

# AMAZON'S RESPONSE TO CMA'S CALL FOR INFORMATION IN RELATION TO THE DIGITAL MARKETS TASKFORCE

(Updated 9 October 2020)

## 1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1 Amazon supports a strong UK economy, enabling the creation and growth of successful digital and non-digital companies and promoting and protecting consumer welfare. Amazon agrees with the Digital Markets Taskforce ("**DMT**") that *"digital innovation plays an enormously valuable and positive role in our economy and our society."* Evaluating the merits of new regulation must take account of its potential impact on innovation, investment and growth in the UK.
- 1.2 Following the CMA's 12-month market study into digital advertising, the DMT proposes to *"broaden the market study's assessment to platforms not funded by digital advertising, albeit with analysis at a higher level."* Given the tight timelines within which the DMT is seeking to advise the UK government, any such *"broadening"* of the market study's conclusions risks resulting in a *"one size fits all"* approach to regulation.
- 1.3 There is no sound basis to define *"digital platforms"* for regulatory purposes and a broad-brush approach to regulating *"digital"* activities in an increasingly digitised economy risks ignoring fundamental differences between business models and fails to take account of different competitive dynamics across different industry sectors. With regard to the retail sector in particular, the CMA itself has recently found that interchangeability between online and offline channels means that they should be *"considered within the same product market."*<sup>1</sup>
- 1.4 Given these risks, Amazon considers that any new regulation should be based on clearly defined consumer harms that have been the subject of detailed inquiry and investigation, based on evidence relating to the sector that would be governed by such regulation. Introducing new rules in a pre-emptive fashion, and without a detailed examination of sector-specific harms and underlying causes would likely be ineffective, have a detrimental impact on innovation, give rise to significant legal uncertainty, undermine business confidence and ultimately result in UK consumers losing out.
- 1.5 Amazon urges the DMT to proceed with care. Given the significance of the DMT's proposals, a thorough analysis will be needed, both to ensure that any eventual intervention is based on a clear rationale and to demonstrate that it will effectively address specific problems identified. Amazon would welcome the opportunity to discuss further and is keen to engage constructively with the DMT on its emerging thinking. This submission focusses on a number of key issues raised by the DMT's call for information.

---

<sup>1</sup> CMA's Final Report on the Completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc, [https://assets.publishing.service.gov.uk/media/5eb2bcc0d3bf7f5d456fde96/Final\\_report\\_NON\\_CONFI\\_---version1\\_---web\\_publication\\_06052020.pdf](https://assets.publishing.service.gov.uk/media/5eb2bcc0d3bf7f5d456fde96/Final_report_NON_CONFI_---version1_---web_publication_06052020.pdf), paragraph 7.112.

## 2. AMAZON IN THE UK

- 2.1 Amazon is first and foremost a retailer engaging in retailing of mainly physical goods and has been serving customers in the UK for more than twenty years. Its retail operations began by offering products online. Amazon later opened its store (the "Amazon Store") to third parties ("Sellers") and, more recently, started operating physical stores with innovative features. Amazon has invested over £23 billion in its UK operations since 2010, and currently employs more than 876,800 employees worldwide, with over 30,000 full-time employees in the UK. Amazon is creating a further 10,000 permanent roles in the UK in 2020, taking its total permanent workforce to more than 40,000 by the end of 2020.<sup>2</sup> Amazon's investments in the UK were made in light of a number of factors making the UK an attractive place to operate, including a legal and regulatory framework that provides certainty and predictability.
- 2.2 Amazon's marketplace services have helped tens of thousands of UK small and medium-sized enterprises ("SMEs") grow their businesses throughout the UK and expand internationally by making it cheaper and easier for them to list their products in the Amazon Store and Amazon's international stores. Over 60 per cent of the tens of thousands of UK-based SME Sellers in the Amazon Store are exporting to customers around the world, achieving total export sales of more than £2.75bn in 2019. These Sellers are spread throughout the country, with the associated benefits being felt across the UK. More than 85,000 people in the UK are employed by independent businesses to run their sales in the Amazon Store.<sup>3</sup>
- 2.3 Amazon operates in the intensely competitive retail sector. Amazon accounted for less than 4% of retail sales in the UK in 2019. Amazon faces intense competition from a broad range of established businesses and new entrants. Many of these competitors (e.g., Tesco, John Lewis, eBay, Argos and Marks & Spencer) are among the largest firms in the UK. Competition in retail is fierce and characterized by low margins.
- 2.4 The digitization of all sectors of the economy has also transformed the retail space, delivering substantial benefits to consumers in the form of increased choice, lower and more transparent prices, convenience, and constant innovation.
- 2.5 Amazon has invested and continues to invest heavily to build a brand and service that is consistently rated by customers as first class. Having set customer expectations high, Amazon's continued success depends on delivering a high-quality customer experience and maintaining customer trust in the Amazon Store, whether customers are buying from Amazon retail or Sellers. Amazon strives to offer customers a great selection of products at competitive prices, conveniently delivered. It is Amazon's belief that it must continuously innovate to provide customers with a compelling offering in a highly competitive environment.

---

<sup>2</sup> See <https://blog.aboutamazon.co.uk/jobs-and-investment/2019-amazons-economic-impact-in-the-uk> which is based on information up to the end of 2019.

<sup>3</sup> See <https://blog.aboutamazon.co.uk/jobs-and-investment/2019-amazons-economic-impact-in-the-uk> which is based on information up to the end of 2019.

### 3. SCOPE OF A NEW APPROACH: "ONE SIZE FITS ALL" REGULATION WOULD IGNORE FUNDAMENTAL DIFFERENCES IN BUSINESS MODELS AND INDUSTRY SECTORS

- 3.1 The CMA has undertaken a market study over 12 months into digital advertising. The DMT's call for information states that it is proposing to "*broaden the market study's assessment*" to other operators "*albeit with analysis at a higher level.*" However, a "*higher level*" analysis cannot replace detailed examination of evidence relating to particular business models and the competitive dynamics of any given sector of the economy. Any attempt to apply observations the CMA has made in respect of digital advertising to other sectors that have not been examined in any detail is very likely to yield undesirable outcomes, as regulation based on a broad-brush "one size fits all" would be ineffective, disproportionate and counterproductive.
- 3.2 It would not be rational for the DMT to recommend regulation on the basis of mere assumptions of "*potential negative effects on platform users*" when such assumptions have not been evaluated and scrutinised as part of an evidence-based process. In particular, neither the DMT nor the CMA have carried out a market study or any other detailed assessment of the retail sector. Using the CMA's market study into digital advertising as a proxy for an assessment of the retail sector would seem both rushed and a fundamentally flawed approach to designing regulation meant to apply more widely.
- 3.3 First, defining separate "digital" markets does not reflect the commercial reality of the retail sector in particular, an observation that is increasingly reflected in the decisional practice of competition authorities, including the CMA's. Second, the retail sector does not exhibit any of the features the CMA identified as problematic in its assessment of digital advertising. Third, consideration of any additional regulation should take account of its impact on innovation, growth and consumer welfare.

#### There are no separate "digital" markets

- 3.4 What commentators sometimes refer to as the "*digital markets*" is a set of foundational technologies, notably the Internet, computing of all types including connected devices, and increasingly more sophisticated digital technologies such as machine learning and robotics. These technologies are now diffused in industries as diverse as advertising, agriculture, automotive, manufacturing, financial services, health and retail. Much like the rapid adoption of Internet technology in the 1990s, all industries now incorporate advanced algorithms, machine learning, and the Internet of Things into their day-to-day operations. Digital technologies are used in all sectors to offer new and improved products and services and to develop new commercial practices and business models.
- 3.5 Digitisation is pervasive and touches every industry. There is no sound basis to define "*digital platforms*" for regulatory purposes. The proposed regulatory measures, which envisage broadening the CMA's assessment of digital advertising to other sectors, are fundamentally different from ex-ante sector specific regulation in areas such as energy and telecoms where historic market failures resulted in regulation tailored to the specific economics and characteristics of the industry.
- 3.6 There is no separate "digital economy" that can be defined with any degree of accuracy and distinguished from the rest of the economy, not least given the significant and

