

Summary of Commission Decision

of 25 July 2013

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(2013) 4750)

(Only the English text is authentic)

(Text with EEA relevance)

(2013/C 378/14)

On 25 July 2013, 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 Penguin Random House Limited (formerly 'The Penguin Publishing Company Limited') and Penguin Group (USA), LLC (formerly 'Penguin Group (USA), Inc.') (collectively 'Penguin')⁽²⁾. The Decision concerns conduct by Penguin in relation to its participation in a possible concerted practice concerning the sale of e-books to consumers.

concerned. Penguin was not an addressee of that Decision as it did not offer commitments at the time. However, Penguin decided to formally offer commitments earlier this year.

- (3) On 1 March 2013, the Commission adopted a preliminary assessment addressed to Penguin.

2. THE PROCEDURE

- (2) On 1 December 2011, the Commission opened proceedings against Apple Inc. ('Apple'), Hachette Livre SA ('Hachette'), HarperCollins Publishers Limited and HarperCollins Publishers L.L.C. (collectively 'Harper Collins'), Georg von Holtzbrinck GmbH & Co. KG and Verlagsgruppe Georg von Holtzbrinck GmbH (collectively 'Holtzbrinck/Macmillan'), Simon & Schuster, Inc., Simon & Schuster (UK) Ltd and Simon & Schuster Digital Sales Inc. (collectively 'Simon & Schuster') (hereinafter collectively the 'four publishers'), and Penguin (collectively referred to as the 'five publishers'), following preliminary concerns regarding a possible concerted practice between these undertakings with the object of raising retail prices in the EEA. On 12 December 2012, the Commission adopted a decision pursuant to Article 9 of Regulation (EC) No 1/2003 addressed to the four publishers and Apple ('Decision of 12 December 2012'). It made binding the commitments offered by the four publishers and Apple and closed proceedings as far as they had been

- (4) On 16 April 2013, Penguin submitted commitments to address the concerns set out in the preliminary assessment ('commitments').

- (5) On 19 April 2013, an Article 27(4) Notice was published in the Official Journal inviting third parties to submit their observations on the commitments within one month of publication (the 'market test').

- (6) On 23 May 2013, the Commission informed Penguin about one observation received from an interested third party during the market test.

- (7) On 28 June 2013, the Advisory Committee approved the draft decision based on Article 9 of Regulation (EC) No 1/2003. On 28 June 2013, the Hearing Officer issued his final report.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ On 1 July 2013, the transaction resulting in the creation of the joint venture known as Penguin Random House was completed. As a result, Penguin Group (USA), Inc. has changed its name to Penguin Group (USA), LLC and The Penguin Publishing Company Limited has changed its name to Penguin Random House Limited. The Penguin Group (a division of Pearson plc) has ceased to exist while Dorling Kindersley Holdings Limited's publishing assets have been transferred to Penguin Random House Limited or its subsidiaries (over which Penguin Random House Limited exercises decisive influence).

3. CONCERNS EXPRESSED IN THE PRELIMINARY ASSESSMENT

Agency agreements signed between each of the five publishers and Apple in the US and EEA

- (8) In line with the preliminary assessment addressed to the four publishers, the Commission took the preliminary

view in the preliminary assessment addressed to Penguin, that no later than 2008, at least the five 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 five 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 five publishers, together with Apple planned 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 Amazon and other retailers.

- (9) In the preliminary assessment, the Commission took the preliminary view that to achieve such a joint switch, each of the five publishers disclosed to, and/or received information from, the rest of the Five Publishers and/or Apple, regarding the five 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 five 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 five publishers was in a position to force Amazon to accept changing to the agency model or otherwise face the risk of being denied access to the e-books of each of the five publishers, assuming that all five publishers had the same incentive during the same time period, and that Amazon could not have sustained simultaneously being denied access even to only a part of the e-books catalogue of each of the five 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 five 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 five 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 five publishers whether any of at least the other five publishers were entering into an agency agreement with Apple in the US under the same key terms.

