amazon uk

Mergers: Draft revised guidance on the CMA's jurisdiction and procedure and draft revised merger notice

Amazon's response to the consultation

Introduction

1. Amazon welcomes the opportunity to respond to the consultation of the Competition and Markets Authority (**CMA**) on its further proposed reform of its (i) Mergers: Guidance on the CMA's jurisdiction and procedure (**CMA2**) and (ii) Merger Notice Template.

2. We support the CMA's prompt action and continued effort to deliver its '4Ps' framework in its merger regime. In particular, embedding the 4Ps – *pace, predictability, proportionality and process* – could help ensure the merger review processes support growth and facilitate investment and innovation while addressing genuine competition concerns in a targeted and evidence-based manner. In the end though, the 4Ps should lead to a solid and substantive competition analysis of the impact of a proposed transaction. That remains the critical point under any merger control regime.

3. This response sets out Amazon's comments in response to the CMA's consultation questions. While our comments are focused on the proposed changes to the current Merger Notice Template, we first address certain points in CMA2 which we consider that further clarity would be helpful.

- *Overall, are the changes introduced by the Draft Revised Guidance sufficiently clear and useful?*
- *What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.*
- *Are the changes Draft Revised Guidance consistent with the CMA's '4Ps framework' and likely to promote the pace, predictability, proportionality and engagement in the CMA's merger investigation process? Are there any additional changes that may further contribute to these priorities?*

Process

4. Overall, we welcome the CMA's further guidance in respect of its pre-notification and formal investigation process, which demonstrate an intention to expedite these processes to drive greater pace and efficiency. Timely clearance is particularly important in dynamic and innovation-driven sectors where commercial opportunities can be time-sensitive.

Jurisdictional tests

5. We also broadly support the clarifications provided in relation to the material influence and horizontal share of supply jurisdictional tests. However:

5.1. Further guidance could be provided to improve transparency and predictability and introduce increased certainty for businesses regarding when the CMA considers that a merger situation will arise, particularly concerning minority shareholdings. For example, the CMA could include example case studies to show how the CMA would treat different forms of influence in modern corporate governance settings. The guidance in respect of the material influence test should also allow for certain flexibility in circumstances where strict application of the test is not appropriate and would deter minority investments that are pro-competitive, and which are a critical source of funding in innovation-led sectors.

5.2. The CMA should provide more detailed guidance on the application of its updated share of supply test. While the CMA's commitment to focus on the statutory criteria is welcome (the CMA having clarified that it will *"typically only focus on the factors listed in section 23(5) of the Enterprise Act"* even though it has the ability to consider other criteria), we are concerned that CMA2 still permits overly flexible interpretations of the application of the share of supply test. This not only creates uncertainty about whether jurisdiction will be asserted over certain transactions but also does not accurately assess markets from the start to ascertain if there is a substantial lessening of competition. Clearer guidance, with an added focus on substantive impact on the application of the share of supply test would assist with increasing efficiency and reducing unnecessary pre-notification and jurisdiction-based discussions with the CMA. It would also be helpful if the CMA could include specific examples of how the hybrid test would apply in respect of different transactions.

Global mergers

6. We welcome the CMA's recognition that certain global mergers may not warrant CMA review and that the CMA is likely to prioritise investigating global deals that have a UK-specific impact and which involve local or national markets, particularly in circumstances where remedies agreed in other jurisdictions would address any UK specific concerns. The CMA's proposed

"wait and see" approach would be a positive development and reduce duplicative investigations and remedies processes from occurring across multiple jurisdictions at the same time.

7. However, it would provide more certainty, and be more likely to positively impact inward investment, if the CMA could clarify in the guidance when and in what circumstances the CMA will defer to other regulators and when the CMA would be more inclined to intervene.

Merger Notice Template

- *Are the proposed amendments to the current Merger Notice template sufficiently clear and useful?*
- *Are the proposed amendments to the current Merger Notice template appropriate in order to provide the CMA with the necessary information to conduct an efficient prenotification process?*
- *Are the proposed amendments in the current Merger Notice template in line with the '4Ps' framework?*
- *Do you have any other suggestions for additional or revised content of the current Merger Notice template?*

8. Overall, the proposed amendments to the current Merger Notice template, which introduce extensive reporting requirements (more substantial than ever before), fail to balance the CMA's need for relevant information with proportionality.

9. **The proposed amendments place an unnecessary burden on merging parties to disclose information and documents during pre-notification**

9.1. Pre-notification should remain an informal process. Requiring extensive supporting documentation as a pre-condition to engagement may risk limiting the effectiveness of early-stage discussions and reduce the agility of the process.

9.2. It may be helpful for parties to have the opportunity to provide draft submissions and receive early feedback during pre-notification, particularly in the context of global transactions with tight timelines. This could support the CMA's stated aim of facilitating "constructive engagement with merger parties throughout pre-notification". However, there is a risk that this objective could be undermined if the Merger Notice begins to function, in practice, as a gating mechanism to such engagement.

10. **Information and document requests should be threshold-based**

10.1. The administrative burden on parties to a merger of assembling detailed information—such as full customer lists, individualised product switching data or documents not created in the ordinary course of business (e.g. UK-specific profitability models)—may be disproportionate to the CMA's need to obtain relevant information for merger assessment purposes, particularly for transactions with a limited UK nexus and/or transactions that do not raise competition concerns. The risk is that burdensome information requests such as these may deter investment.

10.2. To reduce this burden and strike a more appropriate balance, we recommend that the CMA (i) increase the combined share of supply threshold applicable to specific information/document requests; and (ii) impose additional thresholds in the Merger Notice template in respect of certain information/document requests. We discuss our

recommendations with reference to specific Questions in the Merger Notice template, below:

10.2.1. **Question 8(b)(ii) and associated guidance note:** The proposed amendment places an increased burden on the merging parties to provide copies of all Internal Documents spanning various document categories. We recommend including a threshold in line with the threshold included at Question 9 to limit the number of potentially responsive documents to markets where the transaction will likely have an impact.

10.2.2. **Question 9 and associated guidance note:** It's unclear what the CMA's rationale is for increasing the threshold at Question 9 from 15% to 10%. This change may undermine the proportionality of the document request. Given that the share of supply test itself consists of a 25% threshold, we suggest that the CMA considers increasing the threshold at Question 9 (and Question 8(b)(ii) above) to 25% on the basis that, typically, competition concerns will be associated with higher shares of supply.

10.2.3. **Question 15 and associated guidance note:** Question 15 requests that the merging parties provide extensive tender/customer quotation information. The CMA would be well-served to introduce a combined share of supply threshold of 20% before parties are required to provide details of tenders, quotations or bidding behaviour. This would help ensure the CMA is focused on markets where competition may realistically be affected and strike an appropriate balance between requiring necessary information for purposes of the CMA's review while ensuring that the burden to the merging parties is proportionate.