he ability of consumers to compare prices on a real-time basis using digital technology puts additional pressure on [them] to maintain competitive pricing."²¹⁷ Before it went private, Staples also began including Amazon as a competitor in its 10-Ks, starting as early as 2009.²¹⁸

210. *Delco LLC v. Giant of Md., LLC*, No. 07-3522, 2007 U.S. Dist. LEXIS 82711, at *53–54 (D.N.J. Nov. 8, 2007) (internal citation omitted) (citing *United States v. Cont'l Can Co.*, 378 U.S. 441, 453–55 (1964)).

211. *Id.* at *52–54.

212. *See, e.g.*, Target Corp., Annual Report (Form 10-K), at 16 (Mar. 10, 2021) ("[T]he peer group used in previous filings consist[s] of 16 online, general merchandise, department store, food, and specialty retailers (Amazon.com, Inc., Best Buy Co., Inc., . . .)"); Target Corp., Annual Report (Form 10-K), at 13 (Mar. 20, 2013) (listing Amazon.com as a member of the "peer group" for the first time).

213. *See, e.g.*, Staples, Inc., Annual Report (Form 10-K), at 3 (Mar. 9, 2017) ("We also compete with online retailers such as Amazon.com, mass merchants such as Walmart and Target"); Staples, Inc., Annual Report (Form 10-K), at 7 (Mar. 11, 2009) (listing Amazon.com as a competitor for the first time).

214. *See, e.g.*, The ODP Corp., Annual Report (Form 10-K), at 46 (Feb. 24, 2021) ("[W]e are experiencing strong competitive pressures from large Internet providers such as Amazon and Walmart that offer a full assortment of office products through direct sales and, in the case of Amazon, acting as a 'storefront' for other specialty office product providers."); Office Depot, Inc., Annual Report (Form 10-K), at 11 (Feb. 28, 2018) ("The office products market is highly competitive and we compete locally, domestically and internationally with office supply resellers, including Staples, internet-based companies such as Amazon.com, mass merchandisers such as Wal-Mart and Target"); Office Depot, Inc., Annual Report (Form 10-K), at 10 (Feb. 20, 2013) (listing Amazon.com as a competitor for the first time).

215. Target Corp., Annual Report (Form 10-K), at 13 (Mar. 20, 2013) (listing Amazon.com as a member of the "peer group" for the first time).

216. *Id.*

217. The ODP Corp., Annual Report (Form 10-K), at 12, 46 (Feb. 24, 2021).

218. Staples, Inc., Annual Report (Form 10-K), at 7 (Mar. 11, 2009) (listing Amazon.com as a competitor for the first time).

In Staples' most recent 10-K from 2017, it noted that it "compete[s] with online retailers such as Amazon.com," and that "[i]ntense competitive pressures from one or more of [its] competitors could affect prices or demand for [its] products and services."²¹⁹

Sears began listing Amazon as a competitor in 2012, noting that "Walmart, Target, Kohl's, J.C. Penney, Macy's, The Home Depot, Lowe's, Best Buy and Amazon are some of the national retailers and businesses with which we compete."²²⁰ Kohl's for the first time defined "competitor" as "Amazon.com, Inc., . . . Transform Holdco LLC (the entity which acquired the assets of Sears Holdings Corporation and operates Sears and Kmart) . . . Target . . . and Walmart" in its 2021 10-K.²²¹ Similarly, Macy's began listing Amazon as a "competing business" in its 2012 10-K,²²² although it stopped after its 2018 10-K.²²³ Interestingly, retailers like Best Buy, Lowe's, JCPenney, Home Depot, and Walmart have never listed Amazon as a competitor in their 10-K filings. This is especially surprising with Walmart, given how vocal it has been about its competition with Amazon otherwise.²²⁴ However, although a retailer listing Amazon in its 10-K suggests that it views Amazon as a competitor, it is also possible that these 10-K filings may be strategically used by retailers in anticipation of future antitrust investigations. Retailers' counsel may have incentives to include a larger pool of competitors in their filings to broaden the relevant market, and thus protect themselves, in a future merger antitrust lawsuit. Consequently, while listings in a 10-K may be probative, they can also be subject to manipulation.

Additionally, some retailers consider Amazon a competitor in internal documents as well. For example, in 2021, a company memo from Walmart was leaked revealing Walmart's struggles in the face of Amazon and other competitors.²²⁵ The memo made "several blunt assessments about the uphill battle

219. Staples, Inc., Annual Report (Form 10-K), at 6 (Mar. 9, 2017).

220. Sears Holdings Corp., Annual Report (Form 10-K), at 6 (Mar. 14, 2012); *see also* Sears Holdings Corp., Annual Report (Form 10-K), at 4 (Mar. 23, 2018) (listing the same language).

221. Kohl's Corp., Annual Report (Form 10-K), at 10 (Mar. 18, 2021).

222. Macy's Inc., Annual Report (Form 10-K), at 2 (Mar. 28, 2012).

223. *See* Macy's Inc., Annual Report (Form 10-K) (Apr. 4, 2018); *see also* Macy's Inc., Annual Report (Form 10-K) (Mar. 29, 2017).

224. *See, e.g.*, Del Rey, *supra* note 193; Monteros, *supra* note 206 (discussing Walmart and Target announcing big sale events occurring the day before Amazon Prime Day); George Anderson, *Walmart Says Amazon's Grocery Delivery Fee Will Put a 'Whole' in Customers' Wallets*, RETAIL WIRE (Oct. 25, 2021), <https://www.retailwire.com/discussion/walmart-says-amazons-grocery-delivery-fee-will-put-a-whole-in-customers-wallets/> [<https://perma.cc/JB2W-DL43>] ("[Walmart] sent out an email today that read, 'You may have heard that starting today, one grocery delivery service will start charging its customers \$9.95 for every single delivery . . . That's why, today only, Walmart is announcing that new customers who sign up for Walmart+, the membership that helps them save more time and money, will get \$9.95 back. Because customers deserve a grocery delivery service that won't leave a Whole in their wallet for delivery fees—whoops, typo.'").

225. Jason Del Rey, *A Leaked Walmart Memo Highlights the Daunting Challenges Facing the World's Largest Retailer*, VOX: RECODE (May 7, 2021, 12:35 PM), <https://www.vox.com/recode/22423706/walmart-memo-retail-amazon-target-instacart> [<https://perma.cc/GF57-DF74>]; *see also* Adriana Nunez, *Walmart's Leaked Documents Showcase Its Plans to Take on Amazon*, INSIDER INTEL.: EMARKETER (Mar. 12, 2021), <https://content-na1.emarketer.com/leaked-documents-highlight-walmart-s-strategy-overtake-amazon> [<https://perma.cc/78VY-SXQL>].

Walmart faces to hold onto its once-dominant retail market position” and identifies Amazon, and others, as major threats.²²⁶ Memos and documents like this further suggest that brick-and-mortar retailers consider Amazon a major competitor, even behind closed doors.

Explicit inclusion of Amazon as a competitor in official documents like 10-K filings as well as unofficial documents suggests retailers actually consider Amazon a threat to their business enough that they feel the need to report it to shareholders and others internally. This is probative for showing that Amazon should be included in the geographic market for many brick-and-mortar retailers, as some weight should be given to how the retailers themselves perceive their competition.

2. Adoption of Similar Programs and Practices

In addition to price-focused competition, many brick-and-mortar retailers have shown they compete with Amazon by adopting similar practices in order to remain competitive in the market. Examples include adopting marketplace platforms, ramping up shipping speeds and distribution centers, and utilizing greater technology and artificial intelligence (AI).

