

# Antitrust in the Digital Age: What You Need to Know About FTC's Lawsuit Against Amazon

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Chances are if you have ever shopped online, you have shopped, or at the very least browsed Amazon.com. The online retail giant has become synonymous with the ability to find almost anything and everything your heart desires, no matter how obscure, unconventional, or bizarre. Amazon.com (“Amazon”) has an inventory of about 12 million items, which jumps to 350 million items when Amazon Marketplace sellers are included.<sup>1</sup> Amazon.com is one of the largest online retailers in the country, making up 37.8% of the U.S. e-commerce market, as of June 2022.<sup>2</sup> Amazon is the leading online retailer by a considerable margin with Walmart coming in second place with 6.3% market share and Apple entering third with a mere 3.9% market share.<sup>3</sup> Amazon’s success is not just limited to market share percentage. In 2022, Amazon hit over half a trillion dollars in net sales, making it the most profitable online marketplace in the United States.<sup>4</sup> During 2019-2021 there was an increase of approximately 28 million subscribers to Amazon subscription based service, Amazon Prime and based on the current trajectory, it is estimated that there will be 168.3 million subscribers to the service by 2025.<sup>5</sup> Amazon’s continued success has not come without criticism. Amazon has routinely found itself being criticized as a disruptor of well-established industries through its technological innovation and aggressive reinvestment of profits into capital expenditures.<sup>6</sup> More recently Amazon was hit by a lawsuit by the Federal Trade Commission, in one of Amazon’s largest lawsuits in its history. This blog post will summarize the 172-page complaint and educate consumers (or even sellers) about the key things they should know regarding this lawsuit.

The Federal Trade Commission (“FTC”) was created in 1914 by President Woodrow Wilson with the signing of the Federal Trade Commission Act, in order to help “bust the trusts.”<sup>7</sup> The FTC’s mission is to enforce consumer protection laws aimed at preventing fraud, deception, and unfair business practices.<sup>8</sup> The FTC also enforces various federal antitrust laws that prohibit anticompetitive mergers and other business practices that could possibly lead to higher prices and fewer choices for consumers as well as decreases innovation for businesses and sellers.<sup>9</sup> Simply put, the goal of the FTC is to protect consumers and promote competition amongst businesses in similar sectors.

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<sup>1</sup> Seamus Breslin, *15 Amazon Statistics You Need to Know in 2023*, REPRICEREXPRESS, <https://www.repricerexpress.com/amazon-statistics/> (last visited Oct. 14, 2023).

<sup>2</sup> Stephanie Chevalier, *Market Share of Leading Retail E-commerce Companies in the United States as of June 2022*, STATISTA (July 10, 2023), <https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Colby Hopkins, *The History of Amazon and its Rise to Success*, MICH. J. ECON., (May 1, 2023), <https://sites.lsa.umich.edu/mje/2023/05/01/the-history-of-amazon-and-its-rise-to-success/>.

<sup>6</sup> John F. Furth, *Why Amazon and Jeff Bezos Are So Successful at Disruption*, ENTREPRENEUR (May 18, 2018), <https://www.entrepreneur.com/business-news/why-amazon-and-jeff-bezos-are-so-successful-at-disruption/312481>.

<sup>7</sup> *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/history> (last visited Oct. 14, 2023); *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Oct. 14, 2023).

<sup>8</sup> *Enforcement*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement> (last visited Oct. 14, 2023).

<sup>9</sup> *Id.*

On September 26, 2023, the FTC filed a lawsuit against Amazon.com, Inc, in the Western District of Washington State, a federal circuit court. In addition to the FTC, 17 state attorney generals (collectively referred to as the “State Plaintiffs” and when mentioned in conjunction with the FTC they are referred to as simply the “Plaintiffs”) joined the complaint as co-plaintiffs.<sup>10</sup> The states represented in this lawsuit are New York, Connecticut, Pennsylvania, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, and Wisconsin.<sup>11</sup> The Plaintiffs alleged that Amazon is a monopoly and is using interlocking anti-competitive and unfair strategies in order to illegally maintain its power.<sup>12</sup> The Plaintiffs believe that Amazon’s activities allow it to prevent rivals and Amazon marketplace sellers (“sellers”) from lowering prices, which degrades the quality of items for consumers. By stifling the businesses of rivals, Amazon can overcharge sellers who use the marketplace and prevent innovation and proper competition from rivals.<sup>13</sup> All of which is in line with the mission of the FTC. The Plaintiffs are petitioning the court for equitable relief against Amazon under the Federal Trade Commission Act (“FTC Act”), Section 2 of the Sherman Act, and applicable state laws.<sup>14</sup> More specifically, the Plaintiffs are seeking a permanent injunction in order to prohibit Amazon from engaging in its unlawful conduct to loosen Amazon’s foothold as an online monopoly.<sup>15</sup>

