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## A Monopoly as Vast as the Amazon: How Amazon's Proprietary Data Collection is a Violation of the Treaty on the Functioning of the European Union

Alexis Adams

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# **A MONOPOLY AS VAST AS THE AMAZON: HOW AMAZON’S PROPRIETARY DATA COLLECTION IS A VIOLATION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION**

ALEXIS ADAMS\*

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\* Alexis Adams is in the dual degree program at American University Washington College of Law and School of Public Affairs. She is pursuing both her J.D. and master’s in public policy with an interest in criminal law, civil rights, and public policy. Originally from Ypsilanti, Michigan, she obtained her Bachelor of Arts in humanities pre-law and global studies in the arts and humanities with a minor in sociology from Michigan State University.

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## I. INTRODUCTION

Antitrust law is one of the strongest legal protections against anticompetitive practices in the internal market.<sup>1</sup> The internal market is a single market in which there is free movement of goods, services, and capital, where people are able to live, study, work, or conduct business.<sup>2</sup> The Single Market Act I and the Single Market Act II are revitalization efforts put into the internal market.<sup>3</sup> The Single Market retained the principle structure of the internal market, merely adding goals to increase market participation.<sup>4</sup> Single Market Act I and II are intended to improve trade and the consumer experience in the internal

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1. See generally Marcus D. Williams, *European Antitrust Law and Its Application to American Corporations and Their Subsidiaries*, 9 WHITTIER L. REV. 517, 518–22 (1987) (explaining the role antitrust laws play in the internal marketplace, specifically in Europe).

2. See Publ'ns Off. of the Eur. Union, *Internal Market*, EUR-LEX (2020), [https://eur-lex.europa.eu/summary/chapter/internal\\_market.html?locale=en&root\\_default=SUM\\_1\\_CODED%3D24](https://eur-lex.europa.eu/summary/chapter/internal_market.html?locale=en&root_default=SUM_1_CODED%3D24) (evolving since its creation in 1993, the internal market of the EU developed into the Single Market).

3. See Eur. Comm'n, *The European Single Market*, EUROPA (2020), [https://ec.europa.eu/growth/single-market\\_en](https://ec.europa.eu/growth/single-market_en) (exhibiting that the Single Market describes the EU as a single territory without limitations on trade, goods, or services); see also Eur. Comm'n, *Single Market Act*, EUROPA (2020), [https://ec.europa.eu/growth/single-market/smact\\_en](https://ec.europa.eu/growth/single-market/smact_en) (showing that in April 2011, the Commission presented twelve levers to grow and strengthen the market).

4. See Eur. Comm'n, *The European Single Market*, *supra* note 3 (boosting collective participation by member states, thus increasing overall confidence in the Single Market).

market.<sup>5</sup> In the European Union (EU), antitrust laws are intended to protect and produce fair competition in the internal market.<sup>6</sup> The Treaty on the Functioning of the European Union (TFEU) prohibits anticompetitive practices and abuse of power within the market, and the consequences for violations are costly.<sup>7</sup>

Collecting proprietary data for an unfair competitive advantage in the market is inconsistent with the TFEU.<sup>8</sup> Proprietary data consists of information ranging from formulas, product manufacturing, customer lists, and other information that is typically considered confidential.<sup>9</sup> Proprietary data collection is a contractual requirement for sellers to access the Amazon marketplace.<sup>10</sup> Amazon's proprietary data collection has led to direct competition between Amazon and independent third-party sellers.<sup>11</sup> The proprietary data Amazon collects is used to create competitive private-label products.<sup>12</sup> Amazon

5. *See id.* (evidencing that each act significantly invested in the Single Market to exploit its untapped potential).

6. *See* Radostina Parenti, *Fact Sheets on the European Union: Competition Policy*, EUROPA (2020), <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> (“The fundamental objective of EU competition rules is to ensure the proper functioning of the internal market.”); *see also* Eur. Comm’n, *Competition Antitrust Overview*, EUROPA (last updated Nov. 21, 2014), [https://ec.europa.eu/competition/antitrust/overview\\_en.html](https://ec.europa.eu/competition/antitrust/overview_en.html) (evidencing the importance of competition in the EU).

7. *See* Parenti, *supra* note 6 (“The antitrust branch aims at restoring competitive conditions, should improper behavior by companies (e.g. cartels or abuse of dominance) cause distortions of competition.”).

8. Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–02, May 9, 2008, 2008 O.J. (C 115) 88, 89. [hereinafter TFEU].

9. *See, e.g., Proprietary Information, INC.* (last updated Jan. 5, 2021), <https://www.inc.com/encyclopedia/proprietary-information.html> (“Proprietary information can include secret formulas, processes, and methods used in production.”).

10. *See* Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015> (explaining that companies that wish to sell on Amazon cannot restrict Amazon's access to their proprietary data).

11. *See id.* (evidencing that Amazon creates competitive private-label products based on the best-sellers on the platform, reviewing the positives and negatives, then offers the same product as a recommended choice for consumers).

12. *See id.* at 2 (exhibiting that Amazon has more than forty-five private-label brands with over 243,000 products on the marketplace, ranging from furniture to

manufactures private-label products using data that should be confidential.<sup>13</sup> After copying the best-selling third-party products on its platform, Amazon directly advertises its own brand of the copied product as an alternative to the third-party option, at a lower price.<sup>14</sup> Amazon is engaging in anticompetitive practices by knowingly offering more cost-effective versions of independent, best-selling third-party products.<sup>15</sup> Creating a market and creating the products sold on that market is inconsistent with regulations against abusing the internal market.<sup>16</sup>

This Comment argues that Amazon is violating Articles 101(1)(d) and Article 102(c) of the TFEU by contractually requiring independent third-party sellers to share proprietary information to access its marketplace, and using that data to create competitive, identical, private-label products.

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clothing).

13. *See id.* (stating that Amazon employees themselves have noted and have testified before the United States Congress that the inappropriate use of proprietary data is against company policy).

14. *Accord* Eugene Kim, *Amazon Has Been Promoting Its Own Products at the Bottom of Competitors' Listings*, CNBC (Mar. 18, 2019, 3:48 PM), <https://www.cnn.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html> (showing Amazon is purposefully advertising its own products under third-party products as an alternative option); *see also* Renee Dudley, *Amazon's New Competitive Advantage: Putting Its Own Products First*, PROPUBLICA (Jun. 6, 2020, 5:00 AM), <https://www.propublica.org/article/amazons-new-competitive-advantage-putting-its-own-products-first> (discussing Amazon's advertising efforts to combat against third-party sellers).

15. *See* Kim, *supra* note 14 (concluding that Amazon receives an unfair advertising advantage when it advertises its own products over the third-party products); *see also* Dudley, *supra* note 14 (finding that the practice of requiring sellers to pay for advertising slots but reserving the top slots for itself is anticompetitive); TFEU, *supra* note 8, art. 101 (stating that applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" is prohibited as incompatible with the internal market).

16. *See* Kim, *supra* note 14 (evidencing the difficulty in maintaining a competitive market that is created by Amazon brands competing against private brands); *see also* Dudley, *supra* note 14 (showing that Amazon sells advertising space to create targeted advertising); TFEU, *supra* note 8, art. 102 ("Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market").

Part II of this comment will discuss the background of the EU, antitrust laws in the EU, and the TFEU, specifically Articles 101 and 102.<sup>17</sup> Additionally, this section will contribute background about the application of the TFEU against other entities within the internal market.<sup>18</sup> Part III analyzes Amazon's practice of proprietary data collection and how those practices violate the TFEU.<sup>19</sup> Part IV contains recommendations for the EU to sue Amazon, as well as recommendations for regulating business practices of the online e-commerce market to prevent Amazon and others from creating competitive private-labels through their dominant market positions. Added recommendations are offered in support of how to allocate resources for collective redress against anticompetitive practices.

## II. BACKGROUND

### A. AN OVERVIEW OF THE EUROPEAN UNION AND COMPETITION LAW

In the late 1950s, six States formed an economic association called

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17. See TFEU, *supra* note 8, arts. 101 (prohibiting agreements creating competitive disadvantages which inherently distorts the market), 102 (prohibiting abuse of a dominant position in the market that affects trade between Member States).

18. See Elizabeth Schulze, *If You Want to Know What a US Tech Crackdown May Look Like, Check Out What Europe Did*, CNBC (June 7, 2019, 2:01 AM), <https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html> (reviewing the various ways the EU cracked down on antitrust matters against technology companies for violating positions of dominance in the market); see also Jamie Condliffe, *A Brief History of the Impact of E.U. Antitrust Fines on Tech Stocks*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/business/dealbook/eu-antitrust-tech-stocks.html> (showing a thorough, but brief, analysis of various penalties for antitrust violations by tech companies in the EU).

19. See Mattioli, *supra* note 10 (detailing the methods used by Amazon executives to replicate third-party products); see also TFEU, *supra* note 8, arts. 101 (“The following shall be prohibited as incompatible with the internal market . . . apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”), 102 (“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market . . . applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”).

the European Community, which consisted of three communities.<sup>20</sup> The three communities were: (1) The European Coal and Steel Community, organized in 1951 under the Treaty of Paris; (2) The European Economic Community, created by the Treaty of Rome in 1957; and (3) Euratom, formulated in the second version of the Treaty of Rome in 1957.<sup>21</sup> The European Economic Community was a central governing body for the enforcement of policies between Member States.<sup>22</sup> The European Economic Community operated through four institutions: (1) The Commission; (2) the Council of Ministers; (3) the Parliament (formerly the Assembly); and (4) the European Court of Justice.<sup>23</sup> The European Economic Community created a common market and customs union among the members while retaining legislative authority.<sup>24</sup> In 1962, the newly formed Council passed Regulation No. 17/62.<sup>25</sup> This regulation developed the implementation of Articles 85 and 86 from the Treaty of Rome (commonly known as the Treaty Establishing the European Economic Community) regarding competitive practices in the internal market.<sup>26</sup> Articles 85 and 86 were the foundation of competition regulation prior to the official formation of the EU.<sup>27</sup>

The Maastricht Treaty, formerly the TEU, was executed in 1993

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20. See Matthew J. Gabel, *European Community*, ENCYCLOPAEDIA BRITANNICA (Sept. 28, 2018), <https://www.britannica.com/topic/European-Community-European-economic-association> (stating that the original European Member States included Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany).

21. Williams, *supra* note 1, at 518 (signaling that the present-day EU has adopted a central focus on improving the Single Market).

22. See Gabel, *supra* note 20 (evidencing that the communities are more than a customs union, as the foundation of the communities developed the modern EU).

23. See Williams, *supra* note 1, at 518–22 (showing that the Commission and the Council retain legislative powers and all legislation proceeds to Parliament where the legislation is accepted or rejected).