The pressure to change and adapt can be seen as early as in 2010, when Target re-platformed its website with new vendors to be better positioned for the 2011 holiday season vis-à-vis competitors like Amazon and Walmart.²²⁷ The pressure has continued with the addition of third-party marketplaces like Amazon’s. For instance, Walmart first launched its marketplace in 2009.²²⁸ In 2020, Walmart Marketplace partnered with Shopify to increase the number of sellers using the platform.²²⁹ In 2021, Walmart further grew its partnerships by partnering with BigCommerce to expand its marketplace sellers even more.²³⁰ In 2019, Target added “Target+,” a version of Amazon’s marketplace, which, like Amazon, incorporates third-party sellers onto Target’s site.²³¹ Best Buy similarly opened a marketplace in

226. Del Rey, *supra* note 224.

227. See Press Release, Target, Target.com Announces Vendor Partners for Re-platforming Effort (Jan. 11, 2010), <https://corporate.target.com/press/releases/2010/01/target-vendor-partners> [<https://perma.cc/NE7R-YLN5>].

228. Press Release, Walmart, Walmart.com Adds Nearly One Million New Items with the Launch of Walmart Marketplace (Aug. 30, 2009), <https://corporate.walmart.com/newsroom/2009/08/30/walmart-com-adds-nearly-one-million-new-items-with-the-launch-of-walmart-marketplace> [<https://perma.cc/CCS2-P8NP>].

229. Press Release, Jeff Clementz, Vice President, Walmart, Walmart Expands Its eCommerce Marketplace to More Small Businesses (June 15, 2020), <https://corporate.walmart.com/newsroom/2020/06/15/walmart-expands-its-ecommerce-marketplace-to-more-small-businesses> [<https://perma.cc/ENT2-AAHT>].

230. Maria Monteros, *Walmart Opens Its Marketplace to BigCommerce Merchants*, RETAIL.DIVE (Feb. 24, 2021), <https://www.retaildive.com/news/walmart-opens-its-marketplace-to-bigcommerce-merchants/595642/> [<https://perma.cc/CR7W-QR9Q>].

231. Suman Bhattacharyya, *With Target+, Target Gets an Amazon-Like Marketplace*, DIGIDAY (Feb. 26, 2019), <https://digiday.com/retail/target-betting-invitation-marketplace-help-grow-online-offline-revenue/> [<https://perma.cc/Y2ZL-BHQ9>]; see also Press Release, Target, Guests Have Even More to Love with Target + (Feb. 25, 2019), <https://corporate.target.com/article/2019/02/target-plus> [<https://perma.cc/7JKY-CT9S>].

2011, which it eventually shut down in 2016.²³² Many other retailers have succumbed to the marketplace structure in an effort to keep up with e-commerce and Amazon's success.²³³ Some argue the addition of a marketplace structure "helps retailers stay competitive with a behemoth like Amazon" because Amazon is "beating [retailers by] . . . hav[ing] more stuff."²³⁴

Membership programs are another means for retailers to compete with Amazon. Some retailers have added similar membership programs like Amazon's Prime. In 2020, Walmart announced it was launching "Walmart+," a membership program, costing about \$98 per year, that provides members with "same-day delivery on 160,000 items, a fuel discount at certain gas stations[,] and a chance to check out at Walmart stores without having to wait at a register."²³⁵ Walmart's membership program is cheaper than Amazon Prime, which costs \$119 per year, although Prime provides more features.²³⁶

Retailers are also battling Amazon through ramping up their shipping speed and capabilities. Amazon has been known for its fast and free (or relatively inexpensive, for non-Prime members) shipping.²³⁷ In order to compete, other retailers have since begun offering cheaper and faster shipping options for consumers. In 2017, Walmart began offering free two-day shipping on over two million items sitewide.²³⁸ As of 2019, some companies estimate that Walmart offers one-day shipping on around 130,000 products.²³⁹ In 2020, Walmart rolled out its own version of "Walmart Fulfillment Services" to help its third-party marketplace sellers by "offer[ing] storage, picking, packing and two-day shipping, returns and customer service operations," and eventually next-day shipping.²⁴⁰ Additionally, in response to Amazon's "Prime Now," which offers two-hour delivery, Walmart, in 2020, began offering "Express Delivery," which is its version of a two-hour delivery

232. Juozas Kaziukėnas, *Best Buy Is Closing Its US Marketplace*, MARKETPLACE PULSE (Feb. 24, 2016), <https://www.marketplacepulse.com/articles/best-buy-is-closing-its-us-marketplace> [<https://perma.cc/X5BZ-VMCR>].

233. See Michael Waters, *This Is Not Pandemic Boredom: Retailers Are Increasingly Launching Their Own Third-Party Marketplaces*, MOD. RETAIL (Apr. 14, 2021), <https://www.modernretail.co/retailers/this-is-not-pandemic-boredom-retailers-are-increasingly-launching-their-own-third-party-marketplaces/> [<https://perma.cc/G8BX-SZJP>] ("[T]hey're joining the ranks of retail and grocery brands like Urban Outfitters, Kroger, Ahold Delhaize and Anthropologie—all of which have come out with marketplaces for third-party sellers in the last few years. They are also part of a much larger marketplace boom . . .").

234. *Id.*

235. Joseph Pisani, *15 Years Later, Walmart to Launch Its Answer to Amazon Prime*, ASSOCIATED PRESS (Sept. 1, 2020), <https://apnews.com/article/technology-ar-state-wire-us-news-business-wa-state-wire-7917a32fcf25b232b87425b285d25a16> [<https://perma.cc/Y3K9-QPNJ>].

236. *Id.*

237. See eMarketer Editors, *Demand for Fast and Innovative Delivery Persists amid the Pandemic*, INSIDER INTEL.: EMARKETER (May 26, 2020), <https://www.insiderintelligence.com/content/demand-for-fast-and-innovative-delivery-persists-amid-the-pandemic> ("[T]he top reason that US internet users shopped at Amazon was fast and free shipping (79.8%), even outpacing broad selection (68.9%) and best pricing (49.2%).") [<https://perma.cc/RM3G-5F8U>].

238. Walmart, Inc., Annual Report (Form 10-K), at 7 (Mar. 30, 2018).

239. Murphy & Munster, *supra* note 77.

240. Monteros, *supra* note 230; Emma Cosgrove, *Walmart Launches Fulfillment Service for 3rd-party Marketplace Sellers*, SUPPLY CHAIN DIVE (Feb. 25, 2020), <https://www.supplychaindive.com/news/walmart-e-commerce-fulfillment-marketplace/572924/> [<https://perma.cc/7G84-WW6H>].

service.²⁴¹ Even now, Walmart continues to heavily invest in its delivery and supply chain in an effort to compete with Amazon.²⁴² Similarly, Target has heavily invested in shipping to improve its delivery vis-à-vis Amazon. In 2021, Target announced it would invest \$4 billion annually over the next few years to upgrade its stores and improve its online business, including improving shipping times.²⁴³ Like Amazon and Walmart, Target also has begun to offer same-day shipping (as well as same-day pick up) and continues to work on expanding that function.²⁴⁴ Target boosted its same-day shipping in 2017 by acquiring the shipping company Shipt Inc.²⁴⁵ and has also offered more convenience options for customers by increasing the availability of curbside pickup.²⁴⁶

Many other retailers have increased their investments in shipping and their supply chain to improve delivery times. In some cases, such as with Target and Best Buy, the improved shipping speed and decreased costs are a result of utilizing their own retail store spaces as fulfillment centers.²⁴⁷ Best Buy, for example, began piloting “ship-from-store” fulfillment as early as 2013.²⁴⁸ Many retailers also have curbside pickup or “click and collect” models to increase the speed at which customers can get their products.²⁴⁹ Click and collect models have become very

241. Kapadia, *supra* note 78; *see also* Press Release, Walmart, Walmart Introduces Express Delivery (Apr. 30, 2020), <https://corporate.walmart.com/newsroom/2020/04/30/walmart-introduces-express-delivery> [<https://perma.cc/85M4-XV44>].

242. *See* Steve Banker, *Walmart's Massive Investment in a Supply Chain Transformation*, FORBES (Apr. 23, 2021, 9:20 AM), <https://www.forbes.com/sites/stevebanker/2021/04/23/walmarts-massive-investment-in-a-supply-chain-transformation/?sh=c46ef00340ed> [<https://perma.cc/S78C-UWP4>].

