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Antitrust Remedies in the Amazon Case: Reining in Marketplace Platforms

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I. Introduction

The Federal Trade Commission (FTC), alongside 18 state Attorneys General, filed a complaint against Amazon in which it alleged numerous counts of anticompetitive conduct in violation of Section 2 of the Sherman Act, Section 5 of the FTC Act, and several state antitrust statutes, all related to pricing agreements and exclusionary conduct on Amazon's marketplace platform.¹ The FTC in its complaint has primarily alleged three anticompetitive harms. First, the complaint alleges that Amazon unfairly restricts competition amongst marketplaces by premising seller access to Prime features on their use of Amazon's exclusive fulfillment service, Fulfilled By Amazon (FBA). Because merchants generally can only afford to use one logistics service, the tying of Prime sales to FBA exploits Amazon's market dominance to raise the costs of third party sellers of listing on rival ecommerce sites. Second, the complaint alleges that Amazon relied on most favored nation (MFN) provisions to police the prices at which third-party sellers offer products on the marketplace: Amazon sanctions sellers who fail to list products at the lowest price on Amazon. Finally, the complaint alleges that Amazon uses an algorithmic crawling system, Project Nessie, to automatically raise prices of Amazon goods when it is likely that competitors will follow. This paper evaluates several potential remedies for each of these actions.

Broadly, antitrust remedies serve four purposes: compensation for victims, punishment and deterrence of anticompetitive conduct, termination and further prevention of anticompetitive conduct, and restoration of competitive conditions.² However, compensating victims proves difficult because courts are generally unwilling to recognize harms beyond those which have directly been caused by the alleged anticompetitive conduct.³ The punishment of anticompetitive conduct could be addressed by civil fines.⁴ Instead, we focus on remedies that are intended to end and prevent further anticompetitive conduct as well as restore competitive conditions, assuming that the allegations made by the FTC have been established.

Historically, courts have relied on several classes of remedies to address Section 2 violations. We will focus on behavioral remedies, that is, prescriptions to induce or prohibit certain types of behavior by an offending firm. Though common, behavioral remedies can be exceedingly difficult to implement, monitor, and evaluate because they require active supervision of the firm to ensure compliance. Special masters, compliance committees, and other third-party monitors can help ensure compliance, but in general, complex or vague behavioral remedies can be troublesome for courts to implement and enforce.⁵ Thus, any proposed behavioral remedies should take into

¹ See generally Second Amended Complaint at 129-34, *FTC v. Amazon*, No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023) [hereinafter SAC].

² Douglas A. Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 ANTITRUST L.J. 359, 359-64 (2009).

³ See *id.* at 359 (describing under-compensation of victims where courts only compensate intermediaries affected by anticompetitive conduct, rather than the end consumer).

⁴ *Id.* at 361.

⁵ See Spencer W. Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 ANTITRUST L.J. 11, 26 (2009); Chiara Farronato, Andrey Fradkin, Andrei Hagiu & Dionne Lomax, *Understanding the Tradeoffs of the*

account both the necessary measures to restore competition as well as the simplicity and specificity needed to monitor compliance.

In this paper, we assume that the FTC's allegations are true and propose several remedies which the court could order should the government prevail on claims related to FBA, MFNs and Project Nessie. Specifically, we argue that FBA should be portable to other marketplaces, that Amazon should not be able to deny sellers access to essential platform features, and that the Project Nessie algorithm should be disgorged. Taken together, the suite of behavioral remedies we propose are intended to induce entry by rival marketplace platforms, improve low-cost operations for third party sellers, and disgorge Amazon of assets that aid its anticompetitive behavior. In Part II, we discuss the alleged FBA conduct and possible remedies, then turn to the alleged MFN conduct and possible remedies in Part III, and finally evaluate Project Nessie and possible remedies in Part IV before concluding.

