

*This document is an unofficial translation to facilitate the understanding of the CNMC's Resolution*

**RESOLUTION TO THE DECLARATIVE PROCEDURE DETERMINING IF AMAZON SPAIN FULFILLMENT, S.L. (ASF) AND AMAZON ROAD TRANSPORT SPAIN, S.L (ARTS) HAVE THE STATUS OF POSTAL OPERATORS AND CAN BE REQUIRED TO HAVE THE APPROPRIATE AFFIDAVIT**

**STP/DTSP/006/20**

**REGULATORY SUPERVISION CHAMBER**

**Chair**

Mr. Ángel Torres Torres

**Board Members**

Mr. Mariano Bacigalupo Saggese

Mr. Bernardo Lorenzo Almendros

Mr. Xabier Ormaetxea Garai

Ms. Pilar Sánchez Núñez

**Secretary of the Chamber**

Mr. Joaquim Hortalà i Vallvé

Madrid, 24 September 2020

**BACKGROUND**

**FIRST. - Opening of preliminary proceedings and request for information to Amazon Spain Services S.L. (IR/DTSP/003/19)**

On 14 December 2018, Amazon Spain Services, S.L. (hereinafter ASSE) requested a meeting with the Directorate of Transport and Postal Sector (hereinafter DTSP) of the National Commission for Markets and Competition (hereinafter CNMC) to discuss issues related to the company's activity (in particular, the Amazon Flex programme). The Commission showed an interest in knowing in detail the way that parcel services are provided in Spain (functioning of Amazon Spain Fulfillment S.L, Multi-Channel Fulfillment programme, fees applicable to third-party sellers, etc.).

ASSE, by email of 21 December 2018, completed the information provided during the meeting and made several statements about its activity in the matter of parcel shipping, concluding that it could not be catalogued in any case as postal service and that, if it could involve the provision of any postal service, it would be subsumed within the concept of services performed on a self-provision basis.

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On 5 April 2019, the Director of Transport and Postal Sector of the CNMC, prior to any other action and in accordance with the provisions of Article 55 of Law 39/2015 of 1 October, on the Common Administrative Procedure of Public Administrations (hereinafter LPAC), agreed to open a period of preliminary actions in relation to ASSE under the reference IR/DTSP/003/19. Within it, an information request was sent to this company, asking about the nature and characteristics of the parcel activities that Amazon carries out in Spain, in case they could be considered as postal activities and, therefore, be subject to the conditions and requirements that are provided for in Law 43/2010 of 30 December on the Universal Postal Service, Users' Rights and Postal Market, hereinafter referred to as Postal Law (LSP).

In particular, ASSE was asked to explain the reasons why it considered that it should not register as a postal service provider in Spain, while asking it for information about its partners in the delivery tasks managed through the "Amazon Flex" programme<sup>1</sup>.

Specifically, they were asked whether they were registered as postal service providers and, if they were not, to explain why they had not been required to register at the General Register of Postal Service Providers, managed by the Subdirector General for Postal Regime of the Ministry of Transport, Mobility and Urban Agenda (MITMA, previously 'Fomento')<sup>2</sup>.

## **SECOND. - Response from Amazon Spain Fulfillment S.L. to the request for information.**

On 30 April 2019, a document by Amazon Spain Fulfillment S.L. (hereinafter referred to as ASF) entered the CNMC Registry. This document replied to the information request in the following terms:

As a preliminary issue, it requested that CNMC's actions are addressed to ASF, rather than to ASSE, since the former is the Amazon group entity responsible for the activities that are the subject of the information request.

As to the reasons why ASF considered that it should not be registered as a postal service operator, it argued that its activity "*consists in the fulfillment of inventory and the preparation of orders for collection by carriers who ship to end customers*", for which they have timely authorisation as transport operator.

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<sup>1</sup> The features of the Amazon Flex programme can be found on the Amazon website: *About Amazon Flex*, in: <https://flex.amazon.es/> (Page accessed on 9 September 2020)

<sup>2</sup> <https://www.mitma.gob.es/el-ministerio/servicios-postales/registro-general-de-empresas-prestadoras-de-servicios-postales> (Page accessed on 1 September 2020).

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ASF also explained that all its logistics services are provided only to companies in the Amazon group, that its only customers are internal, and that it does not provide logistics services to third parties outside the Amazon group.

To the above, it was added that the activities carried out by ASF do not require registration as a postal service provider in Spain, (i) because the activities carried out do not constitute a postal service and (ii) because, even if they could constitute it, they would be subsumable within the concept of services carried out under a self-provision regime, as they are delivered by the shipper himself, and (iii) because, in any case, they are only offered and lent to other companies in the Amazon group.

With regard to Amazon partners in parcel delivery tasks, in particular Amazon Flex delivery providers, ASF understood that they were self-employed and non-ASF carriers, which was why it had not considered keeping a register to verify whether those carriers were enrolled as postal operators. However, they clarified that prior to the signing of contracts with their collaborators it is verified that carriers meet the requirements applicable in accordance with current regulations.

### **THIRD. - Closure of preliminary proceedings and initiation of declarative proceedings STP/DTSP/006/20.**

By agreement of 18 February 2020, the Director of Transport and Postal Sector, in exercise of the powers conferred and provided for in Article 8 of Law 3/2013 of 4 June, creating the National Commission on Markets and Competition, hereinafter LCNMC, and in Article 25 (a) of the Organic Statute of the CNMC, approved by Royal Decree 657/2013 of 30 August, placed in relation to Articles 37.2, 38.1, 39.1, 40, 41 and 61 (b) of the Postal Law, agreed to end the period of preliminary proceedings and to initiate a procedure to determine whether the circumstances to be considered postal operator and the need to submit the appropriate affidavit to the Subdirector General of Postal Regime of MITMA applied to ASF<sup>3</sup>.

### **FOURTH. - Request for access to the file and extension of the deadline for allegations.**

On 20 February 2020, a document by ASF requested, pursuant to Articles 32 and 53 of the LPAC, access to the administrative file with reference IR/DTSP/003/19 and a five-days extension of the period initially granted for allegations.

This request was granted by letter of 21 February 2020 and a copy of the file containing the entire dossier was sent.

### **FIFTH. - Allegations of Amazon Road Transport Spain S.L.**

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<sup>3</sup> This agreement is notified only to Amazon Spain Fulfillment S.L.

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In a letter of 10 March 2020, prior to the presentation of its allegations, Amazon requested that the actions by the CNMC be addressed to Amazon Road Transport Spain S.L. (ARTS), rather than to ASF, because of the partial split that had occurred in September of the previous year in ASF and which had ARTS as a beneficiary.

