Another chapter in the EC's commitments policy? The e-books commitments

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Introduction by Europe Column editor Anna Tzanaki

As the European Commission is set to accept an offer by Apple and four book publishers to end an antitrust investigation and avoid fines, Marcus Pollard and Rosario Maria Rende Granata (Linklaters LLP) introduce us to the specifics of the EU e-books case. They explain both the background to the case and the Article 9 proposed commitments.

The antitrust investigations on both sides of the Atlantic focused into a series of agreements between five international publishers and Apple regarding the pricing of e-books. The "agency model" (whereby the publishers were to set the prices themselves, without any influence by retailers) and the MFN clauses (whereby Apple was to de facto enjoy the lowest price on the market undercutting other retailers, e.g. Amazon) adopted by those agreements were considered anticompetitive. Against the backdrop of a settlement with the DOJ, four of the publishers and Apple have offered to the European Commission similar commitments as agreed in the US. The article particularly analyses the EU regulator's choice of taking an Article 9 decision in this case as well as the policy conclusions to be drawn by such choice.

Interested in viewing how the authors put the EU e-books investigation in context? Check out this month's CPI Europe column!

Digital markets under the EC's spotlight

The EU's Digital Agenda and the importance of competitive ICT markets to future growth have placed a number of digital markets under the European Commission's (**EC's**) spotlight. The rapid emergence of new markets and platforms, such as digital music services, e-books, smartphones and tablets, the so called "patent wars," and the recent growth in significance of companies such as Google, Apple, Facebook, and Amazon, have all raised a number of challenges for antitrust enforcement.

Not only have new substantive areas required investigation, but antitrust agencies dealing with this sector face the pressing need to adapt their often lengthy investigations to keep pace with fast-moving developments and swift technological changes that characterise such markets. Vice President Almunia recently

acknowledged that more rapid processes may be better tailored to deal with antitrust concerns in digital markets.[1]

One investigation that has taken the Article 9 route and is reported to be heading towards closure is the investigation into the series of agreements between five international publishers and Apple regarding the pricing of e-books. This pending investigation provides for an opportunity to reflect on the circumstances under which Article 9 decisions may be the most appropriate tool to address potential competition concerns.

The e-books investigation

In March 2011, the EC and the US Department of Justice (the "**DoJ**") simultaneously carried out dawn raids at the premises of several companies active in the e-book publishing sector. The EC subsequently announced the opening of formal proceedings against the international publishers Simon & Schuster, Harper Collins, Hachette Livre, Verlagsgruppe Georg von Holtzbrinck and Penguin and Apple in December 2011.[2] The DoJ filed its official complaint in the US in April 2012.[3]

The concern raised by the EC (and the allegations made by the DoJ)[4] relates to the simultaneous switching of the sale of e-books from a wholesale model (where the retailers set the price of the e-books freely) to an agency model (where the publishers set the price of the e-books and the retailers receive a set commission) with the same key terms. As such the publishers, with the help of Apple, are alleged to have engaged in a concerted practice to raise the retail price of e-books and/or prevent lower prices being set by other retailers, such as Amazon.

The disputed agreements contained a most-favored nation ("**MFN**") clause that ensured that the relevant publisher set iBookstore's e-book prices at or below the

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[1]Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *Statement of VP Almunia on the Google antitrust investigation*, SPEECH/12/372, 21 May 2012.
[2]EC Memo/11/126, *Antitrust: Commission confirms unannounced inspections in the e-book publishing sector*, 2 March 2011 and EC Notice, 1 December 2011.
[3]*U.S. v. Apple, et al.*, Complaint, document 1 at http://www.justice.gov/atr/cases/applebooks.html.
[4]EC Market Test Notice - Communication of the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/39.874/E-BOOKS and *U.S. v. Apple, et al.*, case documents at http://www.justice.gov/atr/cases/applebooks.html.

lowest price on the market and, therefore, guaranteed that Apple always had the lowest prices. It is alleged that as a result, if the publishers wanted to avoid lower margins, they would have to pressure other retailers into accepting the agency model too.