II. Amazon's Retail Exclusionary Conduct

Sellers without their own fulfillment services rely on other companies to store, package, and ship products to customers. Traditionally, sellers can choose from a variety of third-party fulfillment services. The FTC complaint alleges that Amazon unfairly restricts competition by premising access to Prime on the use of Amazon's exclusive fulfillment service, Fulfilled by Amazon (FBA).⁶

A. How Fulfillment Service Requirements block competition

At least two exclusionary practices emerge when dominant e-commerce platforms artificially constrain seller fulfillment service choice. First, this behavior disincentivizes sellers from selling on multiple online marketplaces that may require different fulfillment services because the cost of maintaining multiple fulfillment services is too high. The long-term effect of such seller incentives produces a second constraint to the market: mandates to use specific fulfillment service providers raises the cost of entry of smaller marketplaces and fulfillment providers to a prohibitive level.

When sellers are forced by dominant platforms to choose a specific fulfillment service, they cannot choose practices that are the most optimal for their businesses. First and most obviously, the required fulfillment service may be more costly or not provide the best service to their customers. A seller who wants to sell on multiple platforms would prefer a fulfillment service that can also multihome. If the Amazon required fulfillment service does not, then the seller must use multiple different fulfillment services providers. This can be prohibitively costly for small sellers because of the cost associated with keeping minimum stock available in each fulfillment service. Because of this constraint, many sellers will choose to use only one fulfillment service,

Amazon Antitrust Case, HARVARD BUSINESS REVIEW (Jan. 11, 2024), <https://hbr.org/2024/01/understanding-the-tradeoffs-of-the-amazon-antitrust-case>.

⁶ SAC at 8.

effectively limiting their sales to a single platform – the one with the most sales. This can prevent sellers from engaging in sales across multiple platforms, thus hindering the growth of both the rival platforms and the sellers themselves.

Beyond limitations on seller growth, fulfillment service requirements can also entrench dominant marketplaces by lessening competition from other marketplaces and raising entry barriers for other third-party fulfillment services. Because smaller sellers can only operate efficiently by using one fulfillment service, many sellers will opt to use the fulfillment service associated with the platform that makes them the most money. Where a dominant platform requires the use of its own fulfillment service and does not make this fulfillment service portable to other platforms, sellers are incentivized to do business only with the dominant platform. As a result, competing platforms are unable to encourage sellers to use their platforms and third party fulfillment providers are unable to encourage sellers to use their services. Thus, dominant platforms successfully reinforce their market power, stifle innovation and curb competition in those markets.

B. Amazon's Fulfillment Services requirement

Amazon has its own fulfillment service, Fulfilled by Amazon (FBA). While Amazon does not explicitly require sellers to use its fulfillment services, it discourages sellers to use other third-party fulfillment services by premising a seller's Prime eligibility and its resulting benefits on the use of FBA.

Prime eligibility is necessary for a seller's success on Amazon because it provides a host of benefits. First, Prime-eligible sellers have access to the "Buy Box," one of the first points of contact between the seller and the buyer which effectively allows buyers to place items in their carts for immediate purchase. Nearly 98% of sales on Amazon occur through the Buy Box.⁷ Prime-eligible sellers are also prioritized in Amazon searches such that buyers see products of Prime-eligible sellers first and more frequently. Prime also induces buyers to purchase Prime-eligible items by offering decreased shipping costs and faster shipping times. Each of these features means that buyers rarely, if ever, choose non-Prime options. Inability to participate in Prime so effectively limits a seller's success on Amazon that sellers are heavily incentivized to use FBA to access the service.⁸

Sellers hoping to participate on multiple marketplaces must also have multiple fulfillment service providers. The added cost and administrative burden associated with using multiple fulfillment services usually means that small sellers hoping to grow are stunted because they cannot access other marketplaces. Because of Amazon's dominance, sellers nearly ubiquitously choose to participate in Amazon's marketplace to the exclusion of others. This artificially restricts smaller sellers from diversifying their streams of income, and makes them less able to compete with larger, more established businesses. When sellers do choose to take on the added costs of

⁷ SAC at 5.