The change in the status of interested party in favour of ARTS was justified as follows:

*"That, even though the request has been addressed to ASF (since this is the entity for which the prior reporting period was carried out under the IR/DTSP/003/19 file), this is not the Amazon Group entity (hereinafter "Amazon") that is currently responsible for the activities that are essentially the subject of this procedure, but that entity is ARTS. This is because, under the Deed of Partial Splitting granted on 17 September 2019 before the notary of Madrid Mr. Antonio de la Esperanza Rodríguez with his protocol number 5039, ARTS was the beneficiary of the partial division of ASF, the object of which was the division of the autonomous economic unit composed of all ASF assets and liabilities related to the 'middle mile' and 'last mile' logistics services (which include contracts signed with authorised carriers and self-employed "Amazon Flex" carriers).*

*For this reason, although the Initiation Agreement was addressed to ASF, it is ARTS that proceeded to make allegations to it and with whom it was requested to maintain all future communications concerning matters relating to postal services.*

*In this respect, according to the Initiation Agreement, the purpose of the procedure at hand is to determine whether or not ARTS is considered a postal service operator and, therefore, whether or not it must submit an affidavit as a postal service operator."*

Having made this point, the arguments submitted by Amazon revolved around the following two arguments:

*"The activities developed by ARTS do not constitute a postal service, as they consist in the logistic management of packages for collection by carriers who make their shipment to final customers.*

*For this purpose, ARTS obtained an authorisation as a transport operator on 28 October 2019."*

*"Secondly, [...] in the event that the activities it carries out were considered as a postal service (quod non), would, if any, be subsumed under the concept of services provided on a self-provision basis, and therefore ARTS would not have to register as a postal operator."*

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**SIXTH. - Suspension of the deadline for processing and resolution of administrative procedures and for subsequent resumption.**

On 17 March 2020, ASF and ARTS were notified in the appropriate written form of the suspension of the maximum period for resolving the procedure, in accordance with the third additional provision of Royal Decree 463/2020 of 14 March, as well as of the suspension of the deadline for any procedure or placement that, within these proceedings, was started and not completed on 14 March 2020. It was also stated that the suspension would be effective as long as the abovementioned Royal Decree or any of its extensions remained in force and that, once completed, the time limits would be resumed.

Subsequently, in a letter of 4 June 2020 and pursuant to Article 9 of Royal Decree 537/2020 of 22 May extending the state of alarm declared by Royal Decree 463/2020 of 14 March, it was reported that the single repealing provision of the said Royal Decree of 22 May repealed the third additional provision of Royal Decree 463/2020 of 14 March, so that from 1 June 2020 the maximum period for resolving the present procedure was resumed.

**SEVENTH. - Communication to ASF and ARTS of the status of persons interested in the procedure.**

By letter of 4 June 2020, ASF and ARTS were informed that ARTS was formally recognised as interested party in accordance with Article 4 of the LPAC, and that it had been agreed to continue the proceedings regarding the said company and jointly with ASF, as ARTS' request did not prevent the continuation of ASF in its capacity of interested party. In view of this circumstance, ASF was granted a further period of 10 days in accordance with Article 82 of the LPAC, so that it could, if it deemed appropriate, provide any arguments, documents or justifications.

**EIGHTH - ASF's request for extension of the deadline for allegations; response, and allegations by ASF.**

On 8 June 2020 a document submitted by ASF requested, in response to the DTSP letter of 5 June 2020 and under the provisions of Article 32.1 of the LPAC, an extension of five working days of the period initially granted to provide as many allegations, documents and proof as it deemed necessary. In response to that request, by letter of 10 June the request for an extension of the time limit for allegations was rejected on the grounds that the elements and facts of this procedure did not constitute novelty for the Company insofar as they were already known to it by the preliminary proceedings under reference IR/DTSP/003/19.

On 17 June 2020, ASF submitted a document holding the following statements:

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*"ASF elaborates on the arguments already put forward by ARTS and confirms that, following the aforementioned partial division operation of ASF -to which we will refer in more detail-, ASF does not carry out the activities related to the "middle mile" and "last mile" services (considered by the CNMC for the beginning of this present procedure), and therefore the only interested party in the proceedings initiated against ASF is ARTS, which has surrogated itself in the position of ASF.*

[...]

In addition to reiterating this argument and clarifying the scope of the activities of ARTS and ASF, Amazon provided the following explanations in brief form in its submission:

- 1) The activities carried out by ASF are of a logistical nature and not of a postal nature, since they never take place on a postal item. They are only logistical, in accordance with the applicable regulations.
- 2) ASF is not the Amazon entity responsible for the activities of this procedure and, in any case, it would not be required to file an affidavit, as it solely and exclusively performs strictly logistical tasks outside the postal service.
- 3) ARTS would be the only entity that would act, where appropriate, and from a purely material perspective, on postal items, as these are generated by ASF. It is therefore requested that all future communications on postal service issues be maintained with this entity.

The document ended requesting that this procedure be resolved by stating that ASF does not provide postal services and that, in any case, it is not necessary to submit an affidavit in order to register as a postal operator in Spain.

#### **NINTH. - Agreement of the Regulatory Supervision Chamber of the CNMC to extend the period for resolution of the procedure.**

By agreement of 1 July 2020, the Regulatory Supervision Chamber of the CNMC extended by two additional months the maximum period for resolution and notification of the procedure to determine whether the status of postal operators is applicable to ASF and ARTS, due to the complexity of the file after the extension of the number of interested companies, and in order to be able to give due consideration to the circumstances involved in it.

### **LEGAL BASIS**

#### **FIRST. - Competential Authorisation.**

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Law 3/2013 of 4 June, creating the National Commission on Markets and Competition, hereinafter LCNMC, provides in Article 8 that "*The National Commission on Markets and Competition shall supervise and control the proper functioning of the postal market...*"; and Article 29 states that the CNMC shall exercise the power of inspection and punishment in accordance with the provisions of Title VII of the Postal Law.

Moreover, in accordance with Article 21 of the LCNMC and Article 14 (1) (b) of the Organic Statute of the CNMC, the Regulatory Supervision Chamber is the competent body to hear and resolve the present case.

## **SECOND. - Object and purpose of the procedure.**

The object of this declaratory procedure is to determine whether the activity currently carried out by Amazon through its companies, ASF and ARTS, should be considered to be of a postal nature and therefore subject to compliance with the requirements of the Postal Law for its provision. Among these requirements is the obligation to submit to the Ministry of Transport, Mobility and Urban Agenda (MITMA) the affidavit provided for in the Postal Law<sup>4</sup>, for subsequent registration in the General Register of Postal Service Providers<sup>5</sup>.

Prior to the analysis of the issue under discussion, it was noted that, according to the data contained in the General Register of Postal Service Providers, under MITMA, there is no registration in the name of Amazon in a singular way, nor in

<sup>4</sup> The content of the affidavit is set out in Article 41 of the LSP, which provides: "1. *The affidavit shall be submitted prior to the commencement of the activity and shall expressly state the following:*

(a) *That it is aware of and abides by its obligation to comply at all times with the requirements of access and exercise of postal activity, with the essential requirements set out in Article 40.2 and, in particular, that it undertakes strict respect for the rights referred to in Title II of this Act, excluding those contained in Article 8; as well as for the rights established generally in labor, tax, immigration and protection of consumer and user rights.*

(b) *That it complies with the requirements set out in the previous subparagraph and has the documents attesting to it at the time of making the declaration.*

(c) *That it is committed to maintaining the requirements established during the time of the activity and to notify the General Registry of any changes made therein.*

(d) *That it is committed to providing all the information necessary to clearly define the service it intends to provide, and any additional information requested by the National Commission for the Postal Sector.*

2. *The presentation of the affidavit enables the exercise of the activity in question throughout Spain, without prejudice to the payment of the fee for registration in the General Register of Companies providing Postal Services and may, after hearing the interested party and by reasoned decision, be deprived of validity and effectiveness when it is found that the applicable requirements are not met. The adoption of this resolution shall entail the cancellation of the registration and its publication in the manner that the National Commission for the Postal Sector deems sufficient."*

<sup>5</sup> Regulated by Royal Decree 81/1999, of 22 January, approving the Development Regulation of Title II of the Law 24/1998, of 13 July, of the Universal Postal Service and the Liberalisation of the Postal Services, relating the authorisations for the provision of services and the General Register of Postal Service Providers.

