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

(2017/C 26/02)

1. INTRODUCTION

(1) According to Article 9 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([1]), the Commission may decide – in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the parties concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment – to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

(2) According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. SUMMARY OF THE CASE

(3) On 9 December 2016 the Commission adopted a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No 1/2003 concerning alleged infringements of Amazon.com, Inc., and its connected undertakings, including Amazon EU S.à.r.l., Amazon Media EU S.à.r.l. and Amazon Digital Services Inc. (hereinafter collectively 'Amazon') in relation to the retail distribution of e-books to consumers in the EEA.

(4) According to the preliminary assessment, Amazon may be dominant in the relevant markets for the retail distribution of English and German language e-books to consumers in the EEA. The preliminary assessment expressed the Commission's concern that Amazon may have abused its potentially dominant position in breach of Article 102 of the Treaty and Article 54 of the EEA Agreement by requiring E-books Suppliers ([2]) (i) to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere and/or (ii) to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another E-book Retailer ([3]) (hereinafter, collectively referred to as 'Parity Clauses'). The Commission's preliminary concerns focus on the following Parity Clauses:

(5) Clauses requiring an E-book Supplier to notify and offer to Amazon the terms for the distribution of e-books under a given business model as a result of the E-book Supplier's distribution of e-books under that business model through any E-book Retailer other than Amazon ('Business Model Parity').

(6) Clauses requiring the E-book Supplier to make available to Amazon (i) a given e-book within a particular territory and/or at a particular date and time as a result of the E-book Supplier's distribution of that e-book to any E-book Retailer other than Amazon ('Selection Parity') and/or (ii) any feature, functionality, usage rule, element or content for one or more e-books as a result of the E-book Supplier making that feature, functionality, usage rule, element or content available for that e-book through an E-book Retailer other than Amazon ('Features Parity').

([1]) OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this notice, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when applicable.

([2]) 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).

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

(7) Clauses (i) requiring the E-book Supplier to set an agency price on Amazon that depends in any way on the agency price set by the E-book Supplier (or charged by an E-book Retailer) on any E-book Retailer other than Amazon, or on the reseller prices charged to consumers by E-book Retailers other than Amazon ('Agency Price Parity') and/or (ii) requiring the E-book Supplier to offer to Amazon any promotional agency price, promotional wholesale price, or promotional content as a result of the E-book Supplier offering promotional agency prices, promotional wholesale prices, or promotional content through an E-book Retailer other than Amazon ('Promotion Parity') and/or (iii) providing 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. The revenues to the E-book Supplier and the commissions to Amazon are computed on the basis of the discounted agency price ('Discount Pool Provisions').

(8) Clauses requiring the E-book Supplier to provide Amazon a wholesale price that depends in any way on the wholesale/agency price the E-book Supplier provides to any E-book Retailer other than Amazon, or the reseller price charged to consumers by any E-book Retailer other than Amazon ('Wholesale Price Parity').

(9) 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').

(10) In the preliminary assessment, the Commission took the preliminary view that the Business Model Parity and the respective Notification Provisions may be 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 may be weakening competition at the e-book distribution level and strengthening Amazon's potentially already-dominant position.

(11) Further, the Selection Parity and the Feature Parity may be 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, 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.

(12) Moreover, 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) may be capable of (i) deterring the entry or expansion of E-book Retailers, thereby strengthening Amazon's potentially 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.

(13) Finally, the Wholesale Price Parity (i) may be 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) may reinforce 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.

(14) The preliminary assessment expressed the Commission's concerns that all the Parity Clauses described above represent, in and of themselves, a potential abuse of Amazon's dominant position in the relevant markets in the EEA. In addition, the Commission preliminarily considers 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 [1]), Non-Price-Related Parity Clauses (i.e., Business Model Parity, Selection and Features Parity) and Notification Provisions will likely reinforce the potential anti-competitive effects of the individual Parity Clauses.

[1] Agency Commission Parity is a clause requiring the E-book Supplier to provide Amazon an agency commission that depends in any way on the agency commission the E-book Supplier provides to any E-book Retailer other than Amazon under an agency agreement.

3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS

(15) Amazon does not agree with the Commission's preliminary assessment. It has 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 commitments are as follows:

(a) 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 these E-book Suppliers that it will no longer enforce such provisions.

(b) Amazon will offer each E-book Supplier whose e-book agreement for the sale of e-books to consumers in the EEA contains a Discount Pool Provision currently in effect the opportunity to terminate the agreement for any reason upon 120 days' advance written notice.

(c) Amazon will not include in any new e-book agreement with any E-book Supplier any Price-Related Parity Clause, Non-Price-Related Parity Clause, or Notification Provision.

(d) 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.

(16) The commitments are published in full in English on the website of the Directorate-General for Competition at:

http://ec.europa.eu/competition/index_en.html

4. INVITATION TO MAKE COMMENTS

(17) Subject to market testing, the Commission intends to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring binding the commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition.

(18) In accordance with Article 27(4) of Regulation (EC) No 1/2003, the Commission invites interested third parties to submit their observations on the proposed commitments. These observations must reach the Commission not later than one month following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which any information they claim to be business secrets and other confidential information should be deleted and replaced as required by a non-confidential summary or by the words 'business secrets' or 'confidential'.

(19) Answers and comments should preferably be reasoned and should set out the relevant facts. If you identify a problem with any part of the proposed commitments, the Commission would also invite you to suggest a possible solution.

(20) Observations can be sent to the Commission under reference AT.40153 E-book MFNs and related matters either by e-mail (COMP-GREFFE-ANTITRUST@ec.europa.eu), by fax (+322 2950128) or by post, to the following address:

European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË