

Case 51184 – SOMO, BEP and OMI response to Amazon proposed commitments

As public interest organisations scrutinising excessive corporate power in digital markets, we would like to take the opportunity to share our concerns about the CMA's intention to accept Amazon's proposed commitments and close its investigation into the company's anti-competitive practices on its UK Marketplace.

We believe that Amazon's proposed changes will fail to prevent it from leveraging its market dominance to favour its own products and services, unfairly use seller data, and force sellers to buy additional services from Amazon.

Amazon's proposals are too narrow, leave the company with too much leeway to escape or frustrate enforcement, and will be challenging to monitor. Ultimately, Amazon will preserve both the ability and the incentive to continue abusing its power over third-party sellers on its marketplace. Furthermore, we are surprised that the changes offered by Amazon to the CMA are weaker than those it agreed with the European Commission.

Amazon's overwhelming dominance of online marketplace intermediation services in the UK allows it to get away with a range of exploitative practices towards sellers, many which have not been included in the scope of the current investigation. The root of the problem is structural – Amazon holds too much market power and enjoys conflicting roles across multiple markets. This will not be solved with the behavioural commitments that Amazon has offered. Quoting a third-party seller, we are afraid the agreement with Amazon will be “meaningless”.¹

We therefore ask the CMA to reject Amazon's offer; pursue its investigation into Amazon's marketplace practices to its conclusion; and seriously consider structural remedies to what is essentially a structural problem.

The conflicts of interest behind the abuse

As the CMA itself outlines, Amazon's UK Marketplace controls at least 50% of all e-commerce marketplace services in the UK. As a consequence, sellers – many of them SMEs - in the UK wishing to access online shoppers find themselves locked into Amazon's ecosystem, in spite of their many concerns over how the company treats them.

SOMO's research² indicates that Amazon uses its market dominance to impose exploitative terms on third-party sellers dependent on its UK marketplace. This includes abusive practices and terms, forcing sellers into paying for extra services and extracting ever-increasing fees from those sellers.

This has been a profitable position for the e-commerce giant, as Amazon's income from third party sellers has continuously increased over the years. Data for the combined UK and European

¹ Amazon Seller Central, <https://sellercentral.amazon.com/seller-forums/discussions/t/86bfef05-ec7a-4e03-842b-5eb41f34adc9?postId=d20fa697-add7-4d19-bbf1-6f6114f2b90f>

² “Amazon's European chokehold: Independent sellers and the economy under Amazon's monopoly power”, SOMO, June 2023 <https://www.somo.nl/amazons-european-chokehold/>

marketplaces shows that in 2022 Amazon collected 20 billion pounds³ in referral and logistics fees from third party sellers, three times as high as the amount in 2017.⁴

These massive and continuous increases in revenue are only partially explained by higher sales. The other main driver has been the leveraging of Amazon's market power to impose constant increases in the prices that Amazon charges sellers, particularly for its logistics services. While FBA is technically not a mandatory service for third party sellers, by tying it to Buy Box [now Featured Merchant Offer] eligibility, access to the Prime programme and special discount days, Amazon has made it near-unavoidable for sellers.

To this, Amazon increasingly adds income derived from the monetisation of search results, which pits sellers against each other just to achieve visibility. SOMO estimates that in 2022, Amazon generated roughly another 1 billion pounds from sellers in the UK this way.

By leveraging its power, Amazon has continuously increased its cut of sellers' sales. Research from Marketplace Pulse shows that this cut could now be as high as 50% of sellers' revenue.⁵ In the UK, the Guardian has reported that Amazon held onto almost 40% of the pre-VAT price for the products of one UK seller.⁶ This clearly requires extensive further investigation.

Ultimately, Amazon has both the ability and the incentive to abuse its power towards marketplace sellers because there is a conflict of interest inherent to the multiple roles it plays: as the marketplace intermediary, setting the rules for the market and monitoring all activity within it; as a retailer, in competition with the independent sellers on the platform; and as a service provider to those sellers. Until this is addressed, Amazon will just continue to come up with new ways of exploiting this position.

The commitments and their weaknesses

More concretely, we hold the following concerns with respect to the proposed commitments:

Use of non-public seller data by Amazon Retail

Amazon is offering to restrict the use of non-public seller data for Amazon Retail Operations in competition with sellers⁷. This offer has obvious loopholes though. To start with, Amazon has listed which types of Amazon Retail operations are to be covered by the restriction⁸ in a very narrow way.

