

Publishers Association Response to the Digital Markets Taskforce [call for information](#)

Introduction

The Publishers Association is delighted to have the opportunity to respond to this call for information from the Digital Markets Taskforce (the “Taskforce”). We are responding in our role as the trade association representing book, journal, audio and digital publishers in the UK, spanning fiction and non-fiction, academic and education publishing. The industry is worth £6.3bn a year to the economy and has an employment footprint of up to 70,000 people in the UK.

The publishing industry wholeheartedly supports the Taskforce in its efforts to protect and promote competition and innovation in digital markets and to address the anti-competitive effects that can arise from the exercise of market power in those markets.

The publishing industry has been revolutionised by the advent of e-commerce platforms. Amazon, the world’s largest online marketplace and internet company, began its humble existence as an online seller of books and, although it has diversified significantly, its role in the book market remains vast. This submission focusses mostly on the role of Amazon in the publishing market, but it remains true that the changing publishing landscape with Facebook, Twitter and similar platforms is also of ongoing interest to the sector, as is the sales of books through other e-commerce platforms such as eBay. It is a medium-term concern for the sector that content and community platforms like Facebook and Google could, in future, utilise their market positions to extend their services along the value chain and disrupt content development and delivery models, but Amazon remains today’s most pressing issue.

To be clear, Amazon (and other e-commerce platforms) have played an important part in expanding readership and ensuring that books can be delivered into people’s hands and devices all around the globe. They have done a huge amount to build global online customer bases and assisted UK authors in sharing their ideas around the world. In many cases, our members work very closely with Amazon and do so in a constructive, mutually beneficial way. We absolutely want those relationships to continue, but we also request that the CMA ensures they do so on a level playing field so that publishers of all sizes can trade fairly on Amazon’s platform.

For all the benefits that Amazon has brought to the book industry, they have also established a monopoly of the digital and audio books markets and an enormous share of the physical book market. It is also worth stating that Amazon is not just the dominant book retailer but a competitor as a mass market publisher, provider of ebook hardware and as a distributor of other booksellers.

The concerns relating to Amazon’s market dominance in the book market are compounded in the era of a pandemic, where other routes to market (in our sector’s case, high street booksellers) have been closed and we are still unsure of the bounce-back potential of these outlets. As physical routes to market continue to be disrupted, both in the UK and abroad,

Amazon's role in direct selling of print books and its concentrated market power in digital and audio formats has only increased.

The publishing industry is now concerned that Amazon has such a "strong incumbency advantage", to quote the terminology used in relation to Google and Facebook in *Online platforms and digital advertising market study final report* (CMA, July 2020), that it should be assigned "Strategic Market Status" with a designated code of conduct through which fair and transparent business practices in the book sector can be governed and by reference to which appropriate remedies are available.

Questions

Scope of a new approach

1. **What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why?**

In particular:

The Furman Review refers to 'significant market power,' 'strategic bottleneck,' 'gateway,' 'relative market power' and 'economic dependence': – How should these terms be interpreted? – How do they relate to each other? – What role, if any, should each concept play in the SMS criteria?

Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?

What evidence could be used when assessing whether the criteria have been met?

The Furman Review and this subsequent process is a laudable and fundamentally necessary attempt to bring in a new approach to competition regulation for the digital age.

Online platforms and e-commerce platforms have changed the game. The Publishers Association, in our response to the Furman Review, called for the approach of the CMA and other international regulators to shift, from a competition approach looking into "dominance" to one which also takes into account "dependence".

In Amazon's case, it is abundantly clear that the terms referenced above are met. Our view would be that the SMS classification should be used sparingly, so as not to become overly burdensome to challengers to the major incumbents (where they exist), and focus primarily on those companies on whom the vast majority of businesses and consumers are fundamentally "dependent".

The designation of SMS could apply in blanket form to a company across all its markets or be allocated by sector. In our sector's case, Amazon now controls over 90% of ebook sales and approximately 45% of print books sales (a proportion which is growing), including approximately 70% of online print sales and 92% of audio sales. This market presence makes

UK publishers of all sizes fundamentally dependent on Amazon as a route to market and readers equally dependent on its platform for their content. Publishers of all disciplines (not just consumer publishers, but academic and educational book publishers too) cannot afford not to trade with Amazon. They simply have no choice but to trade with them, despite any difficulties they encounter in doing so.

