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e-Books and the boundaries of Antitrust

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Abstract

The e-book market is quite remarkable. The economic models for the distribution of this unique product are original and differ from one jurisdiction to another. The antitrust litigations, in both the US and Europe, against Apple and publishing companies as well as the French law on e-Book price-fixing are challenging the boundaries of antitrust.

Le livre numérique est un bien tout à fait singulier. Les modèles économiques de distribution de ce bien particulier sont originaux et très différents d'un système à l'autre. Les contentieux américain et européen autour des pratiques d'Apple et des éditeurs, la loi française sur le prix unique du livre numérique posent la question des frontières de l'antitrust.

Introduction

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1. A new market is coming into light and spreading. Even if its expansion is evolving different rhythms on both sides of the Atlantic, the fact is obvious: e-Books are part of the future of our modern societies. Therefore, everyone is keeping a watchful eye on the evolution of the balance of power on the e-book market: the consumers, the various competitors who are confronting one another on the market, but also public authorities and, among them, competition authorities. Thus, we have good reasons to believe that the "product" involved is quite peculiar. It is not a consumer good like the others. With it, stories, ideas, dreams, knowledge, are being passed around. Through this type of media, the history and the fate of our peoples are handed down. They build our common culture. Can we reasonably and fearlessly hand over such a precious good to the market? Our trust in the free play of the market forces is being tried. Could the free competition, this formidable "discovery procedure" as Hayek said[1], be a threat to our discoveries? After all, the e-book problem deals with the boundaries that we want to give to the antitrust. At least two questions arise: is the e-book problem a matter of antitrust or *could* it be one? If it's one that antitrust can deal with, what method could we use to treat it?

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2. Is the e-book market a breeding field for the action of competition authorities? In other words: is it appropriate to entrust competition authorities the task of making free competition reign among rivals on a market so specific? There are drastic different points of view concerning this subject.

3. In the United States, the answer is quite clear. The *Department of Justice* has lodged a highly mediatized complaint against the contractual relationships between Apple and several publishers[2]. As stressed by Jonathan M. Jacobson, Kimberley A. Piro[3], Geoffrey A. Manne and William Rinehart[4], Apple is blamed for having concluded agency agreements with the main publishers in the United States. These contracts allow publishers to fix a retail price which is imperative upon all the distributors selling e-books and forbid them to sell cheaper than the price charged on Apple's iBookstore. This strategy without doubt aims at opposing the policy of low prices at Amazon but results in the increase in prices for consumers. The determination shown by the DOJ to fight this is quite remarkable. This is a reminder of the Microsoft case[5]. The DOJ's complaint arose deep controversies. But nobody disputes the fact that antitrust law should seize the case, if however a case exists. Also, the same agreements between various European publishers (and possibly Apple…) have provoked the opening of a formal investigation by the European Commission as explained by Mark Powell and Audrey Oh[6].

1 F.A. Hayek, "Competition as a Discovery Procedure" *in New Studies in Philosophy, Politics, Economics and the History of Ideas*. Chicago: University of Chicago Press, 1978.

2 Complaint, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012) and the answer of Apple, at 1, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012).

3 See "Storm Over EBook Waters".

4 See "The US eBooks Case Against Apple: The Procompetitive Story".

5 See the final judgement US District Court for the district of Columbia, Civil action n° 98-1232.

6 See "e-Books in the EU: Competition, Pricing, and the Expansion of a New Digital Market".

4. The ability of antitrust law to treat the problem does not seem seriously controversial in the US or in the EU. But the facts could fall on the other side of antitrust boundaries if the publishers can convince that their agreements really are agency ones. Indeed, agency agreements are regarded as falling outside the scope of article 101 TFEU and of Sherman Act Section 1. Otherwise, the agreement could be qualified as resale price maintenance, and antitrust law would evidently be relevant: RPM is a hard-core restriction of competition.

