EUROPEAN
COMMISSION

Brussels, 4.10.2017
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COMMISSION DECISION

of 4.10.2017

ON STATE AID SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon

(Text with EEA relevance)

(Only the French version is authentic)

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In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 24 June 2014, the Commission sent a request for information to Luxembourg regarding its tax ruling practice in relation to Amazon. In that letter, the Commission requested Luxembourg to confirm that Amazon is liable to taxation in Luxembourg and to specify the extent of the activities of the Amazon group benefiting from a tax reduction under the taxation regime for intellectual property. In addition, the Commission requested all tax rulings addressed to the Amazon group that were still in force. By e-mail of 18 July 2014, Luxembourg requested an

[1] OJ C 44, 6.2.2015, p.13.

extension of the deadline to respond to the Commission's letter of 24 June 2014, which it was granted[2].

(2) On 4 August 2014, Luxembourg transmitted its reply to the Commission's request of 24 June 2014, to which it annexed *inter alia* a letter dated 6 November 2003 addressed to Amazon.com, Inc. ("the contested tax ruling") from the *Administration des contributions directes* ("the Luxembourg tax administration"), a letter dated 23 October 2003 from Amazon.com, Inc. and a letter dated 31 October 2003 prepared by [Advisor 1]*(*)* on behalf of Amazon.com, Inc. to the Luxembourg tax administration in which a request for a ruling was made (collectively referred to as "the ruling request"), and the annual financial reports of Amazon EU Société à responsabilité limitée ("LuxOpCo")[3], Amazon Europe Holding Technologies SCS ("LuxSCS")[4], Amazon Services Europe Société à responsabilité limitée ("ASE"), Amazon Media EU Société à responsabilité limitée ("AMEU") and other Amazon Luxembourg group entities.

(3) On 7 October 2014, the Commission adopted a decision to open the formal investigation procedure in accordance with Article 108(2) of the Treaty in respect of the contested tax ruling on the ground that it harboured serious doubts as to the compatibility of that measure with the internal market ("the Opening Decision")[5]. In that decision, Luxembourg was requested to provide additional information on the contested tax ruling[6]. By letters of 3 and 5 November 2014, Luxembourg requested an extension of the deadline to reply to the Opening Decision.

(4) By letter of 21 November 2014, Luxembourg submitted its comments to the Opening Decision. That submission included *inter alia* a transfer pricing report prepared by [Advisor 2] on behalf of Amazon ("the TP Report"), which had not been previously submitted to the Commission.

(5) On 6 February 2015, the Opening Decision was published in the Official Journal of the European Union[7]. Interested parties were invited to submit their comments on that decision.

(6) By letter of 13 February 2015, the Commission sent an additional request for information to Luxembourg. In that letter, the Commission also asked Luxembourg to agree that it could contact Amazon directly to obtain the requested information if that information was not in Luxembourg's possession. On 24 February 2015, Luxembourg requested an extension of deadline to reply to the Commission's request for information.

(7) By letter of 5 March 2015, Amazon submitted its observations on the Opening Decision. Comments on the Opening Decision were also submitted by the following third parties: Oxfam on 14 January 2015, the Bundesarbeitskammer on 4 February

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2 If not otherwise stated, the Commission accepted all of Luxembourg's and Amazon's requests for an extension of deadline.

* *Confidential information.*

3 The designation "LuxOpCo" is used by Amazon in its ruling requests of 23 October 2003 and 31 October 2003.

4 The designation "LuxSCS" is used by Amazon in its ruling requests of 23 October 2003 and 31 October 2003.

5 Several exchanges on confidentialities have taken place, which are however not separately mentioned in this Section.

6 OJ C 44, 6.2.2015, p. 30.

7 OJ C 44, 6.2.2015, p. 13.

2015, Fedil on 27 February 2015, the Booksellers Association ("BA") on 3 March 2015, le Syndicat de la librairie française ("SLF") on 4 March 2015, the European and International Booksellers Federation ("EIBF") on 4 March 2015, ATOZ S.A. on 5 March 2015, the Computer and Communications Industry Association ("CCIA") on 5 March 2015 and the European Policy Information Center ("EPICENTER") on 5 March 2015. In addition, the Federation of European Publishers ("FEP") on 5 March 2015 and le Syndicat des Distributeurs de Loisirs Culturels ("SDLC") on 5 March 2015 expressed their support of the EIBF's position.

(8) On 12 March 2015, a telephone conference took place between the Commission and Luxembourg in which the latter assured the former that it would be able to provide a complete reply to the Commission's request for information of 13 February 2015 by 17 March 2015.

(9) By letter of 17 March 2015, Luxembourg partially replied to the Commission's request for information of 13 February 2015. It further explained that outstanding information, in particular that concerning certain contractual relationships between Amazon entities in Luxembourg and third parties, was not in its possession.

(10) On 19 March 2015, the Commission transmitted the comments of third parties on the Opening Decision to Luxembourg.

(11) By e-mail of 19 March 2015, Amazon submitted the amended and restated cost sharing agreement ("CSA") as entered into between LuxSCS and two Amazon group entities in the United States on 1 January 2005, as again amended and restated on 2 July 2009 (effective from 5 January 2009) and amended with effect of 1 January 2014[8].

(12) By e-mail exchanges of 18, 19 and 20 March 2015, the Commission indicated to Luxembourg that its reply of 17 March 2015 to the Commission's request for information of 13 February 2015 was incomplete and it posed further questions for clarification.

(13) On 20 March 2015, Luxembourg agreed that the Commission could address its questions directly to Amazon. On 26 March 2015, the Commission informed Luxembourg that, in accordance with Article 6(a) of the Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty[9], it had identified the formal investigation procedure on the contested tax ruling as ineffective to date. On that basis, and with the authorisation of Luxembourg[10], the Commission, in accordance with Article 6(a)(6) of Regulation No. 659/1999, sent a request to Amazon on 26 March 2015 (the "MIT request") to

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8 Amazon internal documents: Amended and Restated Agreement to share Costs and Risks of Intangible Development entered into and effective as of 1 January 2005, Amended and Restated Agreement to share Costs and Risks of Intangible Development entered into on 2 July 2009 and effective as of 5 January 2009, and First amendment to Amended and Restated Agreement to share Costs and Risks of Intangible Development entered into in February 2014 and effective as of 1 January 2014.

9 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p.1. Regulation (EC) No 659/1999 was repealed and replaced by Regulation (EU) No 2015/1589 laying down detailed rules for the application of Article 108 Treaty on the Functioning of the European Union (codification), OJ L 248, 24.9.2015, p. 9, with effect from 14 October 2015. Any reference to Regulation (EC) No 659/1999 may be construed as a reference to Regulation (EU) No 2015/1589 and should be read in accordance with the correlation table in Annex II to the latter regulation.

10 See Recital (13).

provide it with all agreements concluded by Amazon since 2000 pursuant to which Amazon's intellectual property ("IP") rights were licensed or otherwise made available ("the IP agreements"), as well as any cost sharing and/or buy-in agreements concluded between LuxSCS and other Amazon group entities. Amazon was also requested to provide information on the activities of LuxSCS, the financial accounts of Amazon subsidiaries based outside Luxembourg, and to explain or reconcile certain financial data. Finally, information on the recent changes in the legal structure of the Amazon group in Luxembourg was requested.

(14) By letter of 20 April 2015, Luxembourg requested the Commission to explain the purpose of a meeting the latter had held with Oxfam and Eurodad, of which Luxembourg had not been informed. It also submitted a request not to publish the decision to send the MIT request.

(15) On 4 May 2015, Amazon partially replied to the Commission's request for information of 26 March 2015. Amazon also confirmed that its structure in Luxembourg had changed in 2014 and that a new ruling was granted by Luxembourg on that basis, but explained that the change was irrelevant for the purposes of the Commission's investigation.

(16) On 8 May 2015, a meeting was held between the Commission, Luxembourg and Amazon. By letter of 12 June 2015, Amazon submitted further comments following that meeting. Amazon also submitted a list of IP agreements, referred to by Amazon as the "M.com Agreements", pursuant to which Amazon made IP related to its platform technology available to unrelated third parties.

(17) By letter of 13 May 2015, Luxembourg submitted its observations on the third party comments on the Opening Decision.

(18) By letter of 3 July 2015, the Commission reminded Amazon to provide certain outstanding information, in particular on the IP agreements, and asked for additional information.

(19) By letter of 10 July 2015 (again submitted on 23 July 2015), Luxembourg submitted a statement concerning the non-retroactive application of a final negative decision of the Commission.

(20) By letters of 24 and 31 July 2015, Amazon provided a partial reply to the Commission's request of 3 July 2015, including information on the M.com Agreements. On the basis of those replies, Amazon considered the information request concerning the IP agreements to have been fully replied to, since according to Amazon no other IP agreements concluded by Amazon were comparable to the Intellectual Property License Agreement concluded between LuxSCS and LuxOpCo as of 30 April 2006 (the "License Agreement")[11]. Amazon also requested an extension of the deadline to submit the other information requested by the Commission.

(21) By letter of 31 July 2015, the Commission reminded Amazon to provide all requested information, in particular complete information on all IP agreements concluded by Amazon since 2000. It also requested Amazon to provide the new

[11] The License Agreement was submitted by Amazon on 5 March 2015, Annex 4 (together with the later Amendment 1 of IP License Agreement as effective as of January 1 2009).

ruling granted to it by Luxembourg in 2014, to which a reference was made in Luxembourg's letter of 4 August 2014 and Amazon's letter of 4 May 2015.

(22) By letter of 21 August 2015, Amazon replied to the Commission's request, except for the submission of information on the remaining IP agreements.

(23) On 8 September 2015, a meeting took place between the Commission and Amazon of which Luxembourg was informed. Following that meeting, the Commission reminded Amazon by e-mail of 8 September 2015 about the outstanding request for information concerning the IP agreements.

(24) By e-mail of 14 September 2015, Amazon explained that no other agreements exist pursuant to which the same intellectual property as that covered the License Agreement was or will be made available to related or unrelated parties. At the same time, Amazon informed the Commission that it was preparing a list of intra-group IP agreements, regardless of whether they relate to the EU or intellectual property covered by the License Agreement between LuxSCS and LuxOpCo. That list was submitted to the Commission on 17 September 2015.

(25) By e-mail of 23 September 2015, Amazon submitted a list of agreements by means of which intellectual property was licensed in from or licensed out to third parties.

(26) By e-mail of 29 September 2015, the Commission reminded Amazon to submit the IP agreements as requested by the Commission on 26 March and 3 July 2015 on the basis of the lists provided by Amazon on 17 and 23 September 2015. In addition, the Commission requested further information from Amazon concerning the cost sharing reports and LuxOpCo's customers per website.

(27) By e-mails of 30 September and 1, 2, 12, 13, 20 and 27 October 2015, Amazon submitted information.

(28) On 28 October 2015, a meeting took place between the Commission, Luxembourg and Amazon.

(29) By e-mail of 20 November 2015, the Commission reminded Amazon about the scope of its request for information of 26 March 2015 regarding Amazon's internal and external IP agreements and requested Amazon to submit additional information.

(30) During a meeting on 27 November 2015, a company which requested its name not to be revealed ("Company X") provided the Commission with market information in relation to the Commission's investigation. In a conference call on 15 January 2016, Company X provided additional information on the e-commerce business in Europe. By e-mail of 25 January 2016 regarding the minutes of the conference call, Company X provided additional information.

(31) On 30 November 2016, Amazon submitted additional information.

(32) By e-mail of 1 December 2015, Amazon requested an extension to reply to the Commission's request for information dated 20 November 2015.

(33) On 4 December 2015, Amazon submitted the information requested by the Commission in its e-mail of 20 November 2015 and asked for an extension of deadline for the remaining responses.

(34) By letters of 10 and 28 December 2015, Luxembourg submitted its observations following the meeting of 28 October 2015.

(35) By e-mail of 11 December 2015, the Commission reminded Amazon about the outstanding replies from its information request of 20 November 2015 and sent a further request for information with additional questions to Amazon.

(36) On 18 December 2015, Amazon provided further responses to the Commission's request for information of 20 November 2015.

(37) By e-mail of 18 December 2015, the Commission invited Luxembourg to submit its observations and comments on the information submitted by Amazon to the Commission by that point of the investigation.

(38) On 12 and 15 January 2016, Amazon submitted partial responses to the Commission's information request of 11 December 2015 and asked for an extension of deadline for the outstanding information.

(39) On 18 January 2016, Amazon submitted further information.

(40) By e-mail of 19 January 2016, the Commission informed Amazon that certain replies to questions of previous requests for information were still outstanding. In addition, the Commission requested clarification and further information.

(41) On 22 January 2016, Amazon partially replied to the Commission's request for information of 19 December 2015. On 28 January 2016, Amazon submitted a partial reply to the Commission's request for information of 11 December 2015. By letters of 5, 15, 19 and 24 February 2016, Amazon submitted partial replies to the Commission's request for information of 19 January 2016.

(42) On 26 February 2016, the Commission sent a reminder to Amazon requesting it to reply to outstanding questions concerning the requests for information of 20 November 2015, 11 and 18 December 2015 and 19 January 2016.

(43) On 4 and 21 March 2016, Amazon submitted partial replies to the Commission's request for information of 11 December 2015.

(44) By e-mail of 11 March 2016, Amazon submitted a partial reply to the Commission's request for information of 26 February 2016.

(45) By e-mail of 22 March 2016, Amazon submitted a partial reply to the Commission's requests for information of 19 January 2016 and 26 February 2016.

(46) By e-mail of 8 March 2016, Amazon agreed to waive confidentiality claims previously made vis-à-vis Luxembourg in a letter of 22 January 2016 for certain information submitted and committed to share this information with Luxembourg.

(47) On 14 March 2016, Amazon confirmed to have shared its latest submission to the Commission with Luxembourg.

(48) On 1 April 2016, the Commission requested Company X to agree that certain market information provided by it would be shared with Luxembourg. On 5 April 2016, Company X provided its agreement.

(49) On 8 April 2016, the Commission inquired with Amazon about the information that Amazon had shared with Luxembourg by that point of the investigation. The Commission also informed Amazon that certain information of the Commission's request for information of 11 December 2015 was still outstanding. In addition, the Commission addressed a request for further clarification and information to Amazon.

(50) By e-mail of 11 April 2016, Amazon confirmed what information it had shared with Luxembourg.

(51) By letter of 18 April 2016, the Commission inquired with Luxembourg what information had been shared with it by Amazon and invited Luxembourg to submit its comments on those submissions. The Commission further recalled its e-mail of 18 December 2015, by which it had invited Luxembourg to comment on Amazon's submissions. Finally, the Commission shared the market information as agreed with Company X with Luxembourg and asked Luxembourg for its comments.

(52) On 22 April 2016, Amazon submitted a partial reply to the Commission's request for information of 8 April 2016 and requested an extension of the deadline for the remaining replies.

(53) By letter of 2 May 2016 (again submitted on 10 May 2016), Luxembourg confirmed receipt of the information submitted by Amazon by that point of the investigation and submitted its observations on Amazon's submissions. As regards the market information of Company X, Luxembourg informed the Commission that it had shared that information with Amazon, since Amazon would be in a better position to comment.

(54) By e-mail of 2 May 2016, Amazon submitted a partial reply and acknowledged the outstanding replies to questions raised in the Commission's request for information dated 8 April 2016, as mentioned in the letter of 22 April 2016.

(55) By e-mail of 17 May 2016, the Commission clarified the scope of the information it previously requested from Amazon and recalled that certain information was still outstanding from its requests for information of 11 December 2015 and 8 April 2016.

(56) By e-mail of 24 May 2016, Amazon submitted its reply to the Commission's e-mail of 17 May 2016.

(57) On 26 May 2016, a meeting between the Commission, Luxembourg and Amazon took place. During that meeting and in the draft minutes thereof, the Commission raised further questions to Amazon. By letter of 20 June 2016, Amazon replied to those questions.

(58) By letter of 21 June 2016, Amazon submitted its comments to the market information of Company X. It also requested access to the complete submission of Company X and the disclosure of its identity.

(59) On 7 July 2016, the Commission provided its comments to the amended minutes of the meeting of 26 May 2016 to Amazon. In addition, the Commission requested further information from Amazon.

(60) By e-mail of 22 July 2016, Amazon submitted a partial reply to the Commission's request for information of 7 July 2016. In its reply, Amazon informed the Commission about the protective order covering documents used in US Tax Court proceedings. Therefore, Amazon suggested submitting redacted documents, since these were available to Amazon.

(61) By e-mail of 27 July 2016, the Commission reminded Amazon about outstanding information following its request for information of 7 July 2016 and accepted to receive temporarily documents from the US Tax Court proceedings in a redacted version. In addition, the Commission requested further clarification and information from Amazon.

(62) By e-mail of 29 July 2016, Amazon submitted a partial reply to the Commission's request for information of 7 July 2016 and requested an extension of the deadline to reply to the remaining questions. By letter of 12 August 2016, Amazon submitted a partial reply to the Commission's request for information of 7 July 2016 and 27 July 2016.

(63) By e-mail of 19 August 2016, the Commission requested further clarification and information from Amazon concerning Amazon's replies to the request for information of 7 July 2016.

(64) By e-mail of 19 August 2016, and again by letter of 22 August 2016, the Commission sent a request for information to Amazon asking for the entire redacted documents of the US Tax Court proceedings.

(65) On 26 August 2016, Amazon submitted a partial reply to the Commission's request for information of 7 July 2016 and requested an extension of the deadline to complete its reply.

(66) By e-mail of 30 August 2016, Amazon informed the Commission about its successful application concerning access to the documents used in the US Tax Court proceedings and announced the upcoming submission of unredacted documents.

(67) On 9 September 2016, Amazon submitted a partial reply to the Commission's request for information dated 19 August 2016.

(68) On 30 September 2016, Amazon submitted the unredacted documents as produced in the US Tax Court proceedings, as requested by the Commission on 22 August 2016.

(69) By e-mails of 7 and 19 December 2016, the Commission asked Amazon for additional information concerning the US Tax Court proceedings. On 20 December 2016, Amazon submitted its reply.

(70) On 21 December 2016, the Commission sent a request for information to Amazon to which Amazon submitted a partial reply on 20 January 2017. By e-mail of 2 February 2017, the Commission sent Amazon further clarifications concerning its request for information of 21 December 2017. On 6, 8 and 27 February and 6 March 2017, Amazon submitted further information and partial replies to the Commission. By e-mail of 13 March 2017, the Commission reminded Amazon to submit outstanding information.

(71) On 14 March 2017, the Commission sent a request for information to Amazon.

(72) By e-mail of 24 March 2017, Amazon submitted the opinion of the US Tax Court of 23 March 2017 to the Commission.

(73) By e-mail of 27 March 2017, the Commission requested further information from Amazon concerning the US Tax Court's opinion.

(74) On 28 March 2017, Amazon replied to the Commission requesting more time to answer due to the ongoing post-trial procedures in the US.

(75) By e-mail of 4 April 2017, Amazon submitted a partial reply to the Commission's request for information of 14 March 2017.

(76) By e-mail of 7 April 2017, the Commission informed Luxembourg and Amazon that it was obliged to decline Amazon's request to grant full access to the submissions of Company X.

(77) On 11 April 2017, Amazon submitted another partial reply to the Commission's request for information of 14 March 2017 and requested an extension of the deadline for some remaining parts of its reply.

(78) By e-mail of 12 April 2017, Amazon submitted a partial reply to the Commission.

(79) On 17 April 2017, Amazon submitted further information concerning the post-trial procedure in the US.

(80) On 18 May 2017, Amazon sent another partial reply and thus completed its reply to the Commission's request for information of 14 March 2017.

(81) By e-mail of 19 May 2017, the Commission sent a request for information to Amazon.

(82) On 29 May 2017, Amazon submitted further information to the Commission.

(83) By e-mail of 7 June 2017, Amazon submitted its reply to the Commission's request for information of 19 May 2017.

(84) By e-mail of 14 June 2017, the Commission requested Amazon to confirm that all information submitted by Amazon to the Commission in 2016 and 2017 had also been shared with Luxembourg and invited Luxembourg to submit its observations on the information submitted to the Commission by Amazon at that point of the investigation. On 19 June 2017, Amazon confirmed to have shared all information submitted to the Commission in 2016 and 2017 with Luxembourg. By e-mail of 21 June 2017, Luxembourg confirmed to have received all documents that were submitted to the Commission by Amazon in 2016 and 2017 and that Luxembourg had no further comments in relation to Amazon's submissions to the Commission in 2016 and 2017 except for Amazon's submissions of 30 September 2016 and 20 January 2017.

(85) On 22 June 2017, a meeting was held between the Commission, Luxembourg and Amazon.

(86) On 6 July 2017, Luxembourg submitted its comments to submissions made by Amazon on 30 September 2016 and 20 January 2017.

(87) On 6 July 2017, the Commission sent a request for information to Amazon to which Amazon replied on 10 and 27 July, and 4 and 7 August 2017.

(88) By email of 9 August 2017, the Commission sent a request for information to Amazon. On 7 September 2017, Amazon submitted its reply.

(89) On 12 September 2017, Luxembourg confirmed by email that it had no further comments to Amazon's submissions of 10 and 27 July, 4 and 7 August and 7 September 2017.

2. FACTUAL AND LEGAL BACKGROUND

2.1. Description of the beneficiary of the contested tax ruling

2.1.1. The Amazon group

(90) The Amazon group consists of Amazon.com, Inc. and all companies directly or indirectly controlled by Amazon.com, Inc. (collectively referred to as "Amazon" or the "Amazon group"). Amazon is headquartered in Seattle, Washington, United States of America.

(91) Amazon operates retail and service businesses.

(92) Amazon's retail business consists of selling a range of merchandise to customers through its websites, such as books, DVDs, videos, electronic consumer goods, computers, kitchen equipment and housewares, tools, hardware, mobile phones, etc. and content, such as digital music, E-books, games etc., which Amazon purchases for resale from suppliers[12]. Amazon fulfils customer orders in several ways, including through its own North American and International fulfilment centres and networks and through co-sourced and outsourced fulfilment arrangements in certain countries and through digital delivery[13].

(93) Amazon's service business includes its activities in third party programmes (the "Third-Party Seller Programs"), such as Marketplace and Merchants@Amazon, through which Amazon allows other (smaller) businesses and individuals (Marketplace) and medium and large retail sellers (Merchants@Amazon) to offer their products for sale on Amazon's websites. The products of the third party merchants are integrated into Amazon's websites. In return, the participating businesses and individuals pay fees to Amazon[14]. Those third-party businesses and sellers can also choose to send Amazon their inventory, which Amazon stores at its fulfilment centres[15], lists on all its websites, and picks, packs and delivers to the client's address (the "Fulfilment by Amazon" business)[16].

(94) Amazon also generates revenue through other marketing and promotional services, such as online advertising and co-branded credit card agreements. Amazon previously offered its e-commerce services, features and technologies to operate other businesses' websites selling its products under the Amazon brand name and URL under its "Merchant.com" programme. Under its "Syndicated Stores" programme, Amazon previously offered its e-commerce services, features and technologies to operate other businesses' websites selling its products under another business name and URL.[17] Both programmes have since been phased out.[18]

(95) Finally, Amazon manufactures and sells hardware products, such as Amazon Kindle, Amazon Fire and Amazon Echo devices.

(96) Amazon operates thirteen global web sites, including www.amazon.com and six European web sites: www.amazon.de, www.amazon.co.uk, www.amazon.fr, www.amazon.it and www.amazon.es ("the EU websites") and www.amazon.nl[19]. Amazon's operations are organised in three segments: North America, International, and Amazon Web Services ("AWS")[20].

(97) The North America segment's sales primarily consist of retail sales of consumer products (including by third-party sellers) and subscriptions through North America-

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12 Amazon.com Inc., 2016 Annual Report, p. 18.

13 Amazon.com Inc., 2016 Annual Report, p. 3.

14 Amazon.com Inc., 2003 Annual Report, p. 5.

15 Fulfilment refers to the process initiated in a company when an order for a product is received. This includes warehousing, finding the item ordered, packaging it, and dispatching it (directly or through third parties).

16 https://services.amazon.com/fulfillment-by-amazon/benefits.htm/ref=asus_fba_hnav.

17 Amazon.com Inc., 2002 Annual Report, p. 2. See also TP Report, p. 6-7.

18 Amazon Post trial brief, p. 81, par. 253.

19 The term "EU websites" as used throughout this Decision excludes www.amazon.nl, since this website was launched after the period subject to review in this Decision.

20 Amazon.com Inc., 2016 Annual report, p. 3.

focused websites such as www.amazon.com, www.amazon.ca, and www.amazon.com.mx. That segment also includes export sales from those websites.

(98) The International segment's sales primarily consist of retail sales of consumer products (including by third-party sellers) and subscriptions through international websites such as www.amazon.com.au, www.amazon.com.br, www.amazon.cn, www.amazon.in, www.amazon.co.jp, the EU websites and www.amazon.nl. That segment also includes export sales from these international websites (including export sales from these sites to customers in the U.S., Mexico, and Canada), but excludes export sales from Amazon's North American websites.

(99) The AWS segment consists of global sales of computer, storage, database, and other service offerings for start-ups, enterprises, government agencies, and academic institutions. Through AWS, Amazon provides access to technology infrastructure for different types of business.

(100) In 2016, Amazon generated worldwide net sales of approximately USD 136 billion and net income of USD 2.37 billion. Globally, 91 % of Amazon's revenue comes from its retail business. 59 % of net sales come from the North America segment, 32 % from the International segment, and 9 % from the AWS segment. In 2016, Amazon had 314 400 full- and part-time employees[21].

2.1.2. Amazon's European operations

(101) Prior to May 2006, Amazon operated its European websites through a wholly-owned US subsidiary of Amazon.com, Inc.: Amazon.com International Sales, Inc. ("AIS"). AIS functioned as principal for the retail business on Amazon's European websites (at that time: www.amazon.de, www.amazon.co.uk, and www.amazon.fr), whereas another US group company, Amazon International Marketplace, Inc. ("AIM"), functioned as principal for the service business on those websites. AIM was, in turn, the sole shareholder of ASE, incorporated in 2003, which acted as the service commission agent for the service business on the European websites. Finally, wholly-owned Amazon entities incorporated in the UK, Germany and France ("EU Local Affiliates")[22] performed certain services with respect to the European websites, e.g. costumer referral services[23].

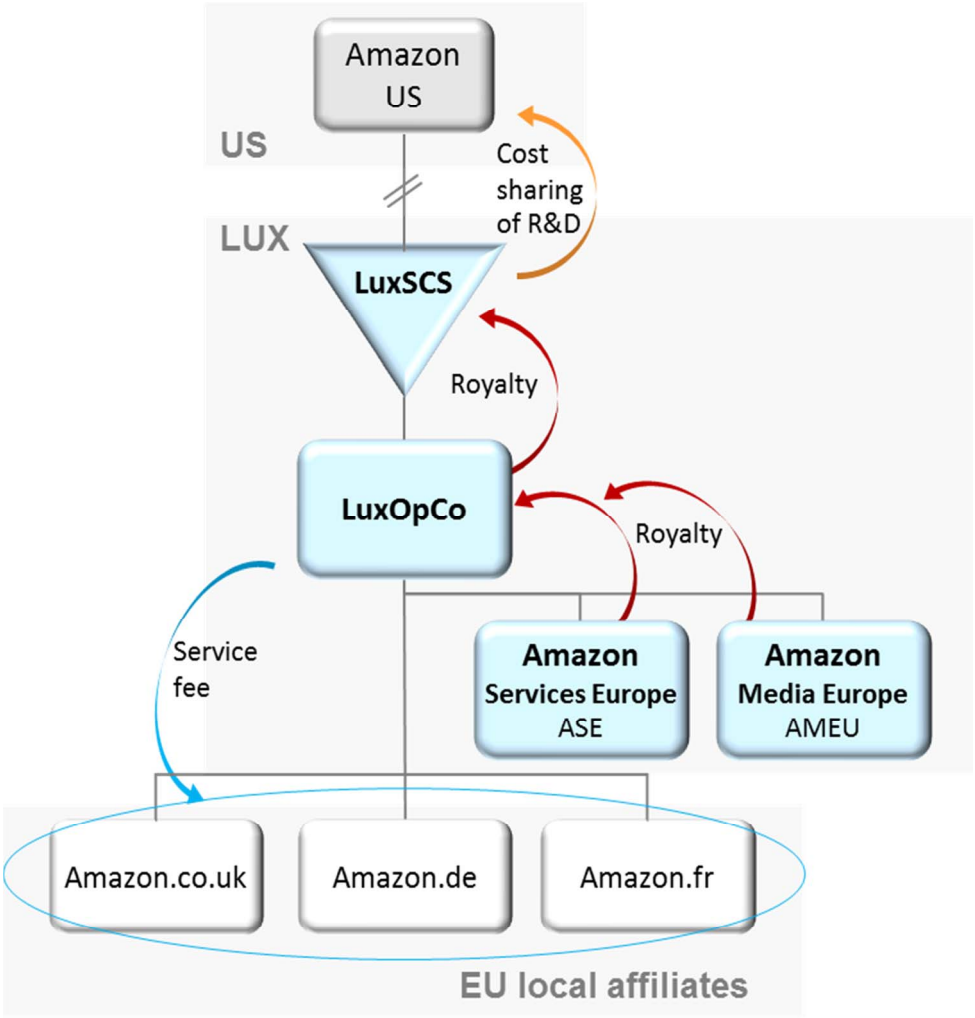
(102) As of May 2006, the restructuring of Amazon's European operations as described in the ruling request (the "2006 restructuring") became effective. During financial years covering 1 May 2006 to 30 June 2014 ("the relevant period"), the structure reflected in Figure 1 was in place. In July 2014, Amazon restructured its European operations (the "2014 restructuring"). The 2014 restructuring and Amazon's European operations as carried out after the 2014 restructuring are not within the scope of this Decision.

21 Amazon.com Inc., 2016 Annual report, p. 4 and 67.

22 The term "EU Local Affiliates" as used throughout this Decision includes Amazon.co.uk Ltd., Amazon.fr SARL, Amazon.fr Logistique SAS, Amazon.de GmbH and Amazon Logistik GmbH which all were EU Local Affiliates as of 1 May 2006.

23 TP Report, p. 12.

Figure 1: Structure of Amazon's European Entities 2006-2014



2.1.2.1. LuxSCS

(103) LuxSCS is a Luxembourg limited partnership (*Société en Commandite Simple*). While the ownership structure changed throughout the relevant period, the partners of LuxSCS were always US-resident companies[24]. On incorporation in 2004, LuxSCS's partners were Amazon Europe Holding, Inc. (general partner); Amazon.com International Sales, Inc. and Amazon.com International Marketplace, Inc. In May 2006, ACI Holdings, Inc. and Amazon.com, Inc. replaced Amazon.com International Marketplace, Inc. as partners of LuxSCS. Since September 2009, Amazon Europe Holding, Inc. (general partner), Amazon.com International Sales, Inc. and Amazon.com, Inc. were the partners in LuxSCS[25].

(104) During the relevant period, LuxSCS was expected to function solely as an intangibles holding company for Amazon's European operations, for which LuxOpCo was responsible as the principal operator[26]. As described by Amazon in a letter dated 20

24 Amazon's submission of 5 March 2015: Annex 6.

25 Amazon's submission of 5 March 2015: Annex 6.

26 TP Report, p. 13: "*As of the Restructuring Date, LuxSCS' principal activities will be limited to those of an intangible holding company and a participant in the ongoing development of the Intangibles through the CSA. Additionally, LuxSCS will license the Intangibles to LuxOpCo, subject to the Intangibles License, and will receive royalty payments pursuant to this license*".

April 2006 to the Luxembourg tax administration, LuxSCS's activities were limited to "*the mere holding*" of the Intangibles and the shares in LuxOpCo. The "*limited number of legal agreements*" concluded by LuxSCS was the ones "*necessary for the Luxembourg structure to operate*". LuxSCS would only receive passive income (royalties and interests) from its subsidiaries[27]. LuxSCS also provided intercompany loans to LuxOpCo and other group companies[28]. LuxSCS had no physical presence or employees during the relevant period.

(105) In 2005, LuxSCS entered into License and Assignment Agreements For Pre-existing Intellectual Property (the "Buy-In Agreement") with Amazon Technologies, Inc. ("ATI")[29] and the CSA as concluded with two Amazon group entities based in the U.S.: A9.com, Inc. ("A9") and ATI[30]. LuxSCS also entered into an Intellectual Property Assignment and License Agreement with Amazon.co.uk Ltd., Amazon.fr SARL, and Amazon.de GmbH, under which LuxSCS received the trademarks and IP rights to the European websites which had been owned by those EU Local Affiliates until 30 April 2006[31].

(106) By means of the Buy-In Agreement and the CSA, LuxSCS obtained the right to exploit and sublicense certain Amazon IP and derivative works thereof ("the Intangibles")[32] as held and further developed by A9, ATI and LuxSCS itself[33]. LuxSCS obtained those rights to exploit the Intangibles for the purpose of operating the European websites and any other purpose within the European territory[34]. In return, LuxSCS had to pay Buy-in Payments (specified in Table 11) and its annual share of the costs relating to the CSA development program (specified in Table 12)[35]. According to the CSA, LuxSCS had to use its best efforts to prevent infringements of the Intangibles licensed to it by A9 and ATI[36]. Furthermore, as specified in the 2009

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27 Amazon's letter of 20 April 2006 to the Luxembourg tax administration (as drafted by Amazon's tax advisor [Advisor 1]), p. 2: *"EHT [LuxSCS], a wholly owned indirect subsidiary of Amazon.com Inc was created for the purpose of holding and developing intellectual property (by way of financial contribution only). […] EHT [LuxSCS] has an activity limited to the mere holding of Amazon's EU intellectual property, the shares in AEU and has concluded a limited number of legal agreements necessary for the Luxembourg structure to operate (as described under point 1.2 below). EHT [LuxSCS] will only receive passive income from its subsidiaries (interest and royalties)."* Point 1.2 of this letter describes the agreements described in Recital ((105)) of this decision.

28 LuxSCS annual financial reports 2005-2013. The intracompany loan by LuxSCS to LuxOpCo increased in the period under review to EUR [2-2,5] billion in 2013. Other group company provided with some limited financing by LuxSCS was Amazon Eurasia Holding Sarl (EUR [20-30] million in 2013).

29 License Agreement For Pre-existing Intellectual Property and Assignment Agreement For Pre-existing Intellectual Property, both between LuxSCS and ATI as of 1 January 2005.

30 Amended and restated agreement to share costs and risks of intangible development between LuxSCS, ATI and A9 as of 1 January 2005. The cost sharing agreement prior to the 2005 CSA was concluded between LuxSCS and A9 and was effective as of 7 June 2004. The CSA was again amended and restated as effective as of 5 January 2009 and again amended as effective as of 1 January 2014.

31 Intellectual Property Assignment and License Agreement between LuxSCS, Amazon.fr SARL, Amazon.de GmbH and Amazon.co.uk Ltd. as of 30 April 2006.

32 Pursuant to the CSA, paragraph 1.8, "*Derivative works*" means "*any and all new works created by or for one Party [to the CSA] from pre-existing material contained within, or as a result of access to or use of another Party's intellectual property, [...]*".

33 CSA, section 6 (License and Ownership). As set out in the CSA, paragraph 6.4, besides the licenses to the Intangibles provided by A9 and ATI to LuxSCS under the CSA, LuxSCS retained the title and ownership to all Intangibles contributed by it.

34 CSA, paragraph 1.13 on the "Licensed Purpose".

35 CSA, section 4, "Development Cost Allocation" and section 5, "Payments".

36 CSA, paragraph 9.12.

amended and restated CSA, LuxSCS was to undertake the functions and risks set out in Exhibit B to the CSA.[37]

(107) According to the CSA, the Intangibles consisted of (i) "*any and all intellectual property rights throughout the world*", as owned or otherwise held by ATI and LuxSCS as well as certain intellectual property rights held by A9[38], (ii) all such IP licensed, transferred or assigned to those parties, and (iii) derivative works thereof as assigned to any of the parties pursuant to the CSA. The Intangibles essentially include three categories of intellectual property, which is hereinafter referred to as (i) "Technology"[39], (ii) "Customer Data"[40], and (iii) "Trademarks"[41]. The Intangibles do not include internet domain names[42].

2.1.2.2. LuxOpCo and its subsidiaries

(108) During the relevant period, LuxOpCo was a wholly-owned subsidiary of LuxSCS[43]. As part of the 2006 restructuring, it was expected to take over the roles of ASI and AIM[44]. It was also expected to further develop and improve the software-based business model underlying Amazon's European retail and service business[45]. As expected, during this period LuxOpCo functioned as the headquarters of the Amazon group in Europe and the principal operator of Amazon's European online retail and service business as carried out through the EU websites[46]. LuxOpCo would further manage the strategic decision-making related to the retail and services businesses carried out through the EU websites, along with the management of key physical components of the retail business[47]. It was expected to set the strategies and guidelines regarding which products would be featured and sold on the EU websites, the pricing and merchandising strategies for the products sold or service offerings, and certain website promotions and advertising programmes offered on the EU websites. It would also be responsible for strategic decisions relating to the selection

37 CSA as effective on 5 January 2009, paragraph 2.3.

38 As explained in the CSA, section 1.1, A9's contribution of IP rights to the CSA is limited to the intellectual property rights owned or otherwise held by A9 with respect to ecommerce search and navigation technologies.

39 These include the technology for Amazon's software platform, appearance of the EU websites, catalogues, search and navigation functions, logistics process, order processing, customer service and personalisation functions. See Recital (174) and following for further details.

40 This is a collection of data on products and customers. It includes customer reviews, publisher reviews, product data, customer names, purchase histories and other data. As explained in Amazon's submission of 21 August 2015, LuxSCS took over the legal ownership of the European customer data accumulated by Amazon Int'l Sales, Inc. and Amazon Int'l Marketplace, Inc. as part of the restructuring of the European operations. The customer database was subsequently further developed and maintained by LuxOpCo.

41 These include the trade mark, trade name, style, logos, presentation of Amazon and associated intangible assets.

42 CSA, paragraphs 1.1, 1.4 and 1.11 provide: "*Notwithstanding the foregoing, the parties expressly agree that the [...][Intangibles] does not include any World Wide Web domain names*".

43 As explained in Amazon's submission of 12 June 2015, LuxSCS transferred the shares in LuxOpCo to Amazon Europe Core S.à r.l. on 16 December 2013.

44 TP Report, p. 12.

45 TP Report, p. 30.

46 Amazon's submission of 5 March 2015, rec. 6 and Amazon internal document: Amazon's letter to the Luxembourg Tax Administration of 14 April 2006, p.2.

47 TP Report, p. 30.

of third-party merchants and product categories, and for marketing towards third parties. Finally, it would manage all aspects of the order fulfilment business[48].

(109) During the relevant period, LuxOpCo recorded revenue in its accounts both from product sales and from order fulfilment services. It purchased goods for resale from vendors located in various jurisdictions which were, in turn, shipped to end customers who made purchases on the EU websites. LuxOpCo was the seller of record[49] of Amazon inventory on the EU websites, held title to the inventory, and bore the risk of any loss in that respect[50]. LuxOpCo was also responsible for the goods shipped by third-party businesses and individuals directly to the fulfilment centres[51].

(110) LuxOpCo also performed treasury management functions[52] and held (either directly or indirectly) the shares in ASE, AMEU and the EU Local Affiliates which performed various intra-group services in support of LuxOpCo's business.

(111) During the relevant period, ASE and AMEU, both Luxembourg resident companies, formed a fiscal unity with LuxOpCo for Luxembourg tax purposes in which LuxOpCo operated as the parent of the unity[53]. Under Luxembourg tax law, those domestic companies were therefore not treated as separate entities, but paid their taxes on a consolidated basis, i.e. as if they were one single taxpayer[54].

(112) After the 2006 restructuring, ASE was expected to continue to act as a service provider to LuxOpCo[55]. During the relevant period, it operated Amazon's EU third-party seller business, "Marketplace". Marketplace offers small businesses and sellers the possibility to make their goods available through the EU websites. It also allowed them to send their inventory to Amazon, which was stored at Amazon's fulfilment centres and which Amazon picked, packed and delivered anywhere in Europe. During the relevant period, AMEU operated Amazon's EU digital business (in which, for instance, MP3s and eBooks are sold).

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48 TP Report, p. 13.

49 The seller of record is the entity which owns and offers the goods for sale and which is responsible for collection and payment of value added tax.

50 The Parliament of the United Kingdom, House of Commons: Report on HMRC's 2011-2012 Accounts - Written evidence from Amazon EU Sarl by Andrew Cecil (Director EU Public Policy, LuxOpCo, Luxembourg), 13 November 2012: "*Amazon EU Sarl owns the inventory, earns the profits associated with the selling these products to end customers and bears the risk of any loss. From Luxembourg, Amazon EU Sarl processes and settles payments from its European customers.*" Available at: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/writev/716/m03.htm.

51 Amazon's submission of 22 March 2016, p. 1-2 and annex E thereto.

52 LuxOpCo managed the cash pooling and liquidity management of Amazon's European operations; cf. Amazon internal document: Luxembourg Headquarters – Overview, p. 11-17 and Amazon internal document: Pre & Post Goldcrest Balance Sheet Analysis, p. 1 and Amazon internal document: Advance Tax Agreement, Letter of Amazon to Mr [...], 2 April 2014, par.11 and Amazon Internal Document: EU Policies and Procedures Manual, effective 1 May 2006, p. 3.

53 Amazon's letter of 14 April 2006 to the Luxembourg Tax Administration, p. 2.

54 In a fiscal unity (le régime d'intégration fiscal), a parent company may be taxed as a group together with one or more of its subsidiaries. For corporate income tax purposes, this means that the subsidiaries are deemed to have been absorbed by the parent company. To be eligible for a fiscal unity, the parent company must hold, directly or indirectly, a participation of 95 % or more in the share capital of a subsidiary and both the consolidating parent as well as the subsidiaries are capital companies resident in Luxembourg that are fully subject to corporate income tax. The consolidation is for at least five accounting years (Article 164bis LIR).

55 TP Report, p. 12.

(113) In 2013 and 2014, the consolidated net turnover of LuxOpCo amounted to EUR 13 612 449 784 and EUR 15 463 362 589, respectively. During the financial year 2013, LuxOpCo employed on average 523 full time employees ("FTEs"), ASE 63 FTEs and AMEU 5 FTEs. The employees of LuxOpCo, ASE and AMEU included strategic management posts that manage and coordinate the entirety of Amazon's European operations[56].

(114) After the 2006 restructuring, the EU Local Affiliates were expected to continue to provide the same services to LuxOpCo with respect to the EU websites as they had previously provided to AIS and AIM[57]. Accordingly, during the relevant period the EU Local Affiliates provided customer referral services with respect to the EU websites by performing costumer and merchant services, support services (such as marketing support localisation and adaption support, research and development ("R&D support") as well as fulfilment services[58]. The EU Local Affiliates developed local content for use on the EU websites and supported the management of merchandise for the online retail stores, as required by LuxOpCo. Customer service support entailed providing pre-sale and after-sale customer support service via e-mail, telephone, chat or other means of communication, as required by LuxOpCo, to meet customer requirements. The support services included general and administrative support. Finally, the EU Local Affiliates also supported the soliciting of the operators of other local websites to promote the EU websites to their customers (the so-called "Associates Programme").

(115) Services provided by the EU Local Affiliates to LuxOpCo were provided pursuant to the "Service Agreements" concluded between each of the affiliates and LuxOpCo as of 1 May 2006[59]. The EU Local Affiliates acted in their own name when providing these services for LuxOpCo, but they did not assume any risks either for the sales or for the inventories[60]. Pursuant to the Service Agreements, the EU Local Affiliates were remunerated by LuxOpCo on a cost plus basis[61], reflecting the EU Local Affiliates' role relative to LuxOpCo[62]. In practice, the costs incurred by the EU Local

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56 Amazon's submission of 6 March 2017, Annex 28a.

57 TP Report, p. 12.

58 See Section 2.3.3.3.

59 Amazon internal documents: the Amended and Restated Service Agreement between LuxOpCo and Amazon.fr SARL, the Amended and Restated Service Agreement between LuxOpCo and Amazon.fr Logistique SAS, the Amended and Restated Service Agreement between LuxOpCo and Amazon.co.uk Ltd., the Amended and Restated Service Agreement between LuxOpCo and Amazon Logistik GmbH, and the Amended and Restated Service Agreement between LuxOpCo and Amazon.de GmbH, all as of 1 May 2006.

60 See Recital (109).

61 Services Agreements, paragraph 4.1 (Fees): "*In consideration of [EU Local Affiliate]'s performance of the Services, [LuxOpCo] shall pay [EU Local Affiliate] fees (the "Service Fees") equal to the Applicable Costs (as defined in Exhibit 1) incurred by [EU Local Affiliate] in providing the corresponding Services, plus the Applicable Markup set forth in Exhibit 1. [...]*." Exhibit 1 provides that the "Applicable Costs" is the sum of all operating expenses, as determined pursuant to generally accepted accounting principles in the US, directly and indirectly related to the Services, excluding interest expense, dividends paid by EU Local Affiliate, foreign exchange expense or any other expense excluded by mutual agreement, as deemed appropriate. The "Applicable Markup" is a percentage of the Applicable Costs which varies from 3 – 8 % depending on the characteristics of the service provided and the EU Local Affiliate.

62 As explained in the Recitals to the Service Agreements, the cost plus mark-up is determined on basis of a "comprehensive economic analysis" of the arm's length rate of compensation for the services provided by the EU Local Affiliates to LuxOpCo.

Affiliates in performing the services rendered for LuxOpCo were invoiced to LuxOpCo with an additional mark-up ranging from 3 % to 8 %. In 2013, the EU Local Affiliates recorded the following turnovers: Amazon.co.uk Ltd: GBP [400-500] million; Amazon Logistik GmbH: EUR [100-200] million; Amazon.de GmbH: EUR [90-100] million; Amazon.fr Logistique SAS: EUR [100-200] million; and Amazon.fr SARL: EUR [50-60] million.

2.1.2.3. The License Agreement

(116) With effect from 30 April 2006, LuxOpCo entered into the License Agreement with LuxSCS. Under that agreement, LuxOpCo irrevocably obtained the exclusive right to develop, enhance, and exploit the Intangibles for the purpose of operating the EU websites and any other purpose within the European Country[63] geographic territory[64] in return for a royalty payment (the "License Fee")[65]. Any IP created by or further developed by LuxOpCo on the basis of or as a result of access to the Intangibles[66] is assigned to LuxSCS[67]. LuxOpCo was required to act on its own initiative and risk to protect and maintain the Intangibles[68]. The License Agreement also provided for

63 License Agreement, paragraph 1.4: "European Country" means "*(a) the economic, scientific, and political organization known as the European Union consisting, as of the Effective Time [30 April 2006], of Belgium, France, Italy, Luxembourg, Netherlands, Germany, Denmark, Greece, Ireland, United Kingdom, Spain, Portugal, Austria, Finland, Sweden, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia, and including any and all other countries that may become members of such organization during the Term, and (b) any countries listed as "Applicant countries" or "Other European countries" on the Web page located at http://europa.eu.int/abc/governments/index_en.htm#, or any successors thereto or replacements thereof.*"

64 License Agreement, paragraph 2.1 (a), and paragraph 1.5 on the Licensed Purpose. Paragraph 2.1 (a) provides: "*(a) "Exclusive Intellectual Property License Grant". Amazon EHT [LuxSCS] irrevocably grants AEU [LuxOpCo], under all Amazon EHT [LuxSCS] intellectual property rights in or comprising the Amazon EHT [LuxSCS] Intellectual Property, whether existing now or in the future, the following sole and exclusive right and license to the Amazon EHT [LuxSCS] Intellectual Property during the Term, solely for the Licensed Purpose, to: (i) make, use, reproduce, copy, modify, translate, integrate into or extract from a database and create derivative works of Amazon EHT [LuxSCS] Intellectual Property; (ii) publicly perform or display, import, broadcast, transmit, distribute and communicate to the public by any means whatsoever, including but not limited to wire or wireless transmission process, using broadcasting, satellite, cable or network, license, offer to sell, and sell, rent, lease or lend originals and copies of, and otherwise commercially or non-commercially exploit any Amazon EHT [LuxSCS] Intellectual Property (and derivative works thereof); and (iii) sublicense to Affiliates or third parties the foregoing rights, including the right to sublicense to further third parties. […].*"

65 Amazon internal document: License Agreement, paragraph 2.5 (License Fee), and Exhibit A.

66 Such Intangibles were referred to as "Derivative Works" in the License Agreement, which according to paragraph 1.3 means "*any and all new works created by or for AEU [LuxOpCo] from pre-existing material contained within, or as a result of access to or use of the Amazon EHT [LuxSCS] Intellectual Property [including the Intangibles][…]*".

67 Amazon internal document: License Agreement, paragraph 2.1(b): "*AEU [LuxOpCo] irrevocably and exclusively assigns and agrees to assign to Amazon EHT [LuxSCS], its successors, and assigns, all right, title, interest and ownership in and to any and all Derivative Works of the Amazon EHT [LuxSCS] Intellectual Property created by or for AEU [LuxOpCo] as provided under Section 2.1(a)*".

68 License Agreement, section 9.2: "*(a) AEU [LuxOpCo] shall, at its sole expense, use its best efforts to prevent, investigate, and prosecute any unauthorised use of any Amazon EHT [LuxSCS] Intellectual Property. AEU [LuxOpCo] agrees to promptly inform Amazon EHT [LuxSCS] of any such unauthorised use that comes to the AEU [LuxOpCo]'s attention. To facilitate coordination of enforcement activities, AEU [LuxOpCo] shall consult with Amazon EHT [LuxSCS] before undertaking any actions to prevent such unauthorised use of Amazon EHT [LuxSCS] Intellectual Property. (b) AEU [LuxOpCo] may, at its sole expense, institute and conduct suits to protect its rights under this*

corporate services to be provided by LuxOpCo for the benefit of LuxSCS without any separate remuneration to LuxOpCo[69]. LuxOpCo further agreed to take over all risks associated with all the activities to be performed by it under the License Agreement[70]. If LuxOpCo acquired any IP to be used for the same purpose as the Intangibles from third parties, LuxOpCo was required to license this IP to LuxSCS on a royalty-free basis[71].

(117) LuxOpCo, ASE, AMEU and EU Local Affiliates used the Intangibles to carry out their business activities[72].

(118) Under the License Agreement, LuxOpCo had the right to sub-license the Intangibles to affiliated companies[73]. As of 30 April 2006, LuxOpCo concluded an "Intellectual Property License Agreement" with both ASE and AMEU, under which ASE and AMEU were irrevocably granted non-exclusive licenses to the Intangibles. To a very large extent, both those agreements mirrored the License Agreement between LuxOpCo and LuxSCS. Under those agreements, a royalty payable by ASE and AMEU to LuxOpCo was set in exactly the same manner as the royalty payable by LuxOpCo to LuxSCS under the License Agreement.

(119) Pursuant to the Service Agreements, the EU Local Affiliates were entitled to use the Intangibles as well as other intangible property and trademarks owned or otherwise held by LuxOpCo to the extent necessary for the provision of their services to LuxOpCo. All goodwill from such use solely accrued for the benefit of LuxOpCo[74].

Agreement against infringement any may retain all recoveries from any such suits." See also License Agreement, paragraph 2.3 (Maintenance) and paragraph 9.5 (Compliance, Data Protection).

69 Amazon internal document: License Agreement, paragraph 3.1.

70 License Agreement, paragraph 7 (No Warranties): "*Each party provides its materials and services to the other pursuant to this agreement "as is," "with all faults" and without warranties of any kind, express, implied, statutory or otherwise, including any implied warranties of merchantability, fitness for a particular purpose, reasonable care, workmanlike effort, results, lack of viruses, accuracy or completeness, all of which each party expressly disclaims, and each party assumes the entire risk as to the results and performance of those services and the materials. There is no warranty of title or noninfringement of any intellectual property rights or any warranty against interference with either party's or any other entity's enjoyment of information provided to it relating to this agreement*".

71 So-called "*third party materials*". For example, in February 2011 LuxOpCo acquired full ownership of the LoveFilm Group, including the intellectual property of that group (See Amazon's submission of 4 May 2015). As part of the post-acquisition integration of the [acquisition Q], it was decided by Amazon to centralise all "digital content rights" [...] in LuxOpCo. [...]. License Agreement, section 3.2, provides: "*Third Party Materials. From time to time during the Term, AEU [LuxOpCo] may license or otherwise acquire rights to or ownership of third party materials, which AEU [LuxOpCo] may use in connection with the Licensed Purpose ("Third Party Materials"). If in connection with obtaining a license to Third Party Materials, AEU [LuxOpCo] acquires the right to sublicense such Third Party Materials to Amazon EHT [LuxSCS], then AEU [LuxOpCo] hereby grants to Amazon EHT [LuxSCS] a royalty free and non-exclusive right and license to use such Third Party Materials during the Term in the same manner as and for the same purposes that such Third Party Materials have been licensed to AEU [LuxOpCo]. If AEU [LuxOpCo] acquires ownership of any Third Party Materials, then AEU [LuxOpCo] hereby grants Amazon EHT [LuxSCS] a royalty free and non-exclusive tight and license to use such Third Party Materials during the Term to the full extent that AEU [LuxOpCo] can use such Third Party Materials as the owner of the Third Party Material*".

72 Amazon's submission of 18 January 2016: "*Both LuxOpCo and ASE rely on the Intangibles in operating their businesses. Inventory risk management, pricing, fulfilment, management and third party registration on Amazon's marketplaces, to name a few, are automated to a very large extent and the required technology is licensed from LuxSCS. As a result of this automation, these functions require limited involvement from LuxOpCo and ASE's employees beyond monitoring and management*".

73 License Agreement, paragraph 2.1 (a) (Exclusive Intellectual Property License Grant). See footnote 64.

74 Service Agreements, paragraph 3.1 (Use by Provider).

All intellectual property rights and derivative works thereof as developed or acquired by the EU Local Affiliates during the provision of those services remained the property of LuxOpCo[75].

(120) The License Agreement was in effect for the life of all the licensed Intangibles[76], and could only be terminated in the event of a change of control or substantial encumbrance[77] or in the event of one of the parties failed to cure for failure of its performance under that agreement[78]. Accordingly, LuxSCS had no possibility to unilaterally terminate the License Agreement. The License Agreement was amended in January 2010, with effect from 1 January 2009[79]. That amendment concerned the definition of "EU Operating Profit" used for the purpose of calculating the License Fee[80].

2.2. The contested measure

2.2.1. The contested tax ruling

(121) The contested tax ruling is a one-sentence letter dated 6 November 2003 from the Luxembourg tax administration to Amazon.com, Inc. which states the following:

"After having made myself acquainted with the letter of october [sic] 31, 2003, directed to me by [Advisor 1] just as with your letter of octobre [sic] 23, 2003 and dealing with your position regarding Luxembourg tax treatment within the framework of your future activities, I am pleased to inform you that I may approve the contents of the two letters."

(122) Following a delay in the implementation of the restructuring of Amazon's European operations, Amazon sought confirmation from the Luxembourg tax administration of the continued validity of the contested tax ruling by letter of 5 December 2004, which the latter confirmed by letter of 23 December 2004[81]. The contested tax ruling, initially concluded for five years, was prolonged in 2010 and effectively used until June 2014[82].

2.2.2. The letter of 31 October 2003

(123) In its letter of 31 October 2003 to the Luxembourg tax administration ("Amazon's letter of 31 October 2003"), Amazon sought confirmation of the tax treatment of LuxSCS, its US-based partners and dividends received by LuxOpCo under that structure. That letter explains that LuxSCS, as a *Société en Commandite Simple*, is not deemed to have a separate tax personality from that of its partners and, as a result, it is not subject to corporate income tax or net wealth tax in Luxembourg.

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75 Service Agreements, paragraph 3.2 (Ownership by Company).

76 License Agreement, paragraph 4.1 (Term).

77 License Agreement, paragraph 4.2 (Immediate Termination upon Notice for Change of Control or Substantial Encumbrance).

78 License Agreement, paragraph 4.3 (Termination After Failure to Cure of Performance).

79 Luxembourg's submissions of 21 November 2014, Annex 4.

80 See Recital (128) for the definitions of terms used in the License Fee calculation. Following the amendment, "EU Operating Profits" means EU Revenue minus EU COGS and EU Operating Expenses and, as agreed upon by the Parties from time to time, certain expenses, at cost, not included in the AEU Operating Expenses.

81 See footnote 84.

82 As explained in Recital (102), Amazon's European structure, as referred to in the ruling request and as endorsed by the contested tax ruling, was put into place from May 2006-June 2014. In June 2014, that structure was changed.

(124) Notwithstanding the tax transparency of LuxSCS, LuxSCS or its US-based partners could still be taxed in Luxembourg if their activities were deemed to be carried out through a permanent establishment in Luxembourg. The letter therefore further explains that neither LuxSCS nor its partners could be considered to have a tangible presence in Luxembourg (offices, employees etc.) so that, in the absence of a fixed place of business, LuxSCS would not be deemed to have a separate personality from its partners nor to carry out a commercial activity in Luxembourg[83]. Nor could its partners be regarded as having a permanent establishment in Luxembourg.

2.2.3. The letter of 23 October 2003

(125) In its letter of 23 October 2003 to the Luxembourg tax administration ("Amazon's letter of 23 October 2003"), Amazon requested a tax ruling confirming the treatment of LuxOpCo for Luxembourg corporate income tax purposes[84]. That letter explains Amazon's envisaged business structure in Europe and seeks confirmation that the transfer pricing arrangement for the License Agreement described therein results in "*an appropriate and acceptable profit*" for LuxOpCo "*with respect to the transfer pricing policy and Articles 56 and 164(3) of the LITL*".

(126) That letter refers to an "*economic analysis*" attached thereto, which sets out "*the functions and risks that LuxOpCo was anticipated to undertake, as well as the nature and extent of the Intangibles that are anticipated to be the subject of the Intangibles License*" concluded between LuxSCS and LuxOpCo. On the basis of that analysis, a transfer pricing arrangement was proposed under which the level of the annual royalty (referred to in the letter as the "License Fee") that LuxOpCo would be required to pay to LuxSCS for the use of the Intangibles was established.

(127) Pursuant to that arrangement, the annual royalty would be equal to a percentage of all revenue (the "Royalty Rate") received by LuxOpCo in connection with its operation of the EU websites. As further set out in that letter, the License Fee and the Royalty Rate would be calculated by use of the following method:[85]

> "*1. Compute and allocate to LuxOpCo the "LuxOpCo Return", which is equal to the lesser of (a) [4-6] % of LuxOpCo's total EU Operating Expenses for the year and (b) total EU Operating Profit attributable to the European Web Sites for such year;*
>
> *2. The License Fee shall be equal to EU Operating Profit minus the LuxOpCo Return, provided that the License Fee shall not be less than zero;*
>
> *3. The Royalty Rate for the year shall be equal to the License Fee divided by total EU Revenue for the year;*

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83 As explained in Amazon's letter of 31 October 2003, p. 4: *"Notwithstanding the tax transparency of LuxSCS, it would have been subject to municipal business tax (Article 2 MBTL) on its profits if these profits are derived by a permanent establishment situated in Luxembourg from the carrying out of a "commercial activity" as defined by Article 14-1 ITL".*

84 This letter and Amazon's letter of 31 October 2003 were supplemented with additional information on the restructuring in Amazon's letters to the Luxembourg tax administration of 5 December 2004, 14 April 2006 and 20 April 2006. The Luxembourg tax administration confirmed in its letters to Amazon on 23 December 2004 and 27 April 2006 that: *"As the changes discussed in your letter of April 14, 2006 and in the letter of April 20, 2006 by Mr. [...] from [Advisor 1] will have no effect on the taxation of your group's companies, my letter of November 6, 2003 will remain in force. So, I have no objections to the content of the letters of April 14, 2006 and April 20, 2006 respectively."*

85 Amazon's letter of 23 October 2003, p. 5.

4. *Notwithstanding the foregoing, the amount of the LuxOpCo Return for any year shall not be less than 0.45% of EU Revenue, nor greater than 0.55% of EU Revenue;*

5. *(a) In the event that the LuxOpCo Return determined under step (1) would be less than 0.45% of EU Revenues, the LuxOpCo Return shall be adjusted to equal the lesser of (i) 0.45% of Revenue or EU Operating Profit or (ii) EU Operating Profit;*

6. *(b) In the event that the LuxOpCo Return determined under step (1) would be greater than 0.55% of EU Revenues, the LuxOpCo Return shall be adjusted to equal the lesser of (i) 0.55% of EU Revenues or (ii) EU Operating Profit.*"

(128) For the purpose of the Royalty Rate Computation the following definitions apply:[86]

"EU COGS" means Costs of Goods Sold, computed using US GAAP (Generally Accepted Accounting Principles), attributable to LuxOpCo's operation of the European Web Sites.

"EU Operating Expense" means LuxOpCo's total costs, including intercompany expenses, but excluding: EU COGS, the License Fee, currency gains and losses and interest expense, calculated under U.S. GAAP.

"EU Revenues" means total net sales revenue earned by LuxOpCo through the EU Web Sites, which shall be equal to the sum of (a) the total sales prices of products sold by LuxOpCo, stated on the invoices which are issued to customers, including revenue attributable to gift wrapping and shipping and handling, less: value added taxes, returns and other allowances, and (b) total services revenue earned by LuxOpCo in connection with the sale of products or services by unrelated parties through the EU Web Sites, less value added taxes.

"EU Operating Profit" means EU Revenue minus: EU COGS and EU Operating Expenses."

2.2.4. The Transfer Pricing Report

(129) In response to the Opening Decision, Luxembourg submitted the TP Report.[87] Luxembourg claims that the TP Report is the "*economic analysis*" to which reference is made in Amazon's letter of 23 October 2003. The TP Report was drawn up by reference to the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations prepared by the Organisation for Economic Co-operation and Development .("OECD TP Guidelines") .[88]

2.2.4.1. Functional analysis

(130) Section 3 of the TP Report provides a functional analysis of LuxSCS and LuxOpCo.

(131) According to that functional analysis, LuxSCS's principal activities will be limited to those of an intangible holding company and a participant in the ongoing development of the Intangibles through the CSA[89]. LuxSCS will also license the Intangibles to

86 Amazon's letter of 23 October 2003, p. 6.

87 TP Report, see Recital (4).

88 See TP Report, section 4.1. Overview of Methods.

89 Amazon's letter of 31 October 2003 further explains that "*LuxSCS will retain any and all risk associated with the ownership of the IP rights*".

LuxOpCo, subject to the License Agreement, and will receive royalty payments pursuant to that agreement.

(132) As regards LuxOpCo, the TP Report explains that "*[t]hrough its staff of full-time management employees, LuxOpCo will manage the strategic decision-making related to the EU Web Sites' Retail and Services Businesses, and will also manage the key physical components of the Retail Business*"[90]. According to Amazon's letter of 23 October 2003, LuxOpCo was expected to have "*in total, at least 25 to 30 full-time employees, including certain key pan-European management with responsibility for strategic decision-making in connection with the EU Web sites*"[91], with the remaining full-time employees (approximately 20) to function in areas such as marketing, technology and accounts payable.

(133) The TP Report further explains that "*[f]ollowing the restructuring, it is anticipated that LuxOpCo's principal activities will be focused on the exploitation of Amazon's software platform in an effort to continually develop and improve the software-based business model underlying the Retail Business and Service Business offered through the EU Websites. [...](*) As part of this effort, LuxOpCo's management will work to identify opportunities to improve and enhance the Retail and Service Businesses through the exploitation of new and improved platform features and functionality as they are developed. As both a retailer and service provider, LuxOpCo will strive to provide the optimal costumer experience in all areas including fulfilment, payment, processing, merchandising decisions and monitoring of third-party seller performance [...].*"[92]

(134) In its role as retailer, LuxOpCo was expected to take merchandising and pricing decisions, and to manage all aspects of the order fulfilment process[93]. As the operator of the service business, LuxOpCo would also be "*responsible for strategic decisions relating to the selection of third-party merchants and product categories, and for marketing to and negotiations with third-party merchants*"[94]. For the purpose of operating the EU websites, LuxOpCo was to use the Intangibles which it licensed from LuxSCS. LuxOpCo was expected to hold legal title to all inventory[95]. LuxOpCo would assume all risks associated with holding inventory and selling products through the EU websites[96]. According to Amazon's letter of 23 October 2003, LuxOpCo was to own and use the Luxembourg-based transaction processing servers to complete the processing of, and authorise payments for, customer and third-party seller transactions, including payments to third-party merchants[97].

(135) LuxOpCo was to contract with ASE, which would act as a service commission agent in its own name but for the benefit of LuxOpCo, in connection with Amazon's third-

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90 TP Report, p. 13.

91 Amazon's letter of 23 October 2003, p. 3-4. The management is expected to account for 8-10 FTEs, and includes the following positions: General Manager Europe, Luxembourg Country Manager, Director, Pan-European Supply Chain, Director, Pan-European Operational Excellence, Director, Pan-European Operations Engineering, Director of Information Technology, Director of Operations Finance, Europe and Director of Operations Finance, Europe.

* *Confidential information.*

92 TP Report, p. 30.

93 TP Report, p. 13.

94 TP Report, p. 13.

95 TP Report, p. 13.

96 TP Report, p. 13.

97 Amazon's letter of 23 October 2003, p. 4.

party seller programs in Europe. ASE's services would primarily consist of certain order processing services associated with the service business.

(136) The EU Local Affiliates located in Germany, France and the UK were to provide various services with respect to the EU websites, including certain customer referral and support, marketing and fulfilment services[98].

(137) According to Amazon's management forecasts submitted for the purpose of the TP Report, LuxOpCo was expected to expand its revenues in the course of its operations from approximately EUR 3.2 billion in 2005 to approximately EUR 8.3 billion in 2010 and incur the following costs: the cost of goods as a percent of revenue was projected on average at approximately 77.5 %, leading to a gross margin of about 22.5 %. Following the 2006 restructuring, LuxOpCo was to assume the on-going costs associated with the management and operation of the Amazon platform in Europe, including payment and collection processing expenses, bad debt expenses, certain system support expenses, as well as the cost of salaries of the management, technology and other personnel working to support the Amazon platform operations in the region[99]. The assumptions underlying the management forecast were neither disclosed nor reviewed in the TP Report[100].

2.2.4.2. Selection of the most appropriate transfer pricing method

(138) Section 5 of the TP Report deals with the selection of the most appropriate transfer pricing method for determining the arm's length nature of the Royalty Rate.

(139) To determine the remuneration attributable to LuxOpCo and the arm's length level of the royalty to be paid by LuxOpCo to LuxSCS under the License Agreement, the TP Report proposes alternative transfer pricing arrangements: one based on the comparable uncontrolled price ("CUP") method and another based on the residual profit split method[101].

2.2.4.3. Transfer pricing assessment based on the CUP method

(140) Section 6.1 of the TP Report calculates an arm's length range for royalty on the basis of the CUP method.

(141) First of all, searches were performed for comparable transactions in Amazon's own internal database of license agreements and an external agency was commissioned to conduct a search for license agreements involving intangible assets similar to those of Amazon. The transactions identified as a result of the searches were not considered sufficiently comparable and were therefore rejected for the purpose of the CUP analysis.

(142) Next, the TP Report identified as relevant the following agreements entered into by Amazon since 2000 with third-party retailers under which Amazon made its technology platform available to those retailers: the Strategic Alliance Agreement between Rocket.zeta, Inc., Amazon.com, Inc., target.direct LLC and Target Corporation (the "Target Agreement")[102], the Strategic Alliance Agreement between Rock-Bound, Inc. and ToysRUs.com LLC (the "ToysRUs Agreement"); the Product

98 TP Report, p. 14.
99 TP Report, p. 29.
100 TP Report, p. 30.
101 TP Report, p. 20-21.
102 See […].

Listing Agreement between Amazon.com Payments, Inc and Circuit City Stores, Inc. (the "Circuit City Agreement"); the Mirror Site Hosting Agreement between Frontier.zeta, Inc. and Borders Online LLC (the "Borders Agreement"); and the Mirror Site Hosting Agreement between Amazon.com International Sales, Inc. and Waterstone's Bookseller Ltd. (the "Waterstones Agreement"). Amazon refers to these agreements as the "M.com Agreements". Upon review of those agreements, the TP Report concludes that the [A] Agreement provides a comparable arrangement to the extent that the rest of the contracts "*did not include the provision of the eCommerce technology platform*"[103].

(143) Pursuant to the [A] Agreement, Amazon agreed to create, develop, host and maintain a new [A] website and a [A] store on Amazon websites, which were to replace [A]'s existing e-commerce website. The functionalities to be included in the [A] website would be substantially equivalent to those generally incorporated in the Amazon websites. In return, [A] was to pay Amazon compensation consisting of, among others, set-up fees[104], base fees[105], and sales commissions[106].

(144) To make that compensation comparable to the License Fee (referred to in the TP Report as the "Royalty Rate"), the set-up fees were amortized and allocated to each of the four periods referred to in the agreement and, together with the annual basic fee, they were converted into a percentage of sales (ranging from 3.4 % to 7.2 %). Since the commission fee included in the [A] Agreement ranged from 4 % to 5 % of sales, the TP Report's first conclusion was that the implied royalty rate in the [A] Agreement ranged from 8.4 % to 11.7 % of sales. However, [A] had also committed to pay Amazon certain fees to compensate for both excess order capacity and excess inventory level. Those fees, referred to in the agreement, were also converted into a percentage of sales, ranging from 1.2 % to 0.7 %. Therefore, the arm's length range for the Royalty Rate was initially calculated to be between 9.6 % and 12.6 % of sales.

(145) Finally, since the [A] Agreement did not provide [A] with access to Amazon's customer data, the TP Report included an adjustment to align the CUP with the fact that LuxSCS granted LuxOpCo access to Amazon's customer data. Accordingly, using the information available in the [B] Agreement, an upward adjustment of 1 % was proposed, resulting in an arm's length range for the Royalty Rate between 10.6 % and 13.6 % of LuxOpCo's sales.

2.2.4.4. Transfer pricing assessment based on the residual profit split method

(146) Section 6.2 of the TP Report calculates an arm's length range for the License Fee (referred to in the TP Report as the "Royalty Rate") on the basis of the residual profit split method. In its application of that method, the TP Report estimated the return associated with LuxOpCo's "*routine functions in its role as the European operating company*"[107] based on the mark-up on costs to be incurred by LuxOpCo[108].

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103 Amazon's submission of 28 October 2015: "Meeting with the Case Team", p. 8.

104 USD 7 million in the first year and USD 8 million in the second year of the contract; in: Amazon internal document: Agreement between Amazon and [A], p. 155.

105 Ranging from USD 7 million in the second year of the agreement to USD 35 million in the fifth year; in: Amazon internal document: Agreement between Amazon and [A], p. 155.

106 Initially 5 %, diminishing to 4 % in the fourth and the subsequent years; in: Amazon internal document: Agreement between Amazon and [A], p. 157.

107 TP Report, p. 30.

(147) To determine an arm's length range for that mark-up, the TP Report conducted a search to identify comparable companies generally identified as engaged in the management and operation of software-based business. A comparable companies search in the Amadeus database[109] using selection criteria related to geographic region[110], keyword search in business descriptions[111] and industry classification of the search combined with manual screening identified seven companies considered comparable to Amazon[112].

(148) On that basis, the TP Report defined a "net cost plus mark-up" as the profit level indicator for testing the arm's length remuneration attributable to the anticipated functions of LuxOpCo, which was defined as operating income divided by the sum of cost of goods and operating expenses[113]. Based on data concerning the seven comparables, the following three-year average (1999-2001) interquartiles range was presented: lower quartile was 2.3 %, median was 4.2 %, and upper quartile was 6.7 %. The table presenting the results indicates that the figures are percentages of net sales[114].

(149) As a result, a mark-up of [4-6] % was selected and applied to the operating expenses of LuxOpCo to determine "*the relevant routine return attributable to LuxOpCo's functions*"[115]. That return was subsequently deducted from LuxOpCo's operating profit. The resulting difference between that return and LuxOpCo's recorded profit, the residual profit, was considered by the TP Report to be wholly attributable to the use of the Intangibles licensed from LuxSCS.

(150) Finally, the TP Report divided each of the projected annual residual profits by the projected net sales of LuxOpCo to obtain an indication of the Royalty Rate. On that basis, the TP Report concluded that "*a Royalty Rate in a range of 10.1 to 12.3 percent of net revenues to be charged by LuxSCS to LuxOpCo would be consistent with the arm's length standard under the OECD Guidelines.*"[116]

(151) The calculations made in the TP Report, are summarised and illustrated in Table 1.[117] Columns 1 and 3 have been added by the Commission to explain those calculations:

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108 TP Report, p. 28.

109 The Amadeus database is a database of financial information for public and private companies across Europe. It is maintained by Bureau van Dijk, or BvD, a publisher of company information and business intelligence.

110 The tax advisor limited the search to the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden and Switzerland.

111 The following keyword search terms were used: Computational, Design, Marketing, Merchandising, Programming, Promotion, Services, Web Design.

112 Algoriel, Askell, Decade, Seresco SA, Societe de Gestion de Terminaux Informatiques, Solutec and Sydelis.

113 TP Report, Annex V.

114 TP Report, Annex V, p. 46.

115 TP Report, p. 31.

116 TP Report, p. 31.

117 TP Report, p. 32.

Table 1 - Calculation in the TP Report, cf. p. 32 of the TP report (Column 1 and 3 added by the Commission)

1	2	3	4	5	6	7	8	9
	EUR million		**2005**	**2006**	**2007**	**2008**	**2009**	**2010**
a	Revenue		3,154.2	4,299.9	5,073.9	5,987.1	7,064.7	8,336.3
b	COGS		2,446.9	3,332.7	3,932.6	4,640.5	5,475.8	6,461.4
c	Gross Profit	a-b	707.3	967.2	1,141.3	1,346.6	1,588.9	1,874.9
d	Operating expense		89.9	106.0	121.7	143.7	171.2	204.2
e	Intercompany (co.uk, .de, .fr)		279.4	338.4	395.6	456.2	524.1	602.7
f	LUX Commissionaire expense		2.8	3.4	4.1	4.9	5.9	7.0
g	Operating expense (incl. Intercompany)	d+e+f	372.1	447.8	521.4	604.8	701.2	813.9
h	Estimated Operating Net Profit (Loss) before Routine Return	c-g	335.2	519.4	619.9	741.8	887.7	1,061.0
i	Routine Return to LuxASE		0.14	0.17	0.20	0.24	0.29	0.35
j	Routine Return to LuxOpCo	[4-6]%*g	16.8	20.2	23.5	27.2	31.6	36.6
k	Estimated Residual Profit Payable to LuxSCS	h-i-j	318.3	499.1	596.2	714.3	855.8	1,024.0
l	Effective Royalty Rate (as % of Revenue)	k/a	10.1%	11.6%	11.8%	11.9%	12.1%	12.3%

2.2.4.5. Reconciliation of the two transfer pricing arrangements

(152) Summarising the transfer pricing analyses of the License Agreement using the CUP method and the residual profit split method, the TP Report considered that the results converge and indicated that an arm's length range for the Royalty Rate from LuxOpCo to LuxSCS under that agreement is 10.1 % to 12.3 % of LuxOpCo's sales.

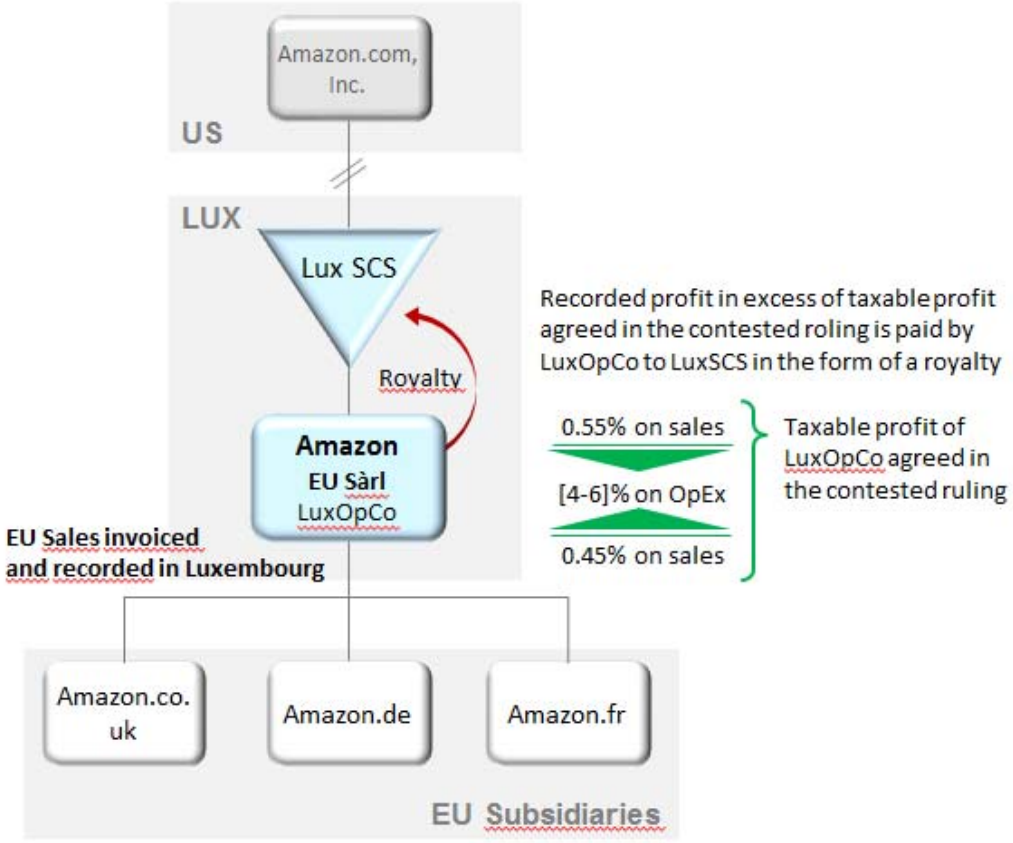
(153) The TP Report then concludes that "*while it is reasonable to conclude that a Royalty Rate chosen from within the range of royalty rates implied by both these methods would be consistent with the arm's length principle, there may be minor differences in the precise future Intangibles transferred under the [A] agreement that would account for the slight differences in results under the two methods. […] it is reasonable to conclude […] that the residual profit split analysis is less likely to produce biased estimates, and accordingly, may be considered to be a more reliable measure of the arm's length Royalty Rate.*"[118]

2.2.5. Consequences of the contested tax ruling

(154) By the contested tax ruling, the Luxembourg tax administration endorsed the contents of Amazon's letters of 23 and 31 October 2003. In particular, it accepted that the transfer pricing arrangement for the purposes of determining the level of the annual royalty to be paid by LuxOpCo to LuxSCS under the License Agreement, which in turn determined LuxOpCo's annual taxable income in Luxembourg, was at arm's length. That arrangement is summarised in Figure 2:

[118] TP Report, p. 34.

Figure 2: Structure of Amazon's European Entities 2006-2014 incl. arrangement for royalty payment



(155) The contested tax ruling was relied upon by LuxOpCo during the relevant period to determine its annual corporate income tax liability in Luxembourg for the purpose of filing its annual tax declarations. The contested tax ruling was also relied upon by LuxSCS and its US-based partners in that it confirms that neither LuxSCS nor its partners are subject to Luxembourg corporate income tax, municipal business tax or, for the latter, tax on their partnership interest in LuxSCS[119].

(156) Table 2 illustrates the implications of the contested tax ruling for the calculation of LuxOpCo's taxable base in Luxembourg and the level of the royalty payment (the License Fee) to LuxSCS since 2006. The Commission recalls that LuxOpCo operates as the parent entity in the fiscal unity formed with ASE and AMEU, and that those companies are accordingly treated as one single tax payer for Luxembourg tax purposes. Accordingly, Table 2 is drawn up on a consolidated basis, and no distinction is made between LuxOpCo, ASE and AMEU in the following parts of this Decision.

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119 Due to LuxSCS's treatment as a fiscally transparent entity in Luxembourg, royalty payments from LuxOpCo to LuxSCS are not considered taxable income of LuxSCS in Luxembourg, but of its partners in the US. Moreover, with effect from 1 January 2004, Luxembourg has not imposed any withholding tax on royalty payments on intangible property to non-resident recipients. Accordingly, no taxes are levied on LuxSCS's profits by Luxembourg. By contrast, since the US does not consider LuxSCS as fiscally transparent, but rather as a separate corporate entity resident in Luxembourg, the taxation of the LuxSCS's partners in the US may be deferred indefinitely, so long as none of LuxSCS's profits are repatriated to the US. The different tax treatment of LuxSCS in Luxembourg (fiscally transparent) and in the US (fiscally non-transparent) thus arises from a so-called "hybrid mismatch", i.e. a difference in the Luxembourg and US tax rules on the entity's characterisation.

Table 2: Calculation of LuxOpCo' taxable base and royalty payments 2006-2013

Luxembourgish fiscal unity group (EUR million)	2006	2007	2008	2009	2010	2011	2012	2013
Total revenue	1,979.4	3,545.7	4,298.6	5,605.4	7,628.8	10,086.3	13,312.1	[15 000 – 15 500]
Net COGS	1,610.8	2,828.3	3,406.1	4,421.6	6,084.4	8,078.0	10,486.6	[11 500 – 12 000]
Total operating expense	262.5	476.8	530.0	637.6	918.3	1,461.7	2,252.9	[3 000 – 3 500]
Thereof								
Expenses applicable to mark-up	*262.5*	*439.9*	*493.6*	*597.0*	*801.9*	*1,313.1*	*2,041.7*	*[2 500 – 3 000]*
Thereof								
LuxOpCo - OpEx	*78.6*	*162.6*	*203.6*	*258.4*	*317.7*	*483.1*	*662.7*	*[800 – 900]*
LuxOpCo - Intercompany	*183.8*	*277.3*	*290.0*	*338.6*	*484.1*	*830.1*	*1,379.0*	*[1 500 – 2 000]*
Expenses excluded from mark-up (Mngt and RSU)	*0.0*	*36.9*	*36.4*	*40.6*	*116.4*	*148.5*	*211.2*	*[200 – 300]*
Resulting operating profit	106.1	240.5	362.6	546.2	626.1	546.6	572.7	[600 – 700]
Estimated Total Return to Lux Fiscal Unity Group at [4-6]% of adjusted OpEx	11.8	19.8	22.2	26.9	36.1	59.1	91.9	[100 – 200]
Ceiling/floor analysis								
Profit ceiling (0.55% of revenue)	10.9	19.5	23.6	30.8	42.0	55.5	73.2	[80 – 90]
Profit floor (0.45% of revenue)	8.9	16.0	19.3	25.2	34.3	45.4	59.9	[60 – 70]
Luxembourg consolidated Profit - per Ceiling/Floor and Return	**10.9**	**19.5**	**22.2**	**26.9**	**36.1**	**55.5**	**73.2**	**[80 – 90]**
Royalty payment (Lux fiscal unity group to LuxSCS)	**95.2**	**221.0**	**340.4**	**519.3**	**590.0**	**491.1**	**499.4**	**[500 – 600]**

(157) According to the calculation of the License Fee to LuxSCS[120], the cost base used to determine LuxOpCo's taxable basis for Luxembourg tax purposes are its operating expenses and the costs incurred by the EU Local Affiliates which are subsequently reimbursed by LuxOpCo (specified in Table 2 as "LuxOpCo - Intercompany"). The costs of goods sold and certain other costs, referred to as "expenses excluded from the mark-up (Mngt and RSU)" in Table 2, are excluded from the calculation of LuxOpCo's taxable profit. The latter category of expenses comprises the following costs: (i) as from 2008, charges by US affiliates of Amazon.com, Inc. for support services,[121] which were not foreseen at the time of the contested tax ruling; (ii) beginning in 2010, Amazon.com, Inc. charged LuxOpCo for the shares awarded as stock compensation to employees of LuxOpCo and certain of its direct and indirect European subsidiaries[122]. Amazon claims that those charges did not change the functions and risks of LuxOpCo.

(158) The application of the [4-6] % mark-up on the sum of LuxOpCo's operating expenses and intercompany expenses produces the Estimated Total Return To Lux Fiscal Unity Group. This result is then tested against the ceiling and the floor criteria (0.55 % and 0.45 % of revenues respectively). In cases where the Estimated Total Return was higher than 0.55 % of the revenues (as in years 2006, 2007, 2011, 2012 and 2013), the application of the ceiling was determinant for assessing LuxOpCo's taxable income in Luxembourg, referred to in Table 2 as the "Luxembourg consolidated Profit – per Ceiling/Floor and Return".

(159) Finally, the Luxembourg consolidated Profit (referred to as the LuxOpCo return in the ruling request) is subtracted from the operating profit (referred to as the "EU Operating profit" in the ruling request) to determine the License Fee due to LuxSCS.

2.3. Additional information submitted in the course of the formal investigation

(160) During the course of the investigation, Amazon provided information on the European online retail market, on its business model in general and on its European operations in particular, on the IP licensing agreements it concluded with unrelated entities, and on its new corporate and tax structure in Luxembourg with effect from June 2014. That information complements the information already presented in Sections 2.1 and 2.2.

2.3.1. Information on the European online retail market

(161) The European online retail market was the subject of a report commissioned by Amazon from [Advisor 3], a consultancy company, which contains an analysis of the economic trends of the e-commerce sector in Europe ("the [Advisor 3] Report")[123]. The [Advisor 3] Report describes "online retail" as the online sales of physical goods

120 As explained in Recital (127).

121 These support services included, among others, general administrative, corporate and public relations, accounting and auditing, budgeting, tax and legal support as well as training and employee development.

122 Amazon's submission of 21 August 2015, p. 7-8.

123 [Advisor 3] Report: "E-commerce in Europe between 2006 and 2013: dynamics and economics", 11 May 2017. As indicated on p. 7: "*Online retail is a segment of the e-commerce sector. Online retail focusses on online sales of physical goods by online retailers, i.e., operators purchasing goods, holding them in their inventory and selling these goods online.*"

by online retailers, i.e. operators purchasing goods, holding them in their inventory and selling them online[124].

(162) According to that report, the activities of online retailers are more similar to the activities of physical retailers, than to that of digital service providers[125]. The main difference between physical retailers and online retailers lies in the product distribution channel used[126]. The study also indicates that online retailers are structurally less profitable than digital service providers, since online retailers have an essentially variable costs basis. The costs structure of digital service providers is more fixed than that of retailers, which allows for economies of scale and higher margins once a company has reached a critical size[127]. For retailers, be it physical or online, the impact of economies of scale on the profitability is limited, since the vast majority of costs are variable. Changes in the cost of goods sold, discounts and logistics costs, which are a major share of the total costs, are strongly linked to business volumes[128]. This factor, together with the intense competition characteristic to the online retail sector, resulted in negative average EBIT margins on the European online retail market. In the period 2006-2013, the relation of the average EBIT margin to sales was -0.5 %.

(163) The [Advisor 3] report's analysis of the market dynamics in the five most populated countries in Europe[129] shows that "*the online retail segment experienced a strong growth and was subject to intense competition between 2006 and 2013.*"[130] In particular, "*[t]he intensity of competition required online retailers to invest heavily to sustain the market segment growth and keep up with the competition, thus putting margins under pressure when not pushing them into negative territory. Online retailers were willing to sacrifice short-term profitability, with the hope that investments undertaken would generate profit in the long run.*"[131] The report concludes that in order to succeed on competitive European retail markets, it is necessary to consider the specific local features of these markets[132].

2.3.2. Information on Amazon's business model

2.3.2.1. The "three pillars" of Amazon's retail business model

(164) According to Amazon[133], the key drivers of its retail business are selection (product/merchandise offerings[134]), price, and convenience (easy-to-use

124 [Advisor 3] Report, 11 May 2017, Preamble, p. 7.

125 [Advisor 3] Report, 11 May 2017, par. 18 and 67, p. 8 and p. 30.

126 [Advisor 3] Report, par. 18. As explained in par. 20 of the [Advisor 3] Report, "*[t]he main difference between traditional retailers and online retailers lies in the product distribution channel used: Online retailers sell their products through a website and deliver them to customers using advanced information systems and complex logistics infrastructure without physical stores. Their cost structure reflects the investments in the IT and in shipping and logistics infrastructure and technology; Traditional physical retailers distribute their products in stores, and bear the costs of renting the physical outlets, which are not borne by online retailers*".

127 [Advisor 3] Report, 11 May 2017, par. 24-25, p. 11.

128 [Advisor 3] Report, 11 May 2017, par. 29, p. 13.

129 The report indicates that this would be the UK, Germany, France, Spain and Italy.

130 [Advisor 3] Report, 11 May 2017, par.11, p. 5.

131 [Advisor 3] Report, 11 May 2017, par.12, p. 5.

132 [Advisor 3] Report, 11 May 2017, par. 77, p. 33-34.

133 See Amazon.com Inc, 2016 Annual Report, p. 3: "*We serve consumers through our retail websites and focus on selection, price, and convenience*".

functionality, fast and reliable fulfilment, timely customer service, feature-rich and authoritative content, as well as a secure transaction environment)[135], whereby selection comes first, then price, and then convenience[136]. These key drivers are referred to by Amazon as the "three pillars"[137], and are traditional retail objectives[138]. According to Amazon, executing the three pillars is critical and requires uniqueness and innovation in product offering, technology, business line, geography etc.,[139] depending mainly on human intervention. The three pillars must be adapted to each local market where Amazon operates[140].

(165) Selection: According to Amazon, selection is one of the key drivers of its success. Amazon employees define it as offering customers everything they may want to buy, which requires identification of customers' tastes and buying preferences in a given market, recruiting relevant suppliers and ensuring that the products are in stock[141]. According to Amazon, there is a tightly linked correlation between selection and revenue[142]. Amazon strives to have the widest selection possible and to continuously

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134 Amazon offers a wide selection of consumable and durable goods that includes electronics and general merchandise as well as media products available in both a physical and digital format, such as books, music, video, games, and software; Amazon.com, Inc. 2016 Annual Report, p.68.

135 Convenience is based on continuous innovation in software development, merchandising and management; See Amazon.com Inc., 2006 Annual Report, p.4. As further confirmed by statements of Amazon employees, see e-mail of [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], dated 16 June 2008, in: Deposition of [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg] – Exhibit 25: "*We need to continue to focus on the retail basics: driving down COGS, driving fast track in-stock, category expansion, selection expansion within categories."* and Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 826:17-18: "*You know, we are a very physical business at the end of the day*".

136 Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 427:18-23.

137 Amazon Final Transcripts: [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 4 November 2014, par. 588:25, par. 589:1-4.

138 Amazon Post trial brief, p. 18, par. 35, and Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 427:18-23, Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 427:18-23.

139 Amazon Post trial brief, p. 19, par. 39-41.

140 Amazon Post trial brief, p. 28, par. 71.

141 Selection also includes having the suitable accessories. Offering the right accessories is very important for Amazon in particular for achieving a positive margin in its sales of electronic goods. See Deposition of [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 200, par. 24-25, p. 201, par. 1-7: "*I mean, in general, it is life critical for a successful electronic retailer to sell accessories with the device for the simple reason you make no margin on the device or low margin, and you make higher margin on the accessories, with the exception of few others that have managed to make high margin on devices, but the usual stuff is, the money is made on the accessory and it's critical*". Matching the product with a suitable selection of fitting accessories cannot exclusively be done by an algorithm, but requires (local) human intervention, see Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 201, p. 203, par. 8-11, par. 9-17, p. 204, par. 3-14: [...].

142 See, Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 21, par. 11-12: "*You need to have something to sell, right*?"; See also, Amazon Final Transcripts: [Vice President European Retail Business, responsible for

grow the number of products offered[143]. Amazon continuously expands its selection, because the broader the selection, the better the customer experience[144].

(166) Since preferences are local and category and vendor preferences differ by geography[145], selection is also local, as tastes and cultures are locally different[146]. This can be seen from comparing Amazon's top selling items, which are different in each country[147]. The goal and main responsibility on country level is to build a business mainly focused on physical retail and to create a relevant selection for the customer[148]. The creation of such a relevant selection happens through personal negotiation (humans with humans)[149].

(167) Within Amazon, selection is created in three ways: (i) through the acquisition of companies, (ii) partnerships with suppliers, and (iii) third-party programmes, such as Marketplace. For instance, Amazon started its tool business in the US by acquiring an existing company that already sold tools to access the existing vendor relationships and the selection that Amazon wanted to add to its retail business[150]. Partnering with suppliers requires specific market know-how and building trust with suppliers[151]. Once a partnership is established with a supplier, local vendor managers have to maintain that relationship, respecting the conditions of the suppliers and knowing the local market. Amazon's Marketplace offers other retailers the use of Amazon's platform for their e-commerce business, even if they are direct competitors of Amazon. Amazon created the technical account management

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all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 918: 10-18: *"One would say that if you don't have a product, you can't sell it. […] The more you add selection, the more your capacity to generate revenue increases*".

143 Amazon Post trial brief, p. 18, par. 36.

144 Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 420:3-4.

145 Amazon Post trial brief, p. 30, par 78.

146 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 42, par. 15-20.

147 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 73, par. 20-25, p. 74, par. 2-6. The high importance of localisation was confirmed in statements of Amazon employees: Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 95, par. 5-6: *"Retail is a very local thing, […]"*; Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France] 5 November 2014, par. 909:10-17; *"[...] important for us to understand is not what is selling somewhere else; it's what local customer needs and wants"*.

148 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 43, par. 19-21. Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 961: 17-23.

149 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 25, par. 19-20.

150 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg] 4 November 2014, par. 761:19-24.

151 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 762:1-7, par. 763: 9-10; Deposition [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 17 January 2013, p. 23 par. 23-25, p. 24 par. 1-7: [...].

("TAM"), which is the contact point for technical questions of Marketplace sellers after their launch on the Amazon websites. Amazon also developed its technology to allow self-service sign up for potential sellers on the Marketplace and, by 2010/2012, self-service sign up became more important for Amazon's Marketplace business[152].

(168) Price: According to Amazon, price is its second most important business driver. Amazon endeavours to keep prices as low as possible[153]. While manual pricing was predominantly used at Amazon until 2009[154], prices have since been set by a pricing algorithm.

(169) Convenience: According to Amazon, its third business driver is convenience. Convenience consists of several goals aimed at facilitating and improving the customer experience, such as (i) helping customers find what they are searching for, while ensuring complete product information for the customer, and (ii) delivering purchased products as quickly and accurately as possible[155].

2.3.2.2. Online marketing efforts

(170) In addition to selection, price and convenience, Amazon's online marketing efforts are a key driver to bring traffic to Amazon websites and increase retail sales[156].

(171) Prior to 2003, Amazon cooperated with international advertising agencies to support its marketing efforts. This changed in 2003, when Amazon started to pursue its own online marketing efforts. One of Amazon's main online marketing tools is its "Associates Program"[157], which is a key traffic driving initiative[158]. Amazon

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152 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 800: 19-23.

153 Amazon Post trial brief, p. 19, par. 38.

154 Amazon Post trial brief, p. 61, par. 182: By 2005, Amazon's pricing technology was insufficient in the light of its business needs to have competitive prices and was heavily dependent on manual intervention.

155 Amazon Post trial brief, p. 18-19, par. 37.

156 See Amazon Final Transcripts: [Senior Vice President, Chief Financial Officer, Amazon Corporate LLC, US], 17 November 2014, par. 2883: 6-18, p. 78: "*Yes. It's -- I think the emphasis, though, should be on, you know, when we do marketing, this is back during this time frame, and until very recently, that the biggest portion of our marketing was to drive very specific customer transactions. And so it says increase customer traffic to our websites, that would certainly be the largest piece and the way we do that is, you know, specifically by we have an associates program, we also use various online marketing and it's to drive -- if someone searches on a Samsung TV, it's to try to drive them to our, you know, detail page to buy on that transaction. That's what we're attempting to do.*"

157 This programme was of paramount importance for Amazon. See Amazon Final Transcripts: [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 14 November 2014, par.2755:1-7, :[...]. Amazon spends significant funds on this programme, cf. Table 7.

158 See Deposition [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 17 January 2013, p. 175, par. 1-3. The marketing organisation was a central function in driving traffic to the Amazon website. See also Deposition [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 17 January 2013, p. 174: 10-12; Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 36: 1-3; Amazon Final Transcripts, [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 907: 1-2:[...]; and Amazon Final Transcripts: [Vice President Technology-Software Development, Amazon Web Services, Inc. US] 7 November 2014, par. 1532:7-8: The Associates Program brought Amazon a "*[…] nice influx of customers.[…]*."

developed the Associates Program to establish marketing partnerships with so-called "associated websites" that advertise Amazon or its products to channel internet traffic to Amazon websites[159].

(172) Once the technology for the Associates Program was developed, it had to be integrated in each country with local associate websites. Consequently, the implementation of the Associates Program could only be done locally[160]. Therefore, Amazon's Associates Program team was split in a "software team" and a "recruitment team" (i.e. a business development team). While the software team was based entirely in Seattle, the recruitment teams were established locally in countries where Amazon operated a website[161], such as Germany, the UK, and Japan.[162]

(173) The selection of the most relevant local partner websites (websites that advertise Amazon products) for the Associates Program, which would subsequently increase traffic to Amazon's websites, requires local market know-how[163]. Therefore, the network of associated websites is created by local Amazon teams. This includes recruiting the local websites (including the EU websites), establishing the association fee, and controlling instances of fraud. This process starts with large players like Google and goes down to special interest websites with few visitors. All agreements are negotiated locally, because local conditions have to be considered for search engine optimisation, even with global websites such as Google[164].

2.3.2.3. Technology

(174) Amazon describes itself as a technology company which "*approaches retail as an engineering problem*"[165]. Thus, technology is an important part of Amazon's business. Technology allows Amazon to provide competitive prices, target suggestions for items to particular costumers, process payments, manage inventory and ship products to customers. Technology is also necessary to support the scale of the business, since Amazon's business strategy relies on constant expansion[166].

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159 Deposition [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 17 January 2013, p. 69: 24-25, p. 70: 1-6.

160 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 117, par. 6-12: [...].

161 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 73 par. 25, p. 74 par. 1-7.

162 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 182 par. 1-4.

163 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 105, par. 25, p. 106, par. 1-15: [...], Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 107 par. 2-5: [...].

164 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 102, par. 4-14. See also Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 41: par. 22-25:[...].

165 Amazon's submission of 22 July 2016, p. 1.

166 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business, p. 4. Amazon provides the following example: "*By way of illustration, a very large brick-and-mortar retailer might have tens of thousands products for sale: in contrast, Amazon's European websites offered nearly 3.7 million distinct products for sale in 2005 and around [20-30] million in 2013. A very successful brick-and-mortar retailer might process tens of thousands transactions each year: in 2005, Amazon's European websites processed nearly 71 million distinct orders, and that number grew to over [1-1,5] billion in 2013. It would simply not be possible to employ a sufficient number of individuals, for*

(175) Amazon's technology is not static, but is continuously developed and improved. If Amazon did not update and maintain its technology, Amazon would not be able to provide the "*comprehensive e-tail experience that underpins its commercial success.*"[167] In addition to maintaining and improving the existing technology, Amazon's teams develop software that supports new functionalities that are added over the years[168]. As stated by Amazon, this is vital to its business since "*[...] constant software development and innovation is indispensable to prevent Amazon's technology from becoming obsolete and the failure of its business operations.*"[169] Amazon strives to be reliable, available, fast and flexible in its operations[170].

(176) Amazon relies on both software and hardware technology[171]. Its software infrastructure is based on a so-called "service-oriented architecture", which is essentially a collection of functions ("services") in the software that are able to communicate with each other. The individual services of Amazon's service-oriented architecture work together to provide varying types of retail functionality, both in internal processes and towards costumers[172]. This ensures, among others, easier maintenance of the individual software components, and a higher degree of innovation.

(177) The main components of Amazon's software technology are described below:

(a) Software platform: the software code developed by Amazon to operate its web sites consists of complex software tools that run the various features of the websites, such as search and navigation, order processing and personalisation. The software tools at the root of the platform form an integrated system that is constantly being improved, reinforced and modified. The main features include operating speed, extent of functions and flexibility in the response to users' needs.

(b) Appearance of the website: the design creates a unique "presentation" of the website.

(c) Catalogue software: the catalogue consists of all the information on the products sold by Amazon on its websites. Amazon's catalogue is notable for the extent of the information on products that it can obtain through querying other services, such as availability and pricing data.

(d) Search and navigation function software: the software tools supporting the search and navigation functions of the websites allow the large quantity of

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example, to determine the price on millions of unique products – let alone to decide what the in-stock levels should be for those products or individually to process every customer order."

167 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business, p. 4.

168 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business, p. 3. The following example is provided: "*While some functionality, such as, for example, identity, which allows customers to log on the website, or Item Master Service, which maintains a catalogue of all products sold on Amazon, has been provided since the very first days of Amazon's operations, the underlying technology would have been rewritten entirely (and continuously) over the years. [..] the identity technology used by Amazon in 2010 had little to do with the identity technology used prior to 2005 – the 2005 service has been disassembled and rewritten as a number of smaller, more manageable services that together provide the identity functionality, to adapt the technology to the evolution of the scope of Amazon's operations.*"

169 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business, p. 4.

170 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business, p. 1.

171 The hardware technology is physical devices, in particular servers.

172 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business, p. 2-3.

information contained in the product catalogues to be flexibly and logically organised and sorted. The site navigation developers use these tools to organise the data so that they can maximise the likelihood that customers will find what they are looking for.

(e) Logistics software: the logistics process uses software developed by Amazon to manage the inventory, supply chain, logistics and restocking.

(f) Order processing software: order processing uses software developed by Amazon to perform certain functions, in particular communication with Amazon order management centres to confirm product availability, validate dispatch, estimate the delivery date, and communicate gift packaging requirements and other customer preferences.

(g) Customer service software: the customer service representatives use software developed by Amazon to monitor customer orders and respond fully and quickly to the wide variety of these.

(h) Personalisation functions software: Amazon has developed, and is continuing to develop software tools that enable the Amazon databases to store, organise and retrieve a large amount of data on the preferences and purchase history of individual customers. This function results in a better experience for users and is more likely to generate repeat purchases.

2.3.3. Additional information on LuxOpCo

2.3.3.1. LuxOpCo's organisational structure

(178) In its submissions of 18 December 2015 and 15 January 2016, Amazon presented an overview of the organisational structure of LuxOpCo as of the end of 2013, describing the departments of the company.

(179) LuxOpCo's organisational structure is illustrated by the organigram in Figure 3. The number of employees (FTE[173]) working in each of LuxOpCo's teams are indicated in brackets. For example, the Localisation and Translation Team, which was subsequently transferred to [another Amazon company] and relabelled "Software development and translation team", employed [60-70] FTEs at the end of 2013.

Figure 3 – LuxOpCo organigram as per end 2013

[…]

(180) According to the Luxembourg Staffing Policy, contained in the EU Policies and Procedures Manual[174], all positions with a pan-EU responsibility, i.e. for more than two European countries, have to be based in Luxembourg, in particular the positions above a certain job level. Accordingly, each of the Luxembourg operating entities (LuxOpCo, ASE and AMEU) must have directors employed in Luxembourg and are not allowed to have directors employed elsewhere in Europe or in the U.S. Luxembourg-based employees responsible for retail, operations, associates and headquarter functions, such as legal, finance, accounting, tax, treasury, HR, PR, must be employed by LuxOpCo. ASE employs the Vice President of European Sales and

173 Full Time Equivalent (FTE) is the hours worked by one employee on a full time basis.

174 Amazon's submission of 20 January 2017, p. 2-4; Amazon Internal Document: EU Policies and Procedures Manual, effective 1 May 2006.

all employees dedicated to the Marketplace, Merchants@ and Enterprise Solutions businesses (e.g. Technical Account Managers, Relationship manager for Enterprise Solutions business). The Relationship Manager for the Enterprise Solutions business is a pan-EU position based in Luxembourg. Technical Account Managers with pan-EU responsibilities are based in Luxembourg, while Technical Account Managers dedicated to merchants in a local country are based in that country.

(181) The aforementioned policy is reflected in the distribution of positions and job holders among Amazon's European entities, illustrated by the list of Amazon's employees since 1997[175]. Amazon's employees performing the roles of Director or Vice President with pan-EU responsibilities are employed at LuxOpCo [...] or at ASE [...], while employees holding lower-level jobs or responsible for only one country are employed by the EU Local Affiliates.

2.3.3.2. Financial information on LuxOpCo

(182) LuxOpCo's profit and loss accounts and balance sheets as presented in its financial statements for the years 2006-2013 are reproduced in table 3.

[175] Amazon's submission of 6 March 2017, Annex 28a.

Table 3 – LuxOpCo financial information for 2006-2013

LuxOpCo profit and loss (EUR million)	2006	2007	2008	2009	2010	2011	2012	2013
Turnover	n.a.	n.a.	n.a.	n.a.	n.a.	9,130.1	11,892.9	[13 500 – 14 000]
COGS	n.a.	n.a.	n.a.	n.a.	n.a.	7,078.4	9,171.9	[10 000 – 10 500]
Net turnover	1,930.1	3,426.7	4,031.6	5,191.1	7,042.1	2,051.7	2,721.0	[3 000 – 3 500]
Staff costs	2.2	5.1	7.5	11.4	14.0	23.4	40.7	[60 – 70]
Value adjustments on assets	4.0	14.9	16.1	15.9	31.8	81.8	254.4	[200 – 300]
Other operating income	91.3	128.6	211.7	286.6	451.0	724.6	1,183.1	[1 500 – 2 000]
Thereof								
Royalty received from ASE	*78.6*	*126.1*	*196.2*	*285.6*	*449.8*	*694.3*	*1,072.3*	*[1 500 – 2 000]*
Royalty received from AMEU		*2.5*	*7.5*	*0.0*	*0.0*	*21.9*	*95.9*	*[100 – 200]*
Other operating (external) charges	1,979.5	3,546.8	4,188.5	5,416.5	7,418.2	2,647.3	3,726.2	[4 500 – 5 000]
Thereof								
COGS		2,608.4	3,058.4	3,952.6	5,458.1			
Royalty paid to LuxSCS	*95.2*	*257.9*	*341.4*	*519.3*	*590.0*	*491.1*	*499.4*	*[500 – 600]*
Interest receivable and similar income	10.9	22.7	29.7	19.2	23.8	65.4	131.1	[40 – 50]
Interest payable and similar charges	30.4	16.5	35.5	38.3	33.1	60.5	80.0	[70-80]
	(19.5)	6.2	(5.7)	(19.1)	(9.3)	4.9	51.1	[30 – 40]
Tax on profit and similar charges	4.6	(1.6)	6.7	4.2	5.5	8.2	2.2	[0 – 10]
Profit (loss) for the financial year	11.6	(3.7)	18.8	10.6	14.4	20.4	(68.3)	[20 – 30]

LuxOpCo balance sheet (EUR million)	2006	2007	2008	2009	2010	2011	2012	2013
Assets								
Fixed assets	190	209	275	304	547	915	1,361	[1 500 – 2 000]
Intangible fixed assets	0	0	0	0	0	2	121	[100 – 200]
Tangible fixed assets	6	5	1	1	3	5	8	[0-10]
Financial fixed assets	184	203	274	303	544	908	1,232	[1500-2000]
Current assets	887	1,171	1,518	2,396	3,255	4,113	4,851	[5000-5500]
Inventories	185	227	245	384	591	990	1,350	[1500-2000]
Debtors	152	255	266	320	511	798	916	[1000 – 1500]
Transferable securities	99	112	376	1,049	1,348	1,182	924	[800-900]
Cash at bank, cash in postal cheque account, cheques and cash in hand	451	577	632	644	805	1,143	1,661	[1500-2000]
Prepayments	0	0	1	1	5	3	16	[10-20]
Total assets	1,077	1,380	1,794	2,702	3,807	5,031	6,228	[7000 – 7500]
Liabilities								
Capital and reserves	35	41	73	89	117	185	109	[100 - 200]
Non-subordinated debt	1,011	1,302	1,676	2,521	3,553	4,636	5,817	[6500 – 7000]
Trade creditors	397	597	779	1,136	1,661	2,187	2,910	[3000 – 3500]
Amounts owed to affiliated companies	550	632	833	1,285	1,712	2,109	2,460	[2500-3000]
Tax and social security debts	2	6	5	3	1	116	121	[100-200]
Other creditors and accruals	61	68	59	96	179	224	327	[100-200]
Deferred income	31	37	46	92	137	210	301	[300-400]
Total liabilities	1,077	1,380	1,794	2,702	3,807	5,031	6,228	[7000-7500]

(183) LuxOpCo was responsible for the group's cash management in Europe[176]. Amounts owed to affiliated companies include a loan granted by LuxSCS to LuxOpCo pursuant to a Credit Facility Agreement[177]. This Credit Facility Agreement was described by Amazon as "*Back-to-back Activity*"[178]. Between 2006 and 2016, LuxOpCo utilised the funds drawn under the Credit Facility for acquisitions (e.g. [acquisition Q, R, S and T]) or to provide a loan or equity increase to its subsidiaries to finance their capital expenditure ([examples of use of loans by LuxOpCo subsidiaries])[179]. The amount owed by LuxOpCo to LuxSCS increased from EUR 387 million in 2006 to EUR [2 000-2 500] million in 2013[180].

(184) The details of value adjustments and provisions in respect of current assets are provided in Table 4.

Table 4 – Value adjustments and provisions in respect of the current assets of LuxOpCo

EUR thousand	2006	2007	2008	2009	2010	2011	2012	2013	2014
Value adjustments in respect of the current assets	n.a.	8,043	12,556	15,343	170,176	54,908	80,858	[70 000 – 80 000]	[40 000 – 50 000]
Thereof:									
Inventories					12,694	45,664	68,251	[60 000 – 70 000]	
Trade debtors					4,382	9,244	12,607	[10 000 – 20 000]	
Provisions for value adjustments:									
For inventory	16,525	19,340	25,127	35,482	48,320	91,060	152,543	[200 000 – 300 000]	[200 000 – 300 000]
Trade debtors - doubtful accounts	6,022	11,019	13,739	9,019	11,739	1,653	16,042	[10 000 – 20 000]	[20 000 – 30 000]

(185) Amazon provided a detailed overview of the main components of LuxOpCo's turnover, which is reproduced in Table 5.

176 Amazon's submission of 8 February 2017, p.1-2 and Deposition [Director International Tax and Tax Policy, Amazon Corporate LLC, US], 24 April 2014, p. 200 par 23-201 par. 3:[...].

177 According to Amazon's submission of 8 February 2017, p. 1-3, LuxSCS and LuxOpCo concluded a Credit Facility Agreement of 29 December 2006 for cash management purposes. That agreement was subsequently amended and restated on 1 March 2007, 1 January 2009, 1 April 2011 and 1 January 2012.

178 "*Back-to-back-activity: EHT [LuxSCS] will lend its funds to AEU [LuxOpCo] on an interest-bearing basis, and AEU [LuxOpCo] will invest the funds.*" and *"[…] all of the financing transactions existing between EHT [LuxSCS] and AEU [LuxOpCo] will be merged into one single debt instrument, which will have the characteristics of a Credit Facility.*" See Amazon's submission of 5 March 2015, Annex 22, p.7.

179 Amazon's submission of 8 February 2017, p. 2.

180 LuxOpCo's annual accounts 2006-2013.

Table 5 – Components of LuxOpCo's turnover

EUR million	2006	2007	2008	2009	2010	2011	2012	2013
Net sales proceeds	1,798.9	3,152.7	3,849.4	5,019.6	6,751.5	8,741.0	11,166.3	[12 000 – 12 500]
Marketplace	71.0	158.1	216.2	302.5	467.0	721.9	1,105.8	[1 500 – 2 000]
Digital	0.0	23.2	28.7	26.6	58.9	146.2	369.5	[500-600].
Fulfillment by Amazon	0.0	0.1	0.4	4.2	53.6	80.5	175.6	[400-500]
Prime subscription	0.0	0.4	5.8	25.8	60.4	77.3	113.2	[100-200]
Transportation costs recharge	74.8	135.1	125.9	124.9	117.8	160.2	208.9	[100 – 200]
Gift packaging	2.9	4.4	4.6	5.4	11.7	14.6	24.4	[20-30]
Ancilliary revenues	30.1	71.7	67.6	96.4	107.9	144.5	148.5	[100-200]
	1,977.7	3,545.7	4,298.7	5,605.4	7,628.8	10,086.3	13,312.1	[15 000 – 15 500]

(186) Amazon provided a detailed break-down of LuxOpCo's operating expenses, which is reproduced in Table 6.

Table 6 – Detailed break-down of LuxOpCo's operating expenses

LuxOpCo external operating charges (EUR million)	2006	2007	2008	2009	2010	2011	2012	2013
Building costs	1.2	2.4	4.3	3.6	3.9	8.0	8.9	[10-20]
COGS	1,486.6	2,608.4	3,058.4	3,952.6	5,458.1	0.0	0.0	[20-30]
Consulting, legal and other	1.5	4.3	5.6	4.9	8.8	16.2	21.2	[30 - 40]
Employee	2.5	2.4	3.2	3.3	4.7	11.7	25.2	[20-30]
Fulfillment	3.1	6.0	8.1	10.1	15.2	25.2	42.9	[60-70]
Intercompany	267.2	544.3	665.3	870.6	1,127.4	976.3	1,591.3	[2 000-2 500]
Marketing	47.3	63.7	85.6	123.9	155.0	259.5	386.6	[400-500]
Others	0.6	-0.3	11.3	2.0	-7.4	-4.6	-6.6	-[0 – 10]
Receivables and Credit Card fees	24.7	46.0	47.5	49.0	60.4	57.6	55.9	[60-70]
Royalty	0.0	0.3	2.0	29.9	66.1	0.0	0.5	[0-10]
Transportation	145.0	269.2	297.2	366.6	525.9	794.3	1,065.9	[1 000-1 500]
Total	1,979.5	3,546.8	4,188.5	5,416.5	7,418.2	2,144.1	3,191.8	[4 000 – 4 500]

(187) As regards marketing costs, Amazon provided further break-down of this category of LuxOpCo's expenses which is reproduced in Table 7.

Table 7 – Detailed overview of LuxOpCo's marketing expenses

LuxOpCo marketing costs (EUR million)	2006	2007	2008	2009	2010	2011	2012	2013
Ad placement	0.0	0.9	-0.1	0.0	0.0	19.7	57.5	[60-70]
Associates	29.7	42.9	57.1	71.0	77.7	101.8	136.1	[100-200]
Coop vendor	-0.4	0.0	0.0	-2.3	-4.5	-8.9	-14.4	- [20 – 30]
DVDs Disposal	3.8	0.5	-0.1	0.0	0.0	0.0	0.0	[0 – 10]
DVDs License fees	0.4	0.2	0.0	0.0	0.0	0.0	0.0	[0 – 10]
DVDs Taxes		0.3	0.1	0.0	0.0	0.0	0.0	[0 – 10]
Editorial	1.1	1.1	1.1	1.4	1.2	1.4	2.1	[0-10]
Free sample		0.0	0.0	0.0	0.0	0.0	0.0	[0 – 10]
Online adds		0.0	0.0	0.1	0.2	2.6	9.4	[20-30]
Promotions	0.1	0.2	0.1	0.2	0.2	10.2	18.6	[10-20]
Research	0.0	0.2	0.5	0.5	0.7	2.3	0.7	[0 – 10]
Sponsored links	12.6	17.2	26.9	52.9	79.5	130.4	176.2	[200-300]
Synd Ad expense		0.0	0.0	0.0	0.0	0.0	0.3	[0-10]
Syndicated store		0.0	0.0	0.0	0.0	0.0	0.0	[0 – 10]
Others	0.0	0.0	0.0	0.0	0.0	0.0	0.0	[0 – 10]
Total	47.3	63.7	85.6	123.9	155.0	259.5	386.6	[400-500]

(188) Amazon also provided a break-down of intercompany costs as summarised in Table 8.

Table 8 – Break-down of the Intercompany costs

EUR million	2006	2007	2008	2009	2010	2011	2012	2013
Advertising	0.1	0.1		-0.1	-0.9	25.8	39.6	[30-40]
Application Development Expense							1.4	[0-10]
Customer Service	10.9	18.5	17.7	22.2	54.7	47.7	74.6	[100-200]
Data Center	14.0	24.4	27.8	27.7	35.1	67.7	107.4	[100-200]
Fulfillment Center	106.6	175.0	188.3	228.1	313.1	576.3	973.0	[1 000-1 500]
Marketing	27.9	50.1	24.2	28.3				
Operations	0.1	0.0	0.0	0.2	0.2	0.2	0.2	[0 – 10]
Shared services center						2.0	6.2	[10-20]
Support Service	0.2	-0.2	31.9	32.1	80.9	107.9	172.3	[200-300]
	159.8	268.0	289.9	338.4	483.1	827.6	1,374.7	[1 500 – 2 000]

2.3.3.3. The relationship between LuxOpCo and the EU Local Affiliates

(189) As explained in Recitals (114) and (115), the EU Local Affiliates provide certain intra-group services to LuxOpCo in return for a remuneration covering their Applicable Costs plus a mark-up. Besides some variations in the characteristics in the services to be provided by the EU Local Affiliates and the mark-up applied on the Applicable Costs[181], the Service Agreements are to a large extent identical[182].

(190) Pursuant to the Service Agreements, the EU Local Affiliates shall, to the extent possible, provide general services for LuxOpCo from time to time as requested by LuxOpCo. Those services must be provided in accordance with service standards and guidelines as provided by LuxOpCo[183]. In addition to the general services, the five EU Local Affiliates in France, Germany and the UK provide different services: Amazon.fr SARL[184] and Amazon.de GmbH[185] provide costumer and merchant services as well as support services, Amazon.fr Logistique SAS[186] and Amazon Logistik GmbH[187] provide fulfilment services, and Amazon.co.uk Ltd[188] provides fulfilment services, costumer and merchant services as well as support services. Those services are also provided on the basis of a request from LuxOpCo.

(191) The EU Local Affiliates act as independent contractors[189] and are responsible for maintaining an organisation of qualified personnel capable of meeting the commercial and technical demands of the services as well as for maintaining the necessary facilities and equipment used in the performance of those services[190]. The EU Local Affiliates neither assume responsibility for the sales nor for the inventories[191]. As explained in Recitals (108) and (109), LuxOpCo takes the strategic decisions concerning the merchandise and pricing (which are critical to the success of LuxOpCo's business[192]), records the sales and costs associated herewith (see Table 3), and owns and assumes the inventory risks.

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181 The definition of the Applicable Costs is set out in footnote 61.

182 The Service Agreements all contains identical provisions on the use of the Intangibles (section 3), on compensation (section 4), status and liabilities of the parties (section 5), confidentiality (section 6), term of agreement and termination (section 7), force majeure (section 8), general provisions (section 9). The definition of the Applicable Costs in Exhibit 1 is identical in all the Service Agreements.

183 Service Agreements, paragraph 2.1 (General).

184 Service Agreement between Amazon.fr. Sarl and LuxOpCo, paragraphs 2.2 (Fulfillment Services) and 2.3 (Customer and Merchant Services).

185 Service Agreement between Amazon.de GmbH and LuxOpCo, paragraphs 2.2 (Customer and Merchant Services) and 2.3 (Support Services).

186 Service Agreement between Amazon.fr Logistique SAS and LuxOpCo, paragraph 2.2 (Fulfillment Services).

187 Service Agreement between Amazon Logistik GmbH and LuxOpCo, paragraph 2.2 (Fulfillment Services).

188 Service Agreement between Amazon.co.uk Ltd and LuxOpCo, paragraphs 2.2 (Fulfillment Services), 2.3 (Customer and Merchant Services) and 2.4 (Support Services).

189 Service Agreements, paragraph 5.1 (No Agency).

190 Service Agreements, paragraph 5.2 (Provider Obligations).

191 Service Agreements, section 5 (Status and Liabilities of the Parties).

192 As explained in Section 2.3.2.1, Amazon has pointed to selection, price and convenience as the key drivers of its online retail business.

(192) The EU Local Affiliates receive a different mark-up on their Applicable Costs for the services provided. The mark-up is determined in the Services Agreements, exhibit 1, as the Applicable Mark-up[193].

2.3.4. Additional information on LuxSCS

2.3.4.1. Financial information on LuxSCS

(193) The balance sheet and profit and loss accounts of LuxSCS for the financial years 2005-2013 are reproduced in Table 9.

[193] The applicable mark-up for Amazon.fr Sarl is [3-3,5] % for customer and merchant services and [5-10] % for support services. The applicable mark-up for Amazon.de GmbH is [3-3,5] % for customer and merchant services and [4-4,5] % for support services. The applicable mark-up for Amazon.fr Logistique SAS is [5-10] % for fulfilment services. The applicable mark-up for Amazon Logistik GmbH is [5-10] % for fulfilment services. The applicable mark-up for Amazon.co.uk Ltd. is [3-3,5] % for fulfilment services, [3-3,5] % for customer and merchant services and [4-4,5] % for support services.

Table 9 – LuxSCS balance sheet and profit and loss

LuxSCS balance sheet

Thousand EUR	2005	2006	2007	2008	2009	2010	2011	2012	2013
CAPITAL									
Subscribed capital	1	4	4	4	4	4	4	4	[0-10]
Share premium	116,204	417,587	417,587	417,587	417,587	417,587	464,363	549,035	[500 000-600 000]
Revaluation reserve								690	[400-500]
Profit (loss) brought forward and of the fi	-149,362	-191,242	-26,127	275,480	684,473	1,125,172	1,426,951	1,544,845	[1 500 000 – 2 000 000]
CREDITORS									
Amounts owed to affiliated companies	33,185	171,406	25,525	26,292	28,013	37,549	65,931	138,006	[100 000-200 000]
Other creditors and accruals	0	13,540	49	1,095	208	629	327	515	[1 000-10 000]
Total liabilities	28	411,294	417,037	720,457	1,130,285	1,580,941	1,957,577	2,233,094	[2 000 000-2 500 000]
ASSETS									
Shares in affiliated undertakings	25	24,184	24,184	24,184	25,909	42,176	104,652	130,152	[100 000-200 000]
Intangible assets (acquired) and goodwill							18,978	116,101	[90 000-100 000]
Amounts owed by affiliated companies	0	387,053	392,810	696,227	1,104,283	1,538,640	1,833,863	1,986,763	[2 000 000-2 500 000]
Other debtors and cash	3	57	42	47	93	125	84	79	[300-400]
Total assets	28	411,294	417,037	720,457	1,130,285	1,580,941	1,957,577	2,233,094	[2 000 000-2 500 000]

LuxSCS Profit and loss

Thousand EUR	2005	2006	2007	2008	2009	2010	2011	2012	2013
INCOME									
Other operating income	0	78,598	274,558	390,593	519,316	582,731	491,107	493,317	[500 000 – 600 000]
Interest receivable and similar income	681	25,178	27,312	30,035	32,373	28,282	44,064	56,026	[40 000 – 50 000]
CHARGES									
Other charges and other operating charges	147,259	135,211	132,461	114,338	105,133	166,143	230,355	409,977	[400 000 – 500 000]
Value adjustments							1,826	18,557	[20 000 – 30 000]
Interest payable and similar charges	524	10,445	4,294	4,683	2,363	4,171	1,211	2,915	[600 – 700]
Profit of the financial year	-147,101	-41,881	165,115	301,607	444,193	440,699	301,779	117,894	[100 000 – 200 000]

(194) Table 10 provides a break-down of the "Other charges and other operating charges" incurred by LuxSCS during the relevant period.

Table 10 - Other charges and other operating charges incurred by LuxSCS 2006 – 2013

EUR		2006	2007	2008	2009	2010	2011	2012	2013
Despription	Counterparty								
Accounting fees	External	2	3						
Bank charges	External	1	2	1	1	1	0	0	[0-10]
Courier charges	External		0						
Domain licenses	External						285		
Legal fees - general corporate	External	111	232	537	617	875			
Outside Services	External					0			
Miscellaneous gains/losses	Various	0	0	-2	0				
Intercompany - sale of inventory	Amazon.de GmbH	1,468							
	LuxOpCo	2,205							
	Amazon.co.uk Ltd	522							
Buy-in payments	Amazon Technologies, & A9.com, & Audible	68,271	42,274	27,209	9,439	39,957	26,803	56,975	[1 000 – 10 000]
Cost sharing agreement	Amazon Technologies, & A9.com, & Audible	62,630	89,956	86,593	95,076	12,561	202,286	351,497	[400 000 – 500 000]

(195) As illustrated in Table 10, the external costs incurred by LuxSCS are mainly intra-group charges under the Buy-In Agreement and the CSA. In addition to the Buy-In Payments, as specified in Table 11, and CSA Payments, as specified in Table 12, LuxSCS incurred subsequent buy-in payments due to some acquisitions of third-parties' IP by Amazon US, which subsequently licensed that IP to LuxSCS under the CSA. Those costs, together with the Buy-In Payments and the CSA Payments, are hereinafter referred to as the "Buy-In and CSA Costs". LuxSCS also incurred charges for the intercompany sale of inventory following the 2006 restructuring of Amazon's European operations. Finally, LuxSCS incurred external costs of domain licenses, legal fees, accounting fees and bank charges[194].

[194] Amazon's submission of 7 June 2017, p 3: "*These fees relate to (i) the share of Luxembourg costs allocated to LuxSCS and to (ii) disbursements in relation to the legal protection of the Intangibles owned by LuxSCS such as patent application fees and related disbursements, trademark application fees and related disbursements and fees and disbursements in relation to domain names and IP searches*".

(196) As further illustrated in Table 10, the costs borne by LuxSCS do not include any recharge of costs incurred by LuxOpCo related to the development, enhancement, or management of the Intangibles or recharge of any costs borne by LuxOpCo due to the operation of the EU on-line retail or service business, such as bad debts, inventory write-downs, marketing costs, etc. LuxSCS also did not incur any costs related to remuneration of the sole manager.

2.3.4.2. Additional information on the Buy-In Agreement and the CSA

(197) In return for the Intangibles obtained under the Buy-In Agreement, LuxSCS agreed to make annual Buy-In Payments to ATI. LuxSCS made following Buy-In Payments to ATI in the period under review (see Table 11 below)[195]:

Table 11 – Buy-In Payments

in millions	2006	2007	2008	2009	2010	2011
Buy-In Payment (in USD)	82.68	54.95	28.26	11.04	2.28	1.08
Buy-In Payment (EUR equivalent)	68.34	42.27	19.15	8.45	2.40	0.79

(198) In return for the rights to the Intangibles obtained under the CSA, LuxSCS agreed to share certain R&D costs incurred in relation to the Development Program[196], i.e. the "Development Costs"[197] (which also includes "Subcontractor's Development Costs")[198]. According to Amazon, those costs encompass expenses associated with the development of products, technology, fulfilment, and marketing intangibles[199], as well as allocated general and administrative costs and expenses for purchase of intellectual property incurred by A9 and ATI[200].

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195 The Buy-In was paid in seven instalments. The first instalment was paid in 2005 and amounted to USD 73.22 million (EUR 52.35 million).

196 As defined in the CSA, paragraph 1.10, the "Development Program" means "*the activities of a Party within the scope and principles set forth under Section 2.*" As specified in the CSA, section 2, paragraph 2.1, the Parties agree that "*all research, development, marketing and other activities relating to the Licensed Purpose after the Effective Date are included within the scope of the Development Program. Such activities may include, but are not limited to, all development activities related to maintaining, improving, enhancing, or extending the Amazon Intellectual Property, A9 Intellectual Property and EHT Intellectual Property [together the Intangibles]. All such activities shall be included in the Development Program except to the extent specifically excluded by mutual, written agreement of the Parties*".

197 As defined in the CSA, paragraph 1.9, "Development Costs" means "*the costs incurred pursuant to Section 3 related to the performance of activities by a Party under the Development Program, including but not limited to any and all costs incurred by a Party in the course of developing Derivative Works.*" The Development Costs are determined in accordance with paragraph 3.3.

198 As set out in the CSA, paragraph 3.2 on "Subcontractor's Development Costs": "*Development Costs incurred by a person that participates at a Party's request in the development or improvement of the Amazon Intellectual Property, A 9 Intellectual Property and EHT Intellectual Property [together the Intangibles] (a "**Subcontractor**") shall be considered Development Costs of that Party if the Party contracting for such work with such Subcontractor (a) materially participates in the management or control of the Subcontractor, and (b) retains ownership, or receives material rights to use, any intangible property developed by the Subcontractor*".

199 Such as trademarks, trade names, domain names, style, logos and presentation of Amazon.

200 Amazon's submission of 21 August 2015, Annex 12: CSA Annual Summary Reports.

(199) The share of the Development Costs to be borne by LuxSCS under the CSA was determined by the proportion of Amazon's revenues generated in Europe to the global group's worldwide revenues in the given year[201]. For example, in 2012 Amazon generated 28.6% of its worldwide revenues in Europe. Therefore, 28.6% of the Intangibles' development costs incurred in 2012 were allocated to LuxSCS[202].

(200) According to the information in the CSA Annual Summary Reports[203], LuxSCS itself did not directly incur any Development Costs during the relevant period. Instead, LuxSCS only contributed financially to the development of the Intangibles, as covered by the CSA, by way of its annual cost sharing payments. Table 12 shows the financial contributions made by LuxSCS to the cost sharing pool under the CSA (the "CSA Payments")[204].

Table 12 - CSA Payments by LuxSCS

in EUR million	2006	2007	2008	2009	2010	2011	2012	2013	Total
CSA Payment by LuxSCS	63	90	87	95	125	202	351	[400-500]	[1000-1500]

(201) The CSA Annual Summary Reports[205] also contain Development Costs incurred by Amazon's development centres, which are spread around the world, including in Europe. Those development centres carry out contract development for A9 and ATI, for which they are remunerated by A9 and ATI at cost +[5-10] % basis[206].

(202) The CSA was entered into for the life of the Intangibles and could be changed or terminated only by mutual agreement between the parties[207] in the event of a change of control or substantial encumbrance[208] or in the event of one of the parties failing to cure for failure of its performance under the CSA[209]. Accordingly, LuxSCS had no possibility to unilaterally terminate the CSA.

(203) The CSA was amended twice during the relevant period.[210] The first amendment, signed in July 2009 and effective as of 5 January 2009, aimed at aligning the agreement to the requirements under the US Treasury Regulation for qualified cost sharing arrangements. As a result, a list of the functions and risks to be undertaken by the parties to the CSA[211] was specified in that agreement.[212] This list is reproduced in Table 13.

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201 CSA, section 4 and exhibit D (as effective of 5 January 2009).

202 Amazon's submission of 21 August 2015, Annex 12: CSA Annual Summary Reports.

203 Pursuant to the CSA, section 4 (Development Cost Allocation), an "Annual Cost Sharing Report" was to be prepared to determine the yearly cost sharing payments from each party to the CSA. The Annual Cost Sharing Reports for the years 2005-2014 were provided by Amazon in its submission of 21 August 2015.

204 As calculated in accordance with the CSA, sections 4 (Development Cost Allocation) and 5 (Payments).

205 CSA, section 4.1: *"As soon as practical after each Year End, the Parties shall each prepare necessary financial statements and forecasts, and shall jointly reconcile and consolidate such statements and forecasts into an "Annual Cost Sharing Report," containing the information required by this Section 4 and signed by the Parties […]."* Section 4 determines the Development Cost Allocation.

206 Amazon's submission of 27 February 2017, p. 4-5.

207 CSA, paragraph 8.1 (Initial Period) .

208 CSA, paragraph 8.2 (Immediate Termination upon Notice for Change in Control or Substantial Encumbrance).

209 CSA, paragraph 8.3 (Termination After Failure to Cure for Failure of Performance).

210 Amazon's submission of 4 May 2015, Annex 2.

211 CSA, as effective as of 5 January 2009. paragraph 2.3: "*In connection with this Agreement, each Party shall undertake the functions and risks specified in Exhibit B hereto*".

Table 13 - Functions and risks of LuxSCS in connection with the CSA

No.	Functions of LuxSCS	Risks to be assumed by LuxSCS
1	[LuxSCS] shall conduct Development Program either directly or indirectly through its subsidiaries, within the European Territory and share the results of its activities with [A9 and ATI].	All business risks relating to European Territory, including, but not limited to, credit risk, collections risk, market risk, risk of loss, risks relating to maintaining a workforce capable of efficiently and timely selling goods and providing services in the European Territory.
2	[LuxSCS] shall perform sales and marketing activities within the European Tenitory[213].	Risk associated with the Development Program risks, including risk of failure or untimely development of products or provision of services for the European Territory.
3	[LuxSCS] shall perform strategic planning activities on customer needs and product requirements relating to Development Program within its Territory.	Products related market risks within the European Territory and impact on success of Research Program[214], including: - Risks associated with the successful recruitment, retention and motivation of employees; - Timely and accurately predicting market requirements and evolving industry standards; -Accurately defining new products or services; - Timely completing and introducing new product or offering designs.
4	[LuxSCS] shall perform budgeting and planning activity associated with the Development Program.	Legal and regulatory risks associated with operating an on-line business.
5	[LuxSCS] shall manage strategic acquisitions of technologies that fall within the scope of the Development Program.	Brand development and brand recognition risks within the European Territory.
6	[LuxSCS] shall perform quality control and assurance functions.	Key personnel risks, quality control risks and product safety and liability risks (including warranty and liability risks) within the European Territory**.**
7	[LuxSCS] shall sell select, hire, and supervise employees, contractors and sub-contractors to perform any of the above activities.	Acquisition risks, including the ability to timely and successfully incorporate any acquired technology successfully.

(204) The second amendment, signed in February 2014 and effective as of 1 January 2014, changed the method to determine the share of the Development Costs to be borne by

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212 CSA, as effective as of 5 January 2009 exhibit B, Functions and Risks. It is in this respect stated in exhibit B that "*[t]his list is representative of the functions and risks to be undertaken by the Parties. The Parties do not represent that this is the exclusive statement of functions and risks, and the omission of any function or risk does not imply that the Party does not perform such function or bear such risk*".

213 The "*European Territory*" is defined in the CSA as "*all the countries included within the meaning of the term "European Country" as defined in Section 1.12 hereof.*" In section 1.12, "*European Country*" is defined as "*(a) the economic, scientific, and political organization known as the European Union consisting, as of the Effective Date, of Belgium, France, Italy, Luxembourg, Netherlands, Germany, Denmark, Greece, Ireland, United Kingdom, Spain, Portugal, Austria, Finland, Sweden, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia, and including any and all other countries that may become members of such organization during the Term, and (b) any countries listed as "Applicant countries" or "Other European countries" on the Web page located at http://europa.eu.intlabc/governments/indexen.htm#, or any successors thereto or replacements thereof*".

214 The term "Research Program" appears not to have been defined in the CSA. This term is understood to also refer to the Development Program.

LuxSCS under the CSA. As a result, LuxSCS's cost share percentage is determined by the proportion of Amazon's gross profit attributable to Europe to the global group's gross profit in a given year.

2.3.4.3. Other costs incurred by LuxSCS in relation to the Intangibles

(205) As regards marketing intangibles used by LuxOpCo in Amazon's European retail business, Amazon explained that they "*included rights to Amazon's local European marketing intangibles and global marketing intangibles. LuxSCS incurred marketing expenses in two ways. First, it either directly or indirectly reimbursed marketing expenses incurred by the European operating companies. Second, the cost sharing payments included an allocation of marketing expenses associated with the development of global marketing intangibles, which LuxSCS had the right to exploit in Europe. With respect to the first set of marketing costs, LuxSCS did not distinguish between expenses that benefitted the global marketing intangibles and those that benefitted only local marketing intangibles, as all such expenses were to be incurred by LuxSCS.*"[215]

(206) However, following a clarification request from the Commission, Amazon clarified that "*[t]he financial accounts [of LuxSCS] do not contain an item directly reflecting the reimbursement of marketing expenses. Rather […] the reimbursement of marketing expenses occurs through a reductions of the royalty amounts paid to LuxSCS, but such reduction is otherwise not directly identifiable in the financial accounts*."[216]

2.3.4.4. Information on the US Tax Court proceedings

(207) In November 2012, the United States tax administration (Internal Revenue Service, "IRS") issued a Statutory Notice of Deficiency[217] to Amazon in the US concerning a deficiency in the United States federal income taxes for Amazon's 2005 and 2006 tax years. In particular, the IRS contested the value at which the pre-existing intangibles were transferred, namely the Buy-In Payments made by LuxSCS to ATI, and the amount of Development Costs paid by LuxSCS under the CSA[218]. Subsequently, a litigation procedure between Amazon and the IRS was initiated before the US Tax Court[219]. In addition to the trial held before the US Tax Court, the IRS issued summons and took depositions under oath from numerous Amazon employees[220].

(208) More specifically, in its US income tax returns Amazon reported the Buy-In Payments received from LuxSCS under the Buy-In Agreement to receive the right to use pre-existing IP (the "Buy-In") of around USD 217 million and CSA Payments received from LuxSCS under the CSA of around USD 116 million in 2005 and USD 77 million in 2006. The IRS contested both the amount of the Buy-In Payments

215 Amazon's submission of 27 February 2017.

216 Amazon's submission of 12 April 2017.

217 A notice of deficiency is an official letter, by means of which the IRS advises a taxpayer about delinquent taxes owed plus any penalties and interest. The notice contains an explanation of the tax adjustments, how they were computed and of the taxpayer's options. In particular, if the taxpayer disagrees with the assessment, he or she can file an appeal with the US Tax Court.

218 IRS (respondent) Trial Memorandum, p.1.

219 Amazon Post trial brief, p. 6-7.

220 The IRS is authorised to issue a summons to any person having information that "may be relevant" to its investigation. That authority permits the IRS to require a person to appear at a designated location and to produce books and records or give testimony under oath; cf. https://www.irs.gov/pub/irs-wd/0950044.pdf.

and the CSA Payments. Based on an expert report dated 2011, the IRS considered USD 3.6 billion to be the correct amount of Buy-In Payments for the IP. This amount was adjusted to USD 3.468 billion by the IRS in the course of the court proceedings. The IRS expert used the discounted cash-flow method applied to the expected cash flows from the European business to arrive at that value. The assumptions on which that valuation was based deviated significantly from those of Amazon. In particular, the IRS experts considered Amazon's IP to have unlimited useful life, while Amazon considered it short-lived. As regards the CSA Payments, the IRS considered that 100 % of costs captured in the "Technology and Content" cost centre should have been included in the pool of costs to be shared under the CSA.

(209) On 23 March 2017, the US Tax Court issued its opinion in which it rejected practically all of the IRS's corrections. In particular, the US Tax Court rejected the IRS's valuation and recognized that the useful life of Amazon's Intangibles was limited. The US Tax Court also found that the IRS was not in compliance with the Income Tax Regulations, which require restricting the valuation of the IP to the assets already existing at the time of the Buy-In Agreement and using recognised valuation methods. The US Tax Court accepted Amazon's reasoning that the costs recorded internally under the "Technology and Content" cost centre are not entirely Development Costs. Instead, they are mixed costs, because they also contain a substantial part of costs not related to IP-development activities. In conclusion, the US Tax Court found that the adjustments to the Buy-in and CSA Payments required by the IRS were arbitrary and unreasonable and the methods used by the IRS to determine those adjustments were not appropriate. At the same time, the US Tax Court confirmed, with certain adjustments, Amazon's method of valuing the Buy-in and of attributing of "Technology and Content" costs to the pool of costs to be shared as appropriate.[221]

(210) In the context of determining the correct Buy-In Payments, the US Tax Court observed that Amazon and the IRS agreed that the comparable uncontrolled transaction (CUT) method[222] can be applied and that the M.com Agreement which Amazon concluded with [A] is the most comparable transaction to the licencing of pre-existing Amazon IP from Amazon US to LuxSCS. Nevertheless, the US Tax Court acknowledged that under the [A] Agreement Amazon provided a variety of ancillary services to [A], which Amazon US did not provide to LuxSCS. Furthermore, it observed that the pricing in the agreement was set in a "holistic" manner, without attributing specific remuneration to the provision of each individual service or IP. That was an obstacle to relying on a headline commission rate of the [A] Agreement as a benchmark for the royalty rate for the IP made available by Amazon US to LuxSCS. A detailed economic review of the [A] Agreement was available only for the July 2006 amendment of the [A] Agreement. Due to an incomplete documentary record of the [A] Agreement, the remaining 15 M.com Agreements, together with the underlying detailed economic analysis of the fee structure, if available, were reviewed to arrive at a base royalty rate for the technology of [3-3,5]% on sales. It was further observed that [description of the

221 The US Tax Court judgement does not contain the ultimate quantification of the adjustments to Buy-in and CSA payments due from LuxSCS to the US.

222 CUT is a transfer pricing method used in the US analogous to the CUP under OECD TP Guidelines.

correlation between commission rate and sales volume][223], a downward volume adjustment was applied to arrive at a royalty rate for the technology of [3-3,5] %. The royalty rate for the pre-existing Amazon's marketing Intangibles was further estimated to be at [1-1,5] % on the basis of a comparison with four license agreements between third parties unrelated to Amazon. The arm's length Buy-In Payment for the customer information was estimated at USD [100-200] million.

(211) To better understand the functions of LuxSCS and its subsidiaries in Europe in relation to the development, enhancement, management, and exploitation of the Intangibles, the Commission requested information produced in the context of the US Tax Court proceedings regarding the payments made by LuxSCS under the Buy-In Agreement and the CSA. Amazon submitted all information used and produced for the litigation before the US Tax Court to the Commission.

2.3.4.5. Buy-in payments for other IP rights acquired by LuxSCS

(212) During the relevant period, LuxSCS received IP from affiliated companies and third parties at several instances which it, however, never acquired at its own initiative.

(213) In some instances, a company holding an IP or an IP itself was acquired by Amazon.com, Inc. and the IP was transferred by Amazon.com, Inc. to Amazon Technologies, Inc. Such IP was comprised by the CSA which included all IP transferred or assigned to ATI by a third party[224] and the costs of such acquisitions would be included in the cost pool as buy-in payments [225]. As a result, a number of buy-in payments made by LuxSCS for IP are not supported by a specific agreement, but are payments made with reference to the CSA. Examples include buy-in payments for [acquisition U and R][226] and [acquisition T].

(214) In other instances, the company holding the IP was acquired by another Amazon entity and its IP then transferred to ATI. This was the case when LuxOpCo acquired the [acquisition Q] group which held IP consisting not only of digital content rights, but also some technology. The technology component of the [acquisition Q] IP was sold to ATI, which then contributed it to the CSA in return for a buy-in payment from LuxSCS.

(215) Initially, all buy-in payments were included in the expenses of the financial year. In 2011, LuxSCS started capitalising some acquisitions, either by recording them as an

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223 Amazon Final Transcripts: [Vice President Technology – Software Development, Amazon Corporate LLC, US former Vice President of Kindle, Amazon Corporate LLC, US], 18 November 2014, par. 3549: 10-25; par. 3550: 1-10, "*Volume impacted deal pricing pretty significantly. You can look at the -- you can go through the various contracts across the M.coms and you will find that the larger ones, such as [C] and [A], they have a lower commission rate than the smaller ones such as [D] and [E] and [F], and so that was a reality of what the market forces would require, […] And so the expectation that became predominant across all of the players in this market segment was that the bigger the sales volume, the lower the commission rate would be, and that found its way into, for example, [A] Amendment 3 is where we went from a single commission structure to a tiered base structure because [A] saw that their sales were doing very well and they predicted them to do very well over the course of the remainder of the agreement and they didn't want to be spending that much because they thought it wasn't competitive with their alternatives. And you saw the same thing in the [C] deal […].*"

224 CSA, paragraph 1.4 (Amazon Intellectual Property)

225 Amazon's submission of 19 February 2016.

226 EUR 33 435 000 expensed directly in 2010.

intangible asset (e.g. [acquisition Q][227], [acquisition T][228] in 2011, [acquisition U] in 2012[229]) or as fixed asset (e.g. [acquisition V][230] in 2013)[231].

2.3.4.6. Written resolutions of LuxSCS's sole manager of and minutes of LuxSCS general meetings

(216) Amazon confirmed that the Amazon group employees involved in developing and maintaining the Intangibles are neither employed by LuxSCS nor by any entities that participate in LuxSCS[232]. To better understand the activities undertaken by LuxSCS, the Commission requested Amazon to provide the written resolutions of the management of LuxSCS as well as minutes from general meetings of LuxSCS. A summary of the written resolutions of the sole manager of LuxSCS (i.e. Amazon Europe Holding, Inc.) and the minutes from general meetings between the partners of LuxSCS during the period 2004-2013 is reproduced in Table 14.

227 Out of the total paid by LuxSCS for [acquisition Q]'s technology (USD 42 928 054), USD 22 928 054 was capitalised as intangible asset.

228 EUR 23,010,000 paid by LuxSCS for [acquisition T], were recorded as an intangible asset.

229 Out of the total paid by LuxSCS for [acquisition U] (USD 70 million), EUR 84 million was capitalised as goodwill and EUR 0.7 million as marketing-related intangible asset.

230 EUR [0-10 millions].

231 Amazon's submission of 12 January 2016.

232 Amazon's submission of 19 March 2015, Supplement.

Table 14 - Minutes of SCS from 2004 -2013

	Date	Type of decision	Summary
	07/06/2004	Written resolution of the sole manager of LuxSCS ([…]as proxyholder)	Approving all necessary actions as regard the post-formation steps; Ratification of the opening of the bank account with [bank]; Approving entering into a domiciliation agreement with [service company]; Incorporation of LuxOpCo.
	14/01/2005	Written resolution of the sole manager of LuxSCS ([…] as vice President)	Ratification of two cost sharing agreements and a buy-in agreement; Adopting amendments to LuxSCS´ articles of association, in order to resolve the adoption of certain specific rights of the shares on dividends and other distributions, and the adoption of specific share premium accounts; Increase of LuxSCS´ share capital by way of an all assets and liabilities contribution to be undertaken by ACI Holdings Limited, a Gibraltar company ("ACI"); Approving the appointment of […] as additional manager of LuxOpCo and an amendment of the corporate object of LuxOpCo; Assigning a note receivable to Amazon.com International Sales, Inc.; Granting a loan to LuxOpCo.
	17/01/2005	Minutes of extraordinary General Meeting ([…] as president, […] as secretary, […] as scrutineer)	Adoption of new articles of association, in order to resolve the adoption of some specific rights of the shares on dividends and other distributions; Increase of share capital
	07/06/2005	Written resolution of the sole manager of LuxSCS ([…] as vice President)	Transfer of the registered address of LuxSCS.
	22/06/2005	Minutes of General Meeting ([…] as president, […] as secretary, […] as scrutineer)	Waiver of notice of rights; Approval of the annual accounts as of 31 December 2004; Discharge of the sole manager, Amazon Europe Holding, Inc. for the financial year ending on 31 December 2004.
	22/06/2005	Written resolution of the sole manager of LuxSCS ([…] as vice president)	Settlement of LuxSCS´s accounts as of 31 December 2004 and resolution to submit such accounts to the LuxSCS´s shareholders for approval; Discharge of the sole manager of LuxSCS for the accounting year ending on 31 December 2004.
	06/02/2006	Written resolution of the sole manager of LuxSCS ([…] acting on behalf)	Adopting an increase of the share capital of LuxSCS by a contribution in kind of shares held by Amazon.com, Inc. in Amazon.fr Holdings SAS having a value of US$ 1,017,240 in consideration of limited shares of LuxSCS; Approving the entering into one or more share transfer agreements in order to acquire 100 % off the shares of Amazon.co.uk Ltd. and Amazon.de GmbH held by Amazon.com, Inc. and 95.8% of the shares of Amazon.fr Holdings SAS held by Amazon.com, Inc., in consideration of a promissory note in principal amount of US$194,672,760,00; Adoption of increase of the share capital by way of an all assets and liabilities contribution to be undertaken by ACI Holdings in consideration of limited shares of LuxSCS.
	06/02/2006	Minutes of the extraordinary General Meeting of LuxSCS ([…] as president, […] as secretary, […] as scrutineer)	Increase of the share capital of LuxSCS; Resolution to accept the subscription and payment by Amazon.com, Inc. of new limited shares by way of a contribution in kind; Increase of the share capital of LuxSCS; Subscription and payment by ACI Holdings Limited of new limited shares by way of a contribution in kind; Cancellation of 900 limited shares in LuxSCS; New composition of the shareholding of LuxSCS.
	07/02/2006	Written resolution of the sole manager of LuxSCS ([…] acting on behalf)	Approving the entering into share transfer agreement in order to sell 100% of the shares of Amazon.de GmbH and 8,724,191 of the shares (representing 93,1471%) of Amazon.co.uk Ltd., in consideration of a note amounting to € 136,828,362; Proposal to contribute 6.8529 % of the shares of Amazon.co.uk Ltd and 100 % of the shares of amazon.fr Holdings SAS to LuxOpCo,; Granting a loan to LuxOpCo.
	18/04/2006	Written resolution of the sole manager of LuxSCS ([…] acting on behalf)	Resolution to split into three different promissory notes a promissory note issued by the LuxSCS on February 6, 2006 in the principal amount of US$194,672,760 to the benefit of Amazon.com. Inc.; Increase the share capital of LuxSCS by a contribution in kind to LuxSCS by ACI of the UK Note and the DE Note in consideration of the issuance of limited shares of LuxSCS.
	19/04/2006	Minutes of the extraordinary General Meeting of LuxSCS ([…] as president, […] as secretary, […] as scrutineer)	Increase of the share capital of LuxSCS; Resolution to accept subscription and payment by Amazon.com, Inc. of new limited shares by way of contribution in kind; New composition of LuxSCS; Amendment of the articles of association.

	28/04/2006	Written resolution of the sole manager of LuxSCS ([…] as vice president)	Acknowledgement of the resignation of […]as manager of LuxOpCo and of the appointment of […] and […] as managers of LuxOpCo; Adopting an increase of the share capital of [LuxSCS] by way of an all assets and liabilities contribution to be undertaken by ACI Holdings Limited, a Gibraltar company ("ACIH") in consideration of limited shares of LuxSCS; Approving the assignment of certain IP rights from Amazon.co.uk Ltd., Amazon.fr Holdings SAS and Amazon.de GmbH; Approving the acquisition of the EU Retail Business of Amazon.com Int´l Sales, Inc., and the subsequent transfer of the same to LuxOpCo; Approving intellectual property license agreements with LuxOpCo; Merger of certain limited shareholders of LuxSCS; Loan to LuxOpCo.
	28/04/2006	Minutes of the extraordinary General Meeting of LuxSCS ([…] as president, […] as secretary, […] as scrutineer)	Increase of share capital; Resolution to accept subscription and payment by ACI Holdings Limited of all the 3,750 limited shares; Cancellation of 1,993 shares; New composition of the shareholding of LuxSCS; Amendments of the articles of Association.
	09/05/2006	Minutes of the General Meeting of LuxSCS ([…] as president, […] as secretary, […] as scrutineer)	Waiver of notice rights; Amendment to the articles of association of LuxSCS further to the merger of Amazon.com Int'l Marketplace, Inc. into Amazon Int'l Sales.
	27/06/2006	Minutes of the extraordinary General Meeting of LuxSCS ([…] as president, […] as secretary, […] as scrutineer)	Decrease of the personal share premium account of ACI Holdings limited further to the final valuation of the 28 April 2006 contribution.
	22/05/2007	Written resolution of the shareholders of LuxSCS ([…] as vice President, […] as vice president, […] as treasurer and director)	Settlement of LuxSCS ´ annual accounts as of 31 December 2005 and resolution to submit the annual accounts to the sole shareholder of LuxSCS and to discharge the sole manager of LuxSCS for the accounting year ending on 31 December 2005.
	22/05/2007	Written resolution of the shareholders of LuxSCS ([…] as vice President, […] as vice president, […] as vice president, treasurer and director)	Approval of the annual accounts as of 31 December 2005 and allocation of the result; Discharge of the managers for the financial year ending on 31 December 2005.
	25/04/2008	Written resolution of the sole manager of LuxSCS ([…] as vice president)	Settlement of LuxSCS´s annual accounts as of 31 December 2006 and resolution to submit such annual accounts to LuxSCS´s shareholders for approval; Resolution to discharge to the sole manager of LuxSCS for the accounting year ending on 31 December 2006.
	25/04/2008	Written resolution of the shareholders of LuxSCS ([…] as vice President, […] as vice president, […] as vice president, treasurer and director)	Approval of the annual accounts as of 31 December 2006 and allocation of the result and resolution to submit the annual accounts to the shareholders of LuxSCS; Discharge of the sole manager of the manager for the financial year ending on 31 December 2006.
	18/06/2008	Written resolution of the sole manager of LuxSCS ([…] as vice President)	Approval of the annual accounts as of 31 December 2006 of LuxOpCo and amendment and adoption of its signatory delegation policies; Approval of the annual accounts as of 31 December 2006 of Amazon Eurasia Holdings Sarl ("AEH") and amendment and adoption of its signatory delegation policies.
	23/03/2009	Written resolution of the sole manager of LuxSCS ([…] as vice president)	Resolution to contribute an aggregate amount of EUR 25,000 to AEH in consideration for the issuance of new shares by AEH.
	25/06/2009	Written resolution of the shareholders of LuxSCS ([…] as vice president, […] as president, […] as vice president, treasurer and director)	Approval of the annual accounts as of 31 December 2008 and allocation of the result; Discharge of the sole manager of the manager for the financial year ending on 31 December 2008.
	25/06/2009	Written resolution of the sole manager of LuxSCS ([…] as president)	Settlement of LuxSCS´s annual accounts as of 31 December 2009 and resolution to submit such annual accounts to LuxSCS´s shareholders for approval; Proposal to give discharge to the sole manager of LuxSCS for the accounting year ending on 31 December 2008; Approval of the annual accounts as of 31 December 2008 of LuxOpCo; Approval of the annual accounts as of 31 December 2008 of AEH; Proposal to increase the share capital of AEH by a contribution in cash.
	06/07/2009	Written resolution of the sole manager of LuxSCS ([…] as president, […] as vice president, […] as vice president, treasurer and director)	Approval of the annual accounts as of 31 December 2008 and allocation of the result; Discharge of the sole manager of the manager for the financial year ending on 31 December 2008.
	31/08/2009	Written resolution of the sole manager of LuxSCS ([…] as president)	Convening of an extraordinary general meeting of LuxSCS regarding from 1 September 2009 regarding: Waiver of notice rights; Amendment to the articles of association of LuxSCS further to the liquidation of ACI Holdings Limited and the related transfer of its 3,750 limited shares held in LuxSCS to its

			parent company Amazon.com Int'l Sales, Inc.
	11/09/2009	Minutes of the General Meeting of LuxSCS ([…] as president, […] as secretary, […] as scrutineer)	Waiver of notice rights; Amendment to the articles of association of LuxSCS further to the liquidation of ACI Holdings Limited and the related transfer of its 3,750 limited shares held in LuxSCS to its parent company Amazon.com Int'l Sales, Inc.
	07/12/2009	Written resolution of the sole manager of LuxSCS ([…] as president)	Resolution on increase of the share capital of AEH by a contribution in cash.
	22/12/2009	Written resolution of the shareholders of LuxSCS ([…] as president, […] as vice president, […] as vice president and treasurer)	Approval of the distribution of interim dividends of LuxSCS.
	22/12/2009	Written resolution of the sole manager of LuxSCS ([…] as president)	Distribution of an interim dividend to the Shareholders of LuxSCS.
	30/04/2010	Written resolution of the sole manager of LuxSCS ([…] as president)	Approval of LuxOpCO's annual accounts as of 31 December 2009; Approval of AEH's annual accounts as of 31 December 2009.
	28/05/2010	Written resolution of the sole manager of LuxSCS ([…] as president)	Settlement of LuxSCS' annual accounts as of 31 December 2009 and resolution to submit it to the shareholders of LuxSCS and to discharge the sole manager of LuxSCS for the accounting year ending on 31 December 2009; Acknowledgement of the change of registered office of LuxSCS' shareholders and sole manager.
	14/06/2010	Written resolution of the shareholders of LuxSCS ([…] as president, […] as vice president, […] as vice president and treasurer)	Approval of the annual accounts as of 31 December 2009 and allocation of the result; Discharge of the sole manager for the financial year ending on 31 December 2009.
	05/07/2010	Written resolution of the sole manager of LuxSCS ([…] as president)	Ratification of shareholder´s advances in cash made by the LuxSCS to AEH; Approval of increase the share capital of AEH by way of a contribution in kind of a receivable.
	13/12/2010	Written resolution of the sole manager of LuxSCS ([…] as president)	Ratification of shareholder´s advances in cash made by the LuxSCS to AEH; Proposal to increase the share capital of AEH by way of a contribution in kind of a receivable; Powers of attorney to […], […] and […] to act on behalf of LuxSCS in this respect.
	07/04/2011	Written resolution of the shareholders of LuxSCS ([…] as president, […] as vice president)	Approval of the allocation of the EUR equivalent of GBP 41 M to a special reserve of LuxSCS further to the contribution by Amazon.com Int'l Sales, Inc., of 3,115 shares it holds in Video Island Entertainment Ltd.
	07/04/2011	Written resolution of the shareholders of LuxSCS ([…] as president)	Resolution to recommend to the shareholders of LuxSCS the allocation of the EUR equivalent of GBP 41 M to a special reserve of LuxSCS further to the contribution by Amazon.com Int'l Sales, Inc., of 3,115 shares it holds in Video Island Entertainment Ltd.; Approval of the contribution by LuxSCS to its wholly owned subsidiary LuxOpCo of 3,115 shares held in video Island Entertainment Limited.
	23/05/2011	Written resolution of the shareholders of LuxSCS ([…] as president, […] as vice president, […] as vice president and treasurer)	Approval of the annual accounts as of 31 December 2010 and allocation of result; Discharge of the sole manager for the financial year ending on 31 December 2010.
	23/05/2011	Written resolution of the sole manager of LuxSCS ([…] as president)	Settlement of LuxSCS ´s annual accounts as of 31 December 2010 and resolution to submit such annual accounts to the LuxSCS´s shareholders for approval; Proposal to give discharge to the sole manager of LuxSCS for the accounting year ending on 31 December 2010.
	01/07/2011	Written resolution of the sole manager of LuxSCS ([…] as president)	Ratification of a shareholder´s advance in cash made by LuxSCS to AEH; Approval, as sole shareholder, of the increase of the share capital of AEH by way of a contribution in kind of a receivable.
	25/01/2012	Written resolution of the sole manager of LuxSCS ([…] as president)	Acknowledgement of the resignation of Mr. […] as manager of LuxOpCo and AEH approval of the granting of discharge; Acknowledgement of the appointment of Mr. […] as new manager of LuxOpCo and AEH; Approval of the amendment of the corporate signatory policy of LuxOpCo and AEH; Ratification of the shareholder´s advance in cash made by the sole shareholder to LuxSCS; Approval of the increase of the share capital of AEH by way of a contribution in kind of a claim; Ratification of the entering by the LuxSCS into amended and restated credit facility agreement; Ratification of the entering by the LuxSCS into an IP assignment agreement dated March 28, 2011 with [acquisition Q].

	23/04/2012	Written resolution of the sole manager of LuxSCS ([…] as president)	Settlement of LuxSCS´ annual accounts as of 31 December 2011 and discharge of the sole manager of LuxSCS for the accounting year ending on 31 December 2011; Approval as shareholder of LuxOpCo of the annual accounts as of 31 December 2011; Approval as shareholder of AEH of the annual accounts as of 31 December 2011.
	27/04/2012	Written resolution of the shareholders of LuxSCS ([…] as president, […] as vice president, […] as vice president and treasurer)	Approval of the annual accounts as of 31 December 2011 and allocation of the result; Discharge of the sole manager for the financial year ending on 31 December 2011.
	27/08/2012	Written resolution of the sole manager of LuxSCS ([…] as president)	Approval of the resignation of Mr. […] as manager of LuxOpCo and AEH; Approval of the appointment of Mr. [...] and Mr. […] as new managers of LuxOpCo and AEH and the amendment of the corporate signatory delegation policy of LuxOpCo and AEH; Ratification of the shareholder´s advance in cash made by LuxSCS to AEH; Approval of an increase of the share capital of AEH by way of a contribution in kind.
	12/12/2012	Written resolution of the sole manager of LuxSCS (represented by […] by virtue of a delegation of authority)	Ratification of the appointment of Mr. […] as new manager of LuxOpCo and AEH; Approval of the amendment of the corporate signature policy of LuxOpCo and AEH; Approval of the resignation of Mr. […] as manager of LuxOpCo and AEH.
	02/04/2013	Written resolution of the sole manager of LuxSCS (represented by […] by virtue of a delegation of authority)	Settlement of LuxSCS´ annual accounts as of 31 December 2012 and discharge of the sole manager of LuxSCS; Approval as shareholder of AEH of the annual accounts as of 31 December 2012; Approval as shareholder of LuxOpCo of the annual accounts as 31 December 2012; Ratification of the entry by LuxSCS into an asset purchase agreement for the acquisition of certain assets from [acquisition W1] and [acquisition W2]; Approval of the entering by LuxSCS into an amendment to an IP assignment agreement with Elkotob.com LLC.
	08/04/2013	Written resolution of the shareholders of LuxSCS (represented by […] by virtue of a delegation of authority, […] as vice president, […] as vice president and treasurer)	Approval of the annual accounts as of 31 December 2012 and allocation of the result; Discharge of the sole manager for the financial year ending on 31 December 2012.

(217) As illustrated in Table 14, the written resolutions of the sole manager, and the minutes from general meetings of LuxSCS from its incorporation in 2004 to 2013 indicate that the sole manager and the partners of LuxSCS principally dealt only with topics related to the monitoring of their investments in their capacity as partners in LuxSCS, such as share capital changes, capital contributions, granting of loans to affiliated companies and other financial decisions related to LuxSCS and its subsidiaries. The decisions reflected in the written resolutions and minutes also concerned the appointments of managers in the subsidiaries, their discharge and resignations, amendments of articles of association and approval of the accounts.

(218) Of the 46 written resolutions and minutes summarised in Table 14 only the following four relate to the Intangibles.

- On 14 January 2005, the sole manager of LuxSCS approved and ratified that LuxSCS had already entered into the Buy-In Agreement and two cost sharing agreements (including the CSA) during December 2004 and January 2005.
- On 28 April 2006, within the context of the reorganisation of the European retail operations, the sole manager of LuxSCS approved the assignment of the editorial contents, trademarks and domain names from Amazon.co.uk Ltd, Amazon.fr Holding SAS and Amazon.de GmbH to LuxSCS as well as the conclusion of the License Agreement with LuxOpCo. The sole manager was further authorised to execute those agreements.
- On 25 January 2012, the sole manager of LuxSCS approved and ratified the IP assignment agreement with [acquisition Q] as entered into by LuxSCS and

effective as of 29 March 2011. The sole manager was further authorised to execute the IP assignment agreement.

- On 2 April 2013, it was reported that LuxSCS and ATI had entered into an asset purchase agreement dated 1 March 2013 to acquire certain assets from a third party comprising software codes and all related intellectual property rights. The sole manager of LuxSCS ratified the asset purchase agreement and the license to LuxOpCo.

2.3.5. Information on IP licensing agreements entered into between Amazon group entities and unrelated entities

2.3.5.1. The M.com Agreements

(219) In addition to the M.com Agreements listed in Recital (142), Amazon concluded eleven further M.com Agreements between 2004 and 2006 with Bombay Company, DVF, Bebe, Marks & Spencer, Sears Canada, Hobby Hub, Benefit Cosmetic, Timex.com, Mothercare UK and Devanlay US[233].

(220) Amazon explained that the M.com partners did not receive access to Amazon's technology as such. Rather, Amazon used its technology to provide IT and e-commerce services to the partners[234]. As explained by Amazon, pursuant to the M.com Agreements "*Amazon agreed to provide e-commerce technologies to allow third parties to operate their own retail websites. The M.com customers, such as [A], received only technology, and did not use or receive rights to the Amazon trademarks, brand names, customer information, or any other Amazon intangible property*"[235]. Amazon further explained that instead of pricing each element of Amazon's offer individually, it took a holistic approach to the pricing of the M.com Agreements[236]. The M.com Agreements post-dating the contested tax ruling contain provisions specifying that each party only obtains a limited, non-exclusive license to the IP of its partner and only for the purpose of executing the agreement.

(221) Amazon stressed that there are important differences between the M.com Agreements and the License Agreement between LuxSCS and LuxOpCo, since "*under the agreement between LuxOpCo and LuxSCS, LuxOpCo received full access to customer data, relating to millions of customers. No such access of data is*

233 Amazon's submission of 12 June 2015.

234 Amazon Final Transcripts: [Vice President Technology – Software Development, Amazon Corporate LLC, US former Vice President of Kindle, Amazon Corporate LLC, US], 18 November 2014, par. 3602: 3-25; par. 3603:1, "*Q. M.com or enterprise solutions, in that program Amazon took all of the technologies that it had developed for its own website business […] and made them available to third-party retailers? […] Is that correct? A. That's a reasonable description. Q: Okay. And these third parties […] then used this technology to build and operate their own eCommerce system and website; is that correct? A: That's not quite correct. It was Amazon, my team specifically that took those technologies and assembled them, extended them, customised them and operated the technology day to day on behalf of that retailer. What the retailer would be doing is they would be managing their pricing, their promotions, their merchandising, their marketing, these elements […] we would be their IT and eCommerce department, but they would be what gets referred to as the merchandising and pricing and marketing department.*"

235 Amazon's submission of 12 June 2015.

236 Amazon Final Transcripts: [Vice President Technology – Software Development, Amazon Corporate LLC, US former Vice President of Kindle, Amazon Corporate LLC, US], 18 November 2014, par. 3540: 24-25, par. 3541: 1-25, par. 3542: 1-25: "*Q: […] And given that these deals involved services and technology, how did Amazon price them? A: Well, the way we priced these deals was essentially looking at them as a wholistic bundle […].*

included in the other M.com agreements. Second, the agreement between LuxSCS and LuxOpCo includes trademarks and domains, which are not included in the other M.com agreements."[237] Amazon explained that it never licenses out customer data to third parties[238].

(222) The M.com Agreements referred to in the TP Report are described in more detail in Recitals (223) to (229).

(223) Under the [A] Agreement, Amazon agreed to create, develop, host and maintain a new [A] website and a [A] Store on the Amazon websites, which were to replace [A]'s existing e-commerce web site. [A] determined the price of the products offered for sale both on the [A] Site and the [A] Store, acting as the seller of record[239]. Amazon was responsible for shipping and handling of the packages to final customers and providing customer services. [A] and Amazon did not exchange any ownership or rights to IP, unless expressly listed in the agreement. Rights to use the Amazon IP, as considered as reasonably necessary to perform the obligations of the parties under the contract, were licensed by Amazon to [A] on a non-exclusive, limited, and non-transferable basis[240]. Similar licenses to exploit [A] IP were granted by [A] to Amazon[241]. As of the launch date, customer information obtained through both website stores was co-owned by the parties. The data gathered by the parties prior to the launch date remained sole property of that party[242].

(224) Under the agreed remuneration structure, [A] was to pay a set-up fee (USD 15 million) and base fees (ranging from USD 7 million to USD 35 million in 2001-2006). Additionally, [A] was to pay variable fees per unit detailed in Table 15 and further fees referred to as accessorial fees (ranging from USD 0.05 to USD 13.75 per unit sold) in relation to the wrapping and over-size of the items sold. Finally, [A] was to pay Amazon a commission fee in percentage of sales detailed in Table 16.

237 Amazon's submissions of 31 July 2015 and 15 January 2016.

238 Amazon's submissions of 12 June 2015 and 15 January 2016.

239 [A] Agreement, section 4.4 (Pricing).

240 [A] Agreement, paragraph 14.4.1.1 (Trademarks) provides: *"ACI hereby grants to [A], during the Term, a limited, non-exclusive, non-transferable (except in accordance with Section 22.7) license, which [A] may sublicense only to its Affiliates to use within the Territory such ACI Content and Trademarks supplied by ACI hereunder: (a) only within the Territory; (b) only as is reasonably necessary to perform its obligations under this Agreement; and (c) only for the purposes contemplated under this Agreement."*. [A] agreement, paragraph 14.4.1.2 (Limited License) provides: *"ACI grants to [A], for a term ending on the earlier of: (a) August 31, 2006; or (b) twelve (12) months following any termination of the Term by [A] pursuant to Section 13.2, or six (6) months following any termination of the Term by [A] pursuant to Section 13.3.2, a limited, temporary, non-exclusive, non-transferable (except in accordance with Section 22.7) license to use the ACI Intellectual Property (excluding Trademarks, URLs and domain names of ACI and its Affiliates), solely as necessary to permit [A] to continue the operation, maintenance and support of the [A] Site (or any successor Web Site, whether hosted by [A] directly or by a Third Party) in the form such exists as of the effective date of any termination of this Agreement as provided above"*.

241 [A] Agreement, section 14.4.2 ([A]).

242 [A] Agreement, section 11 (Customer Information and Other Data).

Table 15 - Variable fees paid by [A][243]

Variable unit fees ($/units)	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Sortable	$ 2.36	$ 2.36	$ 2.10	$ 1.87	$ 1.78	$ 1.78
Conveyable	$ 3.83	$ 3.83	$ 3.57	$ 3.27	$ 3.13	$ 3.13
Non-sortable or non-conveyable	$ 4.83	$ 4.83	$ 4.81	$ 4.48	$ 4.28	$ 4.28
Drop-ship units	$ 0.75	$ 0.75	$ 0.75	$ 0.75	$ 0.75	$ 0.75
[...] Gift Card Drop-Ship Units	$ 0.75	Gift Card free				
Customer Return Processing	Same as variable unit fee for each such [...] product returned to Amazon or its affiliates					
Vendor Return Processing	$ 1.00	$ 1.00	$ 1.00	$ 1.00	$ 1.00	$ 1.00

Table 16 - Sales commissions paid by [A]

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Product Sales Commission (other than catalogue-branded [...] products)	5.0%	5.0%	4.5%	4.0%	4.0%	4.0%
Additional Apparel Product Sales Commission	2.5%	2.5%	3.0%	3.5%	3.5%	3.5%
Product Sales Commission (catalogue-branded [...] products)	2.0%	2.5%	2.5%	2.5%	3.0%	3.0%

(225) For its part, Amazon was to pay [A] a referral fee for Amazon products displayed for sale on the [A] website. This fee amounted to 5 % on sales in 2001 and 2002, 4.5 % on sales in 2003, and 4 % on sales from 2004 to 2006.

(226) The [A] Agreement's initial five year term was subsequently extended until 31 August 2011, when Amazon's commercial relationship with [A] ended[244].

(227) The [G] Agreement covered *inter alia* the development, hosting and maintenance of a co-branded portion of the Amazon website to sell products selected and provided by [G]. After the co-branded store was launched, [G] committed to discontinue the operation of the [G] website and to redirect all the traffic from its website to the co-branded store. Amazon determined the price of the products sold through the co-branded store. It purchased the products from [G] and sold them to the final customers[245]. [G] owned all the units stored in Amazon's distributor centres and assumed the risk of losses related to this inventory. [G] and Amazon did not exchange any ownership or rights to IP unless expressly listed in the agreement. IP rights considered as reasonably necessary to perform the obligations of the parties under the contract were licensed by Amazon to [G] and by [G] to Amazon on a non-exclusive non-transferable basis[246]. [G] was to pay[247] a set-up fee of USD 19.5 million in the first year, an annual base fee of up to USD 70 million in 2004, a fulfilment fee ranging from USD 1.7 to USD 4.5 per unit and a commission fee, initially of 4 % on sales and gradually increasing to 6 % over the years

(228) Under the [H] and [B] Agreements, Amazon agreed to create new e-commerce websites (*mirror sites)* which would replace the existing sites of [H] and [B]

243 Exhibit S of the [A] Agreement.

244 Amazon's submission of 15 January 2016.

245 [G] Agreement , section 5.5 (Pricing of Selected Product Units) and 9.1 (Sale of Selected Product Units to Customers Through the ACT Site: Procedure).

246 [G] Agreement, section 16 (Proprietary Rights and Licenses, Restrictions).

247 [G] Agreement, section 13 (Compensation).

respectively. Amazon was responsible for creating, hosting and maintaining the e-commerce website[248]. It also committed to ensure that the information available and the performance of the mirror sites would be substantially equivalent to the Amazon website. In return, Amazon received the existing client data of [B] and [H], as well as the possibility to list Amazon products on the mirror sites. Amazon paid referral fees amounting to between 5 % and 6 % of the sales value to the two respective counterparties. [H] and [B] shared all pre-existing customer information with Amazon before the mirror sites were launched[249]. As of that date, both parties co-owned the customer information obtained through the mirror sites. The agreements stipulated that each party granted to the other a royalty-free non-exclusive, non-transferable license to use their IP identified as necessary to perform the obligations under the agreement[250].

(229) Under the [I] Agreement, Amazon did not provide an e-commerce platform for [I], but agreed that [I] products would be listed for sale and integrated into the search and browse features of the Amazon website. [I] was to pay a remuneration of 8 % to 9 % of sales generated via the Amazon website.

2.3.5.2. Other IP license agreements between the Amazon group and non-related entities

(230) Amazon submitted all IP license agreements concluded with third parties since 2000. None of those agreements concerned a transfer of IP comparable to that in the License Agreement. The agreements submitted do not cover any transfer of the Amazon trademark, e-platform technology or customer database. They concern either the licensing of a registered patent or the digital content.

(231) In Amazon's opinion, these contracts "*do not have any relevance to the State aid assessment of the 2003 ATC:* [a)] *These agreements could only be used for a CUP analysis, while the 2003 ATC rightfully based its analysis on the residual profit split.* [b)] *In any event, most of the agreements concluded in the period of application of the 2003 ATC (2006 to mid-2014) do not include all of the IP components comparable to the IP included in the license agreement between LuxSCS and LuxOpCo ("Intangibles").* [c)] *Moreover the only agreements with some similarities to the agreement between LuxOpCo and LuxSCS postdate the issuance of the 2003 ATC, which renders them meaningless for the State aid assessment of the 2003 ATC because they could not have been relied upon to conduct the transfer pricing analysis at the time.*"[251]

2.3.6. Description of Amazon's new corporate and tax structure in Luxembourg as confirmed by the 2014 tax ruling

(232) In May 2014, Amazon received a new tax ruling from the Luxembourg tax administration concerning changes made to its corporate and tax structure in Luxembourg. Under the new corporate structure, the role of LuxSCS [...]. The principal change to that structure was the creation of a new [...] company [...], which was inserted in the existing structure between [...].

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248 [H] Agreement, section 2.1 (Mirror Site: Development) of and [B] Agreement, section 2.1 (Mirror Site: Development).

249 [H] Agreement, section 5.2 (Existing Customer Information Delivery) and [B] Agreement, sections 5.2 (Existing Customer Information Delivery).

250 [H] Agreement, section 9.2 (Licenses) and [B] Agreement, section 10.2 (Licenses).

251 Amazon's submission of 12 June 2015.

(233) Under the new corporate structure, the pre-existing platform organisation in LuxOpCo[...][252]. As a result, [60-70] employees previously working in the Localisation and Translation Team of LuxOpCo were integrated in the Software Development and Translation Team [...][253]. As regards the License Agreement, [...] now pays a royalty to LuxSCS[254] in return for the right to use the Intangibles for the purpose of operating an e-commerce platform in Europe[255].

(234) [...]'s main activity is [...]. The main service [...] provides is [...]. [...] also manages [...]. Finally, [...] provides [...] and is responsible for [...]. [...] will in turn receive [...][256], [...][257] and [...] fees[258] from [...].

(235) In the request for a tax ruling of 14 May 2014, the listing fee to be due from LuxOpCo was considered very low as compared to the average listing fee charged to third party merchants[259]. The following reasons were brought forward to justify why [...] was willing to grant a discount on the listing fee to LuxOpCo:

(1) The lower listing fee "*reflects the [...] financial situation and outlook [description of the state of the Retail business market and Amazon's strategy]*."[260]

(2) [Description of Amazon's commercial strategy]. If [...] were to charge a listing fee of [4-6]% to cover its costs of providing the platform service [Amazon projections], both of which would be detrimental to [...]. On the other hand, the discount [...] will be required to grant will be limited by [...]. Given that the allocation of technology and platform expenses is about [4-6] percent of LuxOpCo's projected retail revenues in 2014 it is [...]. Thus, a listing fee that is less than [4-6] percent would appear to be a better alternative for LuxOpCo than LuxOpCo investing in the technology and platform itself[261].

(236) Under the new corporate structure, the role of ASE remains unchanged. It will continue to operate and manage the European Marketplace business. Instead of paying a royalty to LuxOpCo for the totality of sub-licensed Intangibles, it now pays a [...] fee [...].

(237) The role of the EU Local Affiliates also remained unchanged the under new corporate structure.

2.4. Description of the relevant national legal framework

(238) The ordinary rules of corporate taxation in Luxembourg are to be found in the Luxembourg Corporate Income Tax Code (*loi modifiée du 4.12.1967 concernant l'impôt sur le revenue*, the "LIR").

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252 Amazon's submission of 15 January 2016.

253 Amazon's submission of 22 January 2016.

254 [...] will pay a royalty to [...]. However, if royalty payments result in remuneration [...], the royalty will be adjusted [...].

255 As provided in the License Agreement, paragraph 9.7 (Binding effect, Assignment), either party was entitled to assign its rights and obligations under this agreement without the other party's consent provided that the assignee is an Affiliate of the assignor.

256 The [...] fee.

257 [...] fee to be paid by [...].

258 [...] to earn a return on its costs to provide shares service of [1-10]% to [1-10]%.

259 According to the recital 39 a. of the 2014 APA request [...].

260 2014 ruling request, 2 April 2014, par. 39 a, p. 11.

261 2014 ruling request, 2 April 2014, par. 39 c, p. 11.

(239) Article 18(1) LIR provides the method to establish a corporate taxpayer's annual profit: "*The profit is determined as the difference between net assets as of the end and net assets as of the beginning of the reporting period, increased by the withdrawals of business cash or other assets by the taxpayer for its personal use or any other uses which are not intended in the interests of the company and decreased by additional contributions performed during the reporting period.*".

(240) Article 159 LIR provides that resident tax companies are subject to tax on the totality of their profits.[262] Article 160 LIR provides that non-resident companies are subject to tax on their source income,[263] which is defined in Article 156 LIR.[264] Since 2011, all companies subject to tax in Luxembourg are taxed on their taxable profit at the standard tax rate of 28.80 %[265].

(241) Prior to the entry into force of Article 56bis LIR in January 2017, Article 164(3) LIR was considered to enshrine the arm's length principle in Luxembourg tax law. Article 164(3) LIR provides: "*Taxable income comprises hidden profit distributions. A hidden profit distribution arises in particular when a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he normally would not have received if he had not been a shareholder, a stockholder or an interested party.*"[266] According to the prevailing interpretation of Article 164(3) LIR, which has been in place since 1967, transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length. This was confirmed by the explanation provided by Luxembourg in paragraph 64 of its comments to the Opening Decision: "*The arm's length principle for corporate tax payers established in the Grand Duchy of Luxembourg is set out in Articles 164(3) and 18 of the amended Act of 4 December 1967 on income tax (Loi concernant l'impôt sur le revenue – 'LIR') although the term "arm's length principle" is not expressly used in those articles. However, it is definitely that principle that forms the*

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262 Article 159(1) LIR: "*Sont considérés comme contribuables résidents passibles de l'impôt sur le revenu des collectivités, les organismes à caractère collectif énumérés ci-après, pour autant que leur siège statutaire ou leur administration centrale se trouve sur le territoire du Grand-Duché.*" Article 159(2) LIR: "*L'impôt sur le revenu des collectivités porte sur l'ensemble des revenus du contribuable*".

263 Article 160 LIR: "*Sont passibles de l'impôt sur le revenu des collectivités pour leur revenu indigène au sens de l'article 156, les organismes à caractère collectif de l'article 159 qui n'ont ni leur siège statutaire, ni leur administration centrale sur le territoire du Grand-Duché*".

264 Article 156 LIR: "*Sont considérés comme revenus indigènes des contribuables non-résidents: 1. le bénéfice commercial au sens des articles 14 et 15: a) lorsqu'il est réalisé directement ou indirectement par un établissement stable ou un représentant permanent au Grand-Duché, excepté toutefois lorsque le représentant permanent est négociant en gros, commissionnaire ou représentant de commerce indépendant*".

265 The Luxembourg corporate income tax consists of a corporate income tax on profits ("*impôt sur le revenue des collectivités*" or "*IRC*"), taxed at a rate of 21 %, and, for companies established in Luxembourg City, a municipal business tax on profits ("*impôt commercial communal*"), taxed at a rate of 6.75 %. In addition, there is a 5 % surcharge on the 21 % tax rate for an employment fund calculated on the IRC. In 2012, the solidarity surcharge was increased from 5 % to 7 % with effect from tax year 2013. With the changes introduced for tax year 2013, the aggregate income tax rate increases from 28.80 % to 29.22 % for Luxembourg City. In addition, Luxembourg companies are subject to an annual net wealth tax, which is levied at a rate of 0.5 % on the company's worldwide net worth on 1 January of each year.

266 The application of Article 164(3) LIR to financing companies has been clarified by the Luxembourg tax administrations in Circulars no. 164/2 of 28 January 2011 and no. 164/2bis of 8 April 2011, which were replaced by Circulaire du directeur des contributions LIR n° 56/1 – 56bis/1 du 27 décembre 2016, traitement fiscal des sociétés exerçant des transactions de financement intra-groupe.

basis of those provisions." Luxembourg further explained that neither Article 18 nor Article 164(3) LIR differentiates between international and national transactions or between multinational or domestic groups. It follows therefrom that the Luxembourg transfer pricing rules and practices reflect the OECD TP Guidelines, even if Article 164(3) LIR doesn't make any reference to those guidelines[267].

(242) This longstanding interpretation of Article 164(3) LIR was codified by the Luxembourg Tax Administration in several Circular Letters, in particular LIR no. 164/2 of 28 January 2011 and no. 164/2bis of 8 April 2011 ("the Circulars"), which concern the application of the arm's length principle to intra-group financing transactions. In addition to the specific guidance on the application of the arm's length principle for such transactions, the Circulars contained a general description of the arm's length principle as set out in the OECD TP Guidelines, which it transposed into domestic law. More specifically, the Circulars gave the following general guidance on the provision of intra-group services: "*An intra-group service [...] has been rendered if, in comparable circumstances, an independent enterprise had been willing to pay another independent enterprise to carry out that activity, or if it had carried out that activity itself.*"[268] The Circular further specified that, as a general rule, a tax ruling is usually valid for a maximum of five years, unless the facts and circumstances change or unless the legal provisions on which the ruling was based are modified or if one of the key characteristics of the transaction is altered.

(243) As of 1 January 2017, a new article 56bis LIR explicitly formalises the application of the arm's length principle under Luxembourg tax law. With the effect of the same date, the above mentioned Circulars were replaced by the *Circulaire du directeur des contributions LIR n° 56/1 – 56bis/1 du 27 décembre 2016*.

2.5. Guidance on transfer pricing

2.5.1. The OECD framework on transfer pricing

(244) The Organisation for Economic Co-operation and Development ("OECD") has produced several non-binding guidance documents on international taxation. Given their non-binding nature, the tax administrations of OECD member countries, of which Luxembourg is one[269], are simply encouraged to follow the OECD's framework[270]. Nevertheless, the OECD's framework serves as a focal point and exerts a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries guidance documents forming part of that framework have been given the force of law or serve as a reference for the purpose of interpreting domestic tax law. Therefore, to the extent the Commission refers to the OECD framework in this Decision, it does so because that framework is the result of expert discussions in the context of the OECD and elaborates on techniques aimed to address common challenges in international taxation.

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267 See Recital (294).

268 Circular Letter LIR n° 164/2 of 28 January 2011, p. 2.

269 Luxembourg has been a member of the OECD since 7 December 1961.

270 See, for example, 1995 OECD TP Guidelines, preface, paragraph 16: "*OECD Member countries are encouraged to follow these Guidelines in their domestic transfer pricing practices, and taxpayers are encouraged to follow these Guidelines in evaluating for tax purposes whether their transfer pricing complies with the arm's length principle [...]*".

2.5.2. The arm's length principle for international tax purposes

(245) When independent companies transact with each other on the market, the conditions of that transaction, including the prices of the goods transferred or the services provided, are normally determined by external market forces. When companies integrated in a multinational corporate group transact with companies from the same group ("associated group companies"), their commercial and financial relations may not be determined by external market forces, but may, in some cases, be influenced by a common interest to minimise the tax liabilities of the group.

(246) The OECD' Model Tax Convention on Income and on Capital ("OECD Model Tax Convention")[271], which forms the basis of many bilateral tax treaties involving OECD member countries and an increasing number of non-member countries, contains provisions on the appropriate profit attribution between companies within a multinational corporate group. In this respect, Article 9(1) of the OECD Model Tax Convention provides: "*[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly*". That provision is considered to constitute the authoritative statement in relation to the "arm's length principle" for international tax purposes.

(247) According to the arm's length principle, national tax administrations should only accept the transfer prices[272] agreed between associated group companies for intra-group transactions if those prices reflect what would have been agreed in uncontrolled transactions, i.e. transactions between independent companies negotiating under comparable circumstances at arm's length on the market. As explained in the OECD TP Guidelines: "*[t]he arm's length principle is sound in theory since it provides the closest approximation of the workings of the open market in cases where goods and services are transferred between associated enterprises. While it may not always be straightforward to apply in practice, it does generally produce appropriate levels of income between members of MNE [multinational enterprise] groups, acceptable to tax administrations. This reflects the economic realities of the controlled taxpayer's particular facts and circumstances and adopts as a benchmark the normal operation of the market.*"[273] This is the essence of the arm's length principle. Therefore, OECD member countries have agreed that, for tax purposes, the profits of associated companies may be adjusted as necessary to ensure that the arm's length principle is complied with. In other words, the OECD member countries consider that an adjustment of transfer prices is appropriate when the conditions of the commercial and financial relations in an intra-group transaction differ from those they would expect to find in comparable uncontrolled transactions.

(248) By seeking to adjust profits by reference to the commercial or financial conditions which would have been obtained in comparable uncontrolled transactions, the arm's

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271 The most recent version was published by the OECD on 15 July 2014.

272 In this context, "transfer prices" refer to the prices at which a company transfers physical goods or intangible property or provides services to its associated companies. 1995, 2010 and 2017 OECD TP Guidelines, preface, paragraph 11.

273 See, 1995 OECD TP Guidelines, paragraph 1.13; See also, 2010 and 2017 OECD TP Guidelines, paragraph 1.14.

length principle ensures the preferred approach of the OECD of treating the members of a corporate group for tax purposes as operating as separate entities (the "separate entity approach"), rather than as inseparable parts of a single unified business[274].

(249) The OECD provides guidance to tax administrations and multinational enterprises on the application of the arm's length principle in its transfer pricing guidelines, of which the latest amendments were published in 2017 (the "2017 OECD TP Guidelines")[275]. Earlier versions of the guidelines were approved by the OECD Council on 22 July 2010 ("2010 OECD TP Guidelines")[276] and on 13 July 1995 ("1995 OECD TP Guidelines")[277]. The latest revisions and clarifications to the OECD TP Guidelines, as set out in 2017 OECD TP Guidelines, are, among others[278], based on the OECD's final report on Actions 8-10, *Aligning Transfer Pricing Outcomes with Value Creation* ("BEPS Actions 8-10 Final Report")[279], as published under its Action Plan on Base Erosion and Profit Shifting (the "BEPS project"). The BEPS Actions 8-10 Final Report contains revisions and clarifications on the OECD TP Guidelines in general and in relation to intangibles[280] and cost sharing agreements[281] in particular.

2.5.3. The OECD transfer pricing methods

(250) The OECD TP Guidelines describe five methods to determine an arm's length price of intra-group transactions: (i) the CUP method; (ii) the cost plus method; (iii) the resale minus method; (iv) the transactional net margin method (the "TNMM"), and

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274 The separate entity approach is explained in the preface to the OECD TP Guidelines, paragraph 6: *"In order to apply the separate entity approach to intra-group transactions, individual group members must be taxed on the basis that they act at arm's length in their dealings with each other. However, the relationship among members of an MNE [multinational enterprise] group may permit the group members to establish special conditions in their intra-group relations that differ from those that would have been established had the group members been acting as independent enterprises operating in open markets. To ensure the correct application of the separate entity approach, OECD Member countries have adopted the arm's length principle, under which the effect of special conditions on the levels of profits should be eliminated.*" See also the 2010 OECD TP Guidelines, paragraph 1.6.

275 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 as published 10 July 2017. Later changes and additions to the commentaries and guidelines related to the OECD Model Tax Convention, which do not lead to a change of the wording of the Convention itself, are considered to be applicable to the interpretation of the articles set out therein. The rationale for this approach is that the OECD commentaries and guidelines, including the 1995 and 2010 OECD TP Guidelines, are considered to capture the international consensus on the application of the principles set out in the OECD Model Tax Convention, see also OECD Model Tax Convention Commentary, 2010, para. 35.

276 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 22 July 2010.

277 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 13 July 1995. These Guidelines were based on the OECD Report "Transfer Pricing and Multinational Enterprises (1979)".

278 The 2017 OECD TP Guidelines reflect the clarifications and revisions agreed in the 2015 BEPS Reports on Actions 8-10 Aligning Transfer pricing Outcomes with Value Creation and on Action 13 Transfer Pricing Documentation and Country-by-Country Reporting. It also includes the revised guidance on safe harbours approved in 2013 which recognises that properly designed safe harbours can help to relieve some compliance burdens and provide taxpayers with greater certainty. Finally, this edition also contains consistency changes that were made to the rest of the OECD TP Guidelines.

279 The report was published on 5 October 2015 and approved by the OECD Council on 23 July 2016.

280 OECD (2015), Aligning Transfer Pricing Outcomes with value Creation, Actions 8-10 – 2015 Final Reports, BEPS Project, Revisions to Chapter VI of the Transfer Pricing Guidelines.

281 OECD (2015) Aligning Transfer Pricing Outcomes with value Creation, Actions 8-10 – 2015 Final Reports, BEPS Project, Revisions to Chapter VIII of the Transfer Pricing Guidelines.

(v) the transactional profit split method. In general, the most appropriate transfer pricing method must be applied with reference to the circumstances of the case[282]. However, for difficult cases, where no one approach is conclusive, a flexible approach would allow the evidence of more than one method to be used in conjunction[283]. Multinational corporate groups retain the freedom to apply methods not described in those guidelines to establish transfer prices, provided those prices satisfy the arm's length principle[284].

(251) A distinction is drawn between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods)[285]. The traditional transaction methods are regarded as the most direct means of establishing whether the commercial or financial conditions in a transaction between associated companies are at arm's length. On this basis, the OECD TP Guidelines declare an express preference for the traditional transaction methods, such as the CUP method, over the transactional methods, i.e. the TNMM and the profit split method[286].

(252) The CUP method, the TNMM and the profit split method are relevant for the present Decision and are therefore described in more detail in Recitals (253) to (256).

(253) The CUP method is referred to as a direct transfer pricing method[287]. It compares the price and the other conditions agreed for the transfer of goods or services in an intra-group transaction to the price and the other conditions agreed for the transfer of goods or services in comparable uncontrolled transactions (i.e. transactions between unaffiliated companies) conducted under comparable circumstances[288].

(254) The TNMM and the profit split method are often described as "indirect methods". Those methods price intra-group transactions by determining what would be an

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282 1995 OECD TP Guidelines, chapter II, 2010 and 2017 OECD TP Guidelines, part II.

283 1995 OECD TP Guidelines, paragraph 1.69, provides that "*[i]n such cases, an attempt should be made to reach a conclusion consistent with the arm's length principle that is satisfactory from a practical viewpoint to all the parties involved, taking into account the facts and circumstances of the case, the mix of evidence available, and the relative reliability of the various methods under consideration"*.

284 1995 OECD TP Guidelines, paragraph 1.68; 2010 and 2017 OECD TP Guidelines, paragraph 2.9. In this respect, 2010 and 2017 OECD TP Guidelines, paragraph 2.9 stresses that "*[s]uch other methods should however not be used in substitution for OECD-recognised methods where the latter are more appropriate to the facts and circumstances of the case*".

285 1995 OECD TP Guidelines, chapter II and III; 2010 and 2017 OECD TP Guidelines, part II and III.

286 1995 OECD TP Guidelines, paragraph 3.49 provides: "*Traditional transaction methods are to be preferred over transactional profit methods as a means of establishing whether a transfer price is at arm's length, i.e. whether there is a special condition affecting the level of profits between associated enterprises. To date, practical experience has shown that in the majority of cases, it is possible to apply traditional transaction methods.*" 2010 and 2017 OECD TP Guidelines, paragraph 2.3 provides: "*As a result, where, taking account of the criteria described at paragraph 2.2, a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method*".

287 1995 OECD TP Guidelines; paragraph 2.7: "*Where it is possible to locate comparable uncontrolled transactions, the CUP Method is the most direct and reliable way to apply the arm's length principle. Consequently, in such cases the CUP Method is preferable over all other methods*." See also 2010 OECD TP Guidelines, paragraph 2.14 and 2017 OECD TP Guidelines, paragraph 2.15.

288 1995 OECD TP Guidelines; paragraph 2.7: "*Following the principles in Chapter I, an uncontrolled transaction is comparable to a controlled transaction (i.e. it is a comparable uncontrolled transaction) for purposes of the CUP method if one of two conditions is met: a) none of the differences (if any) between the transactions being compared or between the enterprises undertaking those transactions could materially affect the price in the open market; or, b) reasonably accurate adjustments can be made to eliminate the material effects of such differences*". See also the 2010 OECD TP Guidelines, paragraph 2.14 and the 2017 OECD TP Guidelines, paragraph 2.15.

arm's length net profit (i.e. operating profit) for a particular activity by estimating the net profit which a non-integrated company engaging in the same or similar activity would be expected to make on that activity[289].

(255) The TNMM examines the ratio of the net profit[290] to an appropriate base (e.g. costs, sales, assets)[291], which is referred to as a "net profit indicator" or "profit level indicator" and related to the intra-group transaction (or transactions that are appropriate to aggregate) under review. The net profit indicator should be established by reference to the net profit indicator that independent parties earn in comparable uncontrolled transactions. When applying the TNMM, it is necessary to choose the tested party to the controlled transaction, i.e. the party to the transaction which is tested with a profit level indicator. That choice must be consistent with the functional analysis performed (including risk assumed and assets used) of both parties to the intra-group transaction(s) under review. In applying the TNMM, the tested party is, as a general rule, the party to which the method can be applied in the most reliable manner and for which the most reliable comparables can be found. The use of the TNMM is often associated with paragraph 3.18 of the 2010 OECD TP Guidelines, according to which the "tested party" should, in principle, be the company which has the less complex function in relation to the intra-group transaction under review[292]. Accordingly, the TNMM is considered a well-suited method to test the arm's length remuneration of the party that does not make any unique and valuable contributions to the intra-group transaction(s) under review[293].

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289 1995 OECD TP Guidelines, paragraph 3.2; 2010 OECD TP Guidelines, paragraph 2.58; and 2017 OECD TP Guidelines, paragraph 2.64.

290 As explained in paragraph 2.80 of the 2010 OECD TP Guidelines, the determination of the profit level indicator should exclude non-operating items such as interest income, expenses and income taxes Exceptional and extraordinary items of a non-recurring nature should generally also be excluded.

291 1995, 2010 and 2017 OECD TP Guidelines, Glossary.

292 2010 OECD TP Guidelines, paragraph 3.18 provides for the following recommendation: "*When applying a cost plus, resale price or transactional net margin method as described in Chapter II, it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis*." See also, 2017 OECD TP Guidelines, paragraph 6.198: "*In a transfer pricing analysis where the most appropriate transfer pricing method is the resale price method, the cost-plus method, or the transactional net margin method, the less complex of the parties to the controlled transaction is often selected as the tested party. In many cases, an arm's length price or level of profit for the tested party can be determined without the need to value the intangibles used in connection with the transaction. That would generally be the case where only the non-tested party uses intangibles*".

293 As stated in the 1995 OECD TP Guidelines, paragraph 6.26: "*In cases involving highly valuable intangible property, it may be difficult to find comparable uncontrolled transactions. It therefore may be difficult to apply the traditional transaction methods and the transactional net margin method, particularly where both parties to the transaction own valuable intangible property or unique assets used in the transaction that distinguish the transaction from those of potential competitors. In such cases the profit split method may be relevant although there may be practical problems in its application.*" As further explained in the 2010 OECD TP Guidelines, paragraph 2.59: "*A transactional net margin method is unlikely to be reliable if each party to a transaction makes valuable, unique contributions […] In such a case, a transactional profit split method will generally be the most appropriate method,[…]. However, a one-sided method (traditional transaction method or transactional net margin method) may be applicable in cases where one of the parties makes all the unique contributions involved in the controlled transaction, while the other party does not make any unique contribution*".

(256) The profit split method is the other "indirect method" to approximate the arm's length prices of intra-group transactions. That method identifies the combined profit (or loss) to be split between the associated companies party to the intra-group transactions being priced and then splits those profits between them on an economically valid basis that approximates the division of profits that would have been anticipated and reflected in an agreement made at arm's length[294]. The OECD Guidelines describe two approaches to divide the combined profits among the associated companies: the contribution analysis and the residual analysis. The contribution analysis splits the combined profits on the basis of the relative value of the functions performed (taking account assets used and risks assumed) by each of the parties involved in the intra-group transactions being priced. The residual analysis uses a two-step approach to divide the profits. In a first step, each company is allocated a basic (or routine) profit appropriate for the functions it performs, assets it uses and risks it assumes based on a comparison of the market returns achieved for similar transactions by independent enterprises. In other words, the first step essentially corresponds to the application of the TNMM. In a second step, the residual profit remaining after the first step has been concluded is allocated among the parties in a manner that approximates how independent parties would have divided that profit at arm's length. The profit split method is usually considered an appropriate method where both parties to the intra-group transaction make unique and valuable contributions to that transaction, because in such a case independent parties would be expected to share the profits of the transaction in proportion to their respective contributions[295].

2.5.3.1. The arm's length range

(257) The OECD TP Guidelines describe as an acceptable arm's length outcome from a comparison analysis a range of outcomes rather than one specific outcome[296]. In practice, what is referred to as a "range" is the interquartile range[297].

(258) However, the OECD TP Guidelines stress that this is possible only where the range comprises results of relatively equal and high reliability, while in presence of comparability defects, it can be appropriate to use measures of central tendency (for instance the median, the mean or weighted averages, etc.) to determine the most appropriate point in the range[298].

2.5.3.2. Special considerations on the application of the arm's length principle for intangible property

(259) Chapter VI of the OECD TP Guidelines provides specific guidance on the application of the arm's length principle to intangible property. Chapter VI was introduced in the 1995 OECD TP Guidelines and was most recently updated in the 2017 OECD TP Guidelines on basis of the BEPS Actions 8-10 Final Report[299].

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294 1995, 2010 and 2017 OECD TP Guidelines, Glossary.

295 1995 OECD TP Guidelines, paragraph 3.7; 2010 OECD TP Guidelines, paragraphs 2.109 and 2.115.

296 1995 OECD TP Guidelines, paragraphs 1.45 to 1.48, 2010 and 2017 OECD TP Guidelines, paragraphs 3.55 to 3.62.

297 Quartiles in a series of data are three points which divide the figures in the set ranked from smallest to largest into four equally populated sets, that is 25% of the data is in the 25th percentile (also called lower quartile), 50% of the data is below or equal to the second quartile, which is the median of the set, and 75% of the data is below or equal to the 75th percentile (also called upper quartile).

298 1995 OECD TP Guidelines, paragraph 1.48, 2010 and 2017 OECD TP Guidelines, paragraph 3.62.

299 2017 OECD TP Guidelines, Chapter VI, and BEPS Actions 8-10 Final Report, p. 63-117.

(260) According to that Chapter, the application of the arm's length principle to an intangible property must consider both the perspective of the transferor and the transferee of the property. From the perspective of the transferor, the price at which a comparable independent enterprise would be willing to transfer the property under comparable circumstances should be examined. From the perspective of the transferee, it should be examined whether a comparable independent enterprise would be willing to pay such a price[300].

(261) An independent transferee would only accept to pay the price in question if there are reasonable expectations to secure satisfactory benefits from the use of the intangible property, after considering other options realistically available. Identifying the entity or entities involved in intra-group transactions concerning intangible property which are entitled to retain (partly or entirely) the profits derived from that property is crucial to achieve an arm's length outcome. However, the legal ownership of the intangible property is not determinative when analysing the arm's length nature of the remuneration[301].

2.5.3.3. Special considerations on the application of the arm's length principle to shareholder activities and low value adding intra-group services

(262) Chapter VII of the OECD TP Guidelines provides specific guidance on the application of the arm's length principle to intra-group services. Chapter VII was introduced in the 1995 OECD TP Guidelines and most recently updated in the 2017 OECD TP Guidelines on basis of the BEPS Actions 8-10 Final Report[302].

(263) A multinational group may arrange for certain intra-group services to be available to the members of the group, for example financial or administrative services. Such services might be carried out by the parent company or another group member which may initially bear the cost of providing them. Where intra-group services are deemed to have been provided, it is necessary to determine whether the remuneration to be paid by the receiving company for such services, if any, is in accordance with the arm's length principle[303]. As explained in the OECD TP Guidelines, "*[i]n trying to determine the arm's length price in relation to intra-group services, the matter should be considered both from the perspective of the service provider and from the perspective of the recipient of the service. In this respect, relevant considerations include the value of the service to the recipient and how much a comparable independent enterprise would be prepared to pay for that service in comparable circumstances, as well as the costs to the service provider*."[304]

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300 1995 and 2010 OECD TP Guidelines, paragraph 6.14, 2017 OECD TP Guidelines, paragraph 6.112.

301 This focus is further confirmed in the 2017 OECD TP Guidelines, paragraph 6.42: "*While determining legal ownership and contractual arrangements is an important first step in the analysis, these determinations are separate and distinct from the question of remuneration under the arm's length principle. For transfer pricing purposes, legal ownership of intangibles, by itself, does not confer any right ultimately to retain returns derived by the MNE [multinational enterprise] group from exploiting the intangible, even though such returns may initially accrue to the legal owner as a result of its legal or contractual right to exploit the intangible. The return ultimately retained by or attributed to the legal owner depends upon the functions it performs, the assets it uses, and the risks it assumes, and upon the contributions made by other MNE [multinational enterprise] group members through their functions performed, assets used, and risks assumed*".

302 2017 OECD TP Guidelines, Chapter VI, and BEPS Actions 8-10 Final Report, p. 141-160.

303 1995, 2010 and 2017 OECD TP Guidelines, paragraph 7.2.

304 1995, 2010 and 2017 OECD TP Guidelines, paragraph 7.29.

(264) However, not all intra-group activities justify a remuneration to be paid by the recipient. An intra-group activity performed by a company in its capacity as shareholder and solely because of that company's ownership interest in one or more other group members (a "shareholder activity") should not be charged to the subsidiaries[305].

(265) The EU Joint Transfer Pricing Forum ("JTPF") is an expert group formed by the Commission in October 2002 which assists and advises the Commission on transfer pricing matters. The JTPF is composed of governmental and non-governmental sector experts in the field of transfer pricing. In February 2010, a report was published on the JTPF's evaluation of the application of the arm's length principle, as set out in the OECD TP Guidelines, on a specific category of services provided between associated companies, described as "low value adding intra-group services" (the "2010 JTPF Report")[306].

(266) As explained in Annex 1 to the 2010 JTPF Report, low value adding services may, among others, include legal services and accounting services. Where such low value adding services are deemed to have been provided, the 2010 JTPF Report considers the CUP method to be the most appropriate method to determine the arm's length price of those services. However, in the absence of suitable comparable uncontrolled transactions, a cost-based transfer pricing method is the most commonly observed method for determining the arm's length price of such services.[307].

(267) When applying a cost-based method, the appropriate cost base of a particular service needs to be identified. It should then be considered what mark-up, if any, should be applied on those costs. In this respect, the 2010 JTPF Report refers in the first place to paragraphs 7.33 and 7.36 of the 1995 OECD TP Guidelines, stating that a mark-up should not always be applied to the cost base[308].

(268) The 2010 JTPF Report further found that, based on the experience of the national tax administrations, an appropriate mark-up for low value adding services would typically fall within a range of 3 % to 10 %, and often around 5 %. However, where the facts and circumstances of the specific transaction support a different mark-up, that should be taken into consideration.

2.6. Description of the main accounting and financial terms used in the Decision

(269) A brief overview of financial indicators and accounting concepts frequently used in this Decision is given below.

(270) A typical profit and loss account first records the income that a company receives from its normal business activities, usually from the sale of goods and services to customers. This accounting item is referred to as "Sales" or "Turnover" or "Revenue".

(271) Cost of goods sold ("COGS") represents mainly the value of material used for the production of goods (raw materials) or the purchase price of goods that have been

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305 1995, 2010 and 2017 OECD TP Guidelines, paragraphs 7.9 and 7.10.

306 EU Joint Transfer Pricing Forum, JTPF report: Guidelines on low value adding intra-group services, meeting of 4 February 2010, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/jtpf_020_rev3_2009.pdf.

307 2010 JTPF report, paragraphs 59-60.

308 2010 JTPF report, paragraph 62.

resold if the company does not process the goods sold. COGS is deducted from sales to calculate gross profit.

(272) Operating expenses cover principally salary expenses[309], energy expenses, and other administrative and sales expenses. In the case of LuxOpCo, the royalty paid to LuxSCS is classified as "other operating charges", but it is excluded from the operating expenses used to calculate the operating profit according to the contested tax ruling[310].

(273) Table 17 provides a simplified overview of a profit and loss account[311].

Table 17 – Simplified profit and loss account

Sales *(or Turnover or Revenue)*
– Cost of goods sold (COGS)
Gross Profit
– Operating Expense (OpEx)
Operating profit (EBITDA)
Earnings before interest and taxes (EBIT) or operating income
– Interest and and exceptional or extraordinary income
Taxable income
– Tax
Net profit

(274) Performance and profitability is often measured using ratios presented as "margins" or "mark-ups". Margins are also used in peer comparisons in transfer pricing.

(275) In transfer pricing, gross margins can be calculated as gross profit divided by sales (or COGS), and net margins as the operating profit divided by sales (or total costs, i.e. sum of COGS and Operating Expenses), in particular when the transactional net margin method is used. Therefore, when using the "net margin" method the numerator of the profit level indicator would be the operating profit.

3. GROUNDS FOR INITIATING THE PROCEDURE

(276) In its Opening Decision[312], the Commission explained that it harboured serious doubts as to the compatibility of the contested tax ruling with the internal market. In

309 For completeness it is noted that a portion of the labour costs can be included in COGS, when it is directly associated with the production.

310 See Recital (38) of the Opening Decision.

311 In Table 17, EBITDA stands for the conventional acronym of "earnings before interest, taxes, depreciation and amortisation".

312 The Commission's decision of 7 October 2014 to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, C(2014) 7156 final.

particular, it expressed several doubts that the transfer pricing arrangement endorsed by the contested tax ruling resulted in an arm's length royalty payment to LuxSCS and an arm's length remuneration for LuxOpCo.

(277) First, the Commission criticised the fact that the contested tax ruling appeared to have been granted in the absence of a transfer pricing report. It further observed that the ruling had been granted within eleven working days from the receipt of the first letter constituting the ruling request.

(278) Second, the Commission criticised the fact that the transfer pricing arrangement endorsed in the contested tax ruling did not seem to be based on any of the generally accepted transfer pricing methods set out in the OECD TP Guidelines.

(279) Third, the Commission criticised the fact that, contrary to recommendations contained in paragraph 6.16 of the 1995 and 2010 OECD TP Guidelines, the royalty payment approved by the contested tax ruling was not related to output, sales or profit. Instead, the royalty was calculated as the residual profit from LuxOpCo's intra-group transactions, which was determined by deducting a routine return attributable to LuxOpCo's functions from LuxOpCo's actually recorded profit.

(280) Fourth, the Commission questioned whether it was correct to consider LuxOpCo as performing less complex functions when compared to LuxSCS. Based on the description of functions performed by LuxOpCo and the risks assumed by it, those functions and risks appeared to be more complex than those performed by LuxSCS. The specific functions related to the Intangibles, for which LuxSCS is allegedly remunerated, were not described in the ruling request, nor by the Luxembourg tax administration in the contested tax ruling. Furthermore, although LuxSCS was said to retain all risks associated with the ownership of that IP in the ruling request, the risks to be assumed by LuxSCS while holding the Intangibles were not specified, in particular as compared to the entrepreneurial risks assumed by LuxOpCo.

(281) Fifth, at a [4-6] % mark-up on operating expenses, the Commission considered the remuneration endorsed by the contested tax ruling for the functions performed by LuxOpCo to be relatively low, in particular bearing in mind that, among others, the functions of LuxOpCo were presented as central and strategic commercial decision-making, concentrating the business risk of the entire European market. In addition, the application of a floor and a cap[313] to determine LuxOpCo's arm's length remuneration, which effectively overrides the transfer pricing arrangement based on operating expenses, was not explained. Finally, the Commission questioned whether the choice of an indirect transfer pricing method to determine LuxOpCo's remuneration was justified.

(282) Sixth, the Commission observed that while the contested tax ruling was granted in 2003, it appeared to be still in force in 2014. The Commission expressed doubts whether it was correct to consider the remuneration accepted in the ruling to still be at arm's length more than ten years later without any review or obligation to notify the administration, should any critical circumstances have changed in the meantime.

(283) In light of these criticisms, the Commission came to the provisional conclusion that the contested tax ruling conferred a selective advantage on Amazon in that it resulted in a royalty payment for LuxSCS and a remuneration for LuxOpCo that deviated from an arm's length outcome. Since all the other conditions of Article 107(1) of the

[313] 0.45% and 0.55% on European turnover respectively, as illustrated in Figure 1.

Treaty appeared to have been fulfilled and there was no apparent compatibility basis pursuant to Article 107(2) or (3) of the Treaty, the Commission came to the provisional conclusion that the contested tax ruling constituted State aid incompatible with the internal market.

4. COMMENTS FROM LUXEMBOURG

(284) Luxembourg's comments to the Opening Decision focus, first, on alleged procedural shortcomings of the Commission's preliminary investigation, second, on alleged legal errors in the Opening Decision and, third, on the doubts expressed by the Commission in the Opening Decision.

4.1. Luxembourg's comments on alleged procedural shortcomings

(285) Luxembourg alleged that the Opening Decision was adopted in an extremely short period of time and on the basis of insufficient information. Luxembourg considered the Commission not to have exhausted its possibilities to gather the necessary information to assess the measure during the preliminary investigation.

(286) First, Luxembourg argued that the Commission infringed the principles of sincere cooperation and impartiality, in particular by not responding to its offers to meet so as to allow Luxembourg to discuss the information provided before it took the decision to initiate the formal investigation procedure.

(287) Second, Luxembourg alleged that the Commission had not applied either the letter or the spirit of Article 12(2) of the Regulation No. 2015/1589[314], which stipulates that if the Commission finds the reply to its information requests inadequate or incomplete, it should repeat its request or even issue an information injunction.

(288) Luxembourg also referred to Articles 5(2) and 12(3) of Regulation 2015/1589. It observed that, in the present case, no reminder or information injunction was sent to Luxembourg.

4.2. Luxembourg's comments on alleged legal errors in the Opening Decision

(289) Luxembourg considered the Opening Decision to be vitiated by a number of legal errors.

(290) First, Luxembourg considered that decision to constitute an interference of its sovereign powers in the area of direct taxation. In particular, it considered the Commission to have exceeded its powers in the field of State aid by developing and imposing its own interpretation of the arm's length principle. In this manner, the Commission is seeking to latently harmonise direct taxation rules in breach of Articles 113 and 115 of the Treaty, since the Union can only harmonise substantive law on taxation through unanimously adopted legislative measures.

(291) Luxembourg drew particular attention to the specific nature and complexity of transfer pricing. According to the OECD TP Guidelines, the national tax authorities need certain discretion to be able to interpret the tax rules in the context of an individual case and decide whether the transfer pricing methodology used results in an acceptable transfer price. Luxembourg claimed that for national tax authorities to ensure legal certainty through tax rulings they need the necessary discretion without being immediately threatened that their judgement will subsequently be declared

[314] Previously, Article 10(2) of Regulation (EC) 659/1999.

contrary to the State aid rules. Luxembourg argued that it had received confirmation that its tax ruling practice is appropriate and complies with the Code of Conduct for Business Taxation[315] and with the OECD TP Guidelines[316].

(292) Second, Luxembourg argued that the precedents relied upon by the Commission in the Opening Decision differ from the contested tax ruling in that they concerned schemes which contained elements leading to an advantage irrespective of the individual circumstances of taxpayers. The advantages offered under those schemes were accessible only to a certain group of companies, whereas the contested tax ruling does not concern the whole tax system, but its application to the individual case of Amazon.

(293) Third, Luxembourg alleged that the Opening Decision lacks a selectivity analysis and, more specifically, it does not identify the reference tax system or the reference group of taxpayers with regard to which Amazon's tax treatment should be compared. Consequently, no derogation from the reference tax system applied to Amazon and advantage was identified.

(294) With regard to the correct reference framework, Luxembourg considered it to be the national tax law, and in particular Articles 164(3) and 18 LIR. Although no specific reference is made in Article 164(3) LIR to the OECD TP Guidelines, Luxembourg transfer pricing rules and practices reflect those guidelines. Luxembourg considered that national transfer pricing rules serve to ensure that corporate groups and independent enterprises are treated in the same way. It also pointed out that neither Article 18 nor Article 164(3) LIR differentiates between international and national transactions or between multinational and domestic groups. Luxembourg insisted that the contested tax ruling has to be assessed in the light of the relevant regulatory framework in place and the economic context prevailing at the moment of granting the measure, i.e. in 2003[317]. Luxembourg noted that in 2003 the 2010 OECD TP Guidelines did not exist and no reference was made in Luxembourg law to the 1995 OECD TP Guidelines.

(295) Fourth, Luxembourg considered that the Commission has not identified any category of undertakings that might have benefited from the measure. Referring to the *Autogrill* case[318], Luxembourg stated that to establish selectivity a category of undertakings, which are the only ones benefiting from the measure in question, must be identified. As regards the reference group of taxpayers, Luxembourg considered

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315 In its submission of 21 November 2014, par. 43, Luxembourg refers to the report of the Code of Conduct Group on Business Taxation, presented to the Council on 27 May 2011: "*With respect to the Luxembourg tax measure concerning companies engaged in intra-group financing activities the Group discussed the agreed description at the meeting on 17 February 2011. Luxembourg informed the Group that Circular no. 164/2 dated 28 January 2011 determines the conditions for providing advance pricing agreements confirming the remuneration of the transactions. […] With the benefit of this information, the Group agreed that there was no need for this measure to be assessed against the criteria of the Code of Conduct*".

316 Luxembourg's submission of 21 November 2014, par. 44: "*At its meeting on 6 December 2011, the OECD Forum on Harmful Tax Practices agreed that 10 systems did not have to be subject to further examination, one of which was the advance tax analysis of intra-group financing carried out in Luxembourg*".

317 In its submission of 21 November 2014, par. 73, Luxembourg refers to the Commission Decision in case SA.32225 of 2 October 2013: *Expropriation compensation of Nedalco in Bergen op Zoom*.

318 Case T-219/10 *Autogrill España* v *Commission* EU:T:2014:939, paragraphs 44 and 45.

only taxpayers subject to transfer pricing rules and its tax ruling practice to be in a comparable factual and legal situation.

4.3. Luxembourg's comments on the doubts expressed in the Opening Decision

(296) Luxembourg also specifically addressed the doubts expressed by the Commission in the Opening Decision regarding the contested tax ruling's compliance with the arm's length principle.

(297) First, in response to the Commission's criticism that the contested tax ruling was approved in only 11 working days, Luxembourg argued that the process took much longer and involved meetings with Amazon representatives on 9 and 11 September 2003 as well as scrupulous examination by the tax authorities of the approach, Amazon's letters of 23 and 31 October 2003, and the transfer pricing report submitted by Amazon's tax adviser.

(298) Second, Luxembourg argued that the Commission's concern that the contested tax ruling was granted in the absence of the required economic analysis is unfounded. A transfer pricing report was prepared to substantiate the transfer pricing arrangement proposed in the ruling request. It contains such standard elements as a functional analysis of both parties to the transaction (LuxOpCo and LuxSCS), the description of the underlying transaction and the relevant intellectual property, as well as selection of the transfer pricing methods and an assessment of the arm's length price.

(299) Luxembourg explained that when the contested tax ruling was approved in 2003, Amazon's activities were new and increasing rapidly, with priority being given to long-term investment over short-term profitability. In 2003, Amazon recorded a loss and it was envisaged that Amazon would continue to invest heavily in technology for the immediate future. Since online retail is an activity with low margins subject to fierce competition, Amazon's strategy was to differentiate itself through technological innovation. As a consequence, the Intangibles were considered to be the essential source of value in Amazon's activities. The technology needed for the processes is highly sophisticated and continually improved through significant investment by LuxSCS.

(300) According to the functional analysis presented in the TP Report, LuxSCS is responsible for maintaining and continually developing the Intangibles; LuxOpCo manages, operates and develops the retail trade and service activities through the EU websites using the Intangibles licensed from LuxSCS. According to Luxembourg, the economic life of the Intangibles was limited and required continual improvement and significant investment. Luxembourg added that LuxOpCo has not held and does not hold any intangible assets on its own. Under the terms of the IP License Agreement, any derived intangible asset developed by LuxOpCo is legally attributed and held by LuxSCS.

(301) Luxembourg submitted that the contested tax ruling endorses a transfer pricing arrangement based on the TNMM to determine the level of the arm's length royalty paid by LuxOpCo to LuxSCS. The TNMM is a transfer pricing method which corresponds to Luxembourg transfer pricing rules and administrative practice. It is commonly used in tax rulings in Luxembourg and accepted by the 1995 OECD TP Guidelines. The acceptance of the TNMM by the Luxembourg tax administration reflected the functional analysis included in the transfer pricing report: LuxSCS holds, maintains and develops the business' most strategic elements, namely the

Intangibles, which are hard to value. Luxembourg further argues that according to the License Agreement LuxOpCo only has limited rights and responsibilities with regards to the Intangibles and does not hold any IP itself. As a consequence, LuxSCS has viable alternatives for using the Intangibles to create a prosperous business; LuxOpCo, on the other hand, does not have any such alternatives. Therefore, LuxOpCo is regarded as being the less complex entity in comparison with LuxSCS and has been properly selected as the tested party. Luxembourg further claimed that, since online retail generates low margins, the choice of other methods could have exposed LuxOpCo to a risk of losses. The choice of the TNMM guaranteed that LuxOpCo's future profits would be more stable and in line with its profile. It also guaranteed that LuxOpCo's results would increase in line with the growing dimension of its activities in Luxembourg and in the EU and ensured legitimate predictability with regard to LuxOpCo's remuneration. Other methods would have produced more volatile results. In light of these considerations, Luxembourg claimed that the contested tax ruling cannot be regarded as accepting "the lowest possible outcome" for LuxOpCo.

(302) Third, in response to the Commission's doubt expressed in the Opening Decision that the royalty paid by LuxOpCo to LuxSCS is not related to output, sales, or profit, Luxembourg confirmed that the royalty is calculated as a residual profit. However, Luxembourg considered such an outcome inherent in the application of the TNMM and compliant with the functional and risk analyses.

(303) Fourth, Luxembourg claimed that LuxOpCo's real financial return for each year of the relevant period fully complies with the arm's length principle. The arm's length remuneration for LuxOpCo was considered to lie in the interquartile range between [2-2,5] % and [5-10] % with a median value of [4-4,5] %, as indicated in the comparative analysis of the TP Report.

(304) Fifth, as regards the doubt expressed on the relevance of the floor and cap for LuxOpCo's remuneration, Luxembourg argued that since Amazon made a loss in 2003 and companies in the comparative analysis were also loss-making, the floor guaranteed a positive remuneration increasing in line with expanding business. Furthermore, the cap and the ceiling encouraged LuxOpCo to manage its activities efficiently. Without this cap and this ceiling, LuxOpCo could simply increase its costs to increase its result. Given that the margin obtained by LuxOpCo over the period 2006-2013 was on average [3,5-4] % and was each year within the limits of the interquartile range, Luxembourg concludes that the ceilings and caps did not have any real and practical impact.

(305) Luxembourg further argued that the taxable basis has not been capped and has increased in line with Amazon's expansion and investment in the EU. The remuneration margin was applied to all of LuxOpCo's operating costs, not just to its operating costs incurred in Luxembourg. Accordingly, the margin was applied to a wider basis than just the operating costs borne by LuxOpCo in Luxembourg, as it included the operating costs incurred by other subsidiaries in the EU, which were subsequently invoiced to LuxOpCo. If the remuneration received by LuxOpCo was calculated solely in relation to its Luxembourg operating costs, it would have had an average margin of [10-15] %. The figures provided by Luxembourg to support this argument are reproduced in the Table 18.

Table 18 - LuxOpCo's taxable profit expressed in relation to operating expenses of LuxOpCo in Luxembourg (excluding costs rebilled by the EU subsidiaries) (a) and to the operating expenses of LuxOpCo including the costs rebilled EU subsidiaries (b)

Year	2006	2007	2008	2009	2010	2011	2012	2013	Total (2006-2013)
(a)	13.8%	12.0%	10.9%	10.4%	11.4%	11.5%	11.0%	[10 – 15] %	[10 - 15] %
(b)	4.1%	4.4%	4.2%	4.2%	3.9%	3.8%	3.2%	[2,5 – 3] %	[3,5 – 4] %

(306) Sixth, as regards the duration of the contested tax ruling, Luxembourg explained that it was originally envisaged to be valid for five accounting periods from the start of Amazon's activities in Luxembourg, which actually started in 2006[319]. Therefore the contested tax ruling was initially in application until 2011. Luxembourg further explains that, according to its administrative practice of the time, transfer pricing rulings were generally amended only if the activity model or market conditions changes significantly. By 2011, LuxOpCo's activities and operating model had remained unchanged, so that the transfer pricing arrangement was still deemed appropriate and the contested tax ruling was prolonged in 2011 for a further five years. Luxembourg additionally explains that, following the 2008 economic crisis, remuneration for comparable activities (online retail sales) were under significant pressure and Amazon's operating margins kept shrinking. In this context, Luxembourg considered the review of the pricing arrangement could have led to a reduction in LuxOpCo's remuneration.

4.4. Luxembourg's comments on M.com Agreements, the intragroup license agreements, IP license agreements and other information

(307) Luxembourg submitted its comments on the M.com Agreements, the intragroup license agreements, IP license agreements between Amazon group entities and third parties, and other internal financial and legal information of LuxOpCo, LuxSCS, AMEU and ASE, such as external valuation reports or TP reports regarding IP acquisition transactions, minutes of board meetings and general meetings of LuxOpCo's shareholders.

(308) Luxembourg stated that its transfer pricing rules are indistinctly applicable to all groups of companies, domestic or international, and that Amazon was not treated more favourable than other groups, because Luxembourg applied its transfer pricing rules consistently.

(309) Luxembourg questioned the relevance of the M.com Agreements for the case at hand. Except for the Target Agreement, they were concluded after Luxembourg issued its tax ruling. After reviewing the M.com Agreements, Luxembourg stated that it shares Amazon's view that the M.com Agreements reflect a business model that differs from the model put in place between LuxSCS and LuxOpCo. Therefore

[319] By letter of 5 December 2004 Amazon informed Luxembourg that the restructuring would be completed only in 2006 and asked for the contested tax ruling to be applicable for the first five years as of then. On 23 December 2004, Luxembourg confirmed that the described delay does not affect the agreement of 6 November 2003, provided that other stipulations of the request of 23 October 2003 are maintained.

those agreements, including the agreements between Amazon and Borders, Circuit City, Target, ToysRUs and Waterstones, cannot be used for the purposes of a CUP analysis.

(310) Luxembourg further claimed that Amazon's intragroup agreements are also not adequate for a CUP analysis, since these intra-group agreements are by definition not uncontrolled.

4.5. Luxembourg's comments on Amazon's submission of documents related to the US Tax Court procedure

(311) On 6 July 2017, Luxembourg submitted its comments to Amazon's submissions to the Commission concerning documents used and created for the litigation procedure before the US Tax Court.

(312) In its comments, Luxembourg supports Amazon's comments and conclusions and highlights that the Buy-in of LuxSCS values only the intangible assets themselves, separate from all other assets, functions and risks associated with Amazon's business.

(313) According to Luxembourg, the US Tax Court's analysis established that [4,5-5 %] % of the gross merchandise sales ("GMS") would be an appropriate arm's length royalty rate for the Intangibles used to operate Amazon's European business, which is based on the most relevant benchmarks.

(314) Luxembourg observes that LuxSCS received royalties from LuxOpCo corresponding to [3-3,5%] % of the GMS, thus below the arm's length royalty rate as established by the US Tax Court. Consequently, if the US Tax Court's rate were to be applied, LuxOpCo would owe royalty payments to LuxSCS, thereby lowering its taxable income in Luxembourg.

(315) Luxembourg therefore considers that LuxOpCo's taxable base was not unduly reduced as implied by the Commission in its Opening Decision, which is why the contested tax ruling did not confer a selective advantage on LuxOpCo.

5. COMMENTS FROM INTERESTED PARTIES

5.1. Comments from Amazon

5.1.1. Amazon's comments on alleged legal errors

(316) Amazon argued that the Commission did not correctly identify the reference framework and did not prove the selectivity of the measure in its Opening Decision. According to Amazon, the contested tax ruling should be reviewed against a specific rule of national law and/or administrative practice and not the corporate tax system as a whole[320]. Therefore, the correct reference framework to assess the contested tax ruling is the arm's length principle as laid down in Article 164(3) and Article 18 LIR,

[320] Amazon refers to the following State aid cases where, according to Amazon, a particular tax rule served as the reference framework: Commission decision of 12 January 2011 C45/07 (ex NN51/07, ex CP 9/07) on *the tax amortisation of financial goodwill for foreign shareholding acquisitions implemented in Spain*; Commission decision of 20 December 2006 C46/2004 (ex NN 65/2004) on *the scheme implemented by France under Article 39 CA of the General Tax Code*, paragraph 86; Case C-6/12, *P Oy*, paragraphs 22-31; Joined Cases C-78/08to C-80/08, *Paint Graphos*, paragraph 50.

together with the relevant administrative practice applying the provisions in question[321].

(317) According to Amazon, there could only be a State aid concern if the contested tax ruling deviated from the normal interpretation and application of the arm's length principle in Luxembourg. Amazon argued that the widespread use of the residual profit split method revealed in the LuxLeaks database by the International Consortium of Investigative Journalists illustrates that the contested tax ruling did not deviate from the administrative practice of the Luxembourg tax administration[322].

(318) Amazon also argued that the Commission did not demonstrate the selectivity of the measure and referred to the cases where characteristics of non-selective measures were stipulated[323].

5.1.2. Amazon's comments on the doubts expressed in the Opening Decision

(319) Amazon's comments on the doubts expressed in the Opening Decision largely coincide with those of Luxembourg, insofar as it also argued that the ruling request was accompanied by a transfer pricing report and that that request was vigorously scrutinised.

(320) Amazon further argued that the transfer pricing method chosen, the residual profit split, is not only in line with the OECD TP Guidelines, but also with Luxembourg transfer pricing rules and administrative practice[324]. Amazon explained that the Intangibles which LuxSCS makes available to LuxOpCo under the License Agreement consist of the entirety of intellectual property, proprietary rights and any other intangible assets owned and developed by LuxSCS pursuant to an agreement with Amazon affiliates, or licensed from Amazon affiliates or entities otherwise associated with LuxSCS[325]. It explained the role of LuxSCS compared to that of LuxOpCo and argued that, since LuxOpCo is an operating company that does not own unique resources, whereas LuxSCS owns, maintains and develops unique and difficult-to-value key value drivers, LuxOpCo is the least complex entity in that relationship. Therefore, under the residual profit split method, the TNMM is used in the first step to determine the return for the non-unique contributions by LuxOpCo, which has been designated as the "tested party". The residual profit is then fully

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321 Reference is made to Commission decision of 12 January 2011 C45/07 (ex NN51/07, ex CP 9/07) on *the tax amortisation of financial goodwill for foreign shareholding acquisitions implemented in Spain* and Commission decision of 26 May 2010 C 76/2003 (ex NN 69/2003) on *the measures in favour of Umicore NV (formerly known as Union Minière NV) implemented by Belgium*, in particular paragraphs 204 and 223.

322 Amazon's submission of 5 March 2015, Annex 2.

323 In particular, in Amazon's submission of 5 March 2015, par. 43 to 45 and 49: Amazon refers to Joined Cases C-106/09 P and C-107/99 P *Commission and Spain v Government of Gibraltar and United Kingdom*, para. 72 and 73 and the case-law cited; Case C-6/12, *P Oy*, paragraph 17-19, case T-219/10 *Autogrill*, paragraph 29; and Case C-88/03, *Portugal v Commission*, paragraph 54 and the case law cited.

324 Amazon illustrates this argument with reference to the tax rulings issued by Luxembourg and published by ICIJ. Among them Amazon identified 97 rulings, which, according to Amazon, are based on the residual profit split method and within financing arrangements allocate a non-unique return, i.e. fixed financial margin to a Luxembourg entity, while the residual profit is allocated to the holder of a financing instrument.

325 Amazon's submission of 5 March 2015, par. 97.

allocated to LuxSCS to reflect the fact that its contribution is essential to the European business[326].

(321) Amazon added that LuxSCS's contributions, for which it is remunerated as a result of the transfer pricing arrangement endorsed by the contested tax ruling, consist not only of the sublicensing of Intangibles, but also of the assumption of risks associated with LuxOpCo's operations[327]. By holding and financing the development of the Intangibles, LuxSCS took on significant risks, since it had to make the payments under the CSA. The risk borne by LuxSCS stems from the uncertainty inherent to funding R&D development. If the R&D activities do not generate any Intangibles to be successfully exploited, the parties to the CSA would have incurred significant losses. LuxSCS has the ability to control the business risks associated with the Intangibles, since LuxSCS exercises its control and development of the Intangibles through its participation in the CSA. Therefore, it is not necessary for LuxSCS to have employees of its own. Furthermore, in a situation where LuxOpCo would face losses, the Intangibles could be licensed to another company and therefore the control over exploitation of the Intangibles effectively lies with LuxSCS. Finally, as owner of the highly valuable Intangibles, LuxSCS has the financial capacity to absorb risks if these would materialise. LuxSCS could also rely on the cash flow from expected royalty income to fund future investment aimed at maintaining and upgrading the Intangibles.

(322) Amazon further argued that the application of the CUP method to determine a fixed-rate royalty would have produced more volatile results, exposing LuxOpCo to the risk of incurring losses, and that therefore that method was abandoned. In any event, the Luxembourg tax administration has to start the transfer pricing analysis on the basis of the methodology selected by the taxpayer.

(323) Amazon recalled that the application of any transfer pricing method typically produces a range of figures, all of which are equally reliable. Transfer pricing is not an exact science and any transfer pricing analysis will inherently result in a range of arm's length outcomes and a conclusion on *an* arm's length price and not *the* arm's length price. Moreover, referring to the OECD TP Guidelines, Amazon argued that transfer pricing requires the exercise of judgement. Therefore, a certain margin of appreciation is essential to keep the corporate tax system manageable.

(324) Amazon submitted an *ex post* study it had commissioned in 2014 on management services, which compares European firms engaging in activities similar to those of Amazon's intercompany management service ("the 2014 Study")[328]. In the 2014 Study, a search was conducted for comparable companies generally identified as engaged in activities of head offices and management consultancy activities. A comparable companies search in the Amadeus database using selection criteria related to geographic region[329], independence of the company, inadequate financial

326 Amazon's submission of 18 January 2016, p. 6.

327 Amazon's submission of 5 March 2015, par. 9.

328 [Advisor 4], "Benchmark Company Search for European Management Companies for 2010-2012", 5 February 2014. Annex 11 to Amazon's comments to the Opening Decision.

329 The tax advisor limited the search to following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom.

data, and keyword search in business descriptions[330] restrictions resulted in eleven companies[331] considered by the tax advisor to be sufficiently comparable to LuxOpCo. The analysis of the financial data of the selected companies for the years 2010-2012 resulted in the following interquartile range of the profit level indicator, defined as operating income[332] divided by total costs: 1.8 % to 12.0 % with median value of 7.0 %. Amazon considers the 2014 Study to confirm the arm's length nature of LuxOpCo's remuneration endorsed by the contested tax ruling, because LuxOpCo's mark-up as a percentage of Luxembourg-only operating costs remained within this range throughout the relevant period[333].

(325) Amazon also defended the duration of the contested tax ruling. To substantiate the argument that following the financial crisis of 2008 the review of the ruling would most likely have resulted in a lowering of LuxOpCo's remuneration, Amazon submitted an *ex post* transfer pricing report it had commissioned in 2012 ("the 2012 *ex post* TP Report")[334] presenting the financial results of companies used in the comparable search contained in the TP Report. From the original set of comparable companies used in the TP Report, three no longer existed in later years and a further three were not considered comparable or had insufficient data. Two new company sets were prepared: one based on data from 2004-2006 and another 2008-2010. The analysis performed for different financial years resulted in the lower quartile of the return on costs (defined as operating profit to total costs) ranging from 1.1 % to 4.2 %; median: 3.1 % to 5.5 %; and upper quartile: 4.6 % to 8.5 %. On the basis of those outcomes, Amazon claimed that LuxOpCo's remuneration remained within the arm's length range throughout the relevant period.

(326) Finally, Amazon argued that even if the Commission were to conclude that the contested tax ruling constitutes State aid, there would be no legal ground for the recovery of the alleged aid from Amazon. First, Amazon considers such a recovery would amount to unequal treatment, since Amazon would be the only undertaking repaying allegedly illegal aid, although according to Amazon many taxpayers were subject to the same treatment under the Luxembourg tax regime. Second, Amazon argues that it legitimately expected that the contested tax ruling was lawful and it could rely on it. In particular, Amazon could not have anticipated that the Commission, following an unprecedented and novel approach[335], would view the contested tax ruling as State aid. Finally, Amazon notes that the ten-year limitation period since the granting of alleged aid has lapsed. Amazon argues that the contested

330 Following keyword search terms were used: management services, business management consultancy services, strategic consulting services, organisational planning services and other related services. At the same time, the tax advisor excluded companies, which provide unrelated services (such as auditing, actuarial, advertising, brokering, communication, construction, designing and developing, manufacturing, IT, real estate and transportation services), operated as partnerships, operated in a dissimilar industry (utility and energy) and had insufficient qualitative information).

331 Adix, Axholmen Ab, Becitizen, Consilia Business Management Spa, Icm Intercultural Management Associates, Implement Mp Ab, Nike Consulting Spa, Nsa S.P.A., Pambianco Strategie Di Impresa Srl, Rhapsodies Conseil, X-Pm Transition Partners.

332 Total revenue minus total costs, where total costs equal total cost of goods sold plus total operating expense.

333 Amazon's submission of 18 January 2016, p. 6.

334 Amazon's submission of 5 March 2015, Annex 14: [Advisor 2], "[Advisor 2] roll-forward analysis".

335 Amazon refers to the *France Telecom* case (Commission decision of 2 August 2004, C13a/2003 (ex N779/2002) – *France Telecom*, paragraph 263), where the Commission refrained from recovery on the basis of novelty of the measure.

tax ruling is an individual measure. Therefore, the date on which the legally binding act was adopted by which the national authorities undertook to grant the aid is decisive for determining the date of its granting. According to Amazon, the contested tax ruling was granted on 6 November 2003 and, since more than 10 years had elapsed from the date of granting and the date in which the Commission issued its first information request on 24 June 2014, the Commission is barred from ordering recovery.

5.2. EPICENTER

(327) EPICENTER[336] considered the Opening Decision not to be mindful of the appropriate degree of discretion inherent to transfer pricing practice. EPICENTER considered the Commission to exceed its legal powers in direct taxation matters using the State aid rules to tackle harmful tax competition. In this sense, it will undermine the very need of legal and regulatory certainty. According to EPICENTER, the Commission's role should consist less in prescribing a preferred approach than in making sure that individual tax rulings are in compliance with the relevant OECD or national guidelines. Accordingly, the benchmark for assessing the degree of selectivity of any agreement is the general regulation applicable in each Member State.

5.3. Computer & Communications Industry Association

(328) Whereas the CCIA advocates for an effective State aid control, it considered the current investigations are focusing on politically convenient targets. The CCIA considered that using State aid rules in the present case will create legal and business uncertainty in Europe. The CCIA expressed its worries on the application of the prudent independent market operator test and requires the strict application of the national transfer pricing rules as the benchmark for assessing selectivity. It also argued that the application of the arm's length principle usually results in an arm's length range instead of a single arm's length price.

5.4. ATOZ

(329) ATOZ's main argument relates to the legal basis of the Commission assessment. According to ATOZ, the Luxembourg tax legislation did not include any provision specifying the application of the arm's length principle when the tax ruling was approved. Therefore, ATOZ argued that is not correct to consider the OECD transfer pricing rules incorporated in the Luxembourg legislation at that time. ATOZ thinks that the Commission's approach will create, amongst others, legal uncertainty among multinationals.

5.5. Fedil

(330) According to Fedil, State aid investigations might undermine the legal certainty that tax rulings intend to provide to taxpayers. In Fedil's opinion, the assessment of the measure should be based on the Luxembourg legislation and administrative practice at the time, which did not include a general reference to the OECD TP Guidelines. Fedil argued that the Commission takes the view that there is a single truth in transfer pricing, which makes it impossible for companies to obtain upfront legal certainty.

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336 EPICENTER describes itself as an independent initiative of six leading think tanks across the European Union. It seeks to inform the EU policy debate and promote the principles of a free society by bringing together the economic expertise of its members.

5.6. Oxfam

(331) Oxfam expressed support for the Commission's investigation, encouraging the Commission to increase its investigation capacity also in view of the fact that it may be better placed than national bodies to structurally assess the tax ruling practices of the Member States. It called on the Commission to ensure that adequate sanctions are adopted in cases where selective advantages are confirmed and that harmful tax practices are phased out quickly.

5.7. The Booksellers Association of the United Kingdom & Ireland Ltd.

(332) According to the BA, Amazon's tax arrangements with Luxembourg allow an unfair advantage that is not available to independent booksellers in the UK. The BA stressed that, by routing all of its European sales through its Luxembourg headquarters, Amazon benefits from a significantly lower tax burden, regarding both VAT and corporate taxation. Therefore, the BA urges the Commission to challenge those tax deals which distort fair competition.

5.8. The European and International Bookseller Federation, le syndicat de la librairie française, the Federation of European Publishers and le Syndicat des Distributeurs de Loisirs Culturels

(333) The EIBF advocates for a level playing field for all book retailers and therefore welcomes the investigation by the Commission concerning Amazon's tax practices. The EIBF reiterated that it stands for a free and open market space which benefits the consumers.

(334) The SLF, the FEP and the SDLC expressed their agreement with the EIBF's comments on the Opening Decision.

5.9. Bundesarbeitskammer

(335) The Austrian Bundesarbeitskammer supports the Commissions arguments from the Opening Decision and argues that, in general, those sorts of agreements and legal structures lower the worldwide taxes paid.

6. INFORMATION SUBMITTED BY COMPANY X

(336) Company X, which is a competitor of Amazon active in the online retail business in an EU market and does not want its identity to be disclosed, submitted market information to the Commission in relation to the investigation.

(337) According to Company X, overall estimates about the relative importance of different cost positions in the online retail business is 50 % customer satisfaction, 30 % technology and 20 % physical structure and logistics. Although a solid IT platform is essential in the first phase of the launch of an e-commerce business, the main drivers for a successful and durable online retail operator are clients and marketing. Thus, the key assets to ensure growth in this market are a solid client database and the financial capability to undertake significant investments in marketing. The combination of those factors allows for the achievement of scale effects that are necessary to offset the significant fixed cost structure needed to run the online retail operations.

(338) According to Company X, investment in technology for an online retail operator consists of around 4-5 % of turnover in a maintenance situation and 5-8 % when the

operator is in an innovative phase. Amazon benefits from its existing technology, which gave it an advantage over competitors in Europe. The technology is constantly improved and adapted to customer needs. Amazon has been very aggressive in investing in technology. Its large investments are what allowed it to develop its platform, which today presents a hard-to-match competitive advantage. Company X has so far invested EUR 30-35 million cumulatively to develop its platform. However, the scale of the company is smaller than Amazon in its national market; the comparison in terms of size is about 1 to 6.

(339) While Amazon's investments in logistics in the national market of Company X are substantial, the ability to undertake very significant investments in marketing, such as free shipping, and to undercut product prices is significantly more instrumental to Amazon's success.

(340) If companies want to achieve scale and compete in the e-commerce business, they should develop a direct channel to own the customer base needed to build up a market share and compete in that business. Fully relying on Amazon is not consistent with the strategy of a company intending to become a leader in the e-commerce sector. However, competing with Amazon requires significant investments in building up the client base and, in most cases, the supporting technology and processes.

(341) Small retailers (merchants) that sell products on Amazon's third-party platform Marketplace do not own the client's personal/transaction data from their transactions as a result of Amazon's contractual conditions. Amazon owns and collects the data on the customers. In particular, it is forbidden for merchants to solicit customers with new offers or promotions (e.g. newsletters).

(342) While not always necessary, most retailers willing to achieve some relevance and build unique value propositions need to undertake significant investments in technology and operations. They might use Amazon's platform instead, but they would not own a valuable segment of the value chain and depend upon a direct competitor.

(343) Marketing in the e-commerce business requires substantial investments. E-commerce companies normally invest around 30-35% of their gross profit in marketing, depending on which scale they could reach in the market (obviously the bigger you become, the lower the percentage you have to dedicate to marketing). A more aggressive marketing strategy goes up to invest 2-3 times more, at significant losses for the company, thus requiring significant financial backing. Amazon Prime is one of Amazon's main marketing tools, the commercial program which offers free shipping for most items purchased through Amazon.

7. COMMENTS FROM LUXEMBOURG ON THIRD PARTIES' COMMENTS AND ON INFORMATION SUBMITTED BY COMPANY X

7.1. Luxembourg's comments on third parties' comments

(344) By letter dated 20 April 2015, Luxembourg expressed its agreement to the comments submitted by Amazon, FEDIL, CCIA, ATOZ and EPICENTER, whereas it considered that the other comments submitted in response to the Opening Decision were not relevant to the case.

(345) In particular, Luxembourg indicated that Oxfam's observations did not refer to the Amazon case in particular, but were formulated in a general manner. Luxembourg considered the BA not to have commented on the information included in the Opening Decision, but on issues that are outside the scope of the present investigation. Luxembourg does not consider the comments of the EIBF and its members to provide new relevant information to the case. Finally, Luxembourg considered Bundesarbeitskammer's comments to be unfounded and inaccurate.

7.2. Luxembourg's comments on Company X's submission

(346) On 2 May 2016, Luxembourg submitted its comments to Company X's submission. Luxembourg stated that Amazon, being a market operator, is better placed to provide comments to Company X's submission. Therefore Luxembourg has shared a non-confidential version of Company X's submission with Amazon and understands that Amazon will provide its own comments.

8. FURTHER SUBMISSIONS BY AMAZON

8.1. Submissions on the remuneration for LuxSCS and LuxOpCo being at arm's length

(347) In its submission of 18 January 2016, Amazon provided supplementary information to justify that the remuneration for LuxSCS and LuxOpCo endorsed by the contested tax ruling was at arm's length.

(348) First, on the transfer pricing method used to determine the remuneration of LuxSCS and LuxOpCo, Amazon explained that the residual profit split method was chosen, since no sufficiently reliable comparable uncontrolled transaction was found to apply the CUP method. If the less reliable CUP method had been applied, it would have led to higher yearly royalty payments. Amazon further explained that, at the first stage of the residual profit split method, the TP Report applied the TNMM to determine LuxOpCo's arm's length remuneration as the tested party. The reason why LuxOpCo was chosen as the tested party is because LuxOpCo performs non-unique functions relative to LuxSCS, which owns the unique key value drivers of the European business. At the second stage of the residual profit split method, any residual profit or loss is allocated among the parties consistently with their functions and risks. Logically, the more unique a party's functions and risks, the greater the remuneration that it is justified to receive under the residual profit split method. The TP Report allocated the residual profit to LuxSCS in the view of its unique functions and significant risks relative to those of LuxOpCo.

(349) Second, on the economic rationale underlying the transfer pricing methodology, Amazon explained that LuxSCS wants to incentivise its contractors to act in such a manner that contributes to the success of Amazon's global strategy. Thus, if Amazon had entered into a license agreement with a third party, it would have been rational and necessary to provide the licensee with the ability and incentives to undertake all the necessary investments and also to ensure that the correct incentives existed for the licensee to follow Amazon's strategy of maximising selection and price leadership.

(350) According to Amazon, the royalty methodology ensures that LuxOpCo is profitable and does not have a risk of becoming loss-making. This was a real risk since, at the time the contested tax ruling was requested, the online retail market was not yet

developed, online retailers were loss-making and LuxOpCo operated in a market with intense competition and low margins. In this respect, a return to the licensee on its cost base incentivises growth rather than a focus on short-term profit.

(351) LuxSCS's remuneration structure was adopted because the volatility in the European business was anticipated. If a royalty expressed as a fixed percentage of sales had been agreed, LuxOpCo would have been loss-making during several years[337]. Amazon referred in this respect to estimated levels of royalty in the TP Report[338]. According to Amazon, this would have put in danger the capacity of LuxOpCo to make profits over a long period of time. Amazon also noted that LuxOpCo did not have the financial capacity to bear such losses[339].

(352) Third, on the choice of profit level indicator, after having reviewed the TP Report submitted by Luxembourg in response to the Opening Decision, the Commission asked Luxembourg and Amazon to clarify whether the mark-up applied to determine LuxOpCo's arm's length remuneration was calculated on cost of goods and operating expenses, as explained in TP Report in the description of the financial analysis, or on "Annual Net Sales"[340]. Amazon explained that the return earned by LuxOpCo was based on a mark-up of [4-6]% on operating expenses, excluding the COGS[341]. Amazon confirmed that the range reported in the transfer pricing report of 2.3 % to 6.7 %, with a median of 4.3 %, included the COGS of the comparable companies. The reference to the percentage of annual net revenue included in the table presenting the results of the peer review was included to point out that the amounts were weighted average dependent on the annual sales in a respective year.

(353) Regarding the exclusion of the COGS from LuxOpCo's cost base, Amazon explained that the comparable companies had limited COGS whereas LuxOpCo's COGS were expected to be significant. If they had been included in the mark-up, it would have led to a distorted result[342]. In any event, according to Amazon, if the COGS had been excluded from the calculation of the profit level indicator of the comparable entities identified in the TP Report, it would have resulted in a range from 3.7 % to 7.6 %, with a median of 4.9 %. Amazon submitted a table with the seven companies used in the TP Report, for which the mark-up on operating expense was additionally calculated excluding the COGS. Data was provided for only five of the seven companies. Whereas the mark-up on operating expense was not

337 Amazon's submission of 18 January 2016, p. 8. As provided in that submission "*[..] it is highly unlikely that Lux SCS would have been able to find an independent entity capable or willing enter into a licensing agreement if doing so entailed that the business risk would be supported by that independent entity. Accordingly, Lux SCS was ready to take the risks in relation to the Intangibles, so as to enable LuxOpCo to gain more easily market shares: in the longer term growing revenue for LuxOpCo would mean more revenue for Lux SCS, as licensor. In practical terms, this meant entering into a contractual agreement where the royalty methodology is based on the licensee's being profitable and earning a return on its costs, rather than an arrangement that would create a risk of the licensee being loss making*".

338 Amazon's submission of 18 January 2016, p. 11.

339 Amazon's submission of 18 January 2016. As further explained by Amazon: "*Considering those circumstances, it was indeed rational for both parties to agree on a remuneration on the basis that the risks were borne by the licensor and the licensee received a return on costs, as this would incentivize the licensee to grow as quickly as possible, both in terms of geographies and product lines, and to maximize selection (rather than concentrate only on higher margin product lines)*".

340 TP Report, p. 50.

341 Amazon's submission of 15 February 2016, Annex H.

342 Amazon's submission of 15 February 2016, p. 4.

significantly higher than the mark-up on total costs for four out of the five companies for which data was provided[343], for one company the mark-up on operating costs was about five times higher than the mark-up on total costs[344]. On that basis, the TP Report applied a mark-up of [4-6]% to the financial projections provided by Amazon to determine the relevant routine return of LuxOpCo. More specifically, LuxOpCo's return was calculated by multiplying the sum of LuxOpCo's operating expenses and costs expected to be incurred by the European affiliates, while COGS were not included in the calculation base (reference is made to Table 2 of this Decision, which reproduces this calculation as included in the TP report[345]).

(354) Finally, the Commission noted that the TP Report did not include any reference to the floor and ceiling mechanism described in the ruling request**.** Asked by the Commission during a meeting held on 28 October of 2015 about this omission, Amazon explained that the floor and ceiling did not result in LuxOpCo's remuneration being outside the arm's length range. The mark up earned by LuxOpCo over the period was on average [3.5-4] % and was in each year within the interquartile range of 2.3 % to 6.7 %.[346] Amazon further stressed at this meeting that the use of a single technology CUP was expected to give biased and volatile results.

8.2. Submission on information submitted by Company X

(355) Amazon questions whether Company X is actually comparable to LuxOpCo. Moreover, Amazon argues that the information provided by Company X should not be considered for the purposes of assessing the contested tax ruling, since neither Amazon nor the Luxembourg authorities had that information at the time the 2003 tax ruling request was made or when it was renewed in 2011.

(356) In any event, Amazon considers that the information submitted by Company X does not support the finding that the contested tax ruling resulted in the grant of State aid to LuxOpCo. In particular, LuxOpCo agrees with Company X that e-commerce is a thin margin business. Indeed, LuxOpCo could not survive or grow on the market without the Intangibles it licensed from LuxSCS.

(357) Amazon states that its business model revolves around technological innovation, such as search and browse tools, order processing and fulfilment, catalogue functions, customer service support and data management and analysis tools.

(358) Amazon considers that the customer data that LuxSCS licenses to LuxOpCo is a key component of marketing and the scope of Amazon's Prime programme goes far beyond free shipping as it includes a variety of services and requires a complex underlying technology.

(359) For Amazon, customer satisfaction is primarily driven by technology and by customer information, both made available to LuxOpCo as part of the Intangibles.

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343 Companies Algoriel, Decade, Seresco SA and Societe de Gestion de Terminaux Informatiques.

344 Company Solutec.

345 TP Report, p. 32.

346 In Amazon's submission of 18 January 2016, p. 11, Amazon further explains that "*[..] it was logical that the royalty contained a floor based on a percentage of royalties, which incentivized the licensee to maximize revenues (and share in the upside of doing so). The corollary to that was a cap on the licensee's remuneration (based on a higher percentage of revenues) to ensure that the costs of the licensee were efficiently managed and did not increase too far out of line with revenue growth*".

(360) Consolidating and developing the customer base and the brand rests crucially on the Intangibles. Amazon considers that Company X confirmed that the Intangibles, constantly developed and improved, are key for a successful e-commerce operation such as LuxOpCo's, which supports that LuxOpCo is the tested party, because LuxSCS' contribution is more important.

(361) Amazon considers that the royalty calculation method as endorsed by the contested tax ruling preserves LuxOpCo's long term viability, because the royalty rate is not excessively high and allows LuxOpCo to earn a return on its costs. Furthermore, the method incentivises LuxOpCo to create value from the use of the Intangibles by growing the business as much as possible, maximising selection and keeping price leadership, and the royalty rate calculation method incentivises LuxSCS to continue its investment into the Intangibles long-term.

(362) Finally, Amazon concludes that Company X' statements about the shares of turnover which should be invested into technology for an e-commerce company amounting to 4 % to 8 % of sales confirm that LuxOpCo's royalty rate paid to LuxSCS, which amounts to an average of [5-10] % of LuxOpCo's turnover between 2006 and 2014 or [3-3.5] % of GMS and which includes a comprehensive bundle of Intangibles demonstrates that the royalty rate paid by LuxOpCo can be considered an arm's length rate and does not constitute a manifest departure from a reliable approximation of a market-based outcome.

8.3. Submissions on Amazon's technology-centric e-tailing business

(363) Amazon states that its mission is to be "*Earth's most customer-centric company, where customers can find and discover anything they might want to buy online, and endeavours to offer its customers the lowest possible prices.*"[347] The mission to offer the broadest selection of products at the lowest prices in the most convenient way lies at the heart of Amazon's business and its implementation relies critically on technology.

(364) According to Amazon, it is a "*[…] technology company that approaches retail as an engineering problem*"[348] and technology not only provides the interface between Amazon and its customers, but is at the heart of every business process. Amazon's technology allows it to provide competitive pricing, suggests items of interest to potential customers, processes payments, manages the inventory and ships products to the customers. The scale of Amazon's operations requires that the business is run by a high degree of automation to handle inventory management, pricing and order processing. Amazon could not employ a sufficient number of persons to determine prices or in-stock levels of millions of individual products.

