



EUROPEAN COMMISSION
Competition DG

CASE AT.39847 – E-BOOKS

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 25/07/2013

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EUROPEAN COMMISSION

Brussels, 25.7.2013

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PUBLIC VERSION

COMMISSION DECISION

of 25.7.2013

addressed to:

**Penguin Random House Limited (formerly The Penguin Publishing Company Limited)
and Penguin Group (USA), LLC (formerly Penguin Group (USA), Inc.)**

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

in Case COMP/39.847/E-Books

(Text with EEA relevance)

(Only the English text is authentic)

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in Case COMP/39.847/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, and 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 1 March 2013,

Having regard to the commitments offered on 16 April 2013 to meet those concerns,

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 concerns²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

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.

² OJ C 112, 19.4.2013, p. 9.

Whereas:

1. SUBJECT MATTER

- (1) This Decision is addressed to Penguin Random House Limited (formerly The Penguin Publishing Company Limited) and Penguin Group (USA), LLC (formerly Penguin Group (USA), Inc.) ('Penguin') and concerns conduct by Penguin in relation to the sale of e-books to consumers.
- (2) In its preliminary assessment of 1 March 2013 ('Preliminary Assessment'), the Commission expressed concerns regarding Penguin's participation in a concerted practice that may have existed between and among Penguin, Hachette Livre SA ('Hachette'), HarperCollins Publishers Limited and HarperCollins Publishers, L.L.C. ('Harper Collins'), Georg von Holtzbrinck GmbH & Co. KG and Verlagsgruppe Georg von Holtzbrinck GmbH ('Holtzbrinck/Macmillan'), Simon & Schuster, Inc., Simon & Schuster (UK) Ltd and Simon & Schuster Digital Sales, Inc. ('Simon & Schuster') and Apple Inc. ('Apple'). The possible concerted practice may have related to a common global strategy for the sale of e-books with the aim of raising retail prices (or avoiding "low" retail prices in the first place). Penguin's participation in the concerted practice raised concerns as to the compatibility of Penguin's conduct with Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ('EEA Agreement').
- (3) Penguin, Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster are hereinafter collectively referred to as the 'Five Publishers'.
- (4) On 12 December 2012, the Commission adopted a decision pursuant to Article 9 of Regulation 1/2003 addressed to Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster (the 'Four Publishers') and Apple. The decision made the commitments offered by the Four Publishers and Apple binding and closed proceedings in their respect. Penguin was not an addressee of that decision. That decision is hereinafter referred to as the 'Decision of 12 December 2012'.
- (5) The Commission's concerns as identified in the Preliminary Assessment do not relate to the legitimate use of the agency model for the sale of e-books. Penguin remains free to enter into agency agreements in line with the commitments made binding on it by this Decision, in so far as those agreements and their provisions do not infringe Union competition legislation.

2. THE PARTIES

- (6) At the time of the Preliminary Assessment, Penguin was a division of Pearson plc, an international media company with market-leading businesses in education, business information, and consumer publishing. Pearson plc had operations in, among others, the United States (Penguin Group (USA), Inc.) and the United Kingdom (The Penguin Publishing Company Limited, The Penguin Group (a division of Pearson plc) and Dorling Kindersley Holdings Limited).

- (7) On 5 April 2013, pursuant to Article 6(1)(b) of Regulation (EC) No 139/2004 on the control of concentrations between undertakings³, the Commission declared as compatible with the common market the transaction contemplating the creation of a joint venture known as Penguin Random House, combining parts of the publishing businesses of Bertelsmann SE & Co., KGaA and Pearson plc ('Transaction').⁴
- (8) On 1 July 2013, the Transaction was completed. As a result, Penguin Group (USA), Inc. has changed its name to Penguin Group (USA), LLC⁵ and The Penguin Publishing Company Limited has changed its name to Penguin Random House Limited.⁶ The Penguin Group (a division of Pearson plc) has ceased to exist⁷ and its assets have been or shortly will be transferred to Penguin Random House Limited or Penguin Group (USA), LLC. The publishing assets of Dorling Kindersley Holdings Limited have been transferred to Penguin Random House Limited or its subsidiaries (over which Penguin Random House Limited exercises decisive influence).⁸
- (9) 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.
- (10) Harper Collins is a publishing group owned by News Corporation, an international media corporation with its headquarters in the United States. Harper Collins is mainly active in the United Kingdom and in the United States and publishes titles mainly in English.