5. In France, on the other hand, a completely different solution has been chosen. The French legislator, dreading the destructive effects of the competitive game on the balance of the e-book sector, chose to confide in the publishers with the care of setting a unique resale price for e-books[7]. This solution, certainly surprising to those across the Atlantic, is not so original in France. The so-called "Lang Act" adopted in 1981 already planned such a system for printed books. And this solution to exclude any kind of retail price competition has been adopted by other countries in Europe such as Germany, The Netherlands, Greece, Spain and Austria. Thus, we cannot ignore that the economic model of the French law on e-books could spread, sooner or later, elsewhere in the European Union. Be that as it may, this will to rule out the free exercise of competition on e-book prices and the application of antitrust rules is obvious, even if, as pointed out by Pr Siirianen[8], the competition authority will also have to play an important role concerning other e-book matters (copyright use… and abuse, problems of interoperability, refusals to deal, and so on).

* *

6. But let's assume that antitrust law is relevant to regulate the e-book market, here's another question: *How should it be handled*? This is also a challenge for the boundaries of antitrust, in a methodological way. France has made a somewhat surprising choice in adopting a law. In the United States, the method to solve the e-book problem is not yet clear. Considering the determination of the DOJ and its communication on the case, one could assume that the DOJ wants to make an example of the Apple case and go to trial. But the DOJ could settle too, like in the *Microsoft* case. In Europe, it's seems that a negotiated process is on going: a settlement is being discussed with the European Commission. But a prohibition decision pursuant to article 7 of the Regulation No 1/2003 could finally be made. A law? A trial? A prohibition decision? A settlement? How to choose the best method?

7. The degree of maturity of the market and its very nature are, off course, decisive points to take into account. That is why the DOJ could go to trial: in the United States, the market is now almost mature and it's time for the DOJ to hand out brownie points or slaps on the wrist. In Europe, an e-book market is just starting to emerge. So isn't it too soon to adopt a law, like France did[9]? The European Commission would be right to adopt a softer method. As the e-book market is emerging and fast-growing, a settlement procedure may appear appropriate to the Commission, a fast and flexible solution. Nowadays, settlement decisions seem to be the customary way to regulate emerging and technological markets[10], even when serious infringements are committed – and RPM is one of them. But even if this solution is adopted, is it really time to settle? Isn't it too early?

8. So, the role we want our competition authorities to play is also at stake when choosing the good method. The DOJ, even if it settles, considers and evaluates the *results* of the competitive process. The European Commission intervenes early on the competitive process itself to put it on track. Here's another boundary of antistrust challenged by this new e-book market. ■

7 Loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique.

8 See "Le livre numérique, entre prix unique, droit d'auteur et droit de la concurrence".

9 See in this sense Autorité de la concurrence, Avis n° 09-A-56 du 18 décembre 2009 relatif à une demande d'avis du ministre de la culture et de la communication portant sur le livre numérique.

10 See the investigation and the proposal of the Commission of Apple to… offer settlements in the Google case. J. Almunia said: "*I believe that these fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement*", Speech/12/372, 21/05/2012.

Storm over E-books waters

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I. Introduction

1. The outcry over the government's *eBooks* case[11] has been loud. Apple says that "[t]he government sides with monopoly, rather than competition, in bringing [the] case"[12]. Noted antitrust authority CNET proclaimed in a headline that "DOJ is likely to lose eBook antitrust case targeting Apple"[13]. A number of blogs have been equally hostile[14].