(365) Amazon states that its e-commerce business must be available at all time with high speed response time to avoid customer dissatisfaction. Given its constant expansion, its technology infrastructure must be scalable and flexible. Therefore Amazon's software has a service-oriented architecture. The functions that Amazon's business operations require are developed as componentized pieces that can be combined for interaction and cooperation. Such an architecture has many advantages, such as individual optimisation, and maintenance of certain software being possible. This architecture also facilitates the launch of new services and improvements. If Amazon

347 See: http://www.amazon.com/Careers-Homepage/b?ie=UTF8&node=239364011.

348 Amazon's submission of 22 July 2016: Amazon's Technology-Centric E-tailing-Business, p. 1.

were to refrain from maintaining and updating its underlying technology, customers would notice as the e-tail experience that carries Amazon's commercial success would change and Amazon's business operations would fail.

(366) The Amazon websites and mobile applications encompass several functionalities, such as obtaining and maintaining customer identity information, creating and maintaining a catalogue, creating and displaying web and mobile app pages, searching and browsing, constructing and placing orders, payment processing, interaction with fulfilment centres, customer reviews, personalisation and community features.

(367) Other technology tools are website administration tools, the configuration repository, tools for the operation and analytics of the website, vendor and seller management software, inventory management software, catalogue software and pricing software. As regards the latter, Amazon states that 99 % of prices are set by an automated process, while there are also cases of manual price setting, albeit exceptional. All manual price changes in Europe have to be approved by the European Price Manager of LuxOpCo.

(368) Amazon also has marketing software, aimed at generating traffic to its websites, internal and external marketing techniques, such as search marketing (through cooperation with search engines such as Google), search engine optimisation tools, paid search advertising tools, and email marketing tools.

(369) Further technology includes order fulfilment software, such as for the European Fulfilment Network ("EFN"), picking and packaging software and customer service software.

(370) Amazon develops the key software for its e-tailing business in-house. Amazon states that technology development activities are overseen by teams in the US. Testing and bug-fixing of the websites and the software tools is entirely done in the US. Over [60-65] % of its [30 000-40 000] R&D employees are located in the US. Of the [1000-10 000] R&D employees active in Europe, [100-200] are based in Luxembourg.

(371) Finally, Amazon states that every aspect of the traditional retailing has been rethought to make it more efficient, less costly and more serving customer needs. Surrounded by a wide e-commerce environment, Amazon's customer experience created by its technology is setting Amazon apart from its competitors and strengthens its brands. Even brief time lags in ordering or minor hiccups in fulfilment undermine the customer experience, harm Amazon's brand and lead to a loss of sales because customers turn away.

(372) Amazon states that its trademark-related intangibles had a useful life of 10-15 years as of 1 January 2005. The customer database had an estimated useful life of 6-10 years, and the Technology had a useful life of two to five years as of 1 January 2005.

8.4. Submissions on critical threats for Amazon's European operations

(373) In its submission of 27 February 2017, Amazon submitted to consider the following three critical threats for its European businesses:

(374) Competition: the loss of business to competition is Amazon's main business threat, since e-commerce is highly competitive. Competition is largely driven by innovation and competitors that did not innovate left the market. Amazon faces different

pressure and competitors in various markets and there are local specificities in relation to risks from competition.

(375) Customer adoption of new products, services and technologies: Amazon's growth and its expansion into new categories and geographic regions entails the risk that customers do not adopt the new offerings or products. In the same vein, Amazon bears the risk of website outages, which can have significant costs for its business.

(376) Finally, local economic and political conditions and changes to the legal framework constitute a risk or could be a threat for Amazon's European business. Low degrees of internet use and credit card use pose significant challenges to Amazon, making it impossible to create a growing business. Government regulation may render Amazon's business model impracticable.

8.5. Amazon's submissions of 29 May 2017

(377) On 29 May 2017, Amazon submitted a statement to the US Tax Court procedure and a newly commissioned transfer pricing report.

(378) According to Amazon, the decision of the US Tax Court, in application of the CUP method, resulted in an arm's length royalty rate for the intangibles amounting to [4.5-5] % of GMS[349].

(379) Amazon stated that LuxSCS' acquisition of the rights to the technology, brand and customer information was recognized by all parties to the US litigation procedure. Therefore, Amazon refers to the [4.5-5] % royalty rate of GMS as a benchmark for the appropriate arm's length royalty to be received by LuxSCS. Moreover, according to Amazon, the benchmark should be seen as minimum, taking into account that this royalty rate does not consider goodwill and the enhancements to the intangibles made under the CSA after 2005/2006, which LuxOpCo received.

(380) Amazon therefore claims that the aggregate royalty rate that LuxSCS received over the relevant period 2006 to 2014 was in fact lower than the royalty rate as determined by the US Tax Court, namely [3-3.5] % of GMS. Based on Amazon's comments on the US Tax Court judgement, LuxSCS therefore received a too low royalty rate from LuxOpCo and thus Amazon considers that the 2003 tax ruling could not entail any advantage for LuxOpCo.

(381) Amazon considered that an exhaustive evaluation of trial-tested facts was carried out during the US litigation procedure including expert records. The decision of the US Tax Court confirmed previous submissions of Amazon, in particular that technology is a key value driver for Amazon's business, which required investment and continuous innovation and that the integration of Amazon's European operations responded to business needs and finally that the European e-commerce environment was subject to intense competition and characterised by low margins during the relevant period.

(382) Amazon commissioned [Advisor 1] to do a new Transfer Pricing Report, the purpose of which was to verify *ex post* whether the royalty paid by LuxOpCo to LuxSCS in accordance with the contested ruling was at arm's length (the "2017 *ex post* TP

[349] As explained in this submission, p. 5, this calculation was made by [Advisor 1] in the 2017 *ex post* TP report. GMS stands for Gross Merchandise Sales, which is total sales through Amazon's websites, i.e. sales in Amazon's own name and sales by third parties through Marketplace.

Report")[350]. The report examines the level of the royalty from the perspective of two transfer pricing methods: the CUP method and the TNMM.

(383) As regards the CUP analysis, the royalty payments from LuxOpCo to LuxSCS during the relevant period were compared to the royalty determined in the TP Report and in the US Tax Court's opinion. The 2017 *ex post* TP Report claims that the royalty actually paid by LuxOpCo to LuxSCS was below the range of royalty rates determined with reference to the [A] agreement in the TP report[351]. It further claims that the royalty paid by LuxOpCo to LuxSCS falls below the royalty rate of [4.5-5] % established in the US Tax Court's opinion also through the use of the CUP method[352]. In this respect, it clarifies that the Court's opinion sets out an aggregate royalty rate of GMS as "*initial (or starting) arm's length royalty rates for the Intangibles existing as of May 1, 2006*"[353].

(384) The 2017 *ex post* TP Report further claims that several upwards adjustments should be made to the royalty payment from LuxOpCo to LuxSCS due to the differences between the License Agreement and the initial Buy-In. In this respect, the report finds that the "*one-off transfer of pre-existing intangibles between the U.S. counterparties and LuxSCS*" is different from the License Agreement, since LuxOpCo would have to pay a royalty not only for the value of the IP that existed at the time where the License Agreement was concluded, but also for "*all enhancements, developments, or improvements, whose costs are solely borne by LuxSCS.*"[354] Upwards adjustments should also be made to account for a variety of intangibles which were made available to LuxOpCo and were not the subject of the US Tax Court's opinion, for temporal differences, and for the cap and floor applied to royalty paid by LuxSCS, which "*operated to mitigate risks and provide a stable income stream to LuxOpCo in line with its function and risk profile*"[355]. Downward adjustments were not considered necessary as LuxOpCo's contributions to the development, enhancement and maintenance of the Intangibles were not taken into account[356].

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350 Amazon's submission of 29 May 2017: [Advisor 1] and [Advisor 1]: "Economic analysis of the Transfer Pricing approach adopted in the 2003 ATC", 25 May 2017.

351 TP Report, p. 25-28, a royalty within a range of [10-15]% to [10-15]%, was considered arm's length. 2017 ex post TP-report, p. 12: *"LuxOpCo's aggregate royalty payments to LuxSCS over the period under review are approximately [5-10]% of net sales (or [3-3.5]% of GMS). This figure is well below the range of royalty rates indicated by the CUP analysis in the [Advisor 2] Report, which are based on the agreement between Amazon and [A] and include adjustments to account for other intangibles (customer referrals) licensed by LuxSCS to LuxOpCo but not made available by Amazon to [A]*."

352 2017 *ex post* TP Report, p. 13: *"The tax court relied on Amazon's uncontrolled transactions with its M.com business partners for website technology, external trademark comparables for marketing intangibles, and Amazon's uncontrolled transactions for customer referral fees under the Associates and Syndicated Stores programs for customer information"*.

353 2017 *ex post* TP Report, p. 12-13. According to Table 1, the royalty rate is an aggregate of the following royalty rates: Technology [3-3.5]%, Marketing Intangibles [1-1.5]%, and Customer Information [0.5-1]% of GMS. The buy-in payment for the customer information determined by the US Tax Court was converted by [Advisor 1] into a royalty rate proportionately to the value of the technology and marketing intangibles.

354 2017 *ex post* TP Report, p. 12-13.

355 2017 *ex post* TP Report, p. 15-16.

356 2017 *ex post* TP Report, p. 13: "*The license of the Intangibles from LuxSCS to LuxOpCo is different, as the license comes with a commitment by LuxSCS to maintain, update, and enhance those intangibles through ongoing investments under the CSA. Although it is recognized that there is a decay of intangibles over time, these intangibles are replaced by new intangibles from the ongoing investments*

(385) The conclusion of the CUP analysis in the 2017 *ex post* TP Report is that the aggregate royalty paid by LuxOpCo to LuxSCS during the relevant was "reasonable and in line with economic reality".

(386) As regards the TNMM analysis, the 2017 *ex post* TP report begins with a functional analysis[357] to determine which party to the License Agreement should be the tested party, i.e. the party carrying out less complex functions.

(387) The functional analysis of LuxOpCo was performed on the basis of its role within the European value chain as of June 2014, since it was considered that following the gradual increase of LuxOpCo's staff over the whole period under review, its functional profile as of June 2014 would reflect the maximum contribution to value creation by LuxOpCo during that period. According to the 2017 *ex post* TP Report, LuxOpCo heavily relied on tools and technology to manage related business risks and did not autonomously manage or assume any significant risks. It also did not create a working capital need beyond those falling within its functional scope as a management company. LuxOpCo's main activities were managerial oversight over the procurement, sale, marketing, and distribution of products to third party customers via the European Web Sites. Those activities were heavily dependent on the Intangibles which related, *inter alia*, to the pricing of goods, inventory management, support for fulfilment centre activities, online payment processing, fraud detection, customer service operations, logistics, and advertising licensed to LuxOpCo. LuxOpCo did not own, nor develop or invest in the development of any of the Intangibles during the period under review. Instead, LuxOpCo only held standard business equipment assets and inventory related to Amazon's European retail business. Over the relevant period, LuxOpCo was confronted with various strategic, financial, operational, etc. risks in its day-to-day operations. Most of the risks relate directly or indirectly to the technology underpinning Amazon's offering or its global strategy of expanding into new product categories and services. To manage and control these risks effectively, Amazon implemented strict management policies at group level. Finally, in a business driven by technology, LuxOpCo did not independently assume or manage any significant business risks and instead relied on the technology to manage or assume the related business risks.

(388) As regards LuxSCS, the 2017 *ex post* TP Report only points to the fact that it holds the Intangibles as a result of its participation in the CSA.

(389) On the basis of this functional analysis, the 2017 *ex post* TP Report concludes that LuxOpCo is an example of a value chain segment that does not own, manage or control any IP rights, but has a functional profile comparable to that of a "management company" with oversight for logistics, fulfilment, and inventory related to the European online retail operations, while facing limited risks and owning only routine tangible assets[358]. Accordingly, LuxSCS, since it holds the Intangibles by virtue of its participation in the CSA, was considered to be a more complex function. The 2017 *ex post* TP Report explains in this respect that "*[b]oth the functional analysis and the factual background demonstrated that LuxOpCo's under the CSA and therefore, no downward adjustment to the royalty paid by LuxOpCo to LuxSCS is necessary*".

357 2017 *ex post* TP Report, p. 16. By contrast, the 2017 *ex post* TP report appears to ignore the functional analysis in its application of the CUP method although the functional analysis is considered a determining factor in the comparability analysis; see the 1995 OECD TP Guidelines, paragraph 1.20.

358 2017 *ex post* TP Report, p. 32.

activities were heavily dependent on and of secondary importance to the economically significant intangibles that LuxOpCo did not own but obtained access to under the License Agreement with LuxSCS' rights to the Intangibles stemming from its participation in the CSA with certain group companies before and during the period under review."[359]

(390) The 2017 *ex post* TP Report explains that a reliable financial indicator should reflect the contribution of LuxOpCo to the overall value chain. Since LuxOpCo is presented in the report as the party, which "[…] *did not autonomously decide what products to sell, how to price the products or how to promote the products, as these functions are embedded in the technological tools received via License Agreement*"[360], it is not considered appropriate to apply a net profit indicator based on sales[361]. The 2017 *ex post* TP Report finds that operating costs is the most reliable profit level indicator of the value of the functions performed, risks assumed and assets used by LuxOpCo. The report applies a profit level indicator which is calculated as Operating Profit (Loss) divided by Operating Expenses[362].

(391) The report then proceeds to update the economic analyses made in 2003 and in 2014, determining benchmark returns for activities comparable to those of LuxOpCo and carrying out a new analysis to determine benchmark returns. Based on these analysis, it was found that in all years from 2006 to June 2014, LuxOpCo's remuneration was within the interquartile range resulting from benchmark returns earned for activities comparable to those of LuxOpCo. Therefore, the 2017 *ex post* TP Report concludes that LuxOpCo's remuneration was at arm's length.

9. ASSESSMENT OF THE CONTESTED MEASURE

9.1. Existence of aid

(392) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market, in so far as it affects trade between Member States.

(393) According to settled case-law, for a measure to be categorised as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition[363].

(394) As regards the first condition, the contested tax ruling was issued by the Luxembourg tax administration, which is an organ of the Luxembourg State. That ruling entailed an acceptance by that administration of a transfer pricing arrangement which enabled LuxOpCo to assess its corporate income tax liability in Luxembourg on an annual basis during the relevant period. LuxOpCo subsequently filed its annual corporate

359 2017 *ex post* TP Report, p. 30.
360 2017 *ex post* TP Report, p. 33.
361 2017 *ex post* TP Report, p. 33.
362 2017 *ex post* TP Report, p. 33.
363 Joined Cases C-20/15 P *Commission v World Duty Free* EU:C:2016:981, paragraph 53 and the case-law cited.

income tax declaration on the basis of that arrangement, which was in turn accepted by the Luxembourg tax administration as corresponding to its corporate income tax liability in Luxembourg. The contested measure is therefore imputable to Luxemburg.

(395) As regards the measure's financing through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant a tax exemption which, although not involving a positive transfer of State resources, places the undertaking to whom it applies in a more favourable financial situation than other taxpayers may constitute State aid[364]. As will be demonstrated in Sections 9.2 and 9.3, the contested tax ruling results in a lowering of LuxOpCo's corporate income tax liability in Luxembourg as compared to similarly situated corporate taxpayers. By renouncing tax revenue that Luxembourg would otherwise have been entitled to collect from LuxOpCo, the contested tax ruling should be considered to give rise to a loss of State resources.

(396) As regards the second condition for a finding of aid, LuxOpCo is part of the Amazon group, a multinational corporate group operating in several Member States. LuxOpCo operates Amazon's European online retail and service business through the EU websites. The products and services concerned by that business are subject to trade between Member States, so that any State intervention in its favour is liable to affect intra-Union trade[365]. Moreover, by providing a favourable tax treatment to Amazon, Luxembourg has potentially drawn investment away from Member States that cannot or will not offer a similarly favourable tax treatment to companies forming part of a multinational corporate group. Since the contested tax ruling strengthens the competitive position of its beneficiary as compared with other undertakings competing in intra-EU trade, it must be considered as affecting such trade[366].

(397) Similarly, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of an undertaking as compared to other undertakings with which it competes[367]. To the extent the contested tax ruling relieves LuxOpCo of corporate income taxes it would otherwise have been obliged to pay, the aid granted as a result of that ruling constitutes operating aid, in that it relieves LuxOpCo from a charge that it would normally have had to bear in its day-to-day management or normal activities. The Court of Justice has consistently held that operating aid distorts competition[368], so that any aid granted to Amazon should be considered to distort or threaten to distort competition by strengthening the financial position of Amazon on the markets on which it operates. As regards Amazon in particular, it operates an online retail business which competes both with other online retailers and with brick-and-mortar retailers active

364 See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom*, EU:C:2011:732, paragraph 72 and the case-law cited.

365 Case C-494/06 P *Commission v Italy and Wam* EU:C:2009:272, paragraph 54 and the case-law cited. See also Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 112.

366 Case C-126/01 *GEMO SA* EU:C:2003:622, paragraph 41 and the case-law cited.

367 Case 730/79 *Phillip Morris* EU:C:1980:209, paragraph 11. Joined Cases T-298/97, T-312/97 etc. *Alzetta* EU:T:2000:151, paragraph 80.

368 Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55. See also C-271/13 P *Rousse Industry v Commission* EU:C:2014:175, paragraph 44; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere" and Others v Commission* EU:C:2011:368, paragraph 136; Case C-156/98 *Germany* v *Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

in Luxembourg and throughout the European Union. The [Advisor 3] Report submitted by Amazon describes the online retail business as a business characterised by intense competition and thin profitability margins. By relieving Amazon of a tax liability it would otherwise have had to bear and which competing undertakings have to carry, the contested tax ruling frees up financial resources for Amazon to invest in its business operations, which in turn affects the conditions under which it can offer its products and services to consumers, thereby distorting competition on the market. The fourth condition for a finding of aid is therefore also fulfilled.

(398) As regards the third condition for a finding of aid, the function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. However, like any other fiscal measure, the grant of a tax ruling must respect the State aid rules. Where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, without justification, that ruling will confer a selective advantage on its addressee in so far as that selective treatment results in a lowering of that taxpayer's tax liability in the Member State as compared to companies in a similar factual and legal situation. As the Commission will demonstrate in Sections 9.2 and 9.3, the contested tax ruling confers a selective advantage on Amazon in the form of a lowering of its corporate income tax liability in Luxembourg as compared to corporate taxpayers in a comparable factual and legal situation.

(399) In Section 9.2, the Commission will demonstrate that the contested tax ruling confers an economic advantage on Amazon. It does so by endorsing a transfer pricing arrangement that produces an outcome that departs from a reliable approximation of a market-based outcome as a result of which LuxOpCo's taxable base is reduced for the purposes of determining its corporate income tax liability. In Section 9.3.1, the Commission will conclude that since that advantage is granted only to Amazon, it is selective in nature. According to settled case-law, in the case of an individual aid measure, like the contested tax ruling, "*the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective*"[369] without it being necessary to analyse the selectivity of the measure according to the three-step selectivity analysis devised by the Court of Justice for State aid schemes[370].

(400) Nevertheless, for the sake of completeness, the Commission will also examine the contested tax ruling against that three-step selectivity analysis to demonstrate that it is also selective under that analysis. In Section 9.3.2.1 it will demonstrate that the advantage granted by the contested tax ruling is selective in nature because it favours Amazon as compared to other corporate taxpayers subject to corporate income tax in Luxembourg whose taxable profit reflects prices negotiated at arm's length on the market. In Section 9.3.2.2 it will further demonstrate that the advantage granted by the contested tax ruling is selective in nature because it favours Amazon as compared to other corporate taxpayers belonging to a multinational corporate group that engage in intra-group transactions and that, by virtue of Article 164(3) LIR, must estimate the prices for their intra-group transactions in a manner that reflects prices negotiated by independent parties at arm's length on the market.

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369 Case C-15/14 P *Commission v MOL* EU:C:2015:362, paragraph 60. See also Joined C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 55 and Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49.

370 Case C-211/15 P *Orange v. Commission* EU:C:2016:798, paragraphs 53 and 54.

9.2. Advantage

(401) Whenever a measure adopted by the State improves the net financial position of an undertaking, an advantage is present for the purposes of Article 107(1) of the Treaty[371]. In establishing the existence of an advantage, reference is to be made to the effect of the measure itself[372]. As regards fiscal measures, an advantage may be granted through different types of reduction of an undertaking's tax burden and, in particular, through a reduction in the taxable base or in the amount of tax due[373].

(402) The contested tax ruling endorses a transfer pricing arrangement that enabled LuxOpCo to assess its taxable profit for corporate income tax purposes on an annual basis, which in turn determined its corporate income tax liability in Luxembourg during the relevant period. The Court of Justice has previously held that "*[i]n order to decide whether a method of assessment of taxable income […] confers an advantage on [its beneficiary], it is necessary […] to compare that [method] with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.*"[374] Accordingly, a tax ruling that enables a taxpayer to employ transfer prices in its intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers an advantage on that taxpayer, in so far as it results in a reduction of the company's taxable income and thus its taxable base under the ordinary corporate income tax system. The principle that intra-group transactions should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances is referred to as the "arm's length principle".

(403) The essence of the arm's length principle is to ensure that transactions concluded between associated companies (controlled transactions) are priced for tax purposes under the same conditions as comparable transactions concluded at arm's length between independent companies (uncontrolled transactions). When there are conditions made or imposed between two associated companies in their intra-group transactions which differ from those which would be made between independent companies in uncontrolled comparable transactions, the arm's length principle requires appropriate transfer pricing adjustments to be performed to neutralise such differences and thereby ensure that the integrated (group) companies are not treated more favourably than non-integrated (stand-alone) companies for tax purposes[375]. In

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371 Case C-143/99 Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke EU:C:2001:598, paragraph 41.

372 Case 173/73 *Italy v. Commission* EU:C:1974:71, paragraph 13.

373 See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31.

374 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 95.

375 That the focus in transfer pricing is on the pricing of intra-group transactions clearly follows from paragraph 1.6 of the 2010 OECD TP Guidelines: "*Because the separate entity approach treats the members of an MNE [multinational enterprise] group as if they were independent entities, attention is focused on the nature of the transactions between those members and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions. Such an analysis of the controlled and uncontrolled transactions, which is referred to as a "comparability analysis", is at the heart of the application of the arm's length principle*". This focus on the pricing of intra-group transactions is reaffirmed in Par. 1.33 of the 2010 OECD TP Guidelines 2010: "*Application*

this way, the profit that the associated companies derive from their intra-group transactions is determined and ultimately treated no more favourably than the profit derived from transactions concluded by independent companies at arm's length on the market. Indeed, it is the prices charged by independent companies on the market or, as stated by the Court of Justice, "*the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition*",[376] that determine their taxable income. If a tax administration allows associated group companies to charge prices for their intra-group transactions that are below market prices, an economic advantage is conferred upon those companies in the form a tax base reduction.

(404) In response to the argument of Luxembourg and Amazon that, because transfer pricing is not an exact science[377], the assessment by the Commission of the transfer pricing arrangement endorsed by the contested tax ruling should necessarily be limited, the Commission recalls that the approximate nature of transfer pricing has to be viewed in the light of its objective. The objective of transfer pricing is to find a reasonable estimate of an arm's length outcome on the basis of reliable information[378]. The pursuit of that objective would be impossible if the approximate nature of the transfer pricing analysis could be invoked to justify a transfer pricing arrangement producing an outcome that departs from a reliable approximation of a market-based outcome.

(405) Similarly, Luxembourg's argument that the Commission, in undertaking such an assessment, improperly replaces the Luxembourg tax administration in the interpretation of national tax law[379], if accepted, would remove fiscal measures in general and transfer pricing rulings in particular from the scrutiny of the State aid rules. The Court of Justice has long confirmed that measures concerning direct taxation which places certain undertakings in a more favourable financial position than undertakings in a comparable factual and legal situation can give rise to State aid in the same way as direct subsidies[380]. According to the Court of Justice, any measure the Member States adopt in the field of direct taxation must comply with the State aid provisions of the Treaty, which bind them and enjoy supremacy over their domestic legislation[381]. That certainly applies to transfer pricing rulings in the form of advanced pricing arrangements, since they endorse methods of assessment of the taxable base, and thereby the taxable income, for individual undertakings. Any reduction of the taxable base resulting from the application of such a method gives rise to an economic advantage.

(406) Consequently, to establish that the contested tax ruling confers an economic advantage, the Commission must demonstrate that the transfer pricing arrangement it

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of the arm's length principle is generally based on a comparison of the conditions in a controlled transaction with the conditions in transactions between independent enterprises. […]".

376 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 95.

377 Amazon's submission of 5 March 2015, paragraph 27.

378 1995 OECD TP Guidelines, paragraph 1.12, 2010 and 2017 OECD TP Guidelines, paragraph 1.13.

379 Luxembourg's submission of 21 November 2014, par. 38 to 40.

380 Case 173/73 *Italy v Commission* EU:C:1974:71.

381 See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraph 81; Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom* EU:C:2011:732; Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 25, and Order in Case C-529/10 *Safilo* EU:C:2012:188, paragraph 18.

endorses produces an outcome that departs from a reliable approximation of a market-based outcome resulting in a reduction of LuxOpCo's taxable basis for corporate income tax purposes. The Commission considers the contested tax ruling to produce such an outcome.

(407) First and foremost, the Commission considers the transfer pricing arrangement to be based on the inaccurate and unsubstantiated assumption that LuxSCS would perform unique and valuable functions in relation to the Intangibles, whereas LuxOpCo would perform solely "routine" management functions. According to the information provided to the Commission, LuxOpCo performed the unique and valuable functions, used the assets and assumed substantially all the risks that contributed to the development, enhancement, management and exploitation of the Intangibles. LuxOpCo also performed the functions, used the assets and assumed substantially all the risks that are of strategic and vital importance to the generation of profits from Amazon's European online retail and service business. By contrast, LuxSCS did not perform any unique and valuable functions in relation to the Intangibles, nor in relation to Amazon's European operations, but at most carried out certain limited general administrative functions to maintain its legal ownership of the Intangibles[382]. By endorsing a transfer pricing arrangement that attributes a remuneration to LuxOpCo solely for the allegedly routine functions performed by it and that attributes the entire profit generated by LuxOpCo in excess of that remuneration to LuxSCS in the form of a royalty payment, the contested tax ruling produces an outcome that departs from a reliable approximation of a market-based outcome, which confers an economic advantage on LuxOpCo in the form of a reduction of its taxable base for corporate income tax purposes. This reasoning is developed in Section 9.2.1.

(408) In addition, by a subsidiary line of reasoning and without prejudice to the conclusion in the previous Recital, the Commission concludes that even if the Luxembourg tax administration were right to have accepted the inaccurate and unsubstantiated claim that LuxSCS would perform unique and valuable functions in relation to the Intangibles, which the Commission contests, the transfer pricing arrangement endorsed by the contested tax ruling is nevertheless based on improper methodological choices that produce an outcome departing from a reliable approximation of a market-based outcome, which also confer an economic advantage on LuxOpCo in the form of a reduction of its taxable base for corporate income tax purposes. The subsidiary line of reasoning is developed in Section 9.2.2.

9.2.1. Primary finding of an economic advantage

(409) Since the essence of the arm's length principle is to reflect the economic realities of the controlled taxpayer's particular conditions and apply as a benchmark the conditions applied in comparable transactions between independent parties, the first step of a transfer pricing analysis is to identify the commercial and financial conditions between the taxpayer requesting a transfer pricing ruling and its associated companies in the transaction (or transactions) under analysis. As acknowledged by the TP Report, the intra-group transaction being priced by the contested tax ruling is the License Agreement concluded between LuxSCS and LuxOpCo.

382 See Recital (429).

(410) After the identification of the relevant intra-group transaction, the second step of a transfer pricing analysis is the comparison of the conditions of those transactions with the conditions of comparable transactions between independent companies (i.e. the comparability analysis) so that the intra-group transaction can be priced. In transactions between two independent companies, that price will reflect the functions that each company performs (taking into account assets used and risks assumed). Therefore, in determining whether controlled and uncontrolled transactions or companies are comparable, a functional analysis is necessary. The functional analysis seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transaction(s) being priced[383].

(411) The Commission does not consider the transfer pricing arrangement endorsed by the contested tax ruling to result in a reliable approximation of a market-based outcome because it is based on an improper functional analysis. The contested tax ruling endorses a transfer pricing arrangement as a result of which the transfer price for the License Agreement – i.e. the annual royalty due by LuxOpCo to LuxSCS for the license to the Intangibles – is determined as the residual profit generated by LuxOpCo in excess of an arm's length remuneration for the allegedly "routine functions" performed by that company. The TP Report on which that transfer pricing arrangement was based did not, however, examine how the functions performed, assets used and risks assumed by LuxSCS justify the attribution of the entire residual profit of LuxOpCo to it in the form of a royalty payment[384]. Therefore, the contested tax ruling is based on the inaccurate and unsubstantiated assumption that LuxSCS would perform unique and valuable functions in relation to the Intangibles, whereas LuxOpCo would perform solely "routine" management functions in relation to Amazon's European online retail business.

(412) According to Amazon, LuxSCS owns, maintains and develops unique and difficult-to-value key value drivers in the form of the Intangibles, whose contribution is essential to the European retail business. By contrast, LuxOpCo does not own, manage or control any IP rights, but has a functional profile comparable to that of a management company with oversight over the procurement, sales, marketing and distribution of products to customers via the EU websites[385]. Relying on the [Advisor 3] report, Amazon further argued that the online retail business is similar to the physical retail business and that, in the case of retailers be it online or physical, the vast majority of costs are variable. Therefore, the impact of economies of scale on profitability is limited. These factors, together with the intense competition characteristic to online retail, would have justified attributing a limited return to LuxOpCo, like the one endorsed by the contested tax ruling.

(413) The Commission does not agree with this functional analysis, as will be explained in detail in Sections 9.2.1.1 and 9.2.1.2.

(414) Had a proper functional analysis been performed for the purposes of obtaining the contested tax ruling, the Luxembourg tax administration should have concluded that LuxSCS does not perform any unique and valuable functions in relation to the

383 See 1995 OECD TP Guidelines, paragraph 1.20. See also 2010 OECD TP Guidelines, paragraph 1.42 and 2017 OECD TP Guidelines, paragraph 1.51.

384 The TP report only provides the inaccurate statement that the residual profit "*may be considered to be attributable to the Intangibles licensed by LuxOpCo from LuxSCS*".

385 2017 *ex post* TP report p. 21 and 32.

Intangibles for which it merely holds the legal title by virtue of the Buy-In Agreement and the CSA. In particular, LuxSCS does not conduct or control any of the activities related to the development, management, protection and exploitation of the Intangibles, but passes those functions on to LuxOpCo under the License Agreement, without any reservation of LuxSCS supervising LuxOpCo's activities in that respect. LuxSCS has no employees who would be able to control those functions, nor does LuxSCS incur the cost related to the performance of those functions.

(415) Instead, it is LuxOpCo that performs unique and valuable functions in relation to the Intangibles, that uses all assets associated with those functions, and that assumes substantially all the risks associated therewith. In addition, it is LuxOpCo, supported by the EU Local Affiliates, that performs unique and valuable functions in the operation of Amazon's European online retail and service business which are of strategic and vital importance to the generation of profits from that business, that uses all assets associated with those functions, and that assumes substantially all risks associated therewith.

9.2.1.1. Functional analysis of LuxSCS

(416) Amazon claims that "*LuxSCS had the authority to take decisions and participate in the CSA, was endowed with own financial means and was capable of bearing its risks. By holding the Intangibles and funding their development (or, sometimes, their acquisition), LuxSCS had an essential role in controlling the development, the maintenance and the protection of the Intangibles […].*"[386]

(417) The Commission does not dispute that LuxSCS, as a party to the Buy-In Agreement and the CSA, is the legal owner of the rights to exploit, further develop and enhance the Intangibles for the purposes of Amazon's European retail and service business. Nor does it dispute that, LuxSCS was contractually tasked by A9 and ATI under the CSA with several functions and assigned several risks in relation to the Intangibles. However, as a result of the License Agreement, those functions and risks were exclusively and irrevocably licensed to and effectively performed and assumed by LuxOpCo for the entire lifetime of the Intangibles[387].

(418) None of the information provided to the Commission demonstrates that LuxSCS performed, or had the capacity to perform any active and critical functions in relation to the development, enhancement, management, and exploitation of the Intangibles which would justify attributing to it almost all of the profit generated by LuxOpCo in the operation of Amazon's European retail and service business (Recitals (419) to (429)). Nor could LuxSCS have been considered to have outsourced those functions to another party and it did not have the capacity to control or supervise the execution of thereof (Recitals (427) to (428)). LuxSCS also did not use any valuable assets in relation to that business, but merely held the Intangibles in a passive manner as the legal owner thereof (Recitals (431) to (435)). Finally, LuxSCS did not assume, nor did it have the capacity to assume and control, the associated risks in this regard (Recitals (436) to (445)).

386 Amazon's submission of 7 June 2017.

387 It is therefore incorrect when Amazon claims that the control over exploitation of the Intangibles effectively lies with LuxSCS because the Intangibles could be licensed to another company in a scenario where LuxOpCo was loss-making. See Recital (321).

9.2.1.1.1. Functions performed by LuxSCS

(419) LuxSCS is the legal owner and contractual licensor of the Intangibles. However, under the License Agreement, LuxSCS granted LuxOpCo an exclusive and irrevocable license to the economic exploitation of the Intangibles in Europe and a right to further develop, enhance and manage the Intangibles for their entire lifetime[388], without any reservation of LuxSCS managing or supervising LuxOpCo's activities in that respect. Under that agreement, LuxOpCo was also granted the responsibility for concluding and managing sublicenses with associated group companies[389] and granted all rights to prevent IP infringements of the Intangibles[390]. Finally, LuxOpCo was responsible for ensuring compliance with all applicable laws, rules and regulations, including export and privacy laws and regulations that may apply to its use of the Intangibles[391].

(420) Consequently, as a result of that exclusive license, LuxSCS was no longer entitled to economically exploit the Intangibles in Amazon's European operations and therefore could not perform any active and critical functions in relation to their development, enhancement, management or exploitation in that respect[392]. Thus, while the legal ownership of the Intangibles and any derivative works thereof stayed with LuxSCS during the relevant period[393], the aforementioned active and critical functions in relation to the Intangibles were performed by LuxOpCo.

(421) Even if LuxSCS had been entitled to perform such functions, it did not have the capacity to carry out, manage or control them during the relevant period. It had no employees, as confirmed by the contested tax ruling, which endorsed the conclusion in Amazon's letter of 31 October 2003 that LuxSCS' very limited activities do not lead to it carrying out a "commercial activity"[394] or having a taxable presence in Luxembourg[395]. In fact, as confirmed by the TP Report and Amazon's letter of 20 April 2006 to the Luxemburg tax administration, LuxSCS was not supposed to perform any other activity during the relevant period beyond the "*mere holding*" of

388 License Agreement, paragraphs 1.5 (Licensed Purpose), 2.1 (a) (Exclusive Intellectual Property License Grant), 2.1 (b) (Derivative Works), 2.3 (Maintenance), 4.1 (Term) and paragraph 9.2 (Preventing Infringement).

389 License Agreement, paragraph 2.1 (a)(Exclusive Intellectual Property License Grant).

390 License Agreement, paragraph 9.2 (Preventing Infringement). Amazon confirmed this reading of Provision 9.2 in its submission of 7 June 2017, see p.2.

391 License Agreement, paragraph 9.5 (Compliance, Data Protection).

392 The Licensed Purpose of the License Agreement is identical with the Licensed Purpose of the CSA in relation to the licenses obtained by LuxSCS. See the CSA, paragraph 1.13 (a).

393 To the extent, derivative works was not subject to assignment to LuxSCS under the Agreement, LuxSCS obtained an irrevocable, exclusive, and royalty-free worldwide license to those derivative works, including a right to sublicense these, for the entire lifetime of the Intangibles. Any assignment or license of the derivative works shall, however, at the same time remained licensed to LuxOpCo which, under the License Agreement is granted an irrevocable and exclusive license to the Intangibles and all other IP held by LuxSCS within the European territory. License Agreement, paragraphs 1.5 (Licensed Purpose), 2.1 (a) (Exclusive Intellectual Property License Grant), 2.1 (b) Derivative Works.

394 See Recital (124).

395 See Recital (124). See Amazon's submission of 31 October 2003. See also financial accounts of LuxSCS and EU Policies and Procedures Manual, which stipulates that LuxSCS "*must never have any employees*". In its submission of 19 March 2015, Amazon indicated that the Amazon group employees involved in developing and maintaining the Intangibles are neither employed by LuxSCS nor by entities that participate in LuxSCS.

the Intangibles and the shares in its subsidiaries[396] and receiving passive income in the form of royalties and interests from those subsidiaries[397].

(422) In the absence of employees, the only means by which such functions could have been performed by LuxSCS itself would have been through its sole manager or through its general meetings. However, the resolutions of the sole manager and the minutes of its general meetings, summarised in Table 14, do not demonstrate that any active or critical decision-making was performed by LuxSCS with regard to the aforementioned functions in relation to the Intangibles, nor that an effective control or supervision of such functions was carried out during the relevant period. Rather, the resolutions and decisions taken consisted mainly of administrative and shareholder tasks, i.e. approving accounts, receiving dividend payments, approving capital increases and the financing of subsidiaries and, in a few instances, approving the appointment of managers of LuxOpCo and other subsidiaries of LuxSCS. In addition, the complete absence of representatives of LuxSCS in the IP Steering Committee, which is the main forum of discussion for the management of the Intangibles in Europe[398], confirms that LuxSCS played no active role as regards the aforementioned functions and the associated risks during the relevant period[399].

(423) Even the decisions to enter into the Buy-In Agreement and the CSA do not appear to have been taken by LuxSCS, but constitute no more than a simple ratification by the sole manager of a decision taken by Amazon group companies in the US. The same can be said for the decision to enter into the License Agreement with LuxOpCo, as it is reflected in the resolution that the decision of the sole manager to approve and execute this agreement on behalf of LuxSCS was taken in the context of the 2006 restructuring of Amazon's European operations[400], which had already been decided by the Amazon group. In any event, such decisions are not active decisions related to the development, enhancement, management, and exploitation of the Intangibles, but are decisions implementing the "*limited number of legal agreements necessary for the Luxembourg structure to operate*"[401].

(424) The fact that LuxSCS was not legally entitled to perform such functions by virtue of the License Agreement and the fact that it lacked the capacity to do so, also means that it did not actually perform any of the functions assigned to it under the CSA during the relevant period[402]. In other words, LuxSCS was not involved in the development of the Intangibles, nor in budgeting and planning activities related thereto (functions 1 and 4 listed in Table 13, reproducing the functions listed in

396 During the relevant period, LuxSCS also held shares in Amazon Eurasia Holdings Sarl.

397 See Recital (104) and footnote 27.

398 See Recitals (454) - (455).

399 Indeed Amazon confirmed that "*neither [LuxSCS], not its general partner, Amazon Europe Holding Inc., had an active role in the IP Steering Committee*". See Amazon's submission of 7 June 2017, p. 1. As explained in Recital (103), Amazon Europe Holding Inc. was also acting as the sole manager of LuxSCS during the relevant period.

400 Written resolution of the sole manager of LuxSCS of 28 April 2006, see **Table 14**.

401 See Recitals (104) and (218).

402 CSA, paragraphs 1.13 (Licensed Purpose), 2.3 and Exhibit B, and paragraph 9.12 (Preventing Infringement). See also CSA, p. 1, *"the Parties desire to pool their respective resources from the Effective Date forward, for the purpose of further developing and otherwise enhancing the value of the Amazon Intellectual Property [Intangibles owned by ATI], A9 Intellectual Property [Intangibles owned by A9] and EHT Intellectual Property [Intangibles owned by LuxSCS] (as defined below), and to share the costs and risks of developing and using all such intellectual property rights developed by any Party on the basis of benefits anticipated to be derived from such intellectual property rights".*

Exhibit B to the CSA). It was also not involved in sales and marketing activities, strategic planning and quality control, and assurance (functions 2, 3 and 6 listed in Table 13).

(425) LuxSCS also played no active role in the management of strategic acquisitions of technologies (function 5 listed in Table 13)[403], notwithstanding the fact that a number of those acquisitions were executed on the basis of the CSA. In fact, according to the information provided by Amazon on decisions taken by LuxSCS in relation to other buy-in transactions entered into since 2005, its sole manager merely accepted the contribution of the technologies acquired in exchange for a buy-in payment[404]. Those decisions constituted no more than a mere administrative reorganisation of activities, not an active, value-adding management of the acquired technology.

(426) Finally, although Exhibit B to the CSA lists as a final function the ability to "*select, hire and supervise employees, contractors and sub-contractors to perform any of the above activities*" (function 7 listed in Table 13), there are no indications that LuxSCS should be considered to have effectively outsourced any of the functions assigned to it under the CSA to another party acting under the instruction and control (i.e. a subcontractor) of LuxSCS[405]. Neither the resolutions of the sole manager nor the minutes of the general management meetings demonstrate that any active decisions were taken in that respect. Moreover, the CSA Annual Summary reports record no expenses incurred directly by LuxSCS in the development of the Intangibles that would be capable of entering into the cost sharing pool[406], for instance fees paid for the provision of outsourced activities. Only the entities A9, ATI, and the contract development centres managed by ATI and A9 reported Development Costs[407]. Those Development Costs reflect functions performed by or on behalf of those companies, (and risks assumed by those companies) during the relevant period. Those functions therefore cannot be considered as performed by LuxSCS[408].

(427) Consequently, none of the development functions or other functions related to the Intangibles as carried out by A9, ATI and their Subcontractors with reference to the Buy-In Agreement and the CSA (or the risks related to these functions) can be taken into account as a contribution of LuxSCS to the License Agreement between LuxSCS and LuxOpCo. Rather, those functions should be accounted for as contributions of A9 and ATI under the Buy-In Agreement and the CSA[409]. Those agreements, which according to the US Tax Court were remunerated at arm's length by way of the Buy-In Payments and the CSA Payments, are not the subject-matter of this Decision, since they are not covered by the contested tax ruling. The functions performed by A9, ATI and their subcontractors are therefore irrelevant when assessing the remuneration to be paid by LuxOpCo to LuxSCS under the License Agreement, which is the subject-matter of the contested tax ruling.

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403 See Recital (213) as regards the acquisition of [acquisition U, Q, R and T].

404 See Recitals (212) to (214) and (218).

405 See Footnote 199.

406 See Recital (200).

407 See Recital (201).

408 As explained in footnote 402, the parties entered into the CSA in order to share their individual costs and risks for them to be able to obtain the benefits of their joint development of the Intangibles.

409 As illustrated in the accounts of LuxSCS, no trace has been found that A9, ATI, or any other Amazon companies have been remunerated for R&D and the management of the Intangibles beyond the CSA, nor for other services beyond the CSA (see Table 9). It is therefore assumed that the CSA set out the full remuneration to A9 and ATI for all functions performed for the benefit of LuxSCS.

(428) In any event, even if LuxSCS could be considered to have outsourced its development functions and risks under the CSA to a Subcontractor within a meaning of that agreement[410] , which it cannot, it would not have had the capacity to supervise the execution of those functions, let alone control the performance of those functions and the risks associated with them in the absence of employees[411]. In a typical arm's length transaction between independent parties, a licensor that outsources certain IP-related functions would be expected to safeguard the execution of the license agreement through close supervision[412]. Moreover, even if the functions of LuxSCS under the CSA were to be considered outsourced to an associated company, here in particular LuxOpCo, such a company would have been entitled to an arm's length remuneration for the services performed, either in the form of a service fee or, as regards LuxOpCo, in the form of a reduction of the royalty rate[413]. Despite what

410 See Footnote 198.

411 See 2010 OECD TP Guidelines, paragraph 9.24: "*While it is not necessary to perform the day-to-day monitoring and administration functions in order to control a risk (as it is possible to outsource these functions), in order to control a risk one has to be able to assess the outcome of the day-to-day monitoring and administration functions by the service provider (the level of control needed and the type of performance assessment would depend on the nature of the risk).*" As further clarified in the BEPS action 8-10 Final report, p. 63: *"If an associated enterprise contractually assuming a specific risk does not exercise control over that risk nor has the financial capacity to assume the risk, then the framework contained in the chapter "Guidance on Applying the Arm's Length Principle" determines that the risk will be allocated to another member of the MNE [multinational enterprise] group that does exercise such control and has the financial capacity to assume the risk. This control requirement is used in this chapter to determine which parties assume risks in relation to intangibles, but also for assessing which member of the MNE [multinational enterprise] group in fact controls the performance of outsourced functions in relation to the development, enhancement, maintenance, protection and exploitation of the intangible.*" See also 2017 OECD TP Guidelines, paragraph 1.65: "*Control over risk involves the first two elements of risk management defined in paragraph 1.61; that is (i) the capability to make decisions to take on, lay off, or decline a risk-bearing opportunity, together with the actual performance of that decision-making function and (ii) the capability to make decisions on whether and how to respond to the risks associated with the opportunity, together with the actual performance of that decision-making function. It is not necessary for a party to perform the day-to-day mitigation, as described in (iii) in order to have control of the risks. Such day-to-day mitigation may be outsourced, as the example in paragraph 1.63 illustrates. However, where these day-to-day mitigation activities are outsourced, control of the risk would require capability to determine the objectives of the outsourced activities, to decide to hire the provider of the risk mitigation functions, to assess whether the objectives are being adequately met, and, where necessary, to decide to adapt or terminate the contract with that provider, together with the performance of such assessment and decision-making. .In accordance with this definition of control, a party requires both capability and functional performance as described above in order to exercise control over a risk".*

412 See 2017 OECD TP Guidelines, paragraph 6.53: "*In outsourcing transactions between independent enterprises, it is usually the case that an entity performing functions on behalf of the legal owner of the intangible that relate to the development, enhancement, maintenance, protection, and exploitation of the intangible will operate under the control of such legal owner (as discussed in paragraph 1.65). […]*".

413 See paragraph 6.14 of the 1995 and 2010 OECD TP Guidelines: "*Arm's length pricing for intangible property must take into account for the purposes of comparability the perspective of both the transferor of the property and the transferee. […] Given that the licensee will have to undertake investments or otherwise incur expenditures to use the licence it has to be determined whether an independent enterprise would be prepared to pay a licence fee of the given amount considering the expected benefits from the additional investments and other expenditures likely to be incurred*". Paragraph 6.18 further provides: "*It also is important to take into account the value of services such as technical assistance and training of employees that the developer may render in connection with the transfer. Similarly, benefits provided by the licensee to the licensor by way of improvements to products or processes may need to be taken into account*". See also 2017 OECD TP Guidelines, paragraph 6.112.

Amazon claims[414] the License Fee as endorsed by the contested tax ruling was not reduced corresponding to the functions performed by LuxOpCo in relation to the Intangibles, seeing as LuxSCS incurred no direct costs in relation to those activities, with the exception of some limited external costs which appear to relate to the maintenance of its legal ownership of the Intangibles, which was carried out under the control of LuxOpCo.[415]

(429) During the relevant period, the only functions that could actually have been said to have been performed by LuxSCS were functions related to the maintenance of its legal ownership of the Intangibles, although even those were carried out under LuxOpCo's control[416]. According to the detailed break-down of LuxSCS's other operating charges as set out in Table 10, LuxSCS incurred certain external expenses related to domain, accounting and legal fees – general corporate[417]. Amazon explained that those fees related to: (i) the share of the Luxembourg costs allocated to LuxSCS; (ii) disbursements in relation to the legal protection of the Intangibles owned by LuxSCS, such as patent application fees and related disbursements, trademark application fees and related disbursements, trademark application fees and related disbursements; and (iii) fees and disbursements in relation to domain names and IP searches[418]. It is only those costs that could be considered as relevant for the remuneration of LuxSCS under the License Agreement since those costs appear to reflect functions that might have actually been carried out by LuxSCS during the relevant period.

9.2.1.1.2. Assets used by LuxSCS

(430) For transfer pricing purposes, a party to an intra-group transaction can only be attributed a return on an asset to the extent that it exercises control over its use and the risk(s) associated with that use. Thus, the owner of an asset needs to effectively use the asset in question. The determinative factor in every functional analysis is therefore not the assets passively owned by any of the parties to the intra-group transaction under analysis, but the assets actually used[419]. The mere legal ownership

414 See Recital (206).

415 As specified in Recital (429).

416 As set out in the License Agreement, paragraphs 2.3 (maintenance), 9.2 (preventing infringement) and 9.5 (compliance, data protection), LuxOpCo was solely responsible for the maintenance and protection of the Intangibles.

417 See Amazon's submission of 21 August 2015, annex 5.

418 Amazon's submission of 7 June 2017.

419 That the emphasis is on the use of an intangible is made clear in 2017 OECD TP Guidelines, paragraph 6.71 provides: *"If the legal owner of an intangible in substance:*

- *performs and controls all of the functions [..] related to the development, enhancement, maintenance, protection and exploitation of the intangible;*
- *provides all assets, including funding, necessary to the development, enhancement, maintenance, protection, and exploitation of the intangibles; and*
- *assumes all of the risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible,*

then it will be entitled to all of the anticipated, ex ante, returns derived from the MNE [multinational enterprise] group's exploitation of the intangible. To the extent that one or more members of the MNE [multinational enterprise] group other than the legal owner performs functions, uses assets, or assumes risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible, such associated enterprises must be compensated on an arm's length basis for their contributions. This compensation may, depending on the facts and circumstances, constitute all or a substantial part of the return anticipated to be derived from the exploitation of the intangible". See also

of an asset, without using it to undertake any functions or incur any risks, does not give rise to any remuneration beyond the value of the asset itself[420]. Nor does the mere legal ownership of or license to an asset in itself mean that the owner in fact develops, enhances, manages, or exploits that asset.

(431) As regards the Intangibles, Amazon argues that LuxSCS "uses" those assets by licensing them to LuxOpCo. However, pursuant to the License Agreement, LuxSCS granted LuxOpCo an exclusive and irrevocable license to the economic exploitation of the Intangibles in Europe and a right to further develop, manage and exploit the Intangibles for their entire lifetime for the purposes of operating Amazon's European retail and service business, without any reservation for LuxSCS to be eligible to still use the Intangibles or to manage and control their use.

(432) In any event, since LuxSCS did not in fact use, nor did it have the capacity to use, the Intangibles, as explained in Recitals (421) to (427), the Intangibles cannot be said to have been used by LuxSCS in the execution of the License Agreement for transfer pricing purposes.

(433) Nor can LuxSCS be said to have incurred any costs in relation to the development, enhancement, management and exploitation of the Intangibles[421]. As set out in Table 10, LuxSCS did not incur any costs during the relevant period – besides the external fees and disbursements identified in Recital (429) which appear to relate to the maintenance of its legal ownership to the Intangibles, and some one-off costs related to intercompany sale of inventory in relation to the 2006 restructuring – other than the Buy-In and CSA Costs. Moreover, any costs that LuxSCS did incur were financed with its primary source of income, i.e. the royalty payments it received from LuxOpCo[422].

1995 OECD TP Guidelines, paragraph 1.20 and 1.22 2010 OECD TP Guidelines, paragraph 1.42, and 1.44 where the emphasis is clearly on the "use" of the asset.

420 As explained in the 1995 OECD TP Guidelines, paragraph 2.26:*"If it cannot be demonstrated that the intermediate company either bears a real risk or performs an economic function in the chain that has increased the value of the goods, then any element in the price that is claimed to be attributable to the activities of the intermediate company would reasonably be attributed elsewhere in the MNE [multinational enterprise] group, because independent enterprises would not normally have allowed such a company to share in the profits of the transaction.*" See also 2010 OECD TP Guidelines, paragraph 2.33 and 2017 OECD TP Guidelines, paragraph 2.39. As further explained in the 2017 OECD TP Guidelines, paragraph 6.59*: "Group members that use assets in the development, enhancement, maintenance, protection, and exploitation of an intangible should receive appropriate compensation for doing so. Such assets may include, without limitation, intangibles used in research, development or marketing (e.g. know-how, customer relationships, etc.), physical assets, or funding. One member of an MNE [multinational enterprise] group may fund some or all of the development, enhancement, maintenance, and protection of an intangible, while one or more other members perform all of the relevant functions. When assessing the appropriate anticipated return to funding in such circumstances, it should be recognised that in arm's length transactions, a party that provides funding, but does not control the risks or perform other functions associated with the funded activity or asset, generally does not receive anticipated returns equivalent to those received by an otherwise similarly-situated investor who also performs and controls important functions and controls important risks associated with the funded activity. [...]*".

421 See the 1995 and 2010 OECD TP Guidelines, paragraph 6.27: "*In assessing whether the conditions of a transaction involving intangible property reflect arm's length dealings, the amount, nature, and incidence of the costs incurred in developing or maintaining the intangible property might be examined as an aid to determining comparability or possibly relative value of the contributions of each party […]*".

422 See Table 9.

(434) LuxSCS also does not own any other asset that could be said to contribute to the development, enhancement, management or exploitation of the Intangibles[423]. While intangible assets resulting from the purchase of IP are capitalised on LuxSCS's balance sheet since 2011, those acquisitions have been managed and controlled not by LuxSCS, but by Amazon companies in the US and LuxOpCo[424], as explained in Recital (425). The other assets presented on its balance sheets are primarily held in its capacity of sole shareholder of LuxOpCo and one other group entity, Amazon Eurasia Holdings S.a.r.l., Luxembourg. They are not related to the License Agreement, which is the subject matter of the contested tax ruling and this Decision.

(435) Finally, while LuxSCS provided loans to LuxOpCo out of the profits accumulated from the royalties paid by the latter to the former under the License Agreement[425], the provision of loans does not constitute a valuable contribution to the development, enhancement, management, and exploitation of the Intangibles. As explained in Recital (183) and footnotes 177 to 9, the amount of those loans actually seems to have increased in line with the excessive part of the royalty payments[426], since LuxOpCo retained the portion of the royalty which was not used for the Buy-In and CSA Costs as paid on to A9 and ATI under the CSA[427].

9.2.1.1.3. Risks assumed by LuxSCS

(436) The starting point to determine whether a party to an intra-group transaction has assumed economically significant risks is the contractual assumption of risks between the parties to that transaction. However, a party that contractually assumes such risks should be able, on the one hand, to control those risks (operational capacity)[428] and, on the other hand, to financially assume those risks (financial capacity)[429]. In this context, control should be understood as the capacity to make decisions to take on the risk and to manage it[430]. It is therefore crucial to determine how the parties to the transaction operate in relation to the management of those risks, and in particular which party or parties perform control functions and risk mitigation functions, which party or parties encounter upside or downside consequences of risk outcomes, and which party or parties have the financial capacity to assume those risks[431]. When the risk allocation set out in the intra-group

423 See Table 9.

424 See Table 9 and Recital (474).

425 In 2006, LuxSCS lent out funds to the limit of its subscribed capital, whereas the amounts lent to group companies going forward increased in proportion to the profits accumulated from the royalty payments it received from LuxOpCo.

426 The outstanding amount of the credit facility increased in the period 2006-2013 by EUR [1 500 – 2 000] million (see Recital (183)), while the royalty payments due from LuxOpCo to LuxSCS exceeded the payments due from LuxSCS to Amazon US in the same period by EUR [1 500 – 2 000] million (EUR [3 000 – 3 500] million – EUR [1 500 – 2 000] million, see tables 2 and 10 respectively).

427 See footnote 176 and 178 for explanation of interdependence between the royalty and the Credit Facility.

428 2010 OECD TP Guidelines, paragraph 9.23 and 9.26. See also 1995 OECD TP Guidelines, paragraph 1.25-1.27 and 2017 OECD TP Guidelines, paragraph 1.61, 1.65 and 1.70.

429 2010 OECD TP Guidelines, paragraph 9.29. See also 1995 OECD TP Guidelines, paragraph 1.26 and 2017 OECD TP Guidelines, paragraph 1.64.

430 2010 OECD TP Guidelines, paragraph 9.23. See also 1995 OECD TP Guidelines, paragraph 1.25 and 2017 OECD TP Guidelines, paragraph 1.61 and 1.65.

431 According to paragraph 1.49 of the 2010 OECD TP Guidelines, paragraph 1.49, a "*factor to consider in examining the economic substance of a purported risk allocation is the consequence of such an allocation in arm's length transactions. In arm's length transactions it generally makes sense for parties to be allocated a greater share of those risks over which they have relatively more control*." The

contractual arrangement does not reflect the underlying economic reality, it is the parties' actual conduct and not the contractual arrangements that should be taken into account for transfer pricing purposes[432].

(437) Amazon claims that LuxSCS assumes the risks related to the development, enhancement, management and exploitation of the Intangibles on the basis of the contractual arrangements it entered into with associated group companies, namely the Buy-In Agreement, the CSA and the License Agreement, and its ownership of the Intangibles[433]. That claim must be rejected for several reasons.

(438) First, LuxSCS in fact passed on the risks related to the aforementioned functions to LuxOpCo. Under the License Agreement, not only did LuxSCS grant LuxOpCo an exclusive and irrevocable license to the economic exploitation of the Intangibles in Europe and a right to further develop, manage and protect the Intangibles for their entire lifetime for the purpose of operating Amazon's European retail and service business[434], LuxOpCo also contractually assumed all the risks designated to LuxSCS under the CSA[435].

(439) Second, as regards the CSA, while Exhibit B thereto lists several risks attributed to LuxSCS (Table 13), those risks are intrinsic to the performance of the functions attributed to it as recorded in that same exhibit. Since LuxSCS does not actually perform any of the functions attributed to it under the CSA, as explained in Recitals (424) to (427), it also cannot be said to have effectively assumed any risks associated with those functions. Nor is there any evidence of any business rationale for such a risk allocation. Since LuxOpCo took over all the functions related to the development, enhancement, management and exploitation of the Intangibles in the

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same requirement is presented in point 1.27 of the 1995 OECD TP Guidelines and illustrated in the following terms: "*suppose that Company A contracts to produce and ship goods to Company B, and the level of production and shipment of goods are to be at the discretion of Company B. In such a case, Company A would be unlikely to agree to take on substantial inventory risk, since it exercises no control over the inventory level while Company B does. Of course, there are many risks, such as general business cycle risks, over which typically neither party has significant control and which at arm's length, could therefore be allocated to one or the other party to a transaction. Analysis is required to determine to what extent each party bears such risks.*" See also 2017 OECD TP Guidelines, paragraph 1.59 -1.60.

[432] 1995 OECD TP Guidelines present this consideration in paragraph 1.26, according to which, "*in relation to contractual terms, it may be considered whether a purported allocation of risk is consistent with the economic substance of the transaction. In this regard, the parties' conduct should generally be taken as the best evidence concerning the true allocation of risk.*" Paragraph 1.39 further provides that "*contracts within an MNE [multinational enterprise] could be quite easily altered, suspended, extended, or terminated according to the overall strategies of the MNE [multinational enterprise] as a whole and such alterations may even be made retroactively. In such instances tax administrations would have to determine what is the underlying reality behind a contractual arrangement in applying the arm's length principle*." See also 2010 OECD TP Guidelines, paragraph 1.67 and 9.14. 2017 OECD TP Guidelines, paragraph 1.88.

[433] See Recital (321).

[434] License Agreement, paragraph 1.5 (Licensed Purpose), paragraph 2.1(a) (Exclusive Intellectual Property License Grant), paragraph 2.1(b) (Derivative Works), paragraph 2.3 (Maintenance), paragraph 4.1 (Term) and paragraph 9.2 (Preventing Infringement).

[435] See Recital (116) and Table 13 (Functions and Risks). As explained in Recital (116), LuxOpCo did, by way of its exclusive license, agree to perform all activities related to the development, enhancement, management and exploitation of the Intangibles in the European Territory, and to take over all risk associated with those activities.

European territory by way of its exclusive license, LuxSCS would not be able to manage and control the risks related to those activities. [436].

(440) Third, there is equally no evidence suggesting that LuxSCS took any active decisions to outsource its risk management functions under the CSA, nor that LuxSCS would have been able to control and supervise such outsourced activities had it done so[437]. Similarly, none of risks related to the Intangibles, as undertaken by A9, ATI or their subcontractors, with reference to the CSA could be taken into account as a risk assumed by LuxSCS in the licensing arrangement between LuxSCS and LuxOpCo. As explained in Recitals (426) and (427), the other parties to the CSA are not acting as agents of LuxSCS, but on their own behalf in order to achieve the anticipated benefits of the CSA. Those risks should be accounted for as contributions of those parties to the CSA and they cannot affect the remuneration of LuxSCS by LuxOpCo under the License Agreement.

(441) Fourth, that LuxSCS assumed no risks in relation to the Intangibles is further supported by the fact that neither the resolutions of LuxSCS's sole manager nor the minutes of its general meetings reflect any critical decisions on risk management performed by LuxSCS in relation to the risks associated with the development, enhancement, management, and exploitation of the Intangibles[438]. In any event, LuxSCS had no employees which could have performed such risk management functions during the relevant period. LuxSCS therefore lacked the operational capacity to assume any risks contractually assigned to it[439].

(442) Amazon further claims that LuxSCS bore the business risks associated with Amazon's European retail operations due to the fact that online retailing is based and heavily reliant on the Technology (i.e. an element of the Intangibles),[440] which LuxSCS makes available to LuxOpCo pursuant to the License Agreement. That claim is not supported by the contractual allocation of risks under the License Agreement, pursuant to which LuxSCS does not assume any risks associated with the exploitation of the Intangibles. Instead, it is LuxOpCo, to whom the Intangibles have been exclusively and irrevocably licensed, that is responsible for the strategic decision-making related to Amazon's European retail operations and who, in accordance with the contractual allocation, is actually taking those decisions[441]. LuxSCS therefore cannot be said to have assumed any significant operating risks in relation to the use of Intangibles for the purpose operating that business. For instance, LuxSCS did not bear consumer credit risks or bad debt risks, since it did not deal directly with payments by clients; it did not bear warehousing risks, since it

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436 See also the 2010 TP OECD Guidelines, Chapter IX, Business restructurings, Example (B): Transfer of valuable intangibles to a shell company, and in particular, the conclusion in paragraph 9.192: "*A full consideration of all of the facts and circumstances warrants a conclusion that the economic substance of the arrangement differs from its form. In particular, the facts indicate that Company Z has no real capability to assume the risks it is allocated under the arrangement as characterised and structured by the parties. Furthermore, there is no evidence of any business reasons for the arrangement. In such a case paragraph 1.65 allows a tax administration to not recognise the structure adopted by the parties*".

437 An illustrative example is presented in paragraph 9.25 of the 2010 OECD TP Guidelines and 1.70 of the 2017 OECD TP Guidelines of an investor that hires a fund manager to invest funds on its account.

438 See Table 14.

439 See footnote 411, which reproduces 2010 OECD TP Guidelines, paragraph 9.24.

440 See Recitals (363) and following. *"Constant development of the Intangibles is critical to Amazon European business' success (or failure). As such, by developing and controlling the Intangibles Lux SCS takes on significant business risk"*, see Amazon's submission of 18 January 2016, p. 4.

441 License Agreement, paragraph 1.5 (Licensed Purpose).

did not hold any inventory; and it did not bear any warranty risks or product liability risks on the products sold, since it did not sells any products. In sum, LuxSCS did not exercise any functions pertaining to those risks, nor any control over those functions during the relevant period.