³ OJ L 24, 29.1.2004, p.1.

⁴ Case No COMP/M.6789 – *Bertelsmann/Pearson/Penguin Random House*.

⁵ In a letter dated 15 July 2013, Penguin Group (USA), LLC confirmed that Penguin Group (USA), LLC is the legal successor of Penguin Group (USA), Inc. Penguin Group (USA), LLC also confirmed that Penguin Group (USA), LLC can be an addressee of this Decision instead of Penguin Group (USA), Inc. without any further procedural steps being necessary.

⁶ In a letter dated 15 July 2013, Penguin Random House Limited confirmed that the name Penguin Random House Limited refers to the same legal entity formerly called The Penguin Publishing Company Limited. Penguin Random House Limited also confirmed that Penguin Random House Limited can be an addressee of this Decision instead of The Penguin Publishing Company Limited without any further procedural steps being necessary.

⁷ In letters dated 15 July 2013, Pearson plc, Penguin Group (USA), LLC and Penguin Random House Limited confirmed that The Penguin Group (a division of Pearson plc) has ceased to exist and that its assets have been, or shortly will be, transferred to Penguin Random House Limited or Penguin Group (USA), LLC pursuant to the Transaction. Penguin Group (USA), LLC and Penguin Random House Limited also confirmed that Penguin Group (USA), LLC and Penguin Random House Limited can be addressees of this Decision instead of Penguin Group (a division of Pearson plc) without any further procedural steps being necessary.

⁸ In letters dated 15 July 2013, Pearson plc (the owner of Dorling Kindersley Holdings Limited) and Penguin Random House Limited confirmed that Dorling Kindersley Holdings Limited's publishing assets have been transferred to Penguin Random House Limited or its subsidiaries (over which Penguin Random House Limited exercises decisive influence). Penguin Random House Limited also confirmed that Penguin Random House Limited can be an addressee of this Decision instead of Dorling Kindersley Holdings Limited without any further procedural steps being necessary.

- (11) 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 Verlag GmbH and S. Fischer Verlag GmbH). The group includes Macmillan Publishers Limited ('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 its Pan Macmillan (fiction and non-fiction literature), Palgrave Macmillan (academic literature) and Macmillan Education (schoolbooks) divisions.
- (12) 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.
- (13) Apple is a technology company based in the United States. As regards the sale of e-books in the European Economic Area ('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

- (14) On 1 December 2011, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (15) On 1 March 2013, a Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 was adopted, which expressed the Commission's competition concerns. Those concerns related to a possible concerted practice that may have existed between and among the Five Publishers 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 in the first place.
- (16) On 16 April 2013, Penguin submitted commitments ('Commitments') to meet the competition concerns expressed by the Commission in its Preliminary Assessment.
- (17) On 19 April 2013, the Commission published a notice 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 Commitments within one month following publication ('Market Test')⁹.
- (18) On 23 May 2013, the Commission informed Penguin about the observations received from interested third parties during the Market Test.
- (19) On 28 June 2013, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. Also on 28 June 2013, the Hearing Officer issued his final report.

⁹ OJ C 112, 19.4.2013, p. 9.

4. PRELIMINARY ASSESSMENT

4.1. Background

4.1.1. *The e-book industry*

- (20) 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.
- (21) 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.
- (22) The first e-books were available in the early 1990s, however the demand for e-books started to be considerable only after Amazon, an on-line retailer based in the United States, launched in November 2007 its Kindle e-book platform in the United States.
- (23) From 2007 until Spring 2010, publishers sold e-books to retailers mainly under wholesale arrangements, also referred to as the wholesale or reseller model.
- (24) 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 for e-books were generally up to 50% of the e-book list price.
- (25) 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 (the '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*

- (26) 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 the same titles.
- (27) No later than 2008, at least the Five 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 also globally. In the Preliminary Assessment, the Commission preliminarily concluded that the Five Publishers expressed to each other the desire to increase retail prices of e-books above the levels set by Amazon and to 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 Five Publishers' search for a collective and global response*

