

**Summary of Commission Decision****of 4 May 2017****relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement****(Case AT.40153 — E-Book MFNS and related matters)***(notified under document C(2017) 2876)***(Only the English text is authentic)**

(2017/C 264/06)

On 4 May 2017, the Commission adopted a decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003<sup>(1)</sup>, the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

**1. INTRODUCTION**

- (1) The Decision makes legally binding the commitments offered by Amazon.com, Inc., and its directly and indirectly controlled entities, including Amazon EU SARL, Amazon Digital Services, LLC and Amazon Media EU, SARL (hereinafter jointly referred to as 'Amazon') under Article 9 of Council Regulation (EC) No 1/2003 ('Regulation 1/2003') in a proceeding under Article 102 of the Treaty on the Functioning of the European Union ('the Treaty') and Article 54 of the EEA Agreement relating to certain parity clauses and similar provisions introduced in Amazon's agreements with E-book Suppliers.

**2. PROCEDURE**

- (2) On 11 June 2015 the Commission initiated proceedings pursuant to Article 2 of Commission Regulation (EC) No 773/2004 against Amazon.com, Inc. and Amazon EU SARL with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003. On 9 December 2016, proceedings were also initiated against Amazon Digital Services, LLC and Amazon Media EU, SARL.
- (3) On 9 December 2016 the Commission adopted, pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Preliminary Assessment which set out the Commission's preliminary competition concerns.
- (4) On 13 January 2017 Amazon submitted draft commitments ('the Initial Commitments') to the Commission in response to the Preliminary Assessment. On 26 January 2017 a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Initial Commitments and inviting interested third parties to give their observations on the Initial Commitments within one month following publication.
- (5) On 9 March 2017 the Commission informed Amazon of the observations received from interested third parties following the publication of the notice. On 31 March 2017 Amazon submitted an amended proposal for commitments ('Final Commitments').
- (6) On 19 April 2017 the Advisory Committee on Restrictive Practices and Dominant Positions was consulted and issued a favourable opinion.
- (7) On 25 April 2017 the Hearing Officer issued his final report.

**3. THE COMMISSION'S COMPETITION CONCERNS**

- (8) The Preliminary Assessment of 9 December 2016 set out the preliminary concerns of the Commission. In particular, the Commission took the preliminary view that Amazon abused its dominant positions on the markets for the retail distribution of English language and German language e-books to consumers in the EEA, in breach of Article 102 TFEU and Article 54 of the EEA Agreement, by requiring E-book Suppliers<sup>(2)</sup> (i) to notify Amazon of more favourable

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

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

or alternative terms and conditions they offer elsewhere; and/or (ii) to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another E-book Retailer <sup>(1)</sup> (hereinafter, collectively referred to as 'Parity Clauses').

- (9) The Commission's preliminary concerns related to the use by Amazon of non-price Parity Clauses requiring E-book Suppliers to offer Amazon the same business models ('Business Model Parity'), e-books within a particular territory and/or release dates ('Selection Parity'), features, functionalities, usage rules, elements or content ('Features Parity'), as well as price Parity Clauses related to retail prices in agency agreements ('Agency Price Parity'), and promotions ('Promotion Parity').
- (10) The preliminary concerns also related to a clause referred to as 'Discount Pool Provisions', which provides for a 'pool' of credits that Amazon may use at its discretion to discount agency prices for any e-book supplied by that E-book Supplier on Amazon. The pool is calculated based on the differences between the agency prices set by the E-book Supplier for its e-books on Amazon and the agency prices or reseller prices for those e-books available through other E-book Retailers.
- (11) The preliminary concerns further related to clauses requiring E-book Suppliers to provide Amazon a wholesale price as a result of such offer being available to one of Amazon's competitors ('Wholesale Price Parity'). Also covered were clauses requiring the E-book Supplier to notify Amazon if it makes available different alternative business models, e-books, availability dates, features, promotions or lower wholesale and agency prices to E-book Retailers other than Amazon ('Notification Provisions').
- (12) The Commission took the preliminary view that the Business Model Parity and the respective Notification Provisions are capable of (i) reducing E-book Suppliers' incentives to support and invest in alternative new and innovative business models; (ii) reducing Amazon's competitors' ability and incentives to develop and differentiate their offerings through such business models; (iii) deterring entry and/or expansion by E-book Retailers, thus weakening competition at the e-book distribution level and strengthening Amazon's dominant position.
- (13) Further, the Commission took the preliminary view that the Selection Parity and the Feature Parity are capable of (i) reducing the incentives of E-book Suppliers and E-book Retailers to develop e-books which are not primarily text and preventing differentiation of E-book Retailers (on the basis of content, particular features or functionalities of e-books or earlier release dates), thus potentially weakening competition at the e-book distribution level; (ii) weakening competition between, and deterring entry and/or expansion by, E-book Retailers by limiting the scope for differentiated e-book offerings by E-book Retailers, which may result in higher prices and less choice for consumers.
- (14) Moreover, the Commission took the preliminary view that the Agency Price Parity, Promotion Parity, Discount Pool Provisions and the respective Notification Provisions (in combination with Amazon's conduct aimed at achieving retail price parity) are capable of (i) deterring the entry or expansion of E-book Retailers, thereby strengthening Amazon's dominant position; (ii) allowing Amazon to reduce competition between E-book Retailers and thereby to obtain higher commissions from E-book Suppliers, which may ultimately lead to higher e-book retail prices.
- (15) Finally, the Commission took the preliminary view that the Wholesale Price Parity (i) is capable of hindering E-book Retailers from entering and expanding in the relevant markets by offering lower e-book retail prices to consumers than Amazon; and (ii) potentially reinforces the potential effects of the Selection Parity by ensuring that Amazon accesses e-books at best wholesale terms in case E-book Suppliers prefer not to offer a given e-book to Amazon.
- (16) The Commission took the preliminary view that the Parity Clauses analysed in paragraphs (12) to (15) above represent, in and of themselves, an abuse of a dominant position in the relevant markets in the EEA. In addition, the Commission preliminarily considered that the combination of the different Price-Related Parity Clauses (i.e., Agency Price Parity, Discount Pool Provisions, Promotion Parity, Wholesale Price Parity and Agency Commission Parity), Non-Price-Related Parity Clauses (i.e., Business Model Parity, Selection and Features Parity) and Notification Provisions was likely to reinforce the potential anti-competitive effects of the individual Parity Clauses.

