

District of Columbia Asks Local Court to Disfavor Amazon's "Most Favored Nation" Policy

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On May 25, the Attorney General for the District of Columbia (the District) filed a [complaint](#) in the District's Superior Court against Amazon.com, Inc. (Amazon), targeting the Most Favored Nation clauses (MFNs) agreed to as part of the contracts between Amazon and at least some sellers that use Amazon's platform. The lawsuit is seeking injunctive relief for alleged violations of the District of Columbia Antitrust Act, civil penalties, damages, and the disgorgement of profits gained from the alleged wrongdoing. Because the lawsuit is brought solely under local statute, it is unclear if the injunctive relief requested could be nationwide in scope. In bringing the suit, the District presumably seeks to tap into the perception of some that MFNs are anticompetitive—despite their ubiquity—as well as the popular perception of Amazon as a monopolist in certain markets.

The Lawsuit

The District alleges that Amazon has used two relevant MFNs over the years. First, until 2019, Amazon required retailers seeking to sell on its platform to sign a Business Solutions Agreement with a price parity provision (the PPP). The PPP prohibited retailers from offering products at a lower price or on better terms to a competing platform than they did to Amazon. In 2019, Amazon removed the PPP and replaced it with a Fair Pricing Policy (the FPP). The new FPP permits Amazon to impose sanctions, including hefty fines or banishment from the Amazon platform, on retailers that offer a product for a lower price or on better terms on another online retail platform. The lawsuit further alleges that Amazon diligently monitors for violations and enforces the FPP, including by levying fines. More than two million independent retailers who use Amazon's platform to sell products are allegedly impacted by the FPP.

The lawsuit alleges that Amazon controls between 50% and 70% of all online retail sales in the United States and a yet larger market share of sales on multi-seller online platforms. Due to this claimed market power, the MFNs at issue are alleged to keep consumer prices artificially high to match Amazon's desired return. The lawsuit also alleges that these MFNs operate as an anticompetitive restraint on other online retail platforms such as eBay, Walmart, and the retailers' own websites.

Previous Amazon MFN Scrutiny

Before 2013, Amazon had an MFN much like the PPP that was used with retailers operating in Europe. Once regulators in the United Kingdom and Germany initiated investigations into the competitive effects of the policy, Amazon withdrew the provision from the relevant agreements, and unlike in the United States, it did not enact a replacement.

Here in the United States, Amazon's 2019 change to the PPP came three months after Senator Richard Blumenthal of Connecticut requested that the DOJ and FTC investigate the provision.

And most recently, in February 2021, consumers of ebooks filed a class action lawsuit against Amazon and the five largest U.S. publishers alleging that the use of MFNs raises prices and hurts consumers. This suit follows the House Judiciary Committee October 2020 report and recommendations following its 16-month investigation of competition in digital markets. Among many topics covered, the report observed that "Amazon has a history of using MFN clauses to ensure that none of its suppliers or third-party sellers can collaborate with an existing or potential competitor to make lower-priced or innovative product offerings available to consumers." Notably, Columbia Law professor Lina Khan contributed to this report and President Biden has since nominated her to serve on the FTC, a move that is expected to lead to increased antitrust enforcement at the FTC.

Broader MFN Scrutiny

Amazon is not alone. Also in the MFN space, nearly 10 years ago, the DOJ and state attorneys general litigated against Apple and five major U.S. publishers over their use of MFNs, which were alleged to increase prices for ebooks. Certain publishers settled pursuant to a consent decree and the Second Circuit ultimately affirmed a district court judgment against Apple and the remaining companies. Despite the expectations by some that this ruling would lead to increased antitrust scrutiny of the MFNs in contractual agreements, the clauses have largely escaped enforcement actions, until this year.

More recently, in January 2021, a putative class of online gamers sued the owner of the popular online video game platform Steam, Valve Corp., alleging that its MFNs with game developers artificially increase the prices consumers pay for games by preventing them from being sold to other platforms for lower prices. Plaintiffs seek class certification for "tens of millions" of affected gamers, damages, and injunctive relief for violations of Sections 1 and 2 of the Sherman Act. The lawsuit alleges that Steam accounts for 75% of the relevant market, comprising sales of games on platforms, directly by developers, or through retailers (such as Best Buy). As in the District's suit against Amazon, the lawsuit alleges Steam charges a high fee for sales on the platform while other platforms have significantly lower fees, but the consumers are charged the same prices regardless of the platform because of the MFNs. Earlier in January, the European Commission fined Valve and five game publishers nearly \$10 million for violating EU antitrust rules with a "geo-blocking" practice of preventing gamers outside a designated zone from using their games on Steam. Notably, while the publishers cooperated with the Commission to reduce their fines, Valve did not and was individually fined nearly \$2 million.

More to Come

In the United States, enforcement and both prescriptive and preventative legislation have increasingly become a bipartisan effort. Most notably among these efforts, Democratic Senator Amy Klobuchar and Republican Senator Josh Hawley have both been eager proponents of increased regulation of big tech companies. Offering solutions from banning acquisitions by companies of a certain size to eliminating market share analysis to scrapping the consumer welfare standard in preference of a "competition in the U.S. standard" (which Senator Hawley says would replace the short-term and numerically focused standard to protect competition more broadly). These policies could seriously change the way companies offering search, marketplace, or exchanges operate, much as the District's lawsuit aims to do vis-à-vis Amazon.

Finally, since the District's lawsuit was filed, it has been reported that additional states have ongoing or newly opened investigations into Amazon's conduct in several markets in which it participates. The list now includes California, Connecticut, Massachusetts, New York, Pennsylvania, and Amazon's home state of Washington. Also

worth noting is the fact that AG Racine is currently being considered by the Biden administration for the vacant role of FTC chair, along with several others expected to be aggressive on technology companies.

As one takeaway to all of this, this heightened public and private enforcement should not necessarily alarm all businesses who use MFNs to lower their cost of doing business or to win/maintain market share. But certainly, as market power and the likelihood of competitive effects expand, it is increasingly important to exercise caution in this area given the current environment.

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