rapidly increasing digitisation of the economy. With regard to the retail sector in particular, the CMA itself has recently found that online and offline propositions form part of the same relevant market. In its assessment of *JD Sports/Footasylum*, the CMA found "*significant linkages between the in-store and online channels*", noting that "*each of the channels can be used for different aspects of the consumer journey – search, comparison and purchase – and these can be done interchangeably across channels. While some consumers may have strong preferences for one channel, others use these channels as substitutes or in combination. For example, consumers may first see products online, including on social media (e.g. on Instagram) or in-store (e.g. at a flagship store) and then purchase in the other channel. Some consumers might search online and then buy in-store, or the other way around, for example trying on products in-store and then buying online.*" Based on these findings the CMA concluded "*that a sufficient proportion of consumers currently shop in both the in-store and online channels, or would be prepared to move between the two channels, in order for the two channels to be considered within the same product market.*"<sup>4</sup>

- 3.7 As a matter of principle, the scope of any new regulation should focus on addressing an identified market failure with a view to addressing a defined consumer welfare issue. In doing so, regulation should also recognise the insurmountable difficulties in establishing a meaningful distinction between an "online" or "digital economy" on the one hand and an "offline economy" on the other hand. Limiting the scope of regulation to business models exhibiting digital features would not reflect the commercial reality of a digitised economy and would risk hampering innovation and growth, which would in turn harm businesses and consumers.

The retail sector does not exhibit any of the features the CMA's market study raised concerns about

- 3.8 Amazon operates in the retail sector which is fiercely competitive, constantly evolving and open to new entry. Amazon's business model has stimulated further competition and enabled new opportunities for thousands of SMEs as well as larger players. Indeed, the retail industry is highly competitive and fragmented with a plethora of retail channels (including physical stores, online, omnichannel and click and collect propositions) available to consumers. Consumers in retail can and do shop around to find the product they want to purchase and third party sellers have a wide range of options available to them to access consumer demand.
- 3.9 The competitive nature of the retail sector is reflected in low margins and substantial investments in innovation.<sup>5</sup> Innovation is central to the fierce competition in today's global retail industry. In the UK, innovation in retail is central to new entrants including Asos, Wayfair, Ocado, Farfetch, Notonthehighstreet.com, Thread, Swoon Editions,

---

<sup>4</sup> CMA's Final Report on the Completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc, [https://assets.publishing.service.gov.uk/media/5eb2bcc0d3bf7f5d456fde96/Final\\_report\\_NON\\_CONFI\\_---\\_version1\\_---\\_web\\_publication\\_06052020.pdf](https://assets.publishing.service.gov.uk/media/5eb2bcc0d3bf7f5d456fde96/Final_report_NON_CONFI_---_version1_---_web_publication_06052020.pdf), paragraphs 7.53, 7.112.

<sup>5</sup> See T. Philippon, *The Great Reversal*, 2019, page 244: Thomas Philippon examines developments in several sectors of the economy in the US and makes the following observations with regard to the retail sector and Amazon's operations: "*Amazon's profit margin is in line with the average in retail. If anything, it appears to be a bit lower. And more important, Amazon invests a lot. [...] it's important to point out immediately that when competition is weak, investment incentives are also weak. The fact that Amazon invests a lot is clearly a good sign as far as competition is concerned.*"

Farmdrop and Made.com amongst many others, as well as established industry participants such as John Lewis, Argos, Marks & Spencer, Tesco, Next, New Look, and Currys. Investments in innovation in the UK by all of these players have brought significant benefits to customers in the retail sector, including increased choice and convenience, and lower, more transparent prices.

