



EUROPEAN COMMISSION
Competition

***CASE COMP/39771 -
Restrictions concerning ELT books***

ANTITRUST PROCEDURE
**Council Regulation (EC) 1/2003 and
Commission Regulation (EC) 773/2004**

Article 7(2) Regulation (EC) 773/2004

Date: 10/10/2012

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EUROPEAN COMMISSION

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PUBLIC VERSION

ONLY THE GREEK
TEXT IS AUTHENTIC

**Floras Bookshops
Deligiorgi 55-59
10437 Athens
Greece**

**Subject: Case No COMP/39771 – Floras Bookshops vs. OUP/ Burlington/ Pearson
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)**

Dear Sir,

- (1) I am writing to you in connection with your complaint of 27 January 2010 lodged with the European Commission (the Commission) against Oxford University Press (OUP), Burlington Books (Burlington) and Pearson PLC (Pearson) regarding alleged violations of Article 101 of the Treaty on the Functioning of the European Union (TFEU) with respect to the alleged restriction of cross-border sales and "illegal setting of resale prices" of English language teaching (ELT) books. I also wish to refer you to the Commission's letter pursuant to Article 7(1) of Commission Regulation (EC) 773/2004¹ of 28 October 2011 addressed to you in that matter and your letter of 21 November 2011 (your response to the Article 7(1) letter) by which you provided additional information/explanations in response to the Commission's letter.
- (2) The Commission has examined your response to the Article 7(1) letter in detail. However, this examination has not led to a different assessment of the facts underlying the complaint. For the reasons set out below, the Commission considers that there are

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, page 18.

insufficient grounds for conducting a further investigation of your complaint. The Commission therefore rejects your complaint pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.²

1. THE COMPLAINT

- (3) By letter dated 27 January 2010, you requested the Commission to launch an investigation into alleged violations of Article 101 TFEU in connection with the alleged restriction of cross-border sales and "illegal setting of resale prices" of ELT books³. You alleged that OUP, Burlington and Pearson infringed Article 101 TFEU by (i) restricting their distributors' ability to sell ELT books across borders and (ii) "illegal(ly) setting resale prices towards their distributors."
- (4) In March 2010, the Commission sent OUP, Burlington and Pearson non-confidential versions of the complaint and on 19 April 2010, 30 April 2010 and 9 June 2010 Burlington, Pearson and OUP respectively submitted their comments on the complaint.
- (5) In March 2010, the Commission issued a request for information under Article 18 of Regulation No. 1/2003⁴ to OUP, Burlington, Pearson and distributors including Bookhouse and Mondadori to which the Commission received responses between April and June 2010.
- (6) On 28 October 2011, pursuant to Article 7(1) of Regulation No. 773/2004⁵, the Commission sent you a letter indicating that the Commission does not intend to conduct a further investigation into your complaint. You replied to this letter on 21 November 2011.
- (7) In a meeting of the Commission services with your legal representative on 1 March 2012, you indicated that you may submit further evidence. However, the Commission has not received any further evidence from you to date.
- (8) Prior to filing your complaint with the Commission, you filed a complaint with the Greek Competition Authority. On 23 July 2009, the Greek Competition Authority adopted a decision (the Greek Decision) finding inter alia that the agreements between local distributors (Eustathiades and Apollon) and the major publishers including Burlington and Pearson restricted passive sales under Greek and EU competition law. It also imposed fines on the distributors and publishers. The Greek Decision further established the existence of a cumulative effect of agreements which restricted competition and which was created by the parallel networks of similar vertical restraints agreed between the competing publishers, including OUP, Burlington and

² *Ibid.*

³ English language teaching books are books that facilitate the process of learning English; these books can be used at schools or outside of schools during private English language classes, as well as for self-study.

⁴ 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 EC Treaty, Official Journal L 1, 4.1.2003, page 1.

⁵ See footnote 1.

Pearson⁶. The Greek Decision also found that the agreements between local distributors (Eustathiades and Apollon) and the major publishers, including Burlington and Pearson, restricted resale price competition, and in that regard, it imposed fines on the distributors and publishers⁷. On 5 July 2011, the Greek Decision was upheld by the Administrative Court of Appeals of Athens.