2. So what exactly is the claim that has launched this firestorm? It is that the major book publishers, in concert with Apple, (1) all agreed to change their pricing model from a "wholesale" model (in which retailers such as Amazon determined the retail price) to an "agency" model (in which the publishers themselves determine the retail price), (2) reinforced the agency system with an MFN clause that prohibits any of them from selling elsewhere at a price lower than offered through Apple's iBookstore, and (3) raised eBook prices by over 30% as a result[15]. These are just allegations, of course, not proven facts; and only the actual evidence will tell us whether there was collusion or not. But, if proven, a conspiracy among all the major players in an industry to raise prices surely sounds like the stuff of which legitimate antitrust cases are made. And, here, our own common experience tells us that the price of eBooks has in fact increased from $10 to $13-$15 on popular books. And we know that the late Steve Jobs took credit for organizing the publishers in this fashion in comments to his autobiographer[16]. So one cannot say that the allegations are completely made up.

3. The critics of the DOJ Complaint (and the private case brought prior to DOJ's suit) advance two primary criticisms. One is that the $10 price Amazon had been charging at retail was unsustainably low and that a higher price point is necessary to keep the publishing industry healthy. The other is that the alleged agreements generally, and Apple's MFN in particular, are necessary to make competitive inroads on Amazon's monopoly of eBook retailing.

4. In the discussion that follows, we first examine the characteristics of the "agency" model and then address whether these arguments hold up[17].

II. Characteristics of the agency model

5. "Agency" and antitrust have long crossed paths in cases involving resale price-fixing. Prior to the 2007 decision in *Leegin*[18], it was unlawful per se under the Sherman Act for a supplier and a retailer to agree on the retail price to be charged[19]. There were a number of exceptions to this per se rule, however, prominently including the "agency" exception. Under this exception, if the retailer was not an independent actor but, instead, was acting solely as the supplier's agent, there was no "agreement" for Sherman Act Section 1 purposes (and thus no illegal vertical price-fixing) because an agent and principal are a single entity for antitrust purposes and so cannot "conspire" together. Under the exception, the agency must be genuine – with the supplier bearing the risk of loss for the goods, bearing responsibility for insurance, and the like – but as long as these formalities are followed, there is no Sherman Act violation[20]. *Leegin* eliminated the need to rely on the agency exception in many instances, but the rule still remains: with a bona fide agency, there is no agreement for Sherman Act purposes and the supplier is free to set the retail price.

6. Before the agency model of eBook reselling was implemented, publishers sold eBook titles to retailers on a wholesale basis. Under the wholesale model, retailers

11 Complaint, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012).

12 Answer of Apple, at 1, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012).

13 D. McCullagh & G. Sandoval, *DOJ is Likely to Lose eBook Antitrust Case Targeting Apple*, CNET, Apr. 12, 2012, http://news.cnet.com/8301-13578_3-57412861-38/doj-is-likely-to-lose-eBook-antitrust-suit-targeting-apple/.

14 See, e.g., Truth on the Market, http://truthonthemarket.com/2012/04/12/the-procompetitive-story-that-could-undermine-the-dojs-e-books-antitrust-case-against-apple/#comment-41705 (Apr. 12, 2012).

15 See Complaint, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012); *see also In re Electronic Books Antitrust Litig.*, --- F. Supp. 2d ----, 2012 WL 1946759 (S.D.N.Y. May 15, 2012).

16 See *Electronic Books*, 2012 WL 1946759, at *5 (quoting comment by Jobs).

17 As a matter of historic interest, this not the first time there have been allegations of cartelization of book publishing. As recounted by Ariel Katz, the events leading to the Supreme Court's decision in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), were similar in a number of respects. See A. Katz on "Intellectual Property, Competition, Innovation, and Other Issues", http://arielkatz.org/archives/1656 (Apr. 15, 2012). In an earlier related case, the New York Court of Appeals had found (contrary to current law) that "a combination to fix the prices of copyrighted books alone would be legal." *Id.* Because of this, the publishers' pricing requirements were altered to apply only to copyrighted works. See *id.*

18 *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

19 E.g., *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

20 See, e.g., *ABA Section of Antitrust Law, Antitrust Law Developments* 143-44 (7th ed. 2012).

possessed the ability to set prices as they desired. According to the DOJ's Complaint, the defendant publishers found particularly troubling Amazon's decision to set eBook prices for various popular titles at $9.99. The publishers were concerned that this low price point would instill in consumers the belief that books should not cost any more than $9.99, which would lower the wholesale prices the publishers would be able to command. So the publishers all had an interest in counteracting this idea by taking control of eBook pricing. Apple's decision to enter the eBook business thus came at a time when the publishers were anxious for an opportunity to change the way eBooks were priced to consumers.