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the name of these two companies that might be involved in the postal activity of the Amazon Group (ASF and ARTS) in either Section (A or B) of that Registry, which is a *condition sine qua non* for providing postal services of any kind<sup>6</sup>. Notwithstanding the above, it is noted that since August 2019 a whole series of freelancers and small businesses have proceeded to register in Section A of this Register indicating that they operate for the Amazon group<sup>7</sup>.

In this case, the use of a declaratory procedure is justified by the novelty of the business model under consideration and the complexity involved *a priori* in verifying whether an electronic commerce platform such as the one analysed is a postal operator. Therefore, it has been considered necessary to make a detailed analysis of the activities carried out in order to determine that the sum of these two conditions — pure e-commerce player<sup>8</sup> and postal operator — concur with Amazon, while providing the interested party with all the guarantees of the Common Administrative Procedure.

### **THIRD. - Analysis of parcel services provided by ASF and ARTS<sup>9</sup> from the perspective of the regulation of the postal sector.**

Then, for a better understanding of the courier and parcel services provided by Amazon and for further analysis, it is necessary to refer to the commercialisation models of the group even though these activities are not covered by this dossier.

The logistics management of inventory and preparation of orders for collection by carriers shipping to Amazon's end customers generally responds to three different Amazon commercialisation models, which can be broadly described as follows:

**Commercialisation of products that are part of Amazon's inventory (Amazon's own inventory):** They are property owned by Amazon, whose inventory is managed, stored and sold through its own website. The management and organisation of the shipment of the goods, as well as its making available to the recipient, is carried out by Amazon through its collaborating companies/freelancers or by third-party postal operators.

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<sup>6</sup> Section A includes postal operators providing postal services not covered by the universal postal service. Section B lists postal operators providing postal services included in the universal postal service.

<sup>7</sup> Specifically: VARZEA LOGISTICS SL, ECOSCOOTING DELIVERY S.L., KEBEL LOGISTICS S.L., DOLINSKI BECERRA SERVICES S.L. and GAGV LOGISTICS S.L.

<sup>8</sup> Pure players in the field of e-commerce are those who only need an internet connection to trade, but not a physical store open to the public.

<sup>9</sup> The activity carried out by these two companies in this and the following sections, unless their distinction is required in accordance with their specific activities, will be identified under the generic name of Amazon.



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**Commercialisation of products of third-party retailers previously stored (or not) in Amazon fulfillment centres (Fulfillment Programme by Amazon (FBA) or Amazon Logistics)<sup>10</sup>:** Goods owned by third-party sellers or retailers who engage with Amazon for the services of displaying and selling on the Amazon website, storage in their fulfillment centres, inventory management, and shipping to the customer or end user of the product. The management and organisation of the shipment of the merchandise or parcel to the final customer is made in a similar way to that of the Amazon own customer. Moreover, there are times when mixed shipments are made, which are bundles composed of products from own inventory and third-party sellers<sup>11</sup>.

**Commercialisation of third-party retailers' products that are displayed on the Amazon web platform (pure Marketplace<sup>12</sup>):** Products or goods of a third-party seller or retailer which are displayed on the Amazon web platform for sale. The service provided lies in connecting the offeror with the buyer of the goods. The final shipping and delivery of the product to the customer is the retailer's duty, with no additional tasks being performed by Amazon.

The following is an outline of the commercial activity, which is closely linked to the subsequent postal activity carried out by Amazon:

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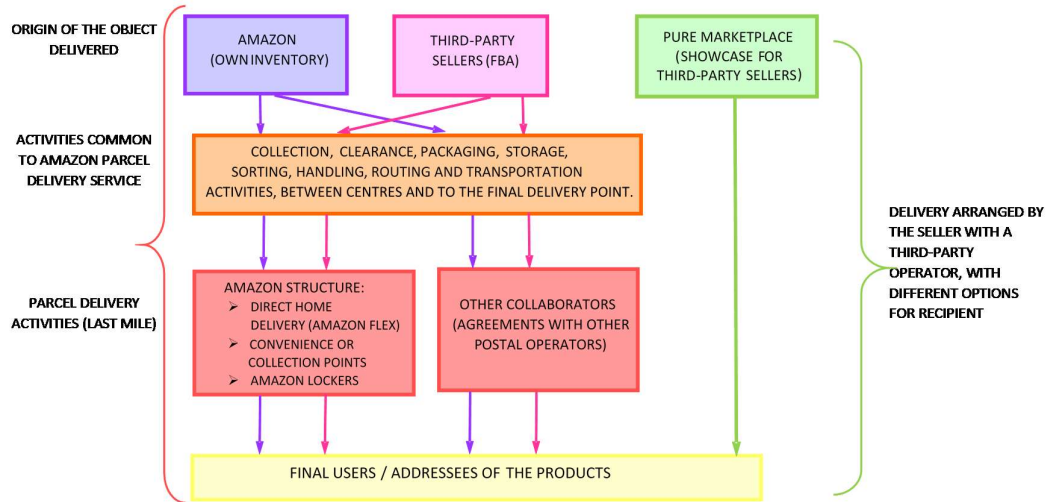
<sup>10</sup> The features of the Fulfillment by Amazon (FBA) programme are described on the Amazon website itself: <https://services.amazon.es/servicios/logistica-de-amazon/funciones-y-ventajas.html?id=AZESFBAFooter> (Page accessed on 9 September 2020).

<sup>11</sup> In any case, the FBA programme or Amazon Logistics is completely flexible and can be designed at the convenience of third-party sellers. In addition to the inventory management, storage, final customer shipping, customer support and return management, it also offers optional services such as labeling, preparation and packaging and gift wrapping service.

<sup>12</sup> Sell on Amazon: [https://services.amazon.es/servicios/vender-por-internet/caracteristicas-y-ventajas.html?ref=ases\\_soa\\_fnav](https://services.amazon.es/servicios/vender-por-internet/caracteristicas-y-ventajas.html?ref=ases_soa_fnav) (Page accessed on 9 September 2020).

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**DIAGRAM OF AMAZON COMMERCIAL AND POSTAL ACTIVITY**



Source: Own elaboration based on information obtained at the Amazon website.

