



EUROPEAN COMMISSION  
Competition DG

***CASE AT.40153 E-book MFNs and  
related matters (Amazon)***

(Only the English text is authentic)

**ANTITRUST PROCEDURE**  
**Council Regulation (EC) 1/2003**

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Article 9 Regulation (EC) 1/2003

Date: 04/05/2017

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Brussels, 4.5.2017  
C(2017) 2876 final

PUBLIC VERSION

**COMMISSION DECISION**

**of 4.5.2017**

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the  
European Union (TFEU) and Article 54 of the EEA Agreement**

**Case AT.40153 – E-book MFNs and related matters**

(Only the English text is authentic)

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# COMMISSION DECISION

of 4.5.2017

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement**

**Case AT.40153 – E-book MFNs and related matters**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>1</sup>, and in particular Article 9(1) thereof,

Having regard to the Commission Decisions of 11 June 2015 and 9 December 2016 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 9 December 2016,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

## **1. SUBJECT MATTER**

- (1) The present Decision concerns Amazon.com, Inc., and its directly and indirectly controlled entities, including Amazon EU S.à.r.l., Amazon Media EU, S.à.r.l. (to which Amazon EU S.à.r.l. contributed its digital business) and Amazon Digital Services, LLC (via its predecessor Amazon Digital Services, Inc.). For the purpose of this Decision, they are jointly referred to as "Amazon".
- (2) This Decision concerns certain most favoured nation (MFN) clauses or parity clauses ("parity clauses") and similar provisions introduced in agreements between Amazon

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<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

and E-book Suppliers<sup>2</sup> in the European Economic Area ("EEA"). Such clauses require E-book Suppliers (i) to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere and/or (ii) to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another E-book Retailer.<sup>3</sup>

- (3) In its preliminary assessment of 9 December 2016 (the "Preliminary Assessment") the Commission raised concerns as to the compatibility of the aforementioned parity clauses with Article 102 of the Treaty and Article 54 of the EEA Agreement.
- (4) While Amazon disagrees with the conclusions reached by the Commission in its Preliminary Assessment, it nevertheless has offered commitments under Article 9(1) of Regulation (EC) No 1/2003 to meet the concerns expressed by the Commission. The present Decision makes those commitments binding on Amazon.

## **2. THE UNDERTAKING CONCERNED**

- (5) Amazon.com, Inc. is a US-based corporation first incorporated in 1994 with its principal corporate offices in Seattle, Washington, USA. Amazon.com, Inc. is active in online retail, e-commerce services, digital content, web and infrastructure computing services. Its primary source of revenue is the sale of a wide range of products and services to customers. The products offered include merchandise and content purchased for resale from vendors and those offered by third-party sellers. Amazon.com, Inc. also manufactures and sells electronic devices, including Kindle e-book readers, Fire tablets, Fire TVs, Echo, and Fire phones. It also offers inter alia services such as cloud computing services, fulfilment services, (that is to say, a service whereby Amazon stores, picks, packs, ships, and provides customer service for products sold by others), publishing, including self-publishing services (Kindle Direct Publishing (KDP)), digital content subscriptions and advertising.
- (6) In the EEA, Amazon.com, Inc.'s e-book business is carried out principally by the following two entities:
  - (1) Amazon EU S.à.r.l., incorporated in Luxembourg, is a 100% owned subsidiary of Amazon.com, Inc., [description of the corporate activities of Amazon EU S.à.r.l.]. On 1 November 2014, Amazon EU S.à.r.l. contributed its digital business, including its e-book vendor contracts, to Amazon Media EU, S.à.r.l.
  - (2) Amazon Media EU, S.à.r.l., incorporated in Luxembourg, is also a 100%-owned subsidiary of Amazon.com, Inc. [description of the corporate activities of Amazon Media EU, S.à.r.l.].

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<sup>2</sup> The terminology "E-book Supplier" is used in order to encompass all entities that hold the necessary rights to license e-books to e-books retailers or sell e-books directly to consumers. As such, "E-book Suppliers" include e-book publishers and certain intermediaries (for instance, wholesalers or aggregators).

<sup>3</sup> The terminology "E-book Retailer" for the purposes of this document includes any person or entity that lawfully sells (or seeks to lawfully sell) e-books to consumers in one or more countries in the EEA, or through which an E-book Supplier, under an agency agreement, sells e-books to consumers in one or more countries in the EEA. An E-book Supplier is an E-book Retailer to the extent that the E-book Supplier sells e-books directly to consumers or sells e-books through an agent under an agency agreement.

- (7) Amazon Digital Services, Inc. is a US entity [description of the corporate activities of Amazon Digital Services, Inc.]. Amazon Digital Services, Inc. is now a Limited Liability Company ("LLC"), and is 100%-owned by Amazon.com, Inc.

### **3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003**

- (8) On 11 June 2015 the Commission initiated proceedings pursuant to Article 2 of Commission Regulation (EC) No 773/2004<sup>4</sup> against Amazon.com, Inc. and Amazon EU S.à.r.l. with a view to adopting a Decision under Chapter III of Regulation (EC) No 1/2003. On 9 December 2016, proceedings were also initiated against Amazon Digital Services, LLC and Amazon Media EU, S.à.r.l.<sup>5</sup>
- (9) On 9 December 2016, the Commission adopted, pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Preliminary Assessment which set out the Commission's competition concerns relating to certain parity clauses and similar provisions introduced in Amazon's agreements with E-book Suppliers. The Preliminary Assessment was notified to Amazon by letter of 9 December 2016.
- (10) On 13 January 2017, Amazon submitted draft commitments ("the Initial Commitments") to the Commission in response to the Preliminary Assessment. On 26 January 2017, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Initial Commitments and inviting interested third parties to give their observations on the Initial Commitments within one month following publication.<sup>6</sup>
- (12) On 9 March 2017 the Commission informed Amazon of the observations received from interested third parties following the publication of the notice. On 31 March 2017 Amazon submitted an amended proposal for commitments ("Final Commitments").
- (13) On 19 April 2017 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 25 April 2017 the Hearing Officer issued its final report.

## **4. PRELIMINARY ASSESSMENT**

### **4.1. Background**

#### *4.1.1. General overview of the e-books distribution market*

- (14) The products concerned by the present Decision are electronic books ("e-books"). An e-book is a digital book that can be read on a computer or mobile e-reading device.
- (15) Most e-books contain simple black and white text with no or limited illustrations (hereafter "primarily text" e-books) but they may also include more illustrations, including graphs (hereafter "highly illustrated" e-books). E-books may also incorporate additional features, functionalities and interactive content, such as author interviews, multimedia content, or external links that are not present in the original

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<sup>4</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18.).

<sup>5</sup> [http://europa.eu/rapid/press-release\\_IP-15-5166\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5166_en.htm) and

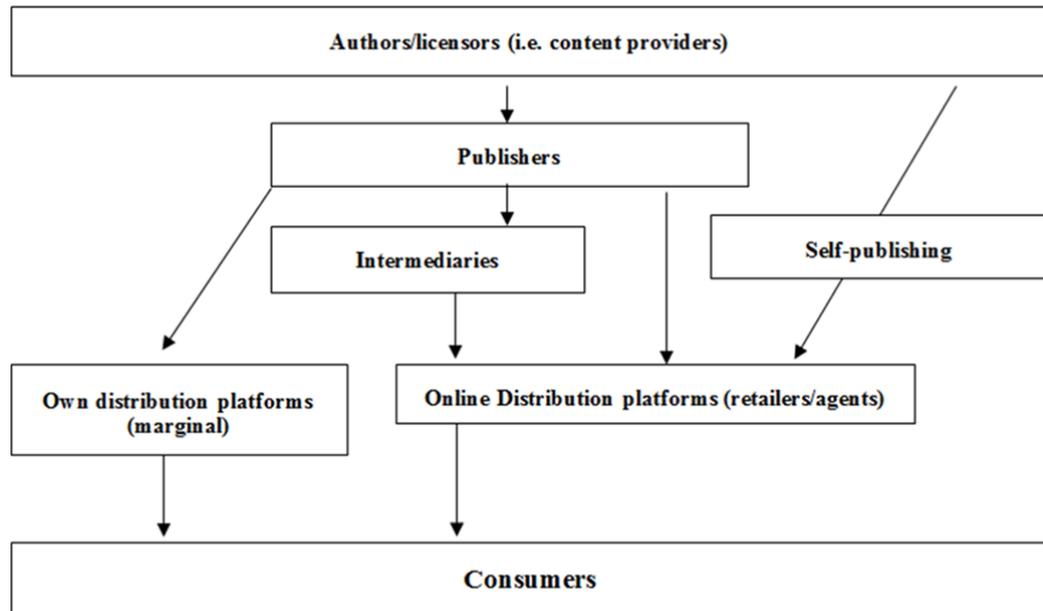
<sup>6</sup> [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40153/40153\\_4013\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4013_5.pdf)

Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.40153 — E-book MFNs and related matters, OJ C 26, 26.1.2017, page 2.

print version or in the primarily text version of the e-book (hereafter "enhanced" e-books). Highly illustrated and enhanced e-books are hereafter collectively referred to as "e-books which are not primarily text".<sup>7</sup>

- (16) Graph 1 below provides a simplified overview of the production and distribution of e-books.

**Graph 1: Overview of production and distribution of e-books**



- (17) Amazon is vertically integrated and is active upstream as a publisher, with its own imprints, and downstream as an E-book Retailer for E-book Suppliers, self-publishing authors and its own (e-)books. In addition, Amazon manufactures its own dedicated e-book readers (Kindle) and tablets (Kindle Fire). Amazon serves consumers across the EEA mainly from its websites at amazon.co.uk, amazon.de, amazon.fr, amazon.es, amazon.it and amazon.nl. It supports the sale of e-books in 61 languages in the EEA from each of those websites. In addition, customers in the EEA can purchase e-books from amazon.com.
- (18) Publishers have traditionally been active upstream in the acquisition of rights from authors. In the past, publishers acquired, edited and marketed authors' works almost exclusively. More recently, to a large extent due to technical developments, authors started to engage in self-publishing. Larger publishers tend to sign e-book distribution agreements directly with major E-book Retailers operating large online platforms such as Amazon, Apple, Google, etc. Smaller publishers may use intermediaries (such as traditional wholesalers<sup>8</sup> and aggregators<sup>9</sup>). Although some

<sup>7</sup> Enhanced e-books are also sometimes referred to as "enriched" e-books [specific content of e-book distribution agreements].

<sup>8</sup> The term wholesaler is used here to refer to companies which distributed print books to retailers before the e-books business developed and who afterwards extended their activity to e-books.

<sup>9</sup> The term e-book aggregation – an operation set up to help authors and publishers to reach a market – refers to an activity aimed at distributing content to one or more platforms.

publishers distribute their e-books directly via their own e-book-shops, direct distribution by publishers remains limited.

- (19) The Commission has recently investigated the distribution of e-books in the EEA under the EU competition rules. In December 2011, the Commission opened proceedings against Apple and five major international publishers, that is to say, Hachette Livre (Lagardère Publishing, France), Harper Collins (News Corp., USA), Simon & Schuster (CBS Corp., USA), Penguin (Pearson Group, United Kingdom) and Verlagsgruppe Georg von Holtzbrinck (owner of inter alia Macmillan, Germany) (collectively the "Five Publishers"). In its Preliminary Assessment, the Commission took the view that "*no later than December 2009*",<sup>10</sup> the Five Publishers and Apple engaged in contacts aimed at either raising the retail prices of e-books above those of Amazon (as was the case in the United Kingdom) or avoiding the arrival of such prices altogether (as was the case in France and Germany) in the EEA. To achieve this aim, the Five Publishers and Apple jointly switched the sale of e-books from a wholesale model (where the E-book Retailer determines retail prices) to an agency model (where the publisher determines retail prices and the E-book Retailer acts merely as its agent) on a global basis, on the same key pricing terms and with various E-book Retailers including Amazon. In order to eliminate the Commission's concerns, as set out in its Preliminary Assessment, the Five Publishers and Apple offered commitments, which were made binding by Commission Decisions of 12 December 2012 and 25 July 2013 respectively.<sup>11</sup> The commitments included the termination of all relevant agreements, a five-year ban on retail price clauses, wholesale price clauses and commission parity clauses, as well as a two-year "cooling-off" period whereby the Five Publishers had to allow all E-book Retailers on agency terms to discount the retail price of e-books on the basis of their respective aggregated annual commissions.<sup>12</sup>
- (20) Following the switch by the Five Publishers to the agency model in 2010, an increasing number of E-book Suppliers followed suit and adopted such agency terms as well. [terms of Amazon's distribution agreements for German and English language e-books]. Under such agency terms the E-book Supplier (acting as the principal) appoints an agent as its non-exclusive E-book Retailer. The E-book Retailer (agent) is usually unable to offer discounts on the retail price set by the E-book Supplier unless expressly allowed under the relevant agency agreement.

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<sup>10</sup> Summary of Commission Decision of 25 July 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39.847/E-BOOKS), OJ C 378, 24.12.2013, page 25, paragraph 8.

<sup>11</sup> See Commission Decision of 12 December 2012 in Case No COMP/39847 – E-Books ([http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39847/39847\\_26804\\_4.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26804_4.pdf)) and Commission Decision of 25 July 2013 in Case No. COMP/39.847 – E-Books ([http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39847/39847\\_27536\\_4.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_27536_4.pdf)).

<sup>12</sup> "*The Commission took the preliminary view that the financial implications for publishers of the retail price MFN clause were such that this clause acted as a joint 'commitment device'. Each of the five publishers was in a position to force Amazon to accept changing to the agency model or otherwise face the risk of being denied access to the e-books of each of the five publishers, assuming that all five publishers had the same incentive during the same time period, and that Amazon could not have sustained simultaneously being denied access even to only a part of the e-books catalogue of each of the five publishers.*" See Summary of Commission Decision of 25 July 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39.847/E-BOOKS), OJ C 378, 24.12.2013, page 25, paragraph 9.

However, many E-book Suppliers have chosen to remain on wholesale terms. [terms of Amazon's distribution agreements for German and English language e-books]. Under wholesale terms, the E-book Retailer is free to set the final price to consumers, including offering promotions and other discounts.