The industry's concern relating to the role of Amazon is not limited to its monopoly or control of certain markets; it is that Amazon also has monopsony power as the sole major buyer in ebooks and audio books and can leverage between markets to strongly distort upstream competition. It is this monopsony power which triggers margin-squeeze and raises rivals' costs.

As will be apparent to those reading this submission, the assessment of significant market power in telecoms spans a number of criteria. The Publishers Association does not have first-hand experience relating to the significant market assessment within telecoms and cannot therefore pass comment on its suitability. However, given it is explicitly referenced, we would point out that a number of those criteria apply unquestionably to Amazon.

It is self-evident, for example, that this is true of market share; overall size of the undertaking; control of infrastructure not easily duplicated; and technological advantages to name a few. Particularly, we would like to point out that there is also a vertical integration issue here, as Amazon is the biggest retail platform for books globally but is also a publisher, a distributor and an own-brand label in its own right. This compounds concerns of anti-competitive behaviour. For detailed examples of this anti-competitive behaviour, please refer to the Publishers Association's Furman Review response and the answer to q.5 of this submission.

2. What implications should follow when a firm is designated as having SMS? For example:

Should a SMS designation enable remedies beyond a code of conduct to be deployed?

Should SMS status apply to the corporate group as a whole?

Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?

The SMS designation should enable remedies which tackle issues resulting from market dependence (listed in answer to q.5) expeditiously. Whether this is through a code of conduct or wider measures is for the competition authorities and policymakers to decide.

What is important is that these issues are dealt with and that failure to do so is met with proportionate remedies to encourage meaningful change in behaviour. One way to ensure that this happens is by imposing a statutory review of the markets identified, but behaviour must also be tracked in real time. We would propose that companies with SMS designation should report quarterly against their codes of conduct to ensure that 'fair trading'; 'open choices'; and 'trust and transparency' prevail.

As referenced above, the Publishers Association is ambivalent as to whether the SMS status applies in blanket form, or to a sub-set of activities. We acknowledge that the role of a company can vastly differ depending on the market concerned. Amazon's role in the book market strongly indicates that it should be allocated SMS for that sub-set of its activity at the very least. The full breadth of activities carried out in a particular sub-set of the company should be taken into account, i.e. it is not only a retail platform but also a distributor, publisher and own brand label in its own right.

3. What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:

What are the criteria that should define which activities fall within the remit of this regime?

Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.

We support the solution outlined in paragraph 2.13 and would stress the importance of a statutory review of the markets identified.

4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?

The pandemic has entrenched Amazon's market share in both e-commerce of physical books and in digital and audio books. As physical routes to market (bookshops) have been disrupted, the sector has seen a transfer to digital and e-commerce and it is as yet unclear how the retail landscape will balance out in the medium term.

In discussion with PA members, it is clear that some saw a doubling of sales through Amazon UK during the lockdown period including substantial increases in sales in ebooks and audio books. What is even more relevant to this discussion is that the trend has continued and been exacerbated post-lockdown when comparing 2020 and 2019 data. To reiterate, UK publishers have significantly benefitted by having this digital route to market and e-commerce of books and digital reading should be celebrated especially at a time when people arguably need the entertainment and comfort of reading more than ever. It is merely important, we feel, to make the point that Amazon's role in the market has been entrenched by the current circumstances making fair trading practices all the more important.

In the submission above we have made the case that Amazon is an essential route to market. One suggestion we would ask the competition authorities to explore is requiring Amazon to be subject to "must carry" provisions, so that all providers can have access to their retail platform on an equal footing during any future national or regional lockdown and perhaps beyond.

Remedies for addressing harm

5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?

The specific issues that publishers face are three-fold:

Firstly, commercial negotiations. Smaller publishers, especially, feel that they are unable to enter into a fair negotiation due to threats of de-listing, lack of promotion, or being labelled “out of stock” by an omnipotent retailer. They cannot deal on a level playing field in contractual negotiations with a company that is both a direct competitor and a distributor, for example. This is especially true in the audiobook market where Audible has such a commanding presence and Amazon’s monopsony power is at its most absolute. The development of an aggressive acquisition strategy relating to audio rights by the platform is compounding the issue and directly distorting the upstream market. The audiobook market is therefore a particularly egregious example of Amazon’s upstream and downstream control and its ability to leverage across markets and along the value chain.

