



District of Columbia v. Amazon – Is This a Market of Everything?

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The District of Columbia filed a bold action in D.C. Superior Court alleging that Amazon.com, Inc. violated the District of Columbia Antitrust Act with respect to its practices related to Amazon’s online store.² According to the District’s complaint, Amazon is a monopolist in an alleged market for online marketplaces and it maintains and deploys that dominance to harm competition.

Amazon vigorously contests the allegations, and the matter is currently in the midst of a second round of motion-to-dismiss briefing, following the District’s filing of an amended complaint in September 2021. If the District’s claims are found plausible, Amazon’s business model and its power in online sales will face close scrutiny in discovery, with tens of millions of pages of discovery likely produced to evaluate how Amazon’s practices impact wholesalers and third-party sellers. If Amazon has its way, the amended complaint will be dismissed with prejudice, which will likely deter copycat actions across the country.

The Suit

On May 25, 2021, the Office of the Attorney General for the District of Columbia, represented by Hausfeld LLP, filed a four-count antitrust complaint against Amazon, alleging illegal horizontal agreements, vertical agreements, illegal maintenance of monopoly, and attempted monopolization. The first two claims were filed under D.C. CODE § 28-4502 (D.C.’s analogue to Section 1 of the Sherman Act) and the latter two claims were filed under D.C. CODE § 28-4503 (the District’s analogue to Section 2 of the Sherman Act).

The action seeks an injunction, declaration of unlawful conduct, and unspecified civil penalties and damages “for the benefit of the District consumers.”

On July 20, 2021, Amazon filed a motion to dismiss the complaint, which resulted in the District filing an amended complaint on September 10, 2021. The First Amended Complaint focuses the counts upon three Amazon contractual policies with third party sellers. The revisions remove

references to “horizontal” and “vertical” characterizations of the challenged restraints and drop the allegation that these restraints are *per se* unlawful. The First Amended Complaint also adds a new count based on Amazon’s contracts with wholesalers.³

The Three Amazon Policies at Issue

The gravamen of the District’s complaint is that Amazon wields three anticompetitive policies that “force” its wholesalers and third-party sellers into adjusting their pricing policies elsewhere on the Internet, to the detriment of consumers and the suppliers themselves. The Price Parity Provision—which was in effect until two years ago—required Amazon Third Party Sellers (TPSs) to commit not to sell their products on any other web-based marketplace for a lower price than the price they charge when selling those same products on Amazon. The Fair Pricing Policy—which is in effect today—requires TPSs to commit not to charge “significantly higher prices” on Amazon compared to the same products for sale elsewhere. The District refers to these two policies, collectively, as the “Most Favored Nations” or MFN policies.⁴

The last challenged policy is called the Margin Maintenance Agreement (MMA), which applies where Amazon purchases a product at wholesale and resells it at a price determined by Amazon. Under the MMA, wholesalers (also known as First Party Sellers (FPSs)) commit that Amazon will earn a certain margin on the product, even if Amazon reduces its prices to a competitive level with other online stores.⁵

The District alleges that these three policies cause TPSs and FPSs “to price their products at artificially high levels on *other* online marketplaces.”⁶ The so-called MFN policies allegedly block sellers from offering consumers a lower price on their own websites or other multi-seller online marketplaces such as eBay or Walmart. The MMA, similarly, allegedly causes wholesalers to inflate their prices in other online marketplaces, lest the race to the bottom on retail prices leaves Amazon with such low margins that the wholesaler must pay Amazon compensation under the MMA.

In essence, the District’s theory of anticompetitive harm is that FPSs and TPSs were “forced to incorporate Amazon’s high fees and commissions into their product prices

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² District of Columbia v. Amazon.com, Inc., No. 2021-CA-001775-B (D.C. Super. 2021) [hereinafter DC v. Amazon].

³ Amended Complaint, DC v. Amazon, No. 2021-CA-001775-B (D.C. Super. Sep. 10, 2021) [hereinafter AC].

⁴ *Id.* ¶¶ 4-10.

⁵ *Id.* ¶¶ 11-12.