- (21) In several Member States (for example, Germany, Austria, France, Spain, Portugal, and Italy) there are national book price laws regulating the retail pricing of e-books. Such laws provide that the publishers are to set the retail prices of (e)books and that the retailers are prevented from or have limited possibilities of discounting the prices set by the publishers.<sup>13</sup> Such laws are often referred to as Resale Price Setting or Resale Price Maintenance laws. In this Decision they are referred to as "RPM laws".

#### 4.1.2. *Amazon's Parity Clauses*

- (22) In its Preliminary Assessment, the Commission expressed concerns that certain parity clauses and similar provisions contained in e-book distribution agreements between Amazon and E-book Suppliers may amount to an abuse of a dominant position by Amazon in breach of Article 102 TFEU and Article 54 of the EEA Agreement.
- (23) The parity clauses and similar provisions addressed in this Decision can be summarised as follows.
- (24) The Business Model Parity Clause contractually obligates the E-book Supplier to notify and offer to Amazon the terms for the distribution of e-books under a given business model as a result of that E-book Supplier's distribution of e-books under that business model (for example, reseller, subscription, rental, bundling with physical books or book clubs, by download, partial downloads (for example, per page), streaming or any other form of digital distribution) through any E-book Retailer other than Amazon.<sup>14</sup>
- (25) There are certain variations in the Business Model Parity Clause applied by Amazon in agreements with E-Book Suppliers. In accordance with its standard wording, E-book Suppliers have to notify and offer to Amazon their business models on the same material terms and conditions as any other E-book Retailer and no later than the relevant e-books become available to end users through such business model. Several agency agreements, [specific third parties with whom Amazon has concluded e-book distribution agreements containing particular clauses], however, contain alternative wording, including language which excludes the obligation to offer the same "economic terms" (that is to say, terms related to price, revenue share, commission, or payments).
- (26) Amazon has also created and implemented so-called "Fallback Options" of the Business Model Parity Clause in some of its agreements with E-book Suppliers.<sup>15</sup>

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<sup>13</sup> See for example German law: Buchpreisbindungsgesetz of 2 September 2002 (BGBl. I S. 3448), amended lastly by Article 1 of the law of 31 July 2016 (BGBl. I S. 1937) which extended its application to e-books and cross-border sales as of 1 September 2016. See also Austrian law: Bundesgesetz über die Preisbindung bei Büchern, BGBl I Nr. 45/2000, amended lastly by BGBl I 82/2009, and BGBl I 79/2014 which extended that law to e-books.

<sup>14</sup> The Business Model Parity Clause is also referred to as "Alternative Business Model" parity clause [specific content of e-book distribution agreements].

<sup>15</sup> According to the information provided by Amazon, "Fallback Options" are to be used for the hypothetical scenario where a "Publisher refuses to give business model parity." Wordings similar to

Those Fallback Options include (i) the narrowing of the applicability of the standard Business Model Parity Clause to only some competing E-book Retailers ("Tier 1" E-book Retailers); and (ii) the transformation of the Business Model Parity Clause into a provision obliging the E-book Supplier to notify Amazon if the E-book Supplier is distributing e-books under a given business model with an E-Book Retailer other than Amazon, and to discuss in good faith the implementation of such business model with Amazon.

- (27) The Selection Parity Clauses include a number of different obligations related to the release of e-books. There are certain variations in the Selection Parity Clauses applied by Amazon in agreements with E-Book Suppliers. Generally, the Selection Parity Clauses contractually obligate the E-book Supplier to: (i) make available through Amazon (in exchange for payment or for free) a given e-book within a particular territory (Catalogue Parity Clause) and/or at a particular date and time (Availability Date Parity Clause) as a result of that E-book Supplier's distribution of that e-book through any E-book Retailer other than Amazon, and/or (ii) make available to Amazon any feature, functionality, usage rule, element or content for one or more e-books as a result of the E-book Supplier making that feature, functionality, usage rule, element or content available for that e-book through an E-book Retailer other than Amazon (Features Parity Clause). Certain wholesale agreements (including the standard agreements) provide that if Amazon does not support a certain feature or type of content, the E-book Supplier will have to provide at Amazon's request an equivalent feature or type of content that Amazon can support. Certain agency agreements provide that for new e-books that are not primarily text<sup>16</sup> the E-book Supplier will notify Amazon and provide all assistance and materials that are reasonably required for Amazon to create an e-book of that title.
- (28) The Agency Price Parity Clause contractually obligates the E-book Supplier to set an agency price<sup>17</sup> on Amazon that depends in any way on the agency price set by the E-book Supplier (or charged by an E-book Retailer) on any E-book Retailer other than Amazon, or the reseller prices<sup>18</sup> charged to consumers by E-book Retailers other than Amazon.
- (29) The Promotion Parity Clause contractually obligates the E-book Supplier to offer to Amazon any promotional agency price, promotional wholesale price<sup>19</sup>, or promotional content as a result of the E-book Supplier offering promotional agency prices, promotional wholesale prices, or promotional content through an E-book Retailer other than Amazon.

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these "Fallback Options" have been found in several agreements entered into by Amazon with EEA publishers.

<sup>16</sup> See recital (15) above.

<sup>17</sup> For the purposes of this Preliminary Assessment, the agency price is the price set by an E-book Supplier or, if discounting is permitted, the discounted price charged by an E-book Retailer for the sale (in exchange for payment or for free) of an e-book to a consumer under an agency agreement.

<sup>18</sup> For the purposes of this Preliminary Assessment, the reseller price is the price charged by an E-book Retailer under a reseller agreement for the sale (in exchange for payment or for free) of an e-book to a consumer.

<sup>19</sup> For the purposes of this Preliminary Assessment, the wholesale price is the net amount that an E-book Retailer pays to an E-book Supplier for an e-book that the E-book Retailer sells (in exchange for payment or for free) to a consumer under a reseller agreement.

- (30) The Discount Pool Provision is a term in agency agreements relating to a "pool" of credits that Amazon may use at its discretion to discount agency prices for any e-books supplied by that E-book Supplier on Amazon ("Discounted Price"). The pool is calculated based on the differences between the agency prices set by the E-book Supplier for its e-books on Amazon and the agency prices or reseller prices for those e-books available through other E-book Retailers. The revenues to the E-book Supplier and the commissions to Amazon are computed on the basis of the Discounted Price. Hence, discounts resulting from the Discount Pool Provision reduce the revenues per e-book to the E-book Supplier.
- (31) The Wholesale Price Parity Clause is a clause in a reseller agreement that contractually obligates the E-book Supplier to provide to Amazon a wholesale price that depends in any way on the wholesale price or agency price the E-book Supplier provides to any E-book Retailer other than Amazon, or the reseller price charged to consumers by any E-book Retailer other than Amazon under a reseller agreement.
- (32) The Agency Commission Parity Clause contractually obligates the E-book Supplier to provide to Amazon an agency commission that depends in any way on the agency commission the E-book Supplier provides to any E-book Retailer other than Amazon under an agency agreement.
- (33) Amazon's agreements with the Five Publishers contain price-related Notification Provisions.<sup>20</sup> These are separate provisions that contractually obligate the E-book Supplier to notify Amazon if (i) the agency price set by the E-book Supplier on Amazon is higher than the agency price set by the E-book Supplier (or charged by an E-book Retailer) on an E-book Retailer other than Amazon, or the reseller price charged to consumers by E-book Retailers other than Amazon ("Retail Price Notification Provision"); (ii) the E-book Supplier offers any promotional agency price or promotional content to an E-book Retailer that the E-book Supplier does not also offer to Amazon ("Promotion Notification Provision"); (iii) the wholesale price the E-book Supplier provides to Amazon is greater than the agency price the E-Book Supplier provides to (or is charged by) an E-book Retailer other than Amazon, or the wholesale price the E-book Supplier provides to an E-book Retailer other than Amazon ("Wholesale Price Notification Provision"); (iv) the agency commission the E-book Supplier provides to Amazon is less than the agency commission the E-book Supplier provides to an E-Book Retailer other than Amazon ("Agency Commission Notification Provision").
- (34) In addition to the price-related Notification Provisions described in the previous recital, Amazon's agreements with E-book Suppliers also contain certain non-price-related Notification Provisions. Those provisions contractually obligate the E-book Supplier to notify Amazon if (i) the E-book Supplier distributes e-books with an E-book Retailer under a given business model other than Amazon's; (ii) the E-book Supplier makes a given e-book available for sale (in exchange for payment or for free) through an E-book Retailer and either does not also make such e-book available for sale through Amazon or makes it available through Amazon at a different date or time; or (iii) the E-book Supplier makes available a particular feature, functionality,

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<sup>20</sup> Those provisions are included in agreements that were concluded after the Five Publishers offered commitments that were made binding by the Commission in Case COMP/39.847 – E-books and whereby inter alia retail price, wholesale price and commission parity clauses involving the Five Publishers were banned for a period of five years.

usage rule, element or content for a particular e-book for an E-book Retailer that the E-book Supplier does not also make available for Amazon. Contrary to the price-related Notification Provisions with the Five Publishers, the non-price-related Notification Provisions are normally integrated in the relevant parity clauses (for example, Business Model Parity Clause or Selection Parity Clauses) in certain e-book distribution agreements. Consequently, the Commission will assess such non-price related notification provisions in the context of its preliminary analysis of the Business Model Parity Clause and the Selection Parity Clauses.

- (35) For the purposes of this Decision, the term "Parity Clauses" is used as a common term to describe the Business Model Parity Clause, the Selection Parity Clauses, the Agency Price Parity Clause, the Promotion Parity Clause, the Discount Pool Provisions, the Wholesale Price Parity Clause, the Agency Commission Parity Clause, and the Notification Provisions.
- (36) Amazon started to introduce Parity Clauses in its wholesale e-book distribution agreements covering the EEA as of [indications of when Amazon started to introduce the Parity Clauses]. Parity Clauses have since been systematically requested by Amazon when concluding e-book distribution agreements. Amazon first introduced the Catalogue and Availability Date Parity Clauses in its wholesale agreements in [indications of when Amazon started to introduce the Parity Clauses]. Today a majority of all of Amazon's e-book distribution agreements include Catalogue and Availability Date Parity Clauses. After E-book Suppliers resorted to agency terms in 2010, Amazon started to require the Agency Price and Agency Commission Parity Clauses as well as the Business Model Parity Clause. The latter was originally requested only in agency agreements with major international publishers. Today, the Business Model Parity Clause is, however, generally sought by Amazon for all types of e-book distribution agreements, including, since [indications of when Amazon started to introduce the Parity Clauses], for wholesale agreements. Because of the commitments made binding by the Commission in 2012 and 2013 on the Five Publishers (see recital (19) above), those Five Publishers could not introduce or maintain any retail price, commission or wholesale price parity clauses for a 5-year period in their e-book distribution agreements in the EEA. With those Five Publishers, Amazon therefore replaced the retail price, commission or wholesale price parity clauses with the Retail Price Notification Provision, Agency Commission Notification Provision, Wholesale Price Notification Provision, and the Discount Pool Provision (see Sections 4.5.4 to 4.5.6 below).
- (37) According to the information available to the Commission, in March 2016 Amazon had in place [number of e-book distribution agreements containing Parity Clauses that Amazon had in place in the EEA in March 2016] distribution agreements containing Parity Clauses with E-book Suppliers based in the EEA, namely in the United Kingdom, Ireland, Germany and Austria.
- (38) The wording of the Parity Clauses is largely similar across e-book distribution agreements with different E-Book Suppliers, although the exact wording may vary from one agreement to another. Amazon has created a template, or a standard, for its agency and wholesale agreements. They are often used as the basis for its negotiations with E-book Suppliers. The template agreements include all of the Parity Clauses discussed in this Decision. In particular, Amazon's agency template includes the following Parity Clauses: the Business Model Parity Clause, Selection Parity Clauses (Catalogue, Availability Date and Features Parity Clauses), the Promotion Parity Clause, the Agency Price Parity Clause and the Agency

Commission Parity Clause. Similarly, the wholesale templates include the Business Model Parity Clause, Selection Parity Clauses, the Promotion Parity Clause and the Wholesale Price Parity Clause. The standard agreements covering the EEA Contracting Parties were discussed by Amazon, at least internally, in [indications of when Amazon started to negotiate standard terms]. Throughout the years Parity Clauses have been added or adapted. Variations to the standard agreements are found in several e-book distribution agreements between Amazon and E-book Suppliers.

## 4.2. Relevant markets

### 4.2.1. Principles

- (39) Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that undertakings in a certain sector face. The objective of defining a market in both its product and geographic dimensions is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.<sup>21</sup>
- (40) According to settled case-law, for the purposes of investigating the existence of a dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services.<sup>22</sup>
- (41) Since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and to behave to an appreciable extent independently of its competitors and its customers, an examination to that end cannot be limited solely to the objective characteristics of the relevant services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.<sup>23</sup>

### 4.2.2. Relevant product markets

- (42) In its Preliminary Assessment, the Commission considered that there is a distinct product market for the retail distribution of e-books that is separate from retail distribution of print books and audio-books, and that the relevant e-books market should be further divided into (i) a market for the retail distribution of English language e-books to consumers, and (ii) a market for the retail distribution of German language e-books to consumers. This conclusion was reached for a number of reasons.

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<sup>21</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law ("*Commission notice on market definition*"), OJ C 372, 9.12.1997, page 5, at paragraph 2.

<sup>22</sup> Judgment of 21 October 1997, *Deutsche Bahn v Commission*, T-229/94, ECLI:EU:T:1997:155, paragraph 54; Judgment of 17 December 2003, *British Airways v Commission*, T-219/99, ECLI:EU:T:2003:343, paragraph 91; Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05 ECLI:EU:T:2010:266, paragraph 31.

<sup>23</sup> Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 370. See also Commission Notice on market definition, page 5.