⁸ SAC at 9.

securing another fulfillment service and splitting inventory, they must bear the costs of multihoming.⁹

Amazon serves as the primary fulfillment provider, usually to the detriment of other independent fulfillment services. Other marketplaces are also at an artificial competitive disadvantage: because smaller sellers often choose to sell only with Amazon to avoid the costs of using multiple fulfillment services, other marketplaces are unable to host the same products, driving consumers to Amazon for other goods as well in order to complete shopping all in one place.

C. Remedies for Amazon’s Fulfillment Services requirement

The Digital Markets Act (DMA) in the European Union is specifically designed to address this type of harm. Ratified in 2022, the DMA is meant to encourage competition by targeting “gatekeepers” or digital platforms with large amounts of capital and “durable” market positions.¹⁰ To ensure competition, the DMA requires interoperability between gatekeepers and competitors, allows “users” to engage with customers outside of the gatekeeper’s platform, and prohibits gatekeepers from privileging their own products and services. Failure to comply with these obligations can result in hefty fines that can amount to 10% of the company’s *worldwide* annual revenue or 20% in repeated infringements.

While the DMA is a regulatory solution rather than a judicial remedy, several of its features might meaningfully be implemented by a court as a remedy in the Amazon case. Specifically, two requirements—decoupling of Prime eligibility and the use of FBA and interoperability—will be explored in depth here as remedies for the harms caused by Amazon’s FBA requirement.

Amazon’s requirement that all sellers use their fulfillment service is an example of a gatekeeper privileging its own service. To stem the anticompetitive effects of this behavior, a court could prohibit Amazon from conditioning Prime-eligibility on the use of FBA. This could effectively ensure that sellers are able to work with a fulfillment service provider that provides access to multiple marketplaces.

Amazon is likely to argue that such a solution is inadequate because the demands of Prime may not be met by other fulfillment providers. For example, Prime offers extremely fast delivery times and other service guarantees which third-party fulfillment services might not satisfy. To tackle this, Amazon could set minimum standards for third-party fulfillment providers. This would facilitate access for third-party fulfillment providers while also maintaining the minimum standards guaranteed by Prime. However, to ensure that Amazon does not set artificially high or discriminatory standards (which no third party fulfillment provider can satisfy even if on the

⁹ SAC at 106.

¹⁰ *The Digital Markets Act: Ensuring Fair and Open Digital Markets*, EUR. COMM’N, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

surface they look neutral), the court could require Amazon to provide detailed rationale for each requirement.

Such a remedy is especially viable because Amazon has already tried doing it.¹¹ In 2015, Amazon piloted a program which allowed sellers to use their own fulfillment services. This program, called Seller Fulfilled Prime (SFP), provided sellers with very high service thresholds. If the sellers could meet these thresholds using another fulfillment service, Amazon would allow that seller access to Prime, despite not using FBA. The SFP immediately increased both the amount of fulfillment service competition and the number of products available to Amazon Prime users.¹² Amazon subsequently stopped the program because it represented a threat both to FBA and to Amazon's market position as a whole: Amazon feared that the SFP would ultimately completely eliminate FBA and make other marketplaces stronger.¹³ The program's previous success suggests that reintroducing it would likely curb some of the anticompetitive behavior associated with Amazon's fulfillment service. The program's previous existence demonstrates that it is both low cost and feasible for Amazon to deploy it again.

