
FTC Files Landmark Monopoly Suit Against Amazon

In a complaint filed on September 26, 2023,¹ the Federal Trade Commission (“FTC”), along with the attorneys general of 17 states,² sued online retail giant Amazon.com, Inc., alleging that Amazon illegally uses its monopoly power to inflate prices, harm sellers, and weaken competition in violation of antitrust laws. The dispute could affect tens of millions of American families, thousands of businesses and products, and more than one hundred million online shoppers.³ The 172-page complaint alleges that Amazon engages in unlawful monopoly maintenance and unfair methods of competition in violation of Section 2 of the Sherman Act, which prohibits acquiring or maintaining monopoly power, or attempting to do so, through improper means; Section 5(a) of the FTC Act, which prohibits unfair competition; and various state antitrust laws.⁴ The FTC is seeking an injunction prohibiting the allegedly unlawful behavior and may advocate for structural relief, which could include a breakup of the company.

The FTC alleges that Amazon illegally maintains monopoly power in the “online superstore” and “online marketplace services” markets through anti-discounting and tying measures.⁵ These efforts allegedly include “burying” certain products in search results, withholding certain display features for products of sellers that offer lower-priced items on rival platforms, and restricting eligibility for Amazon’s “Prime” program to sellers that use Amazon’s fulfillment services.⁶ According to the FTC, Amazon seeks to “prevent rivals from gaining the scale they need to meaningfully compete.”⁷ This exclusionary conduct, the FTC alleges, creates feedback loops⁸ that stifle price competition, production selection, and quality, increasing prices on consumers and harming competition among sellers.⁹

Relevant Markets

The FTC alleges that Amazon has monopoly power in the online superstore and online marketplace services markets in the United States. The online superstore market consists of platforms that “provide shoppers a unique offering: 24/7 access [from any location with internet access] to a broad and deep product selection

¹ Complaint ¶¶ 444, *FTC, et al. v. Amazon*, No. 2:23-cv-01495 (W.D. Wash. Sept. 26, 2023) (“Compl.”), https://www.ftc.gov/system/files/ftc_gov/pdf/1910129AmazonCommerceComplaintPublic.pdf.

² States joining the lawsuit include Connecticut, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Wisconsin.

³ Press Release, *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FTC, Sept. 26, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>.

⁴ Compl. ¶¶ 447, 455, 462, 470.

⁵ *Id.* ¶ 257.

⁶ *Id.* ¶¶ 5, 257–60.

⁷ *Id.* ¶ 7; Press Release, *supra* note 3.

⁸ A feedback loop occurs when the output of a system is used as input for future operations of the same system. For example, a company reinvests sales revenue to generate additional income.

⁹ Compl. ¶ 7; Press Release, *supra* note 2.

accompanied by a distinct set of features that meaningfully reduce the time and effort shoppers expend online.”¹⁰ The online marketplace services market consists of a distinct set of services that provides sellers with access to a base of shoppers, a product-search interface that displays sellers’ products, the ability for sellers to set prices for their goods and create and maintain product-detail pages, and the ability for sellers to display customer-generated ratings and reviews.¹¹ According to the FTC, the scale of, and relationship and feedback loops between, the two markets create barriers to entry and have significant network effects, limiting the ability of rivals to compete.¹² Amazon’s online superstore customers attract sellers who buy marketplace services; as more sellers offer a diverse range of products and services, more customers are drawn to the marketplace, and vice versa.¹³ Amazon’s share of the overall value of goods sold by online superstores is over 60% and growing, and its share of gross merchandise value is over 69%.¹⁴ Two additional, self-reinforcing dynamics strengthen Amazon’s market position: customers’ product reviews and customer data. By leaving product reviews, customers provide value to future buyers who seek out and rely on them.¹⁵ Customer data concerning searches, views, and purchases let Amazon identify customer preferences and personalize the shopping experience.¹⁶ Reputational barriers to entry and switching costs are also high, as Amazon encourages repeat buying and aids the shopping experience by saving payment, shipping, and past order information.¹⁷

Alleged Anticompetitive Conduct

The FTC alleges that Amazon maintains monopolies¹⁸ in the online superstore and online marketplace services markets through anti-discounting and tying measures.¹⁹

First, according to the FTC, Amazon “buries” products of third-party sellers that offer lower-priced items on rival platforms. The FTC claims that Amazon buries products by “demoting” them so far down in the search results that they “become effectively invisible.”²⁰ The FTC further claims that Amazon will disqualify a seller’s product from the “Buy Box,” a display feature on the product detail screen that allows a customer to “Add to Cart” or “Buy Now.”²¹

¹⁰ *Id.* ¶¶ 126, 134–38 (Key features include “sophisticated filtering and discovery tools;” research abilities, including customer generated ratings and reviews; and a convenient checkout and delivery experience.).