- (43) First, although there is a degree of competitive interaction between e-books and print books, which is evidenced, *inter alia*, by the fact that, title-by-title, e-book prices are usually determined by reference to the print book price and that prices of e-books often fall when the price of the print books is lowered, the substitutability is not sufficiently strong to warrant the inclusion of print books in the product market of which e-books form part:
- (1) As regards demand-side substitutability, consumers are unlikely to switch from e-books to print books in case of a 5-10% increase in the retail price of e-books (overall, even with a 5-10% increase of their retail price, e-books would generally be significantly lower priced than print books). There are also strong indications that consumer preferences play an important role in distinguishing the two formats. For example, the Commission's investigation showed that the following are important factors when consumers consider whether to purchase an e-book instead of a print book: (i) e-books are easier to carry than print books when travelling, (ii) e-books have additional functionalities compared to print books, such as the possibility to change the type and size of the font; (iii) e-books can support interactive features such as video or music add-ons, dictionaries, links to information about the subject matter of the book or the author, and (iv) e-books can be purchased and downloaded immediately at any time. There may also be differences in the catalogue in the two formats. For example, a large number of self-published books or back-list titles are only, or more readily, available in the e-book format.
  - (2) As regards supply-side substitutability, the distribution of print books entails important investments in the distribution, ware-housing and logistics, whereas e-books distribution requires mainly setting up and maintenance of an online distribution platform, which is a very different type of investment. As a consequence, it would not be possible for either a traditional book store or an online print book store to switch from print book to e-book sales without acquiring significant tangible and intangible assets, incur additional investments and/or strategic decisions with the immediacy required to allow for a finding of significant supply-side substitutability.
- (44) Second, concerning the distinction between the distribution of audio-books, on the one hand, and e-books, on the other hand, in its Preliminary Assessment, the Commission considered that, in line with previous Commission decisions,<sup>24</sup> audio-books are distinct from both print books and e-books, notably in terms of (i) pricing at wholesale and retail level and (ii) their typical end consumer and mode of consumption.
- (45) Third, as regards a possible further delineation of the e-books market, the Commission noted that the relevant market encompasses only the retail distribution through trade channels and that other sales channels such as library and educational channels should not be considered part of the same product market due to, *inter alia*, the underlying differences in the targeted audience, differences in demand, the overall market structure as well as the applicable contractual arrangements.

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<sup>24</sup> Commission Decision of 5 April 2013 in Case No COMP/M.6789 – Bertelsmann/Pearson/Penguin Random House ([http://ec.europa.eu/competition/mergers/cases/decisions/m6789\\_20130405\\_20310\\_3146409\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6789_20130405_20310_3146409_EN.pdf)), paragraphs 139-149.

- (46) Fourth, as regards the retail distribution through trade channels, in its Preliminary Assessment, the Commission took the view that the different customers' demands for different categories of e-books do not justify a further sub-categorisation of e-books. Although from a demand-side perspective, the degree of substitutability between e-books of different genres appears to be limited, the underlying agreements generally do not distinguish between different genres of e-books (for example, fiction, non-fiction, children e-books, etc.) but cover the whole catalogue of the E-book Supplier in question, thus generally allowing E-book Retailers to offer the full catalogue of the E-book Supplier. Thus, the competitive situation across genres appears to be very similar.
- (47) Fifth, the Commission considered that the e-books distribution markets should be delineated on the basis of language, notably because even though the language of e-books does not constitute a crucial factor in the relationship between an E-book Supplier and an E-book Retailer, readers do not generally find e-books in different languages substitutable and most readers usually purchase e-books in their mother tongue. Moreover, at least some E-book Retailers appear to offer different catalogues of e-books. For example, the Commission noted that certain E-book Retailers sell predominantly German language e-books, while other E-book Retailers offer predominantly English language e-books.

#### 4.2.3. *Relevant geographic markets*

- (48) In its Preliminary Assessment, the Commission considered that the relevant geographic markets for the retail distribution of English language and German language e-books, respectively, do not extend beyond the EEA. It was left open whether those markets are national, are limited to the linguistic regions where the respective languages are primarily spoken, or whether they comprise the entire EEA as Amazon would be potentially dominant under any of the alternative geographic market delineations.
- (49) A number of elements pointed to the existence of national markets for the distribution of English and German language e-books to consumers, including the following:
- (1) Customer preferences are not fully homogeneous across countries. Differences include language, cultural preferences, VAT rates and, in some instances, retail price regulation; differences are reflected for example in country-targeted marketing and advertising campaigns.
  - (2) From the point of view of demand-side substitutability, some E-book Retailers operate country-specific stores, in some cases putting in place geo-blocking and geo-filtering systems discouraging consumers to purchase e-books across borders.
  - (3) From the point of view of supply-side substitutability, certain e-book distribution agreements are limited to a single territory which then also limits the E-book Retailer's scope for freely distributing e-books across different countries.
  - (4) The Commission also noted some price differences across countries, in particular for e-books offered by different e-book stores with a national presence.
- (50) There were also elements indicating that the relevant geographic markets could be defined along linguistic boundaries, that is, grouping together those countries where

the language mainly spoken corresponds to the language of the respective e-books and grouping those countries where it does not correspond to the language of the respective e-books (that is to say, those countries where English or German, respectively, is or is not the main language), including the following:

- (1) From a demand-side substitutability perspective, in those countries where the same language is spoken, cultural preferences are rather similar, and marketing and advertising campaigns may target the linguistic area instead of an individual country.
  - (2) From a supply-side substitutability perspective, a number of E-book Retailers have set up stores covering more than one country (and which offer largely the same prices to customers irrespective of their home country) and compete on a wider than national market. Amazon, the largest E-book Retailer of English and German language e-books in the EEA, has set up stores in Europe that cater for consumers across borders: for instance, the Amazon.co.uk store is available for consumers established in the United Kingdom and Ireland; the Amazon.de store is available for consumers established in Germany and Austria. Moreover, a number of agreements for the distribution of e-books cover several territories (including the whole of the EEA).
  - (3) In contrast, in countries where the language mainly spoken is not English or German, respectively, the importance of English or German e-books, respectively, tends to be less than the importance of e-books in the language mainly spoken. This is reflected in more limited marketing activities concerning English and German e-books.
- (51) A different set of elements indicated that the relevant geographic market could be as wide as the EEA, including the following:
- (1) From the point of view of demand-side substitutability, several respondents to the Commission's market investigation indicated that English language e-books are downloaded and read widely across the EEA because of the global nature of English as foreign language. The market investigation also indicated that, albeit to a lesser extent and on a smaller scale, German language e-books are also purchased by consumers across the EEA.
  - (2) From the point of view of supply-side substitutability, in the publishing sector licences are granted from authors to publishers and from publishers to E-book Retailers. The territories covered by the agreements between publishers and E-book Retailers may differ from the territory of the underlying licenses granted by the author to the publisher, for reasons determined by the parties to the agreements. Amazon's and other E-book Retailers' agreements may be national in scope, EEA wide or limited to certain EEA countries.
  - (3) Many respondents to the Commission's market investigation also indicated that the geographic scope of the relevant market, whilst supra-national, does not extend beyond the EEA, since the above-mentioned features (territoriality of online platforms, scope of licensing agreements, pricing, customer preferences

and VAT issues) make the EEA a distinct economic area for e-book distribution as compared to other national/continental areas.<sup>25</sup>

### 4.3. Amazon's dominance in the relevant markets

#### 4.3.1. Principles

- (52) According to settled case-law, dominance is "a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers."<sup>26</sup>
- (53) The existence of a dominant position derives from a combination of several factors, which, when taken separately, are not necessarily determinative.<sup>27</sup> One important factor is the existence of very large market shares, which are themselves, save in exceptional circumstances, evidence of the existence of a dominant position.<sup>28</sup> A market share of 50% often constitutes in itself evidence of the existence of a dominant position.<sup>29</sup>
- (54) The notion of independence, which is an important criterion to determine dominance,<sup>30</sup> is related to the level of competitive constraints facing the undertaking in question. It is not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition in the market.<sup>31</sup> However, for dominance to exist, the undertaking concerned must have substantial market power so as to have an appreciable influence on the conditions under which competition will develop.<sup>32</sup>
- (55) An important factor for assessing dominance is the existence of barriers to entry or expansion, preventing potential competitors from having access to the market and

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<sup>25</sup> This is consistent with the position taken by the US authorities in the previous e-books case where the relevant market was defined as (trade) e-books in the United States (see NY District Court Opinion, <https://www.justice.gov/atr/case-document/file/486691/download>, footnote 60 at page 121).

<sup>26</sup> Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 65; Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, Case C-85/76, ECLI:EU:C:1979:36, paragraph 38; and Judgment of 17 September 2007, *Microsoft v Commission*, Case T-201/04 ECLI:EU:T:2007:289, paragraph 229.

<sup>27</sup> Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 66; Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 39.

<sup>28</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraphs 39 and 41; and Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, ECLI:EU:T:2003:281, paragraph 154.

<sup>29</sup> Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, ECLI:EU:C:1991:286, paragraph 60; Judgment of 30 January 2007, *France Télécom*, T-340/03 ECLI:EU:T:2007:22, paragraph 100; Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, ECLI:EU:T:2012:172, paragraph 150.

<sup>30</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraphs 42-48.

<sup>31</sup> Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 113.

<sup>32</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 39.

actual competitors from expanding their activities in the market.<sup>33</sup> In this context, the case-law<sup>34</sup> has highlighted that it is important to analyse the conditions of entry and expansion, such as the existence of economies of scale and/or scope and network effects. Important economies of scale, from which newcomers to the market cannot derive any immediate benefit, may have the effect that competitors are less likely to enter or stay in the market if the dominant undertaking forecloses a significant part of the relevant market.

#### 4.3.2. *Amazon's dominance*

- (56) In its Preliminary Assessment, the Commission took the view that Amazon holds a dominant position in the markets for the retail distribution of English language and German language e-books in the EEA. The Commission noted that this held true irrespective of the concrete relevant geographic market delineation for a number of reasons, including the following:
- (57) First, Amazon has high market shares for both the English language and German language e-books distribution markets (irrespective of the exact geographic market definition) and its market share has increased over time at the expense of its competitors in those markets, irrespective of their geographic delineation.
- (58) Amazon's market share for the retail distribution of English language e-books at national level in the United Kingdom and Ireland, and therefore also in the English-speaking region composed of the United Kingdom and Ireland was estimated to be constantly [70-90%] from 2010 to 2015. Amazon's market share for the distribution of English language e-books in the whole of the EEA was estimated to be constantly around [80-100%] from 2011 to 2015.
- (59) This was confirmed by the fact that whether considering a market for the distribution of English language e-books in the United Kingdom and Ireland, or on a regional level composed of a combined United Kingdom and Ireland market, Amazon's net turnover consistently was [several] times larger than that of its closest competitor in each of the years from 2011 to 2015. Similarly, looking at an EEA-wide market for English language e-books, Amazon consistently generated [several] times larger net turnover than its closest competitor in each of the years from 2011 to 2015.
- (60) There may have also been sales of English e-books in other EEA countries (that is to say, other than the United Kingdom and Ireland), where Amazon could be potentially found dominant, but this was not the focus of the Commission's investigation.
- (61) In its Preliminary Assessment, the Commission took the view that the situation was similar as regards German language e-books. Amazon's estimated market share for the distribution of German language e-books at national level in Germany and Austria and in the German-speaking region composed of Germany and Austria was estimated to have been constantly [40-60%] from 2012 to 2015. Amazon's estimated market share for the distribution of German language e-books in the whole of the

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<sup>33</sup> Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraph 122; and Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 48.

<sup>34</sup> Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, C-27/76, ECLI:EU:C:1978:22, paragraphs 91 and 122; Judgment of 11 December 2013, *Cisco Systems, Inc. and Messagenet SpA v European Commission*, T-79/12, ECLI:EU:T:2013:635; and Judgment of 6 October 2015, *Post Danmark II*, C-23/14, ECLI:EU:C:2015:651, paragraph 39.

EEA increased from [30-50%] in 2011 (when Amazon entered this market) to more than [50-70%] in 2015.

- (62) In the market for the distribution of German language e-books at national level in Germany and in the German-speaking region composed of Germany and Austria, Amazon was [several] times larger in net turnover than its closest competitor in each of the years from 2012 to 2015. In the market for the distribution of German language e-books at national level in Austria, Amazon was [several] times larger in net turnover than its closest competitor in each of the years from 2012 to 2015. In the market for the distribution of German language e-books in the rest of the EEA, Amazon was [several] times larger in net turnover than its closest competitor in each of the years from 2012 to 2015.
- (63) There may be sales of German e-books in other EEA countries (that is to say, other than Germany and Austria), where Amazon could be potentially found dominant, but that was not the focus of the Commission's investigation.
- (64) Second, Amazon's potential market power was further confirmed by its significant share of the total e-books sales from E-book Suppliers to E-book Retailers. In the period 2011-2015, on average [70-90%] of total net turnover of English language E-book Suppliers went through Amazon, and in the period 2012-2015 more than [40-60%] of total net turnover of German language E-book Suppliers went through Amazon in the EEA.
- (65) Third, in its Preliminary Assessment, the Commission took the view that there were a number of barriers to entry and expansion as concerns retail distribution of English language and German language e-books, including the following:
- (1) The need to have the necessary assets, notably in terms of availability of a sufficient e-book offering (catalogue of titles): E-book Retailers need to have agreements in place with a large number of E-book Suppliers and notably with the major E-book Suppliers controlling the must-have titles in order to compete. E-book Retailers also need to secure agreements with self-published authors who represent a significant part of the sales of e-books to consumers. In this respect, Amazon's exclusivity agreements with self-published authors through the Kindle Direct Publishing (KDP) Select scheme indicate that Amazon has exclusive access to a part of the e-books catalogue which is in high demand, thereby preventing its competitors from having access to those successful titles.
  - (2) The ability of e-book readers to drive sales and lock-in customers: with its Kindle e-book reader, Amazon operates a closed "ecosystem" (or "walled garden"). Customers who own a Kindle can use that e-book reader only for e-books purchased in Amazon's Kindle store. Moreover, e-books bought in the Kindle store cannot be read on other e-book readers, although they can be read on various e-reading devices such as tablets or smartphones (including tablets and smartphones that are not manufactured and sold by Amazon under its own brand) through the Kindle app (so-called "multi-homing"). This results in a situation in which customers that have already purchased Kindle e-books may face costs in switching to another e-book platform, due to the need to acquire an additional e-book reader and the inability to transfer the library of e-books purchased in Amazon's Kindle store to a different e-book reader. Whereas the closed Kindle ecosystem may not represent an insurmountable barrier to entry and/or expansion in the market for the distribution of e-books (since multi-

homing on different devices seems to be a common practice amongst e-book readers), it does reinforce Amazon's market power vis-à-vis its competitors since consumers willing to move to another platform are likely to face switching costs and may therefore effectively remain locked into Amazon's closed ecosystem.