Thus, in both the first commercialisation model (Amazon own inventory) and the second (FBA Programme or Amazon Logistics), Amazon offers and performs the activities of collection, clearance, packaging, storage, sorting, handling, course and transportation between different fulfillment centres, transportation from fulfillment centres to the final distribution point, and from the final distribution point to the consumer delivery location (last mile). For this purpose, it has own<sup>13</sup> and external means - as a result of the signing of contracts with third parties - to cover various phases of the postal cycle<sup>14</sup>. External means are used mainly for the organisation of the delivery of the last mile (Amazon Flex collaborators, postal operators specialised in parcel and express shipments, as well as the services of the designated postal operator in Spain, Correos). In addition, for the delivery of the parcel in its final phase, it also has the deployment of a network of parcel

<sup>13</sup> As it has been noted from the preliminary proceedings, Amazon has recently incorporated a fleet of vans with the Amazon logo that are already circulating in Madrid for the completion of the last mile tasks: <https://www.aboutamazon.es/sostenibilidad/amazon-logistics-suma-un-centenar-de-furgonetas-eléctricas-y-más-de-80-nuevos-puntos-de-carga-en-madrid> (Page accessed on 9 September 2020). This fleet will be strengthened during this year and the coming ones as a result of collaboration agreements signed between Amazon, Mercedes Benz and Rivian:

<https://somoselectricos.com/amazon-compra-furgonetas-electricas-reparto-espana/>  
<https://www.hibridosyelectricos.com/articulo/actualidad/mercedes-benz-recibe-pedido-1800-furgonetas-electricas-amazon/20200828125242037736.html>  
[https://cincodias.elpais.com/cincodias/2020/08/28/companias/1598607788\\_705049.html](https://cincodias.elpais.com/cincodias/2020/08/28/companias/1598607788_705049.html) (Pages accessed on 9 September).

<sup>14</sup> The postal cycle, as detailed below, consists of the following activities: collection, clearance, sorting, handling, course, transport, distribution and delivery in accordance with the Postal Sector Regulation. In the above chart showing the pattern of commercial and parcel activity developed by Amazon, the postal cycle is reflected by the orange and red rectangles.

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lockers known as Amazon Lockers<sup>15</sup>, owned, managed and controlled by the Amazon group.

Moreover, Amazon's services to third parties are billed at public rates<sup>16</sup> that are standardised according to the size and weight of the goods/parcel and apply a policy of discounts to customers when certain volumes are reached.

Once the activity carried out by Amazon has been described, it is analysed whether it coincides, in whole or in part, with the postal services described by the sectoral regulations, in order to establish whether it should be considered as postal and its providers, therefore, qualified as postal operators.

According to Article 3.2 of the Postal Law, a postal item is *"any object intended to be sent to the address indicated by the sender on the object itself or on its packaging, once presented in the final form in which it must be collected, transported and delivered. In addition to correspondence, it shall include direct advertising, books, catalogues, newspapers, periodicals and postal parcels containing goods with or without commercial value, regardless of their weight"*; and a sender is *"the natural, legal person or impersonal entity from whom the postal items originate."*

For its part, Article 2.1 (a) of the Postal Sector Regulation considers as postal items the *"objects whose physical and technical specifications allow, at least, their traffic through the public postal network, according to the classification given in Article 13 of this Regulation."*

Article 13.2 (c) defines postal parcels as *"consignments containing any object, product or material, with or without commercial value, the circulation of which over the postal network is not prohibited; and any consignment which, containing direct advertising, books, catalogues or periodicals, meets the other requirements established in this Regulation<sup>17</sup> for clearance under this modality. When such consignments contain objects of a current and personal nature, this circumstance must be expressly stated on their cover."*

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<sup>15</sup> These parcel lockers (a term commonly used in the postal sector to refer to automatic parcel terminals) are connected via the Internet to the company's computer systems that allow verification of delivery by the courier and the time of collection by the final recipient. In this regard, it should be remembered that the delivery of a shipment to a place other than the addressee's address (who will then have to pick it up) is a method of delivery that has been used for a long time in the postal sector, and the fact of doing so through innovative methods such as 'parcel lockers' does not affect its rating of postal activity.

<https://www.amazon.es/gp/help/customer/display.html?nodeId=201910660>

(Page accessed on 9 September 2020).

<sup>16</sup> Pay only for what you use, public fees for Amazon Logistics Services: <https://services.amazon.es/servicios/logistica-de-amazon/precios.html> (Page accessed on 9 September 2020).

<sup>17</sup> These requirements relate to the weight limits and minimum and maximum dimensions as set out in the UPU Conventions.

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At the European level, these definitions are supplemented by the new concepts and clarifications introduced in this regard by Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services (hereinafter referred to as RSPT<sup>18</sup>) in the field of postal items and parcels. Its recital (16) states: *"It is assumed that postal items which are over 20 mm thick contain goods other than items of correspondence, whether handled or not by the universal service provider. Postal items consisting only of correspondence should not fall within the scope of parcel delivery services. This Regulation should therefore, in line with consistent practice, cover parcels containing goods, with or without commercial value weighing up to 31,5 kg, since heavier items cannot be handled by a single average individual without mechanical aids and this activity is part of the freight transport and logistics sector."*

Since the concepts of postal item and parcel are already known, specific reference to the postal services themselves is needed, in order to see which specific functions and tasks constitute postal activity.

In accordance with Article 14.3 of the Postal Sector Regulation, the following activities are part of the operations of the postal service or cycle:

*"3. In any of the cases provided for in the preceding paragraphs, the operations of the postal service as a whole are as follows:*

*"(a) Collection: it is the operation of removing postal items deposited at the operator's postal network access points. Access points are physical facilities, especially mailboxes available to the public both on public roads and on public premises or on the premises of the service provider, where customers can deposit postal items for access to the network.*

*(b) Clearance: it consists in the receipt by the postal operator of the shipment entrusted to him by the sender for the completion of the comprehensive postal process and for which he is responsible under the terms provided for in this Regulation.*

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<sup>18</sup> This is acknowledged by the RSPT itself in recital (13) when it says: *Currently, postal services are regulated by Directive 97/67/EC. That Directive establishes common rules governing the provision of postal services and the universal postal service within the Union. It focuses primarily, but not exclusively, on national universal services and does not address regulatory oversight of parcel delivery service providers. Compliance with the minimum universal service requirements laid down in that Directive is ensured by national regulatory authorities designated by Member States. This Regulation therefore complements, insofar as cross-border parcel delivery services are concerned, the rules set out in Directive 97/67/EC. This Regulation is without prejudice to the rights and guarantees set out in Directive 97/67/EC, including in particular the continued provision of a universal postal service to users. Similarly, Article 2 of the RSPT confirms this point by providing that "For the purposes of this Regulation, the definitions in Article 2 of Directive 97/67/EC and in points 1, 2 and 5 of Directive 2011/83/EU apply". The last Directive referred to above deals with consumer rights.*

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(c) *Sorting: it includes the set of operations aimed at the ordering of postal items, taking into account the criteria of postal operations.*

(d) *Handling: it is the set of ancillary operations carried out with postal items accepted by the operator intended to prepare them for subsequent postal operations. These ancillary operations include opening, manual pre-sorting, segregation, indexing, automatic sorting, manual sorting, packaging, containerising or bagging, storage and loading.*

(e) *Course: it is the operation or operations that allow the routing of postal items.*

(f) *Transport: it is the transfer by any type of means of postal items to their final distribution point.*

(g) *Distribution: it is any operation carried out at the destination premises of the postal operator to which the postal item has been transported immediately prior to its final delivery to the recipient.*

(h) *Delivery: it is the distribution of the consignments at the postal address on them, except as provided for in this Regulation.*

For the purposes of the necessary authorisation, each of the operations described above is liable to constitute a postal service itself, as provided for in the Postal Sector Regulation.