The proposed e-books commitments

Shortly after the DoJ began its investigation, three publishers and Apple reached a settlement in the U.S. by which they agreed to change the pricing structure for e-books. In particular, they agreed to terminate the agency agreements with Apple and terminate any other agreements with other retailers that restricted pricing or contain an MFN claue. The settlement also provided for future monitoring by the DoJ of agreements relating to e-books and any communications between other publishers and themselves.[5] Against that backdrop of a settlement in a short period, in September 2012, each of the publishers (except Penguin) and Apple submitted Article 9 commitments to the EC with similar amendments to their arrangements as those agreed in the U.S. These were recently market tested[6] and a final decision is expected from the EC around December 2012.

Putting e-books in context

In the U.S., the e-books settlement came within a year of the original submission of the DoJ's complaint. If the original commitments offered in the EU are accepted, the EC will have achieved opening and closing of the case within a year. Such a quick resolution would fit with the EC's increased focus on speed and efficiency of its decision-making process and in line with the Court of Justice's position in *TeliaSonera*, where it emphasised that *"[…]taking into account the objective of the competition rules, […], their application cannot depend on whether the market concerned has already reached a certain level of maturity. Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible,*

[5] *U.S. v. Apple, et al.*, Final Judgement as to Defendants Hachette, Harper Collins and Simon & Schuster, document 119 at http://www.justice.gov/atr/cases/applebooks.html.

[6] EC Press Release - *Antitrust: Commission market tests commitments proposed by Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for the sale of e-books*, IP/12/986, September 2012.

to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market, in other words it requires action before the anti-competitive effects of that strategy are realised."[7] This may suggest that if time ought to be the essence of EC investigations, Article 9 decisions may appear be the preferred policy tool for the EC going forward. However, there are a number of reasons why such a conclusion may be premature and not yet backed by the EC's existing decisional practice.

First, previous Article 9 decisions, such as in *Rambus* or *IBM (Maintenance Services)* in fact followed lengthy investigations. In *Rambus*, the initial complaint was made some 7 years before the Article 9 decision and in *IBM* it took 2 years from the opening of proceedings to reach the commitments. The *Microsoft (Tying)* decision has a much shorter time frame than those other cases and appears closer, in timing terms, to e-books. We note, however, that the relative speed of the proceedings in the *Microsoft (Tying)* case was undoubtedly influenced by the EC's Windows Media Player decision involving Microsoft.[8] The EC's e-books investigation similarly takes place against a backdrop of parallel proceedings (the U.S. settlement).

Second, the goal of antitrust decisions should always be to fully remove the (allegedly) anticompetitive conduct(s) and its effects. Under the right circumstances this means that the EC may be correct to follow the Article 9 route. But those circumstances are not present in every investigation and a sector specific presumption may not lead to the desirable or correct outcome.

It would seem that in cases such as e-books, Article 9 decisions may be better tailored to address competition concerns as the conduct under investigation and its effects appears more "clear cut," and the commitments proposed may bring the conduct to an end and eradicate its effects. Yet, in other cases a desire for a "quick

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[7]Case C52/09, *Konkurrensverket v TeliaSonera Sverige AB*, 17 February 2011, paragraph 108.

[8]Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) 2007 OJ L.32/23. This decision was upheld by the Court of First Instance in Case T-201/04 Microsoft v Commission [2007] ECR II-3601and proceedings commenced in Microsoft (Tying) shortly thereafter.

fix" may only serve to impinge on the efficacy of the EC's decision and not remedy the competition concern.

Conclusion

The e-books investigation comes at a time when there is a focus on a perceived need for quick and efficient decisions. Article 9 decisions can be a flexible tool with potential for increased use in the future. However, the ICT sector should not benefit from a quasi industry-specific presumption that commitments are the *only* solution to competition concerns arising in this area. Other tools, in particular Article 7 (prohibition) decisions, will remain an effective instrument in the EC's hands to deal with conduct that qualifies as a violation of the EU competition rules. Moreover, it is notable that, so far, the Commission has never used its powers to adopt interim measures under Article 8 of Regulation 1/2003. These powers remain unused tools in the EC's remedial toolbox that, ironically, are specifically designed to offer swift relief against antitrust violations.