- 3.10 None of the features the CMA has identified as problematic in its market study into digital advertising applies to the retail sector. Retail is highly competitive rather than being characterised by "*tipping*" in favour of one large player. Consumers benefit from the intense competition in retail. No retail operator has or could achieve the "*strong incumbency advantages*" the CMA identified in search and social media, where the CMA observed that "*potential rivals can no longer compete on equal terms*". Simply to "*broaden the market study's assessment*" by adopting remedies the CMA considered to be relevant to digital advertising and applying to a wholly different industry characterised by fundamentally different competitive dynamics would be seriously flawed. The case for additional regulation governing the retail sector has not been made.

#### Ensuring a strong economy, innovation, and growth in the UK

- 3.11 Amazon supports a strong UK economy, enabling the creation and growth of successful digital and non-digital companies and promoting and protecting consumer welfare. Amazon agrees with the DMT that "*digital innovation plays an enormously valuable and positive role in our economy and our society.*" Maintaining a culture of innovation and a regulatory framework that supports it is key to promoting technological advancement, competition within retail and other industries, and, in turn, the continued delivery of the benefits of innovation to consumers, business and to the UK's broader economic outlook. In the retail industry, Amazon and many others have contributed innovative technologies. This innovative behaviour has led to the revolution of e-commerce, delivering benefits widely to UK consumers and businesses, and contributing to job creation in the UK.
- 3.12 Amazon's innovative behaviour does not only deliver benefits to customers shopping in its store, or businesses selling through its marketplace. The presence of innovative companies in a market contributes to a culture of creation and invention, thereby spurring innovation by others. New regulation should seek to encourage investment and innovation in the UK to continue. As the DMT notes, "*it is vital that any action does not have a negative impact ..., but rather drives competition and innovation, enabling disruptors to bring new services to market to the benefit of consumers.*" Any regulatory interventions which risk creating an environment in which it is unduly challenging for retailers to operate in may undermine investment in this important sector in the UK.
- 3.13 The most significant factor in enabling the creation and growth of successful digital companies in the UK is a favourable investment environment, including a strong entrepreneurial foundation. Factors such as support for entrepreneurs, innovation hubs, regulatory sandboxes, skills and education, as well as access to a range of different funding solutions, all play a role in encouraging start-ups and promoting their success. Competition law and other regulatory instruments can protect markets and may help level the playing field but, by themselves, they will not make start-ups flourish. Any new rules should promote long-run consumer welfare, which has been the foundation of UK competition law and regulation for decades.

4. **REMEDIES FOR ADDRESSING HARM: LIMITING REGULATION TO MARKET POWER AND BAD OUTCOMES FOR CONSUMERS**

4.1 As a matter of principle, any remedies the DMT is considering must be designed and targeted to address clearly identified consumer harms. This guiding principle should apply to any designation of strategic market status ("SMS"), any code of conduct governing data mobility and data access, and any other proposed intervention measures. Designating any operator as having SMS or imposing any other interventions without an in-depth, evidence-based understanding of the relevant market and well-established findings of consumer harm would introduce ineffective regulation and bureaucracy based on speculation or unsubstantiated assumptions. To be effective and targeted, remedies should also take account of other regulations applying to the sector in question.

Any designation of SMS must be based on a finding of market power and consumer harm

4.2 As suggested by the CMA in its market study's final report, the "*key objective of the code is to mitigate the effects of market power*". As such, any designation of SMS should be made only in relation to a specific market where such market power has been established based on evidence pertaining to that market. No such analysis has been carried out for the UK retail sector.

4.3 Further, it would not be appropriate or practicable to distinguish between digital and non-digital players given the difficulty in delineating which players and activities can be defined as digital in industries where suppliers and customers use multiple channels and business models. In cases where the CMA has carried out an analysis of such industries, it has found that interchangeability between online and offline channels means that they should be "*considered within the same product market.*" To apply this artificial distinction to industries without carrying out an analysis to determine whether or not the distinction should apply, would be to base the imposition of regulation on speculation rather than objective, evidence-based insights.

4.4 A general designation of SMS applicable to "*the corporate group as a whole*" would be inconsistent with the concept of remedies addressing harm and would raise material legal concerns. In particular, applying different rules to different players within a market, where neither player has been found to have market power, would lead to arbitrary discrimination and stifle innovation. It would not be sound, legally or economically, for a company designated as having SMS in one market to be subjected to additional rules in another market in which it has no market power and where there is no evidence of competition concerns or consumer harm.

