

sjberwin



Without Prejudice

Simon & Schuster

Case COMP/39.847 - E-Book

**Proposed Commitments under Article 9 of Council
Regulation (EC) No 1/2003**

For settlement purposes only

14 September 2012

**SJ Berwin LLP
2196/S27046.1/LIVE:74631210.1/CRIS**

CASE COMP 39.847 - E-BOOKS

COMMITMENTS OFFERED TO THE EUROPEAN COMMISSION BY SIMON & SCHUSTER

UNDER ARTICLE 9 OF COUNCIL REGULATION (EC) NO 1/2003

In accordance with Article 9 of Council Regulation No 1/2003, S&S gives the following commitments ("**Commitments**") to address the preliminary competition concerns identified by the European Commission ("**Commission**") in Case 39.847 E-books, which are expressed in the Commission's preliminary assessment dated 14 August 2012 and to enable the Commission to adopt a decision confirming that the Commitments meets its concerns ("**Commitments Decision**").

S&S strongly disagrees with the Commission's preliminary assessment regarding both the factual and legal elements, and denies the allegations against it. Notwithstanding this disagreement and denial, S&S has, nevertheless, offered these Commitments pursuant to Article 9 of Regulation 1/2003, to meet the Commission's competition concerns. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action in relation to S&S' arrangements for the sale of E-books and will close proceedings opened on 1 December 2011 against S&S in relation to S&S's arrangements for the sale of E-books.

For the avoidance of doubt S&S strongly contests that it has engaged in unlawful conduct contrary to Article 101 TFEU or Article 53 of the EEA Agreement or any other aspect of European Union or EEA competition law and these Commitments are without prejudice to S&S's position should the Commission, or any other party, decide to open proceedings or to commence any other legal action against S&S and are offered without any admission of liability.

1 DEFINITIONS

For the purpose of these Commitments, the terms listed below shall have the following meaning:

"**Agency Agreement**" means an agreement between an E-book Publisher and an E-book Retailer under which (i) the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books; and (ii) the E-book Publisher sets the Publisher Price.

"**Apple**" means (1) Apple, Inc., a California corporation with its principal place of business in Cupertino, California; and (2) iTunes Sarl, a Luxembourg limited liability company with its principal place of business in Luxembourg, Luxembourg, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

"**E-book**" means those electronically formatted books designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For the purposes of these Commitments, the term E-book does not include (1) educational and scholarly titles as well as electronically formatted books that are sold through educational and/or library channels; (2) an audio book, even if delivered and stored digitally; (3) a standalone specialised software application or "app"

sold through an "app store" rather than through an e-book store (e.g., through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; (4) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; (5) electronic versions of children's picture books; or (6) self-published books in electronic format.

"E-book Publisher" means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the EEA. S&S is an E-book Publisher. For the purposes of these Commitments, an E-book Publisher is not an E-book Retailer except when it lawfully Sells (or seeks to lawfully Sell) directly E-books to consumers for another E-book Publisher, or acts as an agent under an Agency Agreement for another E-book Publisher.

"E-book Retailer" means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the EEA, or through which an E-book Publisher, under an Agency Agreement, Sells E-books to consumers in the EEA. For the purposes of these Commitments, unless otherwise provided, S&S and all other Persons whose primary business is book publishing are not E-book Retailers. For the purposes of these Commitments, Apple is an E-book Retailer.

"EEA" means those countries participating in the European Economic Area as of the Effective Date and at any time thereafter during the term of these Commitments.

"Effective Date" means the date upon which S&S receives formal notification of a decision pursuant to Article 9 of Regulation 1/2003 by which the Commission makes the Commitments binding on S&S.

"Including" means including, but not limited to.

"Implementation Date" means either:

- (a) the termination of an agreement between S&S and an E-Book Retailer that restricts, limits, or impedes the E-book Retailers ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to purchase one or more E-books in the EEA; or
- (b) the date on which S&S notifies the E-book Retailer in writing that S&S will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books in the EEA.

"Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

"Price MFN" means a term in an agreement between S&S and an E-book Retailer under which:

- (a) the Retail Price at which an E-book Retailer or under an Agency Agreement, S&S, Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or S&S under an Agency Agreement through any other E-book Retailer Sells the same E-book(s) to consumers; or

- (b) the Wholesale Price at which S&S Sells one or more E-books to or through that E-book Retailer depends in any way on the Wholesale Price at which S&S Sells the same E-books to or through any other E-book Retailer; or
- (c) The types of business arrangement for the distribution or Sale of E-books that the E-book Retailer is entitled to enter into with S&S depend in any way on the types of business arrangement for the distribution or Sale of E-books that S&S enters into with another E-book Retailer; or
- (d) the revenue share or commission that an E-book Retailer receives from S&S in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from S&S 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.

"Publisher Price" means the price for sales to consumers set by S&S from time to time for a specific E-book title under the terms of an Agency Agreement.

"Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

"Retail Price" means the price at which an E-book Retailer, or under an Agency Agreement, an E-book Publisher, Sells an E-book to a consumer.

"Sale" means delivery of access on a permanent basis to a consumer to read one or more E-books (Purchased alone, or in combination with other goods or services) in exchange for payment; **"Sell"** or **"Sold"** means to make, or to have made, a Sale of an E-book to a consumer.

"S&S" means (1) Simon & Schuster Inc.; (2) Simon & Schuster Digital Sales Inc.; and (3) Simon & Schuster (UK) Limited, and their successors and assigns, subsidiaries, divisions and groups.

"Wholesale Price" means (1) the net amount, after any discounts or other adjustments, that an E-book Retailer pays to S&S for an E-book that the E-book Retailer Sells to consumers; or (2) the Publisher Price at which S&S, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that S&S pays to the E-book Retailer in connection with, or that is reasonably allocated to, that Sale.

2 REQUIRED CONDUCT

- 2.1 At the latest, within seven (7) days after the Effective Date, S&S shall send a letter to Apple confirming that (1) it waives the notice period contained in any agreement with Apple that concerns the distribution of E-books within the EEA; and (2) it agrees to terminate such agreements no later than fourteen (14) days from the date of the Commitments Decision. A copy of such letter should be provided to the Commission at the same time.
- 2.2 To the extent that any Agency Agreement between S&S and an E-book Retailer other than Apple was executed prior to the Effective Date and relates to the Sale of E-books within the EEA and that agreement:
 - (a) restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or

(b) contains a Price MFN,

S&S shall notify the E-book Retailer, at the latest, within ten (10) days of the Effective Date, that the E-book Retailer may terminate the agreement with thirty (30) days' notice and shall, thirty (30) days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. In respect of each such agreement where S&S has not received such written notice of termination, S&S shall within seventy (70) days of the Effective Date, take each step required under the agreement to cause such agreement to be terminated and not renewed or extended as soon as permitted under the agreement.

3 PROHIBITED CONDUCT

3.1 With regard to those territories within the EEA covered by any of the agreements terminated in accordance with paragraphs 2.1 and 2.2 above:

(a) For two (2) years from the Implementation Date, S&S shall not restrict, limit, or impede an E-book Retailer's ability to set, alter or reduce the Retail Price of any E-book, or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books. Such two (2) year period runs separately for each E-book Retailer at the option of S&S. S&S shall notify the Commission of the option it selects for each E-book Retailer within seven (7) days of making its selection.

(b) For two (2) years from the relevant Implementation Date or the Effective Date, whichever is earlier S&S shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books in the EEA.

3.2 S&S shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books within the EEA that contains a Price MFN.

4 NON-CIRCUMVENTION

4.1 S&S shall not in any way circumvent, by actions and/or omissions, any commitments contained in this document.

4.2 For the avoidance of doubt the following shall not be prohibited under these Commitments:

(a) S&S' good faith decision not to pursue a promotional programme, arrangement or price grid proposed by an E-book Retailer; or

(b) S&S' good faith decision to offer its own promotional programme or arrangement with one or more E-book Retailers; or

(c) S&S' good faith decision not to enter into, or not to remain, in business with an E- book Retailer.