- (28) Each of the Five Publishers sold a significant amount of its e-books through Amazon.
- (29) In the Preliminary Assessment, the Commission's preliminary view was that each of the Five Publishers understood that, rather than independent action, a common approach against Amazon would be necessary to succeed in moving Amazon away from its USD 9.99 pricing policy.
- (30) The Commission took the preliminary view that faced with Amazon's global reach and the USD 9.99 pricing policy, which was expected to be followed by Amazon internationally, the Five Publishers pursued a global approach. Their digital plans and strategies were formulated globally and group-wide.
- (31) Throughout 2009, several of the Five Publishers considered a number of potential approaches to force Amazon to raise retail prices. The approaches 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 through the use of the agency model¹⁰, 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*

- (32) In December 2009, Apple contacted at least the Five Publishers, on an individual basis, regarding its intention to start selling e-books.
- (33) In the Commission's preliminary view, in parallel to the initial contacts with Apple in December 2009, some of the Five Publishers contacted each other directly regarding their respective discussions with Apple and/or the envisaged commercial model for the sale of e-books to consumers.
- (34) The Commission took the preliminary view that Apple at first considered entering the market under a wholesale model. When some of the Five 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 Five Publishers of raising retail prices above Amazon's retail prices. Apple, therefore, simultaneously informed at least the Five 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 Five Publishers, including pricing terms, were

¹⁰ 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.

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

- (35) Shortly afterwards, Apple simultaneously submitted its proposed draft agency agreement to at least the Five Publishers. The draft agency agreements contained, among other things, a retail price most favoured nation ('MFN') clause. That clause replaced Apple's earlier requirement that each of the Five 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 had to lower the retail price of that e-book in the iBookstore to match that other lower retail price.
- (36) Each of the draft agreements contained maximum retail price grids for new release e-books. Those price grids were set above the retail prices charged by Amazon at the time. The Commission's preliminary view was that the Five Publishers' efforts to negotiate higher maximum retail price points with Apple show that they had understood that the actual future e-book retail 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 Five Publishers and Apple had further understood that Apple's proposed pricing and commission level would have resulted in a lower margin for each of the Five Publishers than that under the existing wholesale model.
- (37) The Commission's preliminary view was that Apple ensured, from the outset and throughout the negotiations with at least each of the Five Publishers, that each of the Five Publishers knew that (i) at least each and every one of the Five 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 Five Publishers informed of the status of the negotiations with at least each and every one of them, including information regarding with how many of each of the Five Publishers it had successfully concluded negotiations.
- (38) In addition to Apple's assurances and information, in its Preliminary Assessment, the Commission's preliminary view was that the Five Publishers had engaged, throughout their respective negotiations with Apple, in direct contacts with each other whereby they had disclosed and received information about the course of conduct contemplated and/or adopted by each of them, particularly with respect to pricing.
- (39) The Commission's preliminary view was also that during the negotiations with at least the Five Publishers in the United States, Apple informed each of the Five 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 as well, including in the EEA. Each of the Five Publishers had 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 Five Publishers prepared for the implementation of the agency model outside the United States, and most notably in the EEA, in parallel to its 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 Five Publishers and Apple

- (40) Between 24 and 26 January 2010, each of the Five 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 (35). The retail price MFN obligation became effective with regard to each of the Five Publishers on 3 April 2010, the launching date of the iBookstore.
- (41) Each agreement provided that each of the Five Publishers was, 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 Five Publishers could go. In addition, as regards newly released e-books that appeared 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

- (42) The Commission's preliminary view was that Apple and each of the Five Publishers understood that both Apple's goal of eliminating retail price competition with Amazon, and the Five Publishers' goal of raising e-book retail prices above those of Amazon, could be achieved only if the Five Publishers were able to impose an agency model on all retailers including Amazon. Apple and each of the Five Publishers understood that the retail price MFN clause created a strong incentive for each of the Five 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 Five Publishers was in a position to force Amazon to accept changing to the agency model or otherwise face the risk of being denied access to the e-books of each of the Five Publishers, assuming that all Five Publishers had the same incentive during the same time period, and that Amazon could not have sustained simultaneously being denied access even to only a part of the e-books catalogue of each of the Five Publishers.
- (43) Shortly before each of the Five Publishers signed an agency agreement with Apple in the United States, four of the Five Publishers had separately announced to Amazon their intention to change business terms and move to an agency model in the United States. The fifth publisher had planned to announce that intention during a meeting with Amazon scheduled to take place in Seattle on 27 January 2010. Amazon had initially refused to move to the agency model and had 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 surrendered to that model. By 3 April 2010, the launching date of the iBookstore in the United States and the date when the MFN obligations upon the Five Publishers became effective, four of the Five Publishers signed an agency agreement with Amazon in the United States. The fifth publisher

signed an agency agreement with Amazon in the United States [later in] 2010 because [information on business relationship]. The Five Publishers subsequently also switched to the agency model with other retailers.

