

**Summary of Commission Decision
of 12 December 2012**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union
and Article 53 of the EEA Agreement**

(Case COMP/39.847 — E-BOOKS)

(notified under document C(2012) 9288)

(Only the English text is authentic)

(2013/C 73/07)

On 12 December 2012, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.

1. INTRODUCTION

- (1) The Decision is addressed to Apple Inc ('Apple'), Hachette Livre SA ('Hachette'), Harper Collins Publishers Limited and Harper Collins Publishers L.L.C. (collectively 'Harper Collins'), Georg von Holtzbrinck GmbH & Co. KG and Verlagsgroupe Georg von Holtzbrinck GmbH (collectively 'Holtzbrinck/Macmillan'), Simon & Schuster, Inc., Simon & Schuster (UK) Ltd and Simon & Schuster Digital Sales Inc. (collectively 'Simon & Schuster'), collectively referred to as the 'four publishers'. The Decision concerns conduct of these parties in relation to the retail prices of e-books.

2. THE PROCEDURE

- (2) On 1 December 2011, the Commission opened proceedings against Apple, the four publishers, and another major international publisher known as Pearson/Penguin, following preliminary concerns regarding a possible concerted practice between these undertakings with the object of raising retail prices in the EEA. The Commission's investigation regarding the conduct of Pearson/Penguin is on-going. On 13 August 2012, the Commission adopted a preliminary assessment addressed to the four publishers and Apple.
- (3) Between 12 and 18 September 2012, the four publishers and Apple submitted draft initial commitments to address the concerns set out in the preliminary assessment ('initial commitments').
- (4) On 19 September 2012, an Article 27(4) Notice was published in the Official Journal inviting third parties to submit their observations on the draft commitments within one month of publication (the 'market test').
- (5) On 23 and 24 October 2012, the Commission informed the four publishers of the observations received from

interested third parties following the publication of the notice. On 24 October 2012, the Commission offered to inform Apple of such observations.

- (6) In light of the observations received, the four publishers and Apple submitted, between 31 October and 12 November 2012, amended commitments, intended to become final ('final commitments').
- (7) On 27 November 2012, the Advisory Committee approved the draft decision based on Article 9 of Regulation (EC) No 1/2003. On 27 November 2012, the Hearing Officer issued his final report.

3. CONCERNS EXPRESSED IN THE PRELIMINARY ASSESSMENT

Agency agreements signed between at least each of the four publishers and Apple in the US and EEA

- (8) In the preliminary assessment, the Commission's preliminary view was that prior to 2009, at least the four publishers expressed to each other concerns regarding retail prices for e-books being set by Amazon, a large online retailer, at or below wholesale prices. The Commission takes the preliminary view that no later than December 2009, each of the four publishers engaged in direct and indirect (through Apple) contacts aimed at either raising the retail prices of e-books above those of Amazon (as was the case in the UK) or avoiding the arrival of such prices altogether (as was the case in France and Germany) in the EEA. In order to achieve this aim, the four publishers, together with Apple, intended to jointly switch the sale of e-books from a wholesale model (where the retailer determines retail prices) to an agency model (where the publisher determines retail prices) on a global basis and on the same key pricing terms, first with Apple and then with other retailers (including Amazon).

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

- (9) In the preliminary assessment, the Commission took the preliminary view that to achieve such a joint switch, each of the four publishers disclosed to, and/or received information from, the other four publishers and/or Apple, regarding the four publishers' future intentions with respect to: (i) whether to enter into an agency agreement with Apple in the US; and (ii) the key terms under which each of the four publishers would enter into such an agency agreement with Apple in the US, including a retail price MFN clause, maximum retail price grids and the level of commission to be paid to Apple. The retail price MFN clause provided that each of the publishers would have to match on Apple's iBookstore store any lower prices available for the same e-book titles from other online retailers. Combined with the other key pricing terms, the MFN clause would have resulted in lower revenues for publishers if other retailers continued to offer e-books at the prices then prevalent on the market. The Commission took the preliminary view that the financial implications for publishers of the retail price MFN clause were such that this clause acted as a joint 'commitment device'. Each of the four publishers was in a position to force Amazon to accept a change to the agency model or otherwise face the risk of being denied access to the e-books of each of the four publishers, assuming that at least all four publishers had the same incentive during the same time period, and that Amazon could not sustain simultaneously being denied access even to only a part of the e-books catalogue of at least each of the four publishers.
- (10) In the preliminary assessment, the Commission expressed the preliminary view that Apple's goal was to find a way to have retail prices at the same level as Amazon's while still making its desired margin. Apple would have known that this goal and the goal of each of the four publishers of raising retail prices above the level set by Amazon (or avoiding the introduction of lower prices by Amazon) could be achieved if Apple: (i) followed the suggestion by at least some of the four publishers that it enter the market for the sale of e-books under an agency, rather than a wholesale, model; and (ii) informed each of the four publishers whether any of at least the other four publishers were entering into an agency agreement with Apple in the US under the same key terms.
- Article 101(1) and (3) of the TFEU, Article 53(1) and (3) of the EEA Agreement*
- (11) The Commission's preliminary view was that the joint switch for the sale of e-books from a wholesale model to an agency model with the same key pricing terms on a global basis amounted to a concerted practice with the object of either raising retail prices of e-books in the EEA or preventing the emergence of lower prices of e-books in the EEA.
- (12) The concerted practice between and among the four publishers and Apple is likely to appreciably affect trade between Member States within the meaning of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement.
- (13) Further, the Commission's preliminary view was that Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement do not apply in this case because the cumulative conditions set out in these provisions are not met.
- (14) The Commission's concerns identified in the preliminary assessment do not relate to the legitimate use of the agency model for the sale of e-books. Each of the four publishers and Apple remain free to enter into agency agreements in line with the final commitments in so far as those agreements and their provisions do not infringe Union competition legislation.
- (15) The preliminary assessment was furthermore without prejudice to any national laws allowing the publishers to set retail prices for e-books at their own discretion ('RPM laws').
- 4. THE INITIAL COMMITMENTS, THE MARKET TEST AND THE FINAL COMMITMENTS**
- (16) The four publishers and Apple do not agree with the Commission's preliminary assessment of 13 August 2012. Nevertheless, in order to address the Commission's concerns as set out in that preliminary assessment, they have offered, between 12 and 18 September 2012, their initial commitments. Following the end of the market test, the parties submitted between 31 October and 12 November 2012 the final commitments.
- (17) The key elements of the initial commitments offered by each of the four publishers and Apple are as follows:
- (18) 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, 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.
- (19) Each of 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 any other form of promotions; or (ii) contain a price MFN clause as defined in the four publishers' initial commitments. In case a retailer decides not to use the opportunity to terminate such an agreement, each of the four publishers will terminate it in line with the conditions laid down therein.