7. Two characteristics of the agency model implemented by Apple and the defendant publishers are particularly noteworthy. First, in response to Amazon's $9.99 price point, the agency agreements provided for tiered "maximum" price schedules set by the publishers, with price points of $12.99 and $14.99 for bestsellers, depending on the hardcover list price. Under this system, Apple received a commission of 30% for all eBook sales, comparable to what it was getting in music downloads on iTunes. The DOJ contends that the $12.99 and $14.99 price tiers were not merely "maximum retail prices," as specified in the written agreements, but represented the actual retail eBook prices the publisher defendants would charge. As all defendant publishers were contracting with Apple, the existence of these price points in the contracts (and the actual prices charged publicly on the iBookstore) arguably facilitated the signaling of acceptable eBook prices to one another. Following their contracts with Apple, the defendant publishers secured similar agency agreements with Amazon and other major eBook retailers.

8. Second, Apple inserted MFN clauses into all the agency agreements, which insulated it from retail price competition. Specifically, the MFN "required each publisher to guarantee that it would lower the retail price of each eBook in Apple's iBookstore to match the lowest price offered by any other retailer, even if the Publisher Defendant did not control that other retailer's ultimate consumer price"[21]. This incentivized publishers to execute agency agreements with the other major eBook retailers, as maintaining control over pricing was key to profitability. Because each publisher had an MFN, they all could be assured of price uniformity at or above the $12.99 to $14.99 price levels.

9. The fact pattern, at least as alleged by the Justice Department, appears similar to the 1966 *General Motors* case[22], in which Los Angeles area Chevrolet dealers sought to eliminate discounting and enlisted GM to enforce and implement their agreement.

21 Complaint at ¶ 65, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012).

22 *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

III. Potential justifications for concerted behavior

10. Because consumer prices appear quite clearly to have increased during the duration of the alleged conspiracy, the DOJ should not encounter great difficulty in proving a prima facie case of anticompetitive harm. Whether the DOJ may be able to prove express coordination among the various defendants is less clear and will depend on the proof.

11. In May 2012, a district court denied Apple and certain defendant publishers' motion to dismiss a class action that alleged harm arising out of higher eBook prices[23]. Among other things, the court found that the private complaint "plausibly alleged that each Publisher Defendant's decision to sign its particular agency agreement with Apple and to demand that Amazon accept the agency model would have contravened that defendant's self-interest in the absence of similar behavior by its rivals"[24]. Comments from Steve Jobs before his death also can be read to suggest Apple's role in actual collusion[25]. And the DOJ's Complaint alleges a number of publisher meetings at which agreements were purportedly reached.

1. Ruinous Competition

12. Defenders of Apple and the publisher defendants claim that Amazon's low pricing caused publishers' revenues to suffer in a manner likely to lead, ultimately, to the suppression of output. Apple itself asserts that its entry "spurred tremendous growth in eBook titles, range and variety of offerings, sales, and improved quality of the eBook reading experience"[26]. Because Amazon's $9.99 price point for eBooks was considerably lower than the corresponding hardcover books' retail prices, one of the publishers' concerns was that hardcover book prices would decline. In addition, the publisher defendants were concerned that the downward pressure in retail prices would prompt eBook retailers to demand lower wholesale prices. The challenged conduct, it is argued, was necessary to avoid this destructive spiral. In essence, this is a "ruinous competition" defense – that competition resulting in lower prices for consumers could have the effect of lower producer profits and driving some out of business. But the "ruinous competition" argument has been rejected authoritatively in antitrust for well over a century.