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

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

- (44) Between March and December 2010, each of the Five Publishers entered into negotiations with Apple concerning the signature of agency agreements in the United Kingdom, France and/or Germany.
- (45) In the Commission's preliminary view, when negotiating those agency agreements and in light of their global strategy, each of the Five Publishers and Apple used their agency agreements in the United States as a template.
- (46) Each of the Five Publishers that had signed an agency agreement with Apple in the United States was present in the United Kingdom with e-book titles the rights of which are held by local legal entities ('UK titles').
- (47) The Commission's preliminary view was that, in light of the global strategy adopted by each of the Five Publishers, the executives of four out of the Five 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 UK titles. Regarding the fifth publisher, a senior executive based in London took the decision to enter into an agency agreement with Apple in the United States, and within two weeks of signing with Apple in the United States, internal e-mails show that the United Kingdom executives of the fifth publisher were also planning to enter into an agency agreement with Apple in the United Kingdom.
- (48) Between mid-May 2010 and end of August 2010, each of the Five Publishers signed an agency agreement with Apple for UK titles. As set out in Recitals (51) to (53), the agency agreements between each of the Five Publishers and Apple contained the same key pricing terms as their respective agency agreements in the United States, including the retail price MFN clause, maximum retail price grids, and the payment of a commission to Apple equal to 30% of the retail price.
- (49) In 2010, only one of the Five 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 with the aim of persuading those publishers to enter into agency agreements with Apple on the same key pricing terms for French and German titles respectively.
- (50) Apple launched its iPad and iBookstore in the United Kingdom, France and Germany on 28 May 2010. The Commission's preliminary view was that the Five Publishers

understood 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

- (51) The Commission's preliminary view was that the agency agreements between each of the Five Publishers and Apple for UK, French and German titles contained the same key pricing terms, including the same retail price MFN clause found in the agency agreements in the United States, 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 contained 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.
- (52) Each of the Five Publishers appointed Apple as a non-exclusive agent to sell e-book versions of its titles either throughout the whole of the EEA, or, as was the case for two of the agreements, only in the United Kingdom or only in Germany and Austria.
- (53) The agency agreements established that each of the Five Publishers was, in principle, free to set the retail price for its e-books titles. However, similarly to the agency agreements in the United States, each agency agreement contained maximum retail price points either for all titles, as was the case for UK and German titles, or for newly released e-books, as was the case for French titles. In the Commission's preliminary view, those maximum retail prices were substantially similar or even identical to those in the agency agreements concluded between Apple and each of the Five Publishers for UK titles, in the agency agreements concluded between Apple and Hachette as well as between Apple and a number of other publishers for French titles, and in 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

- (54) 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.
- (55) In the Commission's preliminary view, Apple and each of the Five Publishers understood that, just like for the United States titles, the retail price MFN clause created a strong incentive for each of the Five Publishers to convert Amazon (and other major retailers for UK titles) to the agency model in order for each of the Five Publishers 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 Five Publishers would have had strong incentives to delay or withhold e-book new releases from Amazon.

- (56) Between [...] and [...], four of the Five Publishers each separately announced to Amazon their intention to change their business terms and move to an agency model. The fifth publisher made its announcement in [...]. Each of the Five Publishers understood that it would not have been the only one telling Amazon that it was moving to the agency model over approximately the same period of time.
- (57) 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 Five 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. In the Commission's preliminary view, Amazon and each of the Five Publishers also expected that their agency agreements in the United States would have served as a template for the agency agreements regarding UK titles.
- (58) By the end of [...], four of the Five Publishers each signed an agency agreement with Amazon regarding UK titles. No later than [...], the fifth publisher suspended its on-going negotiations with Amazon regarding an agency agreement after the Office of Fair Trading ('OFT') had started an investigation into e-books in the United Kingdom.

