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Submission by the Booksellers Association to the CMA Call for Information by the Digital Task Force – July 2020

Introduction

This submission is made on behalf of the Booksellers Association of the United Kingdom Ltd (BA), a trade association for UK booksellers, in response to the CMA's recently opened call for information on the work of the Digital Markets Taskforce. It shall focus on the "Remedies for Addressing Harm" section of the consultation, specifically looking at the impact on third-party sellers caused by Marketplaces, our views on the anti-competitive effects that can arise from the market power of digital platforms and how to remedy the imbalance of power that currently exists.

As the trade organisation for booksellers in the UK, the BA currently represents over 95% of specialist booksellers selling new books, including chains, independents, academic, supermarkets and others (e.g. online retailers). It supports, advises and works with its members to create products and services for booksellers. These include National Book Tokens and Batch (the BA payments service which involves settling invoices and organises returns), and a range of marketing and promotional campaign work such as Books Are My Bag, the Christmas Books catalogue, Independent Bookshop Week and Bookshop Day. We also have a close working relationship with the charity World Book Day.

The BA's objective is to represent bookselling operations of all types and sizes within the sector. Its remit is to work for its members through the provision of goods and services, through representation, advocacy, networking and education, and through the promotion to consumers of bookshops and bookselling. As of July 2020 the BA has 4,750 outlets in membership and, of those, 899 are independent retailers.

The response is supported by three surveys commissioned by the BA. The first, a survey of 284 BA member booksellers carried out in 2015. The second bookseller survey was carried out in response to the European Commission's investigation into Amazon Marketplace in 2019 which was more focused and had 42 respondents. Lastly, a survey of 57 UK publishers carried out in 2014 in order to provide a view on how Amazon impacts the wider UK book trade. For confidentiality purposes we have not included the entirety of the surveys in this submission. However, should the CMA wish to see further detail, we are happy to provide it at a later date and answer any questions the Taskforce has on the content of our submission.

UK Bookselling and the impact of Amazon

Until about 25 years ago, bookselling was seen as a mature industry built on a supply chain of printed books from author to publisher to distributor/wholesaler to bookseller. Nevertheless, given the nature of the product, together with the book trade's effective long term industry standards

(e.g. the International Standard Book Numbers which identify uniquely each individual title) and extensive descriptive cataloguing and metadata, the sector was the first to take off online and became a trailblazer for multichannel retailing. Following an explosion in the use of the internet the balance between buyers and sellers shifted.

This has further accelerated during recent months due to the impact of COVID-19 and the lockdown measures put in place which discouraged customers from visiting their local high streets. Despite reports in the media that book sales across the board have increased, our membership (particularly small independents), saw turnovers drop to around 20% of normal at the beginning of lockdown compared to the same period last year. Although most of our members have managed to set up online operations since the pandemic began, many are not yet able to trade efficiently in that manner. Consequently, this points to Amazon being the beneficiary of the majority of the increase in book sales that the UK has experienced during lockdown due to its already dominant online market position.

With the number of bookshops expected to fall in the UK, as part of the retrenchment of retail post-COVID, the BA is very concerned about the state of the high street. It cannot be in the consumer interest if communities do not have access to a local source of books adapted to that community's needs. Many publishers, as the BA understands it, share its concern about the concentration of market power in book retailing. This continuing consolidation of the dominant online seller will clearly, having occasioned the removal of most of the competition, create the power and potential to restrict consumer choice and raise prices. Over 200 bookseller respondents to our 2015 survey cite Amazon as cause for competition in print books to be unbalanced and 64% of them believe that Amazon is the sole cause. One commentator puts it aptly:

“Over the last five years the book market in the UK has moved to a majority of sales being made via the Internet (and one dominant player in that medium). This has had an effect on the high street, but also on access to the market online for those booksellers who wish to use multiple channels. Use of third party platforms to access traffic is not unusual – and indeed oft cited as evidence of competition online, e.g. that marketplace sellers trade well – however these seller’s operations are used to consolidate the dominant player’s own control of the market, and restrict direct communication with customers in that context. It also has other outcomes such as price control and product restriction – e.g. it gives the platform owner access to data which is not available to sellers or competitors about pricing and consumer behaviour, plus they control the catalogue and merchandising (often charged out to publishers) which subsequently controls access to books. This dominance within channel pivots upon control of access to customers, something which is unique to online as opposed to the High Street.”