243. Uday Sampath Kumar, *Target to Spend \$4 Billion a Year to Speed Up Delivery as Pandemic Spurs Online Gains*, REUTERS (Mar. 2, 2021, 3:32 AM), <https://www.reuters.com/article/us-target-results/target-to-spend-4-billion-a-year-to-speed-up-delivery-as-pandemic-spurs-online-gains-idUSKBN2AU16F> [<https://perma.cc/FM82-3K2J>].

244. *Id.*

245. Jamie Grill-Goodman, *Target's \$550M Retail Technology Investment Ties It Up with Walmart and Amazon in the Delivery Race*, RETAIL INFO. SYSS. (Dec. 13, 2017), <https://risnews.com/targets-550m-retail-technology-investment-ties-it-walmart-and-amazon-delivery-race> [<https://perma.cc/J7RW-LGLL>].

246. Alex Van Abbema, *Target's Ship-to-Store Strategy Succeeds Where Amazon Can't*, MINNEAPOLIS/ST. PAUL BUS. J. (Mar. 5, 2019, 3:33 PM), <https://www.bizjournals.com/twincities/news/2019/03/05/targets-ship-to-store-strategy-succeeds-where.html> [<https://perma.cc/7H9F-GZMC>].

247. Timothy Green, *Best Buy Rolls Out Free Next-Day Shipping for the Holidays*, THE MOTLEY FOOL (Oct. 23, 2019, 8:20 AM), <https://www.fool.com/investing/2019/10/23/best-buy-rolls-out-free-next-day-shipping-for-the.aspx> [<https://perma.cc/93N5-BERK>] (Best Buy); Kumar, *supra* note 243 (Target); *see also* Shefali Kapadia, *Best Buy Tests Limited SKUs on Store Floor to Make Space for Fulfillment*, SUPPLY CHAIN DIVE (Nov. 25, 2020), <https://www.supplychaindive.com/news/best-buy-limit-SKU-store-centric-fulfillment-ship/589697/> [<https://perma.cc/6VSZ-TUVJ>].

248. Adam Blair, *Best Buy Enables Online Fulfillment from All DCs, Pilots Ship-from-Store*, RETAIL INFO. SYSS. (June 30, 2013), <https://risnews.com/best-buy-enables-online-fulfillment-all-dcs-pilots-ship-store> [<https://perma.cc/6WDW-Z325>].

249. *See, e.g.*, David Salisbury, *Can Physical Stores Compete with Amazon?*, CAL. MGMT. REV. (Apr. 25, 2019), <https://cmr.berkeley.edu/2019/04/retail/> [<https://perma.cc/7YA2-MAAG>] (“Lowe’s, who has adapted a ‘click-and-collect’ model where customers buy goods online then pick them up at the physical store, says more than 60% of digital orders are picked up in stores.”). In 2007, Walmart began offering “site-to-store” services as well, where customers could make a purchase online and pick it up in the store. Walmart, Inc., *supra* note 238.

popular amongst consumers as a middle ground between in-person and online shopping.²⁵⁰

Lastly, some retailers have sought to compete with Amazon through enlisting in pricing software and AI. For instance, in 2014, retailers like Staples and Sears turned to a data analytics company with price-tracking services called Boomerang Commerce (now called CommerceIQ) to help address issues around pricing strategy, inventory, and customer service to better compete with retailers like Amazon (Boomerang Commerce was founded by a former Amazon employee).²⁵¹ Moreover, retailers like Walmart utilize bots to price check Amazon in order to remain competitive with pricing.²⁵²

3. Vertical Acquisitions

Many brick-and-mortar retailers have responded to the competition posed by Amazon through engaging in vertical acquisitions of startups and similar companies. These acquisitions help large retailers compensate for their weaknesses. Examples of this can again be found with both Walmart and Target.

Walmart's major acquisition in response to Amazon's success was its acquisition of e-commerce site Jet.com in 2016.²⁵³ With Walmart's acquisition of Jet.com, Walmart significantly expanded its e-commerce platform by having access to Jet.com's expertise and platform.²⁵⁴ The CEO of Jet.com became CEO of Walmart's e-commerce sector in the United States as well.²⁵⁵ From 2011 to 2016, Walmart acquired at least fifteen e-commerce startups in its quest to defeat Amazon

250. See Andrew Lipsman, *US Holiday Shopping 2021*, INSIDER INTEL.: EMARKETER (Oct. 18, 2021), <https://content-na1.emarketer.com/us-holiday-shopping-2021> [<https://perma.cc/84K8-7B6Y>] (“36% of US online consumers planned to use click and collect for holiday purchases.”); Agatha Aviso, *60 Online Shopping Statistics Retailers Should Know in 2023*, FIT SMALL BUS. (Feb. 23, 2023), <https://fit-smallbusiness.com/online-shopping-statistics/> [<https://perma.cc/2JP4-MT68>] (“[O]ver nine out of 10 shoppers deem[] the [Click and Collect] option convenient.”).

251. See Ryan Mac, *Ex-Amazon Manager Gets Funding to Help Retailers Battle His Former Employer*, FORBES (July 16, 2014, 8:00 AM), <https://www.forbes.com/sites/ryanmac/2014/07/16/boomerang-amazon-battle/?sh=7a732abb1e41> [<https://perma.cc/2GFN-SZH9>]; see also *Boomerang Commerce*, CRUNCHBASE, <https://www.crunchbase.com/organization/boomerang-commerce> [<https://perma.cc/M8X9-DH3T>] (last visited Feb. 21, 2023) (now acquired by Lowe's).

252. Jeffrey Dastin, *How Amazon Is Crushing Rivals like Walmart in a Burgeoning Tech War over the Future of Retail*, INSIDER (May 10, 2017, 11:12 AM), <https://www.businessinsider.com/how-amazon-beats-rivals-like-walmart-with-bots-to-match-price-cuts-2017-5> [<https://perma.cc/B3BT-N68L>]; Reuters, *How Amazon's Bot Army Is Trouncing Walmart in E-Commerce Wars*, FORTUNE (May 10, 2017, 4:49 AM), <https://fortune.com/2017/05/10/amazon-bots/> [<https://perma.cc/7F3D-FF2Q>].

253. Walmart, Inc., *supra* note 238; Press Release, Walmart, Walmart Completes Acquisition of Jet.com, Inc. (Sept. 19, 2016), <https://corporate.walmart.com/newsroom/2016/09/19/walmart-completes-acquisition-of-jet-com-inc> [<https://perma.cc/U7YW-PNHA>].

254. See Press Release, Walmart, *supra* note 253.

255. *Id.*

and continues to acquire more.²⁵⁶ In 2017, Walmart acquired the company Parcel to further expand its same-day delivery services.²⁵⁷

Target has also made similar vertical acquisitions in order to better compete with Amazon. In 2017, Target acquired the delivery platform Shipt Inc. to increase its same-day delivery capabilities.²⁵⁸ Additionally, in 2017, Target announced its planned acquisition of Grand Junction, a transportation technology company, to further expand Target's delivery capabilities.²⁵⁹ In 2020, Target announced it was planning to acquire the startup Deliv, which also focuses on "last mile batched delivery."²⁶⁰ Other brick-and-mortar retailers have similarly participated in this acquisition craze to become more competitive.²⁶¹

Both Target's and Walmart's recent vertical acquisitions of shipping and e-commerce startups show that another means for brick-and-mortar retailers to compete with Amazon is through acquiring companies that can do what Amazon does, but better. Acquisitions are an important part of how major retailers compete with Amazon and are another indication that courts should consider Amazon a competitor for these retailers.