¹¹ *Id.* ¶ 186.

¹² *Id.* ¶¶ 210–16 (“Prospective entrants to both [online superstore and online marketplace services] markets face a chicken-and-egg problem: they need to attract enough sellers to offer sufficient product selection to attract shoppers, but they simultaneously also need to generate enough shopper traffic to attract those sellers This continuous loop creates a barrier to entry in both markets and accelerates the growth of firms that can overcome it.”).

¹³ *Id.* ¶¶ 119; 214 (“Amazon leverages these network effects Sellers who buy marketplace services from Amazon provide much of the product selection that helps Amazon attract and keep its shoppers. As more shoppers turn to Amazon for its product selection, more sellers use its platform to gain access to its ever-expanding consumer base, which attracts more shoppers, and so on.”).

¹⁴ *Id.* ¶¶ 166, 170.

¹⁵ *Id.* ¶ 179.

¹⁶ *Id.* ¶ 180.

¹⁷ *Id.* ¶ 182.

¹⁸ According to the FTC, Amazon has profitably raised prices on sellers, including through “pay-to-play advertisements,” and “degraded” customer service by providing customers with less relevant search results steered toward more expensive products. *Id.* ¶¶ 5, 248–50. In fact, Amazon continues to have double-digit growth in sales. *Id.* ¶ 238. This, according to the FTC, demonstrates Amazon’s monopoly power, as, otherwise, rivals would “attract business, gain momentum, and grow.” *Id.* ¶¶ 6, 228.

¹⁹ *Id.* ¶¶ 257, 260.

²⁰ *Id.* ¶ 283; Press Release, *supra* note 3.

²¹ Compl. ¶¶ 16, 269 (The FTC alleged that Amazon maintains contractual requirements for certain sellers that threaten “not just banishment from the Buy Box, but total exile from Amazon’s Marketplace” if they are “caught” offering lower prices on other websites.”).

This has the potential to significantly decrease a product's sales.²² According to the FTC, these anti-discounting measures create an artificial price floor on Amazon and on rival platforms because sellers then offer products on non-Amazon platforms for at least the same price as on Amazon.²³ This allegedly prevents rival platforms from offering lower prices than Amazon, punishes sellers seeking to offer lower prices, constrains the growth of other platforms, and forces customers to pay inflated prices on and off Amazon.²⁴ The FTC asserts that Amazon uses a "price-surveillance group" that monitors the internet for Amazon sellers offering lower-priced products on rival platforms.²⁵

Second, according to the FTC, Amazon restricts "Prime" eligibility to sellers that use Amazon's fulfillment services.²⁶ Amazon offers Prime, a subscription program charging \$14.99 per month, where customers receive – among other benefits – free two-day shipping on eligible items.²⁷ Sellers who are "Prime eligible" receive a Prime badge, making their products more discoverable and thus more likely to sell, "while sellers who forgo Prime eligibility effectively disappear from Amazon's storefront."²⁸ Amazon also sells fulfillment services ("Fulfillment by Amazon" or "FBA"), which sellers can use to fulfill orders placed by Amazon customers.²⁹ FBA services include "storing, picking (retrieving from storage), packaging, and preparing items" purchased online for delivery.³⁰ According to the FTC, by tying sellers' Prime eligibility to their use of FBA, when cheaper fulfillment options are available, Amazon "exploits sellers' demand" for Prime eligible products.³¹ It forces sellers to "relinquish physical control over their products" and maintain separate inventories for Amazon and non-Amazon customers, raising their costs of selling on multiple online superstores and marketplaces.³² The FTC argues that this conduct makes it more difficult for other online superstores to compete with Amazon, attract customers, and expand their product offerings, and for other fulfillment services to compete with FBA.³³

Conclusion

This action is the FTC's fourth lawsuit against Amazon since May 2023³⁴ and illustrates the FTC's aggressive enforcement of the antitrust laws. There are also indications that increased regulatory scrutiny has already affected the policies of multinational technology companies. For example, earlier this month Amazon

²² *Id.* ¶ 16 (According to the FTC, "eliminating a seller from the Buy Box causes that seller's sales to 'tank.'").