- (3) The scale and scope of investments needed to set up a viable e-book distribution platform: even though the Commission's investigation indicates that there may be less significant barriers to entry if the entry is carried out through an intermediary/wholesaler, the growth and development of the business to a scale and scope capable of challenging the incumbent Amazon requires significant resources and the ability to face fierce competition. The investigation has also shown that even though some new entrants have entered the market, many have since exited. Further, of those E-Book Retailers still operating in the market, none appears to have been able to significantly expand or provide any significant constraint on Amazon. In fact, Amazon gained market share at the expense of its rivals in the retail distribution of both English language and German language e-books in the period from 2011 to 2015.
- (66) Fourth, the markets for the retail distribution of English language and German language e-books are characterized by a lack of countervailing buyer power. Amazon's customers are individual consumers who have no market strength and each represents only a fraction of the volume of e-books sold and is thus unable to significantly constrain Amazon.
- (67) Fifth, Amazon appeared to be an unavoidable trading partner for many English language and German language E-book Suppliers. The Commission noted that Amazon appeared to be prepared to use that position to obtain terms and conditions that its competitors are not able to obtain.

#### **4.4. Substantial part of the common market**

- (68) Amazon is present in all Contracting Parties to the EEA Agreement. It serves consumers across the EEA mainly from its websites at amazon.co.uk, amazon.de, amazon.fr, amazon.es, amazon.it and amazon.nl. In addition, customers anywhere in the EEA can purchase e-books from amazon.com.
- (69) Amazon holds a potential dominant position in the markets for the retail distribution of English language and the retail distribution of German language e-books in the EEA. The markets concerned constitute a substantial part of the internal market.

#### **4.5. Practices raising concerns**

##### *4.5.1. Principles*

- (70) Dominant undertakings have a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the internal market.<sup>35</sup> The scope of the special responsibility of the dominant undertaking has to be considered in light of the specific circumstances of the case

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<sup>35</sup> Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 57; Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, ECLI:EU:C:2009:214, paragraph 105; Judgment of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraph 23; and Judgment of 12 June 2014, *Intel v Commission*, T-286/09, ECLI:EU:T:2014:547, paragraph 205.

which show that competition has been weakened.<sup>36</sup> Article 102 TFEU and Article 54 of the EEA Agreement accordingly prohibit abusive practices which may cause damage to consumers directly, but also those which are detrimental to consumers through their impact on competition.<sup>37</sup>

- (71) The concept of abuse of a dominant position is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the presence of the very undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial actors, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.<sup>38</sup>
- (72) Article 102 TFEU and Article 54 of the EEA Agreement generally prohibit a dominant undertaking from strengthening its position by using methods other than those which come within the scope of competition on the merits.<sup>39</sup> However, the list of abusive practices in Article 102 TFEU and Article 54 of the EEA Agreement are merely examples and not an exhaustive enumeration of the practices prohibited in Article 102 TFEU and Article 54 of the EEA Agreement.<sup>40</sup>
- (73) Concerning the effects of the dominant undertaking's conduct, Article 102 TFEU and Article 54 of the EEA Agreement prohibit behaviour that tends to restrict competition or is capable of having that effect,<sup>41</sup> regardless of its success.<sup>42</sup> This occurs not only where access to the market is made impossible for competitors, but

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<sup>36</sup> Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, Joined Cases C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 114; and Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 84.

<sup>37</sup> For example Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 91; Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, ECLI:EU:C:2009:214, paragraph 104; Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 24.

<sup>38</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 91; Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, ECLI:EU:C:1983:313, paragraph 70; Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, ECLI:EU:C:1991:286, paragraph 69; Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, ECLI:EU:C:2007:166, paragraph 66; Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, ECLI:EU:C:2009:214, paragraph 104; Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, ECLI:EU:C:2010:603, paragraph 174; and Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 27.

<sup>39</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, ECLI:EU:C:1979:36, paragraph 91; Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, ECLI:EU:C:1991:286, paragraph 70; Judgment of 7 October 1999, *Irish Sugar*, T-228/97, ECLI:EU:T:1999:246, paragraph 111; Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05 ECLI:EU:T:2010:266, paragraph 354; Judgment of 12 June 2014, *Intel v Commission*, T-286/09, ECLI:EU:T:2014:547, paragraph 219; and Judgment of 27 March 2012, *Post Danmark*, C-209/10, ECLI:EU:C:2012:172, paragraph 25.

<sup>40</sup> Judgment of 21 February 1973, *Europemballage and Continental Can v Commission*, C-6/72, ECLI:EU:C:1973:22, paragraph 26.

<sup>41</sup> For example, Judgment of 19 April 2012, *Tomra Systems and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 68.

<sup>42</sup> For instance, Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05 ECLI:EU:T:2010:266, paragraph 347, confirmed on appeal by Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraphs 109 and 111. See also Judgment of 12 June 2014, *Intel v Commission*, T-286/09, ECLI:EU:T:2014:547, paragraph 186 (and case-law cited therein),

also where the conduct of the dominant undertaking is capable of making that access more difficult, thus causing interference with the structure of competition on the market.<sup>43</sup> Customers and users should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it.<sup>44</sup>

#### 4.5.2. *The Business Model Parity Clause in English and German language e-book agreements*

- (74) For the reasons set out in recitals (75) to (77), in its Preliminary Assessment the Commission took the view that Amazon was abusing its dominant position in the relevant markets by contractually obliging its E-book Suppliers to notify and offer to Amazon the same or equivalent terms for the distribution of e-books under a given business model as a result of the E-book Supplier's distribution of e-books under that business model through any E-book Retailer other than Amazon.
- (75) First, as set out in Section 4.5.2.1 below, in its Preliminary Assessment the Commission took the view that the Business Model Parity Clause is capable of reducing, or likely to reduce, E-book Suppliers' incentives to support and invest in alternative new and innovative business models, and that the clause is capable of reducing Amazon's competitors' ability and incentives to develop and differentiate their e-book offerings through such business models.
- (76) Second, in the way described in Section 4.5.2.2 below, in its Preliminary Assessment the Commission took the view that the Alternative Business Model Parity Clause is also capable of deterring, or likely to deter, entry and/or expansion by E-Book Retailers competing with Amazon. This can result in a weakening of competition at the e-book distribution level and a strengthening of Amazon's already-dominant position vis-à-vis competing E-book Retailers.
- (77) The Commission noted that the Business Model Parity Clause is consistently used and operates in a similar manner in Amazon's different e-book distribution agreements across the EEA (whether on agency or on wholesale terms). Given that the relevant barriers to entry and expansion and the overall competitive conditions relevant for the assessment of the Business Model Parity Clause were considered to be sufficiently similar across markets, the Commission considered that the potential effects of the Business Model Parity Clause could be regarded to be similar across those markets. Thus, the preliminary analysis set out below was applied similarly to any relevant e-books distribution market in which Amazon holds a potentially dominant position.

#### 4.5.2.1. *The potential effects of the Business Model Parity Clause on the emergence of alternative business models*

- (78) The Commission considered that Amazon's Business Model Parity Clause is capable of hindering, or likely to hinder, the emergence of alternative business models regarding the distribution of e-books by: (i) reducing E-book Suppliers' incentives to support, and invest in, new and innovative business models for the E-book Supplier's

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<sup>43</sup> For example, Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 63.

<sup>44</sup> For instance, Judgment of 19 April 2012, *Tomra Systems and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 42.

own platform or for sales channels of E-book Retailers; and (ii) by reducing the ability and incentives of E-book Retailers competing with Amazon to develop alternative business models.

- (79) The evidence available to the Commission indicated that the Business Model Parity Clause had prevented the emergence and/or development of alternative models with competitors including: (i) print and e-book bundles; (ii) pay-as-you-read and book club models (where readers do not necessarily have to acquire the e-book for an unlimited period of time, but are rather given a license to access only parts thereof); (iii) subscription models; and (iv) applications for smartphones giving access to e-books versions of classics.
- (80) In its Preliminary Assessment, the Commission took the view that the ability and the incentives of competing E-book Retailers to develop and implement alternative business models depend on the consent of E-book Suppliers. Consequently, any reduction in E-book Suppliers' incentives to innovate would also translate into a reduction in the E-book Retailers' ability and incentives to develop alternative business models. The Commission considered that the potential effects of the Business Model Parity Clause on the incentives of both E-book Suppliers and E-book Retailers to support, invest in and develop alternative business models were as set out below.
- (81) Regarding the E-book Suppliers' incentives to support and invest in alternative business models, in the absence of a Business Model Parity Clause E-book Suppliers appeared to be willing to support alternative business models of competing E-book Retailers mainly for two reasons:
- (1) First, E-book Suppliers have an interest in experimenting with alternative business models, for example with smaller E-book Retailers on a smaller scale (one country/region), or on a selection of their catalogue (children books, classics), or targeting only certain customers groups, without having to test such business models on a larger scale for the mass market.
  - (2) Second, supporting alternative business models of competing E-book Retailers allows E-book Suppliers to increase the strength of those E-book Retailers relative to Amazon and to promote entry and/or expansion. In line with the information received from several E-book Suppliers, the Commission considered that promoting competition at the e-books distribution level is in the interest of E-book Suppliers as this tends to reduce their dependence on Amazon, improve their bargaining position and help them reduce the compensation that they need to concede to Amazon.
- (82) In its Preliminary Assessment, the Commission took the view that the presence of the Business Model Parity Clause changes those incentives to support and invest in alternative business in various ways including the following:
- (1) First, the Business Model Parity Clause may prevent E-book Suppliers from offering differentiated business models (either for direct sales or to any competing E-book Retailer) given the obligation for the E-book Suppliers to offer Amazon the same alternative business model offered or entered into by the E-book Supplier or with a competing E-book Retailer. By effectively preventing E-book Suppliers from launching alternative business models on their own or with a single or few E-book Retailers, the Business Model Parity Clause denies E-book Suppliers the opportunity of testing the effect of

alternative business models on a small scale. This forces E-book Suppliers into a position where they either introduce the alternative business models with Amazon on a larger scale (with the subsequent risk that their products are devalued) or drop such projects and not develop them at all.

- (2) Second, as described in recital (81), E-book Suppliers may want to support certain E-book Retailers selectively. However, if all alternative business models must also be offered to Amazon, alternative business models cannot be used to strengthen competing E-book Retailers relative to Amazon. As a consequence of the Business Model Parity Clause, the incentives to develop and support new business models are likely reduced, and E-book Suppliers may therefore not support any new alternative business models at all.
  - (3) Third, Amazon may use the Business Model Parity Clause as a tool to obtain access to inputs for alternative business models, which E-book Suppliers may otherwise have preferred to give only to competing E-book Retailers.
  - (4) Fourth, the Commission's investigation also indicated that the Business Model Parity Clause may have caused delays in the development of new projects by E-book Suppliers with E-book Retailers competing with Amazon, simply because before launching a new business model, the E-book Suppliers needed to consider alternative contractual wordings or ways to limit the potential impact of the Business Model Parity Clause on the new business model.
- (83) Regarding the E-book Retailers' ability and incentives to develop alternative business models, the Business Model Parity Clause is capable of making, or likely to make, E-book Retailers competing with Amazon less prone to launching alternative business models for fear of those being notified to, and used by, Amazon.
- (84) In the absence of the Business Model Parity Clauses, E-book Retailers appeared open to innovating in order to launch alternative business models to distribute e-books in novel manners which are appealing for consumers. E-book Retailers consider business models as an additional way to differentiate themselves from competitors and under certain circumstances can count on the support of E-book Suppliers to achieve a critical mass of titles to be sold through those alternative business models.
- (85) In its Preliminary Assessment, the Commission took the view that the presence of the Business Model Parity Clause changes those incentives to develop alternative business models in various ways including the following:
- (1) First, E-book Suppliers become reluctant to support alternative business models. This, in turn, undermines the ability of competing E-book Retailers to develop such alternative business models as competing E-book Retailers need the E-book Suppliers' support, cooperation and materials in order to implement alternative business models. For example, in order to implement a subscription business model, competing E-book Retailers need to be authorised by the E-book Suppliers to provide access to the e-books to end consumers on a subscription basis. However, E-Book Retailers are likely to encounter obstacles for reaching agreements with E-book Suppliers if the E-book Supplier has to agree to the same or similar terms with Amazon due to a Business Model Parity Clause.
  - (2) Second, anticipating that E-book Suppliers would not support alternative business models, competing E-book Retailers would have little incentives to invest in developing them.