13. This defense was first rejected by the Supreme Court in 1897. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), a group of competing railway companies entered into an agreement that established "reasonable rates" for freight transportation. After emphasizing the public importance of maintaining railroad operations, the railway companies argued that competition "simply leads in railroad

23 See *In re Elec. Books Antitrust Litig.*, 2012 WL 1946759 (S.D.N.Y. May 15, 2012).

24 *Id.* at *11.

25 *Id.* at *5.

26 Answer at 1, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012).

business to financial ruin and insolvency"[27]. The Court found this argument to be "greatly exaggerated," and concluded that competition, not agreements among competitors, would lead to reasonable rates[28]. One year later, in *United States v. Joint Traffic Assoc.*, 171 U.S. 505 (1898), on highly similar facts, the Supreme Court expanded upon this point: "[t] he natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restraints instead of promoting trade and commerce"[29].

14. The Supreme Court emphasized the same points decades later in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In this case, the defendant society created a canon of ethics that prohibited its members from submitting competitive bids to provide engineering services[30]. Appealing to the public good, as the railway companies had before, the defendant society claimed that such a rule was necessary to promote public safety, as price competition would lead to "deceptively low bids" and poor work quality[31]. The Court refused to entertain an argument that competition is problematic: "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable"[32].

15. Not only did the Supreme Court reject the notion that competition would lead to destructive results in the absence of an agreement among competitors; it also recognized that increased output and lower prices are two sides of the same coin. Since the 1890s, the Court has found counterintuitive the argument that competition may result in the reduction of output because of the exit of suppliers from the market. Thus, it seems doubtful that Apple and the defendant publishers can argue that competition, left to its own devices, would have had the effect of reducing market output. Competition creates a downward effect on pricing, which generally results in increased demand and output. Even if competition proved ruinous for some publishers, there is no indication that market output for eBooks would suffer overall. The idea that authors in the aggregate will stop (or slow down) writing if books are at $9.99 rather than $12.99 seems both implausible and unprovable.

16. It can be argued with equal vigor that a sales model that facilities lower prices and increased demand leads to the dissemination of more authors' works. At lower prices, more books will be sold. There is simply no support for the idea that higher revenues for publishers and eBook resellers are necessary to support market for eBooks. As with the Supreme Court's railway cases at the turn of the Twentieth Century, agreements among competitors are not necessary for setting reasonable rates because competition accomplishes this goal[33].

27 *Trans-Missouri Freight,* 166 U.S. at 330.

28 *Id.* at 338-39.

29 *Joint Traffic*, 171 U.S. at 577.

30 *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 684.

31 *Id.* at 685.

32 *Id.* at 696.

33 See *Trans-Missouri Freight Ass'n,* 166 U.S. at 339.

17. In short, the Sherman Act stands for the assumption that competition confers societal benefits, and arguments that competition itself is harmful cannot prevail.

2. Combating Amazon's "monopoly"

18. Apple and the publisher defendants also argue that their concerted behavior was a reasonable way to combat Amazon's "monopoly" in the retail market for eBooks[34]. Even if this were a defense, which it is not[35], the argument seems unlikely to succeed as a factual matter. The agency agreements, each of which included an MFN clause for Apple, did not just affect Amazon's ability to charge low prices. They affected the ability of anyone to undercut Apple. The upshot has been that other retailers, such as Google[36], cannot expand their penetration of the eBook marketplace through aggressive price cutting. The MFN clause, the mechanism by which the alleged conspirators were able to enforce higher eBook prices, effectively limited discounting by all eBook retailers, not only Amazon. Because the MFN required publishers to guarantee to lower Apple's retail prices to match the lowest price offered by any eBook retailer for a given title, Apple has been able to evade price competition.