2. SUMMARY OF YOUR ARGUMENTS

2.1. Your arguments regarding alleged restrictions on cross-border sale

- (9) You claim that you tried to order books from OUP, Burlington and Pearson directly and/or from the publishers' exclusive distributors outside Greece but that both the publishers and the distributors refused to sell books to your company in Greece. You submit that OUP, Burlington and Pearson have entered into exclusive distribution contracts for their books with local distributors in various Member States and have terminated direct sales to other distributors such as your company⁸. You also claim that OUP, Burlington and Pearson in their contracts with exclusive distributors include passive and active sales restrictions which prohibit sales outside the distributors' exclusively assigned territories including cross-border sales.

2.2. Your arguments regarding resale price maintenance

- (10) You submit that publishers illegally set resale prices for their exclusive distributors in Greece as well as in other European countries. You explain that OUP, Burlington and Pearson sell their books to exclusive distributors by way of two kinds of set prices, either at a "territory-specific price" (which is different for each country) or at a "global price" (which is the same across all countries in which a given publisher sells its books). You state that the publishers sell their books to exclusive distributors which are invoiced at prices specified in a territory-specific price list, minus a discount⁹. You claim that the same price is invoiced by those exclusive distributors to other distributors (i.e. bookshops), but with a lower discount (to factor in the costs and a profit for the exclusive distributors). According to your complaint, these set prices, together with the discounts granted by the publishers to their exclusive distributors, do not leave these exclusive distributors any margin of discretion as regards prices they can set to other distributors and thus de facto result in resale price maintenance (RPM). In other words, you claim that by granting very small discounts to exclusive distributors, the publishers de facto also fix the maximum level of discounts those exclusive distributors can grant from the prices set by the "territory-specific price list". Further, you claim that exclusive distributors give other distributors (i.e. bookshops) such a low discount that these other distributors are forced to sell books at the price set by the "territory-specific price list" in order to be able to cover at least their

⁶ See further the Decision of the Greek Competition Authority 455/V/2009.

⁷ *Ibid.*

⁸ It is noted that potential passive sales restrictions imposed on distributors outside the European Economic Area (EEA) fall outside the scope of the investigation. We understand that the distributor referred to in Annex 33 of the complaint is from Bosnia and Herzegovina.

⁹ From your complaint it is not clear when "global price lists" are used.

operational costs. They are therefore not able to grant final customers any discounts from the “territory-specific price list”.

- (11) Second, you claim that where a "territory-specific price list" is used, the prices of books, established by the publishers, are lower in the country where the publishing company is based than in other countries.
- (12) In your response to the Article 7(1) letter, you claim that both OUP and Pearson admitted applying RPM and therefore any further investigation should not be burdensome. Further, you contest that your complaint is limited to Greece.

3. ASSESSMENT

3.1. Priority setting

- (13) Following the assessment of your complaint, the Commission does not intend to conduct an in-depth investigation into your complaint. As you will appreciate, the Commission is unfortunately unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out in points 41 to 45 of the Notice on the handling of complaints¹⁰.
- (14) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may inter alia balance (i) the importance to the potential impact of the alleged infringement on the functioning of the internal market, (ii) whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement, (iii) that an in-depth investigation would be a complex and time-consuming matter and the likelihood of establishing an infringement appears limited¹¹. The Commission may give priority to the investigation of two of the three criteria in this respect¹² or rely on an entirely different criterion¹³. The Commission can e.g. take into consideration that a national court or national competition authority would be well-placed to examine the allegations made or has dealt with the case or that the complaint concerns a conduct that has ceased and does not continue to have effects¹⁴.
- (15) As regards your complaint, for the reasons set out in more detail below, the Commission takes the view that the further investigation of the alleged cross-border sales restrictions (passive sale restrictions) and RPM with respect to ELT books would

¹⁰ OJ C 101, 27.04.2004, p. 65. See also the Commission’s Report on Competition Policy 2005, p. 25-27.

