



Opening Statement by Karl A. Racine, Attorney General for the District of Columbia
U.S. Senate Committee on Finance
Subcommittee on Fiscal Responsibility and Economic Growth
Hearing on Promoting Competition, Growth, and Privacy Protection in the Technology Sector
December 7, 2021

Chairwoman Warren, Ranking Member Cassidy, and distinguished members of the Subcommittee, thank you for the opportunity to testify before you today to discuss how my office is enforcing antitrust laws and stopping anti-competitive behavior from tech giants.

As the first independently elected Attorney General of the District of Columbia – and also the outgoing president of the bipartisan National Association of Attorneys General – part of my job is to bring creative and novel lawsuits in the public interest.

That is why we were the first attorney general office to bring an antitrust lawsuit against Amazon alleging that it is illegally controlling prices through restrictive agreements with third-party sellers that sell on Amazon’s marketplace and wholesalers that feed Amazon’s retail business.

Amazon claims that everything it does in business is about the consumer. Well, even just a cursory look – and certainly our investigation – reveals otherwise. Amazon is focused on one thing only: its bottom line, even at the expense of consumers – like the ones it claims to care so much about. In fact, Amazon is costing all of us more money by controlling prices across the entire market.

As you have said before, Senator Warren – I too, am a capitalist. A fair profit is more than fair. A great profit is more than fair. And people should get paid for entrepreneurship and hard work. But when companies use their market power to reduce competition and take advantage of consumers under the guise of creating efficiencies, regulators must step in.

Right now, many families are hurting. They’re trying to keep a roof over their heads, food on the table, and clothes on their back. And if they’re lucky, maybe afford a few Christmas presents. But Amazon’s pricing policies contribute to making that unattainable.

Now, let me give you a little bit of background on how we decided Amazon isn’t acting fairly, why we’re suing them, and why consumers deserve better.

Back in 2019, Amazon was facing pressure from Congress and regulators over anti-competitive behavior. To put regulators at ease, Amazon claimed it removed a clause in its agreements with third-party sellers known as its price parity provision (or PPP)—that prohibited third-party sellers from offering their goods for lower prices or on better terms on competing online marketplaces, including the third-party sellers’ own websites.

Spoiler alert: Amazon did a bait-and-switch by replacing the price parity provision with something nearly identical. Amazon called it the Fair Pricing Policy (or FPP) which was incorporated into Amazon's agreements with third-party sellers.

The Fair Pricing Policy, like the original Price Parity Provision, effectively prohibited third-party sellers from offering their products for lower prices or under better terms on a competing online platform – including their own – by allowing Amazon to impose sanctions on those third-party sellers that did so.

Let me give an example of how this works. If I'm a third-party seller selling headphones and I want to list my product on Amazon, I must do the following: Sell the headphones at a price on the Amazon marketplace that allows me to still earn a reasonable profit after incorporating Amazon's high fees and commissions. Then, I'm barred from selling my headphones on any other platform, including my own website at a lower price, even though I could earn the same profit by doing so. And if I do, I – the third-party seller – could get kicked off of Amazon or have other significant sanctions imposed on me.

This leaves third-party sellers with two choices. They can sell their product on Amazon under these restrictive terms. Or they can only offer their product on other marketplaces. But because Amazon controls between 50-70% of all online sales, third-party sellers have little choice but to accept Amazon's terms.

These agreements impose an artificially high price floor across the online retail marketplace. By charging such high fees – as much as 40% of the product price – Amazon is inflating the prices for consumers on its platform and competing platforms. For example, if I'm selling a pair of headphones for \$100 on Amazon. Up to \$40 dollars of that price is to cover Amazon's fees. Plain and simple, this is inflation.

And consumers lose in this scheme. As a result of Amazon's agreements, consumers *think* they're getting the lowest prices on Amazon's marketplace because they don't see any lower prices on other online marketplaces. But, absent these agreements, third-party sellers could offer their products for lower prices on other online marketplaces.

And Amazon isn't just doing this with third-party sellers, they're doing it with wholesalers as well—so we added that to our lawsuit too. First-party sellers sell products to Amazon for Amazon to resell at retail to consumers. And we've found that Amazon requires wholesalers to guarantee a certain minimum profit to Amazon on those products. This agreement is called the Minimum Margin Agreement (MMA).

This is how it works: If Amazon lowers its retail prices to match or beat a lower price on a competing online marketplace, the wholesalers are forced to pay Amazon the difference between the agreed-upon profit and what Amazon realizes with the lowered retail price. This can lead to wholesalers owing Amazon millions of dollars.

To avoid triggering this agreement, wholesalers have increased the prices to and on competing online marketplaces. The Minimum Margin Agreement, like the Price Parity Provision and the Fair Pricing Policy, reduce competing online marketplaces' abilities to compete with Amazon's marketplace on price and result in consumers paying artificially high prices.

And even outside of this litigation, small businesses have complained that Amazon has stolen their business ideas and passed them off as Amazon's own. All of this can stunt innovation.

With this suit, we hope the Court will put a stop to Amazon's use of illegal price restraints. And we hope to recover damages and penalties to deter similar conduct by Amazon and other companies in the District as well as across the country.

We also hope that our lawsuit will encourage other attorneys general in other states to find creative and impactful ways to rein in the abuses of big tech and stand up for consumers.

Thank you and I look forward to your questions.