19. While the MFN clause gave Apple the ability to blunt Amazon's pricing advantage, it did nothing to spur competition from other retailers. Apple argues that the MFN provided it with necessary protection upon its entry[37]. However, Apple possesses a significant market presence in the sale of mobile devices, which provides a solid platform for the sale of eBooks, and other electronic media, such as music and films through its iTunes media player program. Not only do these advantages offer protection to Apple, but they also make it difficult for other eBook retailers to compete successfully against Apple if they cannot compete on price. The MFN clause serves only to solidify this competitive edge.

20. Lastly, the contracts between Apple and the defendant publishers guaranteed a sales commission of 30% to Apple[38]. While market competition typically involves undercutting in prices between rivals in order to gain market share, the

34 Apple has already taken this approach. *See* Answer at ¶ 60, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012) ("Without Apple's entry, eBook distribution would essentially be ceded to a single distributor (Amazon), who would then possess virtually unlimited power in the eBook business.").

35 See *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 370-71 (1963).

36 In comments filed in June 2012, Barnes & Noble objected to provisions in the proposed settlement that would preclude the settling publishers from entering into most types of agency agreements for two years. Comments of Barnes & Noble, Inc., *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed June 7, 2012); *see* Proposed Final Judgment, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012). Typically, remedies in antitrust cases will include similar types of "fencing in" provisions. *See ABA Section of Antitrust Law, Antitrust Law Developments* 670-71, 718 (7th ed. 2012). This particular remedy, however, affects the interests of third parties, such as Barnes & Noble, and that may make a difference. Still, it is difficult to see how the effects of the violation might be undone without this type of relief. It may also be relevant that Barnes & Noble is seeking to preserve a type of agreement that has led to higher prices for eBooks.

37 Answer at ¶ 67, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012).

38 As one of Apple's defenders points out, such an arrangement solves the traditional vertical incentive conflict between publishers and booksellers. See Posting by Josh Wright to Truth on the Market, http://truthonthemarket.com/2012/03/15/the-apple-eBook-kerfuffle-meets-alfred-marshalls-principles-of-economics/ (Mar. 15, 2012).

alleged conspiracy enables Apple to gain market share while *increasing* its prices. The publisher agreements provide Apple with a generous revenue stream, yet insulate Apple from the price competition that usually results when one competitor sets above-market prices.

IV. Conclusion

21. Faced with evidence of meetings of directly competitive book publishers, followed by uniform conversion to an agency model, uniform and interlocking MFNs with Apple, and an increase in the price of eBooks of some 30% or more, it seems tough to say that the DOJ has no case. Given what is already in the public domain through the quotes from Steve Jobs and Rupert Murdoch, and allegations of meetings among the publishers in fancy restaurants, there seems to be at least a plausible argument of actual collusion. The case has to be proven of course, but to dismiss it out of hand as misguided, as some commentators have done, seems quite wrong. ■

The US e-Books case against Apple: The procompetitive story

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I. Introduction

1. In a lawsuit filed against Apple and five of the largest book publishers (three of which have settled)[39], the US Department of Justice alleges that the companies conspired to raise prices in the eBooks market in violation of Section 1 of the Sherman Act. If proven true, the allegations could trigger per se liability, and, even if the conduct serves consumer interests, it may be penalized. But the law is necessarily imperfect, and especially in antitrust's forward-looking world of speculative economic harms, illegal does not necessarily mean undesirable.

2. In this article we assess the likely competitive effects of the alleged conduct, and tell the possible procompetitive story behind the allegations. Along the way we also offer some assessment of the legal claims, in particular the claims aimed at the Most Favored Nation clause that Apple and each of the publishers adopted as part of their agreements. But our primary goal is to describe the market dynamics that form the backdrop to the case and assess the likely competitive effects of the deals at issue – not (necessarily) their legality.

