

## FTC v Amazon: Significant Burdens to Prove Relevant Markets and Net Consumer Harm

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tl;dr

**Background:** The Federal Trade Commission (FTC) and 17 states this month filed a major [antitrust complaint](#) against Amazon. The much-anticipated suit comes more than two years after Lina Khan became FTC chair and more than six years since her [student note](#) criticizing Amazon's practices. The complaint describes a broad scheme in which Amazon (1) used various practices to prevent sellers from offering prices at Amazon's rivals below the level at Amazon (anti-discounting), and (2) conditioned a product's eligibility for Amazon Prime on whether the seller used Fulfillment by Amazon (FBA). This conduct allegedly violates Section 5 of the FTC Act as an unfair method of competition, Section 2 of the Sherman Act as maintenance of monopoly, and various state laws.

**But...** It will be difficult for the FTC and the states to prove Amazon's monopoly power and to discredit the procompetitive justifications for the challenged conduct. Retail competition is robust and the proposed narrow markets are ripe for criticism. Moreover, the challenged conduct is [core to Amazon's offer](#) of important consumer benefits, such as fast and reliable shipping. Whatever remedy the FTC ultimately pursues, it [risks undermining the benefits](#) Amazon has created for consumers and sellers alike.

### KEY TAKEAWAYS

#### SEEMINGLY TRADITIONAL THEORIES OF HARM

The complaint relies on two overarching theories of anticompetitive conduct: anti-discounting and conditioning Prime eligibility on a seller using FBA.

The first is reminiscent of a challenge to "[most-favored nation](#)" (MFN) provisions, in which a defendant demands terms that are equivalent to or better than those given to its rivals. However, MFNs are *agreements* typically challenged under Section 1 of the Sherman Act; the FTC doesn't explicitly claim that Amazon's unilateral policy constitutes an MFN.

The second theory appears similar to a tying claim. But the FTC doesn't allege an actual tie between the sale of two distinct products, perhaps because sellers cannot buy the Prime badge; they must qualify for it by meeting the two-day shipping requirement (which FBA ensures).

#### NARROW RELEVANT MARKETS

Both of the relevant markets put forward in the FTC's complaint [fail to reflect real-world competition](#).

Amazon allegedly possesses monopoly power in the "online superstore market." According to the FTC, online "superstores" provide a unique breadth and depth of products and unique services that brick-and-mortar stores and

smaller online retailers don't. Thus the commission alleges that these rivals cannot constrain Amazon's market power over consumers.

This alleged market is so narrowly drawn that it appears to include just Amazon, eBay, and the online stores offered by Walmart and Target. This excludes single-brand online retailers, product-category-specific online retailers, and all brick-and-mortar stores. It beggars belief that these rivals don't exert competitive constraints on Amazon. After all, no consumers shop exclusively online, and price-comparison services like Google Shopping facilitate shopping across all online outlets. This will almost certainly prove to be a sticking point when the case goes to trial.

The FTC also defines a relevant market for "online marketplace services"—*i.e.*, the services needed to sell products online (including access to shoppers, online interface, pricing capabilities, customer reviews). This excludes traditional wholesalers and e-commerce platforms like Shopify that offer software allowing sellers to create their own online stores.

As with the first market, it's hard to imagine these claims will be borne out by the evidence. Most retail sales still occur offline and manufacturers and brands readily access these outlets. And the recent success of new marketplaces [like Shein and Temu](#)—which entered the U.S. market during the FTC's investigation of Amazon—further undermines both the alleged market and Amazon's market power.

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## OVERLOOKING THE BENEFITS OF AMAZON'S CONDUCT

While both unlawful MFNs and unlawful tying would be legitimate theories of harm, both are also vertical restrictions reviewed under the rule of reason, which requires weighing the anticompetitive and procompetitive effects.

The economics literature shows that [MFNs can promote efficiency](#) by protecting investments that couldn't have been recouped without the protections offered by an MFN, such as Amazon's substantial investment in the infrastructure to deliver products within two days. These provisions can benefit consumers by cutting their search costs and offering retailers incentives to improve the quality of their search and display capabilities.

Economic theory also suggests that it can be cheaper to offer some products together, rather than selling them separately; in some cases, it may be necessary to sell the products together in order to offer the products at all. If Amazon's FBA services are critical for it to dependably deliver on Prime's promise of two-day-shipping, then the alleged tying may be procompetitive.

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## RESTORING 'FAIR COMPETITION'

While the FTC's complaint doesn't explicitly ask for Amazon to be broken up, it does ask for the court to provide "equitable relief, including but not limited to structural relief, necessary to restore fair competition."

It's anyone's guess what this means. "Fair competition" isn't part of U.S. antitrust case law or mainstream economic terminology.

This seemingly innocuous wording [may be used to impose](#) the FTC's idiosyncratic—and nostalgic—vision of online retail on Amazon. Worse, it may be a euphemism for breaking up the company.

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