



EUROPEAN COMMISSION
Competition DG

CASE COMP/AT.39847-E-BOOKS

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 12/12/2012

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EUROPEAN COMMISSION

Strasbourg, 12.12.2012
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PUBLIC VERSION

COMMISSION DECISION

of 12.12.2012

addressed to:

- Hachette Livre SA,**
- HarperCollins Publishers Limited, HarperCollins Publishers, L.L.C.,**
- Georg von Holtzbrinck GmbH & Co. KG, Verlagsgruppe Georg von Holtzbrinck GmbH,**
- Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc.,**
- Apple, Inc.**

**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/39847 - E-BOOKS**

(Text with EEA relevance)

(Only the English text is authentic)

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COMMISSION DECISION

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addressed to:

- Hachette Livre SA,
- HarperCollins Publishers Limited, HarperCollins Publishers, L.L.C.,
- Georg von Holtzbrinck GmbH & Co. KG, Verlagsgruppe Georg von Holtzbrinck GmbH,
- Simon & Schuster Inc., Simon & Schuster (UK) Ltd, Simon & Schuster Digital Sales, Inc.,
- Apple, Inc.

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Case COMP/39847 - E-BOOKS

(Text with EEA relevance)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to 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 Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission Decision of 1 December 2011 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 13 August 2012,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

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 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the Treaty will be used throughout this Decision.

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,
Having regard to the final report of the Hearing Officer in this case,
Whereas:

1. SUBJECT MATTER

- (1) This Decision is addressed to 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") and Apple, Inc. ("Apple") and concerns the conduct of these parties in relation to the sale of e-books to consumers.
- (2) Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster are collectively referred to as the "Four Publishers".
- (3) In its Preliminary Assessment of 13 August 2012 ("Preliminary Assessment"), the Commission provisionally concluded that certain aspects of the global strategy of the Four Publishers and Apple regarding the sale of e-books, pursued with the aim of raising retail prices (or avoiding lower retail prices in the first place), raised concerns as to their compatibility with Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ("EEA Agreement").

2. THE PARTIES

- (4) Hachette is a publishing group owned by Lagardère SCA, a company listed on the Paris stock exchange. The Hachette group is mainly active in France, the United Kingdom, Spain and the United States. The Hachette group publishes titles mainly in French, English and Spanish.
- (5) Harper Collins is a publishing group owned by News Corporation, an international media corporation with headquarters in the US. Harper Collins is mainly active in the United Kingdom and in the United States and publishes titles mainly in English.
- (6) Holtzbrinck/Macmillan is a German publishing group which is active in Germany, the United Kingdom, the United States and in other countries. The ultimate parent company of the Holtzbrinck/Macmillan group is Georg von Holtzbrinck GmbH & Co. KG, a holding company. In Germany, the Holtzbrinck/Macmillan group is active through seven imprints (two of which are Rowohlt and S. Fischer). The group includes Macmillan UK, the holding company for all publishing activities of the Holtzbrinck/Macmillan group outside Germany and the United States. In the United Kingdom, Macmillan UK is active through Pan Macmillan (fiction and non-fiction literature), Palgrave Macmillan (academic literature) and Macmillan Education (schoolbooks).
- (7) Simon & Schuster is a publishing group owned by CBS Corporation, a media corporation based in the United States. Its divisions in the United States include

Simon & Schuster Adult Publishing, Simon & Schuster Children's Publishing, Simon & Schuster Audio and Simon & Schuster Digital Sales, Inc. In the United Kingdom, Simon & Schuster is active through Simon & Schuster (UK) Ltd.

- (8) Apple is a technology company based in the United States. As regards the sale of e-books in the EEA, Apple acts through its subsidiary, iTunes EU S.a.r.l., which has its principal place of business in Luxembourg.

3. PROCEDURAL STEPS PURSUANT TO REGULATION (EC) NO 1/2003

- (9) On 1 December 2011 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (10) On 13 August 2012, the Commission adopted a Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's competition concerns². Those concerns related to a concerted practice between and among Hachette, Harper Collins, Holtzbrinck/Macmillan, Simon & Schuster and Apple in relation to a common global strategy, including in the EEA, for the sale of e-books with the aim of raising retail prices or avoiding lower retail prices.
- (11) On 12 September 2012, Harper Collins, on 13 September 2012, Hachette, on 14 September 2012, Simon & Schuster and Apple, and on 18 September 2012, Holtzbrinck/Macmillan submitted initial commitments ("the Initial Commitments") to the Commission in response to the concerns expressed in the Preliminary Assessment.
- (12) On 19 September 2012, a notice³ 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 Commitments and inviting interested third parties to submit their observations on the Initial Commitments within one month following publication.
- (13) On 23 and 24 October 2012, the Commission informed the Four Publishers about the observations received from interested third parties following the publication of the notice, and on 24 October 2012, the Commission informed Apple about those observations.
- (14) On 31 October 2012, Holtzbrinck/Macmillan, on 6 November 2012, Hachette, on 8 November 2012, Harper Collins, and on 12 November 2012, Simon & Schuster and Apple submitted amended commitments (the "Final Commitments").
- (15) On 27 November 2012, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 27 November 2012, the Hearing Officer issued his final report.

² The Commission also opened proceedings against Pearson plc ("Pearson"). Pearson is the parent company of the Penguin group ("Penguin"), one of the largest English-language trade book publishers in the world. Pearson was, however, not an addressee of the Preliminary Assessment. The Commission is still examining Pearson's conduct and its compatibility with Article 101 of the Treaty. Pearson remains, therefore, a party to the proceedings in case COMP/39.847/E-Books.

³ OJ C 283, 19.9.2012, p. 7.

4. PRELIMINARY ASSESSMENT

4.1. Background

4.1.1. The e-book industry

- (16) An electronic book or e-book is an electronically formatted book designed to be read on a computer, a handheld device or other electronic devices capable of visually displaying e-books.
- (17) Consumers can purchase e-books through websites of e-book retailers or through applications installed on their e-reading devices. Electronic distribution allows retailers to avoid certain expenses inherent in the distribution of print books, including most of the warehousing and distribution expenses.
- (18) While the first e-books were already available in the early 1990s, a non-negligible demand for e-books only started to emerge after Amazon, an on-line retailer based in the United States, launched in November 2007 its Kindle e-book platform in the United States.
- (19) From 2007 until Spring 2010, publishers sold e-books to retailers mainly under wholesale arrangements, also referred to as the wholesale or reseller model.
- (20) Under the wholesale model, e-books were sold to the retailer at a wholesale price below the suggested retail price determined by the publishers (the "list price"). At least in the United States, the United Kingdom and Germany, wholesale prices were generally up to 50% of the e-book list price.
- (21) In the United States and certain countries of the EEA where there was no legislation allowing or obliging publishers to independently set retail prices for print books and/or e-books (so called retail price maintenance ("RPM") laws), retailers were free to set the retail prices charged to consumers.