France

- (59) At the time of Apple's launch of its iPad and iBookstore in France on 28 May 2010, newly released French language e-books had mainly been sold through the website of FNAC SA, 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.
- (60) The Commission's preliminary view was that Apple and Hachette, the only one of the Five Publishers that had signed an agency agreement with Apple in the United States and had also been 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.
- (61) The Commission's preliminary view was that Amazon and Hachette used their agency agreement in the United States as a template for their agency agreement for French titles.
- (62) Amazon and Hachette signed an agency agreement for French titles in [...]. Subsequently, in October 2011, Amazon launched a Kindle store targeting France.

Germany

- (63) At the time of Apple's launch of its iPad and iBookstore in Germany on 28 May 2010, newly released German language e-books had been 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.

- (64) The Commission's preliminary view was that Apple and Holtzbrinck/Macmillan, the only one of the Five Publishers that had signed an agency agreement with Apple in the United States and had also been selling German titles, understood that the MFN clause created 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.
- (65) The Commission's preliminary view was that Amazon and Holtzbrinck/Macmillan used their agency agreement in the United States as a template for their agency agreement regarding German titles.
- (66) 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*

- (67) Evidence collected by the OFT in the context of its United Kingdom investigation regarding [...]’s weekly retail prices suggested that each of four of the Five Publishers that had implemented the conversion to the agency model [...] in the United Kingdom increased the retail prices for their e-books relative to other publishers.
- (68) Based on quantitative evidence regarding the impact of the conversion to an agency model in the United Kingdom, the Commission's preliminary view was 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**

- (69) 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

- (70) A concerted practice is a form of co-ordination where undertakings knowingly substitute practical cooperation between them for the risks of competition¹¹. 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

¹¹ Case 48/69 *ICI v Commission* [1972] ECR 619, paragraph 64.

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 customers¹².

- (71) 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 market¹³. 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 conduct which they themselves have decided to adopt or contemplate adopting in the market in question¹⁴.
- (72) 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”¹⁵. 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”¹⁶.
- (73) 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”¹⁷. 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 materialise¹⁸.
- (74) 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 Commission¹⁹.

¹² Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 86.

¹³ Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 87.

¹⁴ 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.

¹⁵ Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 51; Case T-377/06 *Comap v Commission* [2011] ECR II-1115, paragraph 70.

¹⁶ 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.

¹⁷ Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, paragraph 67.

¹⁸ Case T-99/04 *AC-Treuhand AG* [2008] ECR II-1501, paragraph 122.

¹⁹ Case T-36/05 *Coats Holdings v Commission* [2007] ECR II-1110, paragraph 72.

4.3.1.2. Application in this case

Parallel behaviour

(75) In light of section 4.2, the Commission's preliminary view was that there had existed parallel behaviour in the United States and the EEA between the Five Publishers and Apple including, *inter alia*, in relation to the process of negotiation and the content of the agency agreements between the Five Publishers and Apple in both the United States and the EEA.

Direct and indirect contacts between the Five Publishers and Apple

(76) The Commission's preliminary view was that direct and indirect contacts had taken place between the Five Publishers and Apple, disclosing the course of conduct which each of the Five Publishers and Apple had decided to adopt or had contemplated adopting on the market, in order to influence the future course of conduct of the Five Publishers.

(77) The Commission's preliminary view was that no later than December 2009, each of the Five Publishers had engaged in direct and indirect (through Apple) contacts aimed at raising the retail prices of e-books above those of Amazon (as had been the case in the United Kingdom) or preventing altogether the introduction of lower prices by Amazon (as had been the case in France and Germany) in the EEA. In order to achieve that aim, the Five Publishers, together with Apple, had 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.

(78) The Commission's preliminary view was that to make that joint conversion possible, each of the Five Publishers had disclosed to, and/or received information from the rest of the Five Publishers and/or Apple, regarding the future intentions of the Five Publishers with respect to entering into an agency agreement with Apple in the United States and the key terms under which each of the Five Publishers would enter into an agency agreement with Apple in the United States, including the retail price MFN clause, the maximum retail price grids and the amount of commission to be paid to Apple.