24. See Gabel, *supra* note 20 (showing that the Economic Community created a common market by eliminating trade barriers and tariffs between the Member States).

25. Council Regulation 17/62, art. 1, 1962 O.J. SPEC. ED. 88 (European Economic Community).

26. *Id.*

27. See *id.*; see also Heather Campbell, *Antitrust Law* Encyclopaedia Britannica (Feb. 27, 2020), <https://www.britannica.com/topic/antitrust-law> (stating decisions regarding antitrust law in Europe are based on Articles 85 and 86 of the Treaty of Rome).

and officially formed the present-day EU.<sup>28</sup> Under the Maastricht Treaty, the European Economic Commission was renamed the European Community and became embedded as one of the first pillars of the newly formed EU.<sup>29</sup> Under this change, Articles 85 and 86 of the Treaty of Rome became Articles 81 and 82 as part of a renumbering of the Treaty of Rome (commonly known as the Treaty Establishing the European Community) per the Treaty of Amsterdam, executed in 2012.<sup>30</sup> Council Regulation (EC) No 1/2003 legislated the implementation of the newly renamed Articles.<sup>31</sup> The Lisbon Treaty, the most recent treaty enacted by the EU, led to the TFEU.<sup>32</sup> Under the Lisbon Treaty, the TFEU replaced the European Community (formerly the EC), and the Treaty of Rome (commonly known as the Treaty Establishing the European Community) was renamed the TFEU.<sup>33</sup>

## B. TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

### *i. General Background*

On October 26, 2012, the TFEU replaced the Treaty of Rome and

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28. See Adam Augustyn, *Maastricht Treaty*, ENCYCLOPAEDIA BRITANNICA (Mar. 11, 2020), <https://www.britannica.com/event/Maastricht-Treaty>; see generally Matthew J. Gabel, *European Union*, ENCYCLOPAEDIA BRITANNICA (Jan. 31, 2020), <https://www.britannica.com/topic/European-Union> (explaining that prior to the formation of the official EU, the focus of the States was the economic association and the power of free trade between the States).

29. See Gabel, *supra* note 20 (explaining that the EEC became the EC but kept the substantive value of the EEC).

30. See Council Regulation 1/2003, 2002 O.J. (L 1) 1 (EC) (evidencing that Articles 85 and 86 officially became Articles 81 and 82); see generally Heather Campbell, *Treaty of Rome*, ENCYCLOPAEDIA BRITANNICA (Mar. 18, 2020), <https://www.britannica.com/event/Treaty-of-Rome> (showing that the renumbering did not change the content of the Articles).

31. See Council Regulation 1/2003, 2002 O.J. (L 1) 1 (EC) (showing how Articles 85 and 86 officially became Articles 81 and 82 and how the implementation in the Single Market remains the same).

32. See Michael Ray, *Lisbon Treaty*, ENCYCLOPAEDIA BRITANNICA (Nov. 24, 2020), <https://www.britannica.com/event/Lisbon-Treaty> (showing that the Lisbon Treaty, the most recent Treaty altering the foundation of the EU, led to the creation of the TFEU).

33. See *id.* (explaining that the Treaty Establishing the European Community is another name for the Treaty of Rome, which is now officially named the TFEU).

formally dissolved the European Community.<sup>34</sup> The TFEU is the current binding instrument recognizing the Members and legislative powers of the EU.<sup>35</sup> The treaty is a modernized version of the Treaty of Rome and includes the adoption of Articles 101–09, which regulate competition in the internal market.<sup>36</sup> Under the TFEU, Articles 81 and 82 of the EC Treaty became Articles 101 and 102.<sup>37</sup> Articles 101 and 102 regulate trade involving unfair undertakings and agreements and abuse of power in the market.<sup>38</sup> Undertakings are agreements between parties that involve any economic activity, including contracts, arrangements, or understandings that affect the internal market in the EU.<sup>39</sup> The TFEU, under Article 3(3), establishes a market free from “distortion.”<sup>40</sup> Distortion is a phenomenon that manipulates the market by restricting competition and limiting consumer choice.<sup>41</sup> The restrictions on competition create inherently favorable outcomes for the largest entity in the market.<sup>42</sup> Article 3(3) is enforced under Protocol No. 27, which gives the EU authority to take action against

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34. *See id.* (showing that under the TFEU, the EC was no longer needed and was dissolved).

35. *See id.* (including twenty-seven active Member States across Europe; The United Kingdom, a founding Member State of the European Union, formally left in 2020).

36. *See* TFEU, *supra* note 8, arts. 101–02 (evidencing that the TFEU brought several needed updates to the antitrust laws in the EU, creating Articles 101-109 that address competition within the EU); *see also* Parenti, *supra* note 6 (explaining that Articles 101-09 regulate competition in the Single Market, covering a broad range of sectors in the EU).

37. *See* Campbell, *supra* note 30 (showing that Articles 101 and 102, originally 85 and 86, have remained the same in substance over time).

38. *E.g.*, Parenti, *supra* note 6 (showing that Article 101 regulates transactions between two or more market operators, while Article 102 prohibits abuse of the market).

39. *Accord* PUBL'NS OFF. OF THE EUR. UNION, COMPLIANCE MATTERS: WHAT COMPANIES CAN DO TO BETTER RESPECT EU COMPETITION RULES 13 (2012) [hereinafter EUROPEAN COMMISSION COMPETITION REPORT] (indicating that the EU rules apply to all directly to the EU Member States).

40. *See* Parenti, *supra* note 6 (explaining that distortion refers to any economic activity that affects trade between the Member States and affects consumer choice).

41. *See id.* (stating that improper behaviors by companies such as abuse of dominance can cause distortions of competition).

42. *See id.* (asserting that the underlying policy goal of the TFEU and Articles 101 and 102 is to prevent unfair competition because this power dynamic facilitates monopoly business practices).

distortion of the internal market.<sup>43</sup> The TFEU annexed Protocol No. 27 under Article 352 of the Treaty on European Union.<sup>44</sup>

*ii. Article 101*

Article 101 is a modernized descendant of former Article 85 and later Article 81.<sup>45</sup> Article 101 is a comprehensive ban on anticompetitive agreements in the EU.<sup>46</sup> Anticompetitive undertakings are agreements that have an inherently unfair impact on the internal market.<sup>47</sup> Article 101(1)(d) states the following:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.<sup>48</sup>

Article 101 begins by referencing undertakings, which, under the TFEU, are any economic activities that take place within the EU.<sup>49</sup> Article 101 regulates undertakings of concerted practices that affect

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43. *Accord* TFEU, *supra* note 8, arts. 101–02 (“... the Treaty on European Union includes a system ensuring that competition is not distorted. . .”).

44. *Id.* (identifying that Protocol No. 27 gives the EU authority to enforce the Articles of the TFEU to protect the Single Market).

45. *See* Gabel, *supra* note 20; *see, e.g.*, Campbell, *supra* note 30 (discussing the succession history of the TFEU).

46. *See* Parenti, *supra* note 6 (showing that Article 101 has a comprehensive focus on agreements by undertakings or associations engaging with the Single Market that would distort the market).

47. *Accord* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13 (“Article 101 prohibits agreements between companies which restrict competition, unless they produce substantial benefits to customers and consumers. . .”).

48. TFEU, *supra* note 8, art. 101 (stating that Article 101 prohibits anticompetitive practices when the practices create dissimilar conditions that distort the market).

49. *See* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13 (“EU competition rules apply to ‘undertakings’, a term which encompasses any entity engaged in an economic activity.”).

the internal market, regardless of intentionality.<sup>50</sup> Concerted practices include contractual arrangements made by market entities.<sup>51</sup> If a practice distorts, prevents, or restricts competition by applying dissimilar conditions between equal transactions, the practice is prohibited for being inconsistent with the purpose of Article 101.<sup>52</sup>

Dissimilar conditions are any acts by an undertaking that create unfair competitive advantages for one entity over its competitors in the internal market.<sup>53</sup> Dissimilar conditions can occur by contractual agreement with other entities, with different terms for each entity.<sup>54</sup> If an undertaking is in violation of 101(1), then pursuant to 101(2) the agreement or arrangements in violation of Article 101(1) are prohibited.<sup>55</sup>

Article 101(1) can be excused if the benefits of the practice serve the greater good of the market by technological advancements or other benefits to society, regardless of potential consumer harm.<sup>56</sup> However,

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50. TFEU, *supra* note 8, art. 101 (showing that a small exception to Article 101(1) is carved out by Article 101(3) but otherwise the agreement is, on its face, invalid).

51. *See* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13 (undertakings involve any economic activity in the EU, including contractual arrangements because those agreements affect trade in the EU).

52. *See id.* (exhibiting that unfair contractual arrangements are prohibited under Article 101 regardless of the parties' consent to the arrangement).

53. *See* TFEU, *supra* note 8, art. 101 (showing that dissimilar conditions are created by an unfair competitive advantage between similar market operators); *see also* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13 (evidencing that dissimilar conditions are needed for both Article 101 and Article 102 violations, meaning one must unfairly benefit from the conditions stifling competition).

54. *See* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13–14 (showing that dissimilar conditions are about the imbalance between competitive entities on the market by the application of unfair contractual terms).

55. PUBL'NS OFF. OF THE EUR. UNION, COMMISSION REPORT ON EU COMPETITION LAW: RULES APPLICABLE TO ANTITRUST ENFORCEMENT, VOL. 1: GENERAL RULES 10 (2013), [https://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_1\\_en.pdf](https://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf) [hereinafter COMMISSION REPORT ON EU COMPETITION LAW] (“Any agreements or decisions prohibited pursuant to this Article shall be automatically void.”).

56. *Id.* (“The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings . . . , which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of

if the entity is claiming an Article 101(3) exemption, the entity bears the burden of proving there is a societal and economic benefit to the concerted practice or agreement that outweighs the harm to the internal market.<sup>57</sup>

*iii. Examples of Article 101's Application*

Article 101 and its predecessors have guided the EU in the effort to effectively ban anticompetitive agreements and practices.<sup>58</sup> T-Mobile CZ and O2CZ are examples of companies that recently engaged in prohibited agreements between undertakings that create dissimilar conditions between equal transactions.<sup>59</sup> T-Mobile CZ and O2CZ are the two largest service providers in the Czech Republic, and they engaged in a network sharing arrangement that created unfair competition for the other service providers and slowed down services for customers.<sup>60</sup> O2CZ has over six million fixed and mobile lines, and together the two companies control over two-thirds of the market.<sup>61</sup> O2CZ and T-Mobile CZ entered into a network sharing contract, meaning the two companies would share network tower service, which was supposed to allow their consumers greater cell service.<sup>62</sup>

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the resulting benefit. . .”).

