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(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION
POLICY

EUROPEAN COMMISSION

**Communication of the Commission published pursuant to Article 27(4) of Council Regulation (EC)
No 1/2003 in Case COMP/39.847/E-BOOKS**

(notified under document C(2012) 6552)

(Text with EEA relevance)

(2012/C 283/07)

1. INTRODUCTION

1. According to Article 9 of the Council Regulation (EC) No 1/2003 of 16 December 2002 ⁽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. 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

2. On 13 August 2012, the Commission adopted a preliminary assessment pursuant to Article 9(1) of Regulation (EC) No 1/2003 pertaining to the conduct by Hachette Livre SA ('Hachette'), HarperCollins Publishers Limited, HarperCollins Publishers, L.L.C. ('Harper Collins'), Georg von Holtzbrinck GmbH & Co. KG and Verlagsgruppe Georg von Holtzbrinck GmbH ('Holtzbrinck/Macmillan'), Simon & Schuster, Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc. ('Simon & Schuster') as well as Apple, Inc. ('Apple') in relation to the sale of e-books to consumers ⁽²⁾.
3. In the preliminary assessment, the Commission took the preliminary view that, by jointly switching the sale of e-books from a wholesale model to an agency model with the same key terms on a global basis, the Four Publishers and Apple engaged in a concerted practice with the object of raising retail prices of e-books in the EEA or preventing the emergence of lower prices in the EEA for e-books in breach of Article 101 of the TFEU and Article 53 of the EEA Agreement.
4. To implement their global strategy in the EEA (including, but not limited to, in the UK, France and Germany), each of the Four Publishers signed with Apple agency agreements containing the same key terms (including a so-called most favoured nation ('MFN') clause regarding price, maximum retail price

⁽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⁾ On 1 December 2011, the Commission also opened proceedings against Pearson plc ('Pearson'), the parent company of the Penguin group, which remains a party to the proceedings in case COMP/39.847/E-BOOKS. The Commission is still investigating Pearson's conduct and its compatibility with Article 101 of the TFEU and Article 53 of the EEA Agreement.

grids and the agent's level of commission) for the sale of e-books to consumers located in the EEA. The same key terms, including in particular the MFN clause, in the agency agreements with Apple meant that, to avoid lower revenues and margins for their e-books on the iBookstore, the publishers had to pressure other major e-book retailers offering e-books to consumers in the EEA to adopt the agency model.

5. The preliminary assessment did not seek to examine the compatibility with Article 101 of the TFEU and Article 53 of the EEA Agreement of the agency agreements concluded by the Four Publishers and Apple.

3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS

6. The Four Publishers and Apple do not agree with the Commission's preliminary assessment. They have nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003 in order to meet the Commission's competition concerns. These commitments are without prejudice to national laws which allow or oblige publishers to set the retail price for e-books at their own discretion ('RPM laws').
7. The key elements of the commitments offered by the Four Publishers and Apple are as follows:
8. Each of the Four Publishers and Apple will terminate the agency agreements for the sale of e-books in the EEA concluded between each of the Four Publishers and Apple. Apple will also notify another major international e-book publisher that such publisher may immediately terminate its agency agreement⁽³⁾, and in the event this publisher does not provide Apple with notice of termination, then Apple will terminate the agreement in line with the conditions laid down therein.
9. In addition, the Four Publishers will offer each retailer other than Apple the opportunity to terminate any agency agreements concluded for the sale of e-books that (i) restrict, limit or impede the retailer's ability to set, alter or reduce the retail price, or to offer price discounts or promotions, or (ii) contain a price MFN clause as defined in the Four Publishers' commitments. In case a retailer decides not to use the opportunity to terminate such an agreement, the Four Publishers will terminate it in line with the conditions laid down therein.
10. For a period of two years, the Four Publishers will not restrict, limit or impede e-book retailers' ability to set, alter or reduce retail prices for e-books and/or to offer discounts or promotions. However, as regards agency agreements, the aggregate value of the price discounts or promotions offered by any retailer should not exceed the aggregate amount equal to the total commissions the publisher pays to that retailer over a 12-month period in connection with the sale of its e-books to consumers.
11. Moreover, for a period of five years: (i) the Four Publishers will not enter into any agreement relating to the sale of e-books within the EEA that contains a price MFN clause as defined in the Four Publishers' commitments; and (ii) Apple will not enter into any agreement relating to the sale of e-books in the EEA that contains a retail price MFN clause as defined in Apple's commitments.
12. Apple will inform any publisher with which it has an e-book agency agreement that it will not enforce a retail price MFN clause in any such agreement for a period of five years.
13. 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

14. The Commission intends, subject to market testing, to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition, to be binding. If there are substantial changes to the commitments, a new market test will be launched.
15. 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.

⁽³⁾ See footnote 2.

16. The time limit to submit observations expires one month after the date of publication of this notice. 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'.
17. 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.
18. Observations can be sent to the Commission under reference number COMP/39.847/E-BOOKS, either by e-mail (COMP-GREFFE-ANTITRUST@ec.europa.eu), by fax (+32 22950128) or by post, to the following address:

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Antitrust Registry
1049 Bruxelles/Brussel
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