4.1.2. Amazon's USD 9.99 pricing policy

- (22) In 2007, Amazon started to offer in the United States, and as of October 2009, internationally (therefore also in the EEA), certain newly released English-language bestselling e-books to consumers for USD 9.99. This retail price set by Amazon was generally significantly below the e-book list price, as well as at, or below, the e-book wholesale price set by publishers. Other major United States e-retailers often matched or approached Amazon's USD 9.99 prices for these titles.
- (23) No later than 2008, at least the Four Publishers started to be concerned about, *inter alia*, Amazon's e-book pricing policy and its spread outside the United States (including to the EEA), as well as Amazon's growing market share in the United States and potentially globally. In the Preliminary Assessment, the Commission took the preliminary view that the Four Publishers expressed to each other the desire to increase retail prices of e-books above the levels set by Amazon and stop the spread of those lower retail prices, as well as to stop Amazon's growth in the United States and other markets, including in the EEA.

4.1.3. The Four Publishers' search for a collective and global response

- (24) Each of the Four Publishers sold a significant amount of its e-books through Amazon.
- (25) In the Preliminary Assessment, the Commission's preliminary view was that each of the Four Publishers understood that, rather than independent action, a common approach against Amazon was necessary to succeed in moving Amazon away from its USD 9.99 pricing policy.
- (26) The Commission's preliminary view was that faced with Amazon's global reach and the USD 9.99 pricing policy, expected to be followed by Amazon internationally, the Four Publishers pursued a global approach. Their digital plans and strategies were formulated globally and group-wide.
- (27) Throughout 2009, several of the Four Publishers considered a number of potential approaches to force Amazon to raise retail prices. These included: (i) raising the wholesale prices of their e-books to match those of print books; (ii) exploring the possible establishment of joint e-book platforms; (iii) considering ways of taking control of retail prices of e-books either through using the agency model⁴ or RPM arrangements with retailers, and/or through lobbying for national RPM laws; and (iv) delaying, in the United States, the release of e-book editions of certain new release titles ("windowing") in order to put pressure on Amazon to accept an agency model with higher retail prices.

4.2. Practices raising concerns

4.2.1. Common global plan to convert the sale of e-books to an agency model with the same key pricing terms

- (28) In December 2009, Apple contacted at least the Four Publishers, on an individual basis, regarding its intention to begin selling e-books.
- (29) The Commission's preliminary view was that, in parallel to those initial contacts with Apple in December 2009, some of the Four Publishers engaged in direct contacts with each other regarding their respective discussions with Apple and/or the envisaged commercial model for the sale of e-books to consumers.
- (30) The Commission's preliminary view was that Apple at first considered entering the market under a wholesale model. When some of the Four Publishers proposed an agency model for the sale of e-books and asked Apple to propose retail prices, Apple concluded that the agency model was indeed the preferred business model to achieve both its goal of eliminating meaningful retail price competition with Amazon, and the goal of each of the Four Publishers of raising retail prices above Amazon's retail prices. Apple, therefore, simultaneously informed at least the Four Publishers in early January 2010 that it was proposing to sell e-books under an agency model. The terms that Apple proposed to at least the Four Publishers, including pricing terms,

⁴ Under an agency model, as opposed to a wholesale or reseller model, e-books are sold directly from the publisher to the consumer. The agent is empowered to negotiate and/or conclude contracts on behalf of its principal, either in its own name or in the name of the principal. The agent is usually remunerated for the agency services it provides by payment of a commission.

were identical, and included a statement that all resellers of new titles would have to be on the agency model.

- (31) Shortly afterwards, Apple simultaneously submitted its proposed draft agency agreement to at least the Four Publishers. The draft agency agreements contained, among other things, a retail price most favoured nation ("MFN") clause. This clause replaced Apple's earlier requirement that each of the Four Publishers adopt the agency model with each of its retailers. The retail price MFN clause provided that, in the event another retailer were to offer a lower price for a particular e-book, including in situations where that retailer was operating under a wholesale model and thus was free to set retail prices, the publisher would have to lower the retail price of that e-book in the iBookstore to match that other lower retail price.
- (32) Each of the draft agreements contained maximum retail price grids for new release e-books. These price grids were set above the retail prices charged by Amazon at the time. The Commission's preliminary view is that the Four Publishers' efforts to negotiate higher maximum retail price points with Apple show that they understood that the actual future retail e-book prices for newly released bestsellers were likely to be the same as the "maximum" retail prices proposed in each of the draft agency agreements for e-books. Each of the Four Publishers and Apple further understood that Apple's proposed pricing and commission level would result in a lower margin for each of the Four Publishers than that under the existing wholesale model.
- (33) The Commission's preliminary view is that Apple ensured, from the outset and throughout the negotiations with at least each of the Four Publishers, that each of the Four Publishers knew that (i) at least each and every one of the Four Publishers was also negotiating with Apple on the same key pricing terms, and (ii) Apple considered it necessary to reach an agreement with a critical number of publishers in order to launch its iBookstore. Apple also kept at least the Four Publishers informed of the status of the negotiations with at least each and every one of them, including with how many of each of the Four Publishers it had successfully concluded negotiations.
- (34) In addition to Apple's assurances and information, in its Preliminary Assessment, the Commission took the preliminary view that the Four Publishers engaged, throughout their respective negotiations with Apple, in direct contacts with each other whereby they disclosed and received information about the course of conduct contemplated and/or adopted by each of them, particularly with respect to pricing.
- (35) The Commission's preliminary view was also that during the negotiations with at least the Four Publishers in the United States, Apple informed each of the Four Publishers that while it was initially launching the iBookstore in the United States and Canada, it subsequently intended to roll out the iBookstore in other countries, including in the EEA. Each of the Four Publishers therefore understood that Apple was likely to enter the e-books business on a global scale, including in the EEA, and on the basis of the same agency model and with the same key pricing terms. Therefore, the Four Publishers prepared for the implementation of the agency model outside the United States, and most notably in the EEA, in parallel to the implementation in the United States.

4.2.2. *Implementation of the common global plan in the United States*

4.2.2.1. The agency agreements between each of the Four Publishers and Apple

- (36) Between 24 and 26 January 2010, each of the Four Publishers signed agency agreements with Apple in the United States, each containing the same key terms, including the payment of a commission to Apple equal to 30 % of the retail price paid by a consumer for an e-book purchased from the iBookstore, maximum retail price grids, and a retail price MFN clause for newly released e-books, referred to in recital (31). The retail price MFN obligation became effective with regard to each of the Four Publishers on 3 April 2010, the launching date of the iBookstore.
- (37) Each agreement provided that each of the Four Publishers is, in principle, free to set the retail price for its e-books titles. However, as regards newly released e-books, each agreement contained identical price grids with maximum retail price points, pegged to suggested hardcover retail prices, beyond which none of the Four Publishers could go. In addition, as regards newly released e-books that appear on the bestseller lists published by the New York Times, each agreement also contained identical maximum retail price points depending on the suggested retail price for the corresponding hardcover edition.