The danger to consumers and society in the way Amazon conducts its business is summarised succinctly by a respondent to the BA's Survey in the following terms: “Eventually, those consumers who love Amazon will see [...] the effect they have on other booksellers (closing) publishers (merging and folding) and consumers (with higher prices and a smaller range).”

Amazon started trading as an online retailer of books but has since morphed into a company unparalleled in scope and scale of its activities. Amazon's sales of print books in the UK amount to around 50% of all print book sales but Amazon's sales of print books account for 70 – 80% of all print books bought online. In relation to e-books, its share is higher at around 90% of e-book sales. Sales of print books still make up around 10% of Amazon's revenue. Amazon also owns a number of online book selling platforms like The Book Depository and AbeBooks which would make its market share

of print book sales higher still. In 2017, in the UK alone, Amazon's sales of print books brought in over £360 million revenue.

Amazon Marketplace And The Buy Box

In 2000, Amazon introduced a service called Amazon Marketplace that allows third party businesses to sell used and new books, CDs, DVDs and other products alongside products listed on the Amazon website.

According to Amazon's 2018 SMB impact report, more than \$160 billion worldwide sales were made by global Marketplace sellers on Amazon representing about 58% of Amazon's global sales. 3.3 million new third-party sellers have joined Amazon marketplaces worldwide since 01 January 2017 which equates to two new sellers every minute. 300,000 of those sellers relate to the UK marketplace. Benefits of the service from the perspective of its sellers is most significantly access to Amazon's enormous customer base. Marketplace sellers pay a sales commission depending on the goods category they sell (often 15%) and, in some cases a fee for using the marketplace.

Sellers can also choose to use Amazon's Fulfilment by Amazon ("FBA") service whereby they send their products to an Amazon Fulfilment Centre which are stored until they are dispatched by Amazon, who take care of the picking, packing and delivery, upon sale. All FBA offers are listed as "Fulfilled by Amazon", eligible products also get the "Prime" badge and there is an increased chance of winning the Buy Box

The Buy Box refers to the white box on the right hand side of the Amazon product detail page, where customers can add items for purchase to their basket. It is important where different resellers are selling the same product. To get a sense of how important the Buy Box is for sellers, it is estimated that 82% of sales go through the Buy Box, and that percentage is even higher for purchases on mobile phones because the list of other third party sellers on mobile phones is even less visible. Even sellers who have a lower retail price will be concealed by not having won the Buy Box.

Amazon is elusive about what affects a seller's eligibility to win the Buy Box and there are no transparent criteria for sellers to aim at. Eligibility to win the Buy Box is at the absolute discretion of Amazon. It appears to be linked to performance as a seller but Amazon does not reveal what this means. It used to be that a seller must have Featured Merchant Status to be eligible to win the Buy Box, but that term was replaced with "Buy Box Eligible Status" by Amazon in December 2018.

It is understood that in order to obtain Buy Box Eligible Status, a seller must first become a "Professional Seller" by paying a monthly subscription fee of £25 to Amazon as well as closing and commission fees. Amazon then assesses fluid metrics including the following to determine whether to grant Buy Box Eligible Status and / or the Buy Box to a seller:

- Order defect rate based on customer feedback, A to Z guarantee claims and chargebacks;
- Availability and shipping time;
- Fulfilment method – Amazon heavily promotes its FBA sellers;
- Volume of sales; and
- Customer service record.

In addition to these metrics, pricing is also considered by Amazon when deciding which seller to award the Buy Box for any given product. However, pricing is not the sole criteria. Pricing need not be the lowest but it must be competitive and Amazon review the total price charged to a customer by a seller, e.g. the price of the product plus any shipping costs.

Bookseller's Concerns Relating to Marketplace

We have listed below some examples of the competition issues that booksellers have faced when using the Amazon Marketplace platform based on our survey responses. However it is also important to note, that due to the overwhelming dominance of Amazon in this sector and the numerous allegations of abusive practices by the firm, a number of booksellers have told us that they are afraid of speaking out against Amazon in relation to its Marketplace. So while the issues listed in this response help to paint a picture of the issues retailers face when using the platform it should be noticed that there will be elements of the story missing as booksellers fear being identified and punished by Amazon for speaking out.