Secondly, vertical integration and product promotion. Due to the vertically integrated nature of Amazon’s book business, there is a conflict of interest in how products are promoted on the platform. There are significant issues here for our members. Amazon is not just the dominant platform for book retail but also a competitor - as a mass market publisher, provider of ebook hardware and as distributor of other booksellers. Consequently, their own books are given greatest prominence on their platform and retail data can be shared upstream to inform product development.

Thirdly, the enforcement of territorial copyright. Dominant companies are not easy to compel to change their business practices, especially when it comes to piracy and “grey-market” goods. Publishers have struggled to work with Amazon to control the sale of goods which infringe territorial copyright on their global store.

6. In relation to the code of conduct:

Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?

To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of ‘Fair trading’, ‘Open choices’ and ‘Trust and transparency’, be able to tackle these effects? How, if at all, would they need to differ and why?

As will be clear from this submission, we support the Taskforce’s proposal to expand the SMS proposal beyond the market study and into online marketplaces.

The IPO is currently convening an online marketplaces code of conduct which we hope will prove effective. The work of the IPO in convening the roundtable meetings into online marketplaces, social media and online advertising under the Creative Industries Sector Deal

have all shown how discussions linked to possible codes of conduct have led to some practical co-operative steps being taken which facilitate the protection of the rights of copyright creators. However, the importance of such codes must be underpinned by backstop powers in legislation and via a regulator and we have not yet reached an agreement on the code despite the process having been underway for over two years. This IPO code does not address the full range of issues under consultation here and must not preclude Amazon being denoted its own code of conduct under its SMS. This code can be complementary and is fundamentally separate to the IPO's work in this area.

Specifically relating to the objectives for the code of conduct, fair trading is a crucial metric. As mentioned, commercial negotiations can be heavily skewed by market dominance and the principles of fair trading need to be reinforced.

The 'open choices' metric is also important as it relates to the bundling of products by Amazon. An example would be Amazon Prime's free delivery service, which provides loss-leader "free" services such as postage which then deters consumers from shopping elsewhere. Amazon also offers a Kindle Unlimited package, which gives subscribers access to millions of audio books and ebooks. This is a product aggregation service which captures audiences and heavily promotes Amazon-published material with sales data at its disposal. It is also important that the open choices principle is extended to IP delivered via voice activated content delivery (Alexa, etc) as those models mature and evolve.

On 'trust and transparency', the dominance of Amazon's data acquisition on the market was referenced in the market study. The use of this data is especially pertinent to the book sector given retail data can be used to inform the Amazon publishing business. An incumbency to be more transparent with retail data would level the playing field for publishers trying to compete in the market.

7. Should there be heightened scrutiny of acquisitions by SMS firms through a separate merger control regime? What should be the jurisdictional and substantive components of such a regime?

The most relevant example of acquisition leading to consolidation in the book sector was the buy-out of Audible by Amazon for \$300m in 2008. This move allowed unprecedented consolidation in the audiobook market, which has only grown to this day and has seen gains during the lockdown period. As mentioned above, the audiobook market is a particularly notable example of the nature of Amazon's dominance and its ability to leverage control between retail and upstream markets. .

In addition, in 2011, Amazon acquired Book Depository, a UK online book seller of scale. This compounded its control of the retail market in books, thereby further reducing competition and consumer choice

The Publishers Association would agree that further M&A activity in the book market, particularly of any merger which leads to vertical integration, should be subject to significant heightened scrutiny.

8. What remedies are required to address the sources of market power held by digital platforms?

What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?

Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?

As mentioned above, the dominance of Amazon's data acquisition in the book market is especially pertinent to the publishing sector given retail data can be used to inform the Amazon publishing business directly. Jeff Bezos, CEO of Amazon, testifying to US Congress this week, himself said "we have a policy against using seller specific data to aid our private label business, but I can't guarantee you that that policy has never been violated." Surely this is a less than satisfactory commitment that data cannot be used in this way by his business to the significant detriment of businesses of all sizes in the UK and around the globe that are forced to trade with his platform. In addition, this unsatisfactory response relates to third party sellers on his marketplace and does not cover the impact of direct sales data through his retail business and the crossover with Amazon's publishing business.

An incumbency to be more transparent with retail data would go some way towards levelling the playing field for publishers trying to compete in the market, but Amazon would retain an anti-competitive advantage in having access to such data in advance of those other players and only generating what is useful to it.