4.2.2.2. The conversion of Amazon and other retailers to the agency model

- (38) The Commission's preliminary view was that Apple and each of the Four Publishers understood that both Apple's goal of eliminating retail price competition with Amazon, and the Four Publishers' goal of raising retail prices above those of Amazon could be achieved only if the Four Publishers were able to impose an agency model on all retailers including Amazon. Apple and each of the Four Publishers understood that the retail price MFN clause created a strong incentive for each of the Four Publishers to convert Amazon (and other major retailers) to the agency model in order to avoid the costs of having to match Amazon's lower retail prices under the Apple agency contract. The Commission's preliminary view was that the retail price MFN clause acted as a joint "commitment device" whereby 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.
- (39) Shortly before each of the Four Publishers signed an agency agreement with Apple in the United States, each of the Four Publishers separately announced to Amazon its intention to change its business terms and move to an agency model in the United States. Amazon initially refused to move to the agency model and even stopped selling both print and e-book editions of Holtzbrinck/Macmillan's titles on its United States website for a short period of time, but ultimately gave in. By 3 April 2010, the launching date of the iBookstore in the United States and the starting date of the MFN obligation upon the Four Publishers, each of the Four Publishers had signed an agency agreement with Amazon in the United States. The Four Publishers subsequently converted other retailers to the agency model.

4.2.3. *Implementation of the common global plan in the EEA*

4.2.3.1. The agency agreements between each of the Four Publishers and Apple

- (40) Between March and December 2010, each of the Four Publishers entered into negotiations with Apple concerning the signature of agency agreements in the United Kingdom, France and/or Germany.
- (41) In the Commission's preliminary view, when negotiating those agency agreements and in light of their global strategy, each of the Four Publishers and Apple used their United States agency agreements as a template.
- (42) The Commission's preliminary view was that, in light of the global strategy adopted by each of the Four Publishers, the executives of each of the Four Publishers in the United Kingdom were directed by their superiors and/or counterparts in the United States to enter into an agency agreement with Apple in respect of United Kingdom book titles the rights to which are held by each of the Four Publishers in the United Kingdom ("UK titles").
- (43) Between mid-May 2010 and end of August 2010, each of the Four Publishers signed an agency agreement with Apple for UK titles. As set out in recitals (46) to (48), the agency agreements between each of the Four Publishers and Apple contain the same key pricing terms as their respective United States agreements; namely, the retail price MFN clause, maximum retail price grids, and the payment of a commission to Apple equal to 30% of the retail price.
- (44) In 2010, only one of the Four Publishers had operations in French language titles (Hachette) and only one other in German language titles (Holtzbrinck/Macmillan). Hachette signed an agency agreement with Apple for French language titles the rights to which are held by Hachette in France ("French titles") in May 2010. Holtzbrinck/Macmillan signed an agency agreement with Apple for German language titles the rights to which are held by Holtzbrinck/Macmillan's German entities in Germany ("German titles") in December 2010. The Commission's preliminary view was that Hachette and Holtzbrinck/Macmillan engaged in direct contacts with other local French and German publishers, respectively, with the aim of persuading such publishers to enter into agency agreements with Apple on the same key pricing terms.
- (45) Apple launched its iPad and iBookstore in the United Kingdom, France and Germany on 28 May 2010. The Commission's preliminary view is that it was understood by the Four Publishers that this was only the first step by Apple, as Apple had informed them of its intention to launch the iBookstore in the rest of the EEA shortly thereafter.

4.2.3.2. Common features of each of the agency agreements for UK, French and German titles

- (46) The Commission's preliminary view was that the agency agreements between each of the Four Publishers and Apple for UK, French and German titles contain the same key pricing terms, including the same retail price MFN clause, found in the United States agency agreements, substantially similar maximum retail price grids for each of UK, French and German titles, and the same commission to Apple equal to 30%

of the retail price. The agency agreements concluded for UK, French and German titles further contain a "phase-in" period between the date of entry into force of the agreements and the date of applicability of the retail price MFN clause.

- (47) Each publisher appointed Apple as a non-exclusive agent to sell e-book versions of its titles either throughout the whole of the EEA, or, as is the case for two of these agreements, only in the United Kingdom or only in Germany and Austria.
- (48) The agency agreements establish that the publisher is, in principle, free to set the retail price for its e-books titles. However, similarly to the United States agency agreements, each agency agreement contains maximum retail price points either for all titles, as is the case for UK and German titles, or for newly released e-books, as is the case for French titles. The Commission's preliminary view was that these maximum retail prices are substantially similar or even identical across the agency agreements concluded between Apple and the Four Publishers for UK titles, across the agency agreements concluded between Apple and Hachette as well as between Apple and a number of other publishers for French titles, and across the agency agreements concluded between Apple and Holtzbrinck/Macmillan as well as between Apple and a number of other publishers for German titles.

4.2.3.3. The conversion of Amazon and other retailers to the agency model for UK titles and the adoption of that model for French and German titles.

United Kingdom

- (49) At the time of Apple's launch of its iPad and iBookstore in the United Kingdom on 28 May 2010, Amazon had been selling, since October 2009, English language e-books in the United Kingdom through its .com website operating under the wholesale model. On 10 August 2010, Amazon launched a Kindle store targeting the United Kingdom. Sales from this store were also initially made on the basis of a wholesale model, where Amazon determined the retail prices of e-books.
- (50) The Commission's preliminary view was that Apple and each of the Four Publishers understood that, just like for the United States titles, the retail price MFN clause created a strong incentive for each of the Four Publishers to convert Amazon (and other major retailers for UK titles) to the agency model in order for each publisher to be able to increase retail prices above those set by Amazon. The retail price MFN clause also meant that had Amazon refused to convert to the agency model for UK titles, each of the Four Publishers had strong incentives to delay or withhold e-book new releases from Amazon.
- (51) Between [...] and [...], three of the Four Publishers separately announced to Amazon their intention to change their business terms and move to an agency model. The fourth publisher made its announcement in [...]. Each publisher understood that it would not be the only one telling Amazon that it was moving to the agency model over approximately the same period of time.
- (52) As a consequence of the move to the agency model in the United States, the Commission's preliminary view was that Amazon expected each of the Four Publishers to request it to move to the agency model for UK titles and did not resist as it had done in the United States. The Commission's preliminary view was that also

Amazon and the Four Publishers expected that their United States agency agreements would serve as a template for the agency agreements regarding UK titles.

- (53) By the end of [...], three of the Four Publishers had signed an agency agreement with Amazon regarding UK titles. No later than [...], the fourth publisher suspended its on-going negotiations with Amazon on an agency agreement after the UK Office of Fair Trading ("OFT") had started an investigation into e-books in the United Kingdom.

France

- (54) At the time of Apple's launch of its iPad and iBookstore in France on 28 May 2010, newly released French language e-books were mainly sold through the website of Fnac, a French retailer, and under an agency agreement with Hachette having substantially different terms from those of Hachette's agreement with Apple in the United States. Although certain e-books were available to French consumers through Amazon's .com website, very few newly released French language e-books were available.
- (55) The Commission's preliminary view is that Apple and Hachette, the only one of the Four Publishers that had signed an agency agreement with Apple in the US and was also selling French titles, understood that the retail price MFN clause created a strong incentive for Hachette to allow Amazon (and other major retailers) to sell French titles only under the agency model, in order to avoid potential discounting of its suggested retail prices and maximise its profits under the agency agreement with Apple.
- (56) The Commission's preliminary view is that Amazon and Hachette used their United States agency agreement as a template for their agency agreement for French titles.
- (57) Amazon and Hachette signed an agency agreement for French titles in [...]. Subsequently, in October 2011, Amazon launched a Kindle store targeting France.