- (3) Third, even in instances where an alternative business model is launched, the E-book Supplier's obligation to grant the same business model to Amazon is likely to diminish the competing E-book Retailer's incentives to invest into already-developed alternative business models. Specifically, in light of the Business Model Parity Clause, E-book Retailers are able to anticipate that Amazon will also have access to an E-book Supplier's inputs for alternative business models. The E-book Retailer would also know that Amazon could free-ride on its proposed business model given the E-book Supplier's obligation to inform Amazon about the material terms of such models.
- (86) Consequently, in its Preliminary Assessment, the Commission considered that the E-book Retailers' reduced ability and incentives to develop alternative business models implies that they are unlikely to be made available to consumers or will only become available to them at a later point in time than in the absence of the Business Model Parity Clause. As a consequence of this, consumers may suffer from having less choice of alternative business models.
- (87) Moreover, in its Preliminary Assessment, the Commission took the view that this conclusion also pertained to alternative wordings of the Business Model Parity Clause used by Amazon, including, but not limited to, the following:
- (1) First, versions of the Business Model Parity Clause that exclude the need to offer Amazon any so-called "economic terms" attached to an alternative business model.<sup>45</sup> In such scenarios, E-book Suppliers still need to offer to Amazon all other non-economic terms and E-book Suppliers remain under an obligation to offer Amazon the opportunity to launch the same business model offered elsewhere on the same material non-economic terms.<sup>46</sup>
- (2) Second, versions of the Business Model Parity Clause that do not provide for an obligation for E-book Suppliers to offer the alternative business model to Amazon but nevertheless require E-book Suppliers to notify to Amazon the existence of such model and to initiate good faith negotiations with Amazon regarding its implementation. Such a version of the Business Model Parity Clause therefore still allows Amazon to receive valuable information about competitors' business models that it would otherwise not obtain.
- (88) All versions of the Business Model Parity Clause (standard and non-standard) require at least the notification of alternative business models to Amazon and the initiation of good faith negotiations regarding their implementation. The Commission took the view that E-book Suppliers tend to be more willing to test alternative business models in areas or territories where a notification obligation does not apply. This is because even the risk of having to engage in discussions with Amazon appears to discourage E-book Suppliers from experimenting or innovating with competing E-book Retailers in relation to alternative business models. One reason for this is that

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<sup>45</sup> Publishers remain bound to provide Amazon all alternative business models offered elsewhere although excluding "economic terms", that is to say, terms related to price, revenue share, commission, or payments. This language is found in Amazon's agreements with [specific third parties with whom Amazon has concluded e-book distribution agreements containing particular clauses].

<sup>46</sup> Publishers would also remain obligated to notify Amazon of other material non-economic elements of the alternative business model. Such information could be relevant when passed on to Amazon since it includes information on other material terms including the overall description of the alternative business model and its features and functionalities.

upon notification of an alternative business model applied or envisaged by a competitor, Amazon is free to replicate and launch a similar service itself or with a different E-book Supplier. The notifying E-book Supplier would have limited or no means to prevent Amazon from replicating the notified alternative business model with other E-book Suppliers. This also likely explains why E-book Suppliers tend to be more willing to innovate in areas or territories where the Business Model Parity Clause does not apply.

4.5.2.2. The potential effects of the Business Model Parity Clause on entry and expansion at the e-book distribution level and the strengthening of Amazon's dominant position

(89) In its Preliminary Assessment, the Commission took the view that Amazon's Business Model Parity Clause is capable of reducing, or likely to reduce, the competitiveness of E-book Retailers by limiting their scope to differentiate on the basis of alternative business models. This reduces the intensity of competition at the e-book distribution level and is in itself to the detriment of consumers since less competition may result in higher e-book prices and less choice. The Commission took this view for a number of reasons including the following:

- (1) First, the Business Model Parity Clause is likely to discourage companies to enter the market. Launching a new or innovative business model different from other market participants provides E-book Retailers with an advantage that is often critical for successful entry into the market. The Commission's investigation has shown that even the mere notification of an alternative business model may discourage new entry as Amazon would be able to free-ride on the new entrant's investments and ideas and launch the same or similar service itself. Overall, it appears likely that the Business Model Parity Clause tends to prevent the entry and/or the growth of E-book Retailers through the development of new or alternative business models.
- (2) Second, there are indications that a number of companies, notably smaller ones and start-ups, could not enter the e-books distribution markets or faced difficulties in developing their e-book distribution business because of the inability and unwillingness of E-book Suppliers to license their catalogue to them for alternative business models. As a result, actual or potential competitors of Amazon were not able to exploit new or alternative business models that could have challenged Amazon's market position.
- (3) Third, in addition to failed entry, there may be further potential entrants who anticipated that alternative business models would not be supported by E-book Suppliers and thus did not even attempt to enter the e-book distribution market. There are also clear indications that not being able to compete on the basis of alternative business models has weakened competing E-book Retailers or has even caused some to exit or not to enter the market.

(90) This reduced competition at the E-book Retailer level could reinforce Amazon's potentially dominant position in the markets for the retail distribution of English language and German language e-books in the EEA. The Business Model Parity Clause could effectively reinforce barriers to entry and expansion and also prevent consumers from enjoying alternative sources from which to supply their e-books. This could result in turn in higher market shares and more market power for Amazon.

#### 4.5.3. *The Selection Parity Clauses in English and German language e-book agreements*

- (91) In its Preliminary Assessment, the Commission took the view that Amazon is abusing its potentially dominant position in the relevant markets for the retail distribution of English language and German language e-books in the EEA by obliging E-book Suppliers to (i) make available through Amazon a given e-book within a particular territory (Catalogue Parity Clause) and/or at a particular date and time (Availability Date Parity Clause) as a result of that E-book Supplier's distribution of that e-book through any E-book Retailer other than Amazon, (ii) notify Amazon, as regards e-books that are not primarily text if the e-book may not display well on Amazon's e-book readers and provide all assistance and materials that are reasonably required for Amazon to create an e-book of that title and/or (iii) make available to Amazon any feature, functionality, usage rule, element or content for one or more e-books as a result of the E-book Supplier making that feature, functionality, usage rule, element or content available for that e-book through an E-book Retailer other than Amazon (Features Parity Clause).
- (92) This is, first, because Amazon's Selection Parity Clauses are capable of reducing, or likely to reduce, the incentives of E-book Suppliers and E-book Retailers to develop e-books which are not primarily text and preventing the differentiation of E-book Retailers through, for example, innovative features or functionalities of e-books. Amazon's Selection Parity Clauses therefore tend to reduce innovation, quality and choice to the detriment of customers (see subsection 4.5.3.1 below).
- (93) Second, Amazon's Selection Parity Clauses are capable of weakening, or likely to weaken competition between E-book Retailers, and capable of deterring, or likely to deter, entry and/or expansion by E-book Retailers. This is to the detriment of consumers since it limits the scope for differentiated e-book offerings, and tends to result in higher prices and less choice for consumers (see subsection 4.5.3.2 below).
- (94) The Selection Parity Clauses are used, and operate in, a similar manner in Amazon's different e-book distribution agreements across the EEA (irrespective of whether those agreements are on agency or wholesale terms). Given that the relevant barriers to entry and expansion and the overall competitive conditions relevant for the assessment of the Selection Parity Clauses are sufficiently similar across the relevant e-book distribution markets, the Commission considered that the potential effects of the Amazon's Selection Parity Clauses are also likely to be similar across those markets.<sup>47</sup> Thus, the preliminary analysis in sections 4.5.3.1 and 4.5.3.2 applies similarly to any relevant e-book distribution market in the EEA in which Amazon holds a potentially dominant position.

##### 4.5.3.1. The potential effects of the Selection Parity Clauses on the development of e-books that are not primarily text

- (95) In its Preliminary Assessment, the Commission considered that Amazon's Selection Parity Clauses are capable of hindering, or likely to hinder, the development of e-books that are not primarily text by: (i) reducing E-book Suppliers' ability and incentives to develop innovative e-books and functionalities; and (ii) reducing

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<sup>47</sup> The main difference between the English- and German-language markets is that RPM laws are currently in force in the main European German-language countries (Germany and Austria). This difference does not influence the way in which Amazon's Selection Parity Clause works insofar as this clause primarily relates to non-pricing aspects of alternative business models.

Amazon's competing E-book Retailers' ability and incentives to develop innovative e-books and functionalities, thus reducing innovation, quality and choice to the detriment of customers.

- (96) For enhanced or highly illustrated e-books containing features, functionalities or elements which are not supported by Amazon's e-book readers, the E-book Supplier is obliged to produce, pursuant to Amazon's standard wholesale agreement, a version of such titles with equivalent features that are compatible with Amazon's e-book readers. Certain agency agreements with E-Book Suppliers provide that, for new e-books that are not primarily text, the E-book Supplier will notify Amazon if an e-book may not display well on Amazon's e-book readers and provide Amazon with all assistance and materials that are reasonably required for Amazon to create an e-book of that title.
- (97) In the absence of Selection Parity Clauses E-book Suppliers' could have incentives to develop, and invest in, enhanced or highly illustrated e-books, mainly for two reasons.
- (98) First, E-book Suppliers could have an interest in developing enhanced or highly illustrated e-books with those E-book Retailers which use e-book readers or electronic devices on which the illustrations, features and functionalities of such e-books display well.
- (99) Second, developing enhanced or highly illustrated e-books with E-book Retailers competing with Amazon for their e-book readers or electronic devices could allow E-book Suppliers to increase the strength of those E-book Retailers relative to Amazon and to promote entry and/or expansion. This may reduce their dependence on Amazon and improve their bargaining position.
- (100) Amazon's Selection Parity Clauses were considered likely to change E-book Suppliers' and competing E-Book Retailers' ability and incentives to develop enhanced or highly illustrated e-books with/for competing E-book Retailers.
- (101) First, regarding the likely reduction of E-book Suppliers' ability and incentives to develop innovative e-books and functionalities, in its Preliminary Assessment the Commission considered that creating multiple versions of an e-book in different e-book formats may significantly increase development costs in particular for enhanced or highly illustrated titles. Even though those costs may be shared between the E-book Supplier and Amazon, in practice E-book Suppliers often prefer to produce the Amazon version of the e-book themselves and thus to incur the development costs to ensure good quality results and to maintain the author's control over the final product. Moreover, the costs may make the development process unprofitable in comparison to the expected revenue, in particular for some highly illustrated e-books, for example for children. Evidence in the Commission's file further indicated that also the obligation to assist Amazon in the creation of a version compatible with Amazon's e-book readers can be burdensome, in particular for certain enhanced or highly illustrated titles because it requires cost and working time investments from E-book Suppliers. Furthermore, in certain cases the creation of such a version for Amazon may not be technically feasible.
- (102) Consequently, in its Preliminary Assessment the Commission considered that the Selection Parity Clauses are capable of having, of or likely to have, the following anti-competitive effects:

- E-book Suppliers are likely to refrain from producing enhanced or highly illustrated e-books in the first place in order to avoid having the obligation to also produce a version compatible with Amazon's e-book readers (or to bear the cost of providing assistance and materials to Amazon in that regard). For example, evidence in the Commission's file shows that for a number of highly illustrated print books e-book versions have not been produced for this reason.
  - E-book Suppliers are likely to be induced to keep functionalities of enhanced e-books simple and avoid interactive and more advanced functions for all E-book Retailers in order to avoid the creation of a specific version for Amazon's e-book readers.
  - E-book Suppliers may delay the release of e-books for competing E-book Retailers, as in light of the Selection Parity Clauses E-book Suppliers may feel compelled to develop first a version that is compatible with Amazon's devices.
- (103) Second, regarding the reduction of competing E-book Retailers' ability and incentives to develop innovative e-books and functionalities, in its Preliminary Assessment the Commission considered that Selection Parity Clauses are capable of having, or are likely to have, the following effects:
- (1) Competing E-book Retailers may not be able to develop highly illustrated or enhanced e-books to the extent that E-book Suppliers are hesitant to cooperate with them in light of the Selection Parity Clauses, even where the e-book reader and formats of those competing E-book Retailers display features better than Amazon's e-book readers.
  - (2) Competing E-book Retailers may not invest in the development of highly illustrated or enhanced e-books as they may only be willing to invest in the development of such e-books if they can expect to reap benefits from such investments. If E-book Suppliers are however obliged, due to the Selection Parity Clauses, not to differentiate their e-books offerings across E-book Retailers, competing E-book Retailers can anticipate that many customers will buy a newly developed e-book on Amazon in light of Amazon's ecosystem and its high market share. This in turn significantly reduces the anticipated revenues of competing E-book Retailers.

4.5.3.2. The potential effects of the Selection Parity Clauses on entry and expansion at the e-book distribution level and the strengthening of Amazon's dominant position

- (104) In its Preliminary Assessment, the Commission considered that the Selection Parity Clauses are capable of weakening, or are likely to weaken, competition and are capable of deterring, or are likely to deter entry and/or expansion of E-book Retailers by limiting E-book Suppliers' scope for differentiating their e-book offerings across different E-book Retailers. Reduced competition at the e-book distribution level may result in higher prices and less choice for consumers. This is for a number of reasons, including the following:
- (105) In the absence of Amazon's Selection Parity Clauses, competing E-book Retailers may be able to differentiate and expand their e-book offering for at least the following reasons:
- (1) First, due to technical difficulties to convert or to display certain highly illustrated or enhanced e-books on Amazon e-readers, such e-books would likely be exclusively (or earlier) developed for e-book readers or electronic devices supported by competing E-book Retailers.

- (2) Second, in light of Amazon's dominant position in the relevant e-book distribution markets, E-book Suppliers appear to have an interest in selectively supporting competing E-book Retailers for instance by exclusive content, special editions (for example with specific features and functionalities) or early release dates. This would allow E-book Suppliers to increase the strength of competing E-book Retailers relative to Amazon.<sup>48</sup> In both cases, (temporarily) offering content that would not be available on Amazon would increase competition in the relevant e-book retail distribution markets.
- (106) The presence of Amazon's Selection Parity Clauses may limit competing E-book Retailers' scope to differentiate on the basis of content (including by offering titles or special editions not available on Amazon), or of particular features or functionalities of e-books or of earlier release dates. This is for a number of reasons as set out in recitals (107) to (114).
- (107) The Commission's investigation indicated that as a result of Amazon's Selection Parity Clauses competing E-book Retailers are likely to be hindered from developing and distributing e-books different to those available on Amazon or special editions (including editions with specific features and functionalities), or from choosing early release dates, as this generally requires the approval by the relevant E-book Supplier. If E-book Suppliers are unable to support differentiated content or earlier releases by competing E-book Retailers in light of the Selection Parity Clauses, this undermines the ability of competing E-book Retailers to develop and sell such content or to engage in early promotional releases and, therefore, to expand their e-book distribution activities.
- (108) As a result, increasing sales (for example by means of exclusive non-price promotions or exclusive content) of competing E-book Retailers are likely to persistently increase their competitiveness. Once customers acquire a certain e-book reader or get used to apps of a given competing E-book Retailer, it becomes more convenient for those customers to buy further e-books from that E-book Retailer. In other words, Amazon customers that are already used to competing E-book Retailers have lower switching costs when buying additional e-books from those competing E-book Retailers. Hence, those customers are more likely to consider buying again from those competing E-book Retailers.
- (109) As a consequence of the reduced ability to differentiate e-book offerings due to Amazon's Selection Parity Clauses, retail competition at the e-book distribution level was likely weakened both in the short run and in the long run. For instance, evidence in the Commission's file indicated that E-book Suppliers are obliged to adapt their non-price promotional projects offered to E-book Retailers because of Amazon's Selection Parity Clauses and thereby have reduced incentives to engage in such projects at all.

