Feedback to European Commission's request for comment on Amazon's proposed commitments concerning marketplace seller data and access to Buy Box and Prime.

Signed by, and submitted on behalf of, non-governmental organisations.

September 8, 2022

Introduction: Why we are responding to the call for feedback

We, the undersigned, believe that Amazon's dominant 'gatekeeper' position in e-commerce and other areas poses serious threats to our economies and societies. Amazon's Jeff Bezos and others have described the company's strategy in terms of a spinning 'flywheel' containing many nodes: a boost to the speed of any node boosts them all. For example, the more customers Amazon has, the more third-party sellers feel the need to use the platform - and the more sellers, the more customers flock to Amazon. The more of each, the more power it has to extract fees and other revenues from their businesses. The more fees it generates, the more acquisitions it can make and untapped markets it can enter, increasing nodes on the flywheel. Unchecked, this strategy can tend rapidly towards growing monopoly power.

We are delighted that the European Commission takes these threats seriously, and that it has launched this particular investigation and call for feedback.

In response to the concerns raised and evidence of anti-competitive behaviour already uncovered by the Commission, Amazon has now outlined a set of proposed commitments apparently to refrain from activities and behaviours that the Commission has objected to. While these might seem positive at first glance, we believe these are an attempt by Amazon to forestall and delay effective measures against its abusive activities and its dominant position – i.e. to set the agenda for the Commission. Indeed, the commitments say (p1) that they "are given on the understanding that the Commission will confirm there are no grounds for further action" in current cases.

Amazon's core business model clearly involves creating, then exploiting, basic conflicts of interest. Its new proposed commitments seem designed to ensure that these profitable conflicts ultimately remain intact. We see this offer as a threat to consumers, businesses and workers. It will not stop Amazon from abusing its dominance.

Summary of our recommendations:

We urge the European Commission to reject Amazon's commitments outright and in full, and instead continue vigorously to pursue its antitrust cases against Amazon, imposing remedies and penalties (on the Commission's own terms) as necessary.

The following parts of this submission elaborate on the rationale behind our position, including both our views on Amazon's specific commitments as well as the wider regulatory context surrounding them.

General points about Amazon's commitments

We would highlight several general points about the commitments:

1. They are weak, vague and full of loopholes, leaving too much room for evasion and abuse by Amazon. Moreover, the proposed limitation of these commitments to five years, or indeed any time horizon at all, is unjustifiable.

2. Most of these commitments will be required by the Digital Markets Act (DMA) anyway – for example, the legislation includes prohibitions on self-preferencing and using non-public data generated by business users. Yet the DMA's obligations are more extensive than those offered by Amazon, and will be enforced by the Commission rather than by the company itself. From the point of view of both efficacy and rule of law, it is not appropriate for a private company to make voluntary commitments parallel to those that will imminently be imposed on it by European law.

3. The commitments do not materially improve the position of third-party sellers vis-à-vis Amazon. Third party sellers have publicly shown a lack of trust that Amazon would comply, especially when it comes to use of sellers' non-public data and the need for clarity on the criteria used to select the Featured Offer[1]. The commitments also do not foresee any role for sellers in monitoring compliance or enforcement.

4. The commitments do not address the root causes of Amazon's abuse of its dominant position, which are i) its sheer size, ii) its power over sellers and consumers iii) its control of a whole ecosystem of interrelated services generating fundamental conflicts of interest. Commitments not to abuse market power generated by these conflicts are a pale shadow of what is needed: elimination of those conflicts. In our view, the only way ultimately to eliminate these conflicts is structural legal remedies, such as legally separating Amazon's marketplace from its retail and logistics operations.

---

[1] See, for instance, "Amazon Briefing: Overseas sellers are cautiously optimistic about changes to Amazon's Europe business", Modern Retail, 21 July 2022 (https://www.modernretail.co/platforms/amazon-briefing-overseas-sellers-are-cautiously-optimistic-about-changes-to-amazons-europe-business/)

Specific comments on Amazon's commitments

In addition, we have the following specific comments about individual commitments made by Amazon.

- As set out in paragraph 1, Amazon's commitments on "non-public Seller Data" are narrower than the relevant obligations contained in the Digital Markets Act (DMA), under which Amazon is likely to be designated a gatekeeper. Firstly, they are limited to "Retail Operations in competition with Sellers", whereas Article 6(1) of the DMA would prohibit any use of non-public data "in competition with business users" and therefore also cover any Amazon activity designated as a "core platform service". The DMA obligation also includes "data generated or provided by the customers of those business users," which Amazon's commitments do not cover.