Data mobility and data access are not problematic in retail

4.5 In determining whether the proposed remedies address harm, each sector should be examined in its own right. In particular, remedies relating to data mobility and data access require an assessment as to whether consumers suffer from competition issues relating to these issues in the sector in question.

4.6 Any suggestion that the retail sector would require data-related remedies would fail to grasp the commercial reality of the sector and would therefore be fundamentally misguided. The retail sector has always been highly competitive, with customers

quickly and easily identifying, comparing and buying the best offer from a huge variety of competing stores with offline, online and omni-channel offerings. The fact that customers are constantly shopping around and switching among multiple stores to buy the best offer significantly differentiates the retail sector from other markets.

- 4.7 In addition, a vast amount of data is already available to customers and retailers. By way of example, there are a large number of third party sources of data, including retail data (e.g., from GfK, NPD, comScore, Nielsen, and SimilarWeb), demographic data (e.g., from Experian), and other data (e.g., from credit card companies and LiveRamp).
- 4.8 Furthermore, any imposition of data mobility obligations should be cautiously approached given the potential negative impact on privacy. Users must be able to trust that those handling their data will do so responsibly, and to do so will need to be able to access information about the entity that their data is being transferred to. In order to ensure the protection of privacy throughout the implementation of any such data mobility remedies, regulators must be clear on what data can be requested by whom; there may be cases in which a user requests data that relates to another user, for example where contacts lists are shared. This will raise important privacy questions that regulators must be clear on the resolution of before any data mobility remedies are imposed. Further questions arise as to the duty of those who provide data to third party recipients in response to a request, to make efforts to protect against the misuse of the data they are providing those recipients.

Any new regulation must take account of broader regulatory landscape and insights from other government departments

- 4.9 Amazon considers it very important that any introduction of new regulation does not contribute to an environment of legal confusion, when operating alongside and possibly overlapping with existing regulation governing data sharing, storage and privacy.
- 4.10 The Department for Digital, Culture, Media and Sport's ("DCMS") independent report "Addressing trust in public sector data use" considered data sharing in the context of the public sector and its relation to public trust. The DCMS report recognised in its key findings that *"trust can be undermined by the inconsistent interpretation and application of legal mechanisms for data sharing, as well as the adoption of different security and technical standards. This creates a complex and confusing environment which also hinders transparency."* Clear, precise and practical certification measures for data security standards are therefore of utmost importance.
- 4.11 A holistic assessment of the existing regulatory framework should include regulation that has been adopted recently and will impact companies operating in the UK. It is unclear to what extent the DMT is planning to – or indeed at this stage is *able* to - take account of the functioning and impact of a range of recent regulatory standards and frameworks that are highly relevant to the issues in relation to which the DMT proposes to recommend further regulation. For instance, the EU recently adopted the Platform-to-Business Regulation ("**P2B Regulation**"), which entered into force on 12 July 2020 and which the UK is planning to implement by the end of the year. The P2B Regulation provides far-reaching transparency obligations on data sharing, ranking criteria, and adequate drafting of terms and conditions. As such, it provides a solid basis to address potential frictions in any given sector and gain insights and experience into the functioning of various types of models that can indicate the existence of market failures.

In Amazon's view, the P2B Regulation, and the initial review of its functioning, provide a sound basis for assessing whether additional, targeted regulation is required to address specific and identified market failures.

## 5. **PROCEDURE AND STRUCTURE: REGULATION SHOULD BE PROPORTIONATE AND PRACTICABLE**

- 5.1 The DMT is exploring whether "*speed, flexibility, clarity and legal certainty*" should be the key characteristics of the proposed new approach. At the outset, it is important to recognise that any new regulations will almost inevitably result in greater bureaucracy and complexity that could operate as a limiting factor in innovation and the growth of the UK economy. It is therefore important that any new regulatory framework is indeed structured and operated in a way that provides for legal certainty and predictability.