³ Original amounts calculated in euros and converted to pounds using the European Central Bank average exchange rate for 2022.

⁴ "Amazon's European chokehold: Independent sellers and the economy under Amazon's monopoly power", SOMO, June 2023 <https://www.somo.nl/amazons-european-chokehold/>

⁵ "Amazon Takes a 50% cut of sellers revenue", Marketplace Pulse, 13/02/2023 <https://www.marketplacepulse.com/articles/amazon-takes-a-50-cut-of-sellers-revenue> Retrieved on 21/02/2023

⁶ "Amazon under fire for ramping up sellers' fees and advertising costs", The Guardian, 14/06/2023 <https://www.theguardian.com/technology/2023/jun/14/amazon-rising-fees-advertising-costs-sellers-delivery-storage>

⁷ Article 1, page 33 of "Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

⁸ Definition of "Retail Operations in competition with Sellers", page 32 of Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

For instance, according to this list, Amazon Retail would still be able to access non-public seller data and use it to make marketing decisions. Amazon Retail would also still be able to use UK seller data outside of the UK market, for instance, in the US marketplace.

Amazon has also carved out vague exceptions to this commitment, including “improving the Amazon UK’s Store overall performance and sales, including the operation and features of the Amazon UK Store”.⁹ These exceptions can easily be abused.

The commitments as currently drafted would give Amazon full discretion to decide which seller data is made public or non-public. Amazon – including Amazon Retail – will always have access to the data first and will be able to decide which data to share, based on its own self-interest. In addition, Amazon, one of the world’s biggest technology companies, will continue to have far greater data processing and analytics capabilities than the mostly smaller retailers that use its marketplace. This means that even if the data is made public, Amazon will continue to benefit disproportionately from access to it. We also note that it will be challenging to monitor compliance, given the inherent practical difficulties in overseeing the myriad ways Amazon collects, stores and exploits data.

Featured Offer Selection Process

When it comes to the Buy Box [now Featured Merchant Offer], Amazon is offering to apply objectively verifiable, non-discriminatory conditions and criteria where there is more than one Offer on an ASIN¹⁰. However, the devil is in the detail and this proposal is too limited and, perhaps more importantly, will be very difficult to monitor.

As placement in the Buy Box is determined algorithmically based on a wide variety of categories and data points that are not transparently communicated to sellers and buyers, it would be incredibly hard to ensure that Amazon is keeping up with this commitment.

This is aggravated by the fact that Amazon can tweak its algorithms in a variety of ways that ultimately lead to preferencing of its own products or products delivered by FBA. For example, even if Amazon commits to applying the same criteria equally to all sellers and not take into account “Prime eligibility” or “Prime labelling”¹¹, it could still find subtle ways of favouring its own products or those using FBA by weighting ancillary features. Amazon could, for example, weight delivery reviews which would directly favour Amazon Retail and FBA delivered products, as Amazon deletes all negative delivery reviews of products delivered by Amazon.¹²

⁹ Definition of “Retail Operations in competition with Sellers”, page 32 of Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace”, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹⁰ Paragraph 3, page 33 of “Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace”, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹¹ Paragraph 5, page 34 of “Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace”, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹² “How to remove negative feedback?”, Seller Assistant App, 28/12/2022 <https://www.sellerassistant.app/blog/how-to-remove-negative-feedbacks-and-reviews-on-amazon#spanamazon-negative-review-removal-reasons-nbsp-span>

The criteria and process for awarding the Buy Box is shrouded in secrecy, and it will be nearly impossible for sellers and shoppers to monitor whether Amazon is secretly breaking the commitments.

The trustee, on the other hand, will in theory have more access to the internal workings of the Buy Box. Yet even here, it will be up to Amazon to identify which changes to the FMA and FME ranking process affect the commitments and therefore have to be notified to the trustee.¹³ This gives far too much leeway to Amazon to steer the process in its self-interest.

Unless Amazon is forced to publicly explain the automated systems behind the awarding of the Buy Box and open it up to scrutiny from sellers, shoppers, civil society and regulators, we will always be relying on Amazon's word that it is not preferencing its own products and services, or punishing others.

In addition, we must ask why Amazon has not offered to create a second Buy Box per product page, as it did following the European Commission's investigation of its marketplace. While not a perfect solution, replicating this in the UK would at least weaken the leverage Amazon gains from the Buy Box.