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<sup>(1)</sup> The terminology 'E-book Retailer' for the purposes of this document includes any person or entity that lawfully sells (or seeks to lawfully sell) e-books to consumers in one or more countries in the EEA, or through which an E-book Supplier, under an agency agreement, sells e-books to consumers in one or more countries in the EEA. An E-book Supplier is an E-book Retailer to the extent that the E-book Supplier sells e-books directly to consumers or sells e-books through an agent under an agency agreement.

#### 4. THE INITIAL COMMITMENTS, THE MARKET TEST AND THE FINAL COMMITMENTS

- (17) Amazon does not agree with the Commission's preliminary assessment and findings. It nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns. The key elements of the Initial Commitments offered by Amazon can be summarised as follows:
- Amazon will not enforce or otherwise rely upon any Business Model Parity, Agency Commission Parity, Agency Price Parity, Features Parity, Promotion Parity, Selection Parity, Wholesale Price Parity or Notification Provision contained in agreements between Amazon and E-book Suppliers for the sale of e-books to consumers in the EEA. Amazon will notify each of those E-book Suppliers that it will no longer enforce such provisions.
  - Amazon will offer each E-book Supplier whose e-book agreement for the sale of e-books to consumers in the EEA contains a Discount Pool Provision currently in effect the opportunity to terminate the e-book agreement for any reason upon 120 days' advance written notice.
  - Amazon will not include in any new e-book agreement with any E-book Supplier any Price-Related Parity Clause, Non-Price-Related Parity Clause, or Notification Provision.
  - The commitments cover all e-books sold in the EEA irrespective of language.
  - The duration of the commitments would be five years from the date on which Amazon receives formal notification of the Commission's decision pursuant to Article 9 of Regulation (EC) No 1/2003. Amazon shall appoint a Monitoring Trustee to monitor Amazon's compliance with the commitments.
- (18) In response to the publication on 26 January 2017 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 ('the Market Test'), the Commission received observations from fifteen interested third parties, including from E-book Suppliers, E-book Retailers, publishers associations and consumer organisations.
- (19) The observations received mainly related to the definitions used in the Initial Commitments (it was recommended to clarify and align them with existing Parity Provisions and to expand their scope to cover print books, audio books, apps, self-published e-books, comic books and graphic novels as well as educational titles), scope and timing of Amazon's obligations, duration of the commitments as well as retaliation, non-circumvention and monitoring of compliance.
- (20) In response to the observations made, Amazon submitted a new set of commitments (Final Commitments). The Final Commitments differ from the proposed Initial Commitments as follows:
- Amazon amended certain definitions to further clarify and align them with existing Parity Clauses and to ensure the effectiveness of the commitments.
  - Amazon amended the definition of 'E-book' to clarify that e-book titles (irrespective of genre) distributed through retail channels are covered by the Final Commitments and that educational and library channels are excluded from the scope of the Final Commitments. Amazon also removed the right to maintain Parity Clauses for educational and scholarly titles sold by E-book Suppliers directly to students outside such channels.
  - Amazon added a right for the Monitoring Trustee to ask Amazon for information that is reasonably necessary to monitor Amazon's compliance with the Final Commitments and removed its right to reply to such requests at its sole discretion.

#### 5. CONCLUSION

- (21) The Final Commitments are sufficient to address the initial concerns identified by the Commission in its Preliminary Assessment without being disproportionate. In reaching this conclusion, the Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test.

- (22) The Commission notes that the Final Commitments ban the use of the Parity Clauses in relation to which the Commission expressed the preliminary concern that they were capable of hindering, or likely to hinder, E-book Suppliers' and competing E-book Retailers' ability and incentives to support and invest in alternative and differentiated business models and e-book offerings. Further, the Final Commitments ban the use of the Parity Clauses in relation to the Commission's preliminary concern that they were capable of, or likely to reduce, the competitiveness of E-book Retailers by limiting their ability and incentive to develop and differentiate their e-book offerings, thereby reducing barriers to entry and expansion in the relevant markets. Finally, the ban on the use of the relevant Parity Clauses will likely facilitate entry and expansion of competing E-book Retailers and spur competition at the e-books retail distribution level.
- (23) Amazon has not offered less onerous commitments in response to the Preliminary Assessment that also address the Commission's preliminary concerns adequately. The Final Commitments accordingly comply with the principle of proportionality.
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