Germany

- (58) At the time of Apple's launch of its iPad and iBookstore in Germany on 28 May 2010, newly released German language e-books were sold mainly through five retailers. Although certain e-books were also available through Amazon's .com website, very few newly released German language e-books were available.
- (59) The Commission's preliminary view is that Apple and Holtzbrinck/Macmillan, the only one of the Four Publishers that had signed an agency agreement with Apple in the US and was also selling German titles, understood that the MFN clause was a strong incentive for Holtzbrinck/Macmillan to allow Amazon (and any other retailer) to sell German titles only under the agency model (and to convert other major retailers to an agency agreement), in order to avoid potential discounting of its retail prices and to maximise its profits under the agency agreement with Apple.
- (60) The Commission's preliminary view is that Amazon and Holtzbrinck/Macmillan used their United States agency agreement as a template for their agency agreement regarding German titles.

- (61) Amazon and Holtzbrinck/Macmillan signed an agency agreement for German titles in [...]. Subsequently, in April 2011, Amazon launched a Kindle store targeting Germany.

4.2.4. *The likely consequences for the retail price of e-books in the EEA*

- (62) Evidence collected by the OFT in the context of its United Kingdom investigation regarding [...] weekly retail prices suggests that each of the Four Publishers that implemented the conversion to the agency model with [...] in the United Kingdom increased the retail prices for their e-books relative to other publishers.
- (63) Based on quantitative evidence regarding the impact of the conversion to an agency model in the United Kingdom, the Commission's preliminary view is that the likely consequence of the conduct was to increase the retail price of e-books in the United Kingdom.

4.3. **Preliminary legal assessment**

- (64) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements, decisions and concerted practices which may affect trade between Member States and/or between Contracting Parties and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market and/or the EEA.

4.3.1. *Concerted practice*

4.3.1.1. Principles regarding the existence of a concerted practice

- (65) A concerted practice is a form of co-ordination where undertakings knowingly substitute practical cooperation between them for the risks of competition.⁵ In line with the case-law of the Union Courts, the criteria of cooperation and coordination necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are to be understood in the light of the concept inherent in the provisions of the Treaty on competition, according to which each trader must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers.⁶
- (66) While this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, however, preclude any direct or indirect contact between traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market.⁷ This precludes any direct or indirect contact between competitors, the object or effect of which is to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of

⁵ Case 48/69 *ICI v Commission* [1972] ECR 619, paragraph 64.

⁶ Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 86.

⁷ Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 87.

conduct which they themselves have decided to adopt or contemplate adopting on the market in question.⁸

- (67) Moreover, a concerted practice in the form of an exchange of information does not have to be reciprocal in order to constitute a concerted practice within the meaning of Article 101(1) of the Treaty: “[i]t follows from the case-law that the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information.”⁹ When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it can show “proof to the contrary”.¹⁰
- (68) The assessment of the existence of a concerted practice is not affected by the fact that an undertaking may be active on a level of trade different from that of other participants in a concerted practice. Rather, it is sufficient that there is a “joint intention [of the undertakings] to conducting themselves on the market in a specific way.”¹¹ Thus, the relevant market on which a member of a concerted practice is active does not need to be the same as the market on which that concerted practice is deemed to materialise.¹²
- (69) Finally, where the Commission’s reasoning is based on the supposition that the facts established cannot be explained other than by concerted action between undertakings, it is sufficient for an undertaking to prove circumstances which cast the facts established by the Commission in a different light and thus allow another ‘plausible explanation’ of the facts to be substituted for the one adopted by the Commission.¹³

4.3.1.2. Application in this case

Parallel behaviour

- (70) In light of section 4.2, the Commission's preliminary view is that there exists parallel behaviour in the United States and the EEA between the Four Publishers and Apple including, *inter alia*, in relation to the process of negotiation and the content of the agency agreements between the Four Publishers and Apple in both the United States and the EEA.

Direct and indirect contacts between the Four Publishers and Apple

⁸ Joined Cases 40 to 48, 50, 54-56, 111, 113 and 117/73, *Coöperative Vereniging 'Suiker Unie' and others v Commission* [1975] ECR 1663, paragraph 173 *et seq*; Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 117.

⁹ Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 51; Case T-377/06 *Comap v Commission*, judgment of 24 March 2011, paragraph 70.

¹⁰ Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 162; Case C-49/92 P *Anic Partecipazioni* [1999] ECR I-4125, paragraph 121.

¹¹ Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, paragraph 67.

¹² Case T-99/04 *AC-Treuhand AG* [2008] ECR II-1501, paragraph 122.

¹³ Case T-36/05 *Coats Holdings v Commission* [2007] ECR II-110, paragraph 72.

- (71) The Commission's preliminary view was that there were direct and indirect contacts between the Four Publishers and Apple, disclosing the course of conduct which each of the Four Publishers and Apple had decided to adopt or contemplated adopting on the market, in order to influence the future course of conduct of at least the Four Publishers.
- (72) The Commission's preliminary view was 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 United Kingdom) or avoiding the arrival of those prices altogether (as was the case in France and Germany) in the EEA. In order to achieve that aim, the Four Publishers, together with Apple, planned to jointly convert the sale of e-books from a wholesale model to an agency model on a global basis and on the same key pricing terms, first with Apple and then with Amazon and other retailers.
- (73) The Commission's preliminary view was that to make that joint conversion possible, each of the Four Publishers disclosed to, and/or received information from, the rest of the Four Publishers and/or Apple, regarding the Four Publishers' future intentions with respect to entering into an agency agreement with Apple in the United States and the key terms under which each of the Four Publishers would enter into that agency agreement with Apple in the United States, including the retail price MFN clause, the maximum retail price grids and the level of commission to be paid to Apple.
- (74) The Commission's preliminary view was that Apple's goal was to find a way to have retail prices at the same level as Amazon's while still achieving its desired margin. Apple would have known that this goal and the goal of each of the Four Publishers, that of raising retail prices above the level set by Amazon (or avoiding the introduction of lower prices by Amazon), could be achieved if Apple 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 model rather than a wholesale model and informed each of the Four Publishers about whether at least any of the other Four Publishers were entering into an agency agreement with Apple in the United States under the same key terms.
- (75) The Commission's preliminary view was that Apple and the Four Publishers understood that Apple's entry in the market for e-books on the agreed key agency terms would provide the global scale and framework needed for at least the Four Publishers to convert the sale of e-books to the agency model on a global basis, first in the United States and then in the EEA.

Conditions of competition which do not correspond to normal conditions thereof

- (76) The Commission's preliminary view was that the concerted practice between and among the Four Publishers and Apple has led to conditions of competition which do not correspond to normal conditions.
- (77) Under normal conditions of competition, each of the Four Publishers would have been unaware of whether at least each of the other Four Publishers intended to enter into an agency agreement with Apple, and of the key pricing terms of that agreement.

- (78) The Commission's preliminary view was that the direct and indirect contacts between the Four Publishers and Apple eliminated the risks associated with normal competition and led to the signing of agency agreements, first in the United States and subsequently in the EEA, between each of the Four Publishers and Apple on the same key pricing terms and on a global basis.