### Legal certainty and predictability of regulatory frameworks matter

- 5.2 While new technologies may give rise to novel questions, the application of UK competition law has evolved to address these. A pragmatic, evidence-based and therefore predictable legal and regulatory framework has been one of the hallmarks of the UK, attracting investment and fostering innovation for the benefit of consumers. UK competition law and regulation should continue to be based on clear rules established in primary legislation, driven by a case-by-case analysis of relevant facts, and focused on the core goal of consumer welfare. This will enable the UK to continue to adapt successfully to new and highly differentiated business models and market circumstances, without stifling innovation and foregoing consumer benefits.
- 5.3 The proposals considered by the DMT would, if pursued, amount to a major, far-reaching reform of a well-established legal and regulatory framework and would effectively re-write rules potentially applying to an extremely wide range of industry sectors and operators. Regulatory reform with such significant impact must be based on a detailed analysis of the specific sectors and operators at issue, in order to avoid risking damage to the UK's pragmatic and predictable regulatory framework, and the legal certainty that works to attract investment. For new regulation to apply in a similar manner to highly differentiated industries whose only commonalities are that they contain "*online*" or "*digital*" elements or may be described as "*platforms*" in some way, without proper analysis of the varying impact on those highly differentiated industries is reckless, inviting unnecessary cost, uncertainty, complexity, bureaucracy and the potential for poor consumer outcomes. Terms such as "*digital platforms*" lack the structural elements that have guided sector-specific regulation in the past. They are not sufficiently precise to be used in regulation, without the risk of a lack of legal certainty and confusion.
- 5.4 Any new measures should therefore be confined to providing a targeted and proportionate response to clearly defined and evidenced consumer harm, established on the basis of facts pertaining to the sector in question. Adopting a one size fits all approach would invite significant unintended consequences, including a highly detrimental impact on innovation in the UK.



## SMS designation and other interventions – rule of law and access to justice

- 5.5 Any designation of SMS must be subject to the duty to give reasons and rights of due process. It is crucial that the process of SMS designation follows a clear procedure and that there are clear and rational justifications for the criteria applied and the decisions made as a result of that procedure. As part of the process, companies must be (i) provided with the evidence being applied in respect of the SMS designation criteria and (ii) afforded the right to make representations which are taken into account in the regulator's decision making process. This is essential in order to guard the basic right to fair trial. Companies subject to SMS designation must have available a process by which they can appeal the decision.
- 5.6 The CMA noted in its final report on its market study into digital advertising that it would expect Google and Facebook to be designated as having SMS under a new regime, based on the CMA's estimated market shares of over 90% and over 50% respectively. In light of the CMA's findings, Amazon would therefore expect any SMS designation to only be relevant to operators with similar market positions that are such that "*potential rivals can no longer compete on equal terms.*" This is evidently not a position Amazon finds itself in, given the intensely competitive nature of the retail sector.
6. **CONCLUSION**
- 6.1 In conclusion, Amazon believes that the existing competition rules are sufficiently flexible to catch all new forms of conduct that could pose a threat to competition and the CMA's existing tools are adequate and effective in tackling behaviours that could harm consumers. The case that any regulation the CMA considers to be relevant to digital advertising should apply more broadly to other industries has not been made.
- 6.2 Given that the retail sector does not exhibit any of the features the CMA raised concerns about in the context of its market study into digital advertising, Amazon would not expect the retail sector to be subjected to new regulation. It is apparent that no operator in the competitive retail landscape has a market position that is even remotely comparable to the positions the CMA has identified with respect to search advertising and social media respectively. Consumers benefit from vibrant competition in retail, a sector that is continuously evolving to better meet customers' needs and expectations.
- 6.3 To the extent that the DMT nevertheless recommends additional regulation going beyond digital advertising, any such rules must be clear, specific, non-discriminatory, proportionate and practicable, applicable to all companies with mature capabilities that serve UK customers, and limited to addressing harms that have been specifically identified through rigorous investigative procedures.