Duration

Amazon is proposing that these commitments would remain in place for less than five years¹⁴. This is far too short. Instead, we believe the commitments, were they to be accepted, should be made permanent.

Trustee and complaints mechanism

The establishment of an independent trustee to monitor Amazon's compliance is a welcome development. However, according to the proposed commitments, Amazon would have too much power over this role. In particular, we believe the conflict of interest provisions¹⁵ should be strengthened by, for instance, extending from 1 to 5 years the period of time when the trustee and technical experts would not be allowed to work for Amazon. Amazon would also have excessive discretion in deciding which information the trustee has access to.

We welcome that the commitments envision a complaints mechanism for sellers.¹⁶ We would stress however that this mechanism should be clearly communicated to sellers (via email and the Sellers Central) and that the link should be easily accessible at all times. Sellers using it should also be

¹³ Paragraph 31, page 39 "Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace",
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹⁴ Paragraph 13, page 35 of "Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace",
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹⁵ Paragraph 16, page 35 of "Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace",
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹⁶ Paragraph 15, page 35 of "Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace",
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

guaranteed an answer within a specified timeframe and the Trustee should be empowered to conduct thorough investigations into each complaint.

Limited and difficult to monitor

Ultimately, we believe that these remedies are too limited to adequately prevent Amazon from continuing to abuse its market dominance. To make matters worse, they will be challenging to monitor.

Amazon is one of the world's largest tech companies, whose operations rely on extensive and sophisticated data collection, storage and analysis. Building upon this data, Amazon's business operations rely on numerous automated decision-making systems which process huge swathes of data and use secretive criteria. It is notoriously difficult to impose external scrutiny on these practices and we have serious concerns that the monitoring systems proposed by Amazon will not be up to the task.

We also note that the CMA's own procedural guidance foresees that it should not accept remedies if it would be difficult to assess whether they are being implemented and effective.¹⁷

We also disagree with the CMA in its assessment that accepting Amazon's proposal would not undermine deterrence.¹⁸ First, we should stress that Amazon has only proactively offered these commitments because it has faced similar investigations (and fines) in Italy and at the EU level and is rumoured to be facing an imminent lawsuit in the US.¹⁹

This is not the first time that Amazon has been investigated for abusing its power over sellers, yet the company does not seem to change its behaviour. To give just one example, the CMA previously ordered Amazon to refrain from forcing sellers to accept its unfair price parity clauses.²⁰ Yet, there are indications that the company, via its automated pricing tools, has maintained the practice.²¹ Nor does Amazon hesitate to use its market power to squeeze sellers, as illustrated by the company recently announcing it would start charging a 2% fee for Seller Fulfilled Prime.²²

We urge the CMA to reconsider its preliminary decision, reject Amazon's proposed commitments and instead pursue the investigation to its conclusion. This extended investigation should directly scrutinise how Amazon both relies on and benefits from the conflicts of interest inherent in Amazon's current structure. We call on the CMA to go beyond problematic behavioural remedies

¹⁷ Paragraph 10.20 of "Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8", 10/12/2021, <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#investigation-outcomes>

¹⁸ Paragraph 6.24, page 26 of "Notice of intention to accept commitments offered by Amazon in relation to conduct on its UK online marketplace", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1173816/Notice_of_intention_to_accept_commitments.pdf

¹⁹ "FTC readies lawsuit that could break up Amazon", Politico, 25/07/2023, <https://www.politico.com/news/2023/07/25/ftc-lawsuit-break-up-amazon-00108130>

²⁰ Case CE/9692/12, "Amazon online retailer: investigation into anti-competitive practices", 01/10/2013, <https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices>

²¹ 21 State of California Department of Justice, "Attorney General Bonta Reveals Additional Evidence of Antitrust Violations in Lawsuit Against Amazon", 14/04/2023 <https://oag.ca.gov/news/press-releases/attorney-general-bonta-reveals-additional-evidence-antitrust-violations-lawsuit>

²² "Amazon Seller-Fulfilled Prime 2023 Guide", Jungle Scout, 17/08/2023 <https://www.junglescout.com/blog/seller-fulfilled-prime/>

and instead seriously consider the robust structural solutions needed to comprehensively neutralise Amazon's conflicts of interest.

Signatory organisations:

SOMO

Balanced Economy Project

Open Markets Institute