Note that it is possible that Amazon's FBA maintains its position as a prominent fulfillment service because it is truly the best out there. Such an outcome is within the scope of the remedy: we suggest allowing competition between fulfillment services in order to ensure that FBA is not at an artificial advantage. Where FBA truly is the best service available, it makes sense to require interoperability between FBA and other marketplaces. A court could, for example, require that Amazon allow competing marketplaces to use FBA.¹⁴ Such a solution could help sellers put products on more than one platform, without having to bear the cost of multi-homing. An issue that will arise if Amazon is required to offer FBA to merchants selling on other platforms, is what price Amazon is allowed to charge for FBA on other platforms. To be sure that Amazon does not charge fees that are too high, a court could require detailed pricing explanations. Where decoupling is also required, such an issue will be less of a concern: because sellers can achieve Prime status by using other third-party fulfillment services, they are likely to use the one that is best priced.

Interoperability and decoupling could be exclusive remedies or could be imposed together to encourage both marketplace competition and fulfillment service competition. We recommend the latter since it is very hard to know *ex ante* which remedy will be most effective.

¹¹ SAC at 118.

¹² SAC at 118.

¹³ SAC at 119.

¹⁴ One way to accomplish this might be to break up Amazon's vertical integration by breaking up FBA and Prime. Divestiture can put the ownership of FBA in another company's hands in a way that might truly encourage other fulfillment providers to compete to gain access to the Prime market. While divestiture should generally be used in quite narrow circumstances, many of the concerns with divestiture might be mitigated by forcing a separation along pre-set business functions like fulfillment services and marketplace services.

III. Amazon's Price Parity Conduct

Amazon has long relied on anticompetitive most favored nation (MFN) provisions as part of its business strategy. Historically, Amazon prohibited third-party sellers from offering lower prices on other platforms. In response to widespread criticism and scrutiny from Senator Richard Blumenthal alongside the FTC and DOJ, Amazon removed these MFN requirements in 2018.¹⁵ But Amazon has re-implemented two major programs which have the same effect as enforcing anticompetitive MFN agreements.

First, Amazon employs a program called “Select Competitor - Featured Offer Disqualification” (SC MFN), where Amazon crawls other sales platforms (designated as “Select Competitors”) to identify whether sellers are offering products at lower prices on rival platforms.¹⁶ It then deploys a suite of punishments against sellers found to offer lower prices elsewhere.¹⁷ For example, when Amazon notices that a seller's product has been listed for a cheaper price on another marketplace, it revokes “Buy Box” privileges, the main point of contact between buyers and sellers.¹⁸ Removing these privileges makes it difficult for the sellers to generate profits from browsing traffic: nearly all Amazon purchases are made through the Buy Box, and removal eliminates nearly all of a merchant's sales.¹⁹ Furthermore, Amazon demotes offending sellers in search results and excludes them from advertisements and recommendations.²⁰ The harm from these punitive actions has multiplied in recent years as Amazon continues to expand the number of Select Competitors, increasing the number of competing sites at which a lower price will trigger these punishments.²¹

Second, Amazon operates a similar program on its retail side. The “Amazon's Standards for Brands” (ASB MFN) for certain sellers dictates that sellers must ensure their prices on Amazon are the lowest available across other platforms at least 95% of the time, among other requirements.²² Amazon can force sellers into the ASB program against their will (or otherwise risk being kicked from Amazon). ASB requirements are contractual requirements placed on sellers with punishments for noncompliance ranging from Buy Box disqualification to outright deplatforming from Amazon Retail.²³ The program is astonishing in its scope because a brand does not control the prices at which a retailer sells its product. A retailer takes ownership, sets price, and could, for example, have a sale on the merchant's product. This would result in a lower price over which the merchant has no control. Yet Amazon's requirements hold even if another marketplace independently discounts a seller's product without the seller's knowledge. This makes

¹⁵ SAC at 86.

¹⁶ SAC at 87-88.

¹⁷ SAC at 4.

¹⁸ SAC at 5.

¹⁹ SAC at 89 (describing how less than 3% of purchases on Amazon are made outside the Buy Box).

²⁰ SAC at 89.

²¹ SAC at 88.

²² SAC at 89-90.

²³ SAC at 91.

Amazon’s demands concerning retail prices at competing sites almost impossible for a brand to control—and yet under ASB it has financial responsibility for those prices.

The anticompetitive effects of Amazon’s “workaround” MFNs are wide ranging. Zulily, an online retail platform, exemplifies how Amazon’s MFNs prevent selective discounting. Zulily began discount programs to undercut other platforms, but its sellers began abandoning the platform due to pressures from Amazon’s MFN programs. Ultimately, Zulily had to abandon its discounting programs.²⁴ Likewise, Jet, a discount online retail platform, exemplifies how Amazon’s MFNs chill market entry by platform competitors. Jet was a 2016 market entrant that attempted to compete with Amazon by offering lower prices to consumers through lower seller fees.²⁵ Amazon’s MFN programs similarly pressured sellers on Jet, and it ceased independent operations after just a year and was eventually shut down.²⁶

Thus, Amazon’s conduct shows the difficulty in implementing behavioral remedies. Prohibiting formal MFN agreements is insufficient since Amazon has found workarounds as discussed above. So, remedies must instead focus on the types of conduct Amazon can engage in outside of agreements. Remedies must account for—and not eliminate—the efficiencies introduced by Amazon’s platform. Amazon enjoys extraordinary support and satisfaction from consumers,²⁷ no doubt encouraged by its purported commitment to protect its customers from conduct like price-gouging.²⁸ Likewise, Amazon’s Buy Box recommendation system has been shown to improve consumer surplus, even with self-preferencing conduct.²⁹ Thus, behavioral remedies may need to minimize interference with potentially efficient parts of Amazon’s business.

The following could potentially remedy Amazon’s conduct aimed at imposing price parity.

A. The Third-Party Seller Remedy

We use the term “third-party seller remedy” to refer to any remedy that instructs Amazon what conduct is permissible or prohibited when interacting with third-party sellers on its platform. In other words, it guides Amazon about how it may wield its market power against or through its sellers. Ideally, a third-party seller remedy could simply bar Amazon from denying sellers access to certain key consumer interaction points (such as the Buy Box or recommendation placements) based on certain anticompetitive factors (for example, price on other platforms).

While courts have often imposed injunctions, such remedies also face many risks: because they prescribe how Amazon may interact with its sellers, enforcers must carefully define how and

²⁴ SAC at 103-05.

²⁵ SAC at 102.

²⁶ SAC at 103.

²⁷ See Alex Bitca, *How Amazon Maintains an Impressive NPS*, RETENTLY (July 12, 2024), <https://www.retently.com/blog/amazon-nps/>.

²⁸ Amazon, *Price Gouging Has No Place in Our Stores*, AMAZON NEWS (Mar. 23, 2020), <https://www.aboutamazon.com/news/company-news/price-gouging-has-no-place-in-our-stores>.

²⁹ Kwok Hao Lee & Leon Musolff, *Entry Into Two-Sided Markets Shaped By Platform-Guided Search*, NBER (Sept. 25, 2023) at 40, https://lmusolff.com/papers/Entry_and_Platform_Guided_Search.pdf.

when Amazon may engage in certain conduct. For example, if a remedy prohibits Amazon from excluding sellers from the Buy Box for price-party reasons, then Amazon may easily define a new promotional feature not subject to the remedy (as it did with its MFN workaround). Likewise, if a remedy prohibits Amazon from deplatforming sellers for price-party reasons, then Amazon might find some other pretext to punish or deplatform sellers (for example, for selling counterfeit products or some other violation of its policies). Such tactics can be limited by an ‘anticircumvention’ rule and an independent committee to evaluate cases of circumvention, but of course this will be an imperfect solution.