4.3 After the expiration of the prohibitions in paragraph 3.1 of these Commitments, S&S may unilaterally enter into or enforce any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of S&S' E-books

or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of S&S's E-books.

5 PERMITTED CONDUCT

5.1 Nothing in these Commitments shall prohibit S&S unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing, or other promotional services rendered.

5.2 Notwithstanding paragraph 3.1 of these Commitments, S&S may enter into Agency Agreements with E-book Retailers in relation to the EEA under which the aggregate value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of S&S's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to S&S's E-books) is restricted, provided that:

- (a) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to Purchase S&S's E-books by an aggregate amount equal to the total commissions S&S pays to the E-book Retailer, over a period of at least one (1) year, in connection with the Sale of S&S's E-books to consumers;
- (b) S&S shall not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and
- (c) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

5.3 Details of paragraph 5.2 above will be subject to individual bi-lateral negotiations between S&S and each prospective E-book agent. For the avoidance of doubt, S&S shall be entitled to require from the E-book Retailer such information as may reasonably be required to enable S&S to assess and verify the aggregate amount referred to in clause 5.2(a) above.

5.4 For the avoidance of doubt, the amount that S&S shall be entitled to receive in respect of each E-book title Sold through an Agency Agreement shall be based on the Publisher Price for that E-book, net of VAT.

6 NATIONAL LAWS

6.1 These Commitments are without prejudice to restrictions imposed by national law related to E-books that restrict, limit, or impede the implementation of paragraphs 3.1 and 5.2 above.

7 DURATION AND REPORTING

7.1 Unless provided otherwise, these Commitments shall remain in force for a period of five (5) years from the Effective Date.

7.2 In addition to the requirements set out in paragraph 2.1, throughout the duration of the Commitments, S&S shall provide the Commission with an annual written report on the implementation of these Commitments during the relevant year. It will also address any disputes

or written complaints made by retailers relating to the implementation of the Commitments. The report relating to 2012 shall be provided by 1 March, 2013 and further reports shall be provided on March 1 of each year up to and including 2017.

- 7.3 S&S commits to provide the Commission (1) within seven days of the Effective Date, with one complete copy of any agreement, executed, renewed, or extended on or after 1 January, 2012, between S&S and any E-book Retailer relating to the Sale of E-books within the EEA.; and (2) thereafter, on a quarterly basis, with any such agreement executed, renewed, or extended since S&S' previous submission of agreements to the Commission.
- 7.4 Where S&S enters into a non-disclosure agreement with another E-book Publisher or an E-book Retailer, this non-disclosure agreement shall not prevent S&S from providing to the Commission any kind of relevant information.

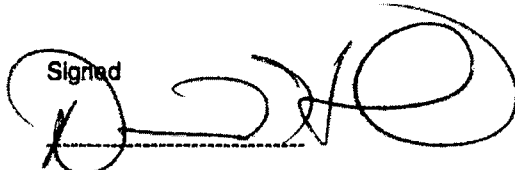
8 REVIEW CLAUSE

- 8.1 Pursuant to Article 9(2)(a) of Regulation 1/2003, S&S may request the Commission to reopen proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commitments Decision was based.

13 September 2012

Signed 

David Hillman, Executive Vice President & General Counsel
Duly authorised to sign on behalf of **SIMON & SCHUSTER INC**

Signed 

David Hillman, Executive Vice President & General Counsel
Duly authorised to sign on behalf of **SIMON & SCHUSTER DIGITAL SALES INC**

Signed



Ian Chapman, Managing Director & CEO
Duly authorised to sign on behalf of **SIMON & SCHUSTER (UK) LTD**