(443) Amazon also claims[442] that LuxSCS assumed financial risks associated with the development of the Intangibles, in particular resulting from its obligation under the CSA to pay its share of the Development Costs, which is calculated as the proportion of sales revenue generated by Amazon in Europe as compared to Amazon's global sales revenue[443]. Due to the contractual arrangements under License Agreement, explained in Recital (438), the only identifiable risk left with LuxSCS was that it needed to honour its obligation under the CSA to pay the Buy-In and CSA Costs to Amazon US. While LuxSCS might not be able to pay those costs in a situation where LuxOpCo would go bankrupt or otherwise permanently be unable to pay a level of royalty sufficient to cover those costs to LuxSCS, this contractual risk appears to have been left with LuxSCS solely because it was "*necessary for the Luxembourg structure to operate*"[444]. It does not reflect economic reality. Had the contractual arrangement, and in particular the methodology for the royalty determination, reflected economic reality and the true risk allocation between the parties[445], LuxSCS would have received a remuneration covering its limited functions only[446], and would not have borne any risk of losses[447]. As explained in the preceding Recital, LuxSCS did not take any active decisions to limit or manage this specific risk, nor did it have control over such risk. In any event, had LuxOpCo gone bankrupt or otherwise permanently unable to pay to LuxSCS the royalties owed to it under the License Agreement, LuxSCS could, in that specific event, have terminated the License Agreement and licensed the Intangibles to another related or independent party and thereby limit its contractual risk[448].

(444) Most important, during the relevant period LuxSCS did not carry out any functions in relation to, nor did it have control over or the capacity to control, the two main input parameters for the calculation of the Buy-in and CSA Costs. The level of those payments are determined, on the one hand, by the level of costs incurred as a result of Buy-in and the development of the Intangibles (the Development Costs) and, on

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442 Amazon submission of 7 June 2017, p. 2-3.

443 See Recital (199). As of 1 January 2014 the proportion of the Development Costs to be borne by LuxSCS was determined by the proportion of gross profit generated by the European operations to the global gross profits of Amazon (see Recital (204)).

444 See Recital (104).

445 See Recital (436), which shows that it is the parties' actual conduct and not the contractual arrangements that prevail in transfer pricing.

446 See Recital (429).

447 As it is LuxOpCo, who manages and assumes the risks related to the Intangibles and to the operation of Amazon's business in Europe (see Section 9.2.1.2), LuxOpCo should keep both the upside and downside result of its activity i.e. including losses, which would potentially occur if LuxOpCo does not generate enough profit to pay an arm's length royalty for the Intangibles. The Commission presents a methodology to determine a remuneration to LuxSCS, which better reflects the economic reality of the contested transaction, in Section 9.2.1.4.

448 License Agreement, paragraph 4.3: *"Termination After Failure to Cure for Failure of Performance. If either party fails to perform any of its covenants contained in this Agreement and fails to cure such default within sixty (60) days after receiving a notice from the non-defaulting party, the non-defaulting party may terminate this Agreement immediately by giving written notice to the defaulting party".*

the other, by the level of sales in Europe[449]. It was ATI and A9 that determined and controlled the Development Costs and LuxOpCo that controlled the level of sales in Europe. As regards the latter, it is LuxOpCo that took all strategic decisions concerning Amazon's European retail business[450], which affected the level of sales revenue generated in Europe. Thus, only LuxOpCo could influence its ability to pay a royalty to LuxSCS, which was determined by the level of profit generated from the operation of Amazon's European online retail business.

(445) In addition, LuxSCS did not have the financial capacity to finance the Buy-In and CSA Costs on its own behalf, since it was only in a position to finance those costs because of the funding received in the form of royalty payments from LuxOpCo[451]. The cash disbursements actually made by LuxOpCo to LuxSCS in this regard seem to have been just sufficient to cover the necessary payments to be made by LuxSCS, including the Buy-In and CSA costs, while the cash related to LuxSCS's income in excess of Buy-In and CSA costs was kept and managed by LuxOpCo[452]. The initial capital of LuxSCS of about EUR [400-500] million is irrelevant in this context. As explained in Recital (443), in an arm's length arrangement LuxSCS would not need to absorb losses, so its capital would not be at any risk. Not only was its initial capital insufficient to cover the Buy-In and CSA costs, since the CSA Payments alone totalled on their own EUR [1 000 – 1 500] million over the period 2006 to 2013[453], that capital was provided to LuxSCS by its shareholders in 2005, which was before LuxOpCo started operating and making royalty payments to LuxSCS and before the relevant period covered by the contested tax ruling and this Decision. In any event, LuxSCS did not effectively perform any critical functions nor assume any substantial risks in relation to the development, enhancement, management, or exploitation of the Intangibles, neither as regards the activities carried out by ATI and A9 under the CSA, nor as regards the development activities carried out by LuxOpCo.

(446) Consequently, LuxSCS cannot be said to have effectively assumed the risks associated with the development, enhancement, management, and exploitation of the Intangibles, nor did it have the financial capacity to assume such risks.

9.2.1.1.4. Conclusion on the functional analysis of LuxSCS

(447) A functional analysis of LuxSCS demonstrates that during the relevant period it was not entitled to perform, it did not perform or outsource, nor did it have the capacity to

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449 As explained in the 2017 OECD TP Guidelines, paragraph 6.63: "*The extent and form of the activities that will be necessary to exercise control over the financial risk attached to the provision of funding will depend on the riskiness of the investment for the funder, taking into account the amount of money at stake and the investment for which these funds are used. In accordance with the definition of control as reflected in paragraphs 1.65 and 1.66 of these Guidelines, exercising control over a specific financial risk requires the capability to make the relevant decisions related to the risk bearing opportunity, in this case the provision of the funding, together with the actual performance of these decision making functions. In addition, the party exercising control over the financial risk must perform the activities as indicated in paragraph 1.65 and 1.66 in relation to the day-to-day risk mitigation activities related to these risks when these are outsourced and related to any preparatory work necessary to facilitate its decision making, if it does not perform these activities itself*".

450 For instance, LuxOpCo's employees from the EU Retail Pricing Committee are responsible for setting the pricing guidelines and approving all retail pricing on the EU websites. See Amazon Internal Document: EU Policies and Procedures Manual, effective 1 May 2006, p. 5.

451 As explained in Recital (104), the only income of LuxSCS is the royalty and interest payments from its subsidiaries.

452 See Recital (183) and footnote 177.

453 See Table 12.

perform or outsource, any unique and valuable functions in relation to the development, enhancement, management, and exploitation of the Intangibles. It further demonstrates that during that period, LuxSCS did not use any assets in relation to those activities, but merely held the ownership and license to the Intangibles with reference to the CSA, nor did it assume, effectively control or have the operational and financial capacity to assume or control the risks associated with those activities. In reality, LuxSCS could at most be said to have performed certain functions necessary to the maintenance of its legal ownership to the Intangibles, as detailed in Recital (428).

9.2.1.2. Functional analysis of LuxOpCo

(448) In Section 9.2.1.2.1, the Commission will assess the functions performed by LuxOpCo in relation to the Intangibles. In Section 9.2.1.2.2, it will assess the functions performed by LuxOpCo in relation to the operation of Amazon's European retail and service business. In Section 9.2.1.2.3, it will assess the assets used by LuxOpCo in the performance of both sets of functions. In Section 9.2.1.2.4, it will assess the risks assumed by LuxOpCo in the performance of both sets of functions.

9.2.1.2.1. Functions performed by LuxOpCo in relation to the Intangibles

(449) Amazon claims that "*LuxOpCo did not contribute to the creation, acquisition, management, deployment, or strategic direction of the [Intangibles] during the period under review*."[454] Based on the information the Commission has reviewed, that claim must be rejected. Not only was LuxOpCo entrusted with performing unique and valuable functions in relation to the Intangibles as a result of the License Agreement, the functions actually performed by LuxOpCo during the relevant period went far beyond their mere exploitation and included the development, enhancement and management of the Technology through independent European technological and business innovations, the creation and management of Customer Data, and the development and maintenance of Amazon's Trademark in Europe.

(450) As explained in Recital (419), LuxSCS granted LuxOpCo an exclusive and irrevocable license to the economic exploitation of the Intangibles and all other IP held by LuxSCS[455] in Europe and a right to further develop and enhance[456],

454 2017 *ex post TP* Report, p. 30.

455 License Agreement, paragraph 1.2: *""Amazon EHT [LuxSCS] Intellectual Property" means: (a) any and all intellectual property rights throughout the world, owned or otherwise held by Amazon EHT [LuxSCS] whether existing under intellectual property, unfair competition or trade secret laws, or under statute or at common law or equity, including but not limited to: (i) copyrights and author's rights (including but not limited to reviews and editorial content), trade secrets, trademarks, patents, inventions, designs, logos, and trade dress, look and feel, "moral rights," mask works, rights of personality, publicity or privacy, rights in associate or vendor information, rights in customer information (including but not limited to customer lists and customer data), and any other intellectual property and proprietary rights (including but not limited to rights in databases, marketing strategies and marketing surveys); (ii) any application or right to apply for any of the rights referred to in this clause; and (iii) any and all renewals, extensions, future equivalents and restorations thereof, now or hereafter in force and effect; (b) any and all intellectual property licensed, transferred or assigned to Amazon EHT [LuxSCS] by any third party or Affiliate; and (c) any and all Derivative Works assigned to Amazon EHT [LuxSCS] pursuant to Section 2.1(b)"*.

456 Pursuant to the License Agreement, paragraph 2.1 (a), LuxOpCO was irrevocably granted an exclusive license *"solely for the Licensed Purpose, to: (i) make, use, reproduce, copy, modify, translate, integrate into or extract from a database and create derivative works of Amazon EHT [LuxSCS] Intellectual Property; (ii) publicly perform or display, import, broadcast, transmit, distribute and communicate to the public by any means whatsoever, including but not limited to wire or wireless transmission process,*

maintain[457], and protect[458] the Intangibles for their entire lifetime[459]. LuxSCS retains the ownership to the Intangibles and Derivative Works created by LuxOpCo and its sublicensees[460]. LuxOpCo was further granted the exclusive and irrevocable right to decide if – and to whom – the Intangibles may be sublicensed[461]. In this regard, LuxOpCo managed the sub-license relationships, in particular with AMEU and ASE.

(451) During the relevant period, LuxOpCo actively performed the aforementioned functions, both in a general manner and as regards each of the three components of the Intangibles: Technology, Customer Data and Trademarks, as explained in more detail in Recitals (452) to (472).

a) The IP Steering Committee

(452) As a general matter, the minutes of LuxOpCo's manager meetings record activities directly related to the development, maintenance and management of the Intangibles, in particular the setting up of an "EU IP Steering Committee"[462] whose role was "*to provide technical and business guidance and assistance in strategic decision making*

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using broadcasting, satellite, cable or network, license, offer to sell, and sell, rent, lease or lend originals and copies of, and otherwise commercially or non-commercially exploit any Amazon EHT [LuxSCS] Intellectual Property (and derivative works thereof)". The "Licensed Purpose" is set out in paragraph 1.5 as *"(a) operating any and all World Wide Web sites accessed via the European Country code top level domains (including but not limited to .de, .uk, and .fr) for the sale of goods or services where any person or entity (including but not limited to Amazon.com , Inc. or any of its Affiliates) is the seller of record for such goods or services, (b) using Amazon EHT [LuxSCS] Intellectual Property for the purposes of providing World Wide Web services to any third party or Affiliate that contracts for such services with respect to a World Wide Web site that utilizes a European Country code top level domain, and (c) using Amazon EHT [LuxSCS] Intellectual Property within the European Country geographic territory for any other purpose*." The Licensed purpose is identical with the Licensed Purpose for the license rights received by LuxSCS under the CSA (CSA, paragraph 1.13).

457 License Agreement, paragraph 2.3: *"Maintenance. AEU shall abide by regulations and practices in force or use in any European Country in order to safeguard Amazon EHT's [LuxSCS]'s rights in the Amazon EHT [LuxSC] Intellectual Property. AEU [LuxOpCo] shall take all necessary actions to maintain such rights"*.

458 License Agreement, paragraph 9.2: *"Preventing Infringement. (a) AEU [LuxOpCo] shall, at its sole expense, use its best efforts to prevent, investigate, and prosecute any unauthorized use of any Amazon EHT [LuxSCS] Intellectual Property. AEU [LuxOpCo] agrees to promptly inform Amazon EHT of any such unauthorized use that comes to the AEU's [LuxOpCo's] attention. To facilitate coordination of enforcement activities, AEU [LuxOpCo] shall consult with Amazon EHT [LuxSCS] before undertaking any actions to prevent such unauthorized use of Amazon EHT [LuxSCS] Intellectual Property. (b) AEU [LuxOpCo] may, at its sole expense, institute and conduct suits to protect its rights under this Agreement against infringement and may retain all recoveries from any such suits."*. Amazon confirmed the active role of LuxOpCo in respect of the protection of the Intangibles in Europe in its letter of 7 June 2017: *"[…] under the License Agreement, LuxOpCo had to use its best efforts to prevent, investigate, and prosecute any unauthorised use of the licensed intangibles and to undertake action in this respect, as well as to institute and to conduct suits to protect its rights under the License Agreement against infringement"*.

459 License Agreement, paragraph 4.1: *"Term. Subject to all necessary government approvals, this Agreement is effective as of the Effective Time and continues in effect for the life of all copyrights or author's rights and patents related to the Amazon EHT Intellectual Property licensed under Section 2.1 of this Agreement and until all proprietary and confidential information and know-how related to Amazon EHT Intellectual Property enters the public domain ("Term")."* Paragraphs 4.2-4.3 provides that the agreement may only be terminated in the case of (i) change in control or substantial encumbrance, or (ii) after one of the parties failure to cure for its failure of performance.

460 License Agreement, paragraphs 2.1(a) (Exclusive Intellectual Property License Grant), 2.1(b) (Derivative Works) and 2.4 (Ownership).

461 License Agreement, paragraph 2.1(b) (Derivative Works).

462 Minutes of the managers' meeting of LuxOpCo on 21 June 2005.

with regard to the development of intellectual property of all types and descriptions held by the Company's parent, Amazon Europe Holding Technologies SCS", or entering into several licensing agreements with third parties[463].

(453) Amazon's EU Policies and Procedures Manual defines the purpose of the IP Steering Committee as follows: "*An EU IP Steering Committee has been created for the purpose of providing technical and business guidance with regard to the development and deployment of Amazon's intellectual property in Europe*". That manual further provides that "*[t]he Committee shall meet […] to review Amazon's EU IP portfolio, business strategy as it relates to the development and deployment of intellectual property and any other matters related to intellectual property that the Committee deems appropriate*". According to that manual, the following representatives must be present at each IP Steering Committee meeting: "*[t]he members of the Committee shall include: Vice President of EU Services; EU Legal Director (employed by Amazon EU Sarl); Amazon IP Counsel (TBD), Vice President, European Operations. The Committee may include additional members, based in Luxembourg or elsewhere, including a representative employee of an EU Development Center*".[464] The IP Steering Committee met at least annually to exchange, discuss and decide on the management and protection of IP in Europe.

(454) Amazon insisted that "*the IP Steering Committee was an advisory body […]. It did not take any decisions in relation to the development or the enhancement of the intangibles assets*" and that the importance of that committee should therefore not be overstated. However, the fact that the Committee was an advisory body does not mean that its recommendations did not impact on the development, maintenance and management of the Intangibles. In fact, according to Amazon itself, the activities of the IP Steering Committee consisted of: "*(i) making recommendations on filings to protect the intangibles (and thereby LuxOpCo's exclusive rights under the license agreement between LuxSCS and LuxOpCo), (ii) reviewing the status of legal proceedings in Europe relating to the intangibles and (iii) providing training to European employees regarding the use of the technology and other intangibles*".[465]

(455) The IP Steering Committee was thus a forum where business and technology leaders employed by LuxOpCo and ASE met to discuss and recommend actions concerning the Intangibles in Europe, as presented to them by Amazon's IP lawyers. The actual decisions on the development, enhancement, management, and exploitation of the Intangibles were then taken by LuxOpCo's and ASE's members of that committee, in their capacity as decision-taking managers responsible for Amazon's European retail and service business[466].

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463 Minutes of the managers' meeting of LuxOpCo on 29 January 2013, 3 June 2013 and 9 December 2014.

464 EU Policies and Procedures Manual, effective 1 May 2006, p. 21.

465 Amazon's submission of 7 June 2017. The minutes of the IP Steering Committee were provided to the Commission with the Amazon's submissions of 22 July 2016 and 11 April 2017.

466 Amazon Final Transcripts, [Vice President Intellectual Property, Legal, Amazon Corporate LLC, US] 20 November 2014, par. 4270: 13-25: "*Q. […] the IP steering committee meetings. Was there a procedure for those? […] A. We would meet annually. I would come in and do a presentation of intellectual property changes, some of the disputes that were ongoing. We would do a review of the foreign filing recommendations, so that would be where we would file an application in the United States, our recommendation as far as whether we should file that outside of the United State, principally – well in Europe for each of those, and we would have a recommendation of yes or no. We*

b) Technology

(456) The Technology licensed to LuxOpCo by LuxSCS under the License Agreement is Amazon US's existing technology, as regularly updated. Nevertheless, the mere existence of a technological framework that works in the US does not mean that it will also seamlessly work in Europe. Due to different product categories in the US and Europe, several functions in Amazon's US software, licensed to LuxSCS under the CSA and sublicensed exclusively to LuxOpCo under the License Agreement, could not be rolled out directly in Europe[467]. Different software was needed to operate the EU websites[468] and, because Amazon's websites were distinct from each other, it was necessary to have software developed by geography[469]. For Amazon's European business operations to succeed, the Technology required further development, enhancement and management, all of which were performed by LuxOpCo with the support of its subsidiaries during the relevant period[470].

(457) Upon its incorporation, LuxOpCo was given the technological resources to conduct R&D, in particular to support the EU websites[471]. This included catalogue development, translation technology, and local adaptations[472]. These resources came

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would go through these with the business leaders, the technology leaders, and they would approve or reject the ideas or our recommendations."

467 Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 117, par. 8-13. See also Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 29, par. 9-16: [...] and Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 823: 1-13 and 17-21: [...].

468 See Amazon Post trial brief, p. 20, par. 43-46. See also Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 113, par. 23-25, p. 114, par. 1-2: [...].

469 Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 74, par. 8-13, p. 77, par. 14-29.

470 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 824: 12-25, par. 825: 1-6: "*When Amazon decides to launch a program or a product category in Europe that's already been launched in the US, isn't it true that Amazon would start with the technology framework in place in the US and then modify that for the local specifications? A. As much as possible, yes, I think it made a lot of sense and, you know, that's what we did is that if the framework had been built that was -- you know, that we could leverage, it made really good economic sense to leverage that framework and evolve that framework to deal with the local nature of these markets. At the same time, right, again, it's not because you've got a framework that, you know, might work in the US It's like if we don't have the selection we can have whatever framework to do, fulfillment by Amazon or jewelry in that country without the local selection and the low prices there's not that much that will otherwise happen.*" For some products, the experiences from the US market can be useful for Europe, such as for Kindle, because US customers adapt quicker to new technology, but this cannot be generalised, as Americans prefer different brands (see Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 93, par. 9-25). However, launching Kindle in Europe was a huge initiative for the local teams to ensure content rights and actually sell the Kindle in each country (see Amazon Post trial brief, p. 109, par. 345).

471 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 112, par. 9-20.

472 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 112, par. 24-25, p. 113, par. 1-7, p. 114, par. 25, p. 115, par. 1-2.

from teams of developers previously placed in the EU Local Affiliates and newly recruited personnel[473].

(458) During the period under review, over [60-70] people in Luxembourg, predominantly employed at LuxOpCo, assumed technology-related jobs[474]. Their business titles included software development engineer, systems engineer, IT support engineer, solutions architect, technical programme manager and technical account manager. Those employees provided Amazon with the capacity to ensure local adaptations of the technology platform and the development of programs that would benefit the EU websites.

(459) A dedicated team – the Localization and Translation team – performed key functions in relation to the Technology, such as the customisation of the EU websites, adapting them to local preferences (what is referred to as "localisation and translation")[475], or providing feedback of the performance of the websites for further development and improvement of the Amazon platform. By the end of 2013, this team comprised [60-70] employees[476]. The team was subsequently moved to [another Amazon company] and changed its denomination to "Software development and Translation team", which indicates that the team was active in software development.

(460) An additional [10-20] people were employed as "Technical Program Manager" ([0-10] at LuxOpCo and [0-10] at ASE), whose role was to translate functional specifications, i.e. turn the description of a tool that a local retail business team wants to add to its website into a technical description what software needs to be developed by a software developer[477]. Upon delivery of the result, the Technology Program Managers support the implementation of the tool together with the operational teams of LuxOpCo and the EU Local Affiliates. Through this process, the Technology used by LuxOpCo is continuously developed and adapted to the local market[478].

(461) Amazon argues that the majority of its global technology employees (approximately [60-65] %) are based in the US and the rest in the international development centres.

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473 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 113, par. 13-19.

474 Amazon's submission of 6 March 2017, Annex 28a: list of Amazon's employees since 1997, number of jobholders employed in Luxembourg with the job code starting with T.

475 For localisation and translation, the team used a translation tool, developed by Amazon employees in Europe in collaboration with a team in the US. See Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 830: 9-12 and 17-21, par. 831: 2-5.

476 Amazon submission of 22 January 2016, p. 3.

477 Amazon Final Transcripts [Senior Vice President Worldwide Application Software, former Vice President/General Manager North America Media and Video], 21 November 2014, par. 4633: 4-17: "*A technical program manager typically comes from a technical background. […] They oftentimes were software development engineers and in some cases still wrote software actively. Their function as technical program manager was to translate, you know, a functional specification, a very business- and product-focused document, translate it into technical terms that a software developer could then code against.*"; Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 16, par. 16-19: "*So, I tell them what to do and then somebody does it and he comes back and he shows me what he did and I tell him this is what I wanted you to do or not.*"; and Amazon Final Transcripts [Senior Vice President Worldwide Application Software, former Vice President/General Manager North America Media and Video] 21 November 2014, par. 4620: 17-19: "Q: *And a functional specification, you describe what you want consumers to experience. A: Yes*".

478 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 59, par. 10-25, p. 60, par. 2-5: [...].

In comparison to those operations, the technical resources based in LuxOpCo are rather limited[479]. While the Commission does not contest that the Technology is continually developed in the US or by Amazon's international development centres, it recalls that the development centres are remunerated at a cost +[0-10] % basis for conducting R&D projects contracted to them by ATI. This cost +[0-10] % remuneration tends to indicate that Amazon does not associate a high added value to the encoding process. The unique value of new technology would therefore rather seem to result from local know-how, identification of new business needs, and their translation into the software project, not from the coding itself. The presence of technical program managers at LuxOpCo indicates that functional and technical specifications of the tools and adaptations needed in Europe were prepared in proximity to the local markets[480], where the local know-how is based and local needs and requirements could be identified.

(462) In addition, LuxOpCo and its EU Local Affiliates specifically developed significant technology for use in the European retail and service business. An example of such a technology is the EFN. The EFN was developed in Europe[481] in 2007/2008 and launched in 2009 by a designated team of LuxOpCo[482]. The EFN sought to address the problem of multiple websites with country-specific fulfilment centres located in multiple countries by having a single seller of record in Luxembourg and pooling inventory and serving customers on a pan-European basis[483]. Through the EFN, all European fulfilment centres were combined and a network was created. The EFN enables customers from each EU country to purchase items from any Amazon country website in Europe. Through the establishment of a common pool of inventory between all European geographies where Amazon is active, selection is increased. In addition, Amazon could reduce the risk of some inventories running out

479 Amazon's submission of 22 July 2016, Amazon's Technology-Centric E-tailing-Business p.12 and Recital (370).

480 Amazon's letter of 4 April 2017, p. 6: "*Generally, the Vice-President for Retail business (first [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], then [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France]) was collecting and prioritizing the requests from local staff for purposes of channelling the information to the technology teams managed from the US, including in relation to the EFN-related requests. […][Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], at the time he was responsible for the European marketplace business, had a similar coordination role (with a small Luxembourg team) with respect to getting US technology teams working on EFN tools for the marketplace business and then supporting local staff and third party sellers regarding the use of the newly developed technology*".

481 Amazon Final Transcripts [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 4 November 2014, par. 603: 2-4: *It was developed in Europe with the help of central technology teams but mainly in Europe*".

482 Amazon Post trial brief, p. 118, par 315, 317. Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 99, par. 20-22 and Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 7 May, 2014, p. 63, par. 16-22.

483 Amazon Post trial brief, p. 118-119, par. 316, 318. See also Amazon Final Transcripts [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 4 November 2014, par. 602: 21-25, par. 603: 1-2: "*Yes, same considerations, plus the fact that finally we -- after so many years, we launched two new countries in Europe; that's Italy and Spain. And we were able to launch those countries because of the work that was done on the technology and the logistics, programs called EFN, European Fulfillment Network, which did not exist before.*

of stock and was able to ship faster[484]. This reduced the delivery time for customers, reduced logistic costs and costs of acquiring the goods from suppliers, prices decreased and selection increased. None of Amazon's competitors in Europe had a solution similar to the EFN[485].

(463) The EFN encompassed new developments on many levels. As regards technology, new functionalities were introduced[486], [description of EFN's functionalities][487], [488], [489] with additional enhancements, which did not previously exist in the world-wide network[490]. Test runs for the EFN were run in the European environment using European data, such as the product category "Baby".[491] In addition, the EFN enabled optimising source costs through a better vendor selection and centralising category management. The fulfilment benefitted from a centralising inventory planning across all EU countries and for sales the EFN facilitated fast frack delivery for customers, an expansion of heavy bulk delivery across national borders and a simplification in returning goods. The EFN eliminated export fees on intra-Europe cross-border shipments leading to substantial savings; enabled inventory pooling so that customers shopping on one website could see inventory in fulfilment centres outside their national borders[492]. To enable a pan-European shopping it was necessary to merge the different catalogues, which required also translation work, which was previously neither considered nor organised[493]. Finally, the EFN enabled a pan-European inventory purchasing and the creation of a "European Seller Network", where Marketplace merchants could get listed on other European websites and sell their products across Europe[494]. The EFN was an important business driver. In 2014, [5-10] % of all sales in France and more than [15-20] % of all sales in Italy and Spain were made through the EFN[495].

(464) Finally, the EU Local Affiliates also played a role in the development of new technology. For example, the German affiliate developed the low price guarantee,[496] Packstation,[497] and a scheduling calendar to facilitate the fulfilment of large

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484 Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 7 May 2014, Exhibit 46, p. 4.

485 Amazon Post trial brief, p. 119, par. 319-321.

486 Annex C-2284-P to Amazon's submission of 30 September 2016.

487 [Description of Amazon's technology].

488 [Description of Amazon's technology].

489 [Description of Amazon's technology].

490 Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 7 May 2014, Deposition-Exhibit 46, p. 10.

491 Amazon internal document: EFN 2013, OP1, p. 7.

492 Amazon Post trial brief, p. 120-121, par. 323-330.

493 Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 493: 24-25, par. 494: 1-5.

494 Amazon post trial brief, p. 120-121, par. 323-330.

495 Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 897: 15-25, par. 898: 1-4.

496 Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 984: 6-15.

497 Packstation is a network of automated booths, run by DHL Germany, which allow for self-service collection of parcels at any time convenient to the addressee. See Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014,

consumer goods, such as washing machines[498]. Moreover, before Amazon Prime went online, the Prime team, based in the US, sought input from local category teams, such as local fulfilment centre and transportation teams in the UK, because the local teams understood the complexities of implementing Prime in the UK versus the US, Germany or elsewhere[499].

(465) In sum, during the relevant period, LuxOpCo undertook significant developments and enhancements in relation to the Technology, which it also managed and controlled. It did not merely exploit the Technology for the operation of the EU websites, but actively contributed to its development, enhancement and management during the relevant period.

c) Customer data

(466) Collecting data from customers is a key value driver for Amazon's online retail business[500]. It increases the conversion rate[501], it makes the purchase process faster, and it reduces friction costs[502], also increasing the probability of a future purchase, e.g. by offering the customer a new customised deal every time the client visits Amazon's EU websites. Company X also identified customer data as a key value driver for online retailers[503].

(467) As shown in Table 19, the number of customers of Amazon of the three EU domains increased from 17 million in 2005 to [70-80] million in 2014.

Table 19 - Unique customers counts by referring site and year (in million)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Amazon.co.uk	8.3	9.9	11.9	14.0	17.3	20.2	24.1	27.5	[30-40]	[30-40]
Amazon.de	7.3	8.5	10.3	12.3	14.8	17.5	20.3	23.6	[20-30]	[20-30]
Amazon.fr	1.4	1.9	2.5	3.2	4.3	5.5	7.0	8.7	[10-20]	[10-20]

(468) Prior to the 2006 restructuring, customer data was accumulated by AIS and AIM[504]. Upon restructuring, LuxSCS obtained the right to the data accumulated through the

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p. 125, par. 22-25, p. 126, par. 2-25, p. 127, par. 2-6: "*So that's why we invented with DHL, something called PAC station, which only three years ago turned into Amazon, in to Abox, Amazon Box. Which also gets implemented in New York. We have Amazon Abox in New York.*"

498 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 57, par. 9-25, p. 58, par. 1-25, p. 59, par. 2-9: [...].

499 Amazon Final Transcripts: [Director Finance, Amazon Instant Video Limited, London, UK, former Manager Finance and Director Finance Amazon.co.uk, London, UK], 5 November 2014, par. 1130: 10-17.

500 See views presented by Company X in Recitals (338) to (342).

501 In e-commerce, conversion rate refers to the ratio between the achieved sales and the visitors.

502 They refer to the direct and indirect costs related to the execution of a purchase order, for example, the research time spent by the customer.

503 See Recitals (337) to (342).

504 TP Report, page 26. According to the TP Report, before the Restructuring AIS operated the Retail Business offered through Amazon's EU Websites and AIM operated the Third-Party Seller Programs offered through the EU Web Sites.

EU websites[505]. However, while the legal ownership of the customer data for the EU websites lay with LuxSCS[506], LuxOpCo actively accumulated that data as a service to LuxSCS[507]. LuxOpCo was solely in charge of accumulating customer data in Europe and responsible for its maintenance and ensuring compliance with applicable data protection laws[508]. In addition, LuxOpCo used the customer data to conduct Amazon's European operations. Thus, it is LuxOpCo that performed active and critical functions in relation to the development, enhancement and management of the Customer Data during the relevant period.

d) Trademark

(469) As regards the Trademark, while the TP Report claims that the Amazon brand is well recognised and that strong global brand recognition is a major asset in attracting customers[509], Amazon employees testified that the brand name is not the focus of Amazon's business model[510].

(470) Information provided by Amazon indicates that the value of Amazon's brand name is of subordinate importance to the proper execution of the three key drivers in the operation of its European retail business: selection, price, and convenience[511]. That means that the brand is only valuable if it is associated with a good selection, price

505 License Agreement for Pre-existing Intellectual Property between LuxSCS and Amazon Technologies, submitted by Amazon on 12 January 2016.

506 License Agreement, section 1.2: "*Amazon EHT [LuxSCS] Intellectual Property" means: (a) any and all intellectual property rights throughout the world, owned or otherwise held by Amazon EHT [LuxSCS] […] (including but not limited to customer lists and customer data […]"*; section 2.1. (a): *"Amazon EHT [LuxSCS] irrevocably grants AEU [LuxOpCo], under all Amazon EHT [LuxSCS] intellectual property rights in or comprising the Amazon EHT [LuxSCS] Intellectual Property, whether existing now or in the future, the following sole and exclusive right and license to the Amazon EHT [LuxSCS] Intellectual Property*".

507 Amazon's submission of 21 August 2015, p. 2: "*Under the License Agreement, ownership of customer data for all EU sites lies with Lux SCS. As a service to Lux SCS, these data are collected by LuxOpCo for the retail activities*."

508 License Agreement, paragraph 2.3 (Maintenance) and paragraph 9.5 (Compliance, Data Protection). In particular LuxOpCo is responsible for (a) limitation of access to data, (b) processing in compliance with applicable laws, (c) use of data strictly for approved purposes, (d) documentation, (e) ensuring that appropriate, operational and technological processes and procedures are in place to safeguard against any unauthorised access, loss, destruction, theft, use or disclosure of the personal data.

509 TP Report, pp. 6-7 and 36.

510 Amazon Final Transcripts [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 4 November 2014, par. 617: 20-25, par.618: 1-3.

511 Amazon Post trial brief, p. 75, par. 229-230; See also Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par.975: 18-25, par. 976: 1-6: "*So brand name -- I keep hearing that question from journalists. That's why I'm -- I think a brand name doesn't really help you, right. A brand name is a name. I mean what really matters to customers is not the name, it's what you do, right. And you have to have the relevant selection. You have to have the relevant services, right, you have to pay attention to the customer. You have to pay attention to the product that you're selling, right, because every product comes with different characteristics and one thing might be more important here, might be more important there. The brand name itself I think has only become important because we filled it with life.*"; Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 146, par. 13-25: "*Why doesn't brand help you build your business? A. Not at all. Q. Why not I said? A. What helps build your business is not a name, right? You need, you need something behind that name. I mean, Amazon is a name until you fill it with the individual product that is relevant to the customer and build to services. I've been talking about and do all that stuff. I mean, it's, it's not enough to just say we're an online store. I mean, you need to bring it alive, right? So that's what's driving it*".

and convenience[512], since customers would only be inclined to shop at Amazon's website so long as they experience a reliable service meeting clients' expectations in that respect[513]. Any disappointment quickly leads to a loss of customers, since customers can easily switch between competitors. This indicates that the Amazon brand and reputation is strongly reliant on the consistent delivery of a highly satisfactory service to customers. The value generation for the Amazon brand in Europe must therefore be said to take place at the level of LuxOpCo and the EU Local Affiliates[514]. It is not acquired from LuxSCS under the License Agreement or from A9 and ATI under the CSA, since it is LuxOpCo and the EU Local Affiliates that take all relevant strategic decisions pertaining to selection, price and convenience in Europe, as explained in Recitals (478) to (499).

(471) In any event, Amazon's brand value is not only established by Amazon.com[515]. Amazon.co.uk, Amazon.de, Amazon.fr, etc. are all perceived as local brands[516] and contribute to the value of the Trademark in Europe. Moreover, while Amazon was known as a seller of books and media when it entered the European market, that reputation did not help with the launch of other product categories[517] or Amazon's third party business[518]. It required additional efforts by the local teams to

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512 Amazon Final Transcripts [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 4 November 2014, par. 727:25, par. 728:1-8, par. 625:4-7, par. 685:5-9. Amazon Final Transcripts [Senior Vice President, Chief Financial Officer, Amazon Corporate LLC, US], 17 November 2014, par. 2848:22-25: "*They don't really care where they get it from. They just want to get it at the right price, they want it to be convenient. They want to get it quickly. And so those are the attributes that matter to customers.";* par. 2852:11-17: *"At the end of the day, you know, I don't think a customer really cares once they have that item that they want and in their home or wherever, where that item came from. The item is the item. What they wanted is they wanted to get it quickly, they wanted to make sure it was at the right price, it was convenient and those are the attributes.*"

513 See Section 2.3.2.1.

514 Amazon Final Transcripts [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 976: 5-17.

515 See Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 905: 1-10: "*So did the brand name help? You know, I think that it wasn't helping in the sense of building selection and trying to get vendors to come on board locally. [...].*

516 See Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 810: 6-21: "*Similar, yeah, with the local -- yeah, so what's important to me like, you know, and the reason IP exists is that what's really important for UK seller or UK customer is that Amazon.co.uk where the customer knows in the UK, the brand name, the customer knows in the UK Amazon.co.uk that's what the customer types to go and visit our site, www.Amazon -- you get it -- Amazon.uk, whatever it is. As it is Amazon.fr, Amazon.de, Amazon.it because they are local brands -- local brand names, you know, for each of these countries. I think that's very important. Q. Okay. A. If you ask my dad, he knows Amazon.fr, you know, not Amazon.com because that's what he types, you know, to go to the France site to buy products in his local market.*" See also Amazon Final Transcripts [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 5 November 2014, par. 976: 5-17, which explains that, in Germany, Amazon.de wanted from the start to be perceived as a German store with German people, fulfilled out of Germany with German customer service. Therefore, Amazon.de was and is pronounced in German and not in English in Germany.

517 Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 1001: 8-18: [...].

518 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November

communicate to customers that Amazon launched a new product category, which customers only realise over time[519].

(472) Amazon also claims that its marketing activities are highly reliant on technology. According to Amazon, its main marketing activities consist of sponsored links, the Associates Programme, and e-mail marketing. However, as explained in Recital (173), the recruitment of local partner websites for Amazon's Associates Program is done by local teams. In Europe, it is LuxOpCo and the EU Local Affiliates that ensure Amazon's online marketing based on their local know-how, such as which partner websites are relevant for their retail businesses in the local markets[520]. LuxOpCo employs an EU Head of Marketing in Traffic for this purpose. The EU Local Affiliates have their own deals and associates' fees which differ in terms of makeup of the associates' pool and fee structure from the US pool[521].

9.2.1.2.2. Functions performed by LuxOpCo in the operation of Amazon's European retail and service business

(473) According to the TP Report, LuxOpCo was to act as the headquarters and principal operator of Amazon's European retail and service business[522]. This means that LuxOpCo was responsible for strategic decisions in relation to the Amazon's business operations in Europe, as well as managing the key physical components of that business.

(474) The minutes of LuxOpCo's management meetings include resolutions related to the headquarter function and strategic decision-taking by LuxOpCo, such as the acquisition of certain companies (*inter alia*, [acquisition X[523], Q[524], Y[525], R[526], Z[527]]), including their IP; the setting up of joint ventures with third parties[528]; the partial sale of LuxOpCo's business or assets to other companies, e.g. to [acquisition Q][529] or [another Amazon company][530]; and the provision of guarantees to related parties[531].

(475) In Europe, all strategic functions for Amazon's online retail and service business during the relevant period were entrusted to LuxOpCo, including the retail business itself, the third-party business, logistics, customer service, human resources and

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2014, par. 772: 8-25: "*Yeah, it did not. You know, the brand name, you know, Amazon was clearly a good name in books [...]*.

519 This was particularly the case in Europe, where it was more difficult to explain to customers that Amazon sells more than just books. See Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 42: par. 8-25, p. 43 par. 1-14.

520 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 41: par. 14-21: [...]; Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany]13 June 2014, p.106, par. 20-25, p. 107, par. 2-9: [...].

521 Deposition [Senior Vice President of Business Development, Amazon Corporate LLC, US], 16 July 2014, p. 117, par. 1-7.

522 See Recital (132).

523 Minutes of the managers' meeting of LuxOpCo on 9 April 2007.

524 Minutes of the managers' meeting of LuxOpCo on 12 April 2010 and 13 December 2010.

525 Minutes of the managers' meeting of LuxOpCo on 17 August 2010.

526 Minutes of the managers' meeting of LuxOpCo on 23 August 2010.

527 Minutes of the managers' meeting of LuxOpCo on 22 July 2011.

528 Minutes of the managers' meeting of LuxOpCo on 21 August 2007 and 12 October 2009.

529 Minutes of the managers' meeting of LuxOpCo on 9 January 2008.

530 Minutes of the managers' meeting of LuxOpCo on 29 January 2013 and 29 of January 2014.

531 *Inter alia*, Amazon internal document: minutes of the managers' meeting of LuxOpCo on 24 July 2008, 18 March 2010; 17 January 2011 and 7 April 2011.

finance. LuxOpCo was the principal operator of that business, meaning that LuxOpCo took the strategic decisions and was responsible for the management of the entire European operations[532]. LuxOpCo also took all the strategic decisions concerning the merchandise and pricing (affecting the sales), recorded the sales and acted as the counterparty to the costumers. LuxOpCo also absorbed the relevant costs (see Table 6), and assumed the risks of sales and inventories[533].

(476) The most senior employees of the Amazon group responsible for strategic decision-taking and coordination of the European retail and service business were employed by LuxOpCo. LuxOpCo employed over [500-600] FTEs who ensured the pan-European and strategic management of the European retail business, coordinating the efforts of the EU Local Affiliates[534], as well as the adaptation and further development of the Intangibles for the European market. LuxOpCo was supported in those operations by the EU Local Affiliates, which acted as service providers[535]. The EU Local Affiliates provided certain support services to LuxOpCo, e.g. in relation to marketing, fulfilment, and customer service, but did not assume responsibility for the sales or for the inventories, as those risks were assumed by LuxOpCo.[536]

(477) To substantiate its claim that LuxOpCo only performs routine management functions, Amazon argued that "*technology lies at the core of its business model.*

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532 The Parliament of the United Kingdom, House of Commons: Oral Evidence taken before the Public Accounts Committee on Monday 12 November 2012: Testimony Cecil: *"All the strategic functions for our business in Europe are based in Luxembourg. That could be our retail business, our third-party-business, our transportation teams, our customer service, HR, finance-*": in: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm.

533 The Parliament of the United Kingdom, House of Commons: Report on HMRC's 2011-2012 Accounts - Written evidence from Amazon EU Sarl *[LuxOpCo]* by Andrew Cecil, 13 November 2012*:"Amazon EU Sarl [LuxOpCo] owns the inventory, earns the profits associated with the selling these products to end customers and bears the risk of any loss. From Luxembourg, Amazon EU Sarl processes and settles payments from its European customers.*" available at: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/writev/716/m03.htm.

534 See Figure 3 and Recital (180).

535 The Parliament of the United Kingdom, House of Commons: Report on HMRC's 2011-2012 Accounts - Written evidence from Amazon EU Sarl by Andrew Cecil, 13 November 2012: "*Fulfilment and customer service centres located in the UK are operated by Amazon.co.uk Ltd, a UK company. Amazon.co.uk Ltd earns a margin on its operating costs for providing services performed in the UK to group companies, primarily to Amazon EU Sarl. The services provided include fulfilment and logistics services; customer support services; accountancy, tax, legal, human resources, localisation and similar back office services; merchandising and marketing support services; and purchasing assistance.*" available at: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/writev/716/m03.htm.

536 The Parliament of the United Kingdom, House of Commons: Oral Evidence taken before the Public Accounts Committee on Monday 12 November 2012: Testimony Cecil*: "The inventory of goods that are in our fulfilment centres across Europe belongs to Amazon EU Sarl [LuxOpCo] and does not belong to the local entities that we may have across Europe."; "Amazon.co.uk is a service company in the UK providing services to Amazon EU Sarl [LuxOpCo] for which it receives payment.*" available at: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm. See also: The Parliament of the United Kingdom, House of Commons: Report on HMRC's 2011-2012 Accounts - Written evidence from Amazon EU Sarl *[LuxOpCo]* by Andrew Cecil, 13 November 2012 "*Fulfilment and customer service centres located in the UK are operated by Amazon.co.uk Ltd, a UK company. Amazon.co.uk Ltd earns a margin on its operating costs for providing services performed in the UK to group companies, primarily to Amazon EU Sarl [LuxOpCo]. The services provided include fulfilment and logistics services; customer support services; accountancy, tax, legal, human resources, localisation and similar back office services; merchandising and marketing support services; and purchasing assistance.*" available at: https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/writev/716/m03.htm.

Every aspect of the traditional retailing has been rethought to make it more efficient, less costly, and most importantly, more serving of customers' needs"[537]. It also argued that "*the scale at which Amazon operates means it would be impossible to run the business without a very high degree of automation to handle functions such as inventory management, pricing, and order processing*"[538]. While the Intangibles are necessary inputs for Amazon's business operations in Europe[539], they are not a product or an end in itself, but require additional effort[540] and know-how so as to be leveraged to generate revenues[541]. As explained in Recitals (164) to (169), the key drivers of Amazon's online retail business are selection, price and convenience. The Intangibles are a facilitator to ensure the proper execution of those three pillars[542].

(478) During the relevant period, it was LuxOpCo, with the support of the EU Local Affiliates, that independently took all relevant strategic decisions pertaining to selection, price and convenience in Europe[543]. For each of those key drivers, the specific know-how of LuxOpCo and the EU Local Affiliates constituted decisive and vital inputs, enabling Amazon's business model to generate revenues in Europe.

a) Selection

(479) As explained in Recital (165), there is a tightly linked correlation between selection and revenue from retail sales. Expanding and maintaining the largest selection of any retailer turned out to be a key driver for Amazon's success in Europe[544]. This is further demonstrated by Amazon's internal customer surveys, according to which [...] available to customers scores highest in customer satisfaction for German ([60-70]%)[545] and French customers ([50-60]%)[546].

(480) The decision which categories of products to sell in which region/country is taken on the basis of local market, product and customer know-how[547]. Technology alone is

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537 See Amazon's submission of 22 July 2016 "*Amazon's Technology-Centric E-tailing-Business*".

538 See Amazon's submission of 22 July 2016 "*Amazon's Technology-Centric E-tailing-Business*".

539 Amazon Post trial brief, 2017 ex post TP report, p. 34, par. 91.

540 See Deposition [Director International Tax and Tax Policy, Amazon Corporate LLC, US], 24 April 2014, p. 129, par. 18-25, p. 130, par. 2; 6-15: [...].

541 See Deposition [Director International Tax and Tax Policy, Amazon Corporate LLC, US], 24 April 2014, p. 126, par. 9-25, p. 127: 2-25, p. 129, par. 2-5: [...].

542 See Email of [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], dated 16 June 2008, (in: Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg] – Deposition Exhibit 25): [...].; Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 61, par. 8-25, p. 62, par. 2: [...]; and Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 32, par. 14-25, p. 33, par. 2-25, p. 34, par. 2-12: [...].

543 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p.41 106 par. 1121-1525, p. 107, par.1-3: [...].

544 Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 7 May, 2014, p. 163, par. 25, p. 164, par. 1-8.

545 Amazon internal document: Amazon Who Is Our Customer DE Customers Report May 2016, p. 6.

546 Amazon internal document: Amazon Who Is Our Customer FR Customers Report June 2016, p. 5.

547 See Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 227, par. 10-12: [...].; Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 228, par. 2-8: [...].; and Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, 13 June 2014, p.228, par. 9-21: [...].

insufficient; selection requires human intervention[548]. Knowing what customers want to buy and selecting the right vendors to ensure a comprehensive selection is the unique and decisive know-how of Amazon's local retail teams[549]. In Europe, selection is created by LuxOpCo with the support of its EU Local Affiliates[550].

(481) To succeed in Europe, Amazon was required to develop specialised expertise in responding to the unique, local needs of consumers. Amazon developed this expertise by investing heavily in, and relying upon, a "boots on the ground" presence in each country[551]. In Germany, France and the UK, LuxOpCo benefitted from having a local workforce to tailor Amazon's offerings to local consumers in those

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548 Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 1002: 2-12: "*So even within a category, there is no magic key that you can just use to turn and everything works in the category. It's calling vendors. It's sitting down with the people. The majority have local organizations. You need to convince them that this is a good thing in their local context, that you're going to drive sales and efficiencies, that you're going to not only cannibalize their business, but create incremental opportunity of growth for them. It's a very local game*".

549 See Email of [Vice President Finance, Amazon Corporate LLC, US] to [Senior Vice President, Chief Financial Officer, Amazon Corporate LLC, US], 2 May 2006: "*Even though we've established Luxembourg as our European headquarters, we will continue to maintain our European country offices and operations facilities in their current locations throughout Europe. It's important that we maintain our local presence in these countries, as we want each site to reflect the tastes and preferences of our customers in these locations.*"; Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 909:10-17: "*Brands are relevant on a national level. Some customers shop some brands in some countries and other brands in other countries, right, so what would be important for us to understand is not what is selling somewhere else, it's what local customer needs and wants. And we had established a list of priority brands we'd have to look to go after and start with that.*"*;* and Amazon Final Transcripts: [Director Finance, Amazon Instant Video Limited, London, UK, former Manager Finance and Director Finance Amazon.co.uk, London, UK], 5 November 2014, par. 1100: 5-10: "*Philips, for example, back at this period were very, very small in the UK, quite powerful in Germany. Panasonic, again, on this list, small in the UK, very strong in Germany. So different focus from customers, different focus from competition. So, yeah, they would look different.*"

550 Amazon's observations to the Opening Decision, paragraph 101. See also TP Report, p.13; see also, Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 209, par. 20-25, p. 210, par. 2-18: "*Germans know how to purchase food for hundreds of years, right? They're not waiting for online store to sell, you know, there's supermarket for them. They're all well fed. They all know how to feed their families. So, if you entered the segment, the selection is one of the most attractive points, because if you picture your store where you buy your noodles, for example, then this store would only have like ten, 50 different kinds of noodles, but I can tell you here in Europe we have 6 000 different kind of noodles. So, when I tasked my team to launch consumer products food, I said please, go build the biggest noodle shelf in Germany, so at least in one area customers can be sure whenever they think about noodles, I go to Amazon because they have all the noodles. They have the organic noodle, they have the Italian handmade, they have the fresh, they have the dry, they have the Japanese rice noodle. They have the import. You know, there's a thousand kinds of noodles.*"; and Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 227, par. 16-25: "*People know how to buy shoes, apparel, everything, so it only makes sense to bring something where I believe I can win the customer. I can win the customer with having a larger selection or better customer service, more convenience, that's, that's my main goal, right? And that's different by country, because it's depending on size, on topics and all that stuff and that's more important than the pure when did you launch the tools category*".

551 Expert report of [Chairman and Founder of Interactive Media in Retail Group, the UK industry association for e-retailing and e-commerce, London, UK), 6 June 2014, (commissioned by Amazon), p. 3.

countries[552]. In Germany, between 100 and 200 employees were initially employed to ensure selection. That number subsequently increased[553]. Amazon's French workforce grew faster than its revenue, increasing from 297 to 5 273 employees from 2004 to 2012, i.e. by a factor of 17.8, whereas sales in France only rose 13.4 times during that same period[554]. In the UK, 260 employees were employed in retail in 2011. Amazon's internal planning of that time foresaw an increase from [200-300] to [400-500] employees by 2015[555]. All these employees were employed by the EU Local Affiliates.

(482) Amazon's experience entering the French online retail market demonstrates the importance of building a local presence. Amazon entered that market in 2000 not by acquiring an existing online retailer, but by relying entirely on its own brand and technology. At the time, online retail in France was dominated by local players with established knowledge of the French consumers and the market circumstances[556]. In addition, the Minitel, a public pre-internet online service, was still widely used and had a high market share in on-line retail. The Amazon.fr website initially offered books, CDs and DVDs. Amazon operations in France were, for various reasons, behind Amazon's initial expectations. In addition, Amazon.fr faced significant regulatory challenges[557]. This created obstacles to market penetration for Amazon. By 2004, Amazon.fr was still a small business due to restrictions on discounting prices and low online penetration[558]. Amazon transferred nearly all of its local employees to Amazon.co.uk and was required by French regulators to file a "social plan" justifying the transfer[559] and the downsizing of its workforce from 70 to 18

552 Expert Report of [Chairman and Founder of Interactive Media in Retail Group, the UK industry association for e-retailing and e-commerce, London, UK], 6 June 2014, p. 36, par.77-78.

553 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 39, par. 21-25; p. 40, par. 2-3: "*I mean it's, when a management is acquiring selection is the core task of this company here, right? I mean, you can't, operating a website, a store with nothing in it is meaningless, right, so all we do here is when the management -- so at that time, it was anything between 100 and 200. Today it would be much more. Q. One hundred to 200 buyers or 100 to 200 employees? Buyers? A. No, buyers. Q. Or employees? A. Selection, people that manipulate selection*".

554 Expert Report of [Chairman and Founder of Interactive Media in Retail Group, the UK industry association for e-retailing and e-commerce, London, UK], 6 June 2014, p. 36, par. 77-78.

555 This figures include an increase from [35-40]% to [45-50]% in the number of vendor managers to support selection growth and term improvements; in: Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 7 May 2014, Deposition – Exhibit 23, p. 5.

556 In 2005, among the top 15 French e-commerce companies, 11 were French (Expert Report of [Chairman and Founder of Interactive Media in Retail Group, the UK industry association for e-retailing and e-commerce, London, UK], 6 June 2014, p. 30, par. 66).

557 Similarly as in Germany, French law limits Amazon in using its customary strategy of competing on price. In France, book publishers are required to set a fixed retail price and retailers cannot discount that price by more than five percent. As a consequence of that regulation, if the total price including the cost of shipping exceeds the price in a physical store, the potential customer is unlikely to buy online.

558 Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 880:16-18; 21-25 par. 881: 1-16.

559 Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 879: 21-25, par. 880:16-18. According to the social plan, "*Amazon France [was] not generating sufficient revenue from its operations to support its cost structure and be a viable going concern.*" and Amazon internal document; "Collective Redundancy Program for Amazon.fr SARL".

employees[560]. At that stage, Amazon considered whether to close the French website and operations[561]. Amazon.fr was turned around when investments were made in a selection growth programme deployed by a new French workforce with local market know-how[562]. The localised efforts of those employees were crucial in expanding into new product categories. Local employees were familiar with local tastes and could establish and maintain relationships with suppliers[563], negotiate licensing contracts with country copyright owners and organizations[564], and determine local pricing. In other words, Amazon had to expand its local knowledge by recruiting a French workforce to make its product and service offerings attractive to French consumers.

(483) As explained in Recital (167), selection is created by Amazon through: (i) the acquisition of other retailers active in the market, (ii) partnerships with suppliers and (iii) third-party programmes, such as Marketplace. In all three instances, the role played by LuxOpCo, with the support of its EU Local Affiliates, was decisive for ensuring the success of Amazon's European operations.

(484) Acquisitions: For its entry into the German and UK markets and in order to create the entities that later became the EU Local Affiliates, Amazon acquired local operators, building its business on the basis of their local market know-how and customer data[565]. In Germany, Amazon acquired Telebuch/ABC Bücherdienst in 1998, which already had some 100 000 customers, a fulfilment centre and a customer service team with German employees[566]. In the UK, Amazon acquired bookpages.co.uk with

560 "Collective Redundancy Program for Amazon.fr SARL", p. 12.

561 Amazon Final Transcripts:[Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 881: 20-24: "*Honestly, there was a fair chance that it wouldn't.*" Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 7 May, 2014, p. 160, par. 16-18: "*[…] we are very disappointed with France, how hard [it] was to get customers to come shop at Amazon*".

562 An Amazon employee stated that Amazon France's business would not exist without the selection growth programme. See Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 918: 19-22: *"I think it wouldn't exist"*.

563 Expert Report of [Chairman and Founder of Interactive Media in Retail Group, the UK industry association for e-retailing and e-commerce, London, UK], 6 June 2014, p. 40, par. 87: "*As was the case for its earlier launches, the localized efforts of Amazon's employees were crucial in expanding into new product categories. Local employees were familiar with local tastes and had to establish and maintain relationships and work with vendors, negotiate licensing contracts with country copyright owners and organizations, determine local pricing, and more. Amazon benefited from having a local workforce who had country specific expertise"*.

564 Expert Report of [Chairman and Founder of Interactive Media in Retail Group, the UK industry association for e-retailing and e-commerce, London, UK], 6 June 2014, p. 40, par. 87: *"Amazon must source certain products, including media products and digital content, on a country-by country basis*." and Deposition [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], , 7 May, 2014, p. 35, par. 22-25,"*[…] Europe has different laws depending upon the media type and the copyright type. So digital gets way more complicated by – by country basis"*.

565 Deposition [Baker Foundation Professor of Business Administration at Harvard Business School, US], 18 August 2014, [Baker Foundation Professor of Business Administration at Harvard Business School, US] Exhibit 7, p. 11.

566 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 11, par. 5-15: "*[…] to me it's much smarter to start a German*

the aim to "*[…] quickly offer European consumers the same combination of selection, service, and value […]*"[567]. In the press release announcing the acquisitions, Amazon stated that it "*expects online retailers Bookpages and Telebuch to become fundamental components of its expansion into the European marketplace.*"[568] In other words, Amazon started its business through the acquisition of local retail know-how it did not have to facilitate the launch of its own retail business in Europe.

(485) Partnership with suppliers: To attract customers, LuxOpCo and its EU Local Affiliates had to select and partner with suppliers of the brands that local customers wanted to buy. LuxOpCo defined policies and best practices for selecting and launching new categories, it arranged partnerships with suppliers through its retail organisation, and it determined standard contract terms for suppliers[569]. Local vendor managers employed by the EU Local Affiliates selected and recruited vendors for the EU websites, thereby growing Amazon's selection[570]. During the relevant period, LuxOpCo and its EU Local Affiliates launched [10-20] new categories of products both in Germany and in the United Kingdom, while in France [10-20] new categories were launched. In some cases, it took several years of negotiations before a supplier was willing to sell its products via an Amazon website.[571] In addition, through the creation, management and operation of the EFN, LuxOpCo ensured a general Europe-wide selection for its European customers[572].

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operation if you have German, knowledgeable people of the German market and not learn everything from scratch."

567 http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-newsArticle&ID=233853, 7.6.2017.

568 Amazon.com Acquires Three Leading Internet Companies http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=502989.

569 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 802:1-6; Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 476:1-13.

570 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 823:1-10: "*[…] a lot of the successes ended up being driven by what we did on a local basis*".

571 An Amazon employee explained that it took [0-10] years of negotiations for Amazon in Germany to establish a partnership with [a supplier] (Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 26, par. 17-25, p. 27, par. 1) and several years to form a partnership with [a supplier] (Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 981: 6-10). In France, Amazon found suppliers such as [a supplier] and [a supplier] quite reluctant to start selling their products with Amazon, demanding [...] and it took a long time to establish a permanent partnership (Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 894:19-25; par. 895,:1-9). In the UK, an Amazon employee reported long and detailed negotiations with suppliers such as [suppliers] in order to establish agreements (Amazon Final Transcripts: [Director Finance, Amazon Instant Video Limited, London, UK, former Manager Finance and Director Finance Amazon.co.uk, London, UK], 5 November 2014, par.1100:16-25, par. 1101: 1-3). Moreover, many suppliers preferred a touch and feel approach for their products, which is hard to deliver for a pure player like Amazon. In view of this restriction, suppliers [...] (Amazon Final Transcripts: [Director Finance, Amazon Instant Video Limited, London, UK, former Manager Finance and Director Finance Amazon.co.uk, London, UK], 5 November 2014, par. 1101: 21-25, par. 1102: 1).

572 Amazon Internal Document: European Fulfillment Network (EFN), p. 1: [...].

(486) Third party programmes: Amazon's Marketplace was initially unknown in Europe[573]. To launch and maintain Marketplace, LuxOpCo and its EU Local Affiliates brought in the necessary know-how and took the strategic decisions to make the programme and its technology successful[574]. They set up local recruiting teams in Germany, France and the UK, capable of speaking the local languages, looking for sellers of product and their sales information to identify and contact potential sellers for Marketplace, and convincing them to sign up to the programme. The recruiters were not only sellers of Marketplace service, but also supported potential third-party sellers in launching their offerings on the Amazon EU websites thanks to their deep understanding of the platform[575].

(487) In addition to recruiters, technical teams were also set up in Luxembourg within LuxOpCo, the so-called "onboarding" teams. These teams consisted of IT specialists that created IT tools or provided the necessary input for the creation of such tools to facilitate the launch of the new sellers' offerings on the EU websites. The work of the onboarding teams started in 2006 and became more important over time, particularly when larger sellers with large catalogues of several thousand products[576] were to be integrated in the Marketplace. In addition to the onboarding teams, there were [10-20] software developers working within LuxOpCo in the third party programme team (Marketplace) by 2013[577]. Finally, the TAM, referred to in Recital (167) was organised within LuxOpCo to work in German, French and English[578].

(488) In an internal plan, Amazon described how the expansion of Marketplace into [...] would be achieved through an extension of the Luxembourg, German, French and British sales organisations and that the Italian and Spanish languages would be

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573 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 772: 8-25: "*Yeah, it did not. You know, the brand name, you know, Amazon was clearly a good name in books, but you know, my recruiters would call sellers I remember them telling me, look, you know, I have to tell them we're like eBay in order for the sellers to understand that actually, you know, we had an e-marketplace and, you know, pitch them and explain to them you know, which categories they might be able to list.*"

574 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 123, par. 2-25, p. 124, par. 2-9.

575 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 771: 14-25, par.776: 11-15, 24-25 par. 777: 1-25, par.778: 4-9, par. 779: 12-21: describing the work of the recruiters with the potential sellers as critically important, because the recruiters actually did most of the work for the sellers to support the launches and to add new products to the website.

576 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 780: 5-25, par 781: 1-24. See also Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 827: 18-23: "*[…] the team in Luxembourg, the onboarding team played a really big role of, like, you know, working and building. So either adding tools, as I talked about, you know, they build a lot of tools, you know, in the process or working with the technology teams that were building*".

577 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 829: 24-25, par. 830: 1-12.

578 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 782: 3-17.

incorporated in selling efforts[579]. To create an initial network of third-party sellers, constituting the foundation for a subsequently more automated self-service environment served by technological solutions, human intervention based on local market know-how was necessary, as testified by the launch of Amazon's business in Italy and Spain, where LuxOpCo's employees had to call potential sellers for Marketplace to establish partnerships[580]. Amazon also recognised that sellers active on the Marketplace were subject to local and European regulations and therefore required specific guidance to ensure legal compliance. This guidance to Marketplace sellers was provided based upon the know-how collected in the course of the EFN project[581].

(489) In 2009 only [25-30]% of gross merchant sales came from third party sellers that had previously signed up via self-service sign-up.[582] In 2012, third party sales accounted for slightly more than [40-45]% of Amazon's sales in Europe[583].

b) Price

(490) Amazon argues that pricing is highly automated and, except for rare instances, LuxOpCo did not have to override the prices set automatically by its pricing algorithm[584]. The Commission acknowledges Amazon's use of a pricing algorithm in its retail operations. Nevertheless, that algorithm is no more than a tool to execute a certain pricing policy, which is determined by LuxOpCo in Europe.

(491) Without individual input based on local market know-how from the EU Local Affiliates, the pricing algorithm would not function effectively[585]. The prices of products on Amazon's websites are local prices and each country has different approaches to pricing[586]. This is because of the unique local competitors, the unique competitive environment, and pricing schemes, because different suppliers set

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579 Amazon internal document: 3 Year Plan: International Merchant Services, July 2009, p. 28.

580 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 803: 11-25: "*[…] new countries like Spain, Italy […] We're still in this process of calling sellers and building the ecosystems*".

581 Amazon internal document: 3 Year Plan: International Merchant Services, July 2009, p. 29.

582 Amazon internal document: 3 Year Plan: International Merchant Services, July 2009, p. 2.

583 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 803: 24-25.

584 See Recital (168) and Amazon's submission of 29 May 2017, 2010 *ex post* TP report, p. 24-25.

585 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 808: 1-13: "*So clearly we learned in the US that low prices are really important. That's very clear. At the same time, you know, how we implement low prices in the UK or low prices in Germany is very different because obviously the competitiveness of our site in the UK is defined by local retailers and local competition. So the learnings of what might happen with low prices would probably, you know, have learned from the US, maybe, maybe not. But in terms of the actual implementation and how we deal with the local nature of our retail business or third-party business, that I think has to be implemented locally*".

586 Deposition [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 18 September 2014, p. 41 par. 9-10. See also Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 909:22-25; par. 910: 1-2: "*Pricing is totally local. Pricing is driven at Amazon by our willingness to be the best value for customers in the country you operate, and to be the best value for customers in the country you operate, you essentially match your competition prices and your competitors are local*".

different prices in different geographies, and because local laws and regulations differ, e.g. fixed prices exist[587]. The main ingredient in Amazon's pricing algorithm is to [...] Since [...] prices on the market constantly change, it needs to [...] monitor [...] pricing[588]. In Europe, this is done by LuxOpCo with support from its EU Local Affiliates.