¹¹ See Case T-24/90, *Automec v Commission*, [1992] ECR II-2223, para. 86; or C-119/97 P, *Ufex v European Commission*, [1999] ECR I-1341, paras. 79 and 80.

¹² See Case T-306/05, *Scippacercola and Terezakis v Commission*, T-306/05, [2008] ECR II-4, para. 190.

¹³ See Case T-296/09, *IECC v Commission*, [2011] ECR, para. 47.

¹⁴ See Commission Notice on the handling of complaints by the Commission under Article 81 and 82 of the EC Treaty, 2004 OJ C 101/65, para. 44(6) and See Case C-119/97 P, *Ufex v Commission*, [1999] ECR I-1341 paras. 93 and 95.

be disproportionate in light of the limited impact that this conduct is likely to have on the functioning of the internal market, the complexity of the investigation required and the limited likelihood of establishing proof of an infringement of Article 101 TFEU. In this context, the Commission also takes into account that the alleged infringements have ceased and do not continue to have effects and that national competition authorities have already dealt with or would be well placed to deal with the alleged infringements.

3.2. Limited Impact on the Functioning of the Internal Market

- (16) The Commission considers that your complaint would only have a limited impact on the functioning of the internal market for the following reasons.
- (17) First, your complaint is limited to conduct directed towards your business operations, all of which are located in Greece. In particular, you allege that you are unable to purchase books for your company in Greece from the publishers' distributors situated outside of Greece. The main effects of the alleged infringement therefore relate to Greece, i.e. one single Member State, whereas the Commission is generally well placed to deal with infringements that relate to three or more Member States¹⁵. While you claim in your response to the Article 7(1) letter that your complaint does not only concern the practices of the publishers in Greece but also in the rest of Europe, the evidence you provided throughout the Commission's investigation only relate to alleged practices in Greece¹⁶. In addition, it should be noted that the conduct with respect to the Greek market (passive sales restrictions and RPM) was already dealt with by the Greek Competition Authority in 2009¹⁷. The Greek Competition Authority would therefore be particularly well placed to assess any potential infringements relating to the Greek market.
- (18) Second, even if your complaint were to include possible infringements outside Greece, you have not provided any substantial evidence showing that they would have a significant impact on cross-border trade and thus on the functioning of the internal market. In this regard, the Commission's preliminary investigation indicated (contrary to what you state in your response to the Article 7 (1) letter) that for ELT books, there is a distinction between "localised versions" that are designed to meet specific demands in terms of national curriculum, language etc. and "global versions", the content of which is not adjusted to a particular language/country¹⁸. In particular, there appears to be no significant cross-border demand for localised ELT books¹⁹. Although the Commission's preliminary investigation has indicated that there is possible cross-

¹⁵ Commission Notice on cooperation within the Network of Competition Authorities, Official Journal 2004 C 101, C 101, 27.4.2004, page 3, para. 14.

¹⁶ As indicated in para. 24 you also provided evidence in relation to Pearson's business practices in other EEA countries, however, as explained below these evidence relate to Pearson's conduct that has ceased and does not continue to have effects.

¹⁷ Decision of the Greek Competition Authority no 455/V/2009.

¹⁸ See for example Bookhouse's [translated, non-confidential version] reply to the Commission's Request for Information of 10 March 2010, answer to question 21.

¹⁹ *Ibid.*

border demand for global ELT books, such demand is also rather limited²⁰. Therefore, the alleged infringements - even if they could be established - would not appear to have a significant impact on the functioning of the internal market.