No alternative plausible explanation

- (79) The Commission's preliminary view was that the decision of each of the Four Publishers to enter into an agency agreement with Apple, first in the United States and then in the EEA, on the same key pricing terms described, cannot plausibly be explained other than by a concerted action.
- (80) The Commission's preliminary view was that each of the Four Publishers knew that by entering into agency agreements with Apple, first in the United States and then in the EEA, containing the retail price MFN clause, maximum retail price grids and a commission of 30% of the retail price payable to Apple, there was the risk of substantially lower revenues if other retailers, such as Amazon, were allowed to continue setting retail prices. Entering into those agreements would therefore not be in the economic interest of each of the Four Publishers individually, unless a sufficient number of the other major international publishers were following suit, thereby substantially increasing the credibility and effectiveness of the threat of each of the Four Publishers withholding e-books from retailers like Amazon if those retailers refused to convert to the agency model with higher retail prices.

4.3.1.3. Conclusion

- (81) In light of the above, the Commission's preliminary view was that by jointly converting the sale of e-books from a wholesale model to an agency model with the same key pricing terms on a global basis, the Four Publishers and Apple engaged in a concerted practice to either raise retail prices of e-books in the EEA or to prevent the emergence of lower prices for e-books in the EEA.

4.3.2. *Restriction of competition*

4.3.2.1. Principles

- (82) According to the case law of the Union Courts, when assessing whether a concerted practice is anti-competitive, regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context.¹⁴ While the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, nothing prevents the Commission from taking it into account.¹⁵
- (83) As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the

¹⁴ Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraph 25; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 27.

¹⁵ *Id.*

prohibition in Article 101(1) of the Treaty. The alternative nature of that requirement, indicated by the conjunction ‘or’, means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued.¹⁶

- (84) In addition, when deciding whether a concerted practice is prohibited by Article 101(1) of the Treaty, there is no need to take into account its actual or potential effects once it is apparent that its object is to prevent, restrict or distort competition within the internal market.¹⁷ The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.¹⁸

4.3.2.2. Application in this case

- (85) The Commission's preliminary view is that the **objective** of the concerted practice between and among the Four Publishers and Apple, in the economic context in which it was pursued, was to raise the retail prices of e-books in the EEA or prevent the emergence of lower retail prices for e-books in the EEA.
- (86) In the Commission's preliminary view, in order to achieve this objective on a global basis, including in the EEA, the Four Publishers and Apple jointly converted the sale of e-books from a wholesale model to an agency model with the same key terms (including the retail price MFN clause, the maximum retail pricing grids and the same 30% commission payable to Apple) with the intention of raising retail prices above the level of those offered by Amazon or preventing the emergence of such lower retail prices.

4.3.2.3. Conclusion

- (87) A concerted practice, as examined in this case, **which aims to raise retail prices or to prevent the introduction of lower retail prices has, by its very nature, the potential to restrict competition.**
- (88) Therefore, the Commission's preliminary view is that the concerted practice between and among the Four Publishers and Apple had the object of preventing, restricting or distorting competition for e-books in the EEA.

4.3.3. *Effect on trade between Member States*

4.3.3.1. Principles

- (89) According to the case law of the Union Courts, in order to find that a concerted practice may affect trade between Member States, it must be possible to foresee with

¹⁶ Case 56/65 LTM [1966] ECR 235, 249; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 28.

¹⁷ Case C 105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I 8725, paragraph 125; and Case C 209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I 8637, paragraph 16.

¹⁸ Case C 209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I 8637, paragraph 17; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29.

a sufficient degree of probability on the basis of a set of objective factors of law or of fact that it may have a direct or indirect, actual or potential influence on the pattern of trade between Member States.¹⁹ Moreover, the effect on trade should not be insignificant.²⁰

- (90) Thus, the effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.²¹

4.3.3.2. Application in this case

- (91) The Commission's preliminary view was that the effect on trade of the concerted practice was appreciable given that the conversion to the agency model by the Four Publishers and Apple formed part of a global strategy that was intended to be, and was, implemented in the EEA.

- (92) In particular, given the nature of the product in question, the position and importance of the undertakings concerned and the scope of the agency agreements entered into between each of the Four Publishers and Apple in the United Kingdom, France and Germany, the pattern of trade was potentially affected by the concerted practice which covered a substantial part of the EEA.

4.3.3.3. Conclusion

- (93) In light of the above, the Commission's preliminary view is that the concerted practice between and among the Four Publishers and Apple is likely to have an appreciable effect on trade between Member States within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

4.3.4. *Article 101 (3) of the Treaty and Article 53 (3) of the EEA Agreement*

- (94) The Commission's preliminary view is that Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement do not apply in this case because the cumulative conditions set out in those provisions are not met.

5. PROPOSED COMMITMENTS

- (95) 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 an initial set of commitments (the "Initial Commitments") and subsequently a final set of commitments (the "Final Commitments") pursuant to Article 9 of Regulation (EC) No 1/2003.

¹⁹ Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and others v Commission* [2009] ECR I-8681, paragraph 36.

²⁰ Ibid.

²¹ C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 35.

5.1. Initial Commitments offered by the Four Publishers

- (96) The key elements of the Initial Commitments offered by each of the Four Publishers (by Harper Collins on 12 September 2012, by Hachette on 13 September 2012, by Simon & Schuster on 14 September 2012 and by Holtzbrinck/Macmillan on 18 September 2012) are set out in recitals (97) to (102).

5.1.1. Termination of existing agency agreements

- (97) Each of the Four Publishers will terminate their respective agency agreements for the sale of e-books in the EEA concluded with Apple, not later than fourteen days following the date of the Commission decision making that commitment binding under Article 9(1) of Regulation 1/2003.
- (98) As regards other agency agreements for the sale of e-books in the EEA that: (a) restrict, limit, or impede an e-book retailer/agent's ability to set, alter, or reduce the retail price or to offer any other form of promotions; or (b) contain an MFN clause regarding price as specified in the Initial Commitments, each of the Four Publishers will promptly notify the e-book retailer or agent that the latter may terminate the agreement with thirty-days notice and shall, within thirty days after the e-book retailer provides such notice, release the e-book retailer/agent from the agreement. In respect of any such agreement which would not be so terminated by the retailer, at the latest within seventy days of the notification of the Commission decision making binding the commitments under Article 9(1) of Regulation 1/2003, each of the Four Publishers must take the steps required under the agreement to cause that agreement to be terminated.

5.1.2. Price-setting discretion for retailers during a period of two years ("cooling-off period")

- (99) For a period of two years, each of the Four Publishers undertakes not to restrict, limit or impede an e-book retailer's ability to set, alter or reduce retail prices of e-books and/or to restrict, limit or impede an e-book retailer's ability to offer price discounts or any other forms of promotions.
- (100) In the event that, after termination of the agreements referred to in recitals (97) and (98), any of the Four Publishers enters into an agency agreement with an e-book retailer, that e-book retailer will be able to reduce, for a period of two years, the retail prices of e-books by an aggregate amount equal to the total commissions that the 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 that amount to offer any other forms of promotions.

5.1.3. Ban on MFN clauses for a period of five years

- (101) For a period of five years, each of the Four Publishers undertakes not to enter into any agreement for the sale of e-books in the EEA that contains any type of MFN clause specified in the Initial Commitments of each of the Four Publishers.
- (102) The ban on MFN clauses as proposed by each of the Four Publishers in their Initial Commitments, is defined so as to cover three price MFN clauses and one business model MFN clause:

(i) a retail price MFN clause, providing that the retail price at which an E-book Retailer or, under an Agency Agreement, a publisher, sells an e-book depends on the retail price at which any other e-book retailer or that publisher under an agency agreement through any other e-book retailer, sells the same e-book(s) to consumers;

(ii) a wholesale Price MFN clause under which the wholesale price at which a publisher sells an e-book to, or through an e-book retailer, depends on the wholesale price at which that publisher sells the same e-book to, or through any other e-book retailer;

(iii) a commission/revenue share MFN clause, under which the commission or revenue share that an e-book retailer receives from a publisher in connection with the sale of one or more e-books to consumers depends in any way on the commission or revenue share that (a) any other e-book retailer receives from that publisher in connection with the sale of the same e-book(s) to consumers, or (b) that e-book retailer receives from any other e-book publisher in connection with the sale of one or more of the other e-book publisher's e-books; and

(iv) a business model MFN clause, under which the type of business arrangement for the distribution or sale of e-books that an e-book retailer or agent may enter into with a publisher depends on the type of business arrangement for the distribution or sale of e-books that a publisher enters into with any other e-book retailer.

5.2. Initial Commitments offered by Apple

(103) The key elements of the Initial Commitments offered by Apple on 14 September 2012 are set out in recitals (104) to (107).

5.2.1. Termination of existing agency agreements

(104) Apple will terminate the agency agreements for the sale of e-books in the EEA concluded with each of the Four Publishers not later than fourteen days from the date of the Commission decision making that commitment binding under Article 9(1) of Regulation (EC) No 1/2003.

(105) Apple will also notify Pearson, informing Pearson that it can immediately terminate its agency agreement concluded with Apple for the sale of e-books in the EEA. In the event Pearson does not provide Apple with a notice of termination, Apple will terminate the agency agreement in accordance with the conditions laid down therein.

5.2.2. Ban on retail price MFN clauses for a period of five years

(106) For a period of five years, Apple undertakes not to enter into any agreements for the sale of e-books in the EEA which contain retail price MFN clauses dictating that the retail price at which an e-book Retailer or, under an Agency Agreement, a publisher, sells an e-book depends on the retail price at which any other e-book retailer or that publisher under an agency agreement through any other e-book retailer, sells the same e-book to consumers, as specified in Apple's Initial Commitments.

(107) Within seven days following the date of notification of the Commission decision under Article 9(1) of Regulation 1/2003, Apple will inform any publisher with which it has an agency agreement for the sale of e-books in the EEA that for a period of

five years it will not enforce any retail price MFN clauses contained in those agreements.

6. COMMENTS RECEIVED IN RESPONSE TO THE COMMISSION'S NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) No 1/2003

6.1. Introduction

- (108) In response to the publication on 19 September 2012 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the "Market Test"), the Commission received observations from 14 interested third parties, including from e-book publishers, e-book retailers, trade associations and one private citizen.
- (109) 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.
- (110) Some observations related to the definition of "eBook" and "Online eBook Store Provider" in Apple's Initial Commitments.

6.2. Termination of relevant agency agreements

- (111) Only one respondent commented on the termination of the agency agreements as proposed in the Initial Commitments by each of the Four Publishers. According to that respondent, if the time period allowed for termination by the Initial Commitments is not sufficient, the Initial Commitments could cause significant disruptions in the consumer offering for existing e-book retailers. The respondent did not take a position regarding whether the time period allowed by the Initial Commitments for termination would or would not be sufficient.
- (112) That same respondent also stated that to the extent that each of the Four Publishers would spend a significant period of time renegotiating with their largest retailers, this would leave limited time available for renegotiations with smaller retailers and would put significant pressure on those smaller retailers. That respondent took no position regarding whether and to what extent each of the Four Publishers might act as suggested.

6.3. Scope of the prohibition on MFN clauses

- (113) Approximately half of the respondents did not comment specifically on the scope of the proposed ban on MFN clauses. None of the respondents that commented specifically on the price MFN ban, commented on its proposed duration. Regarding the scope of the price MFN ban, no respondent suggested that the retail price MFN ban should be removed.
- (114) Regarding the ban on wholesale price and commission or revenue share MFN clauses, it was argued that a ban on these clauses should not be included because commission or revenue share MFN clauses are generally pro-competitive in nature. In particular, it was argued that wholesale price and commission or revenue share MFN clauses allow retailers to offer lower retail prices, and to innovate, because they protect against discrimination and/or retaliation by publishers.

- (115) It was also argued that in countries with national RPM laws, retail price and wholesale price MFN clauses would not have any significant effect and retailers in those countries have to compete on terms other than price.
- (116) Regarding specifically the business model MFN ban, the Commission has received observations arguing both for and against the inclusion of that ban.
- (117) Arguments put forward against the business model MFN ban point to a risk of discrimination by publishers against certain retailers as regards the choice between the agency and the wholesale model. Specifically, retailers would be concerned about being forced by publishers to accept a model, possibly in retaliation for discounting, while other retailers would remain on a different, more advantageous model. Furthermore, it was argued that allowing retailers to choose the model under business model MFN clauses could lead to more retailers operating under the wholesale model which would create a greater potential for price competition.
- (118) In favour of a ban on business model MFN clauses, it was argued that such a ban would incentivise innovation for development of new business models for the distribution of e-books. In addition, if business model MFN clauses were not banned, only larger retailers with greater bargaining power would benefit from those clauses and their resulting protection.

6.4. Cooling-off period

- (119) Approximately half of the respondents submitted observations on the cooling-off provision or its effects.
- (120) One respondent argued that allowing pricing discretion for retailers would render the Initial Commitments disproportionate because domestic third party retailers in Member States with national RPM laws would be negatively affected and the mere termination of the relevant agency agreements would be sufficient to remove the effects of any possible concerted practice. That respondent stated that domestic retailers situated in Member States with national RPM laws would be prohibited from discounting due to those laws while large foreign retailers, to which those laws do not apply, would enjoy discounting discretion, thereby putting domestic retailers at a disadvantage. Another respondent argued that publishers in Member States with national RPM laws would not be able to benefit from those laws because they would face price competition from titles offered by large foreign retailers who could exercise discounting discretion in accordance with the Initial Commitments. Both respondents argued that the cooling-off period should be removed from the final version of the Commitments, or alternatively, the cooling-off provision should be amended to ensure that foreign retailers or agents would not have pricing discretion in countries with national RPM laws.
- (121) As regards the scope of the retail price discretion during the cooling-off period, one respondent questioned whether the ability of retailers to discount should be capped in any manner, in particular as it may be difficult to ensure that a cap is not exceeded, for example when promotions would involve e-books of more than one publisher. That respondent also argued that the proposed cap would impose an accounting burden and may, depending on the terms of the agreement, entail a legal obligation on the agent.

