

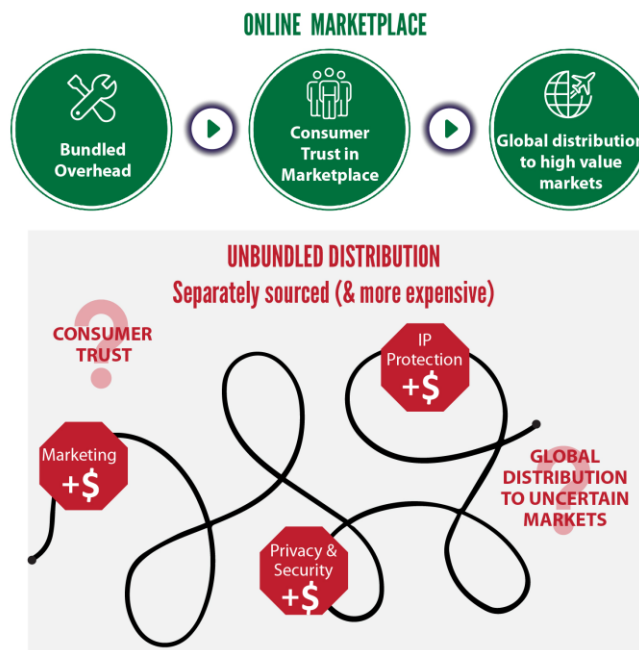
Issue Brief: Why App Developers Care about FTC v. Amazon

Overview. You might be wondering, hasn't the FTC already sued Amazon a few times in the past couple years? Yes, but this latest case is the most anticipated because it seeks to punish Amazon for its size through antitrust—rather than consumer protection—claims. If you've read recent headlines, you might also get the misimpression that the FTC is arguing that Amazon is price-gouging consumers like some sellers did in the early stages of the pandemic. That's also not really what the FTC is arguing, and as usual, the truth is both less shocking and more interesting than reporting suggests.

In any federal antitrust claim, the plaintiff generally has to a) define the relevant market(s), and b) show that the defendant has the requisite market power in those markets to c) harm consumers (*not competitors*) through distortions to competition itself, and that d) the defendant did in fact cause those harms. It's a high bar, and for good reason, because Congress doesn't want federal agencies to punish companies for being successful. A noteworthy aspect of this case is that it doesn't try hard to meet this bar, and yet in the unlikely event the FTC succeeds, there will be serious negative consequences for small businesses that leverage online marketplaces. Specifically, creating a precedent that it is illegal for an online marketplace to offer wraparound services to seller—and that it is presumptively illegal to take steps to make the marketplace more attractive to consumers—would eliminate many of the most important bundled benefits marketplaces offer small companies. In turn, this would effectively close off the streamlined, bundled distribution option and force small companies to distribute via the unbundled route, which can take more precious time, cost more, and involve much more uncertainty.

FTC v. Amazon would force small business to:

Delay time to market | Expend more resources | Experience greater uncertainty



In this case, the FTC is challenging two of Amazon's practices, among others:

- 1) *Fast Shipping Guarantee*. The FTC claims that Amazon unlawfully raised prices and artificially eliminated competitors in the relevant market by requiring Prime-eligible sellers to guarantee 2-day shipping, which the FTC says effectively requires Prime-eligible sellers to use Fulfilment by Amazon (FBA).
- 2) *Low-Price Guarantee*. The FTC claims that Amazon unlawfully raised prices and artificially eliminated competitors in the relevant market by only featuring sellers' items if they guarantee their lowest price for that item on Amazon.