Amazon has proven to be a major disruptor in the retail industry. As the competitive retail environment shows, major brick-and-mortar retailers actively compete with Amazon. Courts and the FTC should consider this competition when analyzing large-scale retail mergers and their applicable geographic markets. Research shows that at least some consumers still rely on price, and that price

256. *Wal-Mart's Next Move Against Amazon: More Warehouses, Faster Shipping*, CNBC (Oct. 6, 2016, 4:23 AM), <https://www.cnbc.com/2016/10/06/wal-marts-next-move-against-amazon-more-warehouses-faster-shipping.html> [<https://perma.cc/5YYA-KJNX>]; see, e.g., Joe Keenan, *Walmart Acquires Virtual Fitting Room Company Zeekit*, TOTAL RETAIL (May 13, 2021), <https://www.mytotalretail.com/article/walmart-acquires-virtual-fitting-room-company-zeekit/> [<https://perma.cc/HC6K-7TNK>] (discussing Walmart's acquisition of a virtual fitting room startup).

257. Grill-Goodman, *supra* note 245.

258. *Id.*

259. Press Release, Target, Target to Acquire Grand Junction to Expand and Improve Delivery Services for Guests (Aug. 14, 2017), <https://corporate.target.com/press/releases/2017/08/Target-to-Acquire-Grand-Junction-to-Expand-and-Imp> [<https://perma.cc/CF42-EHDY>].

260. Press Release, Target, This New Tech Is Helping Target Explore Faster and More Efficient Delivery (May 7, 2020), <https://corporate.target.com/article/2020/05/supply-chain-update> [<https://perma.cc/9GKD-WHLK>].

261. E.g., Press Release, Lowe's, Lowe's Acquires Retail Analytics Platform from Boomerang Commerce (May 20, 2019), <https://corporate.lowes.com/newsroom/press-releases/lowes-acquires-retail-analytics-platform-boomerang-commerce-05-20-19> [<https://perma.cc/7SCD-HA73>] (announcing Lowe's acquisition of a pricing/data analytics company); Kristina Sudham, *American Eagle Outfitters Acquires Quiet Logistics for \$350M*, TOTAL RETAIL (Nov. 2, 2021), <https://www.mytotalretail.com/article/american-eagle-outfitters-acquires-quiet-logistics-for-350m/> [<https://perma.cc/6CPN-3LZS>] (discussing American Eagle's acquisition of a logistics firm to improve same-day/next-day delivery after acquiring another logistics firm earlier in the year (*AirTerra*)); Melissa Campanelli, *Nordstrom Acquires 2 Digital Retail Startups*, TOTAL RETAIL (Mar. 9, 2018), <https://www.mytotalretail.com/article/nordstrom-acquires-two-digital-retail-startups/> [<https://perma.cc/H57D-R6MP>] (discussing Nordstrom's acquisition of two startups: a digital selling tool and a platform for conversational commerce); Taylor Knight, *PetSmart Buys Chewy.com in Largest E-Commerce Acquisition Ever*, TOTAL RETAIL (Apr. 19, 2017), <https://www.mytotalretail.com/article/petsmart-buys-chewy-com-largest-e-commerce-acquisition-ever/> [<https://perma.cc/622T-T9VA>] (discussing PetSmart's acquisition of online retailer Chewy.com).

remains an important consideration for many consumers in choosing where to make their purchases. Moreover, Amazon's effect on brick-and-mortar retailers' pricing decisions is shown through the proliferation of price matching programs among retailers and a generally decreasing price gap between Amazon and some retailers at various points throughout the last decade. Public "price wars" further exemplify the impact Amazon has had on some retailers' prices. In addition to pricing-related competition, brick-and-mortar retailers' competitiveness with Amazon is shown through listing Amazon as a competitor in public filings and documents, adopting similar programs and practices, and acquiring startups to increase their competitiveness.

All in all, these practices combined show the competitive environment that exists among brick-and-mortar retailers and Amazon. While not all brick-and-mortar retailers compete with Amazon to the same degree and in all the same product markets, those that do (for example, Walmart and Target), should have Amazon considered as part of their relevant geographic market for mergers. Ultimately, all merger market determinations are made on a case-by-case basis. However, given the factors discussed above, courts should find that many large brick-and-mortar retailers compete with Amazon heavily in many product markets.

IV. CASE STUDY: OFFICE SUPPLIES—STAPLES/OFFICE DEPOT

To find an example of a retail market where Amazon could fit right in, one need not look any further than office supplies and the recent (third) attempt at a Staples/Office Depot merger. In the initial *FTC v. Staples* case from 1997, the D.C. district court defined the product market for the attempted merger as "consumable office products" sold through office supply superstores.²⁶² The court acknowledged the office supplies sold at a Walmart or a Best Buy were functionally interchangeable with those sold at Staples or Office Depot, but still found this was not enough to put the retailers in the same market.²⁶³ The court determined that a small but significant increase in the prices of office supplies at Staples/Office Depot would not cause enough Staples/Office Depot customers to purchase office supplies from Walmart or other retailers, whereas an increase in Staples' prices would cause customers to turn to Office Depot (and vice-versa).²⁶⁴ Evidence presented by the FTC also showed that office supply superstores' prices were primarily affected only by the presence of other office supply superstores in the area, rather than by the presence of non-superstore competitors like Walmart or Target.²⁶⁵ As a result, the court excluded mass retailers like Walmart from the market by creating a separate submarket for office supply superstores.²⁶⁶ Ultimately, the pricing data and other evidence on the record (such as the Staples CEO stating that "[i]n our industry, Wal-Mart has never been a factor") pushed the court to discount the role of Walmart and other non-office supply superstore retailers as

262. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).

263. *Id.*

264. *Id.* at 1074–75.

265. *Id.* at 1077.

266. *Id.* at 1074–75.

direct competitors.²⁶⁷ Consequently, the merger attempt failed, as the court granted the FTC's injunction request.²⁶⁸

In 2015, Staples and Office Depot attempted a second merger. Again, the FTC challenged the merger. However, in this case, the FTC did not challenge the merger in the context of Staples/Office Depot's retail businesses, but rather focused on the business-to-business aspect of the merger.²⁶⁹ The FTC had in its earlier investigation found that "the market for office supplies had been reshaped since 1997 by the growth of mass merchants like Wal-Mart, club stores like Costco, and online retailers."²⁷⁰ With the updated market definition focused on business clients, the court again granted an injunction for the FTC, and the merger was pronounced dead.²⁷¹

In 2021, Staples again sought to acquire Office Depot.²⁷² However, after its prior experiences with the FTC, Office Depot declined the initial offer.²⁷³ Staples made a new offer to purchase only Office Depot's consumer retail business, and then Office Depot's business division would separate.²⁷⁴ In the end, Office Depot also rejected this offer mid-2022.²⁷⁵ However, had the merger gone through under these updated terms and were it subject to a court's assessment, that court should include Amazon within the relevant geographic market. It should do so because Amazon's role in the retail office supplies market has changed significantly since 1997 when the D.C. district court discounted the impact of non-office supply stores, and Staples and Office Depot rightfully view Amazon as a competitor.

A. Times Have Changed

A lot has changed since the district court in 1997 reviewed the retail office supplies market and the competitors of Staples and Office Depot there. The FTC in 2015 had this realization, as it decided to challenge the Staples/Office Depot merger on only its effects in the business-to-business market rather than challenging the merger's effects on the retail office supplies market. Internet retailers like

267. Plaintiff's Memorandum of Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction (Public Version) at 36, *Staples*, 970 F. Supp. 1066 (No. 97-701).

268. *Staples*, 970 F. Supp. at 1093.

269. *FTC v. Staples, Inc. (Staples II)*, 190 F. Supp. 3d 100, 109–10 (D.D.C. 2016); Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 94, *Staples II*, 190 F. Supp. 3d 100 (No. 15-2115).

270. COMPETITION COMM., ORG. FOR ECON. COOP. & DEV., IMPLICATIONS OF E-COMMERCE FOR COMPETITION POLICY—NOTE BY THE UNITED STATES ¶ 27 (2018).

271. *Staples II*, 190 F. Supp. 3d at 110–11.