- (19) In your response to the Article 7(1) letter you point out that because OUP and Pearson closed their branches in Greece, it is impossible for them to produce truly localised versions. Hence you allege that OUP and Pearson only sell global ELT versions in Greece, for which you claim there is cross-border demand. As noted above it appears from the Commission's initial investigation that cross-border demand for global versions of ELT books is limited. It should also be noted that the Greek Competition Authority has dealt with the Greek aspects of the case and would be well placed to deal with on-going infringements, if any should exist (see above).
- (20) In your response to the Article 7(1) letter, you stated that the impact on the internal market will be particularly significant as regards Pearson, because it publishes the Financial Times through which it is shaping public opinion. In this regard it must be noted that the Commission only assesses the impact on the market concerned by the complaint, i.e. ELT books. The fact that Pearson Group is the owner of the newspaper Financial Times is therefore irrelevant in this respect and unrelated to possible restrictive clauses in Pearson's distribution agreements for ELT books.

3.3. Limited Likelihood of Establishing an Infringement

3.3.1. Alleged Restriction of Cross-Border Sales (Passive Sales Restrictions)

- (21) As regards the allegation that publishers have acted illegally by refusing to sell ELT books to you directly²¹, it should be noted that a publisher may choose whether to sell its books directly to customers or via appointed (exclusive) distributors who will distribute its books. Hence, it is not *per se* illegal under EU competition rules that a publisher directs you to one of its distributors.
- (22) As regards the distribution agreements between a publisher and its (exclusive) distributor, such agreements must comply with EU competition rules. Of particular relevance in this respect is the Commission's Block Exemption Regulation related to vertical agreements²². This Regulation lists certain clauses that are considered as restrictions by object. As noted in your complaint, a publisher cannot impose on its distributors restrictions on passive sales, i.e. a prohibition for the distributor not to sell to unsolicited requests from individual customers outside its territory²³.

²⁰ See for example Mondadori's reply (non-confidential version) to the Commission's Request for Information of 10 March 2010, questions 41-44 and 72; See also Bookhouse's reply [translated, non-confidential version] to the Commission's Request for Information of 10 March 2010, answer to questions 20 and 41.

²¹ See in particular Annexes 30 and 50 of the complaint dated 27 January 2010, related to correspondence with OUP and Burlington.

²² Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (BER).

²³ *Ibid.* Article 4 b.

- (23) As regards any possible passive sales restrictions by OUP and Burlington in relation to ELT books, the Commission notes that you have not provided any evidence of these companies imposing such restrictions on their distributors outside Greece. The evidence indicates that the refusal to sell ELT books to your company resulted from individual business decisions by individual distributors, rather than from any passive sales restrictions imposed by the publishers in question²⁴. The Commission's preliminary investigation has not revealed any evidence of either OUP or Burlington imposing passive sale restrictions on its distributors outside Greece²⁵. The likelihood of establishing an infringement is therefore limited in this regard.
- (24) As regards Pearson, you have provided some evidence, which may indicate that Pearson imposed restrictions on passive sales, at least until early 2009 (cf. in particular Annex 39A, 41A, and 42A to your complaint). We note that Pearson has acknowledged that in the past its distribution contracts for ELT books for certain EU Member States contained provisions which "*on one interpretation, might be seen as attempting to restrict passive sales (even if this was not necessarily the intention)*"²⁶. According to Pearson, these provisions were removed from the distribution contracts between July and September 2009 following a general review of such contracts after the Greek Decision. This is also supported by the Commission's preliminary investigation. We have obtained no evidence, including the evidence you provided²⁷, which would allow us to conclude that these possible restrictions continued after 2009 or that their effects still persist. In your response to the Article 7(1) letter, you state that Pearson knew at least as of 2006 that the clauses it was applying were illegal and it should therefore not have waited with removing them until 2009. However, even if Pearson were found to have committed an infringement prior to 2009, there still can be insufficient grounds to act on the complaint considering that the infringement has since ceased (with no evidence that effects persist)²⁸.

3.3.2. *Alleged Resale Price Maintenance*

- (25) With respect to alleged minimum RPM imposed by OUP, Burlington and Pearson on their exclusive distributors, the Commission's investigation in the EEA has provided evidence of such restrictions in only one case. This concerns Pearson's contract with one distributor in Poland (Omnibus). The Commission's investigation has shown that in the past the contract between Pearson and Omnibus contained provisions which could have been interpreted as imposing minimum RPM. This provision was removed

²⁴ See for example Annex 32 to the complaint dated 27 January 2010.