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<sup>48</sup> In its Preliminary Assessment, the Commission considered that this effect of the Amazon's Selection Parity Clauses is likely reinforced by the Agency Price Parity Clauses and the Wholesale Price Parity Clauses. Specifically, the Agency Price Parity Clauses and the Wholesale Price Parity Clauses ensure that publishers cannot offer Amazon the same title on the same date for a higher wholesale or retail price. The Agency Price Parity Clauses and the Wholesale Price Parity Clauses therefore ensure that Amazon is in a position to offer content that is provided to Amazon because of the Selection Parity Clauses on the same terms as offered by competing E-book Retailers.

- (110) Moreover, to the extent that E-book Suppliers cannot make exclusive content available to E-book Retailers competing with Amazon, such E-book Retailers may also have reduced incentives to invest in developing e-books or new editions (for example in cooperation with E-book Suppliers). The Commission considered that competing E-book Retailers are likely to anticipate that E-book Suppliers will be forced to provide such content also to Amazon, which in turn will imply lower revenues for those E-book Retailers. Similarly, not being able to exclusively offer early release dates may undermine competing E-book Retailers' incentives to invest in such non-price related promotional activities, since Amazon may have the same titles on the same date as its competing E-book Retailers. Therefore, competing E-book Retailers may be likely to anticipate that some additional sales triggered by their non-price related promotional activities would be made by Amazon, leaving less additional sales for them and, hence, reducing their incentives to engage in non-price promotional activities in the first place. There were indications that even a short window of exclusivity granted by an E-book Supplier to an E-book Retailer may have a significant impact on sales volumes for that E-book Retailer.
- (111) In its Preliminary Assessment, the Commission considered that lower investments by competing E-book Retailers (either in content or in non-price promotional activities) will likely deteriorate the attractiveness of competing E-book Retailers from a customer perspective and hence weaken competition at the e-book distribution level in the long run.
- (112) The risk of reduced competition at the e-book retail distribution level due to Amazon's Selection Parity Clauses appeared to be particularly pronounced in markets where Amazon's position in the retail distribution of e-books is particularly strong. Amazon's high market share indicated that many e-book customers have a Kindle e-book reader or at least an Amazon account and that for them it is particularly convenient to buy e-books on Amazon. Buying e-books outside of Amazon's closed Kindle ecosystem may effectively impose a substantial burden ("switching costs") on the users of Amazon's Kindle e-reader. Therefore, to induce potential customers to switch away from Amazon, competing E-book Retailers need to provide additional value to consumers, for example in the form of differentiated content or early releases of e-books.
- (113) In addition, the Commission found that not being able to compete on the basis of a differentiated e-book catalogue or earlier release dates may not only weaken competing E-book Retailers. It could ultimately force competing E-book Retailers to exit the market or induce potential competing E-book Retailers not to enter the market in the first place. Therefore, Amazon's Selection Parity Clauses potentially strengthen its potentially dominant position in the relevant e-books retail distribution markets even further.
- (114) Furthermore, as already explained in recital (89), reduced competition between E-book Retailers may in itself be capable of resulting in further harm to competition in the form of higher prices and reduced choice.

4.5.4. *The Agency Price Parity Clause, the Discount Pool Provision and the Promotion Parity Clause in English language e-book agency agreements*

- (115) In its Preliminary Assessment, the Commission considered that Amazon is abusing its dominant position by having the Agency Price Parity Clause, the Discount Pool Provision, or the Promotion Parity Clause (together "Retail Price Parity Provisions") included in its agency contracts.<sup>49</sup>
- (116) This was, first, because the Retail Price Parity Provisions are capable of deterring, or likely to deter, the expansion or entry of competing E-book Retailers, thereby strengthening Amazon's dominant position (see Section 4.5.4.1 below).
- (117) Second, in its Preliminary Assessment, the Commission considered that the Retail Price Parity Provisions are capable of allowing, or are likely to allow, Amazon to reduce competition between E-book Retailers and thereby to obtain higher commissions from E-book Suppliers. This could ultimately lead to higher e-book retail prices (see Section 4.5.4.2. below).
- (118) The following preliminary analysis of the Retail Price Parity Provisions in Sections 4.5.4.1 and 4.5.4.2 was carried out jointly for all types of Retail Price Parity Provisions, as any of them is directly or indirectly capable of ensuring parity of retail prices among competing E-book Retailers. Specifically, the Agency Price Parity Clause typically contractually obliges an E-book Supplier to set an agency price on Amazon that is no higher than the agency price charged on the platforms of, or by, competing E-book Retailers other than Amazon. The Promotion Parity Clause rules out the possibility to temporarily set a lower retail price on the platform of a competing E-book Retailer (or requires the E-book Supplier to offer an equivalent promotion to Amazon). Similarly, the Discount Pool Provision provides that Amazon has the ability to set a discounted price which is not above the cheapest retail price of any e-book distributed by that E-book Supplier via competing E-book Retailers (see Section 4.5.4.3 below).
- (119) The Commission's preliminary analysis focused on the Retail Price Parity Provisions pertaining to English language e-books. Concerning the e-book retail distribution markets for German language e-books, countries where German is the main language (that is to say, Germany or Austria) are mainly relevant. However, both in Germany and Austria, there are RPM laws in place which are applied to e-books. Given that the vast majority of German language e-books are sold in those two countries, also the likely anti-competitive effects of Retail Price Parity Provisions in the markets for the retail distribution of German language e-books covering those countries were considered largely determined by the effects of those clauses in Germany and Austria. The Commission considered that in light of applicable RPM laws in Germany and Austria, the anti-competitive effects of Amazon's Retail Price Parity

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<sup>49</sup> The Five Publishers entered into commitments in Case COMP/39.847 – E-books whereby inter alia Agency Price Parity Clauses were banned for a period of five years. Since Amazon currently only has agency contracts with [third parties with whom Amazon has concluded e-book distribution agreements containing particular clauses]. However, Agency Price Parity Clauses were included in some contracts until [...].

The Promotion Parity Clause is contained in a number of Amazon's wholesale contracts relevant for [third parties with whom Amazon has concluded e-book distribution agreements containing particular clauses].

Clauses in those countries are likely to be more limited than the potential effects in the relevant English language e-book markets.<sup>50</sup>

- (120) The preliminary analysis in recitals (121) to (135) applies to any relevant English language e-books distribution market in in the EEA in which Amazon potentially holds a dominant position.
- 4.5.4.1. The potential effects of the Retail Price Parity Provisions on entry and expansion at the e-books retail distribution level and the strengthening of Amazon's dominant position
- (121) In its Preliminary Assessment, the Commission considered that Amazon's Retail Price Parity Provisions are capable of hindering, or are likely to hinder, competing E-book Retailers from entering the relevant e-books retail distribution markets and from expanding in those markets by offering lower e-book prices than Amazon.
- (122) A potential entrant or a competing E-book Retailer could normally attempt to increase its market share by charging a lower commission to E-book Suppliers, so as to induce them to set lower retail prices and, hence, attract buyers. However, if Amazon has agreed on Retail Price Parity Provisions with a given E-book Supplier, that E-book Supplier cannot set lower retail prices (compared to those on Amazon) on any platform of a competing E-book Retailer. The Commission therefore took the preliminary view that the Retail Price Parity Provisions limit the ability of a competing E-book Retailer to attract buyers by offering lower retail prices than those on Amazon. This may discourage competing E-book Retailers from entering in the first place.
- (123) In particular, by preventing E-book Suppliers from making available to competing E-book Retailers lower prices (compared to those on Amazon), Amazon prevents competing E-book Retailers from being able to offer customers advantages which would induce them to overcome the costs associated with switching away from Amazon. This tends to prevent the establishment or expansion of competing E-book Retailers on the e-books distribution markets.
- (124) The Commission found indications that Amazon's Retail Price Parity Provisions may have prevented certain competing E-book Retailers from expanding. In particular, competing E-book Retailers could not make use of their existing customer base in adjacent markets (for example distribution of physical books) to gain market share in the retail distribution of e-books, for example by offering pricing structures for packages of print and e-books.
- (125) In its Preliminary Assessment, the Commission further considered that the potential foreclosure effect of the Retail Price Parity Provisions is particularly pronounced in the present case by a number of market characteristics. Those include Amazon's particularly strong market position, indications on the Commission's file that E-book Suppliers would support the expansion of competing E-book Retailers in the absence

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<sup>50</sup> In those countries publishers shall set the retail price of all German language books sold to final consumers and the retailer is largely obligated to respect the price set by the publisher, see recital 21. Therefore, in those countries competition on the retail price of e-books is already limited (in Austria limited discounts are allowed) or almost impossible (Germany). Those pre-existing regulatory restrictions impose very similar constraints on the retail price as Amazon's Retail Price Parity Provisions including the Discount Pool Provision.

of the Retail Price Parity Provisions, and the fact that especially for primarily text e-books price is the most important parameter of competition.

- (126) By reducing e-books retail distribution competition, the Retail Price Parity Provisions potentially strengthen Amazon's potentially dominant position in the relevant markets even further.

4.5.4.2. The potential effects of the Retail Price Parity Provisions to reduce competition at the e-books retail distribution level

- (127) In its Preliminary Assessment, the Commission considered that Amazon's Retail Price Parity Provisions are capable of reducing, or are likely to reduce, competition between E-book Retailers by reducing the incentive of E-book Retailers working on the basis of an agency relationship with E-book Suppliers to compete by offering lower rates of commission.

- (128) In the absence of Retail Price Parity Provisions, E-book Retailers on agency terms have an incentive to compete on commission. Since commission reduces the profits of E-book Suppliers, the latter generally have an interest to steer sales to E-book Retailers which charge lower commission, for example by setting lower retail prices on their platforms. For this reason, E-book Retailers in turn anticipate that charging lower commission may increase the volumes of e-books sold on their platform, thereby increasing their overall revenues and profits.

- (129) In contrast, where Retail Price Parity Provisions are in place, E-book Retailers' incentives to compete on commission are limited. This is because when charging a lower rate of commission, a competing E-book Retailer can no longer expect that E-book Suppliers will respond by lowering selectively the retail prices of its e-books on that E-book Retailer's platform. This is because when bound by Retail Price Parity Provisions of Amazon, a lower retail price set by an E-book Supplier on one E-book Retailer's platform would need to be matched by an equally low price on Amazon as well. Hence, a competing E-book Retailer can no longer expect to attract customers from Amazon by offering lower rates of commission to E-book Suppliers.

- (130) In addition, with Retail Price Parity Provisions in place, Amazon has the incentive to charge higher rates of commission, as E-book Suppliers cannot steer customers away from Amazon by setting a lower retail price on competing E-book Retailers' platforms that charge a lower rate of commission. Instead of raising the retail price exclusively on Amazon as a consequence of higher rates of commission, E-book Suppliers will have to raise the retail price of their e-books uniformly on all E-book Retailers' platforms. In that case, Amazon would however benefit from a higher commission and at the same time would not have to fear a substantial loss of consumers, as the latter would also face higher retail prices at competing E-book Retailers.

- (131) As a result, in its Preliminary Assessment the Commission considered that Amazon's Retail Price Parity Provisions are capable of leading, or likely to lead, to higher rates of commission charged to E-book Suppliers. Those higher rates of commission are, in turn, likely to be passed on to consumers in the form of higher e-book prices.

#### 4.5.4.3. The Discount Pool Provision

- (132) In its Preliminary Assessment, the Commission considered that the Discount Pool Provision currently contained in the agency agreements between Amazon and [specific third parties with whom Amazon has concluded e-book distribution agreements containing particular clauses]<sup>51</sup> allows Amazon to ensure retail price parity, leading to effects similar to those produced by an Agency Price Parity Clause (see Sections 4.5.4.1 and 4.5.4.2 above).
- (133) Although the wording of the Discount Pool Provision varies slightly in the agreements in which it is contained, it generally provides that, if for a given e-book the price originally set by the E-book Supplier on Amazon ("Publisher Price") exceeds the retail price of the cheapest competing E-book Retailer ("Competitor Price"), the number of credits of the Discount Pool increases by an amount equal to the Publisher Price less the Competitor Price, multiplied by the number of units sold by Amazon in the time period during which the Publisher Price exceeds the Competitor Price.
- (134) Amazon can use the credits of the Discount Pool exclusively to discount the price of any e-book of that publisher on Amazon. In particular, it can use the Discount Pool to reduce the price of the same e-book whose Publisher Price is above the Competitor Price.<sup>52</sup> In that case, for each e-book sold on Amazon, the Discount Pool credit increases by the difference between the Publisher Price and the Competitor Price of that e-book, and at the same time decreases by the difference between the Publisher Price and the Discounted Price (see recital (30)). Hence, if Amazon sets the Discounted Price equal to the Competitor Price of that e-book, the discounting ability of Amazon will effectively remain unchanged, as for each sold e-book the Discount Pool increases and then decreases by the same number of credits.<sup>53</sup>
- (135) In its Preliminary Assessment, the Commission considered that based on the Discount Pool Provision, Amazon can therefore ensure that the Discounted Price of e-books on its platform does not exceed the Competitor Price. Furthermore, if Amazon discounts the Publisher Price of a given e-book, Amazon will obtain the same commission as if the Publisher had set the Discounted Price from the outset. Moreover Amazon can display exclusively the Discounted Price on its platform. Amazon can hence replicate the effect of an Agency Price Parity Clause.<sup>54</sup>

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<sup>51</sup> The Discount Pool Provision contained in [third parties with whom Amazon has concluded e-book distribution agreements containing particular clauses] currently suspended.