The complaint alleges that Amazon is in violation of antitrust laws, not because it is a large retailer, but because its conduct is exclusionary and prevents current competitors from growing and new competitors from emerging. It is alleged that this conduct occurs in both the market that serves consumers and in the online marketplace purchased by sellers. The first tactic is through anti-discounting measures.<sup>16</sup> These measures efficiently punish sellers who are selling lower price items elsewhere by burying the item so far down in Amazon’s search results that the item is essentially invisible to consumers.<sup>17</sup> This tactic causes other online retailers and especially sellers to have higher prices for their products outside of Amazon. This tactic has been used by Amazon for years.

Back in 2021, the seller of a Ripple Rug, a cat toy received an email from Amazon informing him that Amazon’s software had detected that the toy was being sold at a cheaper price elsewhere. Almost as a form of punishment, Amazon also informed him that his product would no longer be shown in the area of a listing where shoppers click to add to cart (called the “Buy Box”). Since the seller was the only seller of the cat toy on Amazon, this punishment virtually ensured that his product would disappear from the website. The seller was faced with the choice of either lowering his price on Amazon or to ask other platforms that sold his cat toy to raise the price of the Ripple Rug. Ultimately the seller decided on the latter option. Eventually

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<sup>10</sup> *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FED. TRADE COMM’N (Sept. 26, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>.

<sup>11</sup> *Fed. Trade Comm’n v. Amazon.com, Inc.*, No. 2:23-cv-01495 (W.D. Wash. Filed Sept. 26, 2023).

<sup>12</sup> *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Fed. Trade Comm’n*, No. 2:23-cv-01495 at 5.

<sup>15</sup> *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, *supra* note 10.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

this seller made the decision back in January of this year to no longer sell on Amazon despite the financial hit he will take this year.<sup>18</sup>

The second tactic is requiring any sellers that want to obtain Prime eligibility to use Amazon's fulfillment service, which is costly and has made it much more expensive for sellers to offer tier items on other online platforms.<sup>19</sup> According to the complaint, this tactic is "unlawful coercion" and "limits[s] competitors' ability to effectively compete against Amazon."<sup>20</sup> Amazon tactics are allegedly causing a raise in prices across online retailers on the web. As the company steadily hikes the fees it charges sellers and prevents discounting on other sites, sellers often inflate their prices on other platforms which creates an artificial price floor everywhere.<sup>21</sup>

The complaint also alleges that the marketplace's tactics affect consumers and ruin their experience. By allowing search results to be riddled with paid advertisements, consumers are not getting the best or quality results, which is frustrating for consumers, who must sift through junk to find quality items. Similarly, Amazon prioritizes their own brand of items over third party sellers that Amazon knows are better quality, which has been a long running criticism of Amazon. Many have pointed out that Amazon not only owns the platform that many sellers use to reach consumers, but it also sells its own products on the platform as well as owns the shipping and delivery system that sellers on the platform are incentivized to use.<sup>22</sup> This creates an anticompetitive conflict of interest.<sup>23</sup>

Amazon's response to the complaint came in the form of a blog post by senior vice president David Zapolsky the day the complaint was filed. Amazon dispels key complaints alleged against them by the FTC and explains how each one is inducive of a pro-competition model. Amazon claims that their anti-discounting mechanism, which hides products being sold for lower price elsewhere, earns and maintains customers' trust by ensuring that only competitively priced products are shown.<sup>24</sup> Amazon also addresses the claim that the online retailer coerces sellers into using Fulfillment by Amazon ("FBA"), by stating that the optional service is extremely beneficial to those who make the choice to utilize it. The creation of FBA not only benefits sellers but it has "created over a million jobs and made significant investments in the American economy."<sup>25</sup> Amazon characterizes the FTC's allegations as "wrong" and "misleading" that will ultimately "harm consumers, hurt independent business, and upend long-standing and well considered doctrines."<sup>26</sup>

Many Amazon sellers believe that this lawsuit is long overdue and are optimistic that this will cause Amazon to alter its policy when it comes to sellers' practices. The strained relationship between Amazon and its merchants has been simmering for years. Sellers have been

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<sup>18</sup> Annie Palmer & Lauren Feiner, *Amazon Sellers Sound Off on the FTC's 'Long-Overdue' Antitrust Case*, CNBC (Oct. 6, 2023), <https://www.cnbc.com/2023/10/06/amazon-sellers-sound-off-on-the-ftcs-long-overdue-antitrust-case.html>.