In this same sense, Art. 3.1 of the Postal Law and Art. 2 of Directive 97/67/EC<sup>19</sup> (hereinafter referred to as the Postal Directive) define postal services as "*any services consisting of the collection, clearance, sorting, transport, distribution and delivery of postal items.*"

The Court of Justice of the European Union has also ruled on the interpretation of what should be considered as a postal service and who are postal service providers in its judgment of 31 May 2018 (Joined Cases C-259/16 and 260/16, Confetra et al.)<sup>20</sup>. This judgment sets out definitively the type of companies that

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<sup>19</sup> Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008.

<sup>20</sup> The 3 points of the judgment state:

1) *Article 2(1), (1a) and (6) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which haulage, freight-forwarding and express mail undertakings providing services involving the clearance, sorting, transport and distribution of postal items constitute, except where their*

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should be considered as providers of postal services and their need to have an authorisation for the provision of postal services. In particular, paragraph 34 states that *"In those circumstances, an undertaking must be classified as a 'postal service provider' within the meaning of Article 2(1a) of Directive 97/67 where it provides at least one of the services set out in Article 2 (1) of the directive or the service or services thus provided relate to a postal item, although its business cannot consist merely in the provision of transport services. It follows that haulage and freight-forwarding enterprises offering, as their principal business, a service entailing the transport of postal items and, as an ancillary activity, services entailing the clearance, sorting, and distribution of postal items does not fall outside the scope of the directive."*

In this same line of interpretation, recital 17 of the RSPT includes within its subjective scope as providers likely to be considered as postal operators: *"Providers of parcel delivery services using alternative business models, for example those drawing on the collaborative economy and e-commerce platforms, should be subject to this Regulation if they provide at least one of the steps in the postal delivery chain. Clearance, sorting and distribution, including pick-up services, should be considered parcel delivery services, including when they are provided by express and courier service providers, as well as consolidators, in line with current practice."*

Finally, it should be added that Article 5 of the RSPT provides that (emphasis added) *"all cross-border parcel delivery service providers other than those excluded by Article 4(6) and (7) shall provide the national regulatory authority of the Member State in which they are established with the **public list of tariffs applicable on 1 January of each calendar year for the delivery of single-piece postal items, other than items of correspondence, falling within the categories listed in the Annex.** This information shall be provided by 31 January of each calendar year"*<sup>21</sup>. The above Annex to the RSPT contains 15 categories

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*business is limited to the transport of postal items, postal service providers within the meaning of Article 2(1a) of the Directive.*

*2) Articles 2(19) and 9(1) of Directive 97/67, as amended by Directive 2008/6, are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which requires all undertakings providing haulage, freight-forwarding and express mail services to hold a general authorisation for the provision of postal services, provided that such legislation is justified by one of the essential requirements set out in Article 2(19) of the directive and has due regard for the principle of proportionality, in that it is appropriate for the purpose of ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain it, which is a matter for the referring court to verify.*

*3) Articles 7(4) and 9(2) of Directive 97/67, as amended by Directive 2008/06, are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which requires holders of a general authorisation for the provision of postal services to contribute to a compensation fund for universal service obligations, where, from a user's perspective, those services may be regarded as falling within the scope of universal service as they display interchangeability to a sufficient degree with the universal service.*

<sup>21</sup> More information in the section on International Postal Activity on the CNMC website:

[www.cnmc.es/ambitos-de-actuacion/postal/actividad-internacional/reglamento-paquetaria-transfronteriza](http://www.cnmc.es/ambitos-de-actuacion/postal/actividad-internacional/reglamento-paquetaria-transfronteriza)

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of postal items (namely 9 letter products from 500 g to 2 kg, and 6 parcel products from 1 to 5 kg).

It is noted that Amazon Spain offers unit cross-border parcel shipping rates that meet the characteristics of the products listed in the RSPT Annex<sup>22</sup>.

In short, national legislation, Community legislation and the decisions of the Court of Justice of the European Union consider that they are providers of postal services and postal activity:

1. Providers whose activity consists in the provision of at least one of the services forming part of the postal distribution chain (Article 2 of the Postal Directive, 3 of the Postal Law and 14.3 of the Postal Sector Regulation).
2. A cumulative provision of all services comprising the postal distribution cycle or chain is not required in order to receive the status of a postal operator (Article 14.3 of the Postal Sector Regulation and Confetra et al. Judgment<sup>23</sup>).
3. The services provided must concern a shipment/object that falls within the scope of the definition of postal item, provided that the activity or work of the provider is not limited to mere transport service (Article 3.2 LSP, 2.1 a) and 13.3 of the Postal Sector Regulation, Recital 16 of the RSPT, and Confetra et al. Judgment).
4. Collection, sorting and distribution services, including pick-up by the recipient (from offices/convenience points or parcel lockers), should be considered as parcel services, and therefore postal services, also when provided by express and courier services or consolidators (Recital 17 of the RSPT).
5. The fact that an operator or provider of this type of service has a public list of single-piece tariffs, other than mail services, is indicative of its character as a postal operator and that it is subject to the obligations of the RSPT (Article 5 and Annex to the RSPT).
6. New business models (e-commerce platforms or based on the collaborative economy) are not excluded from the possibility of being considered postal operators (recital 17 of the RSPT).

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<sup>22</sup> In particular, through the "Pan-European Logistics programme of Amazon":  
<https://services.amazon.es/servicios/logistica-de-amazon/programa-paneuropeo/precios.html>  
(Page accessed on 9 September 2020).

<sup>23</sup> Judgment of the European Court of Justice of the European Union of 31 May 2018 (joined cases C-259/16 and 260/16, Confetra et al).

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**FOURTH. - Companies of the Amazon Group that may receive the status of postal operator (ASF and ARTS). Justification of their status as interested in the proceedings.**

The companies identified in this file as likely to be considered postal operators in Spain are two: ASF and ARTS.

This section will deal in detail with the activities carried out by each of them, in particular after the division operated in ASF in favour of ARTS, which justifies the status of interested party of both companies.

As an introductory point, it should be mentioned that ASF was the company that, until last year, had been carrying out the activities that could be related to the various phases of the postal cycle, but this changed after the partial split that occurred in September 2019.

After such partial division, the work between ASF and ARTS is divided in the following way stated by Amazon in the course of this procedure:

*"(i) **ASF:** As far as ASF is concerned, its current activity consists essentially, and as expressly stated in the Deed, of '**fulfillment of customer orders**' (i.e. mainly the operation of fulfillment centres and warehouses and the preparation of customer orders for shipment).*

*In particular, this includes, very briefly, (i) the management of the logistic operation of the centres and warehouses where orders are processed, including the receipt of products from suppliers, the control of the storage of such products, their handling, inventory management and order processing; and (ii) the necessary pre-preparation of orders for shipment — that is, the collection and combination of the products from the orders received, their packaging and reconditioning, the printing and affixing of labels on the parcels and all the processes necessary to ensure that the parcels remain in the final form in which they should be transported and dispatched.*

*(ii) **ARTS:** for its part, the activity currently carried out by ARTS consists in the management of the "last mile" and "middle mile" services.*

*This briefly includes (i) processing the distribution of orders between fulfillment centres and external carriers and postal operators; (ii) the organisation of parcels for subsequent shipment; (iii) planning the delivery processes to consumers in the fastest and most efficient way, optimising transport costs and times; (iv) the development and operation of the processes of provisioning and delivery of parcels, including the control of their traceability; and (v) coordination with carriers — both delivery providers and those in the Amazon Flex programme — of transportation works between fulfillment centres and between fulfillment centres and consumers."*



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On the basis of the above, ASF currently carries out the tasks that are related to what in the postal regulations would correspond to the first phases or stages of the postal activity chain consisting of the "collection", "clearance", "sorting", "handling" and "course" of postal items, while the other phases of the postal services cycle relating to "transport", "distribution" and "delivery" services would be provided by ARTS, as it is responsible for the management of "last mile" and "middle mile" services. Given the distribution of the different phases of the postal chain between the two companies, it was decided to grant ARTS the status of interested party and, in turn, to maintain this circumstance in respect of ASF.