57. *See id.* (explaining that the burden first lies with the Commission or complaining party to prove an Article 101(1) violation, after which the accused can claim an Article 101(3) exception; however, the entity must prove it falls within the exception requirements).

58. *See Parenti, supra* note 6 (showing that the EU has taken up cases against several different entities for arrangements and practices that violate Article 101(1)).

59. *See* European Commission Press Release IP/16/3539, Antitrust: Commission Opens Formal Investigation Into Mobile Telephone Network Sharing in Czech Republic (Oct. 25, 2016) (explaining that T-Mobile and O2CZ, by arrangement, forcibly excluded the only other phone service provider in the area, creating dissimilar conditions in an otherwise equal phone service market).

60. *See id.* (sharing service towers, the companies slowed down outside providers, harming customers in the Czech Republic, and creating unfair conditions between the providers).

61. *See id.* (explaining that O2CZ and T-Mobile are the largest mobile and fixed-line service providers in the area, but they are not the only service providers in the area).

62. *E.g.*, European Commission Press Release IP/19/5110, Antitrust: Commission sends Statement of Objections to O2CZ, CETIN and T-Mobile CZ for their network sharing agreement (Aug. 7, 2019) (“The Commission, therefore, has reached the preliminary conclusion that the network sharing agreement between the two main mobile operators in Czechia restricts competition and thereby harms

However, there is a third provider in the region, Vodafone, which is significantly smaller than the two major companies in the region.<sup>63</sup> Vodafone was left out of the agreement and as a result, was unable to compete.<sup>64</sup> Furthermore, the network sharing agreement left no room for new potential service providers in the region, disincentivizing innovation and competitive advancement for consumers.<sup>65</sup> As a result, the EU opened a formal investigation regarding the network sharing arrangement and raised formal objections to the agreement.<sup>66</sup> The Commissioner of Competition found that the network sharing agreement applied dissimilar conditions by excluding the only other competitor in the region from the agreement, which impacted consumer choice and affected trade within an EU Member State.<sup>67</sup>

Another example of an Article 101(1) violation of the TFEU is the Disney pay-TV program.<sup>68</sup> By introducing a new television subscription service, Disney raised concerns for the European Commission by contractually limiting the geographic scope of third-party streaming platforms across distinct parts of the EU.<sup>69</sup> The clauses of the bilateral agreement between Walt Disney and Sky UK

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innovation in breach of EU antitrust rules.”).

63. European Commission Press Release IP/16/3539, *supra* note 59 (“Vodafone is smaller and, unlike the network sharing parties, has no meaningful presence in the fixed telecoms segment.”).

64. *See id.* (explaining that forcing Vodafone to compete against two-thirds of the market would virtually eliminate it from the market, except for two small regions).

65. *See* European Commission Press Release IP/19/5110, *supra* note 62 (showing that Vodafone was left out of the network sharing agreement; it is unlikely new competitors could arise when an existing competitor is excluded from the market).

66. *Id.* (“The European Commission has informed Czech operators . . . of its preliminary view that their network sharing agreement restricts competition in breach of EU antitrust rules.”).

67. TFEU, *supra* note 8, art. 101; *see also* European Commission Press Release IP/19/5110, *supra* note 62 (showing that because consumers had no alternative to O2CZ and T-Mobile CZ the Single Market was affected).

68. *See* European Commission Press Release IP/18/6346, Antitrust: Commission seeks feedback on commitments offered by Disney in its pay-TV investigation (Nov. 9, 2018) (explaining that Disney’s pay-TV program arranged different channel options and services for consumers based on whether the consumer is in the UK or an EU State).

69. *See id.* (“The European Commission is inviting comments from interested parties on commitments offered by Disney to address competition concerns. . . .”).

prevented EU consumers outside of the UK and Ireland from accessing the pay-TV services available to EU consumers in the UK and Ireland.<sup>70</sup> The Commission began an investigation into Disney's agreements to determine whether restricting broadcasters' ability to accept unsolicited requests from consumers violates Article 101 of the TFEU.<sup>71</sup>

Disney and the European Commission engaged in a State of Play meeting where the Commission brought its concerns to Disney.<sup>72</sup> After this meeting, Disney had a choice on whether to make concessions and promises that would resolve the concerns of the Commission or prepare to fight the Commission's findings in court.<sup>73</sup> Disney chose to settle with the Commission and made commitments that, if unfulfilled, the Commission can fine and sue Disney for violating Article 101 of the TFEU.<sup>74</sup>

#### *iv. Article 102*

Article 102, like Article 101, is a descendant of earlier competition law; specifically, Article 86 and later Article 82.<sup>75</sup> Article 102 codifies a comprehensive ban on abuse of the internal market, prohibiting anticompetitive practices from a power position within the market.<sup>76</sup> Abuse of a dominant position in the market is a form of market or market-participant influencing to gain an anticompetitive advantage.<sup>77</sup> Article 102(c) states the following:

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70. *Id.* ("These clauses appear to prevent Sky UK from allowing EU consumers outside the UK and Ireland to access pay-TV services available in the UK and Ireland.").

71. *See id.* (showing that the clauses would eliminate cross-border competition between pay-TV broadcasters outside the licensed territory (commonly known as "passive sales").

72. *Id.* ("Disney has decided to offer commitments to address the Commission's competition concerns.").

73. *See id.* (illustrating that Disney chose to offer legally binding commitments if Disney does not comply with the terms).

74. *See id.* (showing that the Commission ensured the commitments apply for five years and cover standard pay-TV services and licenses).

75. *See* Campbell, *supra* note 30.

76. *See* Parenti, *supra* note 6 (stating how dominance of a company in a specific market can harm both consumers and competitors).

77. *See id.* (using dominance to create dissimilar conditions between equal transactions that distort the market).

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.<sup>78</sup>

Article 102 focuses on the abuse of power by market players that disproportionately places a competitive disadvantage on other market players.<sup>79</sup> If other players cannot compete because a company is abusing its power, that is inconsistent with the purpose of Article 102.<sup>80</sup>

#### v. *Example of Article 102's Application*

Abuse of power in the internal market has taken several forms over the years.<sup>81</sup> Similar to Article 101 and its predecessors, Article 102 has been applied prior to the adoption of the TFEU as Articles 86 and 82.<sup>82</sup> Consistent with the enforcement of Article 102, the EU pursued the violations by several tech giants.<sup>83</sup> One of those giants is Google, which, at the time, created contracts with mobile phone producers and service providers, requiring multiple Google apps to be pre-installed on devices prior to receiving the licensing for Android software.<sup>84</sup> In 2018, Google received its third fine from the EU for abusing its

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78. TFEU, *supra* note 8, art. 102.

79. See EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13; see also Parenti, *supra* note 6 (“A dominant position is a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained in the relevant market. . .”).

80. See Parenti, *supra* note 6 (stating the purpose of the antitrust branch).

81. See Condliffe, *supra* note 18 (listing violations by tech companies, including Microsoft, Google, Intel, and Facebook, for abuse of dominance in the market).

82. See Parenti, *supra* note 6.

83. See Condliffe, *supra* note 18 (exemplifying that the EU Commission launched several investigations into several tech giants for abusing dominance within the market).

84. See European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018) (showing that Google, the owner of Android, would not license Android software without an agreement to download other Google applications).

dominance in the market.<sup>85</sup> Google used its dominance in the market to impose illegal restrictions on Android software purchasers.<sup>86</sup> Google required manufacturers to pre-install Google Chrome and the Google Search App to access the Google Play Store.<sup>87</sup> Google also made payments to large manufacturers in exchange for pre-installing Google apps onto their devices.<sup>88</sup> Additionally, Google prevented companies from selling any smartphone with a non-pre-approved alternative version of the Android program (commonly known as an Android fork).<sup>89</sup> Google used its power in the market to apply favorable conditions to Android software for Google's benefit.<sup>90</sup> Meanwhile, other competitors and alternatives to Android were hindered by Google's continued efforts to prevent competition against the Android program and Google itself.<sup>91</sup> Google applied dissimilar conditions between itself and competitors, as well as between itself and manufacturers that resulted in an unfair competitive advantage for Google.<sup>92</sup>

In 2017, the EU fined Google 2.42 billion euros for breaching Article 102 by abusing its dominance in the marketplace to favor its

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85. See Adam Satariano & Jack Nicas, *E.U. Fines Google 5.1 Billion in Android Antitrust Case*, N.Y. TIMES (July 18, 2018) (evidencing how Google received a record-breaking fine for abusing its dominance in the Single Market).

86. European Commission Press Release IP/18/4581, *supra* note 84 (“Since 2011, Google has imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search.”).

87. *Id.* (“Google . . . has required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google’s app store (the Play Store). . . .”).

88. See *id.* (explaining that Google made significant payments to large manufacturers in exchange for exclusive downloading of Google and Chrome applications).

89. See *id.* (showing that Google would not let manufacturers sell a single device without pre-approval, which never happened if the manufacturer refused to install the applications).

90. See *id.* (explaining how Google received numerous monetary benefits and solidified its dominance in the market).

91. See *id.* (highlighting that as the market in the twenty-first century was moving away from PC desktops to mobile internet, Google strategized to maintain dominance in the market).

92. *Id.* (“Today, about 80% of smart mobile devices in Europe, and worldwide, run on Android.”).

own shopping network.<sup>93</sup> Google created an online comparison-shopping service within the Google search platform.<sup>94</sup> Comparison shopping networks require heavy traffic to be successful, and Google began using its main search engine to give itself a competitive advantage in the market.<sup>95</sup> Google also used its dominance to promote its shopping service listings while demoting competitors' listings.<sup>96</sup> This practice was found to have violated Article 102 of the TFEU, and the EU ordered Google to pay the fine and cease the practice altogether.<sup>97</sup>

In 2008, Microsoft, received the largest, at the time, fine of 1.3 billion euros from the EU for not following a 2004 judgment that outlined the ways Microsoft abused its dominance in the market.<sup>98</sup> Microsoft made it extremely difficult for competitive internet browsers to be used as alternatives to Internet Explorer in the Windows operating system.<sup>99</sup> Microsoft received an additional fine from the Commission in 2009 for failing to make the appropriate adjustments to allow fair competition between internet browsers.<sup>100</sup>

Intel faced a fine from the EU of 1.06 billion euros for supplying rebates to major technology and computer companies that exclusively

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93. European Commission Press Release IP/17/1785, Antitrust: Commission fines Google €2.42 billion for abusing dominance as a search engine by giving an illegal advantage to own comparison shopping service (June 27, 2017) (outlining how Google abused its position to give its shopping network an advantage).