272. Maile McCann, *Why, After Many Failed Attempts, Staples Is Determined to Acquire Office Depot*, MOD. RETAIL (June 9, 2021), <https://www.modernretail.co/retailers/why-after-many-failed-attempts-staples-is-determined-to-acquire-office-depot/> [<https://perma.cc/KJ6U-VPSN>].

273. Marianne Wilson, *Office Depot Parent to Split into Two Companies as Staples Pursues Acquisition*, CHAIN STORE AGE (May 4, 2021), <https://chainstoreage.com/office-depot-parent-split-two-companies-staples-pursues-acquisition> [<https://perma.cc/A9YY-RJAC>].

274. McCann, *supra* note 272; Wilson, *supra* note 273.

275. Ben Unglesbee, *After Much Mulling, Office Depot Owner Rejects Both Sale and Split*, RETAIL DIVE (June 22, 2022), <https://www.retaildive.com/news/after-much-mulling-office-depot-owner-rejects-sale-and-split/625844/> [<https://perma.cc/6JWC-56NH>].

Amazon now compete with Staples and Office Depot. According to Statista, Amazon is one of the leaders in global office supplies sales.²⁷⁶ Moreover, for the average retail consumer, Amazon is increasingly becoming their go-to for office supplies. In 2021, it was estimated Amazon would capture 85% of back-to-school shoppers in the United States, with only 27% of shoppers choosing to go to office supply stores like Staples or Office Depot.²⁷⁷ Similarly, in a 2019 study, 74% of respondents noted that they planned to purchase back-to-school supplies from Amazon, while only 10% indicated Staples, and 9% indicated Office Depot.²⁷⁸ Throughout the years, many brick-and-mortar stores have significantly increased their office supplies inventories.²⁷⁹ As the numbers suggest, Amazon and other non-office supply stores have become important players in the retail office supplies market.

Even the FTC, in its 2013 assessment of the Office Depot/OfficeMax merger, acknowledged that office supply superstores now face increasing and significant competition from retailers, both brick and mortar and internet based.²⁸⁰ By declining to challenge the Office Depot/OfficeMax merger, the FTC acknowledged that the office supplies market and competitive environment had changed significantly since the FTC's 1997 challenge of the Office Depot/Staples merger.²⁸¹ The FTC found that "[c]ompany documents show[ed] that OSS [office supply superstores] are acutely aware of, and feel threatened by, the continued growth of online competitors, most notably Amazon."²⁸² The FTC's press release regarding the report similarly describes its impact:

The Commission's statement describes differences in the competition faced by office supply superstores in 1997 and today. It states that customers now look beyond office supply superstores when buying office supplies. Non-office supply superstores such as Wal-Mart and Target, along with club stores like Costco and Sam's Club, have expanded their office supply product offerings and now compete with office supply superstores. Additionally, Internet retailers of office supplies,

276. *Office Supplies*, STATISTA, <https://www.statista.com/markets/423/topic/1062/office-supplies/-overview> [<https://perma.cc/B88H-NYKW>] (last visited Feb. 21, 2023).

277. Sara Lebow, *Amazon Will Capture 85% of US Back-to-School Digital Shoppers this Year*, INSIDER INTEL: EMARKETER (July 6, 2021), <https://www.emarketer.com/content/amazon-will-capture-back-to-school-shoppers> [<https://perma.cc/LG23-QWPL>].

278. *Which Online Retailers Do US Mothers Plan to Purchase Back-to-School* Supplies From? (% of Respondents, May 2019)*, EMARKETER (May 16, 2019), <https://chart-na1.emarketer.com/228706/which-online-retailers-do-us-mothers-plan-purchase-back-to-school-supplies-from-of-respondents-may-2019> [<https://perma.cc/9JSF-R9VN>].

279. Matthew J. Reilly & Chetan Sanghvi, *Meet the New Boss: Competitive Effects Analyses in Staples/Office Depot*, ANTI-TRUST, Fall 2016, at 34, 35; see also Orley Ashenfelter, David Ashmore, Jonathan B. Baker, Suzanne Gleason & Daniel S. Hosken, *Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in FTC v. Staples*, 13 INT'L J. ECONS. BUS. 265, 266 (2006).

280. Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., FTC No. 131-0104, at 1–2 (Nov. 1, 2013).

281. *Id.* at 1; see *supra* Section II.B.4.

282. Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., No. 131-0104, *supra* note 280.

most prominently Amazon, have grown quickly and significantly, and compete with office supply superstores.²⁸³

Thus, the FTC's letter was, in many ways, an official acknowledgment of the changing times and shifting competitive environment in the retail office supplies industry. The retail office supplies industry has changed significantly throughout the years, and Amazon has been an important player in the market since. Consequently, courts should consider Amazon in the geographic market for retail office supplies, just as the FTC acknowledged in 2013 and 2015 with its decisions to not challenge the two retail office supply mergers.

B. Staples and Office Depot Compete with Amazon in Office Supplies Sales

Staples and Office Depot compete with Amazon and consider Amazon a major competitor. The tell-tale signs of this competition are Staples and Office Depot's price matching and price differentials, explicit listing of Amazon as a competitor in their official filings, and adoption of other practices and programs meant to compete with Amazon (e.g., fast shipping).

1. Price Matching and Price Differentials

Price matching is one way for retailers to show that they are competing with Amazon on pricing²⁸⁴ because they are willing to meet whatever low price Amazon has that day. Both Staples and Office Depot price match Amazon.²⁸⁵ Not only does Staples price match Amazon, but up until recently, it also offered a 110% price-match guarantee, which provided that Staples would both match Amazon's price and add an additional discount of 10% of the difference.²⁸⁶ Staples' and Office Depot's willingness to match Amazon's prices (and especially Staples' previous offer of an additional 10% discount along with a price match) show that both companies are willing to meet Amazon on their prices to secure a customer.

Staples' and Office Depot's competitiveness with Amazon on pricing is also visible in their price differentials with Amazon throughout the years. Again, utilizing data from Profitero and other companies, Table 6 shows the generally decreasing price differential between Staples and Amazon throughout the years. Unfortunately, the data is greatly limited for Office Depot. This analysis also assumes Amazon has not been increasing its prices, but rather that Staples/Office Depot have been decreasing theirs.

283. Press Release, Fed. Trade Comm'n, FTC Closes Seven-month Investigation of Proposed Office Depot/OfficeMax Merger (Nov. 1, 2013), <https://www.ftc.gov/news-events/press-releases/2013/11/ftc-closes-seven-month-investigation-proposed-office> [<https://perma.cc/E9WJ-6S2F>].

284. See *supra* Section III.C.1.

285. *100% Price Match Guarantee*, STAPLES, <https://www.staples.com/sbd/cre/marketing/pmg/index.html> [<https://perma.cc/GL6B-UBUA>] (last visited Feb. 21, 2023); *Price Match Policy*, OFF. DEPOT, <https://www.officedepot.com/cm/help/price-match> [<https://perma.cc/2HY2-LTKV>] (last visited Feb. 21, 2023).

286. *110% Price Match Guarantee*, STAPLES, <https://www.staples.com/sbd/cre/marketing/pmg/index.html> [<https://web.archive.org/web/20220717091319/https://www.staples.com/sbd/cre/marketing/pmg/index.html>] (last visited July 31, 2022).

**Table 6: Price Differentials Between Amazon and Staples/Office Depot
(On Average)**

	2017	2018	2019	2020	2021
% that Staples' Prices were Higher than Amazon's	38.5% higher (in electronics) ²⁸⁷ 49% higher ²⁸⁸ 19% higher (small study) ²⁸⁹	37% higher ²⁹⁰	31.5% higher (in electronics) ²⁹¹	N/A	11% higher ²⁹²
% that Office Depot's Prices were Higher than Amazon's	23% higher ²⁹³	N/A	N/A	N/A	N/A

Relatedly, in 2018, a small study found that Staples tended to be cheaper than Amazon for one-off items like single notebooks or folders, but not for bigger items like backpacks.²⁹⁴ Although the limited pricing data does not show extremely close prices between Amazon and Staples/Office Depot, the decreasing price differential suggests Staples may be working slowly to minimize the price gap. This suggests that Staples (and perhaps Office Depot) consider Amazon's prices to some degree when determining their own, which is important for antitrust analysis.²⁹⁵

287. Souza, *supra* note 161.

288. Cahill, *supra* note 177.

289. Miriam Gottfried, *Staples Deal: Does the Good Outweigh the Bad?*, WALL ST. J. (Apr. 5, 2017, 3:20 PM), <https://www.wsj.com/articles/staples-deal-does-the-good-outweigh-the-bad-1491333623> [<https://perma.cc/PQC6-4B26>] (discussing a Loop Capital Markets study of thirty items conducted in March 2017).