²⁵ For example see Mondadori's reply (non-confidential version) to the Commission's Request for Information of 10 March 2010, answer to question 73; Bookhouse's reply [translated, non-confidential version] to the Commission's Request for Information of 10 March 2010, answer to question 49.

²⁶ See Pearson's comments to the complaint of 3 June 2010.

²⁷ All examples provided to the Commission regarding refusals to place orders from Pearson's representatives are from March 2009 or earlier. See in particular Annexes 39A, 41A, 42A to the complaint. It is to be noted that contacts with distributors outside the EEA, as evidenced in Annex 40A, remain outside the scope of this investigation.

²⁸ The Commission has reviewed the relevant contracts. The review revealed that the restrictions have been removed. The Commission found no evidence of persisting effects concerning the EEA area. Regarding Greece, even if there would be persisting effects, as stated above the Greek competition authority is particularly well placed in this case to review any potential infringements relating to the Greek market.

in August 2009²⁹. The Commission has no evidence that allows it to conclude that this provision is still in effect or continues to have effects³⁰. In any event, even if that were the case, the Polish Competition Authority would appear well placed to deal with this particular contractual clause as it appears to be limited to Poland. The Commission's investigation has not revealed that similar clauses are imposed by Pearson in any other contracts with other distributors. As regards OUP and Burlington, we have no evidence that their contracts include similar provisions on minimum RPM³¹.

- (26) In your response to the Article 7(1) letter, you further refer to, according to the Commission's understanding, the way publishers indirectly fix maximum resale prices, which you also described in your complaint of 27 January 2010, summarised in paragraph 10 above. Unlike in the complaint, in which you claim that all three publishers mentioned above apply RPM, in your response to the Article 7(1) letter, you refer only to OUP. You point out that OUP admits, on page 19 of its comments to the complaint, that in a few specific cases it imposes maximum resale prices. You explain in your response to the Article 7(1) letter that the only purpose behind OUP's decision to apply "territory specific price lists", instead of "global price lists", is to determine those maximum resale prices. You do not explain how the practice described in paragraph 10 would be different if those publishers applied "global price lists". The Commission understands your argument also to be that by applying "territory specific price lists", instead of "global price lists", OUP determines maximum resale prices, which are different in each country. You seem to imply therefore that by applying "territory specific price lists" the publishers, such as OUP, discriminate between different exclusive distributors.
- (27) Your allegations, whether that regarding discriminatory prices or maximum resale prices, are not supported by evidence. First, regarding the alleged maximum RPM you claim that bookshops are de facto forced to sell books at the price indicated for their country in the publishers' "territory specific price list", because the discounts granted on those recommended prices to exclusive distributors and other distributors such as bookshops are very similar to their operational costs. You do not, however, provide any evidence regarding the average costs of exclusive distributors and bookshops. Second, you have only provided the Commission with your contracts with distributors in Greece, identifying the amount of discounts granted to your shops. You have not provided the Commission with any proof about average costs of bookshops. Third, while OUP has stated that in certain limited circumstances it sets maximum resale prices, it further explained that³² this is done where (i) ELT materials are sold through national or regional tenders and the retail prices are capped at the prices at which the tender is won³³ or (ii) in the limited circumstances in which OUP applies provisions

²⁹ The Commission has reviewed the relevant contracts. The review revealed that the restrictions have been removed.

³⁰ *Ibid.*

³¹ For example, see Mondadori's reply (non-confidential version) to the Commission's Request for Information of 10 March 2010, answer to questions 75-78; Bookhouse's reply [translated, non-confidential version] to the Commission's Request for Information of 10 March 2010, answer to questions 20, 50-53.

³² OUP's comments to the Complaint, page 15.

³³ OUP further explained that in many territories where there is a tender process, the relevant governmental authority will set a price cap for adopted materials.

according to which the distributor cannot raise its resale price by a greater percentage than any OUP price increase to that distributor³⁴. The Commission's investigation indicated that OUP's distributors set their own prices³⁵ therefore; it appears that OUP sets maximum resale prices only in very limited instances.