<sup>19</sup> *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, *supra* note 10.

<sup>20</sup> *Id.*

<sup>21</sup> Palmer & Feiner, *supra* note 17.

<sup>22</sup> Alina Selyukh, *U.S. Sues Amazon in a Monopoly Case That Could Be Existential for the Retail Giant*, NPR (Sept. 26, 2023), <https://www.npr.org/2023/09/26/1191099421/amazon-ftc-lawsuit-antitrust-monopoly>.

<sup>23</sup> Brian Fung, *5 Takeaways from America's Landmark Lawsuit Against Amazon*, CNN (Sept. 28, 2023), <https://www.cnn.com/2023/09/28/tech/amazon-ftc-lawsuit-takeaways/index.html>.

<sup>24</sup> David Zapolsky, *The FTC's Lawsuit Against Amazon Would Lead to Higher Prices and Slower Deliveries for Consumers—and Hurt Businesses*, ABOUT AMAZON (Sept. 26, 2023), <https://www.aboutamazon.com/news/company-news/amazon-ftc-antitrust-lawsuit-full-response>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

expressing their grievances over issues like raising fees, the suspension process, and the increase in competition on the marketplace not only from other sellers but Amazon owned brands as well.<sup>27</sup> In particular, sellers hope that this lawsuit will make Amazon rethink its approach to the Buy Box, because it is difficult for sellers to succeed on Amazon without it.<sup>28</sup> There are still a handful of Amazon sellers that are unsure that this will change anything, as the issues highlighted by the FTC are not ones that will necessarily make the seller and consumer experience better. For example, an Amazon seller criticized the FTC claim that Amazon is coercive in the way that it encourages sellers to use its fulfillment service, because many sellers love the fulfillment service in terms of value and the promise to deliver two-day shipping.<sup>29</sup> This seller goes further by saying that using FBA does not feel like a requirement but rather sellers feel that by using the fulfillment center it will make their small businesses easier to run and more effective.<sup>30</sup>

It is still too early to determine what this case could mean for the online retailer giant. While there has been talks of a breakup of Amazon, the FTC has said that talk of a breakup is premature and as for now the main focus is liability.<sup>31</sup> A breakup is still a possibility considering that the complaint suggests that a court order could include “structural relief.”<sup>32</sup> However there have not been a lot of monopoly based claims remedied by a court ordering a company to divest itself.<sup>33</sup> Another potential outcome of this law lawsuit is the possibility of Amazon executives being held personally liable for Amazon’s alleged misconduct.<sup>34</sup> This lawsuit against Amazon could prove to be remembered as one of most high profile federal antitrust cases, amongst those of Standard Oil, Microsoft, or Google.<sup>35</sup> If the FTC proves to be successful, this lawsuit will be a turning point in antitrust regulation within the sphere of Big Tech and e-commerce.<sup>36</sup> A win against Amazon will show that government agencies will be able to go head to head with giants and win. As e-commerce becomes more common and brick and mortar retailers fall out of favor, it is expected that more antitrust cases in the digital sphere will emerge, and this case will most likely set the standards for how to further proceed in cases such as this.

For concerned consumers or sellers who want more information, here is the full 172 page [complaint](#).

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<sup>27</sup> Palmer & Feiner, *supra* note 17.

<sup>28</sup> Vidhi Choudhary, *Some Sellers Hope the FTC Lawsuit Will Change Amazon’s Buy Box Program*, MODERNRETAIL (Sept. 28, 2023), <https://www.modernretail.co/technology/some-sellers-hope-the-ftc-lawsuit-will-change-amazons-buy-box-program/>.

<sup>29</sup> Palmer & Feiner, *supra* note 17.

<sup>30</sup> *Id.*

<sup>31</sup> Fung, *supra* note 22.

<sup>32</sup> *Id.*

<sup>33</sup> Haleluya Hadero, *The Amazon Antitrust Lawsuit is Likely to be a Long and Arduous Journey for the FTC*, ABC NEWS (Oct. 10, 2023), <https://abcnews.go.com/Politics/wireStory/amazon-antitrust-lawsuit-long-arduous-journey-ftc-103862149>.

<sup>34</sup> Fung, *supra* note 22.

<sup>35</sup> Selyukh, *supra* note 21.

<sup>36</sup> Sara Morrison, *The Government’s Case to Break up Amazon, Explained*, VOX (Oct. 4, 2023), <https://www.vox.com/technology/2023/9/26/23835959/ftc-amazon-antitrust-lawsuit-prime-lina-khan>.