290. Cheng, *supra* note 156.

291. Jannie Cahill, *Amazon Charges into the Holiday Shopping Season with a Strong Price Lead over Other U.S. Online Retailers*, PROFITERO (Oct. 29, 2019), <https://www.profitero.com/press-releases/press-release/amazon-charges-into-the-holiday-shopping-season-with-a-strong-price-lead-over-other-u-s-online-retailers> [<https://perma.cc/JPD3-4G2C>].

292. PROFITERO, *supra* note 159, at 6.

293. Gottfried, *supra* note 289 (discussing a Loop Capital Markets study of thirty items conducted in March 2017).

294. Jeanie Ahn, *Staples vs. Amazon for Back-to-School Supplies*, YAHOO! NEWS (Aug. 14, 2018), <https://www.yahoo.com/news/staples-vs-amazon-back-school-supplies-190727624.html> [<https://perma.cc/7SKC-AFHV>].

295. See RANDY M. STUTZ, AM. ANTITRUST INST., *THE PROPOSED MERGER OF STAPLES AND OFFICE DEPOT: LESSONS FROM HISTORY AND NEW COMPETITIVE CONCERNS 2* (2015) (assuming that Staples' and Office Depot's retail is price disciplined by online retailers like Amazon).

2. Staples' and Office Depot's Official Records and Filings

Staples' and Office Depot's inclusion of Amazon in their SEC 10-K filings and discussion of Amazon on their earnings calls also shows that they consider Amazon a competitor. Both Staples and Office Depot explicitly discuss Amazon in their 10-Ks.

Office Depot began listing Amazon in its 10-Ks in 2013, and specifically notes that it experiences “strong competitive pressures from large Internet providers such as Amazon,” and that “[t]he ability of consumers to compare prices on a real-time basis using digital technology puts additional pressure on [them] to maintain competitive pricing.”²⁹⁶ In 2009, Staples also began listing Amazon as a competitor in its 10-Ks.²⁹⁷ In Staples' most recent 10-K from 2017, before it went private, it noted that it “compete[s] with online retailers such as Amazon.com,” and that “[i]ntense competitive pressures from one or more of [its] competitors could affect prices or demand for [its] products and services.”²⁹⁸ Both companies note their focus on maintaining “competitive pricing” against their competitors, including Amazon.²⁹⁹

Additionally, the companies have been vocal about the competition they face from Amazon in other ways. For instance, in a 2012 earnings call, when asked about Amazon, then-Staples-CEO Ronald L. Sargent replied that they “compete very aggressively with Amazon and retail and dot.com with small business customers” and with consumers.³⁰⁰ He acknowledged they competed on pricing, but also emphasized the importance of competing on service as well with small business customers.³⁰¹ Similarly, in a 2012 earnings call for Office Depot, when asked about why Office Depot did not decrease its gross margin improvement (through decreasing its prices) to incentivize customers to shop from Office Depot's website, then-CEO Neil Austrian acknowledged Office Depot was not going to be able to match Amazon in a number of categories, despite its “significant investment in [the] e-commerce business.”³⁰² Austrian, however, also noted that Office Depot has tried to compete with Amazon (and other retailers) on price in “select[] product areas and technology when [it] think[s] [it] can play and gain.”³⁰³

The discussion of Amazon in both official documents and earnings calls shows how seriously Staples and Office Depot consider Amazon in their retail game

296. The ODP Corp., Annual Report (Form 10-K), at 12, 46 (Feb. 24, 2021).

297. Staples, Inc., Annual Report (Form 10-K) at 7, 9 (Mar. 11, 2009) (listing Amazon.com as a competitor for the first time).

298. Staples, Inc., Annual Report (Form 10-K), at 6 (Mar. 9, 2017).

299. See The ODP Corp., Annual Report (Form 10-K), at 12, 46 (Feb. 24, 2021); Staples, Inc., Annual Report (Form 10-K), at 6 (Mar. 9, 2017).

300. *Staples Management Discusses Q1 2012 Results—Earnings Call Transcript*, SEEKING ALPHA (May 16, 2012), <https://seekingalpha.com/article/594951-staples-management-discusses-q1-2012-results-earnings-call-transcript> [<https://perma.cc/U944-YPSX>].

301. *Id.* (“And I think pricing—there are some items that they're very aggressively priced on, but I don't think that we're losing customers because of the pricing . . .”).

302. *Office Depot Management Discusses Q3 2012 Results—Earnings Call Transcript*, SEEKING ALPHA (Nov. 6, 2012, 12:50 PM), https://seekingalpha.com/article/982801-office-depot-management-discusses-q3-2012-results-earnings-call-transcript?utm_medium=email&utm_source=seeking_alpha [<https://perma.cc/V758-5L6U>].

303. *Id.*

plan as far as competitive pricing goes. As a result, courts and the FTC should consider this impact when determining which retailers should be included in the geographic market for a Staples and Office Depot merger.

3. Competition in Other Avenues

In addition to pricing, Staples and Office Depot turn to other tactics to remain competitive with Amazon. Staples and Office Depot have worked on improving their delivery speeds, turned to data analytics companies for support, and focused on improving their omnichannel models.

One way Staples and Office Depot compete with Amazon is through faster delivery. In a 2012 earnings call, when Staples management was asked about how they planned to compete with Amazon's shipping, management responded that "most of [their] shipping [was already] free."³⁰⁴ Staples management also noted that while they were ultimately "okay with [their] North American Retail business" and delivery, they "credit" Amazon because "Amazon showed [them] what's possible in terms of growing a dot.com business," and will "learn from them . . . [to] grow [their] own business."³⁰⁵ In 2020, Staples announced its partnership with Instacart to provide same-day delivery on retail orders.³⁰⁶ Similarly, in 2020, Office Depot announced its partnership with Shipt to also offer same-day delivery on Office Depot orders.³⁰⁷ Office Depot is also available on DoorDash for even faster deliveries.³⁰⁸ Both companies have been keen on improving their delivery speeds in order to compete with Amazon's fast shipping.

Additionally, Staples has invested in the services of data analytics companies like Boomerang Commerce, founded by a former Amazon employee, to make more effective pricing decisions to compete with Amazon and other retailers.³⁰⁹

Throughout the years, Staples and Office Depot have also turned their focus towards creating omnichannel stores, "which offer a personalized buying experience that attempts to seamlessly deliver information, discount and reward offers, and products and services across all channels."³¹⁰ The merging of online retailing, and the data it acquires, with customers' in-store experiences is an important avenue for traditionally brick-and-mortar retailers like Staples and Office Depot. This allows them to compete with Amazon in a format that Amazon is

304. *Staples Management Discusses Q1 2012 Results*, *supra* note 300.

305. *Id.*

306. Press Release, Staples US Retail, Staples US Retail Partners with Instacart to Offer New Same-Day Delivery for Safe, Convenient Shopping (June 12, 2020, 8:30 AM), <https://www.businesswire.com/news/home/20200612005280/en/Staples-US-Retail-Partners-with-Instacart-to-Offer-New-Same-Day-Delivery-for-Safe-Convenient-Shopping> [<https://perma.cc/9PJX-EHHK>].