94. *Id.* (“In 2004 Google entered the separate market of comparison shopping in Europe, with a product that was initially called ‘Froogle’, re-named ‘Google Product Search’ in 2008 and since 2013 has been called ‘Google Shopping.’”).

95. *See id.* (explaining that traffic is how companies are competitive and how more traffic leads to more clicks, generates revenue, and attracts more retailers that want to list their products with a comparison-shopping service.)

96. *See id.* (revealing that investigations and evidence gathered showed the competitors' listings do not appear until about the fourth page of the search).

97. *See id.* (delineating the consequences of the Commission's decision).

98. Stephen Castle & David Jolly, *Europe Fines Microsoft \$1.3 Billion*, N.Y. TIMES (Feb. 28, 2008) (“European antitrust regulators on Wednesday fined Microsoft \$1.3 billion for failing to comply with a 2004 judgment that the company had abused its market dominance.”).

99. *See id.* (stating that the Commission ordered Microsoft to disclose information that would allow rival vendors to interoperate with Windows).

100. *See id.* (reporting that Microsoft was again fined in 2008, making Microsoft the first company fined twice for the same violation in the EU's fifty-year history).

or almost exclusively bought Intel computer chips.<sup>101</sup> Intel abused its dominance in the market by supplying unfair rebate offers that eventually led to Intel controlling seventy percent of the market.<sup>102</sup> When Intel controlled the market, it was worth 22 billion euros annually.<sup>103</sup>

Facebook, after acquiring WhatsApp in 2014, merged the data between Facebook users and WhatsApp users.<sup>104</sup> However, prior to the acquisition, Facebook testified that it would not merge the data between the two applications.<sup>105</sup> This merger created an unfair competitive benefit for Facebook because it gained an advertising advantage by combining user data.<sup>106</sup> Since other apps cannot gain the same advantage, this creates dissimilar conditions, giving Facebook a competitive advantage inconsistent with Article 102.<sup>107</sup>

### C. INTRODUCTION TO AMAZON'S BUSINESS PRACTICES

Amazon is an online marketplace created in 1994 by founder Jeff Bezos.<sup>108</sup> Bezos began by selling books online, then expanded the platform over time.<sup>109</sup> Amazon introduced music and video on the

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101. James Kanter, *Europe Fines Intel \$1.45 Billion in Antitrust Case*, N.Y. TIMES (May 13, 2009) (reporting that Intel received a fine of 1.06 billion euros for abusing its dominance in the computer chip market).

102. *See id.* (explaining that the rebate chip program helped Intel maintain at least seventy percent of the chip sales market from October 2002 to December 2007).

103. *See id.* (noting that sales in Europe represent about one third of the twenty-two billion euros in annual sales of computer chips by Intel).

104. Condliffe, *supra* note 18 (describing how the Commission fined Facebook \$122 million in the spring of 2017 for giving misleading statements about how WhatsApp's data would be handled during the acquisition of WhatsApp).

105. *Id.* ("The social network said it would not combine its data with that of WhatsApp, but it did so later. . .").

106. *See id.* (explaining the concern was related to Facebook acquiring an unfair advertising advantage by combining the data between the two applications).

107. *See id.* at 2 (suggesting that Facebook has sole access to the WhatsApp data); TFEU, *supra* note 8, art. 102(c) (providing that a form of abuse of a dominant position in a market is applying dissimilar conditions between a party and a trading party that places the trading party at a competitive disadvantage).

108. Mark Hall, *Amazon.com*, ENCYCLOPAEDIA BRITANNICA (Apr. 9, 2020), <https://www.britannica.com/topic/Amazoncom> (tracing Amazon.com's history).

109. *See id.* (describing how Amazon developed private-label products, recently launching a business-to-business private-label brand, including a wireless internet service).

platform in 1998,<sup>110</sup> and by 1999, the platform sold electronics, games, software, home improvement items, toys, and more.<sup>111</sup> Since its creation, Amazon has considered itself as much more than a mere online marketplace.<sup>112</sup> Amazon does not consider itself a consumer retailer but rather a technology company that simplifies online transactions for customers.<sup>113</sup> Amazon is still a major provider for consumer online retail sales but has expanded to include cloud computing services and other web-based services.<sup>114</sup>

Amazon has sixteen marketplaces across the world and has consumers in over 180 countries, with over 175 fulfillment centers around the world.<sup>115</sup> According to Amazon, the company owns 288 million square feet of warehouses, offices, retail spaces, and data centers, most of which are used for logistics for order fulfillment.<sup>116</sup> With over 150 million paid Prime members, and hundreds of millions of active accounts all over the world, Amazon is a massive global platform for sellers.<sup>117</sup> In Europe, Amazon's marketplaces sell across 28 countries, reaching tens of millions of customers.<sup>118</sup> Amazon is the

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110. *See id.* (specifying that music and videos are the first expansions that Amazon made outside of an online bookstore).

111. *Id.* (“By 1999, the platform sold electronics, games, software, home improvement items, toys, and more.”).

112. *See id.* (“While Amazon.com famously started as a bookseller, Bezos contended from its start that the site was not merely a retailer of consumer products.”).

113. *See id.* (“[Bezos] argued that Amazon.com was a technology company whose business was simplifying online transactions for consumers.”).

114. *See id.* (“[Amazon’s] Web services business includes renting data storage and computing resources, so-called ‘cloud computing,’ over the Internet.”).

115. *Id.*

116. *See* Alexis C. Madrigal, *When Amazon Went From Big to Unbelievably Big*, THE ATLANTIC (Feb. 7, 2019), <https://www.theatlantic.com/technology/archive/2019/02/when-amazon-went-from-big-to-unbelievably-big/582097/> (comparing Amazon’s acquisition of warehouse space to the space of Walmart, a box chain retailer).

117. Ben Fox Rubin, *Amazon Now has Over 150 Million Paid Prime Members Worldwide*, CNET (Jan. 30, 2020), <https://www.cnet.com/news/amazon-now-has-over-150-million-paid-prime-members-worldwide/>; *Why Expand to Europe?*, AMAZON, <https://sell.amazon.com/global-selling/europe.html> (last visited Jan. 3, 2021) (pitching why sellers should expand into Europe using Amazon’s fulfillment program for sellers).

118. *Id.* (“Amazon’s European marketplaces help you sell across 28 countries. Don’t miss out on tens of millions of new customers.”).

number one e-commerce market in France, Italy, Spain, Germany, and the UK, with over 290 million different visitors each month.<sup>119</sup> Amazon has created a global marketplace for sellers and consumers.<sup>120</sup>

Amazon is nontraditional in first creating a market, and then creating private-label products to sell on that market.<sup>121</sup> Rather than working in exclusivity, Amazon began as a marketplace of inclusivity, meaning any seller of a product could come to Amazon to sell.<sup>122</sup> However, this allowed Amazon to create similar versions of products and make them more affordable with better margins.<sup>123</sup> Amazon ultimately created conditions where independent sellers could no longer contend against private-label competition.<sup>124</sup> While not acting in a blatantly exclusionary manner, such as contracting to prevent generic brands from introducing competitive medication alternatives on the market altogether,<sup>125</sup> Amazon is still engaging in a similarly anticompetitive practice, thereby hindering the internal market.<sup>126</sup>

Amazon contracts with third-party independent sellers through its retailer platform to give them a consumer base and a means to interact with customers online.<sup>127</sup> Amazon also contracts to allow these sellers

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119. *See id.* (illustrating that Amazon is the number one e-commerce market in France, Italy, Spain, Germany, and the UK, with over 290 million different visitors each month).

120. *Amazon Stores Around the World*, AMAZON, [https://sell.amazon.com/grow.html?ref\\_=sdus\\_soa\\_sell\\_grow](https://sell.amazon.com/grow.html?ref_=sdus_soa_sell_grow) (last visited Jan. 3, 2021) (providing data on Amazon's global services).

121. *See Hall, supra* note 108 (outlining how Amazon created a market for e-readers); *see also* Mattioli, *supra* note 10, at 2 (stating that Amazon has expanded its product line with over 243,000 products and over 43 private-label brands).

122. *See Hall, supra* note 108 (explaining that when Amazon introduced its first publishing line, it allowed individuals to publish their own e-books).

123. *See Kim, supra* note 14 (illustrating how Amazon advertises its own private-label products at the bottom of competitors' listings).

124. *See id.* (revealing that merchants have expressed their frustration with Amazon's practice).

125. European Commission Press Release IP/20/529, Mergers: Commission Opens In-Depth Investigation into Proposed Acquisition of Tachosil by Johnson & Johnson (Mar. 25, 2020) (reporting that Johnson & Johnson proposed the acquisition of a smaller company, Tachosil, in an effort to prevent competition of dual hemostatic patches in the EU market).

126. *See Kim, supra* note 14 (concluding that Amazon eliminates competitors in the market by creating a market, then offering lower-cost products).

127. *See Mattioli, supra* note 10, at 6–7 (describing one third-party independent seller's experience selling on Amazon.com and how Amazon's marketplace

to market to customers directly on its website.<sup>128</sup> However, there is a cost for access to Amazon and its platform.<sup>129</sup> Amazon contracts with these independent sellers for proprietary data collection,<sup>130</sup> which has led to unfair competition from Amazon.<sup>131</sup> Collecting proprietary data, including the materials of the product, reviews on shortcomings and successes, marketing strategy, and other sensitive information, is not necessary for Amazon to allow sellers onto its marketplace.<sup>132</sup> Nonetheless, Amazon has made it a requirement before granting sellers access while still earning a portion of the proceeds.<sup>133</sup>

In 2007, Amazon began launching its own products, beginning with the Kindle e-reader.<sup>134</sup> Since then, Amazon has expanded its private-label to over forty-five brands with over 243,000 products on the marketplace.<sup>135</sup> These private label products make Amazon directly compete with its third-party sellers, including by way of advertisement under independent third-party seller product listings.<sup>136</sup> Amazon advertises directly under the third-party sellers' product page by offering Amazon's private brand as a similar alternative.<sup>137</sup>

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business model initially generated sales).

128. *Id.*; see also Kim, *supra* note 14 (noting that sellers can contract and pay for the right to advertise on product listings).

129. See Dudley, *supra* note 14, at 4 (stating that brands pay between ten and thirty percent of sales for a sponsored slot).

130. See Mattioli, *supra* note 10, at 4 (detailing the extent of Amazon's efforts to acquire proprietary data from individual sellers on its website).

131. See *id.* at 3 (explaining that the Federal Trade Commission is investigating Amazon on antitrust matters stemming from Amazon potentially unfairly using its size and platform against competitors and other sellers on its site).