- (20) For a period of two years (so called 'cooling-off period'), each of the four publishers undertakes not to restrict, limit or impede e-book retailers' ability to set, alter or reduce retail prices for e-books and/or to restrict, limit or impede an e-book retailer's ability to offer price discounts or any other form of promotions. In the event that, after termination of the agreements mentioned above, any of the four publishers enters into an agency agreement with an e-book retailer, that e-book retailer will be able, for a period of two years, to reduce the retail prices of e-books by an aggregate amount equal to the total commissions that publisher pays to that e-book retailer over a period of at least one year, in connection with the sale of its e-books to consumers; and/or to use such amount to offer any other forms of promotions.
- (21) For a period of five years: (i) the four publishers will not enter into any agreement for the sale of e-books in the EEA that contains any type of MFN clause specified in the four publishers' initial commitments (retail price, wholesale price and commission/revenue share MFN clauses as well as business model MFN clauses); and (ii) Apple will not enter into any agreement for the sale of e-books in the EEA that contains a retail price MFN clause as specified in Apple's initial commitments, and inform any relevant publisher that it will not enforce any retail price MFN clause in any agency agreement for the sale of e-books in the EEA.
- (22) In response to the market test, the Commission received observations from 14 interested third parties, including from e-book publishers, e-book retailers, trade associations and 1 private citizen.
- (23) The observations received mainly related to the termination of existing agency agreements, the cooling-off period, the scope of the ban on price MFN clauses as set out in the initial commitments, as well as non-circumvention and compliance terms.
- (24) The Commission also received other observations related to certain definitions in Apple's and the four publishers' initial commitments, as well as to other considerations not directly related to the competition concerns identified by the Commission in its preliminary assessment. Those considerations concerned Amazon's strong position in the EEA, the impact of the initial commitments on cultural diversity and the advantages and disadvantages of using the agency model for the sale of e-books.
- (25) The final commitments differ from the proposed initial commitments in the following aspects:

Apple has aligned the definition of 'eBook' with that used by each of the four publishers and has removed the characterisation of itself as 'online eBook store provider'; and each of the four publishers removed a ban on business model MFN clauses.

5. ASSESSMENT AND PROPORTIONALITY OF THE FINAL COMMITMENTS

- (26) In its preliminary assessment, the Commission expressed the preliminary view that the possible concerted practice among and between the four publishers and Apple had the object of preventing, restricting or distorting competition in the EEA. In order to remove such concerns, the Commission considers that the conditions of competition that existed in the EEA prior to the possible concerted practice should be substantially re-established ('competitive reset').
- (27) Each of the four publishers and Apple have proposed to bring about that competitive reset by causing the termination of relevant agency agreements and by agreeing to certain restraints when renegotiating their commercial arrangements for e-books, as set out in the final commitments. Those restraints include a retail price MFN ban, price MFN bans and, as regards the four publishers, a cooling-off period.
- (28) In particular, the Commission considers that the final commitments offered by each of the four publishers and Apple will substantially reduce the possibility that each of the four publishers and Apple could recreate the effects of the retail price MFN clause, which, in the Commission's preliminary view, acted as a commitment device and enabled the joint conversion to the agency model with the same key terms. In addition, the removal of the retail price MFN clause contained in agreements between Apple and any other e-book publisher will eliminate a significant financial incentive for other publishers to have other retailers on the agency model.
- (29) The Commission considers that the final commitments offered by each of the four publishers and Apple, taken together, will create, over a sufficient period of time, conditions for a competitive reset in the EEA. In particular, it would result in sufficient uncertainty regarding the future intentions of publishers and retailers regarding the choice of business models (that is to say, wholesale, agency or a novel model) and the pricing terms used therein. The final commitments offered by each of the four publishers and Apple will also decrease incentives for each of the four publishers to renegotiate agreements for e-books with the same key terms.
- (30) In conclusion, the Commission considers that the final commitments offered by each of the four publishers and Apple are adequate (both regarding their scope and their duration) to remove the Commission's concerns as expressed in its preliminary assessment. Moreover, neither Apple nor any of the four publishers have offered less onerous commitments that also adequately address those concerns.

- (31) The Commission has taken into consideration the interests of third parties, including those that have responded to the market test.

6. CONCLUSION

- (32) The Decision makes the commitments binding on Apple, Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster for a total period of five years from the date of notification of the decision, except for the cooling-off period, which will be binding for a total period of two years from the date of notification of the decision.
-