Thus, enforcers may instead seek to impose remedies that target Amazon’s ability or incentives to establish MFNs, rather than confronting Amazon’s conduct directly. Because Amazon both participates in MFN conduct and creates workarounds that mimic MFN conduct, a simple-to implement third-party seller remedy must restrict the underlying behavior of both the MFN and similar workarounds. For example, a court could prohibit Amazon from restricting a seller’s access to valuable features like the Buy-Box based solely on the price of that seller’s products on another marketplace. Additionally, a court could prevent Amazon from restricting sellers from platform features for any reason. Such a wide ranging remedy can prevent Amazon from circumventing restrictions by introducing new features designed to mimic prohibited behavior.

Amazon may wish to restrict a seller because it is attempting to exploit users of the platform, for example. The issue of defining reasons for which Amazon may justifiably restrict a seller is much more difficult. For example, a remedy which prohibits Amazon from restricting sellers’ access on any ‘unreasonable’ or ‘anti-competitive’ reason is inadequate because of the vagueness of these terms. Instead, the DOJ in *United States v. Apple* focused on effects: in a case targeted against Apple’s discounting and MFN agreements with ebook publishers, the DOJ sought a remedy barring any agreement that would have the effect of preventing Apple from discounting ebooks.³⁰ In this case, the remedy may instead outline that “Amazon shall not impose any restrictions on sellers that reduce access to platform features when those restrictions limit or impede sellers’ ability to lower prices on Amazon or elsewhere, offer inventory on Amazon or elsewhere, etc.” Additional data on compliance with the *Apple* remedy may give additional clarity on the effectiveness of such remedies.

Another consideration for all third-party seller remedies is the difficulty in auditing Amazon’s conduct with respect to its sellers. With the massive amounts of seller restrictions applied by Amazon every day (in the first half of 2023, Amazon restricted 2.3 million accounts in just its EU store),³¹ it would be extraordinarily difficult to audit whether seller restrictions were

³⁰ See Final Judgment at 5, *United States v. Apple, Inc.*, No. 1:12-CV-2826 (S.D.N.Y. Sept. 5, 2013) (restricting Apple from entering into agreements that lessen Apple’s or publishers’ ability to offer discounts).

³¹ Camilla Hodgson, *Amazon Marketplace Crackdown has Sellers Searching for Legal Help*, ARSTECHNICA (Jan. 3, 2024), <https://arstechnica.com/tech-policy/2024/01/amazon-marketplace-crackdown-has-sellers-searching-for-legal-help>.

being applied in compliance with a remedy or whether restrictions continue to be added for anticompetitive reasons. Despite these difficulties, third-party seller remedies are key to directly addressing Amazon's conduct.

B. The Data Restriction Remedy

Amazon's MFN conduct is only possible because of its access to price data; therefore, we further recommend that courts consider remedies targeted at how Amazon uses data to facilitate its anticompetitive behavior. This remedy stipulates that Amazon should be prohibited from using price data gathered from competing platforms to guide its own business or algorithmic decisions; it should instead base pricing decisions solely on the (vast) competitor pricing data already available on the Marketplace. Ultimately, without price data from other platforms, the SC and ASB MFNs in their current forms would not be able to continue due to their reliance on policing other platforms' prices.

The data restriction remedy has two benefits. First, it does not require proscribing conduct related to Amazon's relationship with its sellers; instead, it just bluntly prohibits Amazon from using price data from competing platforms to impact the sales of merchants or brands. However, Amazon may use competitors' prices to evaluate other competitively neutral or pro-competitive management decisions;³² thus, if the company protests at the restriction on gathering of competitors' pricing data because it wishes to continue with these uses, a data-usage restriction could be modified to address these concerns.³³ One option is to allow Amazon to use crawled price data for Amazon Retail pricing when Marketplace does not otherwise provide sufficient pricing data. Enforcers may define "sufficient pricing data" specifically or broadly: for instance, if a given product has two or fewer third-party sellers on Amazon Marketplace, Amazon Retail may use crawled price data to help determine a price for its product. Certainly, adding these exceptions to the data restriction remedy increases its complexity and observability, but it may ultimately be necessary to ensure that the remedy does not accidentally cripple the competitive viability of Amazon Retail.