In view of the argument put forward by Amazon that the proceedings initiated by the CNMC concern the activity carried out in the "middle mile" and "last mile", which is why it considers that the proceedings should only be followed against ARTS, it should be noted that the DTSP has not made such a statement or delimitation in any of the submissions forming part of the present proceedings; on the contrary, as stated in the title of the declaratory procedure followed against Amazon, it is intended to determine whether Amazon covers any or more of the activities that may be eligible for the status of a postal operator. Note, in this regard, that the tasks that make up the definition of a postal chain or cycle include many other tasks than those corresponding to the "middle and last mile" phases.

Therefore, given the fact that the services provided by both companies are likely to be considered as postal activity, they may need prior approval by submitting the corresponding individual affidavit for each company to the General Register of Postal Service Providers, with independence that they may have other authorisations such as the corresponding authorisation by the Register of Companies and Transport Activities, which will be discussed later.

#### **FIFTH. - Analysis of Amazon's claims.**

The allegations made by Amazon in the various submissions included in this file can be summarised as follows:

**First.** - The activities carried out by Amazon do not constitute a postal service because they are not made on a postal item, since until ASF does not act on the parcels, they are not constituted as such postal items, as they are not "*in the final form in which it must be collected, transported and delivered*". In addition, it states that none of its activities can be considered as a postal service, but only logistics management activities, including storage and inventory management, packaging and preparation of orders for collection by carriers who make their shipment to end customers.

As seen in the previous section, the postal cycle comprises various activities and tasks, which may include preparatory activities or ancillary activities (packaging, re-labeling...) to the postal activity (sometimes carried out by so-called

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consolidators), without this precluding the identification or qualification of the provision of certain services prior to or after these ancillary services as postal activity. However, Amazon's statements expressly acknowledge<sup>24</sup> that after certain work (pre-processing) the shipments would, if any, be converted to postal, so any further activity or work should be considered postal as long as it coincides with the activities described by applicable law.

It has been argued by the interested parties, before and after the split, that the activities carried out by Amazon cannot be classified as postal but as logistic, in accordance with the 'relevant sectoral regulation'. However, no reference is made to this so-called regulation under which such work would acquire exclusively a logistical nature, and therefore a non-postal nature. Similarly, the consideration of an activity as postal is not determined by the place in which it is provided (logistic centre, automated processing centre, warehouse, ...) but by the characteristics and features of the activity itself and whether it coincides with the definitions of the phases included in the already regulated postal cycle. Moreover, in the Register of Postal Service Providers there are many companies whose main activity is not the postal one, but that when carrying out the postal activity in a marginal or ancillary way, have proceeded to their registration, since the specificities and regulatory objectives that affect other sectoral regulations (transport, commercial distribution, advisory or assistance activities, foundations, ...) are not coincident and do not hinder or impede compliance with the provisions of the postal sector.

In relation to this statement, the interested parties state that if the regulations were not interpreted in the proposed sense and in case of insisting in the consideration of the activity as postal, *"we would be faced with a situation in which any retail company would be providing a postal service as they also prepare parcels to be collected for delivery to the final customer"*. The difference between Amazon and other retailers offering home delivery or e-selling services is, first, that all goods leaving the warehouses of such retailers are owned by them (and that they do not provide postal or logistical services to third parties), and second, that even when preparing these parcels for delivery to their customers, once the carrier takes care of them, the retailer has no capacity to influence their routing, the number of parcels to be distributed or the route to be followed to deliver them (in the case of Amazon Flex, Amazon would exercise such influence) and lastly, the fact that this service covers the various activities of the postal cycle and that the Amazon Group's own network is used to provide services to third parties. In this regard, it must be stated that the status of postal operator is directly related to the decision-making and control capacity that is exercised over the

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<sup>24</sup> ASF literally states in its writing (pages 2 and 3) that *"insofar as the products in ASF fulfillment centres undergo a process of storage, handling and packaging for shipment, we understand that such products would not, in their case, become a postal item until ASF acts on them (it is not until then that they acquire the final form, in which they are to be collected, transported and delivered)"* and *"since until ASF acts on the parcels, they would not constitute, in their case, a postal item because they are not in the final form in which they are to be collected, transported and delivered"*.

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management and delivery of parcels, as well as the steering and organisation of the elements that make up the network.

**Second.** - Interested parties understand that the activities they carry out, in the event of entailing the provision of a postal service (*quod non*), would in any case be subsumed within the concept of services performed under a self-provision regime, which currently, under Article 4 of the Postal Law, is understood to exist when *"the provision of postal services is carried out directly by the sender of the consignments, or by the use of a third party acting exclusively for himself"*, without any additional requirements being applicable.

Amazon considers that such logistic activities could, if any, be included in the concept of self-provision services for two reasons: (i) because they would be delivered directly by the sender himself and (ii) because, in any case, they are only offered and lent to other companies in the Amazon group.

National legislation (Art. 4 of the Postal Law) states that there is a regime of self-provision when the provision of postal services is carried out directly by the sender of the consignments, or when it is made by the use of a third party acting exclusively for the same person. In the latter case, the services provided to the sender by the third party must include the entire postal process of collection, clearance, sorting, transport, distribution and delivery of the consignments.

In addition, at Community level, recital 21 of the Postal Directive refers to it as:

*"provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person."*

The Commission's Communication on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02)<sup>25</sup> also defines self-provision as:

*"the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail."*

The requirement of Community legislation to be at the origin of the items of correspondence as a condition for assessing self-provision excludes other cases in which the operator (Amazon) merely handles that shipment on behalf or at request of a third party (retail seller in the case of FBA programme or Amazon Logistics).

In this regard, it should be noted that Amazon, in the commercialisation model based on the FBA and/or Multi-Channel Fulfillment programme, does not operate

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<sup>25</sup> <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A31998Y0206%2801%29>

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as a true sender of shipments because it does so, on a circumstantial and conjunctural basis, on behalf of a third party (retail seller) for whom it performs pre-preparatory works to the postal activity and provides the subsequent postal service. This is confirmed by the fact that the ownership of the goods contained in the parcel belongs to the true sender (retail seller), and not to Amazon, with the retailer invoicing it to the final customer and sending the invoice for the order. Nonetheless, the presumption on the sender's right of ownership by virtue of Article 13 of the Postal Law and its eventual transmission will be discussed at a later time.