⁶ *Id.* ¶ 88 (emphasis added).



not only when selling through Amazon’s marketplace, but also when selling through competing online marketplaces.”⁷

Amazon’s Second Motion to Dismiss

Amazon’s pending motion to dismiss is mostly devoted to defending its FPP and MMA policies as pro-competitive and pro-consumer, while dismissing the PPP as a red herring.⁸ Those policies, it argues, are “entirely lawful,” “common throughout the industry,” and born of one goal alone: “lower retail prices for products sold in Amazon’s store.”⁹ Amazon repeatedly asks the Superior Court Judge to use “commonsense” and “judicial experience,” arguing that the two policies on their face reduce prices to Amazon consumers. Amazon further argues that its reputation for low prices would be detrimentally impacted if these policies are invalidated, and that a predictable result would be higher prices both on its own website and elsewhere.

In support, Amazon cites Supreme Court precedent and treatises for the proposition that low prices for consumers is a key goal of modern antitrust jurisprudence and is never illegal unless predatory.¹⁰ To Amazon’s credit, it does seem counterintuitive for the District to argue that the District’s consumers would benefit if TPSs had an unfettered right to charge “substantially higher” prices on Amazon.com than other market prices. Amazon also argues that the FPP mirrors the anti-price gouging laws in the District and in many states and other municipalities.

As for the MMA, Amazon argues that the District is speculating that wholesalers are so worried about Amazon’s margins that they are deterred from offering discounts on other platforms. The District did not cite statistical studies or regression analyses, for example, to support the existence of any deterred discounts. This missing link may be fatal on its own, and it is potentially exacerbated by an overbroad market definition.

⁷ *Id.* ¶ 6. The Amended Complaint also alleges that the suppliers are harmed by reducing their own profits, however it seems the court is most likely to focus on harm to the public, not to Amazon’s own competitors or its wholesalers.

⁸ Defendant Amazon.com, Inc.’s Opposed Mot. to Dismiss Pl. District of Columbia’s Am. Compl., DC v. Amazon, No. 2021-CA-001775-B (D.C. Super Oct. 25, 2021) [hereinafter MTD]. Amazon does not devote much time to discussing the Price Parity Provision other than to say that it was never enforced and is not in effect today. If true, this may be enough to obtain an early dismissal on an otherwise-strong PPP claim. Back in 2013, the DOJ successfully challenged Apple’s similar policy preventing publishers from selling bestseller books at lower prices on Amazon than on Apple’s iPad.

⁹ MTD at 1.

¹⁰ *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 338, 340 (1990) (“When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be

Is The Relevant Market Everything For Sale Online . . .

Amazon’s history from a small online e-book store to the top online destination for shopping of any kind is one of the Internet’s most well-known chapters. Figuring out how and where Amazon wields market power, however, requires close attention to its products, its services, and where the barriers to entry might be for effective competition. A decision that finds antitrust violations in markets where Amazon holds no durable market power risks chilling vigorous price competition and downward pressure on wholesaler and third-party pricing that might benefit consumers.

The Amended Complaint alleges that Amazon holds durable monopoly power in “online marketplaces” or “multi-seller online marketplaces,” with competitors being entities such as e-Bay and Walmart.¹¹ The complaint alleges that “online marketplaces are separate and distinct from brick and mortar marketplaces” and that Amazon’s share of “online sales” has gone up from 36% in 2016 to over 50% last year.¹²

Normally, a market is defined as a set of interchangeable goods and services available in a defined geographic region. A commonly used test is the SSNIP test, where a Court or expert asks whether a small but significant non-transitory increase in the price of a good would result in substitution. A relevant market may be constrained to a certain channel of commerce, but only if this economic analysis shows that price competition in that channel is fundamentally different for those goods. For example, the FTC filed an action to challenge the proposed merger of Office Depot and Staples, arguing that the product market was limited to office supplies sold through office supply retail chains.¹³ Other courts have found that an online market for specific goods may be distinct from the same goods’ physical markets.¹⁴

But no court or regulatory agency—to the best of the author’s knowledge—has ever found that all online sales of products on a website can be considered a market, separate from

viewed as an ‘anticompetitive’ consequence of the claimed violation”); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 768a6 (5th ed. 2021 Cum Supp.) (noting even a dominant firm should not be condemned for low prices that do not violate predatory pricing restrictions).

¹¹ AC ¶ 39.

¹² *Id.* ¶ 52.