Relating to its conflict with Amazon's role as a retailer:

"We have put a lot of effort into sourcing DELETED: BUSINESS SECRETS (this specialism is the reason we are still open). We have to sell our unique books on Amazon as well because many consumers now look for books nowhere else online. Therefore, the only way to reach a bigger UK market is to use Amazon marketplace. It is a problem because Amazon don't reward you for selling there: if you do well, they end up stocking your products themselves. If this online business folded we would fail, because shop traffic is decreasing" [Booksellers Survey 2015]

Relating to its use of information:

"We used to sell on Amazon Marketplace but it was too much about algorithms for Amazon's benefit than selling books, you could spend your life obtaining good star ratings" [Booksellers Survey 2019]

"I note that the books I sell most are then promoted by Amazon or other sellers as "prime". The fees to be on marketplace are already significant on top of the percentage they take. The books are nonetheless priced competitively. To then need to sign up to further (like Fulfilled by Amazon) means fewer profits just to be seen in searches. Further, no matter how many years active unless part of their programs I always seem to show up as "new"." [Booksellers Survey 2019]

"We were excluded from the site for about 6 months with regard hitting a metric – We addressed the issue but found it very difficult to speak with anyone with authority to reinstate us. Finally, by resort to our MP we were able to get back on line." [Booksellers Survey 2019]

"A few years ago after they went to Europe I was asked for a copy of my passport. I complied as I felt everyone knew my details but then I was asked for very personal details like who were my beneficiaries. Can't remember the rest! Was so angry. I refused and within 10 minutes every book I had listed was removed as was I as a seller. I have lost out but I refuse to be part of such a business." [Booksellers Survey 2019]

"They started asking for sensitive information about the business which we not willing to confide" [Booksellers Survey 2019]

Blocking sellers / products:

"We publish occasional books and when they are "not yet published" Amazon lists them as 'unavailable' and blocks our listing until THEY have copies, so we are unable to solicit pre-orders through our listing and misleading information is given to the public by Amazon." [Booksellers Survey 2019]

“(1) Threats of suspension over Christmas if we do not meet certain unspecified criteria. (2) demands for supplier invoices for popular DVDs and CDs with the threat that if not supplied we will be blocked from selling those particular products.” [Booksellers Survey 2019]

“After a number of years successfully selling via Amazon Marketplace with high customer ratings we were told our Seller account would be closed down. This was about 2 years ago. Although there was some sympathy from the first level of customer services, there was never any explanation of the reasons for closing our account from ‘higher up’, including appeal direct to Jeff Bezos.” [Booksellers Survey 2019]

One established BA member had its entire marketplace account arbitrarily suspended because of its listing of Amazon’s own individual self-published print on demand titles which Amazon itself also lists. Amazon suspected counterfeiting and / or intellectual property infringements in relation to a tiny fraction of its own self-published titles and cited this as the reason for suspension of the booksellers’ entire marketplace account preventing any sales by that member on marketplace for the period of the suspension. There has been some coverage of Amazon’s struggles to control these issues in its published titles. Amazon, however, continued to list the print on demand titles itself despite the suspicions of counterfeiting and / or intellectual property infringement.

It is noted in the Bundeskartellamt decision in Germany, that Amazon’s terms and conditions reserved an unlimited right to immediately terminate contractual relations with sellers and they use this at an alarming rate (the decision notes that 250,000 accounts were permanently blocked on the German marketplace in 2018 and 30,000 accounts were temporarily blocked) and that, following the decision, ordinary termination of an account will require 30 days’ notice. However, Amazon still retain the right to terminate immediately if they suspect counterfeiting or intellectual property breaches and use these concerns as a guise to terminate marketplace accounts disproportionately and abusively at great detriment to the sellers affected. There was no reason, for example, that the suspension referred to above could not have been limited to the specific titles in question or even to all of the members individual self-published print on demand titles rather than affecting its entire catalogue.

Other:

“Removing Next Day shipping options. Taking advantage of Prime membership to undercut seller prices” [Booksellers Survey 2019]

Abusive Practices

As outlined above, there are countless examples of abusive practices by Amazon. Since the start of the COVID crisis, Amazon’s market dominance has increased substantially and the dangers for the future of booksellers and publishers are such that unless action is taken to constrain Amazon’s anti-competitive behaviour in the market, Amazon’s dominance in the market may be complete and unassailable.