307. Daniel B. Kline, *Target Grows Its Delivery Business by Partnering with a Rival*, THE MOTLEY FOOL (Jan. 23, 2020, 7:15 AM), <https://www.fool.com/investing/2020/01/23/target-grows-delivery-biz-partners-office-depot.aspx> [<https://perma.cc/U2EZ-ZNKY>].

308. *Office Depot: Delivery Near You*, DOORDASH, <https://www.doordash.com/business/office-depot-971879/> [<https://perma.cc/A9P6-2GG8>] (last visited Feb. 21, 2023).

309. Mac, *supra* note 251; *see also* Joe Lindsey, *Taking on Amazon*, ENTREPRENEUR, Nov. 2014, at 76, 76.

310. STUTZ, *supra* note 295, at 19.

weaker in because of its relatively sparse physical stores.³¹¹ Utilizing retail space and customer experience is an important way for Staples and Office Depot to compete. Both retailers have emphasized the importance and value that they place on their ability to offer good service.³¹² Becoming more service-oriented is an avenue that retailers like Staples and Office Depot can turn to in order to differentiate themselves from Amazon.

Given that cutting into profit margins has its limits for most retailers, Staples and Office Depot have turned to other practices to compete with Amazon in the retail office supplies market. These non-price tactics, like improving delivery speed and becoming more service oriented with omnichannel stores, are methods that Staples and Office Depot use to signal to consumers that they are the same, if not better, options for consumers when they are in need of office supplies.

Ultimately, any review of a Staples and Office Depot merger in the future should take into account the impact that Amazon has had on the retail office supplies industry. Throughout the years, Amazon has become an important competitor in the market, which the FTC itself acknowledged when reviewing the Office Depot/OfficeMax merger in 2013 and even in its decision to challenge only the business-to-business aspect of the Staples/Office Depot merger in 2015. Staples and Office Depot continue to compete with Amazon both in pricing—as evidenced by price matching programs and a generally decreasing price gap between the companies and Amazon—and through non-price avenues as well. These factors are important in considering whether Amazon should be included in the geographic market for these two office supplies retailers.

V. LIMITATIONS OF THIS NOTE

This Note is ultimately plagued with many limitations and qualifications. A primary limitation is the lack of access to private company data on how retailers like Walmart, Target, Best Buy, Staples, and Office Depot make their pricing decisions and whether they are truly making these decisions with Amazon in mind. The difficulty in accessing this data limits this theory to only the pricing data that is publicly available and conducted by outside analytics companies.

A. Inequalities in Internet Access

This Note also does not take into account the inequalities that exist between consumers with respect to stable internet access. For internet retailers like Amazon to be an adequate substitute for brick-and-mortar retailers like Walmart, consumers must have stable access to internet, a mailing address to receive packages, and likely a credit card or bank account to transact online (although VISA gift cards are a potential alternative to this). Thus, this Note assumes the average consumer has access to all of these things. Pew Research Center estimates that 86% of adults in the United States making less than \$30,000 per year use the internet, whereas 99%

311. *Id.*

312. See, e.g., *Staples Management Discusses Q1 2012 Results*, *supra* note 300; *Office Depot Management Discusses Q3 2012 Results*, *supra* note 302.

of adults making over \$70,000 regularly use the internet.³¹³ Although the gap in internet access has decreased over the years, it is still an important limitation that this Note does not consider.³¹⁴

B. Separate Treatment of Internet versus Brick-and-Mortar Retailers

One argument that might be made in response to this Note is that Amazon should be separated from brick-and-mortar retail markets because it is internet based and thus a different kind of retailer. While this might have been a stronger argument back when most brick-and-mortar retailers did not actively maintain e-commerce businesses, this argument now, in the context of Amazon as a retailer, seems to ignore the realities of competition and consumer choices.

Most major brick-and-mortar retailers, like Walmart, Target, and Best Buy, now have very active e-commerce websites. Additionally, Amazon has opened Amazon stores and owns the brick-and-mortar grocery store Whole Foods. Amazon currently has three different types of physical stores and operates over five hundred stores in the United States (including Whole Foods).³¹⁵ The distinction between solely “online” retailers and “brick-and-mortar” retailers has blurred significantly.³¹⁶ Others have similarly argued, or assumed, that these categories of retailers should be treated as one for antitrust purposes.³¹⁷ Even some courts, such as the court in *Gerlinger v. Amazon.com, Inc.*, have collapsed the market for online retailers and physical retailers into one for the purpose of antitrust enforcement (although *Gerlinger* is not in the context of a merger).³¹⁸ Ultimately, the reality of consumer behavior suggests consumers treat internet retailers as substitutes for brick-and-mortar retailers, so to separate these retailers in all circumstances on solely those grounds would be artificial.³¹⁹

C. Assumption of Amazon’s Prices Being Low

Another argument might be raised that, instead of price disciplining retailers, Amazon artificially inflates prices via its third-party seller policies. In 2021,³²⁰ the

313. *Internet/Broadband Fact Sheet*, *supra* note 24; *see also* Eblen, *supra* note 9, at 81 (“Because Internet technology is not available to all consumers and some consumers prefer brick and mortar sellers, Internet competitors do not exert equal competitive pressure across all geographic and demographic areas.”).

314. *See Internet/Broadband Fact Sheet*, *supra* note 24.

315. *See Physical Retail*, *supra* note 79; Redman, *supra* note 79.

316. *See* COMPETITION COMM., *supra* note 270, ¶ 8 (“[O]nline and offline marketplaces increasingly interact and compete with each other. This development has required the Agencies to consider the effects of these sales and the interaction between the marketplaces when considering the competitive effects of conduct or transactions.”).

317. *See, e.g.*, Kagan, *supra* note 16 (arguing to treat brick-and-mortar retailers and internet retailers as part of the same market); COMPETITION COMM., ORG. FOR ECON. COOP. & DEV., COMPETITION ISSUES IN ELECTRONIC COMMERCE 32 (2001) (predicting e-commerce to expand market definitions rather than to create additional submarkets).

318. *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 851 (N.D. Cal. 2004).

319. *See, e.g.*, Weltevreden, *supra* note 105, at 193, 205.

320. The district court dismissed the OAG’s lawsuit in March 2022, although the OAG has since filed an appeal. *See* Dan Papsun, *Amazon.com Antitrust Suit Revival Sought by DC AG Karl*

D.C. Office of the Attorney General (OAG) filed a complaint against Amazon alleging that Amazon has caused “prices across the entire online retail sales market to be artificially inflated, both for products sold on Amazon’s . . . platform and on its competitors’ online . . . platforms,” by including clauses in its contracts with third-party sellers that prohibit sellers from “offering their products on a competing online . . . platform, including . . . [their] own website, at a lower price or on better terms than” offered on Amazon.³²¹ The OAG argued this alleged anti-competitive restraint “suppressed competition from other online retail sales platforms,” including eBay and Walmart.³²² Consequently, the OAG argued this “artificially raised the price of goods to consumers” because third-party sellers “were forced to incorporate Amazon’s high fees and costs into their product prices” across “the entire online retail sales market.”³²³

However, even if true, Amazon’s alleged anti-competitive actions against its third-party sellers do not necessarily mean that other large retailers are not competing, or have not historically competed, with Amazon on price and non-price factors. Amazon’s relatively recent (relative to the span of its existence) behavior would not change whether or not other retailers have competed with Amazon in the past. The alleged anti-competitive actions of Amazon are an individual antitrust violation and do not necessarily mean that Amazon should not be included in a relevant geographic market that it would have been included in otherwise.

D. Dynamic Pricing Considerations

Lastly, this Note does not take into account the potential role of dynamic pricing in the actions of retailers. With dynamic pricing, many retailers, including Amazon, personalize the prices of products based on the individuals who are viewing those products.³²⁴ Amazon itself changes its prices millions of times per day.³²⁵ Throughout the years, retailers like Staples, Walmart, and Target have been accused of changing their prices based on customers’ physical locations, among

Racine (1), BLOOMBERG LAW (Aug. 25, 2022, 3:43 PM), <https://news.bloomberglaw.com/antitrust/amazon-com-antitrust-suit-revival-sought-by-dc-ag-karl-racine> [<https://perma.cc/YNN3-ERNC>].