- (28) According to the Commission Guidelines on Vertical Restraints (the Guidelines)³⁶, the possible competition risk of maximum and recommended prices is that they will work as a focal point for the resellers. Based on the Commission's preliminary investigation, there is no indication that the maximum prices applied by OUP work as a focal point for the resellers³⁷ and in any event they are applied by OUP only in very limited circumstances. Fourth, you do not explain in your complaint if and how the publishers force the exclusive distributors to use the prices from the "territory-specific price lists" established by the publishers when they resell the books to other distributors.

3.4. Further investigation would be disproportionate

- (29) As previously noted, the Greek Competition Authority has already dealt with passive sales restrictions and RPM provisions with respect to effects on the Greek market, which constitutes the main focus of your complaint. As regards other EEA countries, the Commission's investigation found no evidence of on-going infringements. It appears from the Commission's preliminary investigation that, following the Greek Decision, distribution contracts in other EEA countries were reviewed by the publishers in order to ensure compliance with competition laws across the EEA. As a result, it appears that there is a very limited likelihood of finding an infringement in the EEA.
- (30) Hence, it would be disproportionate for the Commission to carry out an in-depth investigation into your complaint. It should also be noted that such an investigation would require a complex factual and/or economic analysis, including an analysis as regards possible justification for the potential restrictions under Article 101(3) TFEU, involving a number of companies in several Member States (e.g., the distributors of the publishers)³⁸.

³⁴ OUP's comments to the Complaint.

³⁵ For example, see Bookhouse's reply [translated, non-confidential version] to the Commission's Request for Information of 10 March 2010, answer to questions 20, 50-53.

³⁶ Commission's Guidelines on Vertical Restraints [2010] OJ C130/1, paragraph 227. Setting of a maximum sale price should not be confused with setting a minimum sale price. See Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, Article 4 (a) which states that setting a minimum sale price amounts to so called hard-core restriction.

³⁷ For example, see Bookhouse's reply [translated, non-confidential version] to the Commission's Request for Information of 10 March 2010, answer to questions 20, 50-53.

³⁸ Your suggestion to assess the existence of RPM by asking the publishers for a copy of the sales invoices of their ELT books in every European country for the last ten years would be very fact-intensive.

- (31) A further investigation into certain possible restrictive practices by Pearson that may have existed prior to August 2009 would also appear disproportionate. As stated above, the fact that an infringement has ceased and its effects do not longer persist is a fact that the Commission can take into account when determining whether there is a European Union interest in pursuing a complaint³⁹. The Commission's preliminary investigation provided no indications that the effects of any of the clauses concerned continues to persist today⁴⁰.
- (32) In any event, any investigation into possible past infringements would require a significant investigation in several Member States involving a number of undertakings. In view of the indication of the likely limited impact of the alleged conduct on the functioning of the internal market (taking into account the limited cross-border demand for ELT books), the Commission takes the view that it would be disproportionate for it to carry out such an in-depth investigation in relation to past restrictive practices⁴¹.

4. CONCLUSION

- (33) In view of the considerations above, the Commission has come to the conclusion that there are insufficient grounds for conducting a further investigation concerning your complaint. Therefore, the Commission rejects the complaint.

5. PROCEDURE

- (34) An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 of the Treaty.

For the Commission

*Joaquín Almunia
Vice-President*

³⁹ See Case C-119/97 P, *Ufex v Commission*, *supra*, paras. 93 and 95; Commission Notice on the handling of complaints by the Commission under Article 81 and 82 of the EC Treaty, *supra*, para. 44(6).

⁴⁰ *Ibid.*

⁴¹ Contrary to what you state in your response to the Article 7(1) letter, Pearson did not admit an infringement. Pearson only stated that its distribution contracts for ELT books for certain EU Member States contained provisions which "on one interpretation, might be seen as attempting to restrict passive sales (even if this was not necessarily the intention)". See Pearson's comments on the Complaint paragraph 1.3.1.