(79) The Commission's preliminary view was that Apple's goal had been to find a way to have retail prices at the same level as Amazon's while still achieving its desired margin. Apple knew that that goal, and the goal of each of the Five Publishers, of raising retail prices above the level set by Amazon (or preventing the introduction of lower prices by Amazon), could have been achieved if Apple followed the suggestion by at least some of the Five Publishers that it enter the market for the sale of e-books under an agency model rather than a wholesale model, and informed each of the Five Publishers about whether at least any of the other Five Publishers had also entered into an agency agreement with Apple in the United States under the same key terms.

(80) The Commission's preliminary view was that Apple and the Five Publishers had understood that Apple's entry in the market for e-books on the agreed key agency model terms would have provided the global scale and framework needed for the

Five 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 did not correspond to normal conditions thereof

- (81) The Commission's preliminary view was that the concerted practice between and among the Five Publishers and Apple had led to conditions of competition which did not correspond to normal conditions.
- (82) Under normal conditions of competition, each of the Five Publishers would have been unaware of whether at least each of the other Five Publishers intended to enter into an agency agreement with Apple, and of the key pricing terms of that agreement.
- (83) The Commission's preliminary view was that the direct and indirect contacts between the Five Publishers and Apple had eliminated the risks associated with normal competition and had led to the signing of agency agreements, first in the United States and subsequently in the EEA, between each of the Five Publishers and Apple on the same key pricing terms and on a global basis.

No alternative plausible explanation

- (84) The Commission's preliminary view was that the decision by each of the Five 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, could not have plausibly been explained other than by concerted action.
- (85) The Commission's preliminary view was that each of the Five Publishers had known that by entering into agency agreements with Apple containing the retail price MFN clause referred to in Recital (35), maximum retail price grids and a commission of 30% of the retail price payable to Apple, first in the United States and then in the EEA, there would have been the risk of substantially lower revenues if other retailers, such as Amazon, would have been allowed to continue setting retail prices. Entering into those agreements would therefore not have been in the economic interest of each of the Five Publishers individually, unless a sufficient number of the other major international publishers would have been following suit, thereby substantially increasing the credibility and effectiveness of the threat of each of the Five Publishers to withhold 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

- (86) In light of Recitals (20) to (85), the Commission's preliminary view was that by jointly having converted the sale of e-books from a wholesale model to an agency model with the same key pricing terms on a global basis, the Five 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

- (87) According to the case law of the Court of Justice of the European Union, 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 context²⁰. 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 account²¹.
- (88) 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 an anti-competitive effect constitute not cumulative but alternative conditions in determining whether a practice falls within the 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 pursued²².
- (89) 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 market²³. 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 competition²⁴.

4.3.2.2. Application in this case

- (90) The Commission's preliminary view was that the objective of the concerted practice between and among the Five Publishers and Apple, in the economic context in which it had been pursued, had been 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.
- (91) In the Commission's preliminary view, in order to achieve the objective referred to in Recital (88) on a global basis, including in the EEA, the Five 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

²⁰ 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.

²¹ *Id.*

²² Case 56/65 *LTM* [1966] ECR 235, 249; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 28.

²³ 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.

²⁴ 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.

raising retail prices above the level of those offered by Amazon in the EEA or preventing the introduction of such lower retail prices in the EEA.

4.3.2.3. Conclusion

- (92) A concerted practice, as examined in this case, which aimed to raise retail prices in the EEA or to prevent the introduction of lower retail prices in the EEA, has, by its very nature, the potential to restrict competition.
- (93) Therefore, the Commission's preliminary view was that the concerted practice between and among the Five Publishers and Apple had the objective of preventing, restricting or distorting competition in the market for e-books in the EEA.

4.3.3. *Effect on trade between Member States*

4.3.3.1. Principles

- (94) According to the case law of the Court of Justice, in order to find that a concerted practice may affect trade between Member States, it must be possible to foresee with 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 States²⁵. Moreover, the effect on trade should not be insignificant²⁶.
- (95) Thus, the effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive²⁷.

4.3.3.2. Application in this case

- (96) The Commission's preliminary view was that the effect on trade of the concerted practice had been appreciable given that the conversion to the agency model by the Five Publishers and Apple formed part of a global strategy that was intended to be, and was, implemented in the EEA.
- (97) 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 Five Publishers and Apple in the United Kingdom, France and Germany, the pattern of trade potentially affected by the concerted practice covered a substantial part of the EEA.