132. See *Let's Talk Numbers*, AMAZON, [https://sell.amazon.com/pricing.html?ref\\_=sdus\\_soa\\_hp\\_pricing](https://sell.amazon.com/pricing.html?ref_=sdus_soa_hp_pricing) (last visited Jan. 3, 2021) (demonstrating that just the collection of fees and charges are sufficient for sellers to enter the marketplace).

133. See Mattioli, *supra* note 10, at 6 (discussing how a brand did not want to work with Amazon because they did not want to risk private-label copying of their product).

134. Hall, *supra* note 108.

135. Mattioli, *supra* note 10, at 2.

136. See Kim, *supra* note 14, at 2 (showing that at the bottom of listings, Amazon includes a link that takes the consumer to Amazon's private-label product); see also Dudley, *supra* note 14, at 4 (highlighting the effects of Amazon's private-label strategy).

137. See Kim, *supra* note 14, at 2 (explaining that at the bottom of listings, Amazon includes a link called "Similar Item from Our Brands").

Furthermore, Amazon advertises its own products in the coveted top left spot of the page where Amazon lists the products searched by consumers.<sup>138</sup> Being a rather new retail space has essentially enabled Amazon to create a market and sell on it, too.<sup>139</sup> Amazon's conduct of collecting proprietary data and using it to gain a competitive advantage is inconsistent with TFEU Articles 101 and 102, prohibiting anticompetitive practices in the EU.<sup>140</sup>

### III. ANALYSIS

After the adoption of the TFEU, the EU attempted to modernize antitrust laws with the intent of adapting to changes in the world and the market.<sup>141</sup> The purpose of the TFEU and Articles 101 and 102 is to promote competition in the market and prevent distortion of the market.<sup>142</sup> Amazon is in violation of Articles 101 and 102 of the TFEU, and through Protocol No. 27 the EU has authority to remedy these violations.<sup>143</sup> Proprietary data collection is an unnecessary practice and is the root cause of Amazon's violations.<sup>144</sup> Amazon is specifically in violation of Articles 101(1)(d) and 102(c).<sup>145</sup>

Amazon engages in distortion of the market by contractually requiring individual third-party sellers to allow proprietary data collection,<sup>146</sup> then using the collected data to create competitive

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138. See Dudley, *supra* note 14, at 1 (discussing how Amazon's brands are listed higher than third-party products).

139. See Hall, *supra* note 108, at 4–5 (detailing the rise of Amazon's e-reader market).

140. TFEU, *supra* note 8, arts. 101–02 (providing that agreements which distort the market and abuse power in the market are prohibited).

141. See *id.* arts. 101–09 (demonstrating how the Treaty establishing the European Community was subsumed under the TFEU).

142. See Parenti, *supra* note 6, at 1–2 (outlining the competition policy and purpose of the TFEU).

143. *Id.*; see TFEU, *supra* note 8, Protocol No. 27 (providing that the EU has explicit authority to remedy anticompetitive practices that affect the single market).

144. See generally Mattioli, *supra* note 10, at 2, 3 (detailing some of Amazon's proprietary data collection methods).

145. See TFEU, *supra* note 8, arts. 101–02 (prohibiting any agreements or abuse of dominance resulting in dissimilar conditions that affect trade, consumer choice, or create unfair competition in the market).

146. See Mattioli, *supra* note 10, at 1–2 (stating that Amazon admits to collecting proprietary data from third-party sellers).

private-label products.<sup>147</sup> After creating the private-label products, Amazon advertises the replicated products at the bottom of the original sellers' product listing.<sup>148</sup> In addition to advertising under the independent third-party seller's listing, Amazon also advertises its products first in the coveted top-left corner of its webpage, pushing independent sellers' products lower on the page.<sup>149</sup> Independent third-party sellers are directly competing with Amazon's private-label products, and Amazon has an unfair advantage by advertising for free while independent sellers pay Amazon for marketing in addition to already giving up a percentage of product proceeds.<sup>150</sup>

#### A. AMAZON IS IN VIOLATION OF ARTICLE 101(1)(D)

Article 101(1) prohibits concerted practices that may affect trade between Member States which have the effect of preventing, restricting, or distorting competition.<sup>151</sup> Article 101(1)(d) specifically deals with undertakings that apply dissimilar conditions to equivalent transactions with other trading parties, creating a competitive disadvantage.<sup>152</sup>

Undertakings, under the European Commission definition, encompass any entity engaged in economic activity within the EU.<sup>153</sup> Amazon is engaged in economic activity in the EU as Amazon has several factories in several member states, including Spain, France, and Germany.<sup>154</sup> Amazon has fulfillment centers and roughly six

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147. See Mattioli, *supra* note 10, at 2, 5 (detailing the extent of Amazon's private-label business).

148. Kim, *supra* note 14, at 2.

149. Dudley, *supra* note 14, at 1 ("But in late March, Boyce noticed that Amazon's own brand, Solimo, had taken over the top left, while his client's product had been bumped to a lower row.").

150. *Id.* at 2 ("Now, they still bid for top-row placements, but the best spot—the top left on the first page—is unavailable across dozens of product search terms. . . .").

151. TFEU, *supra* note 8, art. 101(1); see also Parenti, *supra* note 6, at 1 (stating the effects of the TFEU).

152. TFEU, *supra* note 8, art. 101(1)(d).

153. EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13.

154. *Why Expand to Europe?*, *supra* note 117, at 2, 3; see also Madrigal, *supra* note 116, at 1 (" . . . Amazon now has 288 million square feet of warehouses, offices, retail stores, and data centers.").

marketplaces in Europe.<sup>155</sup> Amazon is also an online retailer in a number of Member States, which constitutes economic activity in the EU.<sup>156</sup> The Member States are affected as the internal market allows free trade across the EU Member States.<sup>157</sup> Amazon is the world's largest online marketplace,<sup>158</sup> and its sales comprise roughly forty percent of EU retail sales.<sup>159</sup>

As such a large contributor to the market, Amazon can easily distort the market by replicating independent best-selling products and selling them at a lower price.<sup>160</sup> Amazon stated its intention was to simplify consumer transactions, but that does not require creating private-label products to sell competitively.<sup>161</sup>

Creating private-label products creates dissimilar conditions to equivalent transactions with other, independent sellers, placing the

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155. *Why Expand to Europe?*, *supra* note 117, at 2, 3.

156. See Philipp Westerhoff, *The German Amazon Marketplace Agreement Case: A Landmark Settlement with Global Reach or More Hype Than Substance?*, HAUSFELD (Nov. 20, 2019), [https://www.hausfeld.com/news-press/the-german-amazon-marketplace-agreement-case-a-landmark-settlement-with-global-reach-or-more-hype-than-substance?lang\\_id=1](https://www.hausfeld.com/news-press/the-german-amazon-marketplace-agreement-case-a-landmark-settlement-with-global-reach-or-more-hype-than-substance?lang_id=1) (explaining that Germany is the second largest retail market for Amazon outside of the United States with net sales of almost 20 billion dollars in 2018).

157. See Gabel, *supra* note 20, at 1, 2 (discussing how the Single Market allows consumers to engage with different sellers across different Member States of the EU).

158. See Lauren Debter, *Amazon Surpasses Walmart as World's Largest Retailer*, FORBES (May 15, 2019, 5:50 PM), <https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/?sh=605741f4171c> (stating in 2019, Amazon officially surpassed Walmart as the world's largest retailer); see also Daniela Coppola, *Total revenue of Amazon Europe from 2011 to 2019*, STATISTA (Nov. 26, 2020), <https://www.statista.com/statistics/934963/revenue-of-amazon-europe/> (showing how the EU market comprised a significant portion of Amazon's global earnings).

159. Coppola, *supra* note 158, at 1 ("Amazon's European division is headquartered and registered in Luxembourg, since June 8, 2004, with registered branches in France, Germany, Italy, Spain and the United Kingdom.").

160. See, e.g., Mattioli, *supra* note 10, at 5 ("Former executives said they were told frequently by management that Amazon brands should make up more than 10% of retail sales by 2022.").

161. Hall, *supra* note 108, at 2 (invoking Jeff Bezos's argument that Amazon was not merely a retailer but a technology company that simplified online transactions for consumers).

independent sellers at a competitive disadvantage.<sup>162</sup> Dissimilar conditions occur in two ways – first, independent sellers incur several costs that Amazon does not, creating a dissimilar condition.<sup>163</sup> Second, because Amazon uses the data to create a better version of the product, it creates a dissimilar condition with sellers who cannot compete with Amazon's margins and resources, similar to the anticompetitive practices of O2CZ and T-Mobile CZ.<sup>164</sup> O2CZ and T-Mobile entered into a networking sharing agreement allowing free use of cell towers between O2CZ and T-Mobile CZ.<sup>165</sup> However, this presented a disadvantage for the smallest phone service provider in the region and created a dissimilar condition because O2CZ and T-Mobile CZ had access to a benefit that the smaller company did not.<sup>166</sup> Furthermore, the condition was dissimilar because the network sharing stifled competition between the phone service providers discouraging innovation and slowing the services provided.<sup>167</sup>

Like the mobile providers in the Czech Republic, Amazon enters into agreements that, at face value, seem beneficial but create an unfair competitive advantage for Amazon while harming competitors.<sup>168</sup> Similar to the phone service providers, Amazon has a large presence in the European market without the resource limitations of independent third-party sellers.<sup>169</sup> Similar to network sharing,

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162. See, e.g., Mattioli, *supra* note 10, at 6 (statement of Etailz CEO Kunal Chopra) (“We had a brand say they wanted to sell exclusively on Walmart, and when we proposed Amazon, they said they don’t want to risk private-label copying their product. . . .”); see also TFEU, *supra* note 8, art. 101 (providing that dissimilar conditions place trading parties at a competitive disadvantage).

163. Dudley, *supra* note 14, at 4 (“Amazon has an advantage over competitors because it doesn’t have to pay itself for the best placement . . . Brands pay between 10% and 30% of sales for a sponsored slot. . . .”).

164. See Mattioli, *supra* note 10, at 1, 4, 5 (detailing how Amazon uses data from sellers in strategy to promote private-label products); see also European Commission Press Release IP/19/5110, *supra* note 62, at 1 (reporting the Commission’s finding that the agreement between O2CZ and T-Mobile CZ gave the parties a competitive advantage over other phone service providers).

165. European Commission Press Release IP/19/5110, *supra* note 62, at 1.

166. See *id.* (explaining how the two larger companies cover all mobile technologies, servicing 85% of the population, while Vodafone does not).