In addition, Amazon cannot be identified as the sender for FBA and/or Multi-Channel Fulfillment programme because the parcel displays certain symbols and adhesive tapes with advertising or Amazon logo, in the same way as a prepaid envelope or parcel with the Correos hunting horn or any other courier operator symbol does not make it a sender, but merely identifies the operator providing the service. Instead, Amazon could be considered a sender for products that are part of its own inventory, owned by it and billed to the end customer.

However, even if Amazon is the sender of the products from its own inventory that it sells, it cannot be understood that it does so under the self-provision regime, insofar as the service is performed both: (i) through partners in the Amazon Flex programme that it steers and manages with the use of mobile phone terminals that have a computer application installed (Amazon Flex<sup>26</sup>) (ii) and through third-party partners (couriers and express parcel operators and freelancers) who do not work exclusively for Amazon but for a multitude of customers. This form of mixed provision (both through means steered and directly managed by and outside Amazon) excludes ASF from the self-provision scheme, as the definition of self-provision requires choosing alternatively either a model of own provision or a model outside the company but operating in exclusive for it, and does not support a combination of the two systems.

The argument that the courier and parcel services provided by Amazon are only offered to other companies in the Amazon Group cannot be accepted as, even if ASF and ARTS only provided services to Amazon Spain Services S.L (ASSE), it should be noted that the latter does provide services to third parties. Insofar as all the companies listed are part of the same corporate group and share partners and managers who have the control and decision-making power of the Group, it cannot be regarded as genuine outsourcing, but of intra-group transactions. In any case, after consulting the accounts deposited by ARTS and ASF in the Commercial Registry, the detailed description of their activities shows that the companies concerned provide services to external customers.

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<sup>26</sup> The Amazon Flex app for mobile devices used by Amazon collaborators can be downloaded from the following website: <https://flex.amazon.es/> (Page accessed on 9 September 2020).

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**Third.** - Amazon understands that Article 13 of the Postal Law, on the right to ownership of postal items, cannot be argued to oppose the fact that ASF is to be considered the sender and that its logistic activities are necessarily covered by the concept of self-provision<sup>27</sup>.

With regard to the impossibility of using Article 13 (right to ownership of postal items) of the Postal Law to try to determine whether the activity carried out by Amazon can be covered by the self-provision regime, it should be noted that any provision or element of postal regulations can and should be brought to insofar as it guarantees a joint and systematic interpretation of the applicable regulations, as required by article 3.1 of the Civil Code (C.C.).

This is not a question of requiring an additional requirement in order to consider that it is dealt with a situation of self-provision, but of how the requirement in the postal regulations to be at the "origin of the items of correspondence" should be interpreted in order to protect an activity as self-provision. Concerning this particular subparagraph, Article 13 of the Postal Law may provide greater clarity and definition.

Concerning this provision, and contrary to what ASF states in its letter of argument, this Chamber considers that Article 13 of the Postal Law does not grant a right to property conditional on the mere effects of "recovery or modification of the consignment", but is a legal presumption that admits proof to the contrary (*juris tantum*) on the ownership of the object of the shipment and by means of which the sender is considered to be the one at the origin of the object of the parcel (owner) and is therefore the one who has the capacity to transmit it to the final consignee as well as the ability to retrieve it or route it.

Without going into an in-depth analysis of the scope of the existing legal relationship, it should be noted that ASF, for the FBA programme, would limit itself to having been commissioned by a third party or having received an order from a third party (the sender and owner of the property) to send the goods or merchandise to the recipient (consumer and future owner). It is, therefore, that third party and not Amazon that would be at the origin of the shipment.

**Fourth.** - Amazon considers that the "Multi-Channel Fulfillment" programme cannot be claimed to justify that its activities are not covered by the concept of self-provision as it constitutes a residual programme offered by Amazon to companies that have already contracted the FBA programme and are eligible to benefit from.

Regardless of the residual nature or not of the "Multi-Channel Fulfillment" programme, what should be considered for the purposes of this dossier is the

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<sup>27</sup> The content stated in this section as Third claim is understood with respect to the FBA or Multi-Channel Fulfillment commercialisation model in which sender and owner are not matched.

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nature and characteristics of the delivery performed, which can be classified as a postal service in accordance with sectoral regulations. In addition, as noted by this Chamber, "Multi-Channel Fulfillment"<sup>28</sup> services continue to be offered on the Amazon Spain website.

In any case, call it "Multi-Channel Fulfillment" or "FBA", it will be the nature and characteristics of the services and activities carried out that will allow them to be qualified as postal or not, as mentioned above.

**Fifth.** - ASF and ARTS consider that the activity they carry out is already authorised from a sectoral point of view, as both companies have the authorisation of a transport operator.

Although according to Article 41.3 of the Postal Law *"the registration regulated in Article 53 of Law 16/1987 of 30 July on the Regulation of Land Transport shall also enable the provision of postal services not included in the scope of the universal postal service"*, this does not exclude the submission of the relevant affidavit to the General Register of Postal Service Providers attached to the Ministry of Public Works and the necessary registration of its employees<sup>29</sup>.

In this respect, the argument put forward by Amazon concerning a possible excess of administrative burden should be rejected, since it is a requirement contained in Article 41.3 (*"without prejudice to the submission of the relevant affidavit to the National Commission for the Postal Sector"*), which provides for a specific coordination mechanism (*"For this purpose, the Ministry of Public Works and the National Commission for the Postal Sector shall agree on the necessary measures for the interconnection of the General Register of Postal Service Providers and the General Register of Carriers and Undertakings involved in Ancillary and Complementary Transport Activities"*).

It should be recalled that Article 17.2 of Law 20/2013 of 9 December on the Guarantee of Market Unity, to which Amazon appeals in its claims, considers that the principles of necessity and proportionality meet in order to require the submission of an affidavit for the access to an economic activity or its practice when the regulations establish the compliance of requirements for the general interest and they are proportionate. It is beyond doubt that the principles and rights regulated by the Postal Law justify such a requirement.

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<sup>28</sup> The features and conditions of the Amazon Multi-Channel Fulfillment (MCF) service are described in detail at:

<https://services.amazon.es/servicios/logistica-de-amazon/logistica-multicanal.html>  
(Page accessed on 9 September 2020).

<sup>29</sup> This Chamber notes that the following companies of the Amazon Group are currently listed in the Register of Transport Operators: AMAZON SPAIN FULFILLMENT S.L. (NIF B82170135) and AMAZON ROAD TRANSPORT SPAIN S.L. (NIF B88405303).

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**Sixth.** - Finally, Amazon argues that the management of parcel lockers would also not constitute a postal service subject to postal regulations.

As to parcel lockers not constituting a postal service, it should be recalled that the deployment of these additional delivery points to that of the home locker or postal boxes is another way by which postal operators (including the designated operator via infrastructure such as CityPaq or other private operators through Citibox) are developing and managing their delivery activity in the last mile and offering their customers new options and facilities for delivery. In addition, the way items are deposited and guarded by Amazon until final collection by the recipient is nothing different from the way other postal operators do, whether through their own parcel lockers or post office boxes.

In short, the ownership and management of a parcel lockers system as described above constitutes a postal distribution service to deal with the tasks related to the last mile.

**Seventh.** - With respect to collaborators to delivery tasks managed through the "Amazon Flex" programme, Amazon indicates that, as these are external means and postal registration is not mandatory under the applicable regulations, it did not consider necessary to verify whether these carriers are registered as such.