Second, this sort of remedy is easier to audit: auditors would easily be able to spot whether crawled price data was entering automated decision-making systems. The remedy would also apply if Amazon purchased such crawled data from third parties. In contrast to third-party seller remedies, then, there is no need to deal with the complex task of distinguishing between procompetitive and anticompetitive actions Amazon takes against its sellers: if crawled price data enters any of Amazon's decision-making systems, it is a violation of the remedy.

While promising, restricting the use of external data is ineffective if not paired with a conduct-based remedy because it is possible that Amazon can use other seller traits as proxies for

³² Such decisions may include fee pricing for third-party sellers or even pricing for first-party Amazon Retail sales.

³³ Note that this concern may be moot: For instance, Amazon can still structure fees based on its cost basis and a target profit margin; Amazon Retail also has vast amounts of competitors' pricing data even without external crawling based on prices offered by other sellers on Marketplace.

price to continue its anticompetitive conduct. This is an especially salient concern because Amazon currently does use seller traits to regulate access to key features of the marketplace: aside from cross-platform pricing, Amazon also restricts ASB sellers if they do not meet certain in-stock, product selection, and Prime eligibility requirements.³⁴ To address these concerns, enforcers might task a court-appointed monitor with approving or otherwise supervising any new data inputs Amazon wishes to use in its algorithms or management decisions. Once again, this would increase the complexity of the data restriction remedy, but it would also render it much more difficult to evade.

Thus, a data restriction remedy applied to competing platform data would directly address Amazon's ability to impose a price-based MFN, as well as any other anticompetitive conduct stemming from Amazon's use of crawled price data. Furthermore, though the remedy would be relatively simple to implement and audit, these benefits diminish when the data restriction remedy is modified to address overinclusive data restrictions and other seller data.

IV. Amazon Retail's direct price manipulation

Many online stores employ pricing algorithms to dynamically adjust their prices and respond to market fluctuations. To take advantage of the tendency for competitors to match Amazon's price increases, Amazon designed an algorithm to directly increase and maintain higher prices, called "Project Nessie." Project Nessie builds on extensive research and models derived from Amazon's competitors, which permits predictions of whether other stores will follow Amazon's price increases. Project Nessie raises the prices of Amazon's first-party Retail products when it calculates that it is likely for other online stores to automatically match Amazon's higher prices. Afterwards, Amazon maintains this higher price, resulting in industry-wide price increases for thousands of products. For Amazon alone, this algorithm generated over \$1 billion in profit. For consumers, the cross-platform price increases likely resulted in even greater losses.

Currently, Project Nessie is paused. But when Project Nessie was active, Amazon turned the algorithm on and off at least eight times in anticipation of increased customer and media attention during holidays and big sales. Keeping with Project Nessie's objective to covertly raise prices without consumer knowledge, Amazon took measures to keep the algorithm out of the public eye and protect itself against backlash from its customers.

Amazon's unilateral price manipulation and deliberate inducement of leader-follower behavior from competitors harms consumers. By definition, Project Nessie ensures that prices remain higher than their competitive levels. As a tool, Project Nessie accomplishes this by facilitating tacit collusion between firms.³⁵ Using this algorithm, Amazon is able to exploit every potential opportunity for collusion, generating price increases at an unprecedented scale.

³⁴ SAC at 90-91.

³⁵ For further reading on how facilitating coordination can be an unfair method of competition, see generally Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the*

A. Remedies for Project Nessie

Project Nessie may be paused right now, but it is easy enough for Amazon to turn on this algorithm at will. Monitoring the operation of the algorithm, even though it is limited to Amazon's first-party retail products, would be difficult to accomplish with billions of products.