167. *Id.*

168. See, e.g., Mattioli, *supra* note 10, at 5–7 (detailing one seller’s experience).

169. See Westerhoff, *supra* note 156, at 4 (stating that Germany, has over 300,000 merchants on the platform and accounts for 55-60 percent of Amazon’s overall

proprietary data collection creates an unfair advantage for Amazon.<sup>170</sup> The CZ mobile companies applied dissimilar conditions to competitors in the market by engaging in network sharing and gave them an unfair competitive advantage over the smaller company.<sup>171</sup> Like the CZ mobile companies, Amazon applies dissimilar conditions to the sellers by requiring proprietary data collection from them, giving Amazon an unfair advantage.<sup>172</sup>

The dissimilar condition of cost-effectiveness exists between what an independent seller must charge for a product and what Amazon needs to charge for a product.<sup>173</sup> Amazon can afford greater overhead costs and has significant access to resources.<sup>174</sup> Amazon can produce private-label items and earn all of the profit without cost, unlike the independent sellers.<sup>175</sup> By making the replicated products cheaper, Amazon is inherently driving business away from smaller independent business owners who cannot lower the cost of their product, especially in cases where it is the only product the seller has.<sup>176</sup> Independent best-sellers end up losing to Amazon's replicated, improved product.<sup>177</sup> Amazon owns a massive amount of physical space to mass-produce replicated products; this gives Amazon another advantage over

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sales); Coppola, *supra* note 158, at 1 (stating that in 2019, Amazon grossed approximately 32 million euros in revenue from the EU market).

170. See Mattioli, *supra* note 10, at 5, 6 (noting that Amazon collects proprietary sales data and that more than 1,000 Amazon Marketplace sellers have said Amazon sells private-labeled products that directly compete with their products).

171. See European Commission Press Release IP/19/5110, *supra* note 62, at 1 (finding that practices provided a benefit to the consumers using O2CZ and T-Mobile CZ that Vodafone customers did not have).

172. See Mattioli, *supra* note 10, at 5 (reporting that Amazon has a goal of controlling at least ten percent of the retail market by 2022).

173. See generally *Let's Talk Numbers*, *supra* note 132, at 1, 5–12 (listing all the fees independent sellers must incur to sell products on Amazon.com).

174. See Madrigal, *supra* note 116, 1, 2 (outlining the explosive growth of Amazon's warehouses, offices, retail stores, and data centers in recent years).

175. See *Let's Talk Numbers*, *supra* note 132, at 1, 5–12 (listing all the fees independent sellers must incur to sell products on Amazon.com).

176. See Dudley, *supra* note 14, at 1 (explaining how one seller's product was pushed out of the top spot by Amazon's competing product).

177. Kim, *supra* note 14, at 3 ("If you've got Amazon brands competing against you, it's just become that much more difficult to be competitive in the marketplace. . . .").

independent sellers by lowering overhead costs.<sup>178</sup> Furthermore, Amazon gathers proprietary data after the product has been created and entered into the market.<sup>179</sup> Again, this gives Amazon an advantage through access to data about what to fix about the product and what works even before the seller has a chance to edit or revise the product.<sup>180</sup>

Amazon owns the marketplace and therefore does not pay to market its own products.<sup>181</sup> Instead, Amazon markets its products and third-party seller products entirely at its discretion.<sup>182</sup> Independent sellers, however, pay to market their products in addition to other fees for selling on Amazon.<sup>183</sup>

Disney, similar to Amazon, created agreements with third-party entities that created unfair competition between third-party platforms and consumer location.<sup>184</sup> Disney restricted competition based on the location of EU consumers.<sup>185</sup> Streaming services should be equal

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178. Madrigal, *supra* note 116, at 1, 2 (“Amazon now has 288 million square feet of warehouses, offices, retail stores, and data centers.”).

179. See Mattioli, *supra* note 10, at 1–4 (explaining how Amazon begins collecting a seller’s proprietary data from the moment the item enters the marketplace, and the information is easily accessible to executives at Amazon).

180. See *id.* at 6–9 (detailing how one independent seller noticed that Amazon had a competing product within six months of the initial launch of the product).

181. See Dudley, *supra* note 14, at 3 (“During the [COVID-19] pandemic, Amazon has begun to use that position for its own private-label products, without bidding, under the heading ‘featured from our brands.’”); see also Kim, *supra* note 14, at 1 (reporting that sellers complain of seeing “Similar Items From Our Brands” as an alternative link at the bottom of the product page they are paying to sell their products on).

182. See Dudley, *supra* note 14 (“By putting its own private brands in some of the most valuable slots, Amazon is sacrificing short-term ad revenue to build up sales of its private brands over time, consultants said.”); see also Mattioli, *supra* note 10; Kim, *supra* note 14.

183. *Let’s Talk Numbers*, *supra* note 132; Dudley, *supra* note 14 (evidencing that sellers agree to give a part of the sales of all products to Amazon, while also paying for advertising space with Amazon); Kim, *supra* note 14 (noting that sellers on Amazon pay for advertising space and lose consumer opportunities to Amazon).

184. See European Commission Press Release IP/18/6346, *supra* note 68 (noting that Disney created unfair competition to consumers and third-party streaming platforms by limiting the access of EU Member State consumers in and out of the UK).

185. See *id.* (noting that EU consumers in the UK were offered different services and streaming channels than EU consumers streaming outside of UK, which is not

transactions across the EU and not limited or restricted.<sup>186</sup> Therefore, Disney created dissimilar conditions for the consumer by regulating the streaming service by location, giving Disney an unfair advantage over third-party networks as well.<sup>187</sup> Disney contractually created a difference in its streaming platform and limited the options of the consumer.<sup>188</sup> Amazon, similarly to Disney, restricted competition across the EU by enforcing agreements granting Amazon access to proprietary data collection used to replicate best-selling products, causing a chilling effect on independent third-party sellers.<sup>189</sup> Amazon restricted competition and limited consumer choice by forcing individual and third-party sellers out of the market.<sup>190</sup> Amazon created dissimilar conditions for the seller and consumer in what should be an equal transaction between Amazon and the seller.<sup>191</sup>

Amazon is a different platform than Disney and the phone service providers because Amazon created its own market.<sup>192</sup> Amazon serves to simplify the consumer transaction, which is why Amazon offers such a wide array of products.<sup>193</sup> Given that Amazon is an online

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to be confused with citizenship; rather, it is about EU Member State citizens who are all consumers under the Single Market).

186. See TFEU, *supra* note 8, art. 101 (prohibiting all agreements between undertakings which create unfair conditions between consumers based on their region and streamers who cannot access all consumers).

187. See European Commission Press Release IP/18/6346, *supra* note 68 (demonstrating that Disney forced third-party streaming services out of additional users by restricting the broadcasting of the third-party networks to geographic locations).

188. See *id.* (limiting the options of the consumer is inconsistent with competition practices in the Single Market in the EU; there was no benefit from the limitation); see also TFEU, *supra* note 8, art. 101.

189. See Mattioli, *supra* note 10 (evidencing that third-party sellers have begun taking retail offers to other places out of fear of being replicated by Amazon, and others have stopped creating for the marketplace, or lost a business altogether).

190. See Dudley, *supra* note 14 (noting that some sellers complained about the loss of profits being so significant that it could eventually lead to the demise of their business, an experience some smaller sellers have already had).

191. See TFEU, *supra* note 8, art. 101 (providing that dissimilar conditions occur when a party makes an otherwise equal transaction unequal).

192. Hall, *supra* note 108 (Amazon started as an online bookstore, then developed into an online marketplace where sellers of almost anything can use the marketplace); see also Mattioli, *supra* note 10 (evidencing that Amazon owns the marketplace and controls what goes on the market).

193. Hall, *supra* note 108 (being an online bookstore was only the beginning for

platform that simplifies consumer transactions, Amazon could claim an Article 101(3) exception.<sup>194</sup> Article 101(3) creates an exception to Article 101(1) violations if the violation brings technological and economic advances and does not hurt consumer choice.<sup>195</sup> Under Article 101(3), Amazon, as an online platform, may present economic advancement, and perhaps a technological advancement, as a greater benefit than harm to the market.<sup>196</sup> Furthermore, Amazon could claim that replicating products does not hinder consumer choice, but rather encourages choice because the consumer is presented with additional options in the market.<sup>197</sup>

However, regardless of any economic advances made by Amazon, such advances are losses for sellers on the marketplace.<sup>198</sup> Moreover, the technological advances are small in comparison to the distortion of the market.<sup>199</sup> When considering an Article 101(3) exception, the

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the ambitious platform, which later entered the web services and cloud storage sectors); *see also* Mattioli, *supra* note 10 (noting that Amazon wants to make up ten percent of the retail sales on the marketplace platform by 2022; this reflects the rapid growth Amazon desires and has been able to carry out).

194. *See* TFEU, *supra* note 8, art. 101 (providing that Article 101(3) carves out an exception to Article 101(1), but it is narrow and only for significant breakthroughs in the economy and for the enhancement of technology); *see generally* TFEU, *supra* note 8 (implementation of the Articles is provided for in the TFEU).

195. TFEU, *supra* note 8, art. 101; *see also* Parenti, *supra* note 6 (evidencing that consumer choice is important in the Single Market since consumers must have the ability to choose between different products on the market; high quality, top items are one option, while other generic, more affordable products are another).

196. *See* Hall, *supra* note 108 (demonstrating that as an online marketplace with its own private label, various tech devices, and cloud and web services, Amazon has created tech advancements offered at low prices, supporting a claim of economic advancement).

197. *See* Mattioli, *supra* note 10 (noting that Amazon has over 243,000 products on the marketplace, not including what Amazon offers outside of the traditional online marketplace, giving the consumer endless options).

198. *See* Kim, *supra* note 14 (noting that sellers are nervous about the loss of sales to Amazon because Amazon advertises as a cheaper, comparable alternative); *see also* Dudley, *supra* note 14 (providing that sellers repeatedly expressed frustration about paying for advertising, only to learn that Amazon reserved the top slot for its own products); Mattioli, *supra* note 10 (noting that product developers opted to go with Walmart instead of Amazon out of fear of product replication).

199. *See Let's Talk Numbers*, *supra* note 132 (noting that sellers pay several costs and fees to sell on the marketplace and the margins for independent sellers are significant compared to Amazon, who provides a marketplace and now additionally profits from private-label production).

benefits must be greater than the cost.<sup>200</sup> Amazon costs a great deal to sellers on the platform and gains a significant advantage within its own market.<sup>201</sup> Amazon also costs consumers because when small businesses can no longer compete, Amazon becomes the only option.<sup>202</sup> Additionally, a typical customer will opt for the cheaper item, often causing a decrease in overall quality.<sup>203</sup> Even if Amazon had enough benefits to raise a claim to Article 101(3), the harms under Article 101(1) are too significant.<sup>204</sup>

## B. AMAZON IS IN VIOLATION OF ARTICLE 102(C)

Article 102 addresses abuse by an entity engaged in undertakings from a dominant position within the internal market.<sup>205</sup> Article 102 prohibits abuse of dominance in the market.<sup>206</sup> Article 102(c) specifically prohibits abuse by dominant entities where dissimilar conditions are applied to equivalent transactions, placing the smaller

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200. See Parenti, *supra* note 6 (suggesting that Article 101(3) specifies the advancements that are needed and since anticompetitive agreements are highly scrutinized, the burden lies with Amazon to prove the advancements outweigh the costs); see also TFEU, *supra* note 8, art. 101.

201. See Mattioli, *supra* note 10 (demonstrating that in order to have sales, Amazon must take away sales from independent makers); see also Dudley, *supra* note 14 (noting that sellers are unable to advertise in the highest slot because it is reserved for Amazon, and consumers see Amazon's product as the first in the listing); Kim, *supra* note 14 (noting that sellers are facing direct competition from the place that they market, drawing away sales and making it hard to compete).

202. See Dudley, *supra* note 14 (evidencing that Amazon will force other sellers off the market, leaving no other choice than Amazon, and since it is the more affordable option, it effectively becomes the only option; consumers are hurt by the limited quality options).

203. See Mattioli, *supra* note 10 (evidencing that Amazon, by making a cheaper product, affects the quality and care of small businesses who develop the product); see also Dudley, *supra* note 14 (suggesting that not allowing others to advertise in the top slot is a hindrance to competition, but also causes potentially higher quality products to be demoted because they are never featured).

204. See TFEU, *supra* note 8, art. 101 (demonstrating how under Article 101(1), Amazon created a system that is too harmful because sellers cannot fairly compete with Amazon).

205. TFEU, *supra* note 8, art. 102 (providing that Article 102 prohibits dissimilar conditions as well as abuse of an advantageous position in the market).

206. See Parenti, *supra* note 6 (“Dominant positions are assessed in relation to the internal market as a whole. . . . How much of the market . . . will depend on the nature of the product, availability of alternative products, and consumers’ behaviour and readiness to switch to alternative products.”).

entities at a competitive disadvantage.<sup>207</sup>

Amazon, by requiring proprietary data collection from independent sellers in order to use its marketplace, abuses its dominance by using the data to gain a competitive advantage over independent sellers.<sup>208</sup> Again, charging independent sellers to advertise on the platform while simultaneously replicating their products is an abuse of the market.<sup>209</sup>

Amazon is an undertaking because it is an online platform engaged in economic activity in the EU.<sup>210</sup> Controlling roughly forty percent of the retail market qualifies Amazon as a substantial part of the market.<sup>211</sup> Amazon's engaging as a seller in the marketplace also constitutes an economic activity within the EU.<sup>212</sup> Amazon earned over thirty-two billion Euros in 2019, so at the very least, Amazon is involved with economic activity in the EU.<sup>213</sup> Amazon unquestionably impacts trade between Member States and under its current practices is inconsistent with Article 102(c).<sup>214</sup>

Abuse in a dominant position means applying dissimilar conditions

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207. *See id.* (providing that dissimilar conditions are any restrictions, concerted practices, or agreements that give one party an unfair advantage over the other).

208. *See* Mattioli, *supra* note 10 (noting that Amazon argues the data is not used improperly, but former and current executives argue it is regular practice to use data to replicate products).

209. *See* TFEU, *supra* note 8, art. 101; *see also* Mattioli, *supra* note 10 (demonstrating how Amazon not only charges sellers for access to the platform but then takes away sales by producing private-label replicas).

210. *See* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13 (“... Article 102 outlaws abuses by dominant companies.”).

211. *See* Tugba Sabanoglu, *Third-Party Seller Share of Amazon Platform 2007-2020*, AMAZON VIA STATISTA (Feb. 11, 2021), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/> (showing that in the first quarter of 2020, 52 percent of paid units on Amazon's marketplace were by third-party sellers; units sold on the platform are not exclusive to small businesses).

212. *See* EUROPEAN COMMISSION COMPETITION REPORT, *supra* note 38, at 13 (selling goods in an online marketplace, is economic activity, which is an undertaking, and therefore Amazon is engaged in economic activity in the EU).

213. Coppola, *supra* note 158 (demonstrating Amazon's total revenue from the EU, alluding that the company has a dominant position in the Single Market); *see also* Sabanoglu, *supra* note 211.

214. *See* Westerhoff, *supra* note 156 (demonstrating that Amazon has a significant position in the Single Market in the EU); *see also* TFEU, *supra* note 8, art. 102 (evidencing that Amazon abuses its position in the market whenever it creates dissimilar conditions between undertakings).

to equivalent transactions with other trading parties.<sup>215</sup> If Amazon did not collect proprietary data, the competition would be fairer, but this data allows Amazon to see the good and bad qualities of products before creating their replicas.<sup>216</sup> Additionally, Amazon has access to ideal price points, costs of labor, and materials while the unsuspecting independent seller is still paying to advertise and sell on Amazon.<sup>217</sup> Amazon can make a better, more affordable product more cheaply than the independent sellers whose data Amazon collects and uses to replicate the product; this practice is highly unfair and deviates from the practices of traditional brick and mortar entities.<sup>218</sup> Amazon developed the marketplace and, through private-label products, situates itself for complete control of the market in a manner inconsistent with Article 102(c).<sup>219</sup>

Google has repeatedly created dissimilar conditions from a position of dominance in the market violating Article 102.<sup>220</sup> For instance, Google bumps competitor listings down to bolster its own products.<sup>221</sup> Google, after creating Froogle, bumped competitor shopping networks down the list in favor of its own network.<sup>222</sup> Additionally, when

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215. See TFEU, *supra* note 8, art. 102 (dissimilar conditions occur when one undertaking gains an unfair competitive advantage in the market by way of agreement, arrangement, or some alternative construction); see also Parenti, *supra* note 6.

216. See Mattioli, *supra* note 10 (noting that it is a regular business practice to compare best-selling products to a model Amazon creates; Amazon searches the customer reviews and obtains other feedback about the product before going forward on production).

217. See *id.* (Amazon is replicating products to increase its own value in the market); see also Dudley, *supra* note 14 (noting that Amazon intentionally solicits consumers away from sellers and continues to charge for advertising and other associated fees).

218. See Mattioli, *supra* note 10; see also Dudley, *supra* note 14 (demonstrating that Amazon collects data on its competition that normal brick and mortar entities cannot gather, thus creating a new marketplace with no regulation).

219. See TFEU, *supra* note 8, art. 102 (providing that Article 102 explicitly deals with abusing a dominant position in the Single Market, creating dissimilar conditions between undertakings);

220. See Condliffe, *supra* note 18 (noting that Google has been fined over two separate times for abusing dominance in the market: promoting its own shopping network over others and favoring its own search engine over others).

221. See *id.* (noting as well that the continued fines have not stopped Google from engaging in anticompetitive practices within the Single Market).

222. *Id.* (discussing how Google bumped down competitor listings in hopes of

contracting with third parties and manufacturers, Google required exclusive engagement with Google applications prior to allowing service providers the license to Android software and Android forks, which are non-Google Android programs.<sup>223</sup> This runs parallel to Amazon's practice of requiring data collection prior to access to the platform.<sup>224</sup> Additionally, Google's practice of promoting its shopping network while simultaneously demoting its competitors matches the behavior of Amazon using its own platform to promote its private-label products over the products of third-party sellers.<sup>225</sup>

In 2004, the EU accused Microsoft of abusing its dominance in the market and, after Microsoft failed to comply with a settlement agreement, fined Microsoft and demanded that the Windows operating system be remedied to be consistent with the terms of the settlement agreement.<sup>226</sup> Microsoft, like Amazon, favored its own products in the market, so much so that competitors could not even challenge the Windows operating system.<sup>227</sup> Amazon sellers, like Microsoft competitors, cannot compete in a rigged system and eventually die out without legal remedy.<sup>228</sup>

In 2009, the EU faced abuse in the market by Intel. For roughly five years, Intel created a computer chip rebate program that offered

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generating more favorable outcomes for itself).

223. European Commission Press Release IP/18/4581, *supra* note 84 (noting that service providers could not get permission to sell alternative versions of Android without approval, but approval was based solely on downloading Google applications).

224. *See* Westerhoff, *supra* note 156; *see also* Dudley, *supra* note 14 (demonstrating how Amazon bumps listings like Google by reserving the top slot for itself); Kim, *supra* note 14 (noting that Amazon bumps competitor listings by offering its own products on competitors' listings).

225. *See* Mattioli, *supra* note 10 (showing how Amazon only varies slightly when compared to Google, but not enough to create a different outcome; Amazon sellers are hindered the same way Google's competitors were).

226. Castle & Jolly, *supra* note 98 (noting how Microsoft violated Article 102 twice by not allowing other operating systems a chance to compete with the Windows operating system, and even though Microsoft settled, it did not comply with the terms); Condliffe, *supra* note 18.

227. Castle & Jolly, *supra* note 98 (noting that Microsoft was forced to change the operating system to be fairer to competitors who could not get their programs to work within the Windows system).

228. *See id.* (evidencing that it took years and multiple punitive fines by the Commission to finally get Microsoft to follow the terms of the 2004 judgment).

significant discounts for purchasing exclusively with Intel. From the success of the rebates, Intel controlled seventy percent of the computer chip market.<sup>229</sup> Amazon, like Intel, creates discounted versions of the independent sellers' products, and with an Amazon Prime membership, entices the consumer further with free, two-day shipping and other services that small companies and individuals cannot provide.<sup>230</sup>

In 2017, Facebook abused its place in the internal market by combining Facebook user data with data from WhatsApp.<sup>231</sup> Facebook previously testified to the Commission that Facebook would not merge the data between the two applications, but did so later.<sup>232</sup> Facebook, making its money in adverts, abused its position of dominance to gain an advertising advantage over other social media and advertising-based platforms.<sup>233</sup> Amazon, a company with significant interest in advertising, has limited the advertising ability of its sellers and collected proprietary data, giving itself a significant advantage by exploiting user data.<sup>234</sup> As a consequence of violating Article 102, each company in the above-mentioned cases was forced to pay a fine, cease the abusive practice, or both.<sup>235</sup>

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229. Condliffe, *supra* note 18 (Intel controlled seventy percent of the market by offering rebates to returning customers who refused to shop anywhere else, preventing other chip makers from engaging in the market).

230. *Amazon Stores Around the World*, *supra* note 120 (Amazon's fulfillment service certifies items under Prime, but, after production replication, Amazon offers Prime on its item undercutting the seller).