In relation to Marketplace and the Buy Box, Amazon has the ability to bring independent retailers under its control. Its near monopsony power enables it to manipulate prices and to extract whatever fees it wishes from independent dealers who have no option but to use Marketplace if they wish to remain in business

In addition, the operation of Marketplace and Buy Box give Amazon access to the price information and sales activity of all competitors in a particular market. Amazon then has the ability to choose whether or not it wishes to compete or whether it is in its commercial interest merely to exact an

inflated fee from the independent retailer using its services. If Amazon chooses not to stock a product and instead offer it via a third party seller, due to the access it has to that third party seller's sales volume data Amazon can choose when it becomes commercially viable for it to stock the item at which point the third party seller is discarded. This represents a clear conflict of interest in Amazon's operation as a marketplace platform and as an online retailer.

As put by the American Booksellers Association, the BA's equivalent in the USA, in a Submission to the US Federal Trade Commission in December 2019 on the subject of unfair competition, "Amazon leverages the interplay between the direct retail and platform sides of its business to maximise its dominance over suppliers". As Amazon extracts more fees from suppliers, it reduces their ability to invent and develop new products. Meanwhile Amazon is rapidly expanding its own product lines, using the trove of data it gathers from its platform to understand its suppliers' industries and compete directly against them.

The practice of Amazon to use sensitive data from independent retailers for purposes designed to expand its market dominance is a thread which runs through all the abuses identified above in addition to Amazon's practices in the operation of its Marketplace and in the operation of its "Buy Box" system.

The BA believes that Amazon's use of sensitive data from independent retailers who sell on its Marketplace is in breach of competition rules. Amazon's use of such sensitive data goes well beyond the operation of Marketplace, but is an integral part of Amazon's core strategy in acquiring a dominant position in all aspects of the consumer retail market. Addressing the abuse of data in one area of Amazon's activity will not resolve the competition issues which arise unless applied across the board. However, the scale of Amazon's practices are wider than the issue of Marketplace and Amazon's use of the sensitive data of sellers on Marketplace. Competition law concerns in relation to abusive conduct arise in relation to the online sale of books and eBooks. Amazon has a position approaching superdominance in relation to online sales of print books, with an estimated UK market share of 70-80% and has an even higher estimated UK market share of 90% in relation to sales of eBooks. In relation to both of these markets it is arguably guilty of predatory pricing and exercise of monopsony power. In the BA Survey 2014, 86% of surveyed publishers took the view that the competition authorities should investigate the print book market and 74% believed the print market was skewed because of the domination of Amazon. Furthermore, 48% of publishers thought that Amazon may well have sold print books below cost.

Conclusion and Next Steps

Given the self-evident fact that Amazon holds Strategic Market Status (SMS), we believe there should be mandated data separation to limit organisations', such as Amazon's, ability to leverage that market status. This could involve the CMA and Digital Markets Taskforce deciding to intervene in the market and to recommend full ownership and operational separation between Amazon Marketplace and the rest of the Amazon business. This should go some way to putting an end to Amazon abusing its market position to the detriment of independent retailers, including booksellers, on its Marketplace. This remedy is entirely in keeping with the three principles of the Task Force's remit – fair trading, trust and transparency and open choices.

In relation to the proposed enforceable code of conduct for SMS firms, we have no objection to this in principle. The principles of the code set out in the report from the Digital Competition Panel look to encompass the main issues that impact booksellers. However the arbitration of disputes arising from SMS firms diverging from the Code should be speedy as delays would have a huge impact on

Marketplace sellers. We agree that there is a need for power to enforce legally binding decisions and penalties for contraventions of the code where a participative approach is not effective. The imbalance of power between the SMS firms and complainants would also need to be addressed when looking at code enforcement perhaps through the creation of an ombudsman scheme or similar.

As outlined above, Amazon is a company with market power on an unprecedented scale and scope and has not refrained from using this power abusively. The BA requests that the CMA and the Digital Markets Taskforce not only considers consider this Submission in connection with its current in depth investigation into Amazon's activities in Marketplace but that it also looks at issues connected to the Buy Box and more generally as regards Amazon's role in providing an e-commerce platform which retailers are bound to use in order to access e-sales whilst also competing with those same retailers in the direct supply to customers and the major conflict of interest which is implicit in those activities.