Article Article 101(1) and (3) 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 five publishers and Apple is likely to appreciably affect trade between Member States within the meaning of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.
- (13) Further, the Commission's preliminary view was that Article 101(3) 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. Penguin remains free to enter into agency agreements in line with the 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 COMMITMENTS AND THE MARKET TEST

- (16) Penguin does not agree with the Commission's preliminary assessment of 1 March 2013. Nevertheless, in order to address the Commission's concerns as set out in that preliminary assessment, Penguin offered, on 16 April 2013, commitments that are substantially the same as

the commitments previously submitted and made binding by the commission's Decision of 12 December 2012 on the four publishers.

(17) The key elements of the commitments offered by Penguin are as follows:

(18) If Apple has not already terminated, pursuant to its commitments, its agency agreements concluded with Penguin, Penguin will terminate its agreements with Apple no later than 14 days following the date of the adoption of the Commission decision making binding the commitments.

(19) Penguin 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 Penguin's commitments. In case a retailer decides not to use the opportunity to terminate such an agreement, Penguin will terminate it in line with the conditions laid down therein.

(20) For a period of two years (so called 'cooling-off period'), Penguin 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 discounts or promotions. In the event that, after termination of the agreements mentioned above, Penguin 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 Penguin will not enter into any agreement for the sale of e-books in the EEA that contains any type of MFN clause specified in Penguin's commitments (retail price, wholesale price and commission/revenue share MFN clauses).

(22) In response to the market test, the Commission received one observation.

(23) The observation related to considerations which are not linked to the competition concerns expressed in the preliminary assessment, namely the use of differing file formats and digital rights management ('DRM') which may render certain e-book files readable only on certain types of e-book readers, and Amazon's strong market position in the EEA.

5. ASSESSMENT AND PROPORTIONALITY OF THE COMMITMENTS

(24) In its preliminary assessment, the Commission expressed the preliminary view that the possible concerted practice among and between the five publishers and Apple had the object of preventing, restricting or distorting competition in the EEA.

(25) In the Decision of 12 December 2012, the Commission considered that the conditions of competition that existed in the EEA prior to the possible concerted practice should be substantially re-established ('competitive reset').

(26) Each of the four publishers and Apple offered commitments that would 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. These included, as regards the four publishers, both a cooling-off period and a price MFN ban and, as regards Apple, a retail price MFN ban.

(27) The Commission considered that the commitments offered by each of the four publishers and Apple, taken together, would create, over a sufficient period of time, conditions for a competitive reset in the EEA. The commitments 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. They would also decrease incentives for each of the four publishers and Apple to renegotiate agreements for e-books with the same key terms.

(28) Penguin's commitments will add to the competitive reset brought about by the Decision of 12 December 2012.

(29) First, Penguin's commitments will lead it to terminate its relevant agency agreements with retailers (in addition to the agency agreements with Apple which have to be terminated under the commitments made binding on Apple by the Decision of 12 December 2012).

(30) Second, under Penguin's commitments, the two-year cooling-off period will now apply to all Penguin e-book titles offered by Apple and other retailers.

(31) Third, under Penguin's commitments, the price MFN ban will apply to any renegotiated agreement between Penguin and retailers (in addition to the application of the retail price MFN ban to any renegotiated agreement between Penguin and Apple, as foreseen by the commitments made binding on Apple by the Decision of 12 December 2012).

- (32) The Commission considers that taken together, the commitments offered by Penguin, in light of the commitments of the four publishers and Apple made binding by the Decision of 12 December 2012, will further contribute to creating, over a sufficient period of time, conditions for a competitive reset.
- (33) In conclusion, the Commission considers that the commitments offered by Penguin are adequate (both regarding their scope and their duration) to remove the Commission's concerns as expressed in its preliminary assessment. Moreover, Penguin did not offer less onerous commitments that also adequately address those concerns.
- (34) The Commission has taken into consideration the interests of third parties, including those that have responded to the market test.

6. CONCLUSION

- (35) The Decision makes the commitments binding on Penguin 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.
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