²³ *Id.* ¶ 17.

²⁴ *Id.* ¶¶ 257–58.

²⁵ *Id.* ¶ 263.

²⁶ *Id.* ¶¶ 259, 395.

²⁷ *Id.* ¶¶ 98–100.

²⁸ *Id.* ¶¶ 26 ("According to public reports, [Amazon founder] Mr. [Jeff] Bezos told Amazon executives that Prime was created in 2005 to "draw a moat around [Amazon's] best customers."), 352, 359. "Prime subscribers account for an overwhelming share of all purchases on Amazon Prime subscribers also disproportionately purchase Prime-eligible offers." *Id.* ¶ 358.

²⁹ *Id.* ¶ 108.

³⁰ *Id.* ¶ 109.

³¹ *Id.* ¶¶ 354, 355, 357, 364–65.

³² *Id.*

³³ *Id.* ¶¶ 257, 260 (According to the FTC, "[e]ach element of Amazon's course of conduct mutually reinforces its monopolies in both relevant markets Amazon's anti-discounting scheme stifles price competition . . . [and] reinforces the exclusionary effects of Amazon's use of Prime eligibility to force sellers to use FBA, by making it even less profitable for sellers to sell on other marketplaces. This feedback loop fuels a flywheel of anticompetitive harm, amplifying the aggregate effects and further widening the gulf between Amazon and everyone else."), 366–67, 375–76.

³⁴ Complaint, *FTC, et al. v. Ring LLC*, No. 1:23-cv-1549 (D.D.C. May 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/complaint_ring.pdf; Complaint, *United States v. Amazon, et al.*, No. 2:23-cv-00811 (W.D. Wash. May 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Amazon-Complaint-%28Dkt.1%29.pdf; Complaint, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-00932 (W.D. Wash. June 21, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/amazon-rosca-public-redacted-complaint-to_be_filed.pdf.

discarded plans to raise fees for marketplace sellers that do not use its shipping service, possibly to avoid further antitrust scrutiny.³⁵

Additionally, Amazon agreed last year to certain structural changes in a settlement with the European Commission (“EC”) over allegations that it used non-public business data from independent sellers to advance its own retail operations.³⁶ The EC also alleged anticompetitive conduct involving Amazon’s “Buy Box” and “Prime” features, similar to the FTC’s claims.³⁷ As part of the settlement, Amazon agreed to no longer use non-public seller data, revise its “Buy Box” policies, and allow Prime sellers to select any carrier for logistics and delivery.³⁸ In 2021, Amazon reached a similar settlement with Italian antitrust authorities.³⁹ Not all of these changes have been implemented, and it is too early to fully assess their impact or whether they provide a roadmap to a potential FTC-Amazon settlement.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Lauren Rackow (counsel) at 212.701.3725 or lrackow@cahill.com; or Ryan M. Maloney (associate) at 212.701.3269 or ryan.maloney@cahill.com; or email publications@cahill.com.

³⁵ Spencer Soper, *Amazon Scraps Planned Merchant Fee With Antitrust Suit Looming*, BLOOMBERG, Sept. 20, 2023, <https://www.bloomberg.com/news/articles/2023-09-20/amazon-scraps-planned-merchant-fee-amid-antitrust-scrutiny#xj4y7vzkg>.

³⁶ Press Release, *Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime*, EUROPEAN COMMISSION, Dec. 20, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Elvira Pollina and Maria Pia Quaglia, *Italy fines Amazon record \$1.3bln for abuse of market dominance*, REUTERS, Dec. 9, 2021, <https://www.reuters.com/technology/italys-antitrust-fines-amazon-113-bln-euros-alleged-abuse-market-dominance-2021-12-09/>.

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