231. Condliffe, *supra* note 18 (noting that Facebook merged the data of users between the two apps after the acquisition, despite testifying that it intended to do the very opposite, giving itself an advertising advantage).

232. *Id.* (noting that Facebook merged the data after explicitly stating on the record it had no intention to do so and subsequently received a fine for the malfeasance).

233. *Id.* (noting that after purchasing Whatsapp, Facebook merged that data between the two, creating an advertising advantage between the platforms for Facebook; prior to the merge, Facebook made its money by advertising and leasing advertising space on the platform to target users).

234. *See* Dudley, *supra* note 14 (noting that Amazon previously sold all advertising slots, including the coveted top left slot, but now competitors can only advertise in slots not reserved for Amazon).

235. *See* Condliffe, *supra* note 18 (noting that Microsoft, Intel, and Facebook received fines for abusive practices and must stop the anticompetitive practice).

## IV. RECOMMENDATIONS

### A. RECOMMENDED ACTION FOR THE EUROPEAN COMPETITION NETWORK

The European Competition Network (ECN) is a specialized unit within the EU that has the authority to investigate and address anticompetitive practices in the EU.<sup>236</sup> The ECN is made up of the National Competition Authority (NCA) within the Member States of the EU.<sup>237</sup> The NCA can conduct its own investigations, but the ECN can relieve the NCA of its investigation if the ECN takes over.<sup>238</sup> The ECN should send official correspondence to the EU members detailing action to be taken against Amazon.<sup>239</sup> First, the EU should collectively sue Amazon with a binding agreement that no member state will settle prior to the outcome of the lawsuit.<sup>240</sup> Germany formally inquired about Amazon's business practices but settled prior to obtaining any legally binding substantive goals for the EU.<sup>241</sup> The EU is a large central governing body made up of several member states, each of which could settle prior to the conclusion of the suit

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236. Eur. Comm'n, *Competition: European Competition Network*, EUROPA (2020), [https://ec.europa.eu/competition/ecn/index\\_en.html](https://ec.europa.eu/competition/ecn/index_en.html) ("The European Commission and the national competition authorities in all EU Member States cooperate through the European Competition Network (ECN).").

237. Eur. Comm'n, *Competition Antitrust Overview*, *supra* note 6 ("National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted.").

238. *See* Eur. Comm'n, *Competition: European Competition Network*, *supra* note 236 ("Through the ECN, the competition authorities inform each other of proposed decisions and take on board comments from the other competition authorities.").

239. *See id.* (suggesting that Amazon has violated the TFEU across multiple borders and it is proper for the ECN to confront the anticompetitive practices).

240. *See* CNBC Tech, *Amazon in deal with German watchdog to overhaul marketplace terms*, CNBC (July 17, 2019), <https://www.cnbc.com/2019/07/17/amazon-in-deal-with-german-watchdog-to-overhaul-marketplace-terms.html> (noting that Germany settled after Amazon made promises to change contractual arrangements with third-party sellers; however, the concessions are not legally binding, nor do they prevent proprietary data collection and Interbrand competition).

241. *Id.*; *see also* Westerhoff, *supra* note 156 ("Amazon did not commit to anything hindering its ability to engage in interbrand competition. . . . However, as noted above, the FCO's case may be more hype than substance, with rather limited effects, raising new problems in terms of lack of guidance and deterrence effect.").

which would fail to hold Amazon to account.<sup>242</sup>

The Legislative Council of the EU should propose new legislation that specifically regulates expanding online marketplaces and proprietary data collection.<sup>243</sup> Third-party proprietary data collection is unnecessary and violates the privacy of independent sellers and creators.<sup>244</sup> The legislation would be akin to the legislation created by the Council to regulate individual personal data collection.<sup>245</sup> If the legislation is as exhaustive as the regulation regarding personal data collection, then it will further limit unfair contracting practices between sellers and Amazon.<sup>246</sup> First, the regulation will prohibit contractual arrangements that involve an exchange of proprietary data for access to the dominant marketplaces.<sup>247</sup> Second, if the collection is necessary, (consistent with the exception outlined in Article 101(3) of the TFEU) then the data collected must be on a secure cloud drive that is inaccessible to employees outside of evaluation departments, and all employees must be contractually bound to keep the data confidential.<sup>248</sup> Third, in the interest of protecting the principles of competition, a producer of a marketplace should be prohibited from creating private-label versions of existing products on that market.<sup>249</sup>

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242. See Gabel, *supra* note 20 (stating that each Member State has its own government system and NCA board, therefore collective action prevents individual settlement).

243. See Eur. Comm'n, *Data Protection in the EU*, EUROPA (2020), [https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en) ("Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.").

244. See *id.* (noting that personal data is fundamentally protected, and business secrets should be extended similar protection, as this will secure competition in the market).

245. See *id.* (evidencing that the individual person in the EU is protected under specific data laws and rights which should be extended to protect small sellers).

246. See *id.* (providing that the legislation itself provides for several different occurrences of data collection; it is practical to introduce legislation consistent with protecting small business owners).

247. TFEU, *supra* note 8, arts. 101–02 (demonstrating that prohibiting anticompetitive agreements is a good starting point, but it is reactive rather than proactive).

248. See Mattioli, *supra* note 10 (suggesting that access to proprietary data was supposed to be limited in use by Amazon executives, consequently additional measures must ensure going forward that data remains confidential).

249. See *id.* (demonstrating that Amazon's business model—creating the market then creating private-label products—does not foster legitimate competition;

Additionally, a complaint system should be established through the ECN for anyone who believes their proprietary data was used unfairly.<sup>250</sup> The system should have a built-in, monitoring structure for periodic review, approximately every five years, of the actions of those found to have violated the anti-competition laws previously as a self-check to prevent further abuse.<sup>251</sup>

## B. THE EU SHOULD COLLECTIVELY SUE AMAZON IN THE EUROPEAN COURT OF JUSTICE

The TFEU, by way of Protocol No. 27, can gather the Member States and file a lawsuit against Amazon for violating Articles 101(1)(d) and 102(c) of the TFEU.<sup>252</sup> The European Court of Justice is the highest arbiter of lawsuits in the EU.<sup>253</sup> The European Court of Justice would oversee the proceedings and make the proper determination of damages for Amazon's anticompetitive behaviors.<sup>254</sup> Additionally, the Court could give other remedies consistent with a comprehensive ban on private-label replication.<sup>255</sup>

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instead, it creates more revenue for Amazon while eliminating third-party, small competitors).

250. See *European Parliament Commission on Economic and Monetary Affairs Study on Collective Redress in Antitrust*, at 19–23, IP/A/ECON/ST/2011-19 (June 2012) (demonstrating how all comments must go through the official ECN or the NCA of the respective Member State; however, instead of going through the Member State, the ECN or NCA should have an EU system outside of the Member States).

251. See Castle & Jolly, *supra* note 98; see also Condliffe, *supra* note 18 (demonstrating that Microsoft is not an outlier; many companies tend to be repeat offenders, so having regular checks could serve as a better deterrent for repeat offenders and larger dominant entities).

252. See TFEU, *supra* note 8, Protocol No. 27.

253. See Udo Bux, *Fact Sheets on the European Union: The Court of Justice of the European Union*, EUROPA (2020) [www.europarl.europa.eu/factsheets/en](http://www.europarl.europa.eu/factsheets/en) (“The Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.”).

254. See *id.* (stating that the Court's job is to interpret EU law, and therefore the decisions regarding Amazon should be interpreted by the Court to set the proper remedy and precedent).

255. See Westerhoff, *supra* note 156 (noting how Germany did not secure legal obligations from Amazon; therefore, the Court can issue a judgment against Amazon with recurring penalties should Amazon fail to comply).

### C. THE EU SHOULD CREATE A GRANT PROGRAM FOR INDEPENDENT SELLERS AND ONLINE MARKETPLACES

Derived from the judgment for Amazon's violation of the TFEU, the EU should develop a grant program awarding small online marketplaces supplementary support to compete in the internal market.<sup>256</sup> Product development, including marketing, is a significant part of the appeal of a platform like Amazon.<sup>257</sup> If grants were issued to level the playing field, then other online platforms could be available and offer the marketing opportunity and customer base to compete with Amazon's marketplace.<sup>258</sup>

The grants will ensure Amazon faces competition in the EU market to prevent Amazon from creating a market and then controlling it.<sup>259</sup> If Amazon faces competition over attracting independent sellers, then Amazon will feel encouraged, at the very least, to follow the provisions of the TFEU.<sup>260</sup> With multiples factories in several member states of the EU, Amazon has grown to be a major retailer in the EU.<sup>261</sup> Additional grant awards would be issued to creative new mediums which simplify the consumer transaction while providing the consumer with quality options and affordability.<sup>262</sup>

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256. See *European Parliament Commission on Economic and Monetary Affairs Study on Collective Redress in Antitrust*, *supra* note 250, at 38–42 (noting that legal redress is challenging and the infrequent payouts do not result in creating competition; rather, they remedy an inability to compete).

257. See Dudley, *supra* note 14 (noting that sellers regularly purchased the top slot for advertising on the platform); see also *Amazon Stores Around the World*, *supra* note 120 (demonstrating why sellers desired access to the world's largest retailer).

258. See Mattioli, *supra* note 10 (showing that Amazon does not face significant competition for an online seller platform; while some go to other major retailers like Walmart, there are no platforms to compete with Amazon).

259. See *id.* (noting that despite humble beginnings, Amazon has grown with over 243,000 private-label products, and Amazon has created a market and is trying to control the sales on the market, too).

260. See *id.* (evidencing that Amazon expressed worry over growing antitrust concerns and whether the industry, including Amazon, should be regulated).

261. See Madrigal, *supra* note 116 (noting that Amazon is the owner of the largest retail facility in the world and that this has only expanded Amazon's retail sales and private-label creation); see also *Amazon Stores Around the World*, *supra* note 121.

262. See Madrigal, *supra* note 116 (Amazon offers a simplified consumer experience with several advancements for the consumer, but at a significant cost, so, consequences will incentivize Amazon to comply with the rules).

## V. CONCLUSION

Amazon is in violation of EU competition law by requiring proprietary data collection from sellers for access to its massive global platform. Amazon uses this collected data to directly compete with independent sellers by replicating the best-selling products and directly advertising them under the private-label products. Amazon offers these private-label products as a more affordable alternative, placing unfair and dissimilar conditions on equal transactions. It is an abuse of power for one of the largest global online retailers to create a market, force sellers to hand over data in order to replicate certain products, and resell them cheaply. Amazon is engaging in anticompetitive behavior, inconsistent with the TFEU, specifically in violation of Articles 101(1)(d) and 102(c). Thus, the EU should collectively sue Amazon and ban private-label product replication in the EU to protect competition in the internal market.