321. Complaint, *supra* note 93, ¶¶ 2, 3.

322. *Id.* ¶ 4.

323. *Id.*

324. See Suman Bhattacharyya, *Pressured by Amazon, Retailers are Experimenting with Dynamic Pricing*, DIGIDAY (Feb. 21, 2019), <https://digiday.com/retail/amazon-retailers-experimenting-dynamic-pricing/> [<https://perma.cc/5XK3-71PF>].

325. See Ferdman, *supra* note 147 (“[In 2013] Amazon change[d] its prices more than 2.5 million times a day. By comparison, Walmart and Best Buy change[d] their prices roughly 50,000 times each in the entire month of November.”); see also Neel Mehta, Parth Detroja & Aditya Agashe, *Amazon Changes Prices on Its Products About Every 10 Minutes—Here’s How and Why They Do it*, INSIDER (Aug. 10, 2018, 8:13 AM), <https://www.businessinsider.com/amazon-price-changes-2018-8> [<https://perma.cc/GZ7A-EURF>]; Elizabeth Dwoskin, *Why You Can’t Trust You’re Getting the Best Deal Online*, WALL ST. J. (Oct. 23, 2014, 12:01 AM), <https://www.wsj.com/articles/why-you-cant-trust-youre-getting-the-best-deal-online-1414036862> [<https://perma.cc/C27N-B68Y>] (“In 2000, Amazon.com Inc . . . apologized for an internal research program in which consumers were shown different prices for identical products.”).

other factors.³²⁶ Other tactics include keeping certain popular items' prices low or competitive, while increasing the prices of other, related but not popular products.³²⁷ If retailers are pricing based off of customer data, then it might be argued these companies are no longer focusing on competing with other retailers through price.³²⁸

This Note does not address the impact of dynamic pricing on competition between retailers and Amazon. However, arguably Amazon's pioneering of certain types of dynamic pricing (such as the tactic of lowering the price of popular items while increasing the prices of others) has been copied and followed by other retailers in order to better compete with Amazon.³²⁹ This dynamic pricing itself could be a form of competition. The importance of customer data collection has only increased since Amazon's arrival, and retailers like Walmart also rely on this data to make their pricing decisions.³³⁰ In 2017, for example, Walmart, which had been found to utilize bots to check Amazon's prices multiple times a day, faced a significant roadblock when Amazon found a way to have its bots block Walmart's access.³³¹ Walmart was "unable to work around the blockade for weeks" and was forced "to retrieve Amazon's data through a secondary source" instead.³³² Thus, it appears that even with "bot-driven pricing," retailers are competing in some manner to outsmart the other.

It is also possible that, in some cases, the backlash associated with these tactics may be a force pushing some retailers away from utilizing them as heavily. For instance, in 2019, it was found that Target charged higher prices on its app for items when a customer was closer to a physical Target store.³³³ The uproar this caused

326. Jennifer Valentino-DeVries, Jeremy Singer-Vine & Ashkan Soltani, *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J. (Dec. 24, 2012), <https://www.wsj.com/articles/SB10001424127887323777204578189391813881534> [<https://perma.cc/GEG7-UQG3>] (Staples); Bhattacharyya, *supra* note 324 (Walmart and Target).

327. Jerry Useem, *How Online Shopping Makes Suckers of Us All*, THE ATL. (May 2017), <https://www.theatlantic.com/magazine/archive/2017/05/how-online-shopping-makes-suckers-of-us-all/521448/> [<https://perma.cc/49R7-9CEC>] ("The software identifies the goods that loom largest in consumers' perception and keeps their prices carefully in line with competitors' prices, if not lower. The price of everything else is allowed to drift upward.").

328. See Lina Khan, *Why You Might Pay More than Your Neighbor for the Same Bottle of Salad Dressing*, QUARTZ (Jan. 19, 2014), <https://qz.com/168314/why-you-might-pay-more-than-your-neighbor-for-the-same-bottle-of-salad-dressing/> [<https://perma.cc/H9SQ-ZUZB>].

329. See Useem, *supra* note 327; see also Ann, *How Amazon Uses Its Own Cloud to Process Vast, Multidimensional Datasets*, DZONE (Jan. 26, 2016), <https://dzone.com/articles/big-data-analytics-delivering-business-value-at-am> [<https://perma.cc/2QMF-XSGQ>] ("Amazon provides huge discounts on best-selling products whilst making better profits on slightly less popular ones.").

330. See *How Big Data Analysis Helped Increase Walmarks Sales Turnover?*, PROJECT PRO (Feb. 2, 2023), <https://www.projectpro.io/article/how-big-data-analysis-helped-increase-walmarks-sales-turnover/109> [<https://perma.cc/23SB-TU39>].

331. Dastin, *supra* note 252; see also *How Amazon's Bot Army Is Trouncing Walmart in E-Commerce Wars*, *supra* note 252.

332. Dastin, *supra* note 252.

333. Chris Hrapsky, *Target Changes App After KARE 11 Investigation*, KARE 11 (Feb. 7, 2019, 10:11 PM), <https://www.kare11.com/article/money/consumer/target-changes-app-after-kare-11-investigation/89-40ec0e76-9a0f-425d-93b0-b0eb89150f6c> [<https://perma.cc/7DFK-DFRX>]; see also *Target Updates App After TV Station Reveals In-Store Price Hikes*, CBS NEWS (Feb. 8, 2019, 5:26 PM), <https://www.cbsnews.com/news/target-app-price-switch-target-updates-app-after-tv-station-revealed->

ultimately resulted in Target apologizing and updating its app to avoid changing prices based on customers' locations.³³⁴ Whether this kind of response from retailers would occur from other types of dynamic pricing is unclear and perhaps unlikely. Nevertheless, this Note does not purport to take into account the full impact of bot-driven pricing on competition between Amazon and brick-and-mortar retailers.

CONCLUSION

The retail industry has endured a variety of changes throughout the last twenty years. One of the major disruptions in this industry has been the rise of internet retailers like Amazon. Amazon's rise has pushed traditional brick-and-mortar retailers to either adapt in order to compete or risk a slow and painful retail death (see Sears and Kmart). Antitrust law should take into account the realities of the retail industry and with whom large brick-and-mortar retailers are actually competing against. One avenue through which antitrust law can take these changes into account is in its approach towards retail mergers. A major part of assessing whether there will be an anti-competitive effect on a specific geographic market as a result of a merger is determining who is included in that market to begin with. This Note argues that courts and the FTC should include Amazon as a competitor in the geographic market for major retailers like Walmart, Target, Staples, Office Depot, and Best Buy. As of November 2021, federal courts have not really had a chance to consider whether Amazon should be included in the geographic market for major retail mergers. To the extent that courts have tangentially touched the issue, it appears they have been hesitant to include Amazon and other internet retailers. The FTC, on the other hand, has addressed the issue a bit more than courts have. Thus far, the FTC's response to Amazon and internet retailers has been mixed. In some cases, internet retailers have been considered (e.g., Office Depot/OfficeMax merger), while in others they have not (e.g., Dollar Tree/Family Dollar Stores merger).

Nevertheless, both courts and the FTC have had limited opportunities to address this specific issue since Amazon's disruption has become impactful. Inevitably, major brick-and-mortar retail mergers will occur which will require consideration by the FTC, and in some cases, federal courts. When they do, Amazon should be considered as a competitor where appropriate.

This Note only touches the surface of the extent to which Amazon and brick-and-mortar retailers compete, both in terms of pricing and non-pricing decisions. Further research into this issue is both necessary and productive in order for courts and the FTC to truly address the realities of the retail industry when making antitrust decisions in mergers (and beyond).

price-switches/ [https://perma.cc/2Y49-ZZAQ].

334. Hrapsky, *supra* note 333; *Target Updates App After TV Station Reveals In-Store Price Hikes*, *supra* note 333.