Publishers working with Amazon are currently unable to access data relating to their own titles. They cannot understand click-through rates or conversion rates on the best-selling titles and cannot adapt accordingly. At the very least we believe publishers should be able to access the consumer data relating to their own products, especially when the retailer in question has a substantial publishing business itself.

We would urge the Taskforce to consider remedies which include measures to limit what can be done with the data. Structural intervention should be considered where it is necessary to prevent vertical integration leading to anti-competitive effects. Amazon is not just the dominant platform for book retail but also a distributor, a mass market publisher in its own right and a provider of ebook hardware.

Structural intervention may mean full ownership separation (or 'divestiture') where separation cannot be achieved by other means; operational separation (where there is management separation or firewalls between different businesses under common ownership), as was the case in the BT/Openreach investigation; or restrictions targeted at conflicts of interest, where a company is not allowed to act on both sides of a single transaction.

The appropriateness of structural intervention measures should be explored and not taken off the table when anticipating how the code of conduct could be enforced. We would urge

the Taskforce to begin from the standpoint that anti-competitive behaviour by platforms such as Amazon should be stopped. It is then an iterative process using the various levers the competition authorities have at their disposal to achieve that goal. The Publishers Association strongly supports the SMS and code of conduct approach, but also suggests that other structural intervention measures should be strongly considered should the code prove ineffective in achieving the ultimate goal – i.e. a fair online trading environment.

9. The tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?

Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?

What measures, if any, are needed to address information asymmetries and imbalances of power between businesses (such as third-party sellers on marketplaces and providers of apps) and platforms?

What measures, if any, are needed to enable consumers to exert more control over use of their data?

What role (if any) is there for open or common standards or interoperability to promote competition and innovation across digital markets? In which markets or types of markets? What form should these take?

The Publishers Association would argue that Amazon's code of conduct objective relating to 'trust and transparency' should include a provision compelling the retailer to share consumer data with third party business suppliers on their platform which would go some way towards creating a level retail playing field. Structural intervention should also be considered where it is necessary to prevent vertical integration leading to anticompetitive effects.

Procedure and structure of a new pro-competition approach

10. Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?

The Publishers Association would make one fundamental point in relation to these characteristics – that speed is key. These are business relationships which are being undertaken on a minute-to-minute basis and the Taskforce must be able to act quickly to suspend, block and reverse decisions of SMS firms, and order conduct in order to achieve compliance with the code. Financial penalties for non-compliance should be firmly part of the mix.

11. What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of

conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?

12. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?

The Government's online harms legislation is not intended to address economic harm being caused by online platforms and e-commerce platforms. This new competition approach can and should fulfil that purpose.

Annex: Examples of anti-competitive behaviour

UK publishers have at times faced anti-competitive behaviour from platforms including predatory pricing; de-listing of products; most-favoured nation clauses in contracts; and IP enforcement issues such as the regular presence of territorial copyright infringement occurring on platforms. We understand from members that it is very difficult to deal with these issues when dealing with such a dominant customer.

It is notable that Amazon has previously been subject to an EU Commission antitrust investigation (June 2015) which looked into Amazon's ebook distribution arrangements. In May 2017, the Commission accepted Amazon's commitments to change some of the contracting terms with ebook publishers.¹ This was a welcome step forward that was designed to improve competition in the marketplace and we would urge the CMA to retain vigilance with regard to ongoing compliance with these commitments post-Brexit which only last until May 2022. It is worth noting, however, that while most favoured nation clauses have been removed from contracts, the effect has been net zero due to Amazon's monopsony power position. These clauses can be triggered without being present in contracts due to the commercial structure of the market.

Additionally, the company has on occasion removed the "pre-order buttons" on forthcoming titles from publishers, listing their existing titles as not for sale or out of stock, as a result of a stalling commercial negotiation. Competition enforcement may not happen quickly enough to deal with abuses of this type and while it might be possible to get an injunction on competition law grounds or otherwise seek redress from the CMA or the courts, smaller publishers in particular still remain concerned about the threat of such reprisals and may not be able to finance litigation (and may fear Amazon in doing so). This makes the case for ex ante regulation because of publishers' dependence on access to the platform. In these circumstances, the classification of Strategic Market Status and an associated code of conduct would be invaluable.

¹ http://europa.eu/rapid/press-release_IP-17-1223_en.pdf