- Amazon's commitments repeatedly reference "non-discriminatory conditions and criteria" for Buy Box and Prime eligibility, without elaborating what this will mean in practice and what the process will be for determining these. We are concerned about Amazon's ability to discreetly skew these in its favour, given the information asymmetry that exists between Amazon and its business users as well as regulators. Moreover, Amazon's admission in paragraph 3 that the conditions and criteria will "include…those applied by existing selection mechanisms" suggests it is not serious about changing its abusive behaviour.

- In paragraph 15, Amazon states that it may modify or set exceptions to the application of Prime eligibility and Prime labelling conditions criteria in response to factors including "peak shopping periods and evolutions of customer preferences". These vague factors will give Amazon unacceptable freedom to arbitrarily change the rules of the game that sellers depend on when selling on Amazon. The fact that Amazon's own retail business and sellers using its logistics services will also be subject to these modifications does not solve the problem, as Amazon will have the incentive to update the rules in ways that subtly benefit its own commercial interests.

- Amazon's self-assigned role in the commitments in defining what is considered "non-public" and "public" data, and in deciding when the latter is made available to sellers (therefore unilaterally turning it from "non-public" to "public"), will allow it to continue using data generated by its business users to its advantage. Moreover, the scenarios Amazon identifies as justifying the use of seller data, including "improving the Amazon Store's overall performance and sales", are vague and therefore prone to abuse.

- We believe there are serious issues with Amazon's commitments on the "second offer" set out in paragraphs 6 to 12. First, as set out in paragraph 10, the last time that Amazon will report on implementation of the second offer is 13 months after the end of the six-month implementation period, despite the commitments lasting for 60 months in total. After that point, the monitoring trustee and the Commission will receive no data on either the effects of the original change or further experiments by Amazon, seriously undermining both enforcement of the commitments and evaluation of their efficacy.

- As established in paragraph 10(b), the benchmark for judging the efficacy of the second offer is "a material increase in the frequency of the display of or the consumer interaction with the Second Displayed Offer". The use of "or" implies that a material increase in display frequency would be considered enough, despite this being highly unlikely to reflect increased competition with offers contained in the Buy Box. In addition, the lack of a definition for "consumer interaction" leaves open the possibility that a click on the second offer without completing the purchase would also be considered sufficient, despite this again not being evidence of greater competition with the Buy Box.
- The lack of an independent and binding dispute resolution mechanism is a major gap in Amazon's commitments. Without one, Amazon's third-party sellers - the supposed beneficiaries of these commitments - will have no formal means of challenging any potential non-compliance with the commitments. In contrast, the commitments offered by Google in 2020 as part of its acquisition of Fitbit included a "fast track dispute resolution mechanism" invokable by third parties. Moreover, Amazon's description of the role and responsibilities of the Monitoring Trustee does not mention any responsibility to consult third-party sellers or indeed any other third party, making the trustee excessively dependent on Amazon's version of events. This is insufficient to ensure effective enforcement of the commitments.
- We struggle to see a compelling rationale for the five-year limitation in the duration of the commitments. If the anti-competitive behaviour identified by the Commission in its investigations is considered harmful, then this will surely still be true in ten years' time and even beyond.
- The commitments do not cover Amazon's ability to use the Buy Box to influence offerings on other marketplaces, which would amount to an exertion of hidden power and could have economy-wide harmful effects on consumers and on others. There are reports[2] that Amazon's Fair Pricing Policy and the ability to threaten removal of the crucial Buy Box, force its third party sellers not to offer lower prices elsewhere. If this is the case, then Amazon is likely to be exporting

2 See, for example, *Amazon Loses Antitrust Ruling in Consumer 'Fair Pricing' Case*, Bloomberg, March 14, 2022. That case concerns the United States. However, Amazon's "Fair Pricing" rules in Europe appear to allow this possibility too. For instance, its Fair Pricing policy for Germany states that "Amazon can remove the Buy Box [if sellers are] setting a price on a product or service that is significantly higher than recent prices offered on **or off** Amazon." (Our emphasis added.) This statement appears to say that Amazon may remove the buy box if a seller offers lower prices off Amazon than it does on Amazon.

high prices to parts of the economy, an issue that takes on particular importance in this high-inflation era. It would also exclude competitors from competing on lower fees and thereby entrench Amazon's dominant position. We urge the Commission, in partnership with competition authorities inside and outside Europe, to investigate this issue.

- Furthermore, the rules and criteria for the Buy Box and Prime boost Amazon's market power which allows it to engage in selling below cost on selected items in order to drive particular retail competitors out of business[3]. Such predatory pricing may also allow Amazon to increase prices in the longer term: the commitments would not restrain this.

- Lastly and perhaps most importantly, the commitments do not set out any robust means of enforcement or sanctions for non-compliance. All the document proposes is that the Monitoring Trustee would be able to "propose" (p12) measures to Amazon to ensure compliance, with no requirement on Amazon to accept these measures. In addition, the commitments state that : "The Monitoring Trustee shall not: . . . have any decision-making power or powers of investigation of the kind vested in the Commission pursuant to Regulation 1/203." This is clearly unacceptable. Any compliance mechanisms subsequently proposed by the Commission should be as robust as possible and impose significant sanctions in case of non-compliance.