- (122) Another respondent argued that pricing discretion should be calculated on a title-by-title basis rather than across a whole catalogue. In particular, calculating pricing discretion across a whole catalogue would disproportionately benefit large retailers who would be able to offer greater discounts than smaller retailers, because the larger retailers would have larger catalogues and/or could off-set lower margins from e-books with other revenue sources.
- (123) Only two respondents commented on the duration of the cooling-off period. One respondent questioned whether a two year duration for the cooling-off period would be appropriate in light of a five year duration for the MFN ban, and stated that a longer duration for the cooling-off period would be desirable. The other respondent, however, argued that a two-year duration would be too long, as it would result in irreparable changes for domestic retailers in countries with national RPM laws, thus favouring large international retailers.

6.5. Definitions

- (124) A few respondents commented on some of the definitions in the Initial Commitments by Apple, and the difference between those definitions and the definitions of the same terms established in the Initial Commitments by each of the Four Publishers, namely, the definitions of "eBook" and "Online eBook Store Provider".
- (125) One respondent argued that it was not clear whether aggregators would be covered by the definition of "eBook Retailer" in the Initial Commitments by each of the Four Publishers.

6.6. Non-retaliation, compliance terms and deterrence

- (126) One respondent suggested that the Initial Commitments by each of the Four Publishers and Apple should be amended, in order to moderate their future behaviour. Most notably, that respondent suggested that the Commitments by each of the Four Publishers should include a prohibition on retaliation against retailers engaging in conduct which each of the Four Publishers is prohibited from restricting. That respondent also suggested that the Final Commitments by each of the Four Publishers and Apple should include an undertaking to abstain from any collusive conduct related to the sale of e-books, as well as measures ensuring deterrence and compliance with that undertaking.

6.7. Market power, cultural diversity and the agency model

- (127) A number of respondents submitted in their observations other considerations which are, however, 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.

7. SUBMISSION OF THE FINAL COMMITMENTS BY EACH OF THE FOUR PUBLISHERS AND APPLE

(128) Following the end of the Market Test, on 31 October 2012, Holtzbrinck/Macmillan, on 6 November 2012, Hachette, on 8 November 2012, Harper Collins, and on 12 November 2012, Simon & Schuster and Apple submitted amended versions of their commitments. These Final Commitments differ from the proposed Initial Commitments in the following aspects:

(i) 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

(ii) each of the Four Publishers removed the ban on business model MFN clauses.

8. ASSESSMENT OF THE FINAL COMMITMENTS IN LIGHT OF THE OBSERVATIONS RECEIVED IN RESPONSE TO THE COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) No 1/2003

8.1. Purpose of the Final Commitments

(129) 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 those 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").

(130) 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.

(131) The Commission considers that the Final Commitments offered by each of the Four Publishers 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. The Commission also considers that the Final Commitments by each the Four Publishers will provide a level of pricing discretion for retailers and/or agents which is reasonably comparable to that which existed before the possible concerted practice.

(132) The Commission considers that, in addition to the Final Commitments by each of the Four Publishers, the Final Commitments by Apple will also lead, either immediately or in accordance with the conditions laid down in Apple's agency agreement, to the termination of that agreement with Pearson.

(133) The Commission considers that Final Commitments by Apple will also lead to the removal of retail price MFN clauses contained in agreements between Apple and any other e-book publisher, thereby no longer requiring publishers to match lower prices

from a competing retailer, in particular from a retailer operating on the wholesale model. The Commission considers that the Final Commitments offered by Apple will, as a result, eliminate a significant financial incentive for other publishers to have other retailers under the agency model.

- (134) 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. This 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.
- (135) The Commission therefore considers that the Final Commitments offered by each of the Four Publishers and Apple are adequate to remove the Commission's concerns expressed in its Preliminary Assessment.

8.2. Termination

- (136) Regarding the potential risk that smaller retailers (as compared to larger retailers) would be under significant pressure as a result of the possible renegotiation of future e-book arrangements within a limited period of time, the Commission considers that such a potential risk is likely to result from the greater bargaining power of each of the Four Publishers as well as the larger retailers, rather than from the time period allowed for termination under the Final Commitments. That greater bargaining power of each of the Four Publishers and larger retailers exists under normal conditions of competition and can therefore not be attributed to the Final Commitments.
- (137) The Commission considers that, in light of the termination notice periods previously negotiated by each of the Four Publishers in their relevant agency agreements, the manner and time periods proposed for termination of relevant agency agreements in the Final Commitments strike a reasonable balance between the need to remove the effects of the possible concerted practice and the need to provide a reasonably workable period for renegotiation of the commercial arrangements for e-books.

8.3. Scope of the prohibition on MFN clauses

- (138) With respect to the suggestion to narrow the scope of the price MFN ban, the Commission considers that the combined use of wholesale price and commission or revenue share MFN clauses in an agreement between any of the Four Publishers and Apple may result in effects similar to those of the retail price MFN clause. As a result, the ban on wholesale price and commission or revenue share MFN clauses in the Final Commitments of each of the Four Publishers is necessary to remove the possibility that any of the Four Publishers and Apple could recreate the effects of the retail price MFN clause.
- (139) The business model MFN clause would not have resulted in effects similar to those of either a retail price MFN clause, or a combined use of commission or revenue share and wholesale price MFN clauses. As for the ban on a business model MFN clause, which each of the Four Publishers removed from its Final Commitments, the

Commission considers that such a ban would not have addressed the Commission's concerns as expressed in the Preliminary Assessment.

8.4. Cooling-off period

- (140) As regards the impact of the cooling-off period on domestic retailers operating in countries with national RPM laws applicable to e-books, the Commission considers that in absence of the possible concerted practice between the Four Publishers and Apple, it is likely that those domestic retailers would be facing price competition from foreign retailers operating under the wholesale model. Moreover, the Commission considers that in countries having national RPM laws, the possible concerted practice may have had the effect of allowing publishers to constrain price competition by foreign retailers, and that this effect will be adequately removed by the Final Commitments. The potentially disparate abilities of domestic retailers bound by national RPM laws to compete on price against foreign retailers that are not bound by those laws is therefore attributable to the national RPM laws themselves, rather than to the Final Commitments.
- (141) Regarding the impact of the cooling-off period on third-party publishers operating in countries with national RPM laws applicable to e-books, the Commission considers that those laws mainly aim at restricting "intra-brand" price competition between retailers for titles from a certain publisher, not at restricting "inter-brand" price competition between competing publishers. As a result, publishers other than the Four Publishers operating in countries with national RPM laws applicable to e-books will still have to face "inter-brand" price competition from competing retailers. In any event, the Final Commitments are without prejudice to national RPM laws for e-books.
- (142) With respect to the argument that termination of the relevant agreements would be sufficient to address the Commission's concerns, the Commission considers that mere termination of those agreements would not be sufficient to remove the possibility that the Four Publishers and Apple could replicate the pricing terms resulting from their possible concerted practice or use them as reference points in subsequent renegotiations.
- (143) Regarding the comment that a retailer's discounting discretion should not be capped, the Commission considers that the cap proposed by each of the Four Publishers in their Final Commitments creates enough uncertainty and risk regarding the future intentions of competing publishers and retailers concerning retail prices, to substantially remove the possibility that the pricing terms of the possible concerted practice between the Four Publishers and Apple will be replicated or used as reference points in the future.
- (144) Furthermore, the Commission considers that capping the pricing discretion during the cooling-off period does not impose a disproportionate burden on retailers due to possible obligations to ensure that such amount is not exceeded. Publishers and retailers are in a position to devise practical business arrangements to implement this type of commitment. The Final Commitments by each of the Four Publishers also prohibit each of the Four Publishers from imposing accounting obligations upon retailers which restrict, limit or impede the ability of retailers to engage in promotional activities.