(492) Amazon's EU Policies and Procedures Manual further clarifies the role played by LuxOpCo and the EU Local affiliates in relation to pricing[589]. It explains that an EU Retail Pricing Committee is solely responsible for setting pricing guidelines for products offered by Amazon through the EU websites. That Committee consists only of LuxOpCo employees: the Vice President of Finance, Europe; the European Legal Director; and the European Retail Vice Presidents. The Committee is responsible for approving all retail pricing on the EU websites and related issues, such as supplier rebates. Decisions made by that Committee cannot be overruled by non-LuxOpCo employees and non-LuxOpCo employees (including senior Vice Presidents) must seek the approval of the Committee for any pricing adjustments[590]. LuxOpCo also employs a European pricing manager who has to agree to prices, in particular when deviating from the prices set by the algorithm[591]. Since the pricing tool implements the Committee's decisions in setting the pricing policy and pricing rules, it is unsurprising that the price of goods resulting from the use of that tool required little further intervention by LuxOpCo. Finally, a [...] team, located in Luxembourg within LuxOpCo, also exists. It monitors [...] prices [...], measuring global prices, including those in the US[592].

(493) The influence of LuxOpCo and its EU Local Affiliates over pricing decisions is also reflected in the pricing promotions launched on the EU websites. For instance, in the first years of its operation in Germany, Amazon.de invented the so called "low price guarantee", which incentivised Amazon's customers to feedback price information to Amazon.de to receive a rebate on their purchases[593]. Moreover, because prices for books in Germany and France are fixed, Amazon.de developed the free shipping programme[594]. This programme, which had the effect of an indirect discount on the price of books, turned out to have a significant impact on Amazon's book sales in Germany[595] and in France[596]. In the UK, unique types of price promotions common on the market, such as [...], made it difficult [...] to compete on price [...]. Therefore,

587 Amazon Post trial brief, p. 31, par. 79.

588 Redline Minutes of the meeting between the Commission, Amazon and Luxembourg, 26 May 2016, p.3.

589 Amazon Internal Document: EU Policies and Procedures Manual, effective 1 May 2006, p. 5.

590 Amazon Internal Document: EU Policies and Procedures Manual, effective 1 May 2006, p. 5.

591 Amazon submission of 14 March 2017, dated 4 April 2017.

592 Amazon Final Transcripts: [Vice President Sales International, Amazon Corporate LLC, US, former Head of European Third Party Business (such as Marketplace), LuxOpCo, Luxembourg], 4 November 2014, par. 831: 5-10.

593 Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 984: 5-25.

594 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 50, par. 6-13.

595 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 52, par. 8-15.

596 Amazon Final Transcripts: [Vice President European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg, former Country Manager France, Amazon.fr SAS, Clichy, France], 5 November 2014, par. 939:23-25; par. 940: 1-2.

Amazon.co.uk had to focus on its local employees to find those promotions and establish a means to compete with them effectively[597].

c) Convenience

(494) According to Amazon's internal customer survey data, besides appreciating [...] ([50-60]%), [...] ([50-60]%), [...] ([50-60]%), [...] ([50-60]%)[598], while French customers also appreciate [...] ([50-60]%), [...] ([40-50]%), and Amazon's [...] ([40-50]%)[599].

(495) It is the task of LuxOpCo, with support from its EU Local Affiliates, to ensure that customers find what they are looking for on the EU websites.[600] Without human intervention, the customer would be lost[601]. LuxOpCo had a team of [60-70] FTEs that worked in a so-called "localisation and translation" team that check and adapt the machine translation to local standards[602] and enable the merging of the different European catalogues to create and manage the EFN, to facilitate customers' Europe-wide search for products[603] and add selection.[604]. Amazon.de employs content audit teams to ensure content quality through content audits to ensure that the website preserves its design and presentation of information to support customers' shopping experience[605]. It is also important that the customer service speaks the local language

597 Amazon Final Transcripts: [Director Finance, Amazon Instant Video Limited, London, UK, former Manager Finance and Director Finance Amazon.co.uk, London, UK], 5 November 2014, par. 1104: 6-25 par. 1105: 1-2.

598 Amazon internal document: Amazon Who Is Our Customer DE Customers Report May 2016, p. 6. See also Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 49, par. 18-25: For Amazon's German customers, the fact that "Amazon functions", i.e. delivers, is more important to them than price, contrary to the US, where price is the most important factor: "*If you ask a German customer today why do you love Amazon, they would say because it works, and you can find many studies showing you exactly that and price would come somewhere ranked third, a second, third at best, depending on the category. Where in the U.S., people would say Amazon has great prices, right?*"; and Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 151, par. 10-14: An Amazon commercial in Germany would never focus on price, because price is of lesser importance: "*In the U.S. at that time you would show a commercial based on price, right, Amazon attractive prices. And I said that in Germany that would be meaningless, because our largest category would not have attractive prices [...]*".

599 Amazon internal document: Amazon Who Is Our Customer FR Customers Report June 2016, p. 5-6.

600 Amazon Final Transcripts [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 1046: 1-6: "*So my -- part of my team's job is to make sure that the customer finds the relevant content on the website. That would mean we would be adding pictures and product description. We would work on customer reviews and -- that are visible changes on the website*".

601 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 34, par. 12-23: "*To translate a legal text by Google, you need an individual to put it in correct wording again and that's the same thing that we do on our website, that we present to our customer, and consistency of presentation is very important in my store because, you know, the detail pages need to look the same. The language, you can't call color, color on this page and something else on the next page, so you need to have people that make sure you use consistent German terminology, otherwise the customer is completely lost*".

602 Amazon Final Transcripts [Vice President eCommerce platform], 24 October 2014, par. 215: 8-23: [...].

603 Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 493: 8-25, par. 494: 1-5: [...].

604 Amazon Final Transcripts: [Vice President International Retail, Amazon Corporate LLC, US, former Head of European Retail Business, responsible for all retail operations in Europe, LuxOpCo, Luxembourg], 3 November 2014, par. 503: 24-25, 504:1-25: [...].

605 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 35, par. 5-18: [...].

and understands local preferences[606], such as German customers expecting fast shipment of their goods[607].

(496) Convenience also means delivering products cheaply, quickly and predictably. Speed, convenience and service increase customer satisfaction and therefore constitute growth factors[608]. Since Amazon's logistics costs and the speed, reliability, and accuracy of its delivery differ in each country[609], it is necessary to have local logistical know-how. For Europe[610], this know-how is centred and developed in LuxOpCo and its EU Local Affiliates.

(497) Fulfilment centres function differently in Europe than in the US[611] and, even within Europe, fulfilment centres function differently[612]. The design and processes are different and there are different standards to be complied with[613]. Amazon initially experienced difficulties finding plant managers who knew how to run a European fulfilment centre[614].

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606 Amazon Final Transcripts: [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 5 November 2014, par. 976: 6-17: "*And to a certain extent, you can hear, we phonetically used the U.S. expression of the brand name so we're not saying Amazon.de but we say Amazon.de, because we didn't want customers in Germany for a minute to think about that this is a U.S. store, right. It's a German store with German people, fulfilled out of Germany, where you reach German customer service. You work with all the things that you're familiar in Germany. You find all the product that is relevant to you in Germany, and that is very, very different from France, UK, from the U.S*".

607 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 49, par. 7-18.

608 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p.148, par. 16-20.

609 Amazon Post trial brief, p. 31, par. 80. See also Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 25, par. 18-23: "*So because the networks are different, you would want to have supply chain people that understand the individual network. Supply chain people in the US for the US network; supply chain people to understand the European network; supply chain people to understand the Asian network*".

610 Amazon Final Transcripts [Senior Vice President Product Management – Retail, Amazon Corporate LLC, US], 4 November 2014, par. 588: 11-20: "*Yes. There isn't and there wasn't a European transportation carrier, so we had to deal with Royal Mail in the UK, Deutsche Post in Germany, and with LaPoste in France. At that time we had to deal with Royal Mail, and Deutsche Post or LaPoste. There was not much alternative. Some small couriers were starting to grow, but we had to negotiate with the quality of service, the type of the support, and the type of delivery with the three big players in those three countries*".

611 Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 37, par. 2-7, p. 55, par. 22-25, p. 126, par. 24-25, p. 127, par. 1-8: "*The physical process in the UK and Germany had been designed by, principally by a German team. And that process just was totally different from the one that was principally Crisplant-based*".

612 Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 56, par. 13-15: "*So they were -- those two were very different, even though the physical processes was the same in both plants*".

613 Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 54, par. 20-23.

614 Deposition [Senior Vice President, Product Management-Retail, Amazon Corporate LLC, US, former Vice President / General Manager Worldwide Operations, Amazon Corporate LLC, US], 15 July 2014, p. 58, par. 9-12.

(498) For planning and investment purposes, LuxOpCo works closely with the EU Local Affiliates' fulfilment teams and the retail teams who deliver the most important input, namely the expected volumes and types of products or product categories to add to the selection and fulfilment centres[615]. The data collected by the EU Local Affiliates influenced the capital investment for fulfilment centres and the cost and margin calculation[616]. This information is only obtained on the basis of local market know-how, such as the relationships with the local vendors[617] and merchant sellers.

(499) Finally, convenience for the customer also encompasses a reliable customer service that speaks the customers' language and understands the customers' culture (such as a habit of returning a high share of purchased goods). In the UK [description of the specificities of the UK market]. Therefore, Amazon.co.uk [...] to match competitors' offerings such as same day delivery or slotted delivery, i.e. within a certain timeframe[618]. In Germany [description of the specificities of the German market]. Amazon.de had to cope with [...] and had to develop a process in its German fulfilment centres to [...][619].

9.2.1.2.3. Assets used by LuxOpCo

(500) LuxOpCo uses significant assets to perform the functions described in Sections 9.2.1.2.1 and 9.2.1.2.2.

(501) LuxOpCo owns and manages Amazon's entire inventory in Europe, which is indispensable for the operation of Amazon's European retail business. During the relevant period, LuxOpCo held up to EUR [1.5-2] billion worth of inventories on its balance sheet. It also held all the shares of ASE, AMEU and the EU Local Affiliates, which it provides with financing for investment in the expansion of infrastructure for

615 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 64, par. 25, p. 65, par. 2-10: "*So, I did not decide the color of the walls or which equipment to put into the operations. What I delivered, the most relevant input factor, which was the expected number of articles, ASINs that we're planning to sell. That's what determines the size and the equipment, but then operations figures out the layout of the building and when and where to build it, so I do not pick the land. I do not build the building, but I tell them I'm gonna sell washing machines, which makes a huge difference in the shelving than selling books.*".

616 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 110, par. 22-25, p. 111, par. 2-9: "*[…] I would deliver forecasts based on what selection growth and additions I would expect and then they would determine how many square meters, […]*" p.176 par. 19-25, p.177 par.2-4, p.178, par. 2-7: "*[…] I'm setting the biggest guidance by saying we going to sell washing machines or books and then everything follows that strain, and the cost and the margin calculation would be highly determined on that input*".

617 In Germany, Amazon.de asked its retail team to develop with suppliers the most efficient way to send and receive their goods. Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p. 166, par. 2-5 and p. 137, par. 16-23: "*So, this is the team that I, for example, sent to the inbox to make their life more efficient because I have the relation to the vendor and can change the vendor behaviour […]"* and *"So, this would be people from, from my retail team that would be on the dock engineering the inbound, right? Like, if you sign up vendors you want to, you want to teach them how to deliver so that our fulfilment center can efficiently handle the product*".

618 Amazon Final Transcripts: [Director Finance, Amazon Instant Video Limited, London, UK, former Manager Finance and Director Finance Amazon.co.uk, London, UK], 5 November 2014, par. 1108: 25, par. 1109: 1-19.

619 Deposition [Vice President and Country Manager Germany, Amazon Deutschland Services GmbH, Munich, Germany], 13 June 2014, p.88 par. 13-25, p.89 par. 2-13: "*That's just a small piece of innovation. No, innovation is not always inventing Kindle. Innovation is make a process work for specific customer behaviour that is existing*".

the operation of the retail business, e.g. construction of and equipment for fulfilment centres and expansion of the European data centre's capacity[620]. Following the acquisition of LoveFilm Group, LuxOpCo also owned certain intangibles assets which are necessary to operate part of its service business, namely video streaming.

(502) LuxOpCo's cost structure demonstrates that significant assets are used to absorb the costs incurred in relation to the development, enhancement and management of the Intangibles in the framework of functions undertaken[621]. The Commission analysed the costs incurred by or cross-invoiced to LuxOpCo as regards their potential relevance to the development of the Intangibles. As regards the Technology, this includes the cost of employees employed in technology-related jobs. It also includes the costs of servers, located in Luxembourg and Ireland, which allow the EU websites to operate. The costs categories "Application Development Expense" and "Data Center" in Table 8 also contribute to the Technology component of the Intangibles.

(503) As regards the Trademark, LuxOpCo incurred significant direct marketing costs[622], as demonstrated by Table 7. This includes the costs of free delivery promotions, which are performed at the expense of LuxOpCo's profitability. Such promotions foster sales and improve customer satisfaction which in turn increases the value of the Amazon brand in Europe. The Amazon Prime program, which is effectively operated for European markets by LuxOpCo, has also been identified as a key marketing strategy by Company X[623]. A comparison of transport costs borne by LuxOpCo[624] and those recharged to customers[625] shows that only a small proportion is passed through to the customers. Finally, the costs of dispatching ordered goods to the customers, which are also absorbed by LuxOpCo, are also considered to strengthen Amazon's brand in Europe according to Company X[626].

(504) Amazon acknowledges[627] that part of the marketing expenses incurred by the European operating companies benefited Amazon's global marketing intangibles. Amazon claims, however, that since LuxSCS holds the rights to all Trademarks used in Amazon's retail business, it reimburses the expenses incurred by the European operating companies either directly or indirectly. LuxOpCo did not, however, charge LuxSCS for any of those expenses directly. Nor could the reimbursement of the marketing expenses be said to have occurred indirectly through a reduction in the royalty paid by LuxOpCo to LuxSCS. During the relevant period, no deviation from the methodology endorsed by the contested tax ruling for the determination of the

620 Amazon's submission of 8 February 2017, p. 2, concerning the LuxOpCo financing and the purposes it is used for and Recital (183).

621 To the extent that any of those functions were outsourced to the EU Local Affiliates, those affiliates were remunerated on a cost-plus basis, meaning that LuxOpCo has effectively absorbed the costs associated with those functions.

622 Up to EUR [400-500] million in 2013.

623 See Recital (343).

624 See Table 6.

625 See Table 5: Transportation costs recharge and Prime subscription. While Prime offers a larger spectrum of services than just the free-of-charge shipment, conservatively 100% of proceeds from the Prime Subscription were considered to cover only transportations costs for the purpose of identifying cost categories benefitting the Intangibles.

626 See Recital (339).

627 See Recitals (205)-(206).

royalty to the benefit of LuxOpCo was observed[628]. In the absence of any identifiable reimbursement of LuxOpCo by LuxSCS, the costs benefitting global marketing intangibles incurred in Europe – as well as the other IP development costs set out in Table 6 and Table 8 – must be considered to have been absorbed by LuxOpCo. Nor should the fact that, pursuant to the application of the contested tax ruling, LuxOpCo can retain sufficient financial means to cover its costs with a margin be considered to constitute a reimbursement of any costs by LuxSCS. LuxSCS does not generate any revenue from related or independent parties[629] and, in the absence of the contested tax ruling, would not be able to make any payment to LuxOpCo (or Amazon US) out of its own means**.** Instead, it is LuxOpCo that generates proceeds from sales and services and that is therefore able to absorb the costs incurred in the course of operating its business.

(505) In sum, none of costs incurred by LuxOpCo in the performance of functions in relation to the development, enhancement, management and exploitation of Intangibles can be said to have been incurred on LuxSCS's behalf. Had that been the case, those costs should have been rebilled to LuxSCS and included in the cost pool under the CSA as LuxSCS's contribution thereto. Rather, the cost structure suggests that LuxSCS in fact acted as a service provider to LuxOpCo by holding the Intangibles on its behalf. Thus, LuxOpCo was the entity effectively carrying out the activities in relation to the Intangibles in its own name and for its own risk, while LuxSCS's payments under the Buy-In Agreement and CSA to the Amazon entities in the US were covered with the royalty payments from LuxOpCo, being LuxSCS's primary source of income. Accordingly, LuxOpCo effectively incurred the relevant costs in relation to the economic exploitation of the Intangibles as well as the development, enhancement, and management thereof, and assumed the relevant risks in that respect.

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628 See Recital (428) and Table 3 and Table 6. The 1995 and 2010 OECD TP Guidelines, paragraphs 6.36 to 6.39, refer to situations where a company not owning trademarks or trade names undertakes marketing activities. In those circumstances, the ability of the company to share the future benefits derived from the marketing activities depends on the substance of the rights it has to the trademarks or trade names. In this sense, advertising and promotional expenditures can play an important role to maintain the value of a trademark. The following illustrative example is given in paragraph 6.36: "*Where the distributor actually bears the cost of its marketing activities (i.e. there is no arrangement for the owner to reimburse the expenditures), the issue is the extent to which the distributor is able to share in the potential benefits from those activities. In general, in arm's length transactions the ability of a party that is not the legal owner of a marketing intangible to obtain the future benefits of marketing activities that increase the value of that intangible will depend principally on the substance of the rights of that party. For example, a distributor may have the ability to obtain benefits from its investments in developing the value of a trademark from its turnover and market share where it has a long-term contract of sole distribution rights for the trademarked product. In such cases, the distributor's share of benefits should be determined based on what a independent distributor would obtain in comparable circumstances. In some cases, a distributor may bear extraordinary marketing expenditures beyond what an independent distributor with similar rights might incur for the benefit of its own distribution activities. An independent distributor in such a case might obtain an additional return from the owner of the trademark, perhaps through a decrease in the purchase price of the product or a reduction in royalty rate.*" See also the 2017 OECD TP Guidelines, Annex to chapter VI: Examples on Intangibles, Example 10.

629 As explained in Recital (433), the only substantial income of LuxSCS is the royalty from LuxOpCo.

9.2.1.2.4. Risks assumed by LuxOpCo

(506) Amazon claims that "*[i]n a business driven by technology enabling highly automated processes, LuxOpCo heavily relied on technology to manage or assume business risks*."[630] Amazon failed to provide any concrete examples to substantiate that claim.

(507) In reality, LuxOpCo assumed, both contractually[631] and effectively, the risks associated with the development, enhancement, management, and exploitation of the Intangibles. LuxOpCo also controlled and managed all the relevant business and entrepreneurial risks in relation to Amazon's European retail and service business, including, but not limited to, credit risk, collections risk, inventory risk[632], market risk, risk of loss, risks relating to maintaining a workforce capable of efficiently and timely selling goods and providing services.

(508) In any event, Amazon's claim cannot be accepted for the following reasons.

(509) First, the risks of LuxOpCo were not "*assumed*" through its use of the Technology. Those risks were assumed because of LuxOpCo's designation as the European headquarters and the operator of Amazon's European retail and service business. Other risks assumed by LuxOpCo in relation to the Intangibles resulted from its contractual arrangements with LuxSCS (by way of the License Agreement) and from its actual conduct in the context of those arrangements[633]. As regards the Intangibles, LuxOpCo effectively assumed the management and control of the risks that LuxSCS eventually contractually assumed under the CSA (see Table 13)[634] .

(510) Second, the Technology could very well have been a useful tool to mitigate and optimise certain risks to the level strictly necessary for the operation of the EU business. For example, this could be achieved by inventory technology allowing LuxOpCo to keep the inventory at the levels appropriate to meet the demand, while minimising the risk that goods would be out of stock or become non-sellable. Nevertheless, inventory risk is inherent in the operation of a retail business and cannot be fully eliminated, even by means of advanced software. Similarly, LuxOpCo assumes the risk of sale and bad debts. This is confirmed by the fact that LuxOpCo builds the provisions and absorbs value adjustments for the inventory and doubtful accounts relating to receivables[635]. The Commission has not observed any mechanism in the course of its investigation that would indicate that losses related to the inventory and bad debts are reimbursed by any entity to LuxOpCo.

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630 Amazon submission of 29 May 2017, 2017 *ex post* TP report, p. 29.

631 License Agreement, paragraph 7 (No Warranties).

632 TP Report, p. 14. As explained in the 2017 *ex post* TP Report, p. 23: "*A key aspect of the European business was the effective management of the inventory which is comprised of millions of individual items purchased from third-party vendors for resale*".

633 As explained in the 2010 OECD TP Guidelines, paragraph 9.12: "*[…], a tax administration is entitled to challenge the purported contractual allocation of risk between associated enterprises if it is not consistent with the economic substance of the transaction. Therefore, in examining the risk allocation between associated enterprises and its transfer pricing consequences, it is important to review not only the contractual terms but also the following additional questions:*
• Whether the conduct of the associated enterprises conforms to the contractual allocation of risks […],
• Whether the allocation of risks in the controlled transaction is arm's length ([.,]), and
• What the consequences of the risk allocation are ([…])".

634 CSA as effective of 5 January 2009, paragraph 2.3 and exhibit B (Functions and Risks).

635 See Table 4 for a detailed overview of value adjustments and provisions built in relation with LuxOpCo's current assets.

(511) Third, even if LuxOpCo did, to a certain extent, rely on the Technology to manage its business risks, it would only be due to a strategic decision taken by LuxOpCo, which has the capacity to manage and control the outcome of these automation processes potentially limiting its business risks.

(512) Amazon also relies on a claim made in the 2017 *ex post* TP Report that the strategic, financial, and operational risks LuxOpCo faces in its day-to-day operations were not effectively managed and controlled by it, since "*strict management policies were applied at group level during the period under review*"[636]. Amazon did not, however, submit any specific information on risk management group policies to substantiate that claim and no specific risk management strategies are referred to in its annual Form 10-K filings to the US Securities and Exchanges Commission.

(513) In any event, even if such group policies had been in place during the relevant period, LuxOpCo would still have been responsible for the strategic management decisions it adopted in running Amazon's European business and it would have been liable for the economic consequences of those decisions. Moreover, while it is not unusual that activities relating to a corporate group are centralised in the parent company or a group service centre[637], the fact that subsidiaries of the group might receive certain instructions or support from their ultimate parent, or other companies of the group, as a consequence of such group policy or strategy, does not mean that those subsidiaries should no longer be considered as separate legal entities distinct from their parent company, nor that those subsidiaries are no longer responsible for their decisions[638]. To the extent that any intra-group service was provided by the Amazon group for the benefit of LuxOpCo in relation to its risk management, this would only be relevant, if at all, when determining the transfer prices for such services[639].

(514) According to Amazon, the main critical risks of the European operations are, first, the risks of loss of business to its competitors. This varies according to local markets. It is therefore vital for Amazon to keep innovating to avoid exiting the market, such as some of Amazon's competitors in France and the UK have[640]. A second critical risk identified by Amazon is the risk of customers not adapting to new offerings. An expansion of a product category, an introduction of new services or the launch of new business entails a risk that the customers would not appreciate the new products. An expansion further entails risks of service disruptions, failures or other quality issues[641]. As indicated by Amazon in its 2013 Form 10-K filing[642], the risks related to the constant need for Amazon to expand to be competitive, in particular, "*places significant strain on our management, personnel, operations, systems, technical performance, financial resources, and internal financial control and reporting functions.*" A third critical risk identified by Amazon is local economic and political conditions as well as changes to the legal framework. Amazon points to government

636 The 2017 *ex post* TP Report, p. 29.

637 1995, 2010 and 2017 OECD TP Guidelines, paragraph 7.14.

638 See footnote 274.

639 Whether a remuneration is due for the provision of such services from one associated group company to another will depend on an analysis of the specific facts and circumstances, and, in particular, if those intra-group "risk management" services in themselves represented a benefit (or an expected benefit) for LuxOpCo. See 1995, 2010 and 2017 TP OECD Guidelines, paragraph 7.29.

640 Amazon's submission of 27 February 2017, p. 12.

641 Amazon's submission of 27 February 2017, p. 13.

642 Amazon's submission of 27 February 2017, annex 32-9.

regulation on e-commerce and other services or on electronic devices as an example[643].

(515) All those critical risks are managed at the local level, with LuxOpCo as the responsible principal in Europe. As the [Advisor 3] Report explains, it is necessary to consider the local features of the market in question in order to succeed in the competitive European markets[644]. Local management and teams are able to identify the next moves of competitors, are best placed to identify customers' needs and preferences, and are closer to the local authorities and therefor best placed to voice relevant concerns in relation to new regulations, etc. The importance of the local management and local teams in this respect is further supported by the testimonies of Amazon employees in the context of the US tax proceedings. For instance, the risk that the Marketplace business would not evolve, when first introduced to Europe, was mitigated by input and local know-how of LuxOpCo as supported by the EU Local Affiliates. This all confirms the conclusion that LuxSCS, in the absence of employees, lacks the operational capacity to manage and control these risks.

(516) Other risks mentioned in Amazon's 2013 Form 10-K are also managed and controlled by LuxOpCo. For example, the reputational risk concerning the European operations is assumed by LuxOpCo. In case of website outages, the EU Local Affiliates turn to LuxOpCo for support. Failure to meet demand and delivery dates in Christmas season, which lead to returns of goods delivered too late in the short-term and to the loss of sales potential in longer term, affect first and foremost the seller of record itself, i.e. LuxOpCo. LuxOpCo also assumes the cost and risk of sales, bad debts and inventory. In particular, the costs of returns of damaged goods are absorbed by LuxOpCo.

(517) The 2013 Form 10-K further identifies the risks associated with infringements of the Intangibles as a critical risk factor[645], although those risks appear to be minor compared to the risks associated with the need for expansion for Amazon to stay competitive. By virtue of the License Agreement, LuxOpCo also controlled and managed the risks associated with IP infringements, since LuxOpCo was empowered to act at its own risk and initiative and for its own account to protect the Intangibles[646]. As explained in Recital (419), LuxOpCo assumed sole responsibility for this obligation despite the fact that, according to the CSA, LuxSCS itself should have carried out this function[647].

9.2.1.2.5. Conclusion on the functional analysis of LuxOpCo

(518) A functional analysis of LuxOpCo demonstrates that during the relevant period it performed active and critical functions in relation to the development, enhancement, management and exploitation the Intangibles as well as active and critical functions in relation to the headquarter function and the operation of Amazon's European retail and service business. LuxOpCo used its license to the Intangibles for the operation of Amazon's European retail and service business and ultimately bore the costs associated with their further development, enhancement, management, and

643 Amazon's submission of 27 February 2017, p. 13.

644 As explained in Recital (163).

645 Those risks were, however, not addressed by Amazon as a critical threat in the submission of 27 February 2017.

646 License Agreement, paragraph 9.2 (Preventing Infringement).

647 CSA, paragraph 9.12 (Preventing Infringement).

exploitation. LuxOpCo also used a range of tangible assets and was the ultimate carrier of the costs associated with Amazon's European retail and service business in general. Finally, LuxOpCo assumed and controlled the substantial risks associated with the Intangibles and all the relevant business and entrepreneurial risks in relation to Amazon's European retail and service business.

9.2.1.3. The choice of the most appropriate transfer pricing method

(519) Once the intra-group transaction has been identified and a functional analysis of both parties to that transaction has been conducted, the next step of any transfer pricing analysis is to select an appropriate transfer pricing method so that the intra-group transaction can be priced. To ensure that the transfer price for the intra-group transaction reliably approximates a price negotiated at arm's length on the market, the most reliable method should be chosen depending on the circumstances of that case[648].

(520) As explained in Recitals (250) to (256), the OECD TP Guidelines describe five methods to determine an arm's length price for intra-group transactions. Those Guidelines express a preference for traditional transaction methods, such as the CUP-method, over transactional profit methods, such as the TNMM and the residual profit split method, as a means to establish whether transfer prices are at arm's length[649]. More specifically, paragraph 2.14 of the 2010 OECD TP Guidelines and paragraph 2.7 of the 1995 OECD TP Guidelines provide that "*[w]here it is possible to locate comparable uncontrolled transactions, the CUP method is the most direct and reliable way to apply the arm's length principle. Consequently, in such cases the CUP method is preferable over all other methods.*" Thus, for the purposes of selecting an appropriate transfer pricing method, it is necessary to first examine whether comparable uncontrolled transactions exists that can be used to price the intra-group transaction under examination.

9.2.1.3.1. The CUP method

(521) Amazon argues that, with the exception of the [A] Agreement, none of the IP agreements concluded between Amazon and unrelated counterparties, including the M.com Agreements, provides for a directly comparable transaction on the market for the purposes of pricing the License Agreement[650]. The Commission agrees that none of the IP agreements concluded by Amazon with unrelated parties as submitted to the Commission in the course of investigation, and in particular the M.com Agreements, provides for a sufficiently comparable uncontrolled transaction to establish a CUP. The Commission also does not consider the [A] Agreement to constitute a directly comparable transaction.

(522) The OECD TP Guidelines set out five comparability criteria that need to be met for controlled and uncontrolled transactions to be considered as comparable, namely (i) the characteristics of the property or services transferred, (ii) the functions performed by the parties (taking into account assets used and risks assumed), (iii) the contractual terms, (iv) the economic circumstances of the parties, and (v) the

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[648] See paragraph 2.2 of the 2010 OECD TP Guidelines: "*[t]he selection of a transfer pricing method always aims at finding the most appropriate method for a particular case.*" See also paragraph 1.42 of the 1995 OECD TP Guidelines.

[649] See also Paragraphs 3.49 and 3.50 of the 1995 OECD TP Guidelines. This preference for traditional transaction methods has been maintained in paragraph 2.3 of the 2010 OECD TP Guidelines.

[650] Amazon's submission of 4 May 2015, page 3-4, and Amazon's submission of 31 July 2015, p. 2-3.

business strategies pursued by the parties [651]. The M.com Agreements, including the [A] Agreement, clearly do not meet any of those five criteria:

(523) As regards the first and third criteria, i.e. the characteristics of property or services and the contractual terms, LuxOpCo obtained an exclusive and irrevocable license to exploit the Intangibles in Europe and a right to further develop, enhance, and manage the Intangibles for their entire lifetime under the License Agreement[652]. By contrast, none of the M.com Agreements concluded by Amazon US concern a similar license, nor do they concerns the same IP[653]. As explained in Recital (220), the characteristics of the M.com Agreements are very different to those of the License Agreement. The License Agreement gives LuxOpCo rights to exploit and further develop, enhance and manage the Intangibles (including the Technology) in its operation of Amazon's European websites. By contrast, under the M.com Agreements Amazon US only granted the M.com partners a non-exclusive license to **use** Amazon's IP as part of the provision of IT and e-commerce services for them to operate their own retail websites and to meet its obligations towards them[654]. Accordingly, those licenses do not give the M.com partners a similar right to further develop and enhance the Amazon IP as part of their operations, as is granted to LuxOpCo under the License Agreement. In addition, obligations to maintain and protect the IP, as set out in the License Agreement, are not included in the M.com Agreements. Finally, in none of the five M.com Agreements listed in the TP Report and in none of the eleven additional M.com Agreements provided by Amazon to the Commission do the unrelated counterparties obtain access to the software or the underlying algorithms used by Amazon's e-commerce platform.

(524) The M.com Agreements also oblige Amazon US to provide many more activities beyond the licensing of IP. Despite Amazon's view that those agreements cover the access to certain IP, the contracts have a broader scope, in so far as they include services provided by Amazon US to the M.com partners, such as the hosting and maintenance of e-commerce websites, shipping and handling packages, conducting

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651 See 1995 OECD TP Guidelines, Chapter I, section C, and 2010 OECD TP Guidelines, Chapter I, section D.1.2. Paragraph 1.17 of the 1995 OECD TP Guidelines provides the following guidance in this respect: *"As noted above, in making these comparisons, material differences between the compared transactions or enterprises should be taken into account. In order to establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or enterprises that would affect conditions in arm's length dealings. Attributes that may be important include the characteristics of the property or services transferred, the functions performed by the parties (taking into account assets used and risks assumed), the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the parties. […]"*. These "*attributes*" are usually referred to as the five comparability factors. See also paragraph 1.36 of the 2010 and 2017 OECD TP Guidelines.

652 See Section 2.1.2.3.

653 1995 OECD guidelines, paragraph 1.19: "*Characteristics that it may be important to consider include the following: […] in the case of intangible property, the form of transaction (e.g. licensing or sale), the type of property (e.g. patent, trademark, or know-how), the duration and degree of protection, and the anticipated benefits from the use of the property*".

654 See Recital (220), which describes Amazon's explanation why the IP licensed under the M.com Agreements is different from the Intangibles licensed under License Agreement. See also Recital (223) on the [A] Agreement. As further explained in Amazon's submission of 31 July 2015: "*Customer data is never licensed out to third parties. Moreover, third-party use under license of the Amazon trademarks and the Amazon logo in Europe is limited to marketing and similar materials that have been approved in advance by LuxOpCo. These limited licenses are revocable, royalty-free, non-transferable and non-assignable.*"

sales, etc. Moreover, while the provision of services pursuant to the M.com Agreements is mainly ensured by Amazon US, which is simultaneously acting as licensor and the user of the intangibles, in the case of the License Agreement it is LuxOpCo that uses the Intangibles in its capacity as a licensee and, that ensures the development, management, hosting and operation of the EU websites. LuxSCS, which is the licensor of the Intangibles under the License Agreement, does not have any employees and therefore lacks the capacity to perform any functions similar to those performed by Amazon US under the M.com Agreements.

(525) As regards the [A] Agreement in particular, not only are the rights to the intangibles covered by that agreement not comparable to the exclusive and irrevocable license granted by LuxSCS to LuxOpCo under the License Agreement, that agreement also concerns many additional services that are not provided by LuxSCS under the License Agreement. In particular, the [A] Agreement covers services including the development, hosting and maintenance of an e-commerce website. The denomination of that agreement as a [...][655] further indicates the increased scope of that commercial relation. The TP Report takes note of neither of those differences, nor does it make any adjustments to the comparability apart from the delivery of customer data.

(526) As regards the second criterion, i.e the functional analysis, the Commission has already established that LuxSCS does not perform any functions that add value to the Intangibles. In particular, LuxSCS was neither in charge of the development, enhancement, management or exploitation of the Intangibles, nor did it undertake any kind of marketing activities. Under the M.com Agreements, Amazon US was not only the creator and developer of the IP used in the context of the transaction, but also the provider of many services, including the provision of e-commerce services, which are performed by LuxOpCo, not LuxSCS, under the License Agreement.

(527) As regards the fourth criterion, i.e. economic circumstances, the Commission notes that the majority of the M.com Agreements relate to the territory of the United States of America, and concern significantly lower sales volumes.

(528) As regards the fifth criterion, i.e. the business strategy, the M.com Agreements were concluded with well-established brick and mortar retailers, which aimed at setting up an alternative distribution channel. In the case of the License Agreement, the purpose was for LuxOpCo to penetrate the European e-commerce market, its exclusive distribution channel, which required the use of the Intangibles[656].

(529) In sum, none of the IP agreements concluded between Amazon and unrelated third parties, including the M.com Agreements in general and the [A] Agreement in particular, provide for a comparable uncontrolled transaction on the basis of which the remuneration to LuxSCS under the License Agreement can be assessed through an application of the CUP method. The CUP-method relies in its application on a comparison of the conditions in a controlled transaction with the conditions in transactions between independent enterprises[657]. In order for such comparison to be useful, the relevant characteristics of the situation compared must be sufficiently

655 This is the same for the [G] Agreement, while other agreements are referred to as [...] Agreement in the case of [H] and [B] and [...] in the case of [I].

656 As explained in Recital (309), Luxembourg similarly concluded that those agreements, including the [A] Agreement, cannot be used for the purposes of a CUP analysis as this agreement reflects a business model that differs from the model put in place between LuxSCS and LuxOpCo.

657 See Recital (253).

comparable. To be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences. As explained in Recitals (522) to (528), the License Agreement and the M.com Agreements are different in a way that would materially affect the conditions of the transaction when looking at five out of five comparability factors. In addition, the Commission finds that no reasonable accurate adjustments can be made to eliminate the effects of those differences[658].

(530) In particular, Amazon argues that the transfer of the core technology under the [A] Agreement can be isolated from the other services and reasonable adjustments could be made to eliminate the differences between that Agreement and the License Agreement[659]. However, according to the testimony of an Amazon employee[660], Amazon took a holistic approach to the pricing of the M.com Agreements and did not attempt to price identifiable services of Amazon US on a separate basis[661]. Therefore, a determination of the portion of Amazon US's remuneration which is due for the pure access to its Intangibles does not seem practicable in the absence of clearly identifiable adjustments for the tangible services provided by Amazon US under the [A] Agreement, such as the creation, development, maintenance and hosting of the websites ensured by Amazon US's team.

(531) Even assuming that it were possible to isolate the transfer of the core technology, the remuneration for that transfer under the [A] Agreement must be much less than that calculated in the TP Report. In that report, the remuneration was arrived at by adding several fees provided for in the [A] Agreement, including those relating to the tangible aspects of the agreement, such as an adjustment for Amazon's labour costs increase. For the purpose of determining the implied remuneration, several adjustments to the set-up, base fees and the sales commissions due by [A] were added, such as fees to compensate for excess order capacity and excess inventory levels. Those fees are related to the physical operation of a retail business. They do not bear reference to the intangibles transferred under that agreement. The TP Report does not put forward any arguments justifying their inclusion in the analysis of an arm's length royalty rate for the Intangibles[662]. Moreover, in the implied royalty calculation, the TP Report did not account for the negative relationship between the level of the commission fee and the sales to which that fee would be applied. More specifically, the commission rate agreed under the [A] Agreement was set to decrease from year-to-year (from 5 % to 4 %) along with the increasing level of the projected sales to be generated by [A] pursuant to the agreement (from initially USD 350 million to USD 750 million). This fact points towards economies of scale

658 See 1995 OECD guidelines, paragraph 1.15, 2010 and 2017 OECD TP guidelines, paragraph 1.33.

659 Amazon's submission of 29 May 2017, p. 5.

660 Amazon Final Transcripts: [Vice President Technology – Software Development, Amazon Corporate LLC, US former Vice President of Kindle, Amazon Corporate LLC, US] , Trial Testimony of 18 November 2014, par. 35413540: 24-25, par.3541:1-25, par.-3542: 1-25: "*Q: […] And given that these deals involved services and technology, how did Amazon price them? A: Well, the way we priced these deals was essentially looking at them as a wholistic bundle […]*".

661 As explained in Recital (210), this was further recognised by the US Tax Court.

662 See Recital (144).

or/and increasing bargaining power of the service receiver[663]. The TP Report, by contrast, incorporated the commission rates diminishing to 4 % p.a. in its calculation only as set in the [A] Agreement, without due consideration whether those rates would be justified in view of much higher levels of sales forecasted in Europe (EUR 3.2 billion in the first year following the restructuring to EUR 8.3 billion in financial year 2010).

(532) The application of the CUP method, as set out in the TP Report, also produced an exaggerated result, which exposed "*LuxOpCo to the risk of incurring losses*"[664] . This means that the income generated by LuxOpCo using the Intangibles would potentially not only be insufficient to pay the royalty to LuxSCS determined on the basis of the CUP method, but also be insufficient to remunerate all other functions performed by LuxOpCo. The Commission observes that an unrelated party licensee would be unlikely to accept a method for determining its remuneration according to which it probably would be structurally loss-making[665]. It further observes that the use of the CUP-method on basis of the [A] agreement was rejected in the TP Report since the residual profit split analysis was considered "*less likely to produce biased estimates*"[666].

(533) In its most recent submission, Amazon argued in the alternative that a CUP could be established for the License Agreement on the basis of a royalty rate of [4.5-5] % on gross merchandise sales ("GMS")[667]. In support of that argument, Amazon relies on its interpretation of the US Tax Court's Opinion. However, as explained in Recital (210) and footnote 354, the royalty rate of [4.5-5] % was not in fact established by the US Tax Court, but calculated by Amazon for the purpose of this Decision**.** In any event, the Commission does not agree that such a royalty rate, as established for the purpose of valuing the lump sum of the Buy-In Agreement, is a reliable comparable for the purpose of applying the CUP-method to establish an arm's length remuneration for the License Agreement.

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663 Amazon Final Trial Testimony 18 November 2014, [Vice President Technology – Software Development, Amazon Corporate LLC, US former Vice President of Kindle, Amazon Corporate LLC, US], p. 3549: 9 to 3550:1, par. 3549: 10-25; par. 3550:1-10: "*Volume impacted deal pricing pretty significantly. You can look at the -- you can go through the various contracts across the M.coms and you will find that the larger ones, such as [C] and [A], they have a lower commission rate than the smaller ones such as [D] and [E] and [F], and so that was a reality of what the market forces would require, […] And so the expectation that became predominant across all of the players in this market segment was that the bigger the sales volume, the lower the commission rate would be, and that found its way into, for example, [A] Amendment 3 is where we went from a single commission structure to a tiered base structure because [A] saw that their sales were doing very well and they predicted them to do very well over the course of the remainder of the agreement and they didn't want to be spending that much because they thought it wasn't competitive with their alternatives. And you saw the same thing in the [C] deal […]*".

664 Amazon's submission 5 March 2015, par. 129, p. 41.

665 See Recital (322). As explained in the 1995 OECD TP Guidelines, paragraph 1.53: "*The fact that there is an enterprise making losses that is doing business with profitable members of its MNE [multinational enterprise] group may suggest to the taxpayers or tax administrations that the transfer pricing should be examined. The loss [making] enterprise may not be receiving adequate compensation from the MNE [multinational enterprise] group of which it is a part in relation to the benefits derived from its activities*". See also 2010 OECD TP Guidelines, paragraph 1.71 and 2017 OECD TP Guidelines, paragraph 1.130.

666 See Recital (153).

667 Amazon's submission of 29 May 2017.

(534) As a preliminary matter, the Commission observes that the Buy-In Agreement was concluded in 2005 and that the Luxembourg tax administration was informed about its existence in Amazon's letter of 20 April 2006. If Amazon and Luxembourg considered the value of the Buy-In under that agreement to be a reliable comparable, that information should have been taken into consideration by the Luxembourg tax administration when re-confirming the contested tax ruling in December 2006.

(535) The Commission further notes that the US Tax Court made its adjustments to the value of the Buy-In with reference to a comparison with the M.com Agreements, in particular the [A] Agreement[668]. Even if the US Tax Court was able to isolate the transfer of the core technology from the other services covered by that agreement[669], the fact remains that none of the five comparability factors listed and analysed in Recitals (522) to (528) are fulfilled when comparing the License Agreement to the M.com Agreements, including the [A] Agreement. The same concerns identified in those Recitals are relevant in relation to using the Buy-In Agreement as a comparable for pricing the License Agreement.

(536) Most important, the Buy-In Payments relate to a one-off transfer of the rights to pre-existing Intangibles. They do not take into account the functions related to the further development, enhancement, and management of the Intangibles, and the risks associated therewith, which were set out in the CSA and were performed by LuxOpCo. Those functions not only create value for LuxOpCo, but also for LuxSCS's counterparties to the CSA: ATI and A9.

(537) The US Tax Court compared the [A] Agreement concluded between Amazon US and [A] to the Buy-In Agreement concluded between Amazon US and the Luxembourg operations as a whole, without making any distinction between LuxSCS and LuxOpCo, since they are considered as a single entity from a US tax perspective. As such, the [A] Agreement was deemed comparable to a license arrangement between an IP creator (Amazon US) and an IP user (the European business operations in general). The License Agreement does not constitute such an arrangement, since it concerned a *de facto* passive IP holder (LuxSCS) sub-licensing intangibles to a related party (LuxOpCo) for it to develop, enhance, manage and exploit during the relevant period. Consequently, if the value of the Buy-In should be used as a CUP, this would be relevant only to establish LuxSCS's remuneration to LuxOpCo for the functions performed by LuxOpCo (taking into account the assets used and risk assumed) under the License Agreement. As evidenced in Section 9.2.1.1, LuxSCS did not provide or add any unique and valuable contribution to the development, maintenance or enhancement of the Intangibles, as otherwise set out in the CSA, but instead passed those on to LuxOpCo, the licensee[670]. Thus, LuxSCS was eligible to achieve the benefits granted to it under the CSA (i.e. the legal ownership of the Intangibles and derivatives works thereof) only because LuxOpCo performed the functions and risks designated to it under that agreement as explained in Section 9.2.1.2.

668 See Recital (210).

669 As explained in Recital (210), the US Tax Court acknowledged that under the [A] Agreement Amazon provided a variety of ancillary services to [A], which was not related to the Intangibles.

670 The 2017 *ex post* TP report is wrong to claim that "*the license of the Intangibles from LuxSCS to LuxOpCo […] comes with a commitment by LuxSCS to maintain, update, and enhance those intangibles through ongoing investments under the CSA.*" As explained in Section 2.1.2.3, LuxOpCO takes over this "commitment" as it was granted an irrevocable and exclusive license to develop, enhance and exploit the Intangibles held by LuxSCS.

(538) This is evidenced by the terms of the License Agreement, pursuant to which LuxOpCo obtained an exclusive and irrevocable license to all existing and future intangible property rights of LuxSCS for an unlimited period of time, and by the functional analysis performed in Sections 9.2.1.1 and 9.2.1.2. While a licensing arrangement similar to the relationship between the licensor and the licensee in the [A] Agreement may be concluded between independent and related parties on at arm's length, a sub-license agreement comparable to the License Agreement is hard to conceive between independent parties.

9.2.1.3.2. The profit split method and the TNMM

(539) Since no direct comparables to the License Agreement exist[671], a transactional profit method is the most appropriate transfer pricing method to determine the transfer price of that intra-group transaction in the present case. As explained in Recital (251), two transactional transfer pricing methods are described in the OECD TP Guidelines, the TNMM and the profit split method. The profit split method refers to two approaches: the contribution analysis and the residual analysis. The latter is often referred to as the "residual profit split analysis".

(540) The TP Report allegedly calculated an arm's length range for the License Agreement on the basis of the residual profit split method[672]. However, a closer examination of that assessment shows that the transfer pricing method actually applied is the TNMM. In the first step, the TNMM was used to determine an arm's length return of [4-6]% on the operating expenses of LuxOpCo for its allegedly "routine functions", while in a second step 100 % of the remaining profit was attributed to LuxSCS as a royalty payment for the use of Intangibles by LuxOpCo. The use of the residual profit split method implies that, after the "routine functions" of the intra-group transactions have been remunerated, the residual profit is split between the parties to the controlled transactions to remunerate their unique and valuable contributions[673]. However, in the present case, 100 % of the residual profit was attributed to LuxSCS without any justification in TP Report, since that report does not determine how contributions (taking into account the functions performed, assets used and risks assumed) by LuxSCS justify an attribution of the total residual profit to LuxSCS. The report simply states that the residual profit "*may be considered to be attributable to the Intangibles licensed by LuxOpCo from LuxSCS*"[674].

(541) The absence of a split of the residual profit between the LuxSCS and LuxOpCo in the transfer pricing assessment of the TP Report indicates that only one of those parties to the License Agreement was considered to perform valuable and unique contributions, namely LuxSCS. This means that, in reality, a one-sided transfer method, i.e. the TNMM, was applied to determine the arm's length range for that transaction[675]. This has been confirmed by Luxembourg[676].

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671 See Recital (529).

672 See Recital (153).

673 See Recital (256).

674 TP report, p. 31.

675 See also the 2017 *ex post* TP report, p. 19: "*For the party that does not make a unique and valuable contribution, like any other one-sided method, the TNMM tends to mathematically give the same effect as a residual profit split method as only a remuneration for the routine functions can be allocated and no residual profit can be attributed to that party. The TNMM is under the circumstances of the case, the most appropriate method for an ex-post analysis of the outcomes of the royalty transaction given that other available methods do not provide a more reliable basis for testing the transaction*"".

(542) In light of the functional analysis conducted in Sections 9.2.1.1 and 9.2.1.2, the Commission agrees that only one of the parties to the License Agreement performs unique and valuable contributions, and accordingly, that the TNMM is the more appropriate transfer pricing method to assess the remuneration to be paid under the License Agreement. However, as evidenced above, the party performing unique and valuable functions in this transaction is LuxOpCo, not LuxSCS. On that basis, the tested party for the application of the TNMM should be LuxSCS, not LuxOpCo, as further explained in Section 9.2.1.4.

9.2.1.4. The application of the TNMM to the present case

(543) As explained in Recital (255), the application of the TNMM requires, first, the selection of the tested party and, second, the choice of an appropriate profit level indicator that examines the profits to be generated on the basis of the functions performed by the tested party in the controlled transaction, taking into account the assets used and the risks assumed by it.

9.2.1.4.1. The tested party should be LuxSCS

(544) In the application of the TNMM, a "tested party" must be chosen based on the functional analysis performed (including assets used and risk assumed) by all parties to the intra-group transaction[677]. As a general rule, the tested party is the party to which the TNMM can be applied in the most reliable manner and for which the most reliable comparables can be found. This will most often be the party that performs the less complex functions[678]. The TNMM is considered as a well-suited method to test the arm's length remuneration of the party which does not make any unique or valuable contributions to the transaction subject to the transfer pricing analysis[679].

(545) For the transfer pricing arrangement endorsed by the contested tax ruling, LuxOpCo was selected as the tested party in the application of the TNMM. The TP Report justifies that choice by arguing that LuxOpCo performs the least complex functions in its relationship with LuxSCS on the grounds that, contrary to LuxSCS, it does not own valuable IP and does not incur meaningful business risks in the performance of its routine activities[680].

(546) That line of reasoning demonstrates confusion between the complexity of assets held and the complexity of functions performed by the parties to the intra-group transaction being priced. As explained in Recital (430), there is no basis for the assumption that an associated group company that licenses an intangible asset to

676 As explained in Recital (301), Luxembourg clarified in its comments to the Opening Decision that the contested tax ruling endorses a transfer pricing arrangement based on the TNMM. According to the Luxembourg tax administration, the acceptance of the TNMM as the appropriate transfer pricing method in this case reflected the functional analysis included in the transfer pricing report.

677 The choice of the tested party is only necessary when using the cost plus, resale minus or TNMM, see paragraph 3.18 of the 2010 and 2017 OECD TP Guidelines. This requirement is also to be found in paragraphs 2.38, 3.26 and 3.43 of the 1995 OECD TP Guideline.

678 See also paragraph 2.59 and 9.79 of the 2010 OECD TP Guidelines.

679 2010 OECD TP Guidelines, paragraph 2.59: "*A transactional net margin method is unlikely to be reliable if each party to a transaction makes valuable, unique contributions […] In such a case, a transactional profit split method will generally be the most appropriate method, […]. However, a one-sided method (traditional transaction method or transactional net margin method) may be applicable in cases where one of the parties makes all the unique contributions involved in the controlled transaction, while the other party does not make any unique contribution*". (emphasis added) See also 2017 OECD TP Guidelines, paragraph 2.65.

680 TP report, p. 30-31.

another group company performs more complex functions than that company merely because it legally owns a complex asset. For transfer pricing purposes, legal ownership of an intangible in itself does not confer any right to ultimately retain the returns derived from the exploitation of that intangible. The remuneration of a party to an intra-group transaction depends on the functions it performs, the assets it uses, and the risks it assumes, on the one hand, and on the contributions made by the other related parties to the transaction through their functions performed, assets used, and risks assumed, on the other[681]. As explained in Section 9.2.1.1.3, any risks that might have been contractually attributed to LuxSCS, which were in fact of a very limited nature due to the License Agreement, does not correspond to the actual conduct of the parties.

(547) In the present case, the Luxembourg tax administration should not have accepted Amazon's claim that the mere legal ownership of the Intangibles constitutes a "*unique contribution*[682] for which LuxSCS should receive a remuneration consisting of almost all profits derived from all LuxOpCo's business activities. Rather, it should have required a functional analysis demonstrating that LuxSCS performs unique and valuable functions in relation to that asset, which was entirely missing from the TP Report. While it is undisputed that LuxOpCo should not receive the exclusive and irrevocable right to use and sublicense the Intangibles without reimbursing LuxSCS for the costs the latter bears in relation to the Buy-In Agreement and the CSA, whether LuxSCS should be remunerated in excess of that amount depends on the functions performed by LuxSCS and LuxOpCo respectively in relation to the Intangibles.

(548) Although it was the legal owner of the Intangibles during the relevant period, the functional analysis undertaken in Section 9.2.1.1 demonstrates that LuxSCS performed no active and critical functions in relation to the development, enhancement, management, or exploitation thereof which would justify attributing to it almost all of the profit generated by LuxOpCo in the operation of Amazon's European retail and service business. LuxSCS merely held the Intangibles for the purpose of the European operations carried out through the EU websites (i.e. the business activities carried out by LuxOpCo). The functional analysis undertaken in Section 9.2.1.2 shows that all the effective legal rights related to the development, enhancement, management and exploitation of the Intangibles in the European territory had been exclusively and irrevocably granted to LuxOpCo for the entire lifetime thereof[683]. Moreover, it was LuxOpCo, with the support of the EU Local

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681 As explained in 2017 OECD TP Guidelines, paragraph 6.42: "*[...] For example, in the case of an internally developed intangible, if the legal owner performs no relevant functions, uses no relevant assets, and assumes no relevant risks, but acts solely as a title holding entity, the legal owner will not ultimately be entitled to any portion of the return derived by the MNE [multinational enterprise] group from the exploitation of the intangible other than arm's length compensation, if any, for holding title*".

682 Amazon's submission of 5 March 2015, par. 91, p. 30.

683 As provided in 2017 OECD TP Guidelines, paragraph 6.89: "*In transactions involving the transfer of intangibles or rights in intangibles, it is essential to identify with specificity the nature of the intangibles and rights in intangibles that are transferred between associated enterprises. Where limitations are imposed on the rights transferred, it is also essential to identify the nature of such limitations and the full extent of the rights transferred. It should be noted in this regard that the labels applied to transactions do not control the transfer pricing analysis. For example, in the case of transfer of the exclusive right to exploit a patent in Country X, the taxpayer's decision to characterise the transaction either as a sale of all of the Country X patent rights, or as a perpetual exclusive licence of a portion of the worldwide patent rights, does not affect the determination of the arm's length price if, in either*

Affiliates[684], that actually carried out all the relevant functions, used the relevant assets and assumed all relevant risks in relation not only to the exploitation of the Intangibles, but also to their development, enhancement, management and exploitation. LuxOpCo also performed headquarter functions and a range of unique and valuables functions relevant to the key values drivers of Amazon's business, namely selection, price and convenience. All this was apparent from the terms of the License Agreement, as well as from the functional analysis in the TP Report, which states that LuxSCS's only functions were the ones of a passive intangible holding company administering the intellectual property held by it[685].

(549) Notwithstanding that the ruling request and the TP Report explained that LuxSCS was expected to operate as an intangibles holding company and LuxOpCo was expected to act as the principal operator of the European operations[686], none of these functions were taken into account by the Luxembourg tax administration when it scrutinised that request and accepted the proposed transfer pricing arrangement. Rather, that administration relied on Amazon's unsubstantiated and inaccurate claim that LuxSCS would perform unique and valuable functions in relation to the Intangibles, whereas LuxOpCo would perform solely "routine" management functions incurring limited risks[687]. However, in light of the functional analyses undertaken in Sections 9.2.1.1 and 9.2.1.2, it is LuxSCS and not LuxOpCo that is the less complex entity. Consequently, LuxSCS should have been selected as the tested party for the application of the TNMM for the purposes of pricing the License Agreement.

9.2.1.4.2. The profit level indicator

(550) In applying the TNMM, the choice of profit level indicator must reflect the value of the functions performed by the tested party in the controlled transaction, taking into account the assets used and the risks assumed by it[688], be based on objective data, and be capable of being measured in a reasonably reliable and consistent manner. In applying the TNMM, the net profit is generally weighted to costs for manufacturing and service activities, to sales for sales activities, and to assets for asset-intensive

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case, the transaction being priced is a transfer of exclusive rights to exploit the patent in Country X over its remaining useful life. Thus, the functional analysis should identify the nature of the transferred rights in intangibles with specificity".

684 As explained in Recitals (189)-(192), the EU Local Affiliates are providing support services etc. to LuxOpCo and are remunerated for those services on a cost plus basis.

685 TP Report, p. 13.

686 TP Report, pp. 13 and 30.

687 The Commission observes that these shortcomings, observed in the TP report and endorsed by the contested tax ruling, were replicated in both the 2014 Study (see Recital (324)) and 2017 *ex post* TP report (see Recitals (386)-(387)). In the latter, LuxOpCo's functions have been presented as of a limited value and routine nature. Second, LuxOpCo is stated to carry limited risks. In relation to the assets, it is further explicitly stated in the 2017 *ex post* TP report that LuxOpCo "*does not own, manage or control any IP rights*". In this respect, the report openly ignores that LuxOpCo was granted an exclusive and irrevocable license to the Intangibles for their entire lifetime in the European market, and that LuxOpCo – in accordance with the rights granted to it under the License Agreement – in fact further develops, enhances, and manages the Intangibles on its own account and risks. As already demonstrated in the Section 9.2.1.2, this is an incorrect delineation and a manifest misrepresentation of LuxOpCo's functions, assets, and risks. See 2017 *ex post* TP report, p. 31-32.

688 See, in this context, paragraph 2.87 of the 2010 OECD TP Guidelines that state: "*The denominator should be focussed on the relevant indicator(s) of the value of the functions performed by the tested party in the transaction under review, taking account of its assets used and risks assumed*". See also the 2017 OECD TP Guidelines, paragraph 2.93.

activities[689]. Since LuxSCS does not record any sales, nor assume risks in relation to the Intangibles, the costs it incurs directly are the most reliable indicator of the value of the limited functions it performs (taking into account the assets used and risks assumed). The relevant profit level indicator in this case is therefore a mark-up on total relevant costs.

(551) As regards the determination of the appropriate cost base to which a mark-up should be applied in the present case, LuxSCS did not perform any value-adding functions in relation to the development, enhancement, management, or exploitation of the Intangibles, nor did it use any assets or assume any substantial risks in this respect. It merely fulfilled an intermediary function, passing on the Buy-In and CSA Costs to LuxOpCo and transferring a portion of the royalty payments (the License Fee) it receives from LuxOpCo under the License Agreement to A9 and ATI in the amount of those costs. Moreover, LuxSCS was only entitled to the benefits of the CSA because LuxOpCo performed the functions and assumed the risks assigned to LuxSCS under that agreement during the relevant period[690] by way of the License Agreement. Any remuneration of LuxSCS under the Licencing Agreement should therefore reflect that those contributions were provided by LuxOpCo[691].

(552) Despite what Amazon claims[692], the License Fee, as endorsed by the contested ruling, was not reduced corresponding to the functions of development, enhancement, management and exploitation of the Intangibles carried out by LuxOpCo[693]. Paragraph 3.1 of the License Agreement, which arranges for LuxOpCo

689 Paper on Transfer Pricing Methods prepared by the OECD Secretariat in July 2010, paragraph 17.

690 As provided in the 1995 OECD TP Guidelines, paragraph 8.8: "*What distinguishes contributions to a CCA [CSA] from an ordinary intra-group transfer of property or services is that part or all of the compensation intended by the participants is the expected benefits to each from the pooling of resources and skills. Independent enterprises do enter into arrangements to share costs and risks when there is a common need from which the enterprises can mutually benefit. For instance, independent parties at arm's length might want to share risks (e.g. of high technology research) to minimise the loss potential from an activity, or they might engage in a sharing of costs or in joint development in order to achieve savings, perhaps from economies of scale, or to improve efficiency and productivity, perhaps from the combination of different individual strengths and spheres of expertise*". See also 2010 OECD TP Guidelines, paragraph 8.8 and 2017 OECD TP Guidelines, paragraph 8.12.

691 Amazon claims in its submissions of 28 October 2015, "Role of European Entities", p.2 and "Meeting with the Case Team", p. 4 that LuxSCS maintains and develops the Intangibles though making "*significant investments*". However, as explained in Section 9.2.1.1, LuxSCS does not in fact perform any value-adding functions in relation to the development of the Intangibles. By its reference to the CSA, Amazon appears to suggest that the development activities carried out in the US by A9 and ATI should be considered as functions of LuxSCS relevant for the assessment of the contested transaction. However, as explained in Recital (427), the functions carried out by A9 and ATI are carried out by these companies on their own behalf, and as evidenced by the CSA Annual Reports, LuxSCS itself does not contribute to the development under the CSA. Had it performed any of the functions assigned to it in the CSA, this would have been reflected in the cost pool. Accordingly, A9 and ATI receive remuneration for their functions in relation to the Intangibles through the Development Costs.

692 See Recital (206).

693 As explained in point 6.18 of the 1995 and 2010 OECD TP Guidelines: "*It also is important to take into account the value of services such as technical assistance and training of employees that the developer may render in connection with the transfer. Similarly, benefits provided by the licensee to the licensor by way of improvements to products or processes may need to be taken into account.*" See also 2017 OECD TP Guidelines, paragraph 6.75:*"The principles set out in this Section B must be applied in a variety of situations involving the development, enhancement, maintenance, protection, and exploitation of intangibles. A key consideration in each case is that associated enterprises that contribute to the development, enhancement, maintenance, protection, or exploitation of intangibles legally owned by*

to provide corporate services to LuxSCS, explicitly stipulates in this regard that "*the parties agree that the License Fee set forth in exhibit A shall be the sole consideration for the licenses granted and services provided under this Agreement*"[694]. In fact, LuxSCS incurred no direct or indirect costs related to the Intangibles, with the exception of some limited costs related to the administration of its legal ownership of the Intangibles.

(553) Accordingly, the Buy-In and CSA Costs should be excluded from the cost base as pass through costs, i.e. no mark-up should be applied on those costs when determining LuxSCS's arm's length remuneration under the License Agreement. Since LuxSCS does not carry out any functions, use any assets or assume any risks in relation to the development, enhancement, management, and exploitation of the Intangibles, an independent party would not be expected to pay LuxSCS a mark-up on those costs[695]. Similarly, the costs related to the intercompany sale of inventory in 2006 should be excluded from the cost base as this seems to be a one-off cost that does not relate to the provision of the Intangibles but to the restructuring of the European operations, where LuxSCS was re-organising the activities of its subsidiaries. That can be qualified as a shareholder activity and should not be subject to any mark-up[696].

(554) As regards the functions performed by LuxSCS during the relevant period, the general administrative services described in Recital (429) were acquired externally and did not entail any substantial risks. Those services can be delineated with reference to the costs directly incurred due to them.[697] Those costs related to the share of the Luxembourg costs allocated to LuxSCS for the administration of its legal ownership of the Intangibles, such as certain costs for maintaining that legal ownership. Although no evidence was provided showing that LuxSCS actually took any active and critical decisions in relation to the protection of the Intangibles in Europe, the responsibility for which was in fact transferred to LuxOpCo, the Commission can nevertheless accept that those costs are included in the cost base for the application of the TNMM, so long as they represent actual functions carried out by LuxSCS. Those costs would then appear to relate to then maintenance of LuxSCS's legal ownership of the Intangibles in Europe.

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another member of the group must receive arm's length compensation for the functions they perform, the risks they assume, and the assets they use. […]".

694 As explained in Section 2.5 above, both Luxembourg tax law and the OECD framework clarify that any intra-group service carried out by LuxOpCo should not only allow LuxOpCo to recharge its costs to LuxSCS but also to receive an arm's length remuneration in addition to those costs incurred.

695 In the application of the TNMM with LuxSCS as the tested party guidance can be found in point 7.36 of the 1995 and 2010 OECD TP Guidelines, which specifies that "*[W]hen an associated enterprise is acting only as an agent or intermediary in the provision of services, it is important in applying the cost-plus method that the return or mark-up is appropriate for the performance of the services themselves. In such a case, it may not be appropriate to determine arm's length pricing as a mark-up on the cost of the services but rather on the costs of the agency function itself […] For example, an associated enterprise may incur the costs of renting an advertising space on behalf of group members, costs that the group members would have incurred directly had they been independent. In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function.*" See also 2017 OECD TP Guidelines, paragraph 7.34. See also Recitals (242) and (263).