A data restriction remedy, which has been introduced and described in greater detail in a preceding section,³⁶ would prevent Project Nessie from crawling price information from retail competitors. A remedy of this nature would prevent the algorithm from operating effectively. In addition to data restriction, or perhaps as an alternative, a disclosure requirement for the operation of Project Nessie can ensure that Amazon is not leveraging the algorithm to raise prices for the sake of effecting industry-wide price increases. Though Amazon may track its competitors' prices for some limited purposes (described above), they will be required to disclose how they use that information. Self-reporting obligations could discipline Amazon's use of this information, preventing it from taking the additional step of calculating when it will be likely for competitors to follow Amazon's price increases, much less implementing the increases with Project Nessie.

Additionally, there is a strong case to be made that Project Nessie as a whole is unfair and there are no pro-competitive justifications for its existence. Thus, one possible remedy is algorithmic destruction or disgorgement, a remedy that the FTC has explored in several other cases.³⁷ The FTC could require that Amazon destroy its existing data and code for Project Nessie and prohibit any future usage of the algorithm. Destroying or deleting this information should be paired with a prohibition on building any similar algorithm for the next 10 years.

The FTC has previously ordered algorithmic destruction or disgorgement in three consent settlements.³⁸ In each of the three cases, algorithmic destruction was justified by the ill-gotten data that the algorithm was created from. While the data used for Project Nessie may not be ill-gotten per se, the algorithm itself is created for the sole purpose of lessening competition and fostering an unfair trade practice (increasing industry-wide product prices) and thus warrants the same equitable remedy of disgorgement. Given that Project Nessie has been shut on and off throughout its existence, Amazon has already proven that it can be separated from Amazon's other algorithmic tools and leave the company operating efficiently.

Yet the threat to competition that Project Nessie poses is directly related to Amazon's dominant market position and its ability to set the price floor. Therefore, Project Nessie is only a

Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

³⁶ See *supra* Section III.B.

³⁷ Joshua A. Goland, *Algorithmic Disgorgement: Destruction of Artificial Intelligence Models as The FTC's Newest Enforcement Tool for Bad Data*, 29 RICH. J.L. & TECH. 1 (2023).

³⁸ Cambridge Analytica (required to destroy algorithms built with deceptively-harvested data), Everalbum (ordered to delete any models or algorithms they created with data they collected from users under false pretenses), and WW International (under COPPA, had to delete any recommendation algorithms created with the data of children under 13). *Id.* at 17-24.

symptom of a less competitive marketplace, such that Amazon can reap the long-term benefits of its price hikes. Simultaneously, however, Amazon's unique position provides a limit to how much algorithmic disgorgement might deter other e-commerce retail competitors from using their own pricing algorithms. Project Nessie is only problematic because of Amazon's dominance, which allows it to credibly induce leader-follower behavior, resulting in an unfair method of competition. Other companies exercise far less market power. So, if a smaller e-commerce player were to deploy a similar algorithm which does not induce similar leader-follower behavior, their algorithms will not be implicated by this solution. If the remainder of the remedy successfully energizes competition in the ecommerce sector, the risk of tacit collusion may fall overall. This would, in turn, lower the returns to algorithms like Project Nessie by making leader-follower behavior more difficult to induce.

V. Conclusion

In this paper, we have discussed a set of potential remedies for Amazon's platform MFNs, the FBA requirement for Prime eligibility, and the Project Nessie price-manipulation algorithm. Specifically, we argue that, assuming the government prevails, the court should (a) prohibit Amazon from using merchant/sellers' off-Amazon data in algorithms that control seller access to customers, (b) be required to make FBA portable to other marketplaces and allow sellers to use other fulfilment services that meet FBA's standards, and (c) disgorge the Project Nessie algorithm. These remedies would restore competition and prevent the recurrence of anti-competitive conduct without compromising Amazon's business integrity. These remedies would alleviate harm to consumers and remove barriers to entry for sellers and platform entrants.