- Additionally the selection process for the Monitoring Trustee is too strongly based on proposals by Amazon. The one-year period before the Monitoring Trustee may start working for Amazon after terminating their mandate is too short.

- Given the numerous serious flaws we have pointed out in Amazon's commitments, which are by no means exhaustive, <u>we urge the European Commission to reject Amazon's commitments outright and in full, and instead continue vigorously to pursue its antitrust cases against Amazon, imposing remedies and penalties (on its own terms) if necessary.</u>

Additional remarks

- The root causes of the anti-competitive behaviour identified by the Commission are Amazon's sheer size, the power this gives it over sellers, and the profound conflicts of interest generated by its businesses across retail, marketplaces, data storage, logistics, payments, healthcare and more. As long as these conflicts of interest continue to exist, Amazon will have the incentive to abuse its market

[3] See *Prime Predator: Amazon and the Rationale of Below Average Variable Cost Pricing Strategies Among Negative-Cash Flow Firms*, Shaoul Sussman, Journal of Antitrust Enforcement, Volume 7, Issue 2, July 2019

power, however many commitments it makes. It follows logically from this, and is our view, that structural remedies – such as forced divestiture or legal and operational separation – are the only real, durable means of tackling these conflicts of interest and Amazon's market dominance. Behavioural remedies or commitments will not be equally effective. The experiences with other digital gatekeepers like Google would support that assessment. Therefore, DG Competition should impose structural measures based on Article 7 (1) of Regulation 1/2003.

- We welcome the recently passed Digital Markets Act (DMA), which will give the Commission new ex-ante powers to sanction anti-competitive behaviour across Amazon's businesses, instead of having to investigate potential abuses one by one. We believe the holistic nature of the DMA, which sets out universal obligations that all gatekeepers have to follow, and the investigation powers it provides the Commission, will be much more effective in challenging Amazon's market power than the commitments it has offered, and better able to keep up with changes in Amazon's business model and practices. We urge the Commission to proceed with designating Amazon as a gatekeeper as quickly as possible given the severe harm the company continues to inflict on consumers, small businesses, competitive markets and innovation. It should be made very clear that any commitments by Amazon cannot be used to prevent enforcement by the Commission based on the DMA. Moreover, accepting both Amazon's commitments while simultaneously imposing obligations on it via the DMA would create a dual-track regulatory regime that would be confusing, inefficient and vulnerable to manipulation by Amazon.

- Separately, and at the same time, we call on the Commission to use its merger control powers to the fullest to prevent Amazon from continuing its long trail of acquisitions to create more 'nodes on the flywheel'. This should include reversing the burden of evidence for acquisitions[4], taking advantage of the recent General Court Ruling on Illumina/GRAIL confirming the Commission's ability to review transactions below EU or national merger control thresholds, and making active use of the enhanced merger control regime for gatekeepers in the DMA.

---

4 Currently, the burden of evidence is generally on the European Commission to demonstrate why a proposed merger or acquisition should <u>not</u> go ahead. This has made it very hard to block mergers and acquisitions: according to EC data, of 8,083 merger notifications since 1990, only 30 have been prohibited – less than 0. 4%. (See https://ec.europa.eu/competition/mergers/statistics.pdf Because of its dominance, the burden of proof for acquisitions by Amazon should be reversed so that it is the company, not the Commission, that must demonstrate to a high degree of evidence i) why it cannot invest to create its own in-house version of the product or service as a company it wants to acquire, ii) how such an acquisition will not inflict harm or reduce competition, and iii) why an acquisition is the <u>only</u> way for it to achieve this. (See, for instance, *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews*, Tommaso Valletti, ProMarket, June 28, 2021.)

- Finally, we also draw attention to Amazon's systematic labour rights violations, in particular with regard to working time laws, statutory and collectively agreed minimum wages and employee data protection throughout Europe, which constitute unfair business practices in the broader sense and are thus relevant under competition law. We therefore call on the Commission to also examine this aspect of competition law, which has so far often been at the expense of local businesses and workers.

  END

Signatory organisations:

- Austrian Federal Chamber of Labour (AK Europa)
- Balanced Economy Project
- Digitale Gesellschaft e.V.
- European Public Services Union (EPSU)
- Foxglove
- Goliathwatch
- FairVote UK
- LobbyControl
- Simply Secure
- Centre for Research on Multinational Corporations (SOMO)
- UNI Europa
- WEED (Weltwirtschaft, Ökologie & Entwicklung e.V.)

This submission was co-ordinated by the Balanced Economy Project.