Fast Shipping Guarantee. On this count, the FTC takes issue with Amazon setting a requirement for Prime-badged sellers to guarantee 2-day shipping. The FTC claims that because the most viable option for sellers to meet this is by using Amazon's own marketplace fulfilment service, FBA, it is essentially coercing sellers into accepting FBA along with plain distribution on the marketplace. This argument is unlikely to succeed because a) Amazon doesn't require FBA for distribution on the platform or even the Prime badge and b) the ability for small sellers to use FBA and actually guarantee 2-day shipping anywhere in the United States is undeniably good for competition and consumers. Realistically, most sellers, especially the smallest ones, will need to use FBA, which is able to reliably meet that 2-day shipping guarantee. This is a high bar and naturally (without distortions in the market), the ability to ship to anywhere in the United States within two days is an exceedingly expensive proposition. The fact that Amazon has invested prodigious amounts of capital in its shipping network to be able to offer previously impossible shipping guarantees for small companies is not anticompetitive. In fact, it's one aspect of a vertically integrated bundle that has accelerated success and growth for small companies.

Small companies that make mobile software benefit from marketplace services like these just as much as sellers of physical goods and services on Amazon's retail marketplace. For example, the major mobile app stores provide developer services for app makers, including access to application programming interfaces (APIs), accessibility tools, built-in privacy and security controls, built-in marketing through search, ratings, and comments from users, and developer tools. The fact that the online marketplaces design these tools with *end consumers* in mind just as much as app makers is a good thing. Consumer trust in the app stores and retail marketplaces that provide those services benefits small companies selling through them because it keeps those consumers coming back to marketplaces where they can be found. Therefore, baseline security, privacy, and quality guarantees are not only pro-consumer—they are also rather pro-small company. Perversely, the FTC claim—if successful—would require small companies to take the more circuitous, costlier, and less certain distribution path that exists now as the “unbundled” alternative to the major online marketplaces.

Low-Price Guarantee. On this count, the FTC's argument is that by requiring any seller seeking to have Amazon feature its offered product must guarantee the lowest price for that item on Amazon, it could be seen as requiring higher prices to be offered on other platforms. The problem is that if Amazon allowed sellers to offer higher prices on its marketplace and *still* agreed to feature those items, the seller would be essentially [advertising for free on Amazon's platform and convincing consumers to buy the product on another platform at a lower price](#). With the low-price guarantee, Amazon is taking steps to make its own platform a more

attractive place to shop, and that is an example of competing vigorously with other marketplaces. If Amazon were forced to promote sellers' higher prices, in short order, Amazon's value to sellers generally would start to erode because consumers would start to divide their shopping ventures across even more platforms than they already do.

The arithmetic is simple in this case. The natural, smaller number of high-value marketplaces on which to sell—where sellers know consumers want to shop—benefits smaller sellers more than larger sellers. While there are valid concerns with concentration in any market, at least some degree of natural concentration in the market for marketplaces—that is, online app stores or retail marketplaces—tends to benefit the smallest sellers. For sellers, having at least a couple options is essential, [especially where those marketplaces have meaningful differentiation](#). However, their prospects begin to dwindle rapidly when they must bargain with several different marketplaces to reach *the same number* of high-propensity consumers they could previously reach on one marketplace or a handful of them. An artificially high number of marketplaces where consumers would not want to shop—if not for government intervention—adds costs that are disproportionately borne by smaller, younger companies. This is true whether you are a small company selling candles or a small company that makes augmented reality apps for smartphones. Both kinds of companies need to sell where consumers are, and the more transaction costs and friction the government adds with lawsuits like these, the worse off smaller companies are across industries.

Conclusion. It's not anticompetitive for Amazon to have created a vast shipping fulfillment network that can *guarantee* two-day shipping for Prime users. That's pretty remarkable, and the fact that small businesses can leverage it to reach their customer base makes it worth protecting. Similarly, the fact that Amazon makes it more attractive for consumers to buy from Amazon benefits small sellers, who need to assure their investors that they can reach high-propensity consumers. The flexibility and *incentive* to maintain an online store that consumers want to use is crucial for the smallest businesses that leverage online marketplaces. The FTC's case against Amazon threatens to increase the smallest companies' costs to market by increasing overhead and transaction costs and degrading the value of managed marketplaces as a distribution option.