<sup>52</sup> Since the credits of the Discount Pool can be exclusively used to discount the Publisher Price, no payments of either party are necessary to increase the Discount Pool.

<sup>53</sup> For example, if a publisher sets a Publisher Price on Amazon for a title at EUR 10 and offers the same e-book via a competing E-book Retailer at EUR 7, and assuming that there is no discounting and the e-book is sold at the Publisher Price of EUR 10, the Discount Pool will increase by 3 credits for each e-book of that title sold on Amazon. If instead Amazon decides to sell that e-book at a Discounted Price of EUR 7, for each sold e-book of this title on Amazon, the increase of the Discount Pool by 3 credits (since the Publisher Price remains at EUR 10 and is EUR 3 above the Competitor Price) is offset by a decrease by 3 credits (since the Discounted Price is EUR 3 below the Publisher Price), which means that the Discount Pool remains effectively unchanged.

<sup>54</sup> The Commission furthermore considers that the Discount Pool Provision may have even a wider scope than the Agency Price Parity Clause, as it is not only triggered if competing E-book Retailers operating based on an agency agreement offer a lower retail price, but also if an E-book Retailer with a wholesale agreement offers a lower retail price than the Publisher Price on Amazon.

4.5.5. *The Retail Price Notification Provision, the Promotion Notification Provision in Amazon's English language agency agreements and its policy to request retail price parity on e-books*

- (136) In its Preliminary Assessment, the Commission considered that Amazon has abused its potentially dominant position by having the Retail Price Notification Provision and the Promotion Notification Provision included in its e-books distribution agreements. Those clauses allow Amazon to ensure that the retail prices of e-books offered on its platform do not exceed the lowest retail prices of the same e-books sold via competing E-book Retailers.
- (137) The Retail Price Notification Provision obliges the E-book Supplier to notify Amazon if the agency price on Amazon is higher than the retail price charged via any competing E-book Retailer (see recital (33)). The Promotion Notification Provision obliges the E-book Supplier to notify Amazon if it offers any promotional agency price or promotional content to an E-book Retailer competing with Amazon and that the E-book Supplier does not also offer to Amazon. Once notified by an E-book Supplier on the basis of those provisions, Amazon typically requests from that E-book Supplier that the same low retail price or promotional agency price that is charged on the platform of the competing E-Book Retailer is also offered to Amazon ("Amazon's policy to request parity").
- (138) The Commission found indications that Amazon explicitly threatens to punish E-book Suppliers if they do not accede to such requests by Amazon. In its Preliminary Assessment, the Commission considered that Amazon has a number of measures at its disposal which constitute a credible threat to induce E-book Suppliers not to set (even temporarily) lower prices on competing E-book Retailers' platforms.<sup>55</sup> Such measures could be implemented swiftly, without any need of approval by the E-book Suppliers and without terminating any agreement, which makes them very credible threats to induce E-book Suppliers to modify their prices on Amazon.
- (139) In its Preliminary Assessment, the Commission considered that the Retail Price Notification Provision and the Promotion Notification Provision and Amazon's policy to request parity result in anti-competitive effects which are very similar to those of the Retail Price Parity Provisions described in Sections 4.5.4.1 and 4.5.4.2.
- (140) First, the Commission found indications suggesting that in several cases where an E-book Supplier initially offered a lower retail price for a given e-book on a competing E-book Retailer's platform, following the notification of that price to Amazon due to a Retail Price Notification Provision or Promotion Notification Provision, Amazon induced that E-book Supplier (when having an agency agreement with that E-book Supplier) to set a retail price for that e-book on Amazon that did not exceed the cheapest retail price set on competing E-book Retailers' platforms.
- (141) Second, there also appear to be instances where E-book Suppliers eventually resisted Amazon's requests to provide reduced prices or certain promotions to Amazon.

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<sup>55</sup> Amazon could for example remove the buy button for one or several e-books on its platform (as it has done previously), exclude e-books of a publisher from all promotional activity, remove the pre-order buttons or prominently display banners which attempt to dissuade potential buyers by referring to seemingly more attractive alternative e-books.

However, it also appears that E-book Suppliers anticipate that they will often need to accede to Amazon's request and eventually set prices on Amazon that do not exceed those offered on the platforms of competing E-book Retailers and offer to Amazon similar promotions as they will offer to competing E-book Retailers. As a result, E-book Suppliers' incentives to offer differentiated e-books prices across competing E-Book Retailer platforms are reduced.

- (142) Third, there are several instances where proposed promotions offered by E-book Retailers competing with Amazon were turned down by E-book Suppliers because of the concern that such promotions would have to be notified to Amazon. E-book Suppliers are discouraged from offering lower prices or better terms to any of Amazon's competitors or new entrants because doing so would require them either to refuse to apply the same prices on Amazon and risk retaliation from Amazon, or to give up the same amount of margin to Amazon, which in light of Amazon's size would represent a significant cost to them.
- (143) Indeed, several E-book Suppliers pointed out that the Retail Price Notification Provision, the Promotion Notification Provision and Amazon's policy to request parity hinder them from offering lower prices or promotions on the platforms of E-book Retailers competing with Amazon. Publishers may thus be hindered from supporting new entrants by setting lower prices, which would also be to the benefit of consumers.
- (144) Fourth, the Commission found indications suggesting that with respect to certain E-book Suppliers, in 2014 the volume share of e-book sales on Amazon grew particularly in those regions of the EEA where a Retail Price Notification Provision or Promotion Notification Provision was in place (as compared to those regions where such provisions were not in place). This observation is consistent with the potential expansion-deterring effect of the Retail Price Parity Provisions (as described in Section 4.5.4.1. above) and could reflect that retail price parity is effectively enforced by Amazon on the basis of its Retail Price Notification Provision and Promotion Notification Provision.

#### 4.5.6. *The Wholesale Price Parity Clause in English and German language e-book reseller agreements*

- (145) In its Preliminary Assessment, the Commission considered that Amazon is abusing its potentially dominant position by having the Wholesale Price Parity Clause (see Section 4.1.2 for a description of these clauses) included in its e-books distribution agreements.
- (146) The Commission considered, first, that the Wholesale Price Parity Clause is capable of hindering competing E-book Retailers from entering the relevant e-books retail distribution markets and from expanding in those markets by offering lower e-book retail prices to consumers than Amazon.
- (147) In the absence of the Wholesale Price Parity Clause, competing E-book Retailers may be able to obtain lower wholesale prices from E-book Suppliers than Amazon which could be passed on to consumers in the form of lower retail prices. Offering lower retail prices than Amazon appears to be important to induce consumers to switch away from Amazon to competing E-book Retailers despite the inconveniences to which the switch to another platform gives rise (see recital (123)).
- (148) Where, in contrast, the Wholesale Price Parity Clause is in place, E-book Suppliers cannot offer lower wholesale prices to competing E-book Retailers. This reduces

those competing E-book Retailers' incentives to undercut Amazon's prices at the retail level in order to improve their market position.

- (149) Second, in its Preliminary Assessment the Commission considered that the Wholesale Price Parity Clause also ensures that Amazon obtains access to e-books at best wholesale terms in scenarios where E-book Suppliers otherwise would have a preference not to offer a given e-book to Amazon for the reasons set out in Section 4.5.3.2. The Wholesale Price Parity Clause therefore potentially reinforces the anti-competitive effects of Selection Parity Clauses set out in Section 4.5.3.

#### 4.5.7. *The potentially mutually reinforcing effects of Amazon's Parity Clauses*

- (150) In its Preliminary Assessment, the Commission noted that Amazon's Parity Clauses cover practically all the potential avenues a competing E-book Retailer may attempt to use in order to differentiate itself against Amazon and that, in order to set up a differentiated product offering, E-book Retailers need the agreement of the relevant E-book Supplier.

- (151) While, in the Preliminary Assessment, the Commission took the view that all the Parity Clauses analysed in Sections 4.5.2 to 4.5.6 above individually represent an abuse of Amazon's dominant position in the relevant e-book retail distribution markets in the EEA, the Commission also considered that the combination of the different price-related parity clauses (that is to say, Agency Price Parity Clause, Discount Pool Provision, Promotion Parity Clause, Wholesale Price Parity Clause, and Agency Commission Parity), non-price related parity clauses (that is to say, Business Model Clause and Selection Parity Clauses) as well as the Notification Provisions is likely to reinforce the potential anti-competitive effects of the individual Parity Clauses

- (152) In particular, the very fact that the Parity Clauses cover virtually all aspects of competition between E-book Retailers puts E-book Suppliers in a position where they need to consider the potential impact that dealing with an E-book Retailer competing with Amazon may have on their business relationship with Amazon in view of the Parity Clauses. The Commission considered that this is likely to mutually reinforce the adverse effects of the individual Parity Clauses.

## 4.6. **Effect on trade between Member States**

- (153) Article 102 TFEU prohibits as incompatible with the internal market an abuse of a dominant position "*in so far as it may affect trade between Member States*". Article 54 of the EEA Agreement contains a similar provision.

- (154) According to settled case-law, in order for conduct to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of facts and points of law, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant.<sup>56</sup>

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<sup>56</sup> Judgement of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, Case C-1/12 EU:C:2013:127, paragraph 65 and the case law cited therein.

- (155) In its Preliminary Assessment, the Commission took the view that the conduct covered by this Decision had an appreciable effect on trade between Member States, for the reasons set out in recitals (156) and (157).
- (156) First, the activity of Amazon is, by its very nature, cross-border in scope. The Parity Clauses have been implemented in agreements with E-book Suppliers from several Member States, and in agreements not limited to one Member State. Further, the potential anti-competitive effects of the relevant clauses are supported by information received during the Commission's investigation which indicates that the Parity Clauses have the potential effect of foreclosing competitors by hindering or hampering them from developing a differentiated business model and/or from offering differentiated content and price offerings in the internal market.
- (157) Second, Amazon has a strong position in the relevant markets. It is also confirmed that Amazon is considered an unavoidable trading partner by E-book Suppliers across the EEA. As such, Amazon's conduct is capable of affecting the competitive structure of the internal market and thus of affecting trade between Member States.

## **5. INITIAL COMMITMENTS**

- (158) Amazon does not agree with the Commission's Preliminary Assessment. Nevertheless, in order to address the Commission's concerns as set out in the Preliminary Assessment, it offered first a set of Initial Commitments and subsequently the Final Commitments.
- (159) The key elements of the Initial Commitments offered by Amazon on 13 January 2017 can be summarised as follows:
- (a) Amazon will not enforce or otherwise rely upon any Business Model Parity Clause, Agency Commission Parity Clause, Agency Price Parity Clause, Features Parity Clause, Promotion Parity Clause, Selection Parity Clause, Wholesale Price Parity Clause or Notification Provision contained in agreements between Amazon and E-book Suppliers for the sale of e-books to consumers in the EEA. Amazon will notify each of those E-book Suppliers that it will no longer enforce such provisions.
  - (b) Amazon will offer each E-book Supplier whose e-book agreement for the sale of e-books to consumers in the EEA contains a Discount Pool Provision currently in effect the opportunity to terminate the e-book agreement for any reason upon 120 days' advance written notice.
  - (c) Amazon will not include in any new e-book agreement with any E-book Supplier any price-related parity clause (that is to say, Agency Price Parity Clause, Discount Pool Provision, Promotion Parity Clause, Wholesale Price Parity Clause, and Agency Commission Parity), non-price related parity clause (that is to say, Business Model Clause and Selection Parity Clauses), or Notification Provision.
  - (d) The commitments cover all e-books sold in the EEA irrespective of language.
  - (e) The duration of the commitments would be five years from the date on which Amazon receives formal notification of the Commission's decision pursuant to Article 9 of Regulation (EC) No 1/2003. Amazon shall appoint a Monitoring Trustee to monitor Amazon's compliance with the commitments.

## **6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003**

(160) In response to the publication on 26 January 2017 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 ("the Market Test"), the Commission received observations from fifteen interested third parties, including from E-Book Suppliers, E-Book Retailers, publishers associations and consumer organisations.

### **6.1. Summary of the main comments from third parties during the Market Test**

#### *6.1.1. Overall adequacy*

(161) Four respondents invited the Commission to make the Initial Commitments binding without any amendments. Eleven respondents suggested certain amendments to the Initial Commitments. The main comments received during the Market Test are set out in Sections 6.1.2 to 6.1.6 below.

#### *6.1.2. Definitions*

(162) Three respondents provided observations aimed at further aligning the definitions used in the Initial Commitments on existing Parity Provisions as well as clarifying certain definitions. Suggestions included clarifications as regards the definitions of Agency Commission, Agency Price Parity, Business Model Parity, Discount Pool Provision, eBook, eBook Agreement, eBook Retailer, eBook Supplier, Notification Provision, Selection Parity, Sale and Wholesale Price Parity.

(163) Six respondents provided observations on the definitions aimed at expanding the overall scope of the Initial Commitments. In particular, it was proposed that print books, audio books, apps and self-published e-books should be covered by the commitments and the relevant definitions amended or added accordingly.

(164) It was further argued that comic books and graphic novels (including those for which Amazon provides significant non-standard services) as well as educational titles should not be excluded from the definition of "E-books" and hence from the scope of the commitments. Similarly, it was argued that sales through educational and/or library channels should be covered by the commitments.

#### *6.1.3. Scope and timing of Amazon's obligations*

(165) Five respondents considered that, in light of the Commission's preliminary findings, the Discount Pool Provision may create effects similar to a retail price parity provision and that the Commission should require Amazon to stop enforcing all Discount Pool Provisions as of the effective date of the Commission decision making the commitments binding (that is to say, from the date upon which Amazon receive formal notification of this Commission Decision, hereinafter the "Effective Date"). One respondent noted that E-book Suppliers would probably not exercise the option to terminate their existing e-book agreements with Amazon (including for fear that Amazon will retaliate or demand highly unfavourable terms in negotiations on a future e-book agreement after losing the Discount Pool Provision). Two respondents pointed out that if E-book Suppliers do not terminate their existing e-book agreements with Amazon, Amazon could still benefit from the effects of the Discount Pool Provision.

(166) Of the E-book Suppliers that currently have a Discount Pool Provision in their e-book agreements with Amazon, only one commented on the corresponding proposed commitment, noting that the negative impact the Discount Pool Provision may have on its commercial behaviour was limited in scope and time as only one contract was

affected and only for a limited period of time. The respondent therefore did not oppose the corresponding commitment proposed as the Initial Commitments would, taken in their entirety, allow for a quick and pragmatic solution to the competition concerns identified by the Commission in its Preliminary Assessment.

- (167) Two respondents indicated that the Parity Clauses should not only not be enforced in existing contracts but that Amazon should be obliged to remove all Parity Clauses from its existing contracts as from the Effective Date.

#### 6.1.4. *Duration of the commitments*

- (168) Two respondents considered that the five-year duration of the Initial Commitments was too short to eliminate the potential anti-competitive effects brought about by the Parity Clauses. One proposed that the commitments should be prolonged to seven years, the other suggested that an assessment of the need for a possible prolongation should be made at the end of the initial five-year term.

#### 6.1.5. *Retaliation, non-circumvention and monitoring of compliance*

- (169) Six respondents raised concerns about Amazon's ability to circumvent the Initial Commitments. In particular, concerns were raised that Amazon will attempt to circumvent the commitments by adopting retaliatory behaviour that would have the same effects as the anti-competitive effects created by the Parity Clauses.

- (170) To address such concerns, one respondent proposed that the non-circumvention clause contained in the Initial Commitments should be amended to specifically prohibit any attempt to *de facto* impose the banned Parity Clauses, while two respondents suggested expanding the clause to specifically refer to non-retaliation/non-discrimination. One respondent suggested amending the definitions to broaden the scope of the Parity Clauses to reduce Amazon's ability to circumvent the commitments by retaliatory behaviour. Further, one respondent suggested adding a commitment that Amazon could not insist upon equal or equivalent trading terms as agreed between an E-book Supplier and E-book Retailer competing with Amazon.

- (171) Several respondents acknowledged that the proposed non-circumvention clause was wide and that it may be sufficient to catch possible circumvention of the Initial Commitments by Amazon. However, some argued that the role and mandate of the Monitoring Trustee should be further strengthened to ensure compliance with the commitments. This included *inter alia* allowing the Monitoring Trustee to respond to, and act upon, requests or concerns raised by third parties, wider rights to request clarifications, documents and assistance from Amazon, the right to monitor negotiations and to intervene in disputes and to suggest measures deemed necessary to ensure compliance with the commitments. Finally, one respondent suggested that Amazon should be obliged to provide the contact details of the Monitoring Trustee to its trading partners in order to allow them to directly address the Monitoring Trustee.

#### 6.1.6. *Additional comments*

- (172) One respondent argued that the Commission's proceedings and hence any commitments should provide for an obligation of interoperability on Amazon in relation to its e-book readers and e-book formats.

## 6.2. **The revision of the Initial Commitments in the light of the Market Test**

- (173) In response to the comments received in the Market Test, Amazon modified the Initial Commitments and submitted the Final Commitments on 31 March 2017. The

Final Commitments modified the Initial Commitments in a number of aspects, in particular:

- (1) the definitions of Agency Price Parity, Notification Provision, and Wholesale Price Parity are amended to ensure that the commitments also apply when E-Book Suppliers sell books directly to final consumers;
  - (2) the definitions of the price-related parity clauses (that is to say, Agency Price Parity Clause, Discount Pool Provision, Promotion Parity Clause, Wholesale Price Parity Clause, and Agency Commission Parity) are amended in order for the commitments to be effective regardless of the type of contract used for the distribution of e-books;
  - (3) the definition of Promotion Parity is amended in order to broaden the scope of that clause so as to cover "any other promotion" offered through E-book Retailers other than Amazon;
  - (4) the definition of Discount Pool Provision is broadened to cover also situations where no direct funding by the E-book Supplier exists;
  - (5) the definition of Sale is amended to cover situations where e-books are bundled with "digital content"; and
  - (6) relevant definitions are amended to clarify that the Final Commitments cover situations where an E-book Supplier has not yet offered or notified better or alternative terms to an E-book Retailer other than Amazon but had only "planned" to do so.
- (174) In order to align the definitions used in the commitments with those relied on in the Preliminary Assessment and with existing Parity Clauses, Amazon amended, in the Final Commitments, the definitions of the Agency Commission, Agency Price Parity, Business Model Parity, Features Parity, Notification Provision, Promotion Parity, Selection Parity and Wholesale Price Parity, including a clarification that the Final Commitments address situations where E-book Suppliers offer, "*directly or indirectly*", better or alternative terms to E-book Retailers other than Amazon.
- (175) Amazon further amended the definition of "E-book" to clarify that e-book titles (irrespective of genre) distributed through educational and library channels are excluded from the scope of the commitments, and removed the right to maintain Parity Clauses for educational and scholarly titles sold by E-book Suppliers directly to students outside such channels.
- (176) Finally, Amazon added a right for the Monitoring Trustee to ask Amazon for information that is reasonably necessary to monitor Amazon's compliance with the Final Commitments and removed its right to reply to such requests at its sole discretion.

### 6.3. Proportionality of the Final Commitments

#### 6.3.1. Principles

- (177) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.<sup>57</sup>
- (178) In the context of Article 9 of Regulation No 1/2003, the application of the principle of proportionality is confined to verifying, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address the Commission's preliminary concerns adequately.<sup>58</sup> When carrying out that assessment, the Commission must take into consideration the interests of third parties.<sup>59</sup> The Commission enjoys discretion when assessing the appropriateness of proposed commitments.<sup>60</sup>

#### 6.3.2. Application in the present case

- (179) In its Preliminary Assessment, the Commission expressed concerns that the Parity Clauses imposed by Amazon in its e-book retail distribution agreements with E-book Suppliers may amount to an abuse of a dominant position in breach of Article 102 of the Treaty and Article 54 of the EEA Agreement.
- (180) The Final Commitments ban the use of the relevant Parity Clauses in relation to which the Commission expressed the concern that they are capable of hindering, or are likely to hinder, E-book Suppliers' and competing E-book Retailers' ability and incentives to support and invest in alternative and differentiated business models and e-book offerings. Further, the Final Commitments ban the use of the Parity Clauses in relation to which the Commission expressed the concern that they are capable of, or are likely to reduce, the competitiveness of E-book Retailers by limiting their ability and incentive to develop and differentiate their e-book offerings, thereby reducing barriers to entry and expansion in the relevant markets. Finally, the ban on the use of the relevant Parity Clauses will facilitate entry and expansion of competing E-book Retailers and spur competition at the e-books retail distribution level.
- (181) For the reasons set out in sections 6.3.3 to 6.3.7 below, the Commission therefore considers that the Final Commitments address adequately the competition concerns identified by the Commission in its Preliminary Assessment. In reaching this conclusion, the Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test.
- (182) Amazon has not offered less onerous commitments in response to the Preliminary Assessment that also address the Commission's concerns adequately. The Final Commitments accordingly comply with the principle of proportionality.

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<sup>57</sup> See for instance, Case T-260/94 *Air Inter v. Commission*, ECLI:EU:T:1994:265, paragraph 144; Case T-65/98 *Van den Bergh Foods v. Commission*, ECLI:EU:T:2003:281, paragraph 201; Case T-76/14 *Morningstar v Commission*, ECLI:EU:T:2016:481, paragraph 84.

<sup>58</sup> Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41. Case T-76/14 *Morningstar v Commission*, ECLI:EU:T:2016:481, paragraphs 45 and 86.

<sup>59</sup> Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

<sup>60</sup> Case T-76/14 *Morningstar v Commission*, ECLI:EU:T:2016:481, paragraph 40; Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 94.

### 6.3.3. *Definitions*

- (183) The Commission considers that the modified definitions used in the Final Commitments (see Section 6.2) are sufficient to address adequately the concerns expressed by the Commission in the Preliminary Assessment.
- (184) In particular, the Final Commitments address adequately the concerns identified by the Commission in its Preliminary Assessment insofar as they ban the use of the Parity Clauses for a period of five years for all e-books distributed by Amazon through retail e-book distribution agreements to consumers regardless of their genre.
- (185) Regarding the comments received arguing for the extension of the scope of the commitments to print books, apps and audio-books, the Commission notes that any possible concerns related to Parity Clauses for such books or apps in general fall outside the scope of the current proceedings and of the concerns expressed in the Preliminary Assessment, which is limited to the retail distribution of e-books and without prejudice to possible concerns in other markets. With regard to the inclusion of apps, the Commission notes that the Final Commitments cover not only traditional text-only e-books but also e-books containing "*additional interactive/multimedia material [...] or functionalities [...] beyond the text and images found in the physical books.*" Moreover, the definition of Sale in the Final Commitments was expanded and now explicitly encompasses "*bundling [of e-books] with physical books or digital content.*" This definition is applied throughout the Final Commitments.
- (186) Similarly, regarding the comments received concerning the exclusion of sales of e-books through educational and/or library channels, the Commission notes that this is consistent with the scope of the current proceedings and the concerns expressed in the Preliminary Assessment, which are limited to the distribution of e-books through retail channels and is without prejudice to possible concerns in other markets.
- (187) Regarding the requested inclusion of e-books published through Amazon's self-publishing programmes in the scope of the commitments, the Commission does not have any evidence that Amazon's self-publishing programmes contain Parity Clauses. Moreover, the scope of the Commission's current investigation was confined to Amazon's distribution agreements with publishers and other e-Book Suppliers and did not extend to agreements Amazon enters into with authors that wish to publish through Amazon's self-publishing programmes, without prejudice to possible concerns in this market.
- (188) Finally, the exclusion from the Final Commitments of a limited number of agreements whereby Amazon provides substantial non-standard services not related to e-book distribution in relation to comic books and graphic novels does not call into question the adequacy of the Final Commitments as such services fall outside the scope of the Commission's investigation.

### 6.3.4. *Scope and timing of the Final Commitments*

- (189) The Commission considers that the scope and timing of Amazon's obligations as set out in the Final Commitments are sufficient to address adequately the concerns expressed by the Commission in its Preliminary Assessment.
- (190) First, the Final Commitments prohibit Amazon from introducing any of the relevant Parity Clauses in any new e-book agreement from the Effective Date.
- (191) Second, the Final Commitments prohibit Amazon from enforcing any of the Parity Clauses contained in existing agreements as of the Effective Date, with the exception

of the Discount Pool Provision. As regards the Discount Pool Provision, the Commission notes that such a provision is only included in a small number of e-book agreements which will automatically expire at the latest [expiry date of Amazon's e-book distribution agreements with certain E-book Suppliers] (or earlier if the E-Book Supplier decides to terminate the relevant e-book agreement in its entirety pursuant to the Final Commitments). Consequently, as the Final Commitments prohibit Amazon from introducing any Discount Pool Provision in any new e-book agreements, Amazon will not be able to benefit from any Discount Pool Provision as from the expiry, [expiry date of Amazon's e-book distribution agreements with certain E-book Suppliers], of those e-book agreements that currently include a Discount Pool Provision. The Commission further notes that only one of the E-book Suppliers concerned by a Discount Pool Provision commented on the Initial Commitments; that E-book Supplier indicated that the Discount Pool Provision only had a limited impact on it.

- (192) Third, the Commission considers that it is not necessary that Amazon modify its existing e-book agreements in order to remove the Parity Clauses from those agreements. The obligation on Amazon not to enforce the relevant clauses in existing agreements is sufficient as it has the same or similar effect to the removal of the clauses from Amazon's e-book agreements. Therefore, requiring the modification of existing e-book agreements in order to remove the relevant clauses would not be more effective in addressing the competition concerns identified by the Commission in its Preliminary Assessment. Moreover, it may have unintended effects on the competitive situation of Amazon's trading partners.

#### 6.3.5. *Duration of the commitments*

- (193) The five-year duration of the Final Commitments is sufficient to address adequately the concerns expressed by the Commission in its Preliminary Assessment. A longer period would go beyond what is necessary to protect competition in the fast-moving markets for the retail distribution of E-books to consumers.

#### 6.3.6. *Retaliation, non-circumvention and monitoring of compliance*

- (194) With regard to compliance with its commitments, the Commission considers, first, that the Final Commitments contain a far-reaching non-circumvention clause which prohibits Amazon from engaging in any conduct that would directly or indirectly, by act or omission, lead to similar anti-competitive effects as those identified in the Preliminary Assessment.
- (195) Second, a breach of the Final Commitments could lead to the application of a number of measures provided for in Regulation (EC) No 1/2003, namely reopening of the proceedings pursuant to Article 9(2), imposing a fine pursuant to Article 23(2)(c), and/or the imposition of periodic penalty payments pursuant to Article 24(1)(c).
- (196) Third, as regards specific comments made during the Market Test in relation to the monitoring of Amazon's compliance with its commitments, the Commission takes into account the clarifications contained in the Final Commitments as regards the Monitoring Trustee's powers, as well as Commission's powers under Regulation (EC) 1/2003, to request all relevant information to ensure Amazon's compliance with the Final Commitments.

6.3.7. *Additional comments*

(197) The issue of interoperability of Amazon's e-book readers and e-book formats goes beyond the competition concerns expressed by the Commission in its Preliminary Assessment and therefore does not need to be addressed in the Final Commitments.

**7. CONCLUSION**

(198) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns, as expressed in its Preliminary Assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.

(199) The Commission's assessment of whether the commitments offered by Amazon are adequate to address its concerns as set out in the Preliminary Assessment is based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(200) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

(201) The Commission retains full discretion to investigate and open proceedings under Articles 101 and 102 of the Treaty and Articles 53 and 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

*Article 1*

The Final Commitments as contained in the Annex shall be binding on Amazon.com, Inc., Amazon EU S.à.r.l., Amazon Digital Services, LLC and Amazon Media EU, S.à.r.l. for a period of five years from the date of notification of this Decision.

*Article 2*

There are no longer grounds for action by the Commission in this case.

*Article 3*

This Decision is addressed to:

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2338 Luxembourg  
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Done at Brussels, 4.5.2017

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*