¹³ *FTC v. Staples, Inc. & Office Depot, Inc.*, Civ. No. 197-cv-00701 (D.D.C. Apr. 10, 1997) available at <https://www.ftc.gov/enforcement/cases-proceedings/9710008/staples-inc-office-depot-inc>.

¹⁴ *Compare* *Distance Learning Co. v. Maynard*, No. 19-cv-03801-KAW, 2020 WL 2995529, at *7 (N.D. Cal. June 4, 2020) (holding that Plaintiff’s limitation of the relevant market to online traffic schools is not “facially unsustainable” even though the DMV’s approved list of traffic schools includes physical schools, “this does not necessarily mean the services provided are



all other retailers who sell the same products. In that sense, Amazon’s motion portrays the District’s complaint as not just bold, but irrational. “[T]he alleged market,” Amazon argues “purportedly includes every product available for purchase online including products of highly differentiated uses (like batteries, mattresses and motor oil).”¹⁵

... or is it a Market of Online Marketplace Infrastructure

Perhaps, however, the District’s intended market is the infrastructure comprising an online marketplace: the hosting, online features, shipping, or logistics provided to wholesalers and third-party sellers, together with customer-facing functions such as search, reviews, and user interface. In that case, the competitors are not just Amazon, eBay, Walmart, and Target, but also FedEx and UPS.

At times, the District hints at this being the market, but it appears to shy away from this view. The District mostly argues that consumers generally see shopping online as fundamentally different than brick and mortar shopping and will not substitute brick and mortar shopping for online shopping.¹⁶ If the District would focus on the infrastructure view of the market, then it would not focus on where consumers might substitute their shopping experience, but would focus on the services to sellers and consumers which facilitate the sale of goods: hosting, logistics, customer base, search, online reviews, data, or other services.¹⁷ The District claims that consumers, TPSs, and FPSs are all harmed by Amazon’s policies, but it still avoids the market definition that focuses upon the Amazon platform and infrastructure.

Perhaps the District took this tack because it originally pleaded a *per se* violation, or perhaps it is because Amazon’s logistical and infrastructure-type services have more varied competitors. Regardless of the reason why, the District’s current market definition focuses upon the price charged for the goods by Amazon or by the TPSs who rent the infrastructure, rather than the legal arrangements that define the infrastructure such as hosting fees, commissions, or other charges necessary to access the customer network itself. The complaint does not

describe these arrangements, other than conclusory statements about Amazon charging “high” commissions and fees.

Thus, as it stands, the Complaint seems to view the “online marketplace” market as being comprised of all the goods and services therein rather than the virtual infrastructure or platform-type services. It is unclear how an economist would apply any meaningful test to demonstrate durability of market power under the hypothetical monopolist or SSNIP test given the facts plead.

This is not to suggest that an infrastructure-focused theory can be plausible. It is notable that Amazon made a comment in passing that the District failed to conduct a pre-suit investigation.¹⁸ At this early stage of the case, it may well be that further factual development and description of the services offered by Amazon to sellers is required before a relevant market can be described or analyzed.

interchangeable”) with *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, No. 09-cv-4609-JFW (RZX), 2010 WL 11597436, at *14 (C.D. Cal. June 7, 2010), affirmed in rel. part and rev’d and remanded on other grounds in 494 F. App’x 743 (9th Cir. 2012) (defendants’ distinction between major brick and mortar retailers and online sales “but it fails to analyze the extent to which those retailers could expand their online business and capture additional sales if the online-only sellers raised prices to supracompetitive levels. [T]he examination of this cross-elasticity of demand is an essential element of the relevant market analysis).

¹⁵ MTD at 2.

¹⁶ AC ¶¶ 44-48 (Economists and academics recognize the distinction between online and physical marketplaces and “therefore the lack of substitutability between the two”).

¹⁷ Amazon’s policies forming the infrastructure of its supply, marketing, and logistics may be seen as a two-sided market, where its policies must be shown to harm competition on both sides of the market. *Ohio v. American Express*, 138 S.Ct. 2274 (2018). Again, the District seems to avoid defining the market this way. It devotes substantial time to allege barriers to entry in the form of “network effects.” According to the District, Amazon’s reputation for low prices was built through “years of staggering losses” and first mover advantages, that has now locked in over 120 million households to Prime membership, such that consumers have so much momentum using Amazon they do not check physical stores or other websites before they buy from Amazon.com.

¹⁸ MTD at 5 n.2.