



Insight

# Antitrust Litigation Against Amazon's Online Marketplace

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## Executive Summary

- On Tuesday, the Federal Trade Commission and 17 state attorneys general filed an expansive antitrust case against tech giant Amazon arguing that a variety of the company's practices violate federal antitrust laws and harm competition online.
- The courts will examine the alleged anticompetitive conduct and weigh that against the procompetitive effects, as fierce competition among sellers can lower prices and increase the quality of services; if the courts determine that Amazon's conduct produces anticompetitive harms that outweigh the potential benefits, they can stop these practices under current antitrust law.
- Congress should not pass legislation targeting firms such as Amazon on the basis of size alone and instead should allow the courts to continue weighing these harms and benefits.

## Introduction

On Tuesday, the Federal Trade Commission (FTC) and 17 state attorneys general filed [the long-awaited antitrust case against Amazon](#), arguing that the firm has violated Section 5 of the FTC Act and Section 2 of the Sherman Act by illegally [maintaining a monopoly](#) in online retail. If these arguments are accepted by the U.S. District Court for the Western District of Washington, the decision could have major implications for Amazon, the platform's consumers and sellers, and the entire technology industry.

To succeed, the FTC will need to prove two key elements. First, it will need to prove that Amazon has monopoly power in a relevant market. Second, it must prove that Amazon has used anticompetitive, exclusionary conduct to illegally maintain that monopoly power. At the core of the argument, the FTC alleges that Amazon has monopolized both the "online superstore" and the "online marketplace services" markets through practices such as anti-discounting conduct whereby sellers can't offer lower prices on rival marketplaces and coercing sellers to use Amazon's Fulfillment services.

The FTC's case may run into some difficult hurdles, however. First, the FTC's definition of "online superstore" excludes alternative retail options such as brick-and-mortar stores, specialized online retailers, and grocers. Additionally, its definition of online marketplace services likewise ignores alternative retailers and platforms such as Shopify to directly reach consumers. Second, the practices in question may not be exclusionary and may instead be procompetitive, as the requirement for sellers to offer the lowest possible price ensures that Amazon customers have the lowest prices online and the firm's Fulfillment services provide significant benefits such as free two-day shipping for Prime members.

Regardless of how the court rules, Congress should carefully consider the court's rationale and approach before passing major antitrust legislation targeting large technology firms such as Amazon. Multiple bills, among them the American Innovation and Choice Online Act, would target some of these types of practices regardless of

existing market constraints on monopolistic behavior and the procompetitive effects that the court will weigh in this case. These bills are unnecessary: If Amazon has used monopoly power to harm competition, current antitrust law can and will address the conduct in question without the need to upend analysis that weighs procompetitive benefits against anticompetitive harms entirely.

### **Element 1: Monopoly Power**

For the FTC's illegal monopolization claim to succeed, it will first need to prove that Amazon has monopoly power in a relevant market. Monopoly power generally exists if a firm can raise prices for, or lower outputs of, its products or services without consumers being able to choose alternatives. While courts often use [size and concentration as a proxy for monopoly power](#), other factors such as the barriers to entry, network effects, and substitutability of different products can ultimately restrict a firm's ability to raise prices or lower outputs.

The FTC asserts that Amazon has monopoly power in U.S. "online superstore" and "online marketplace services" markets.

"Online Superstore" Market: According to the complaint, the "online superstore" market consists of online marketplaces that offer "an extensive breadth and depth of product selection through an online storefront," with breadth referring to product offerings across multiple categories. Unlike brick-and-mortar stores, online superstores offer 24/7 access to a wide range of products that are more accessible to consumers. This, in turn, builds trust for the store, leading to a significant number of repeat customers. These features make substitutability in the form of brick-and-mortar stores and more specialized online retail options less likely, supporting the FTC's claim that online superstores are a relevant market. If the FTC's understanding of the relevant market is accurate, Amazon could be said to control over 60 percent of the market, and barriers to entry such as economies of scale, network effects, reputational barriers, and shopper switching costs could allow Amazon to exert monopoly power in that market.

"Online Marketplace Services": The FTC also alleges that "online marketplace services" is a relevant market. These services provide seller services to merchants, connecting them to potential buyers and allowing them to participate in the online store. These services include:

- access to a significant base of shoppers who use the online marketplace to find and buy goods;
- an interface for consumer search that allows sellers' products to be discovered and purchased without shoppers needing to leave the online marketplace;
- the ability of sellers to set the prices for their goods on the online marketplace;
- the ability of sellers to create and maintain product detail pages with product information and specifications on the online marketplace; and
- the ability of sellers to display to potential shoppers on the online marketplace an array of consumer-generated ratings and reviews.

The complaint alleges that this relevant market is not interchangeable with selling products as a vendor to a retail store that then sells to end-consumers because vendors typically sell goods to retailers at a wholesale price, while vendors sell to consumers using marketplace services at a retail price. Under the relevant market of online marketplace services, the court could find that more than 66 percent of marketplace sales occurred on Amazon over the last five years, and barriers to entry such as economies of scale, switching costs, and network effects allow Amazon to extract monopoly rents.

Amazon's Response: Amazon will likely argue that other retail markets do serve as substitutes for both consumers and sellers using Amazon's marketplace.

For example, the FTC's definition of online superstore markets excludes things such as physical stores, specialty retailers, and online grocers, but consumers can always choose these options if Amazon attempts to raise prices. Viewed from this wider lens, Amazon has only a [37.6 percent market share in online retail and 3.5 percent of all retail sales](#). If these other options for consumers do in fact act as substitutes, the FTC will fail to show that Amazon has the power to raise prices or lower outputs above competitive levels.