In this regard, it should be borne in mind that legal persons may be liable for organisational defects in which they incur, provided that they have failed to take precautionary measures that are required of them to ensure an orderly and non-infringing conduct of the business.

In order to assess the existence of both *culpa in eligendo* and *culpa in vigilando*, the Supreme Court recalls that the dependence of the author of an infringement on the entity contracting his services is not a strict dependency, nor is it limited to the formal legal sphere or labour relations, but requires of a broad interpretation, in which the assessment of an element of control, supervision and steering of the tasks entrusted to him is often crucial<sup>30</sup>.

Article 57 of the Postal Law also provides that:

*“1. Postal service providers shall be jointly and severally liable for postal offences committed by workers within the scope of their management and command power.*

*2. The proprietor of the trademark shall be liable jointly and severally for infringements committed in the provision of postal services using a particular trademark if concerted action is found between him and the offender.*

*3. The participants or co-holders of the entities without legal personality referred to in the previous article are also jointly and severally liable insofar as they have*

<sup>30</sup> View, above all, STS 2197/2006 of 3 April 2006, Id. Cendoj: 28079110012006100391 — and STS 2389/2009 of 6 May 2009, Id. Cendoj: 28079110012009100295.

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*some power of management or administration in such companies, as well as those who succeed the offender in any way in the exercise of the postal activity in which the offence was committed, unless the will of the offender has not intervened in the succession.*

*4. In addition, the legal or de facto administrators of legal persons who had not saved their vote on the occasion of the agreement that would have caused the infringement are jointly and severally liable."*

Consequently, insofar as Amazon exercises a power of steering, control and surveillance of the tasks entrusted to the members of its Flex programme through the application installed on their mobile phones, which allows the timely tracking of their routes, the suggestion of more efficient itineraries, the verification of the delivery of shipments and the control of the quality parameters of service delivery, it is concluded that Amazon, given the nature and intensity of this collaboration relationship, is obliged to verify compliance with the applicable sectoral regulations by its collaborators and must exercise utmost care to guarantee a non-offending activity by the company.

## **SIXTH. - Conclusions**

In view of the above, the final conclusions obtained in the present declaratory procedure are as follows:

**First.** Previously, it can be concluded that electronic platforms, as well as alternative business models based on the collaborative economy, are susceptible to being subject to postal regulations as long as their objective of providing a comprehensive service to the consumer incorporates into their own organisation courier and parcel delivery services.

**Second.** Amazon has an organisation that, by its configuration and functions, is comparable to and assimilated to the concept of "postal network" as described in the Postal Law (article 3.12) and in the Postal Directive (article 2.2), regardless of whether its use is also intended for the commercialisation of products in its own inventory.

**Third.** Analysing the activities carried out by ASF and ARTS in the light of the current postal regulations, it is observed that these activities cover the different phases that comprise the postal cycle and that have been described above. In addition, the consignments on which the parties concerned act are treated as postal in accordance with the postal regulations, as demonstrated in the preceding paragraphs.

**Fourth.** The fact that Amazon has a network of own and external means that does not differ from the legal concept of a postal network, and the fact that it performs or provides parcel delivery services on behalf of third parties (and not



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just transportation), are determining factors in considering this provider as a postal operator.

**Fifth.** The difference between the case of a platform such as Amazon and that of other sellers or retailers (who can operate on and off-line) is the full control and management capacity that Amazon exercises over its parcel delivery service, the fact that this service covers the various activities of the postal cycle, and that the Amazon Group network is used to provide services to third parties. In short, the intensity of the control that Amazon has over its parcel delivery services is not comparable to that which other retailers have over their own, insofar as the latter outsource the delivery of their service to one or more parcel delivery service providers<sup>31</sup>.

**Sixth.** The concept of self-provision, which allows the exclusion of the application of postal legislation, does not apply when the operator is not at the origin of a part of the goods or shipments it manages (shipments owned by third-parties who are the ones that invoice them), as the various activities of the postal cycle or chain are not carried out entirely by Amazon itself and neither by an exclusive third-party provider.

**Eighth.** Companies interested in the procedure have external clients to which they provide services, as reflected in the activity description of the accounts deposited in the Commercial Registry. Nonetheless, the nature of external customer in a corporate group such as Amazon is predicable for each and every company in the group (that is, ASSE's external customers are also ASF's and ARTS'). There can be no outsourcing of services between companies of the same corporate group, but a division of activities and tasks by companies of the Group to serve a common purpose and objective.

**Ninth.** In application of the figures of *culpa in eligendo* and *in vigilando*, the interested parties in this procedure are obliged to ensure that their third-party collaborators comply with the law.

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<sup>31</sup> On determining the control and intensity of the relationship over the provision of the service, see the European Postal Regulators Group ERGP PL I 20 (7) Report on Postal Definitions (currently in public consultation):

<https://ec.europa.eu/docsroom/documents/42142>

"Three criteria can be cumulatively fulfilled in order to establish a high level of control: *determination (not only suggestion) of the price, determination of contract terms (including the obligation of users to provide a service) and ownership of assets that are essential to the provision of the service. The fulfilment of these criteria is an indication about the significant influence exerted by the platform over the provider of the underlying service. In some cases, the platform itself could be considered as providing the underlying service. Additionally, the assumption of risks for performance or an employment relationship with the main provider can indicate a high level of control and influence over the provision of the underlying service.*"

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**Tenth.** Ultimately, the activity carried out by Amazon is in no way different from that carried out by other postal market operators, and as a provider of postal services, it must be subject to the reference rules, without the exception of the self-provision regime being applicable. As a result, being a postal activity, Amazon must submit the relevant affidavit to MITMA for subsequent registration in the General Register of Postal Service Providers.

For all the foregoing, the Regulatory Supervision Chamber

### RESOLVES

**First.** - That the companies of the Amazon Group, Amazon Spain Fulfillment S.L. and Amazon Road Transport Spain S.L., meet the circumstances to be considered postal operators, so they must proceed to the presentation of the corresponding affidavit in order that MITMA makes their registration in the General Register of Postal Service Providers.

**Second.** - The companies of the Amazon Group, in particular Amazon Spain Fulfillment S.L. and Amazon Road Transport Spain S.L., must submit the corresponding affidavit within one month, as the activities they carry out in the field of parcel delivery and courier are postal services in accordance with postal regulations.

In the same period, Amazon Spain Fulfillment S.L. and Amazon Road Transport Spain S.L. must require their companies and freelance collaborators operating in the parcel delivery sector to submit the corresponding affidavit, so that MITMA proceeds to their registration in the General Register of Postal Service Providers.

**Third.** - The provisions of the two preceding paragraphs shall apply to any other Amazon company that, in the future, as a result of the restructuring and reorganisation of the Group, may carry out the activities that have been analysed and described in this file.

**Fourth.** - The Directorate of Transport and Postal Sector must follow up on the provisions of the preceding paragraphs and adopt, where convenient, any measures deemed appropriate in the event of non-compliance.

This Resolution is to be communicated to the Directorate of Transport and Postal Sector and is to be notified to the interested parties, with it to be informed that this resolution terminates the administrative procedure and that they can file a contentious-administrative appeal against it before the National High Court within two months of the day following its notification.