4.3.3.3. Conclusion

- (98) In light of the above, the Commission's preliminary view was that the concerted practice between and among the Five Publishers and Apple had been 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.

²⁵ 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.

²⁶ *Ibid.*

²⁷ C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 35.

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

(99) The Commission's preliminary view was that Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement did not apply in this case because the cumulative conditions set out in those provisions had not been met.

5. COMMITMENTS

(100) Penguin does not agree with the Preliminary Assessment. Nevertheless, in order to meet the Commission's concerns as expressed in the Preliminary Assessment, Penguin offered Commitments, the key elements of which are set out in Recitals (101) to (105).

5.1. Termination of agency agreements

(101) The Commitments provide that if Apple has not already fulfilled its obligations pursuant to Sections II.1 and II.2 of Apple's commitments made binding by the Decision of 12 December 2012, with respect to its agency agreements concluded with Penguin, Penguin will terminate its agreements with Apple no later than fourteen days following the date of the adoption of the Commission decision making binding the Commitments.

(102) As regards Penguin's agency agreements for the sale of e-books in the EEA with retailers other than Apple, for any such agreement that: (a) restricts, limits, or impedes 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) contains an MFN clause regarding price as specified in the Commitments, Penguin will, within ten days of the notification of the Commission decision making binding the Commitments, notify the retailer that it may terminate the agreement with thirty days' notice. Penguin will also, thirty days after the retailer provides such notice, release the retailer from the agreement. For each agreement that has not been so terminated, at the latest within seventy days of the notification of the Commission decision making binding the Commitments, Penguin must take the steps required under the agreement to cause that agreement to be terminated and not renewed or extended.

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

(103) For a period of two years, Penguin 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.

(104) In the event that, after termination of the agreements referred to in Recitals (101) and (102), Penguin enters into an agency agreement with an e-book retailer, Penguin undertakes that the 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 Penguin 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.

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

(105) For a period of five years, Penguin undertakes not to enter into any agreement for the sale of e-books in the EEA that contains the following price MFN clauses, as specified in the Commitments:

(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; and

(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.

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

(106) In response to the publication on 19 April 2013 of the Market Test, the Commission received one observation. That observation related to considerations which are not linked to the competition concerns expressed in the Preliminary Assessment, namely the use of differing file formats and digital rights management ('DRM') which may render certain e-book files readable only on certain types of e-book readers, and Amazon's strong market position in the EEA.

7. ASSESSMENT OF THE COMMITMENTS IN LIGHT OF THE OBSERVATION RECEIVED IN RESPONSE TO THE COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

7.1. Purpose of the Commitments

(107) In the Preliminary Assessment, the Commission took the preliminary view that the concerted practice that may have existed among and between the Five Publishers and Apple had the object of preventing, restricting or distorting competition in the EEA.

(108) In the Decision of 12 December 2012, the Commission considered that the conditions of competition that existed in the EEA prior to the possible concerted practice should be substantially re-established ('competitive reset'). Each of the Four Publishers and Apple offered commitments that would bring about that competitive reset by causing the termination of relevant agency agreements and agreeing to certain restraints when renegotiating their commercial arrangements for e-books.