Likewise, with regard to sellers in the online marketplace services market, while some individual sellers may not have options other than Amazon, many do. If Amazon can show that the threat of rival marketplaces will result in sellers going elsewhere if the company raises prices or reduces output, it can directly counter the claims that it has monopoly power. For example, [Shopify, an e-commerce platform, offers a rival option for sellers](#) to build their own store. While Shopify does not have exactly the same structure as would fit the FTC's proposed market definition, the important point for antitrust analysis is whether sellers can use the service as a substitutable option to reach consumers, thereby restricting monopoly power in those markets. Without a showing of monopoly power, the FTC will almost certainly lose the case prior to even getting to the question of anticompetitive conduct.

## **Element 2: Anticompetitive Conduct**

Even if a firm has or may obtain monopoly power, plaintiffs must also prove a second element: The firm achieved that power through exclusionary conduct designed to harm competition. This is because a healthy market should encourage firms to improve their products and outcompete rivals. Nevertheless, defining what kinds of exclusionary conduct violate the law is difficult. Generally, however, courts will look at the procompetitive justifications for that conduct and weigh those benefits against the anticompetitive harm.

The primary conduct the court will examine is the practice of exclusionary anti-discounting that stifles price competition, coercing sellers to use Amazon's Fulfillment services, and combining these two practices to amplify their exclusionary effect. First, Amazon prohibits its sellers from offering lower prices on rival marketplaces by actively surveilling prices on rival marketplaces and then "punishing" third-party sellers by disqualifying the seller's offer from appearing in the "Buy Box," which displays the highest-ranked seller when consumers land on a desired product page. As [economist Hal Singer explains](#), even if a seller discounts its product on a lower cost platform, it would lose access to the Buy Box and as a result forgo significant revenue from Amazon, and thus keep the higher price even on lower-cost platforms. This conduct prevents sellers from competing with Amazon by offering lower prices on rival marketplaces. Second, Amazon drives sellers to use Amazon's Fulfillment services (packaging, shipping, storage, etc.), denying rival online marketplace services and superstores the ability to gain the scale needed to compete with Amazon. This is done primarily through Prime, as the Prime label helps sellers win the Buy Box and comes with free shipping to consumers, and the only way for seller products to be Prime eligible is through use of Amazon's Fulfillment.

Amazon will likely argue that such conduct is not exclusionary, and instead simply represents competitive measures to offer the best products at the lowest prices to consumers.

For example, Amazon will argue the Buy Box rules aren't exclusionary, but rather procompetitive, as they ensure that Amazon customers [will receive the best price online](#). [As Amazon explains](#), "just like any store owner who wouldn't want to promote a bad deal to their customers, we don't highlight or promote offers that are not competitively priced." Indeed, those sellers who don't use Fulfillment by Amazon lose out on Prime's benefits such as free two-day shipping, and consumers and sellers who use Fulfillment by Amazon benefit because Amazon offers this service to better compete with other online retail options. In fact, the costs Amazon charges to sellers could be lower than the cost to acquire all the different components of fulfillment (packaging, storage, shipping, etc.) separately.

The fact that Amazon is successful as both an online retailer and marketplace allows the firm to add value to both consumers and sellers, something that could be lost should it lose this case. Rival marketplaces would then be required to find similar benefits for consumers and sellers, increasing overall competition.

Showing that Amazon's conduct is truly exclusionary ensures that the court will not punish competition on the merits that benefits consumers, and instead only address conduct that harms competition as a whole.

### **Impact on Antitrust Law and the Need for Congressional Action**

If Amazon has monopoly power and engages in exclusionary conduct that harms competition, the Sherman Act and the FTC Act allow [injunctive relief against these practices](#), as well as potentially even structural remedies to separate portions of a firm that allow it to exert monopoly power. For example, AT&T agreed to a consent decree breaking up the firm into [regional telephone companies so as to keep control over a manufacturing subsidiary](#) it was slated to lose at trial. Courts could impose similar structural remedies to Amazon if necessary, or they could impose less stringent behavioral remedies to address the specific anticompetitive conduct without changing the structure.

These remedies, however, will only apply when the court determines that the firm violates the law, not simply when the firm acquires a specific size or concentration. Proponents of major antitrust reform have argued that regardless of competitive effects, Congress should address market concentration in isolation. In that vein, Congress has introduced a variety of bills to target the kinds of practices under examination in this case.

Most notable, a bipartisan group of senators led by Senator Amy Klobuchar introduced the [American Innovation and Choice Online Act](#) (AICOA), which bans self-preferencing for the largest online platforms. Much of the anticompetitive conduct alleged by these senators could indeed constitute self-preferencing. For example, the legislation would likely [make the offer of free two-day shipping](#) illegal for those sellers who use Fulfillment by Amazon and are eligible for Prime.

Congress should not pursue legislation that would ignore the competitive effects of given conduct. Even if the courts examine the relative competitive effects of a conduct and find the benefits outweigh the harms, the AICOA would essentially ignore that determination to hold concentration as per se illegal. If the court agrees with the FTC and imposes behavioral or structural remedies to address the anticompetitive conduct, further legislation would be unnecessary. Allowing the examination of competitive effects benefits consumers and drives firms to improve, and current antitrust law can address anticompetitive conduct in online markets. Just because these markets present novel challenges does not mean the existing tools lack the flexibility to address

them.