

Insights

AMAZON ADDED TO CMA'S SHOPPING LIST OF GROCERY RETAILERS

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The way in which we buy groceries has vastly transformed over the last few years given the increasing prominence of online sales and delivery services, a trend exacerbated by the global pandemic. As society's buying habits continue to evolve, grocery retailers are also becoming more innovative and delivering services in different ways, making increasing use of digital platforms to reach customers.

On February 9, 2022, the UK's Competition and Markets Authority (CMA) officially added Amazon to its list of grocery retailers required to comply with the Grocery Supply Code of Practice (GSCOP). Amazon entered the UK grocery sector with its Amazon Fresh offering in 2016 and the company's food retail activities have since increased with physical stores launching in the UK in March 2021. However, it has only now been added to the CMA's list.

GSCOP was published in 2009 and provides detail on how designated retailers should manage their relationship with suppliers. For example, GSCOP:

- restricts designated retailers from making changes to supply contracts at short notice;
- requires designated retailers to give an appropriate period of notice if they no longer want to use a supplier;
- requires designated retailers to provide reasons for ending a contract with a supplier.
- Compliance with GSCOP is monitored by the Groceries Code Adjudicator (GCA) who has powers to impose penalties for breach.

There are now 15 designated grocers that must comply with GSCOP, with an online grocer being the most recent addition before Amazon.

WHY HAS AMAZON BEEN DESIGNATED?

In making a designation, the CMA is focussed on relative size of a retailer and its buyer power in relation to its suppliers. A turnover threshold is applied and in order to be added to the designated

list to comply with GSCOP, grocers must have annual grocery sales of more than £1 billion in the UK. In reaching its decision to designate Amazon as a grocery retailer, the CMA looked at the relevant groceries turnover of Amazon's two wholly owned subsidiaries and the applicability of GSCOP to Amazon.com Inc. and concluded that, "...there is a risk that Amazon and the companies that are part of the Amazon corporate group of companies may seek to use their size and status to negotiate more favourable terms with grocery suppliers...".

WHAT DOES THIS MEAN FOR SUPPLIERS?

The CMA's designation means that Amazon must now comply with the terms of GSCOP and suppliers who feel that the code has been breached will have the right to refer Amazon to the GCA. If one of the designated grocers is found to have breached GSCOP, the GCA has a number of enforcement powers, including the ability to impose fines of up to 1% of the grocer's total UK annual turnover. For example, in 2019 one of the largest grocery retailers in the UK was fined £1.3 million for breaching GSCOP on two counts - it didn't provide the necessary reasonable notice to its suppliers on decisions to delist products and it changed supply agreements without giving reasonable notice of the changes. The GCA also required the grocer to issue an official apology.

Suppliers are likely to welcome this development as it equips them with more tools to safeguard their business dealings and supply contracts with Amazon. Suppliers will be also be able to rank Amazon for compliance with GSCOP in the GCA's annual survey - which is used as clear measure by the GCA for benchmarking progress. Suppliers will be able to access the confidential platform established by the GCA in February 2021 to report any behaviour by a retailer that they feel is in breach.

WHAT DOES THIS MEAN FOR AMAZON?

Amazon will have to be mindful of the provisions of GSCOP and report to the CMA annually. Additionally, in order to remain compliant, Amazon will need to train staff and ensure that they are aware of their obligations to suppliers. More broadly, the CMA's designation comes at a time when competition authorities globally are wrestling with the challenge of whether (and how) to regulate large digital platforms.

In the UK in particular, as part of its new "pro competition regime for digital markets", the government is consulting on the introduction of a number of new measures which will apply to digital firms. As part of this package of measures, firms with designated "strategic market status" (SMS), will be given bespoke enforceable codes of conduct setting out how they are expected to behave, to be overseen by a specially created unit within the CMA, the Digital Markets Unit (DMU). A firm's SMS designation will be made by the DMU.

The government has indicated that the purpose of the Digital Markets Unit should be to promote competition and competitive outcomes by addressing both the sources of market power and the economic harms that result from the exercise of market power. With its focus on curbing market

power and its code based system, there are clear parallels with GSCOP. Indeed, the CMA looked to the Grocery Code Adjudicator (along with other UK sectoral regulators like Ofgem) to inform its decision to recommend a code based system (as opposed for example to the legislative approach to big tech being taken in the European Union in the form of the Digital Markets and Digital Services Acts).

Once the UK regime is up and running, Amazon may well be in scope for designation as having SMS, in which case it may find itself subject to codes of conduct governing multiple aspects of its UK retail activities.

BCLP's Antitrust and Competition group continues to monitor developments in this space. Please do not hesitate to contact any of the lawyers listed if you have any questions about this.

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