- (109) As stated in the Decision of 12 December 2012, the Commission considered that mere termination of the relevant agency 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. That is why the commitments offered by each of the Four Publishers and Apple included additional restraints on their conduct when renegotiating e-books arrangements. Those restraints included, as regards the Four Publishers, both a "cooling-off" period and a price MFN ban, and, as regards Apple, a retail price MFN ban.
- (110) The Commission considered that the commitments offered by each of the Four Publishers would substantially reduce the possibility that the Four Publishers and Apple would be able to recreate the effects of the price MFN clause that, in the Commission's preliminary view, had acted as a "commitment device" and enabled the joint conversion to the agency model with the same key terms. The Commission also considered that the commitments offered by each of the Four Publishers would provide a level of pricing discretion for retailers and/or agents distributing e-book titles, which would be reasonably comparable to the discretion they enjoyed before the possible concerted practice.
- (111) The Commission further considered that the commitments offered by Apple would lead to the termination of its agency agreements with Penguin and the removal of retail price MFN clauses contained in agreements between Apple and any e-book publisher (in addition to such clauses being removed from the agreements between each of the Four Publishers and retailers other than Apple).
- (112) The Commission, in addition, considered that the commitments offered by each of the Four Publishers and Apple, taken together, would create, over a sufficient period of time, conditions for a competitive reset. The commitments would result in sufficient uncertainty regarding the future intentions of publishers and retailers regarding the choice of business models (that is to say, wholesale, agency or a novel model) and the pricing terms used therein. They would also decrease incentives for each of the Four Publishers and Apple to renegotiate agreements for e-books with the same key terms.
- (113) Penguin's Commitments will add to the competitive reset brought about by the Decision of 12 December 2012.
- (114) Firstly, Penguin's Commitments will result in termination of relevant agency agreements between Penguin and retailers (in addition to the agency agreements between Penguin and Apple which had to be terminated under the commitments made binding on Apple by the Decision of 12 December 2012).
- (115) Secondly, under Penguin's Commitments, the two year "cooling-off" period will now apply to all Penguin e-book titles offered by Apple and other retailers.
- (116) Thirdly, under Penguin's Commitments, the price MFN ban will apply to any renegotiated agreement between Penguin and retailers (in addition to the application of the retail price MFN ban to any renegotiated agreement between Penguin and Apple, as foreseen by the commitments made binding on Apple by the Decision of 12 December 2012).

- (117) The Commission considers that taken together, the Commitments offered by Penguin, in light of the commitments of the Four Publishers and Apple made binding by the Decision of 12 December 2012, will further contribute to creating, over a sufficient period of time, conditions for a competitive reset.
- (118) The Commission therefore considers that the Commitments offered by Penguin are adequate to meet the concerns expressed by the Commission in its Preliminary Assessment.

7.2. Duration of the Commitments

- (119) The 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 Commitments is adequate. If the Commitments were to be binding for a shorter period, that duration would be insufficient to meet the competition concerns identified by the Commission in its Preliminary Assessment.

8. PROPORTIONALITY OF THE COMMITMENTS

8.1. Principles

- (120) 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 pursued²⁸.
- (121) 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 that assessment, the Commission must take into consideration the interests of third parties²⁹.

8.2. Application in this case

- (122) The Commitments offered by Penguin, as set out in Section 5, adequately address the Commission's concerns expressed in the Preliminary Assessment.
- (123) Moreover, Penguin has not offered less onerous commitments that also adequately address the Commission's concerns.
- (124) The Commission has taken into consideration the interests of third parties, including those of the interested third party that responded to the Market Test.

²⁸ 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.

²⁹ Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, paragraph 41.

9. CULTURAL DIVERSITY

9.1. Principles

(125) In accordance with Article 167(4) of the Treaty, when applying Article 101 of the Treaty, the Commission must "*take cultural aspects into account in its action [...] in order to respect and to promote the diversity of [...] cultures*". Accordingly, in the application of Article 101 of the Treaty, the Commission is required to take into consideration the objective of respecting and promoting cultural diversity, in particular where the application of Article 101 of the Treaty concerns an activity linked to culture³⁰.

9.2. Application in this case

(126) The purpose of the Commitments is to further contribute to restoring the conditions of competition in the market prior to the possible concerted practice. The Commission considers that in making the Commitments binding on Penguin, cultural diversity in the EEA will not be adversely affected.

10. CONCLUSION

(127) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the Commitments, offered by Penguin to meet the Commission's concerns expressed in its Preliminary Assessment, binding on Penguin. 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.

(128) The Commission's assessment of whether the Commitments offered by Penguin 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.

(129) In light of the Commitments offered by Penguin, 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.

(130) 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:

³⁰ Case T-451/08 *Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. (Stim) v Commission*, paragraphs 73 and 87.

Article 1

The Commitments listed in the Annex shall be binding on Penguin 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 by the Commission, and the proceedings in this case should therefore be brought to an end.

Article 3

This Decision is addressed to:

Penguin Random House Limited

80 Strand
London
WC2R 0RL
United Kingdom

Penguin Group (USA), LLC

375 Hudson Street
New York
NY 10014
USA

Done at Brussels,

For the Commission
[...]

Vice-President

ANNEX

Commitments offered by Penguin