- (145) As regards the suggestion that the cap on a retailer's discretion during the cooling-off period should be calculated on a title-by-title basis because a catalogue-wide basis would disadvantage smaller retailers, the Commission considers that although larger retailers may potentially negotiate a greater total amount to be used for discounting, under normal conditions of competition, larger retailers may in any event use efficiencies of scale to offer greater discounts than their smaller competitors. As a result, any disparity between retailers with respect to their ability to discount is predominantly attributable to certain efficiencies resulting from size rather than to the Final Commitments.
- (146) Finally, regarding the suggestion that the duration of the cooling-off period should be generally longer or shorter, the Commission considers that a duration of less than two years would not create sufficient uncertainty to allow for an effective competitive reset of the market. Therefore, there would be the risk that the effects of the possible concerted practice could be replicated at the end of the cooling-off period. On the other hand, the Commission considers that a period longer than two years risks over-regulation of an emerging and fast moving sector.

8.5. Definitions

- (147) In view of the comments received with regard to certain definitions in the Initial Commitments, the Commission notes that Apple has amended its Initial Commitments so that terms used both in its Final Commitments and the Final Commitments of each of the Four Publishers are defined in the same way.
- (148) As for the scope of the definition of “aggregators”, the Commission considers that the definition of “ebook Retailer” as set out in the Initial Commitments by each of the Four Publishers includes aggregators.

8.6. Non-retaliation and compliance terms and deterrence

- (149) With regard to non-retaliation, compliance terms and deterrence, the Commission considers that the obligations under Article 101 of the Treaty, together with the Final Commitments, will be sufficient to deter the Four Publishers and Apple from repeating their possible concerted practice in the future.
- (150) Furthermore, a breach of the Final Commitments could lead to the application of a number of measures contemplated by Regulation (EC) No 1/2003 namely reopening of the proceedings pursuant to Article 9(2), and/or a fine pursuant to Article 23(2)(c) and/or the imposition of periodic penalty payments pursuant to Article 24(1)(c).

8.7. Market power, cultural diversity and the agency model

- (151) The Commission considers that the size of e-book retailers active in the EEA varies and that under normal conditions of competition, which the Final Commitments offered by each of the Four Publishers and Apple are intended to re-establish, larger retailers may have certain advantages over smaller retailers, including economies of scale. Should these possible advantages for larger retailers give rise to concerns, the Commission may investigate these concerns in accordance with Union competition rules.

- (152) Furthermore, the Commission notes that in accordance with Article 167(4) of the Treaty, when applying Union competition legislation in the publishing sector, it should "*take cultural aspects into account in its action [...] in order to respect and to promote the diversity of [...] cultures.*" The purpose of the Final Commitments by each of the Four Publishers and Apple is to restore as much as possible the conditions of competition that existed prior to the possible concerted practice. The Commission considers that in making those commitments binding, it is not adversely affecting cultural diversity in the EEA.
- (153) Regarding the advantages and disadvantages of using the agency model for the sale of e-books in the EEA, the Commission notes that its 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.

8.8. Duration of the Final Commitments

- (154) The Final Commitments will be binding for a total period of five years, except for the cooling-off period which will be binding for a total period of two years from the date of notification of this Decision. The duration of the Final Commitments is adequate. If the Final Commitments were to be binding for a shorter period, such a period would be insufficient to address the competition concerns identified by the Commission in its Preliminary Assessment.

9. PROPORTIONALITY OF THE FINAL COMMITMENTS

9.1. Principles

- (155) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.²²
- (156) In the context of Article 9 of Regulation (EC) No 1/2003, the application of the principle of proportionality requires the Commission to assess, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately. When carrying out this assessment, the Commission must take into consideration the interests of third parties.²³

9.2. Application in this case

- (157) The Final Commitments offered by the Four Publishers and Apple, set out in Section 8, adequately address the Commission's concerns expressed in the Preliminary Assessment.

²² See for instance, Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997, paragraph 144 and Case T-65/98 *Van den Bergh Foods v. Commission* [2003] ECR II-4653, paragraph 201.

²³ Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, paragraph 41.

- (158) Neither Apple nor any of the Four Publishers have offered less onerous commitments which also adequately address the Commission's concerns as expressed in the Preliminary Assessment.
- (159) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the notice published on 19 September 2012 pursuant to Article 27(4) of Regulation (EC) No 1/2003.

10. CONCLUSION

- (160) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Final Commitments, offered by each of the Four Publishers and Apple to address the Commission's concerns expressed in its Preliminary Assessment, binding upon them. Recital 13 of Regulation (EC) No 1/2003 provides that the decision should not conclude whether or not there has been or there still is an infringement.
- (161) The Commission's assessment of whether the Final Commitments offered by each of the Four Publishers and Apple are adequate to address its concerns expressed in its Preliminary Assessment, represents the preliminary view of the Commission based on its underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) 1/2003.
- (162) In light of the Final Commitments offered by each of the Four Publishers and Apple, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end with respect to the addressees of the present Decision.
- (163) The Commission retains full discretion to investigate and open proceedings pursuant to Article 101 of the Treaty and Article 53 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Final Commitments listed in the Annex shall be binding on Hachette, Harper Collins, Simon & Schuster, Holtzbrinck/Macmillan and Apple for a period of five years from the notification of this Decision.

Article 2

It is hereby concluded that there are no longer grounds for action in this case with regards to Hachette, Harper Collins, Simon & Schuster, Holtzbrinck/Macmillan and Apple.

Article 3

This Decision is addressed to:

Hachette Livre S.A.

43, Quai de Grenelle

75905 Paris Cedex 15

France

HarperCollins Publishers Limited

77-85 Fulham Palace Road

Hammersmith

London W6 8JB

United Kingdom

HarperCollins Publishers, L.L.C.

10 East 53rd Street

New York, NY 10022

U.S.A.

Georg von Holtzbrinck GmbH & Co. KG

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70184 Stuttgart

Germany

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New York, NY 10020

U.S.A.

Apple, Inc.

1 Infinite Loop

MS 36-3SU

Cupertino, CA 95014

U.S.A.

Done at Strasbourg,

For the Commission
[...]

Vice-President

ANNEXES

Annex I: Final Commitments – Apple

Annex II: Final Commitments – Hachette

Annex III: Final Commitments – HarperCollins

Annex IV: Final Commitments – Holtzbrinck/Macmillan

Annex V: Final Commitments – Simon & Schuster