696 See Recital (264).

697 See Recital (429).

(555) Consequently, in addition to the re-charge of the pass through costs it bore in relation to the Buy-In Agreement and the CSA (i.e. the Buy-In and CSA Costs), LuxSCS should be remunerated with a mark-up on a cost-base consisting solely of the costs incurred for the external services acquired to maintain its legal ownership of the Intangibles, as described in Recital (429), to the extent that those costs actually represents actual functions carried out by LuxSCS. That level of remuneration ensures an outcome in line with the arm's length principle since it appropriately reflects LuxSCS's contributions to the License Agreement.

9.2.1.4.3. The determination of an appropriate mark-up

(556) Determining an appropriate mark-up to apply to the selected profit level indicator normally requires a comparability analysis. Such an analysis entails a comparison of the controlled transaction with a comparable uncontrolled transaction or transactions. Transactions are considered comparable if none of the differences between them could materially affect the factor being examined in the methodology (e.g. price or margin), or if reasonably accurate adjustments can be made to eliminate the material effects of any such differences[698].

(557) In the present case, it is not possible to perform a reliable comparability analysis. The comparables provided in the TP Report are not relevant in this respect, since those relate to companies which were active in data processing, database activities, other computer related activities, market research and public opinion polling, business and management consultancy activities and advertising, and none of those services are performed by LuxSCS. To perform a reliable comparability analysis in the present case, relevant uncontrolled comparables providing services similar to the general administrative services provided by LuxSCS under the License Agreement would need to be identified. However, a sub-license agreement comparable to the License Agreement is hard to conceive between independent parties. That would require the identification of independent companies that acquired an asset and undertook to perform certain functions and assume certain associated risks in relation to the entity from which it acquired the asset, transferred those functions and risks to another independent company, and was left with limited administrative functions to protect its ownership interest in the IP license. For the transactions to be comparable, the independent companies would also have to carry out their businesses under similar economic circumstances and with business strategies similar to that pursued by the parties to the License Agreement[699]. Finally, an adjustment would have to be made to any comparables included in a transfer pricing analysis to exclude pass-through costs incurred by those comparables from the cost base to which the mark-up should not be applied[700]. Such comparables simply do not exist. It is therefore not possible to conduct a comparability analysis in the present case without making significant and potentially random adjustments which would alter the reliability of that analysis. Consequently, the Commission has refrained from performing a comparability

698 1995, 2010 and 2017 OECD TP Guidelines, Glossary.

699 See Recital (522) and footnote 652.

700 2017 OECD TP guidelines, paragraph 2.100: *"Where treating costs as pass-through costs is found to be arm's length, a second question arises as to the consequences on comparability and on the determination of the arm's length range. Because it is necessary to compare like with like, if pass-through costs are excluded from the denominator of the taxpayer's net profit indicator, comparable costs should also be excluded from the denominator of the comparable net profit indicator. Comparability issues may arise in practice where limited information is available on the breakdown of the costs of the comparables".*

analysis for the purposes of determining the level of a mark-up applicable to the functions actually performed by LuxSCS.

(558) Instead, the Commission relies on the conclusion in the 2010 JTPF Report according to which a mark-up for low-added intra-group services in the range of 3 % to 10 % was observed by the national tax administrations of the Member States participating in the JTPF. According to that Report, the mark-up most often observed in practice was 5 % on the costs of providing such services. As explained in Recital (258), where an arm's length range is deemed to comprise of equally reliable results, it is appropriate to use a measure of "central tendency", such as the median, to select the most appropriate point in the range[701]. The Commission therefore considers it appropriate to apply a mark-up of 5 % to the external costs incurred by LuxSCS for the maintenance of its legal ownership of the Intangibles, as described in Recital (429). In that way, an arm's length remuneration for LuxSCS's performance of services under the License Agreement is determined, so long as those costs actually reflect actual functions that were carried out by LuxSCS.

9.2.1.5. Conclusion on the primary finding of an economic advantage

(559) In light of the foregoing analysis, an arm's length remuneration for LuxSCS under the License Agreement (i.e. the License Fee) equals the sum of Buy-In and CSA Costs incurred by LuxSCS in relation to the Intangibles, without a mark-up, plus any relevant costs incurred directly by LuxSCS as described in Recital (429) to which a mark-up of 5 % should be applied to the extent that those costs may be considered to reflect actual functions performed by LuxSCS.

(560) That level of remuneration fits the economic reality of the controlled transaction as properly remunerating the functions performed by the parties thereto, taking into account the assets used and the risks assumed by them. It reflects what an independent party in a position similar to that of LuxOpCo would be willing to pay for the rights and obligations assumed by it under the License Agreement. That level of remuneration provides LuxSCS with sufficient means to cover its payment obligations under the Buy-In Agreement and the CSA and the costs it incurs in the performance of its administrative functions (if any) over any given period. LuxSCS would be ensured that remuneration in full on an annual basis, independently of LuxOpCo's business results (including periods in which LuxOpCo is loss-making). Such a level of remuneration appropriately reflects the fact that LuxOpCo develops, enhances, manages, and exploits the Intangibles in relation to Amazon's European retail and service business, takes all relevant strategic decisions in relation to that business, and assumes and controls the relevant risks in this respect, while LuxSCS does not perform any value adding functions in relation to the Intangibles or that business.

(561) Considering that this level of remuneration is lower than the level of remuneration for LuxSCS resulting from the transfer pricing arrangement endorsed by the contested tax ruling, according to which it was attributed the entire residual profit generated by LuxOpCo in excess of a routine remuneration for allegedly routine functions, the Commission concludes that the contested tax ruling conferred an economic advantage on LuxOpCo in the form of a reduction of its taxable base for Luxembourg corporate income tax purposes as compared to the income of companies whose taxable profit reflects prices negotiated at arm's length on the market.

[701] See Recital (258).

9.2.2. Subsidiary finding of an economic advantage

(562) Without prejudice to the assessment in Section 9.2.1, the Commission considers, by way of a subsidiary line of reasoning, that even if Luxembourg were right to have accepted the unsubstantiated and inaccurate assumption that LuxSCS performed unique and valuable functions in relation to the Intangibles, which the Commission contests, the transfer pricing arrangement endorsed by the contested tax ruling still confers an economic advantage on LuxOpCo, since it is based on inappropriate choices leading to a reduction of that company's taxable income.

(563) More specifically, the Commission identified the following inappropriate methodological choices underpinning the contested tax ruling that result in a taxable income for LuxOpCo that departs from a reliable approximation of a market-based outcome in line with the arm's length principle: (i) LuxOpCo was inaccurately considered to perform only "routine" functions, as a result of which the whole of the residual profit was attributed to LuxSCS; (ii) the profit level indicator selected for the purposes of the transfer pricing arrangement endorsed by the contested tax ruling should have been based on total costs not operating expenses; and (iii) there is no economic justification for the inclusion of a ceiling in that transfer pricing arrangement. Each of those inappropriate methodological choices independently lead to the conclusion that the transfer pricing arrangement endorsed by the contested tax ruling produces a result that departs from a reliable approximation of an arm's length outcome.

(564) The purpose of the assessment undertaken in this Section is not to determine a precise arm's length remuneration for LuxOpCo. For the reasons set out in Section 9.2.1, the Commission considers that the Luxembourg tax administration should not have accepted a transfer pricing arrangement based on the unsubstantiated and inaccurate assumption that LuxSCS performed unique and valuable functions in relation to the Intangibles. Rather, the purpose of this assessment is to demonstrate that, even if that administration were right to have accepted that assumption, which the Commission contests, the contested tax ruling still confers an economic advantage on LuxOpCo since the transfer pricing arrangement it endorses is based on the three aforementioned inappropriate methodological choices which result in a lowering of LuxOpCo's taxable income as compared to companies whose taxable profit reflects prices negotiated at arm's length on the market.

9.2.2.1. LuxOpCo was incorrectly considered to perform solely "routine" management functions

(565) As explained in Section 9.2.1.2, far from performing solely "routine" management functions, LuxOpCo performed a range of unique and valuable functions in relation to the Intangibles and Amazon's European business operations during the relevant period.

(566) Nevertheless, even if the Luxembourg tax administration were right to accept the unsubstantiated and inaccurate assumption that LuxSCS performed unique and valuable functions in relation to the Intangibles, the fact that LuxOpCo also performed such functions means that it was inappropriate to endorse a transfer pricing arrangement according to which the entire residual profit generated by LuxOpCo in excess of [4-6] % of its operating expenses was attributed to LuxSCS.

(567) As explained in Recital (256), where both parties to the intra-group transaction make unique and valuable contributions to that transaction, the profit split method is usually considered a more appropriate transfer pricing method because in such a case independent parties would be expected to share the profits of the transaction in proportion to their respective contributions. As further explained in that Recital, the OECD TP Guidelines describe two approaches to divide the combined profits among the associated companies: the contribution analysis and the residual analysis. Where both parties perform unique and valuable contributions and there are no less complex transactions that need to be priced separately, it is more appropriate to apply the contribution analysis for the attribution of combined profits; a residual analysis is appropriate if some less complex transactions exist[702]. In the contribution analysis, the combined profits are split on the basis of the relative value of the functions performed (taking account assets used and risks assumed) by each of the parties involved in the intra-group transaction being priced. Accordingly, in this case, where both LuxSCS and LuxOpCo are considered to perform unique and valuable functions in relation to the Intangibles, this method is preferred over the residual analysis, where one party is also remunerated for its routine functions in addition to the remuneration it receives for its unique and valuable contributions to the transaction..

(568) The application of the contribution analysis to the present case would have led to a remuneration for LuxOpCo corresponding to all the functions it performs (as set out in Sections 9.2.1.2.1 and 9.2.1.2.2), the assets used by it (as set out in Sections 9.2.1.2.3) and the risk assumed by it (as set out in Sections 9.2.1.2.4), which would have been greater than the remuneration resulting from the transfer pricing arrangement endorsed by the contested tax ruling, since that arrangement was based on the incorrect assumption that LuxOpCo performs solely "routine" management functions**.** Consequently, by endorsing that transfer pricing arrangement, the contested tax ruling confers an economic advantage on LuxOpCo, since it results in a lowering of LuxOpCo's taxable income as compared to companies whose taxable profit reflects prices negotiated by contrast at arm's length on the market.

9.2.2.2. Inappropriate choice of operating expenses as profit level indicator

(569) Even if the Luxembourg tax administration were right to accept the unsubstantiated and inaccurate assumption that LuxSCS performed unique and valuable functions in relation to the Intangibles, and even if it were subsequently right to accept that LuxOpCo performed solely "routine" management functions, the Commission considers the choice of a profit level indicator based on operating costs in the transfer pricing arrangement endorsed by the contested tax ruling to be inappropriate.

(570) As explained in Recital (550), the choice of profit level indicator in the application of the TNMM must reflect the value of the functions performed by the tested party in the controlled transaction, taking into account the assets used and the risks assumed by it, it must be based on objective data, and it must be capable of being measured in a reasonably reliable and consistent manner.

(571) While the contested tax ruling endorsed a transfer pricing arrangement with a mark-up on operating expenses as profit level indicator, as proposed in Amazon's letter of 23 October 2003, the TP Report in fact determined a mark-up on total costs as the profit level indicator for the independent companies considered as comparables for the application of the residual profit split method. Asked to explain this apparent

[702] See 2010 OECD TP Guidelines, paragraph 2.1.2.1.

inconsistency, as well as another inconsistency in the TP Report where the results of the comparables search were presented as a percentage of sales rather than as a percentage of total costs[703], Amazon confirmed that the comparables analysis indeed resulted in a mark-up as a percentage of total costs, rather than in a mark-up as a percentage of sales or operating expenses. Amazon argued that, regardless of this inconsistency, the result is substantially the same, since the companies used as comparables do not report substantial COGS and operating expenses are the main component of their total costs[704].

(572) That argument is at odds with the TP Report's choice of comparables in the first place, since LuxOpCo does report substantial COGS. In fact, it is inherent to the business model of LuxOpCo as retailer that COGS constitute the largest component of total costs of the company[705]. Therefore, selecting companies which, contrary to LuxOpCo, do not report substantial COGS, would indicate an inappropriate choice of comparable companies, since they lacked some of the characteristics inherent to LuxOpCo's functional profile. In any event, several companies selected for the comparables analysis in the TP Report do, in fact, report significant COGS[706].

(573) Since total costs is a broader base than operating expense, if the outcome of the comparables search in the TP Report had been applied to LuxOpCo's total costs and not its operating expenses, its resulting annual taxable income would have been higher than the remuneration agreed in the contested tax ruling. This is because operating expenses exclude the costs related to raw materials and COGS and COGS are the main variable component of LuxOpCo's costs. The difference is demonstrated in Table 20.

Table 20 – Comparison of LuxOpCo's profit determined based on the contested tax ruling and calculated similarly to the profit level indicator used for comparable entities in the transfer pricing report

in EUR million	2006	2007	2008	2009	2010	2011	2012	2013	Total
Profit attributed to LuxOpCo according to the contested	11	20	22	27	36	55	73	[80-90]	[300-400]
Profit of LuxOpCo at [4-6]% of total costs (no ceiling/foor)	84	147	177	228	315	429	573	[600-700]	[2500-3000]

(574) According to the comparables search in the TP Report, a mark-up on total costs would produce a remuneration for LuxOpCo in line with the arm's length principle. Consequently, by endorsing a transfer pricing arrangement based on a mark-up on operating expense, the contested tax ruling confers an economic advantage on LuxOpCo by inappropriately lowering its annual taxable income.

9.2.2.3. Inappropriate inclusion of a ceiling in the transfer pricing arrangement

(575) The Commission also considers the transfer pricing arrangement's inclusion of a ceiling to determine LuxOpCo's taxable base to produce an outcome that departs from a reliable approximation of a market-based outcome. More specifically, according to that arrangement, LuxOpCo's arm's length remuneration cannot exceed 0.55 % of its annual sales. As a matter of fact, in financial years 2006, 2007, 2011,

703 See Recital (148).

704 See Recital (353).

705 See Table 3: LuxOpCo's profit & loss 2006-2013, which demonstrates that COGS consistently represent around [70-75]% of LuxOpCo's total costs.

706 TP Report, appendix V.

2012 and 2013, the Luxembourg tax administration effectively accepted tax declarations by LuxOpCo in which its taxable income was determined by the ceiling of 0.55 % of its annual sales, instead of being determined as [4-6]% of its operating expenses.

(576) The Commission observes, first and foremost, that the inclusion of that ceiling is not justified in the TP Report. Nor do any of the *ex post* transfer pricing studies submitted by Amazon in the course of the investigation justify that inclusion from a transfer pricing perspective.

(577) Luxembourg and Amazon argue that the ceiling is necessary to encourage LuxOpCo to manage its operations in a cost-efficient manner[707]. They further argue that the application of the ceiling never resulted in LuxOpCo's taxable income being outside the arm's length range[708]. The Commission cannot accept either argument. Apart from the fact that the ceiling has never been determined on the basis of any comparability analysis, the erroneous application of the mark-up to the operating costs, instead of the total costs, led to an unjustified reduction of LuxOpCo's taxable basis. Its further reduction in the years 2006, 2007, 2011, 2012 and 2013 therefore cannot lie within the range of arm's length results.

(578) Consequently, the inclusion of a ceiling in the transfer pricing arrangement endorsed by the contested tax ruling confers an economic advantage on LuxOpCo since it produces an outcome that departs from a reliable approximation of an arm's length outcome and results in a lowering of its taxable income.

9.2.2.4. Conclusion on the subsidiary finding of an economic advantage

(579) The presence of the aforementioned methodological inconsistencies underlying the contested tax ruling means that, even if the Luxembourg tax administration were right to accept the unsubstantiated and inaccurate assumption that LuxSCS performed unique and valuable functions in relation to the Intangibles, that ruling nevertheless confers an economic advantage in LuxOpCo since it produces an outcome that departs from a reliable approximation of a market-based outcome which results in a lowering of LuxOpCo's taxable income and thus its corporate income tax liability in Luxembourg as compared to companies whose taxable profit reflects prices negotiated at arm's length on the market.

9.3. Selectivity

(580) According to settled case-law, "*the assessment of [the condition of selectivity] requires a determination whether, under a particular legal regime, a national*

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[707] Luxembourg and Amazon further argued that the introduction of the floor was meant to protect LuxOpCo, as comparable companies were loss-making in 2003 and the floor mechanism guaranteed a positive remuneration. Apart from the fact that the floor was never relevant (but only the ceiling) and the necessity of a floor has little ado with the necessity of a ceiling, the argument is in any event not very convincing. In fact, the method to establish the royalty (i.e. LuxOpCo Return) stipulates that in case LuxOpCo's Return is less than 0.45% of EU sales, the LuxOpCo Return should be adjusted to equal the lesser of 0.45% of Revenue or EU Operating Profit. Thus, in the event of positive turnover but where LuxOpCo incurs losses, i.e. EU Operating Profit is negative, the application of the mechanism referred to by Amazon and Luxembourg as "floor" leads to the choice of the lower value, which would in this case be the negative EU Operating Profit. Therefore, LuxOpCo is not protected against losses by means of royalty pricing mechanism contained in the contested ruling. In fact, as the royalty, i.e. the remuneration for LuxSCS shall according to the method to establish the royalty never be less than zero, it would thus be zero, while potential losses would be absorbed by LuxOpCo.

[708] See Recitals (304) and (354).

measure is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory."[709].

(581) A distinction is made between the conditions of advantage and selectivity to ensure that not all State measures that confer an advantage (i.e. that improve an undertaking's net financial position) constitute State aid, but only those which grant such an advantage in a selective manner to certain undertakings or certain categories of undertakings or to certain economic sectors. What this means is that measures of purely general application – which confer an advantage, but which do not favour certain undertakings only or the production of certain goods – do not constitute State aid, since they are not selective in nature[710]. Therefore, a key aspect to assess selectivity is to determine whether the measure in question is of general application or, on the contrary, applies only to certain undertakings or certain sectors of the economy in a given Member State.

(582) In this context, the Court of Justice has made a distinction between individual aid measures and aid schemes and has indicated that the selectivity requirement differs depending on which category a measure falls into. According to the Court, "*the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.*"[711] In other words, the identification of a group of undertakings or certain sectors of the economy in a given Member State which benefit from the measure in question to the exclusion of economic operators in a similar factual and legal situation is relevant within the context of the assessment of the selectivity of schemes which can, at least potentially, be of a general application. By contrast, in the case of individual aid measures, which are addressed to only one undertaking in view of its specific circumstances, such an analysis is not necessary.

9.3.1. Primary finding of selectivity

(583) The contested tax ruling is an individual measure. It is addressed only to Amazon.com Inc., it concerns only the tax situation of LuxOpCo and LuxSCS, it can be used only by LuxOpCo to assess its yearly taxable income and its corporate income tax liability in Luxembourg, and any reduction of its tax revenue is based individually on that company's results.

(584) Given that the contested tax ruling is an individual measure, the Commission may presume that it is selective in nature, since it has demonstrated in Section 9.2 that it

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709 Joined Cases C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 54 and the case-law cited.

710 Case C-20/15 P *Commission v World Duty Free Group* EU:C:2016:981, paragraph 56 and Case C-6/12 *P Oy* EU:C:2013:525, paragraph 18.

711 Case C-15/14 P *Commission v. MOL* EU:C:2015:362, paragraph 60. See also Joined C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 55; Case C-211/15 P *Orange v. Commission* EU:C:2016:798, paragraph 53 and 54; and Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49.

confers an advantage on LuxOpCo by endorsing a transfer pricing arrangement producing an outcome that departs from a reliable approximation of a market-based outcome which results in a lowering of LuxOpCo's taxable base and thus its corporate income tax liability in Luxembourg.

9.3.2. Subsidiary findings of selectivity

(585) Although the Commission may presume the selectivity of the contested tax ruling on the basis that it is an individual measure that confers an advantage on LuxOpCo, it has also examined, for the sake of completeness, whether that ruling is selective under the three-step analysis devised by the Court of Justice for aid schemes[712].

(586) In order to classify a national tax measure as selective under that analysis, the Commission must begin by identifying the ordinary or normal tax system applicable in the Member State concerned (the "reference system") and thereafter demonstrate that the tax measure at issue is a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation.[713] A tax measure which constitutes a derogation to the application of the reference system may nevertheless be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system[714]. If that is the case, the tax measure is not selective. The burden of proof in that last step lies with the Member State.

9.3.2.1. Favourable treatment as compared to all corporate taxpayers

(587) The contested tax ruling was granted to Amazon in order to allow its Luxembourg subsidiary, LuxOpCo, to assess its annual taxable profit for the purposes of determining its corporate income tax liability under the ordinary rules of taxation of corporate profit in Luxembourg. The Commission therefore considers the reference system in the present case to be composed of those rules, i.e. the general Luxembourg corporate income tax system. It is thus against that system that it must be determined whether that ruling constitutes a derogation giving rise to a favourable treatment compared to other undertakings in a comparable factual and legal situation.

(588) According to the case-law, whether undertakings are in a comparable factual and legal situation for the purposes of the selectivity analysis depends on the objective of the reference system[715]. The objective of the general Luxembourg corporate income tax system is the taxation of all profit that is subject to tax in Luxembourg. Under the general Luxembourg corporate income tax system, all resident corporate taxpayers are taxed on their worldwide profits,[716] while non-resident taxpayers are taxed on their Luxembourg source income. For the determination of the taxable profit under that system, the profits as set out in the commercial accounts of the taxpayer are used as a reference, subject to adjustments and allowances imposed by Luxembourg tax

712 Joined Cases C-78/08 to C-80/08 *Paint Graphos*, EU:C:2009:417.

713 Joined C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, paragraph 57 and the case-law cited.

714 Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2009:417, paragraph 65.

715 Joined Cases C-106/09 P and C-107/09 P, *Commission v Government of Gibraltar and United Kingdom*, EU:C:2011:732, paragraph 75. See also Joined Cases C-20/15 P and C-21/15 P *Commission v. World Duty Free Group* EU:C:2016:981, paragraph 54.

716 See Recital (240).

law. Finally, under that system, the taxable profit of all resident taxpayers and all non-resident taxpayers is subject to the same tax rates.[717]

(589) In the light of that objective, all corporate taxpayers, whether they operate independently on the market or form part of a multinational corporate group, are in a comparable factual and legal situation when it comes to assessing their corporate income tax liability in Luxembourg. Indeed, the Luxembourg tax code lists the entities in Luxembourg that are subject to corporate income tax and it includes "*toute entité économique pouvant être soumise directement à l'impôt sur le revenu des collectivités*". Neither the legal form of the undertaking nor its structure constitute a determinant criterion for the imposition of corporate income tax in Luxembourg. In general, Luxembourg corporate income tax is levied on the basis of the separate entity approach, i.e. on the level of the individual entities, not on the level of the group, and the contested tax ruling relates only to the taxable profit of LuxOpCo, so that any reduced tax revenue is based individually on that company's results. While it is true that Luxembourg tax law contains certain special provisions applicable to groups (e.g. the rules on fiscal unity as applied by LuxOpCo, ASE and AMEU[718]), these are aimed at putting on equal footing non-integrated companies and integrated companies rather than at treating groups more favourably[719]. Consequently, if it can be established that the tax treatment afforded to LuxOpCo as a result of the contested tax ruling confers a favourable treatment on that taxpayer that is unavailable to other corporate taxpayers, it can be concluded that the contested tax ruling derogates from that system.

(590) Luxembourg and Amazon argue that, in order to determine whether LuxOpCo has been selectively favoured as a result of the contested tax ruling, its fiscal treatment by the Luxembourg tax administration should be compared only to other Luxembourg corporate taxpayers forming part of a multinational corporate group. They argue that the contested tax ruling concerns transfer pricing and, since only multinational corporate groups are confronted with pricing cross-border intra-group transactions, companies belonging to such groups are in a different factual and legal situation to independent companies. With that argument, Luxembourg and Amazon advocate for a reference system limited to Article 164(3) LIR, the provision of Luxembourg tax law that was considered to lay down the arm's length principle for the purposes of pricing cross-border intra-group transactions during the relevant period.

(591) The Commission does not agree that the reference system should be so limited in the present case.

(592) First, companies belonging to a multinational corporate group do not need to resort to transfer pricing to assess their taxable income in all instances. Where a group company transacts with non-associated companies (either independent standalone companies or companies forming part of another multinational corporate group) its

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[717] See Recital (240). For example, interest expenses on assets generating tax-exempt income or directors' fees, which are not for the day-to-day running of the company.

[718] Article 164bis/LIR. See also Footnote 54. The tax consolidation of a fiscal unity assimilates the group of companies to a single (non-integrated) taxpayer.

[719] Tax consolidation assimilates a group of companies to a single taxpayer. It is a means to eliminate the disadvantages that groups of companies experience compared to single companies with respect to income taxation. Consolidation is not an aid measure if, once consolidated, a group of companies is not treated more favourably than a single company.

profit from those transactions reflects prices negotiated at arm's length on the market, just like for independent companies transacting between themselves. It is only in those instances where a group company transacts with associated companies that it must estimate the prices it charges for those intra-group transactions. However, the fact that a group company might resort to transacting with associated companies and, in those situations where it does, it must resort to transfer pricing does not mean that group companies are in a different factual and legal situation to other taxpayers for corporate income tax purposes in Luxembourg.

(593) Second, profit derived from transactions concluded between unrelated companies and profit derived from intra-group transactions between related companies are taxed in the same way and under the same corporate income tax rate in Luxembourg. The fact that profit has been generated from an intra-group transaction that is subject to Article 164(3) LIR does not mean it is subject to special exemptions or a different tax rate. Consequently, the different manner in which the taxable profit is necessarily arrived at in the case of controlled and uncontrolled transactions has no bearing for the determination of the reference system in the present case. Since the profit of all corporate taxpayers is taxed in the same manner under the Luxembourg corporate income tax system, without any distinction as to its origin, all corporate taxpayers should be considered to be in a similar factual and legal situation.

(594) Third, all corporate taxpayers, whether they operate independently on the market or form part of a multinational corporate group, are taxed on the same taxable event – the generation of profit – and at the same tax rates under the Luxembourg corporate income tax system. By limiting the reference system only to companies forming part of a multinational corporate group, an artificial distinction is introduced between integrated companies and standalone companies based on their company structure which the Luxembourg corporate income tax system does, in general, not take into account when taxing the profits of companies falling within its tax jurisdiction.

(595) Fourth, by virtue of Article 164(3) LIR, profit derived from intra-group transactions is in fact determined in exactly the same manner as income derived from transactions between unrelated companies: while the latter depend on prices negotiated on the market, the former depend on market conform prices, so that in both instances the profit being taxed is ultimately determined (directly or indirectly) by the market. Seen in this light, Article 164(3) LIR is merely the means to ensure that group companies behave for tax purposes in the same manner as independent companies in similar circumstances when it comes to setting prices, terms and conditions of intra-group transactions, so that the portion of their taxable profit resulting from those transactions can be taxed in the same manner and at the same corporate income tax rate under the ordinary rules of taxation of corporate profits. The purpose of Article 164(3) LIR is therefore to align the tax treatment of transactions concluded between associated group companies with the tax treatment of transactions concluded between independent companies, so that the former are treated no more favourably than the latter under the Luxembourg corporate income tax system.

(596) Fifth, accepting the argument that the reference system should be limited to companies belonging to a multinational corporate group simply because Article 164(3) LIR only applies to those companies would open the door to Member States to adopt fiscal measures that blatantly favour multinationals over independent companies. Companies belonging to a multinational corporate group can and do engage in the same activities as independent companies and those two types of

companies can and do compete with one another. Since both types of companies are taxed on their total taxable profit at the same corporate income tax rate under the general Luxembourg corporate income tax system, any measure allowing the former to reduce its taxable base upon which that tax rate is applied grants it a favourable tax treatment in the form of a reduction of its corporate income tax liability as compared to the latter, which in turn distorts competition and affects intra-EU trade.

(597) Finally, the Commission does not agree with Luxembourg and Amazon that in previous decisions the Commission confirmed that the reference system must be limited to integrated companies only. At the outset, the Commission recalls that it is not bound by its decisional-practice and that each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the Treaty, so that even if a contrary decisional practice were shown to exist, that could not affect the findings of the present decision[720]. In any event, in those decisions the national tax schemes giving rise to aid were set up in a way that those schemes already differentiated between different categories of integrated companies[721]. To establish that those schemes were selective, it was simply not necessary to compare the treatment of the beneficiaries with the treatment of independent standalone companies. That does not mean, however, that those schemes were not also selective from that perspective.

(598) Amazon also argued that to demonstrate selectivity in the present case, the Commission must compare the treatment of LuxOpCo as a result of the contested tax ruling against the tax ruling practice of the Luxembourg tax administration, in general, and the 97 rulings it identified that allegedly endorse the profit split method, in particular[722]. The Commission disagrees with that argument since it would mean that the reference system is that practice, limited to a subcategory of rulings, and not the provisions of Luxembourg's national tax legislation. If that argument were accepted, it would allow a Member State's tax administration to consistently deviate from its national tax legislation so as to give a consistently favourable tax treatment to a specific category of taxpayers, namely those that have requested and obtained the type of ruling in question[723]. In any event, the Commission observes that none of the 97 rulings to which Amazon refers actually mention the profit split method or the TNMM as a transfer pricing method endorsed by the relevant tax ruling. Of the 97 rulings referred to by Amazon, 78 concerned the tax treatment of profit participating

720 C-138/09 *Todaro Nunziatina & C.* EU:C:2010:291, paragraph 21.

721 For instance, in Commission decision of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) - Coordination Centres - implemented by Luxembourg, OJ L 170, 9.7.2003, p. 20, paragraph 53, the tax benefit could only be obtained by a "*coordination centre that is a resident limited company which is multinational in nature and has as its sole purpose the provision of services exclusively to companies or enterprises in the same foreign international group*." Similarly, in Commission decision of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1, paragraph 66: "*the benefit of the scheme is limited exclusively to headquarters and logistics centres which provide their services predominantly to associated companies situated outside France*." Finally, in Commission decision of 24 June 2003 on the aid scheme implemented by Belgium - Tax ruling system for United States foreign sales corporations, OJ L 23, 28.1.2004, p. 14 paragraph 57: "*the ruling system for the Belgian activities of FSCs constitutes a specific scheme applicable exclusively to FSC branches and subsidiaries*".

722 Amazon's submission of 5 March 2015, Annex 2.

723 The Commission has already found such a practice to give rise to State aid in Commission Decision C(2015) 9837 final of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, 27.9.2016, p. 61).

loans and 6 of income sharing loans, both of which are financial hybrid instruments. On that basis, the Commission considers that none of the 97 tax rulings referred to by Amazon can be compared to the contested tax ruling.

(599) In light of the foregoing, the Commission concludes that the applicable reference system is the general Luxembourg corporate income tax system and not Article 164(3) LIR. As demonstrated in Section 9.2, the contested tax ruling endorses a transfer pricing arrangement producing a taxable profit for LuxOpCo that departs from a reliable approximation of a market-based outcome in line with the arm's length principle which lowers its taxable base for corporate income tax purposes. By contrast, independent companies, companies belonging to a multinational corporate group that transact exclusively with unrelated parties, and companies belonging to a multinational corporate group that employ arm's length transfer prices in their intra-group transactions are all taxed on a level of profit in Luxembourg that, as a starting point, reflects prices negotiated at arm's length on the market. The contested tax ruling can thus be said to derogate from the general Luxembourg corporate income tax system in that it grants a favourable tax treatment to LuxOpCo that is unavailable to other corporate taxpayers in Luxembourg whose taxable profit reflects prices negotiated at arm's length on the market. That ruling can therefore be said to confer a selective advantage on LuxOpCo under the general Luxembourg corporate income tax system.

9.3.2.2. Favourable treatment in comparison with corporate taxpayers belonging to a multinational corporate group

(600) Without prejudice to the conclusion in the preceding Recital, the Commission further concludes that even if the reference system is to be limited to Article 164(3) LIR and only companies belonging to a multinational corporate group can be considered to be in a similar factual and legal situation, as Luxembourg and Amazon argue, the contested tax ruling should be considered to favour LuxOpCo as compared to those taxpayers as well.

(601) During the period that the contested tax ruling was in force, Article 164(3) LIR was considered to lay down the arm's length principle under Luxembourg tax law. Pursuant to that provision, companies belonging to a multinational corporate group that transact with associated companies must determine their transfer prices in line with that principle. As demonstrated in Section 9.2, the transfer pricing arrangement endorsed by the contested tax ruling produces a taxable income for LuxOpCo that does not reflect prices negotiated at arm's length on the market. It therefore lowers LuxOpCo's corporate income tax liability in Luxembourg as compared to companies belonging to a multinational corporate group that determine their transfer prices in compliance with Article 164(3) LIR.

(602) In light of the foregoing, the Commission concludes that the advantage identified in Section 9.2 is selective in nature because it favours Amazon as compared to other corporate taxpayers belonging to a multinational corporate group that engage in intra-group transactions and that, by virtue of Article 164(3) LIR, must estimate the prices for their intra-group transactions in a manner that reflects prices negotiated by independent parties at arm's length on the market.

9.3.3. Lack of Justification

(603) Neither Luxembourg nor Amazon has advanced any possible justification for the favourable treatment caused by the contested tax ruling in favour of LuxOpCo. The Commission recalls, in this respect, that the burden of establishing such a justification lies with the Member State.

(604) In any event, the Commission has not been able to identify any possible ground for justifying the preferential treatment from which LuxOpCo benefits as a result of that measure that could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the system[724], whether that reference system is the general Luxembourg corporate income tax system, as established by the Commission, or Article 164(3) LIR, as advocated by Luxembourg and Amazon.

9.3.4. Conclusion on selectivity

(605) In light of the foregoing, the Commission concludes that the advantage identified in Section 9.2 which the contested tax ruling confers on LuxOpCo is selective in nature.

9.4. Conclusion on the existence of aid

(606) Since the contested tax ruling fulfils all the conditions of Article 107(1) of the Treaty, it must be considered to constitute State aid within the meaning of that provision. That aid results in a reduction of charges that should normally be borne by LuxOpCo in the course of its business operations and should therefore be considered as granting operating aid to LuxOpCo.

9.5. Beneficiary of the aid

(607) The Commission considers the contested tax ruling to grant a selective advantage to LuxOpCo within the meaning of Article 107(1) of the Treaty, since it leads to a lowering of that entity's taxable profit and thus its corporate income tax liability in Luxembourg. However, the Commission notes that LuxOpCo forms part of a multinational corporate group, i.e. the Amazon group.

(608) Separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, "*[i]n competition law, the term 'undertaking' must be understood as designating an economic unit […] even if in law that economic unit consists of several persons, natural or legal.*"[725] To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links[726]. In the present case, LuxOpCo was fully controlled by LuxSCS during the relevant period, which in turn was controlled by US-based companies of the Amazon group[727]. Moreover, as it is clear from the ruling request, it was the Amazon group, as controlled by Amazon.com, Inc., which took the decision to establish LuxOpCo in Luxembourg.

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724 Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2009:417, paragraph 69.

725 Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* EU:T:2004:304, paragraph 50.

726 Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

727 The corporate structure of the Amazon group is explained in more detail in Figure 1.

(609) In addition, transfer pricing, by its very nature, affects more than one group company, because a profit decrease in one company normally increases the profit of its counterparty. In the present case, the determination of LuxOpCo's taxable profit in Luxembourg influences the royalty payments to LuxSCS, since the level of the royalty corresponds to any profit recorded by LuxOpCo above [4-6]% of its operating expenses or 0.55 % of revenue, as agreed by the contested tax ruling. The reduction of LuxOpCo's tax liability in Luxembourg therefore not only benefits LuxOpCo, but also LuxSCS. Moreover, since profit attributed to LuxSCS was not subject to taxation in Luxembourg, but, at best, subject to deferred taxation if and when it is distributed to its US-based partners[728], the contested tax ruling confers aid on the Amazon group as whole.

(610) Consequently, any favourable tax treatment afforded to LuxOpCo by the Luxembourg tax administration benefits not only LuxOpCo, but the Amazon group as a whole by providing additional financial resources to the entire group. Therefore, notwithstanding the fact that that group is organised in different legal personalities and the contested tax ruling concerns the tax treatment of LuxOpCo and LuxSCS, that group must be considered as a single economic unit benefitting from the contested aid measure[729].

9.6. Compatibility of the aid

(611) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty[730] and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty.

(612) Luxembourg has not invoked any of the grounds for a finding of compatibility under either of those provisions for the State aid it has granted through the contested tax ruling.

(613) Moreover, as explained in Recital (606), the aid granted by the contested tax ruling constitutes operating aid. As a general rule, such aid can normally not be considered compatible with the internal market under Article 107(3) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas, nor

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728 See footnote 119. Under the US tax code, domestic companies are taxable on their worldwide income, including their foreign income and – contrary to the practice of other countries – the income of subsidiaries. Generally, however, tax on the income of foreign subsidiaries is deferred until that income is distributed as a dividend or otherwise repatriated by the foreign company to its U.S. shareholders. If and when any of the profit of LuxSCS is repatriated to its US-based partners, it will be taxed under this worldwide taxation system in the same way as any other regular distribution of after-tax profits by a foreign controlled company.

729 See, by analogy, Case 323/82 *Intermills* EU:C:1984:345, paragraph 11. See also Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 102: "*the Commission was correct to hold that the rules governing the determination of taxable income constitute an advantage for the coordination centres and the groups to which they belong*".

730 The exceptions provided for in Article 107(2) of the Treaty concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, none of which apply in the present case.

are the tax advantages in question limited in time, declining or proportionate to what is necessary to remedy to a specific market failure in the areas concerned.

(614) Consequently, the State aid granted to LuxOpCo and the Amazon group by Luxembourg is incompatible with the internal market.

9.7. Unlawfulness of the aid

(615) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the Commission has taken a final position decision on the aid in question (standstill obligation).

(616) The Commission notes that Luxembourg did not notify the Commission of any plan to grant the contested aid measure, nor did it respect the standstill obligation laid down in Article 108(3) of the Treaty. Therefore, in accordance with Article 1(f) of Regulation (EU) 2015/1589, the contested tax ruling constitutes unlawful aid, put into effect in contravention of Article 108(3) of the Treaty.

10. RECOVERY

10.1. The recovery obligation

(617) Article 16(1) of Regulation 2015/1589[731] establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned shall take all necessary measures to recover unlawful aid that is found to be incompatible. Article 16(2) of Regulation 2015/1589 establishes that the aid is to be recovered includes interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 elaborates the methods to be used for the calculation of recovery interest.[732] Finally, Article 16(3) of Regulation No. 2015/1589 states that "*recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate an effective execution of the Commission decision*".

10.2. New aid

(618) In accordance with Article 17 of Regulation (EU) 2015/1589, the power of the Commission to recover aid is subject to a limitation period of 10 years. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period. Each interruption starts time running afresh. The limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice. Finally, any aid with regard to which the limitation period has expired is deemed to be existing aid.

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731 Council Regulation (UE) 2015/1589 of July 13 2015 laying down detailed rules for the application of Article 108 of the Treaty (OJ L 248, 24.9.2015, p. 9).

732 Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

(619) Amazon argues that any aid granted under the contested tax ruling is existing aid, because the contested tax ruling is an individual measure granted to it more than ten years before the Commission started its State aid investigation into that ruling. The contested tax ruling was indeed issued more than ten years before the Commission started its investigation, namely on 6 November 2003. However, contrary to what Amazon claims, that does not mean that all and any aid granted under it constitutes existing aid that cannot be recovered.

(620) In the present case, the aid granted as a result of the contested tax ruling was granted on an annual basis, at the moment when LuxOpCo had to pay its corporate income tax in Luxembourg. That is because the purpose of the contested tax ruling was to enable LuxOpCo to determine, over a certain period of time, its annual corporate income tax liability in Luxembourg. That ruling endorses a transfer pricing arrangement that allows LuxOpCo to determine its transfer prices, which in turn determine its annual taxable profit. That amount of profit is then declared in its annual corporate income tax declaration, which Luxembourg has accepted each and every year during the relevant period. The aid is thus granted under the contested tax ruling every year that that declaration is accepted by the Luxembourg tax administration[733].

(621) What this means for the present case is that only aid granted before 24 June 2004 constitutes existing aid, since the limitation period laid down by Article 17 of Regulation (EU) 2015/1589 was interrupted on 24 June 2014, the date on which the Commission sent a letter to Luxembourg requesting information on any rulings granted to Amazon[734]. As explained by Amazon, even though the contested tax ruling was obtained in 2003, LuxOpCo did not start to use the transfer pricing arrangement endorsed therein for the purposes of determining its annual corporate income tax liability in Luxembourg until 2006. Consequently, there are no fiscal years before 24 June 2004 in which the ruling was used to assess LuxOpCo's annual taxable profit and the Luxembourg tax administration accepted a tax declaration based on that assessment. In any event, the Commission recalls that by letter of 23 December 2004 the Luxembourg tax administration confirmed the continued validity of the transfer pricing arrangement endorsed by the contested tax ruling following a delay in the implementation of the restructuring of Amazon's European operations, for which that ruling was initially requested.

(622) All aid granted to LuxOpCo and the Amazon group by way of the contested tax ruling therefore constitutes new aid.

10.3. No general principle of law prevents recovery

(623) Article 16(1) of Regulation No. 2015/1589 provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

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733 Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* EU:C:2006:416. The same reasoning was applied by the General Court in Joined Cases T-427/04 and T-17/05 *France and France Telecom* v *Commission* EU:T:2009:474, where France Telecom benefitted from a tax exemption and the Commission concluded that the aid was granted annually, i.e. the tax differential due and exempted was calculated on an annual basis and depended, among others, on the level of tax rates voted annually by the local authorities. This conclusion was confirmed by the General Court.

734 See Recital (1).

(624) Luxembourg argues that the principles of legal certainty and legitimate expectations stand in the way of recovery in the present case, first, because the Commission is retroactively applying an allegedly new approach to transfer pricing and, second, because the Code of Conduct Group (Business Taxation)[735] and the OECD Forum on Harmful Tax Practices[736] had assured Luxembourg that its tax ruling practice based on Article 164(3) LIR and the Circular is consistent with the OECD Code of Conduct and the OECD TP Guidelines.

(625) The principle of legal certainty is a general principle of EU law that predicates the predictability of rules and their legal effects. According to the case law, the principle of legal certainty prevents the Commission from indefinitely delaying the exercise of its powers[737]. The Court of Justice has also stated that the only grounds on which, in exceptional cases, that principle may be invoked, is when the Commission has manifestly failed to act and has clearly breached its duty of diligence in the exercise of its supervisory powers[738]. However, when a measure has been granted without having been notified, the mere fact that there has been a delay by the Commission in ordering recovery does not suffice in itself to render that recovery decision unlawful under the legal certainty principle[739]. In the present case, since the contested tax ruling was never notified to the Commission by Luxembourg, nor otherwise publicly available, the Commission could only have learnt of ts existence when Luxembourg responded to its request for information on 4 August 2014.

(626) The principle of legitimate expectations can be invoked by any person in a situation where an EU authority "*has caused him to entertain expectations which are justified*."[740] Important limitations apply to invoking that principle, however, as decided by the Court of Justice. First, the Court has stated that that principle cannot be invoked unless the person invoking it "*has been given precise assurances by the administration*"[741]. Second, Member States cannot invoke that principle in cases where they have failed to notify the aid measure to the Commission[742]. Third, the Commission's alleged failure to act is irrelevant when an aid measure has not been notified to it[743] and, consequently, the Commission's silence cannot be interpreted as

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735 Luxembourg's Observations to the Opening Decision, par. 42-43.

736 Luxembourg's Observations to the Opening Decision, par. 44.

737 Case C-74/00 *Falck y A. di Bolzano* v *Commission* EU:C:2002:524, paragraph 140.

738 Case C-408/04 *Commission* v *Salzgitter*, EU:C:2008:236, paragraphs 100-107.

739 *Id*., paragraph 106.

740 *Forum 187* (cited above), paragraph 147, Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products Lopik* v *Commission* [1987] ECR 1155, paragraph 44.

741 *Id*.

742 Joined Cases C-471/09 P to C-473/09 P Territorio Histórico de Vizcaya – Diputación Foral de Vizcaya and Others v Commission EU:C:2011:521, paragraph. 64: "*Sur ce point, il convient de rappeler qu'un État membre, dont les autorités ont octroyé une aide en violation des règles de procédure prévues à l'article 88 CE, ne saurait, en principe, invoquer la confiance légitime des bénéficiaires pour se soustraire à l'obligation de prendre les mesures nécessaires en vue de l'exécution d'une décision de la Commission lui ordonnant de récupérer l'aide. Admettre une telle possibilité reviendrait, en effet, à priver les dispositions des articles 87 CE et 88 CE de tout effet utile, dans la mesure où les autorités nationales pourraient ainsi se fonder sur leur propre comportement illégal pour mettre en échec l'efficacité des décisions prises par la Commission en vertu de ces dispositions du traité CE*". In the same line, see also Joined Cases C-465/09 to C-470/09 *Diputacion Foral de Vizcaya e.a./Commission*, EU:C:2011:372, paragraph 150; and Case, C-372/97 *Italy v Commission* EU:C:2003:275, paragraph 112.

743 *Territorio Histórico de Vizcaya* (cited above), paragraph 68. See also Case C-183/02 P *Demesa and Territorio Histórico de Álava v Commission* EU:C:2004:701, paragraph 52.

an implicit authorisation of the measure that may give rise to legitimate expectations[744]. Consequently, since the Commission never gave precise assurances to Luxembourg that the contested tax ruling does not constitute aid and Luxembourg never notified the contested tax ruling to the Commission, Luxembourg cannot rely on the principle of legitimate expectations.

(627) Luxembourg's subsequent claim that the Commission adopted a novel approach for a finding of State aid to the present case cannot be accepted.

(628) First, in response to an argument made by a Member State that direct taxation fell under its fiscal autonomy, the Court of Justice explicitly acknowledged, in a judgment of 1974[745], the application of the State aid rules in the field of direct taxation. Since a tax ruling is no more than an interpretation of the tax rules to a particular situation, upon which a taxpayer may rely to determine its tax burden in a particular Member State, the State aid rules necessarily apply to tax rulings as well, as explicitly acknowledged by the Commission in its 1998 Notice on the application of the State aid rules to measures relating to direct business taxation ("the 1998 Notice")[746].

(629) Second, the Commission adopted a series of decisions in 2002 to 2004 in which it concluded that several tax schemes in various Member States constituted State aid because they endorsed a method of assessment of taxable income for certain categories of undertaking that departed from a reliable approximation of an arm's length outcome or otherwise benefitted certain multinational group companies under the ordinary rules of corporate taxation[747]. That a method of assessment of taxable income producing an outcome that diverges from the arm's length principle results in the grant of State aid for its beneficiary/-ies was explicitly endorsed by the Court of Justice in a 2006 judgment[748].

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744 *Territorio Histórico de Vizcaya* (cited above), paragraph 76.

745 Case 173/73 *Italy* v *Commission* EU:C:1974:71, paragraph 13.

746 Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10.12.98, p. 3, Recital 22: "*If in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules*".

747 See, *inter alia*, Commission Decision of 22 August 2002 in Case C 48/2001 (ex NN 43/2000) on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya, OJ L 31, 6.2.2003, p.26; Commission Decision of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres, OJ L 177, 16.7.2003, p. 17; Commission Decision of 16 October 2002 on the State aid scheme in Case C49/2001 implemented by Luxembourg for coordination centres established in Luxembourg, OJ L 170, 9.7.2003, p. 20; Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium, OJ L 282, 30.10.2003, p. 25; Commission Decision of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities OJ L 180, 18.7.2003, p. 52. Commission Decision of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1; and Commission Decision of 24 June 2003 on the aid scheme implemented by Belgium on Tax ruling system for United States foreign sales corporations; OJ L 23, 28.1.2004, p. 14.

748 Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* EU:C:2006:416.

(630) Luxembourg further submits that it was explicitly confirmed at the Council (ECOFIN) meeting of 27 May 2011 that, in view of the adoption of the Circulars, Luxembourg's tax ruling practice should not be evaluated according to the Code of Conduct Group[749] and that an agreement in a Code of Conduct Group meeting that "*there [is] no need for the [Luxembourg tax measure on companies engaged in intra-group financing activities] to be assessed against the criteria of the Code of Conduct*" constitutes a precise assurance as to appropriateness of the general tax ruling practice of Luxembourg. However, those submissions cannot be accepted as substantiating a claim of either legal certainty or legitimate expectations.

(631) First, the Code of Conduct and the State aid rules pursue different objectives: while the Code of Conduct aims at tackling harmful tax competition between Member States, the State aid rules seek to address distortions of competition that result from favourable treatment by Member States, also in the form of tax reductions, of certain undertakings.

(632) Second, the Code of Conduct is not a legally binding instrument. It is a forum of discussion for Member States on measures which have, or may have, a significant impact on the location of businesses within the Union. While the Code of Conduct group enjoys a certain margin of discretion, the Commission enjoys no discretion in determining whether a tax measure falls to be considered State aid, since that notion is an objective one.

(633) Third, the Code of Conduct was adopted by the Council (ECOFIN)[750], not the Commission, and therefore cannot bind the Commission in the exercise of its State aid competence.

(634) Fourth, the Code of Conduct considered the Circulars on intra-group financing in general, whereas this Decision examines a specific tax ruling granted in favour of a specific company not related to intra-group financing. Even if those Circulars could be said not to give rise to harmful tax competition that does not mean that an individual transfer pricing ruling granted to Amazon does not.

(635) Consequently, an agreement in the Code of Conduct Group meeting can neither bind nor restrict the Commission's actions in exercising its powers which are conferred on it by the Treaty in the field of State aid[751]. The same is true for the agreements reached on 6 December 2011 in the OECD Forum, according to which "*the following 10 regimes did not need to be examined further […] Luxembourg – Advance tax analysis for intra-group financing*". The OECD is not a Union institution, nor is the

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749 Luxembourg's observations to the Opening Decision, paragraph 43 Luxembourg quotes paragraph 19 of the report of the Code of Conduct Group (Business Taxation) to the Council (ECOFIN) which reads: "*With respect to the Luxembourg tax measure concerning companies engaged in intra-group financing activities the Group discussed the agreed description at the meeting on 17 February 2011. Luxembourg informed the Group that Circular No 164/2 dated 28 January 2011 determines the conditions for providing advance pricing agreements confirming the remuneration of the transactions. At the meeting on 11 April 2011, Luxembourg informed that Group that Circular No 164/2 bis dated 8 April 2011 ensured that advance confirmations granted prior to the entry into force of Circular No 164/2 would cease to be valid by 31 December 2011. With the benefit of this information, the Group agreed that there was no need for this measure to be assessed against the criteria of the Code of Conduct*".

750 Council conclusions of the ECOFIN Council meeting of 1 December 1997 concerning taxation policy, OJ C 2, 76.1.1998, p. 1. See also documents at the following link: http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/#code_conduct.

751 See, to that effect, Advocate General Léger's opinion in Case C-217/03, *Belgium and Forum 187 ASBL v Commission* ECLI:EU:C:2006:89, paragraph 376.

Union a member of that organisation[752], and its conclusions, which are non-binding, cannot bind the institutions of the Union. Moreover, far from giving a precise assurance, the OECD Forum refrained from further examining the Luxembourg tax analysis for intra-group financing. It is therefore impossible to draw any kind of conclusions or inferences from this statement as regards the application of the State aid rules to the contested tax ruling, which is an individual transfer pricing ruling unrelated to intra-group financing.

(636) Amazon similarly invokes the principle of legitimate expectations, arguing that the Commission's investigation was based on a novel approach to the State aid rules[753]. The Commission has already explained in Recital (626) why that claim is unfounded. For a claim of legitimate expectations to succeed, the expectation must arise from prior Commission action in the form of precise assurances[754]. This means that the legitimate expectation must arise from a previous behaviour of the Commission that, for instance, had already adopted a decision on the same or identical aid scheme. Amazon did not refer to any such acts of the Commission, but instead claimed that "*the application of State aid rules to individual tax rulings on transfer pricing has never been subject of any previous statement by the Commission*"[755]. The Commission recalls in this regard that State aid is an objective notion, so that even if no decisions existed prior to 2015 that declared individual tax rulings as giving rise to State aid, that does not mean that such rulings cannot give rise to State aid. In any event, the Commission has adopted a number of decisions declaring schemes deviating from the arm's length principle as giving rise to State aid[756] and it has adopted a number of decisions declaring individual tax measures to constitute State aid[757].

(637) Amazon also invokes the principle of equal treatment, arguing that Amazon would be the only undertaking of many subject to the same tax treatment which would have

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752 In the Supplementary Protocol No. 1 to the Convention on the OECD of 14 December 1960, the signatories to the Convention agreed that the European Commission shall take part in the work of the OECD. European Commission representatives participate alongside Members in discussions on the OECD's work programme, and are involved in the work of the entire Organisation and its different bodies. However, while the European Commission's participation goes well beyond that of an observer, it does not have the right to vote and does not officially take part in the adoption of legal instruments submitted to the Council for adoption.

753 See Recital (326).

754 Case T-290/97 *Mehibas Dordtselaan* v *Commission* EU:T:2000:8, paragraph 59 and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL* v *Commission* EU:C:2006:416, paragraph 147.

755 Amazon's observations to the Opening Decision, paragraph 178.

756 See footnote 748.

757 See, by way of example, Commission Decision 1999/718/EC of 24 February 1999 concerning State aid granted by Spain to Daewoo Electronics Manufacturing España SA (Demesa) (OJ 1999 L 292, p. 1); Commission Decision C(1999) 1122 of 21 April 1999 on the treatment by the Netherlands tax authorities of a technolease agreement between Philips and Rabobank (OJ 2000 L 297, p. 13); Commission Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ 2000 L 318, p. 36); Commission Decision 2005/709/EC of 2 August 2004 concerning State aid paid by France to France Telecom (OJ 2005 L 269, p. 30); Commission Decision of 11 December 2007 on State aid C 12/07 (ex N 799/06) planned by the Slovak Republic for Glunz & Jensen s.r.o., OJ L 178, 5.7.2008, p. 38; Commission Decision of 4 June 2008 on State aid C 57/07 (ex N 843/06) which the Slovak Republic is planning to implement for Alas Slovakia, s.r.o. OJ L 248, 17.9.2008, p. 19; and Commission Decision of 26 May 2010 in State Case C 76/03 (ex NN 69/03) concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (OJ 2011 L 122 p. 76).

to repay illegal aid[758]. However, the Court has already considered that the fact that other undertakings are granted State aid, even competitors, is irrelevant for determining whether a particular measure constitutes State aid.[759] Since recovery is the logical consequence of the existence of unlawful aid, this must *a fortiori* apply to the repayment of the unlawful State aid.

(638) In conclusion, no general principle of law prevents recovery in the present case.

10.4. Methodology for recovery

(639) The obligation on a State to abolish unlawful aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing competitive situation on the market. In this context, the Court of Justice has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it has enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

(640) No provision of European Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered[760]. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty[761]. Union law merely requires recovery of unlawful aid to restore the position to the *status quo ante* and that repayment be made in accordance with the rules of national law[762]. Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid[763].

(641) In relation to unlawful State aid in the form of tax measures, the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. As concluded in Recital (542), the remuneration paid from LuxOpCo to LuxSCS should be determined on the basis of a TNMM whereby LuxSCS is considered as the less complex entity to the License Agreement and the remuneration to be paid by LuxOpCo to LuxSCS should be determined with reference to LuxSCS as the tested party[764].

(642) The remuneration of LuxSCS should reflect the fact that it performs an intermediary function in relation to the Intangibles, in that it merely holds the legal ownership and the licenses to the Intangibles owned by ATI and A9 but passes on the rights to develop, enhance, manage and exploit the Intangbles to LuxOpCo for the purpose of LuxOpCo's operation of Amazon's European retail business. It should also reflect the fact that LuxSCS itself at most performs solely limited functions in the form of

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758 See Recital (326).

759 Case T-214/95 *Het Vlaamse Gewest (Flemish Region)* v *Commission* EU:T:1998:77, paragraph 54.

760 Albeit in the context of "impossibility to recover" and not "difficulty to quantify the aid amount".

761 See Case C-441/06 *Commission v France* EU:C:2007:616, paragraph 29 and the case-law cited.

762 Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* EU:T:2009:474, paragraph 297.

763 Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* EU:T:2009:474, paragraph 299.

764 See Recital (549).

general administrative services necessary to maintain its legal ownership of the Intangibles, which appear to be provided by external providers on LuxSCS's behalf (see Recital (429)).

(643) As regards the determination of the appropriate cost base to which a mark-up should be applied, the Commission notes that LuxSCS does not record any sales and does not assume the risk in relation to the Intangibles. As a consequence, a cost-based remuneration should be used to determine the remuneration of LuxSCS, where a mark-up is applied only on the incurred external costs of its actual functions, but without a mark-up on the Buy-In and the CSA Costs, which are in reality just passed on by LuxSCS to A9 and ATI[765].

(644) As regards the appropriate level of the mark-up to be applied on LuxSCS's costs, which is assumed to reflect actual functions related to the necessary maintenance of the ownership of the Intangibles under LuxOpCo's control, the Commission considers, on the basis of the experience underlying the 2010 JTPF Report, that an appropriate mark-up for low-value adding services, such as those provided by LuxSCS in relation to the Intangibles, should be 5 %[766]. However, where the facts and circumstances of the specific transaction support a different mark-up, that should be taken into consideration[767]. The Luxembourg tax authorities are therefore invited, within two months of the notification of this Decision, to put forward and justify the final level of that mark-up by comparing that mark-up with comparable transactions with independent service providers. Should Luxembourg fail to do so, the Commission will accept a mark-up on LuxSCS's directly incurred external costs incurred in the maintenance of the ownership of the Intangibles of 5 %, to the extent that these costs reflect actual functions that are carried out by LuxSCS.

(645) In light of the foregoing considerations, the amount to be recovered should be determined: (i) by taking LuxOpCo's accounting profit in each of the years that the contested tax ruling was used to determine its corporate income tax liability; (ii) deduct therefrom the sum of Buy-In and CSA Costs, the costs for external services incurred for LuxSCS and the appropriate mark-up on the costs of those services to the extent that those costs reflects active functions by LuxSCS[768]; (iii) apply to the resulting amount the ordinary rules of taxation of corporate profit in Luxembourg, including the standard corporate income tax, municipal tax, surcharges and wealth tax; and (iv) deduct from that amount the amount of tax effectively paid by LuxOpCo in each of the years that the contested tax ruling was in force.

(646) It is the difference between (iii) and (iv) that constitutes the amount of aid to be recovered to eliminate the selective advantage granted by Luxembourg as a result of the contested tax ruling.

10.5. Entity from whom the aid is to be recovered

(647) In light of the observations in Recitals (607) to (610), the Commission considers that Luxembourg should, in the first place, recover the unlawful and incompatible aid

765 See Recitals (551) and (552).

766 See Recital (558).

767 2010 JTPF report, paragraph 63.

768 See Recital (429). As explained in the 1995 OECD TP Guidelines, paragraph 7.33 : "*[…] In an arm's length transaction, an independent enterprise normally would seek to charge for services in such a way as to generate profit, rather than providing the services merely at cost […]"*. Thus LuxSCS would not only receive the mark-up on costs but also reimbursement of those costs.

granted by the contested tax ruling from LuxOpCo. Should LuxOpCo not be in a position to repay the full amount of the aid received as a result of the contested tax ruling, Luxembourg should recover any remaining amounts from the Amazon group or/and any of its successors, or group companies, since it is the entity which controls the Amazon group, which is the single economic unit benefitting from the aid (see Section 9.5). In this manner, the undue advantage granted by the contested tax ruling is eliminated and the previously existing situation on the market is restored through recovery[769].

11. EVIDENCE RELIED UPON BY THE COMMISSION FOR A FINDING OF AID

(648) Luxembourg claimed that some of the information relied upon by the Commission during the formal investigation was not available to its tax administration on the date on which it adopted the contested tax ruling and that, therefore, the Commission enjoys the benefit of hindsight when examining that ruling.

(649) The Commission observes that the arguments on which it bases its findings of advantage were available at that time. This relates, in particular, to the functional analysis in the ruling request and the TP Report. In those documents, LuxSCS is clearly described as having neither employees nor a physical presence and its principal activities are described as being limited to those of an intangible holding company, and contract party to the CSA, to which it was supposed to contribute only financially. By contrast, LuxOpCo is described as performing the functions of the European headquarters, assuming the risks and managing the strategic decision-making and key physical components of the Amazon's online retail business in Europe. These descriptions should have made the Luxembourg tax administration call into question the inaccurate and unsubstantiated assumption that LuxSCS would perform unique and valuable functions in relation to the Intangibles which underpins the transfer pricing arrangement endorsed by the contested tax ruling.

(650) In any event, as explained in Recital (620), the moment at which aid is granted to a taxpayer in the case of a tax ruling that endorses a method for determining its taxable income is each year that that taxpayer uses that ruling to determine its annual corporation tax liability and the tax administration accepts a declaration of taxable income determined on the basis of that method. Consequently, any information that subsequently called into question the critical assumptions on which that ruling were based should have led either to a revision of that ruling or to a refusal by the Luxembourg tax administration to accept a tax declaration relying upon the transfer pricing arrangement endorsed in that ruling in the more than eight years in which LuxOpCo relied upon it to determine its corporate income tax liability in Luxembourg.

769 As stated in Section 9.5, and Recital (607) in particular, the Luxembourg tax administration afforded favourable tax treatment to LuxOpCo. For this reason, that is the first beneficiary from which Luxembourg must recover the aid. If recovery from this beneficiary does not remove the undue advantage, recovery must be extended against the Amazon group, as the whole group forms a single economic unit benefitting from the aid. In this sense, see Joined cases T-415/05, T-416/05 and T-423/05 *Greece* v *Commission* EU:T:2010:386, paragraph 126.

12. CONCLUSION

(651) In conclusion, the Commission finds that Luxembourg, in breach of Articles 107(1) and 108(3) of the Treaty, has unlawfully granted State aid to LuxOpCo and the Amazon group by way of the contested tax ruling and by accepting each year a corporate income tax declaration based thereon which Luxembourg is required to recover by virtue of Article 16 of Regulation No 2015/1589 from LuxOpCo and, if the latter fails to repay the full amount of the aid, from the Amazon group or any of its successors, or group companies for the outstanding amount of aid. Accordingly, the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The tax ruling of 6 November 2003, by virtue of which Luxembourg endorsed a transfer pricing arrangement proposed by Amazon.com, Inc. that allowed Amazon EU S.á.r.l. to assess its corporate income tax liability in Luxembourg from 2006 to 2014 and the subsequent acceptance of the yearly corporate income tax declaration based thereon constitutes aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union that is incompatible with the internal market and that was unlawfully put into effect by Luxembourg in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

Article 2

(1) Luxembourg shall recover the incompatible and unlawful aid referred to in Article 1 from Amazon EU S.á r.l.

(2) Any sums that remain unrecoverable from Amazon EU S.á r.l., following the recovery described in the preceding paragraph, shall be recovered from the Amazon group.

(3) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

(4) The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

(1) Recovery of the aid granted referred to in Article 1 shall be immediate and effective.

(2) Luxembourg shall ensure that this Decision is implemented within four months following its date of notification.

Article 4

(1) Within two months following notification of this decision, Luxembourg shall submit information regarding the methodology used to calculate the exact amount of aid.

(2) Luxembourg shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 1 has been completed. It shall immediately

submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

Article 5

This Decision is addressed to the Grand Duchy of Luxembourg.

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Done at Brussels, 4.10.2017

For the Commission,
Margrethe VESTAGER
Member of the Commission

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