3. The aim of any sensible competition policy is to maximize consumer welfare. While that often means antitrust regulators should focus on lower prices, the situation is more complicated for markets for new products, where technologies for distribution and consumption are evolving rapidly along with business models. By shifting from a wholesale pricing model to the "agency" pricing model at issue in the case, Apple and the publishers may or may not have raised ebook prices in the short run (as we discuss below and contrary to some claims, the short-term price effect is unclear, at worst). But this should not end the analysis. Their chosen courses of action also resulted in more variability in pricing, and facilitated Apple's entry into the market in the first place[40]. This, in turn, has increased ebook retail competition overall and promoted innovation among ebook readers, while also increasing funding for ebook content creators. Judged on the basis of effects, even if concerted, their conduct may well have benefited consumers. While that may still open the companies up for legal liability, it is far from clear that it should.

II. Apple versus Amazon

4. Apple – decidedly a hardware company – entered the ebook market as a device maker eager to attract consumers to its expensive iPad tablets by offering appealing media content. In this it is the antithesis of Amazon, a general retailer that naturally moved into retailing digital content, and began selling hardware (Kindle readers) only as a way of getting consumers to embrace ebooks.

5. The standard Kindle is essentially a one-trick pony (the latest Kindle Fire notwithstanding), and its focus is on ebooks. By contrast, the Apple iPad and, to a lesser degree, the Apple iPhone, is a multi-use platform, offering Internet browsing, word processing, music, apps, and other products, of which books accounted – and still account – for a trivial percentage of revenue. Importantly, unlike Amazon, Apple has many options for promoting adoption of its platform; as Apple's Answer to the DOJ's Complaint notes, "Apple did not believe it was necessary to sell eBooks for the iPad to be successful"[41]. Without denigrating Amazon's offerings, Amazon, by contrast, competes largely on the basis of its content, and its devices sell only as long as the content is attractive and attractively priced.

6. In essence, Apple's iPad is a platform; Amazon's Kindle is a book merchant wrapped up in a cool device. The difference between a merchant and a platform is in the degree of control an intermediary exerts over pricing and other terms of sale, and the extent to which it bears risk. The more control, the more merchant-like; the less control, the more platform-like (Thus the Gap is a merchant; eBay is a platform)[42]. Background economic conditions determine which model, or where on the continuum between them, is more efficient for

39 Complaint, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012).

40 See Apple Inc.'s Answer at 5, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012) ("Apple admits that absent the agency agreements it would not have entered eBook distribution, given the circumstances of the business as it existed prior to Apple's entry.")

41 Apple Inc.'s Answer at 4, *United States v. Apple, Inc.*, No. 12-cv-2826 (S.D.N.Y. filed May 22, 2012).

42 See A. Hagiu, "Merchant or Two-Sided Platform", 6 *Review of Network Economics* 115,115 (2007) ("The main difference between [merchants] and two-sided platforms is that pure merchants . . . take full control over their sale to consumers. By contrast, pure two-sided platforms leave that control entirely to sellers and simply determine buyer and seller affiliation with a common marketplace.").

a given intermediary or market. As these conditions change, the optimal degree of control may change, as well. At the same time, suppliers or intermediaries may choose to assert or deny control in response to changing economic conditions – and this choice may not be optimal.

7. What this means is that Apple, unlike Amazon, is far less interested in controlling content prices for books and other content; it hardly needs to control that lever to effectively market its platform, and it can easily rely on content providers' self interest to ensure that enough content flows through its devices. Apple is content to act as a typical two-sided platform would, acting as a conduit for others' content, which the content owner controls. Amazon surely has "platform" status in its sights, but reliant as it is on ebooks, and nascent as that market is, it is not quite ready to act like a "pure" platform.

8. As a further indication of this distinction, consider that, while engaging in the alleged anticompetitive behavior in this case, Apple has also permitted Amazon to offer its own Kindle app on the iPad and iPhone platforms and sell books to iPad owners independent of Apple's iBooks store. Rather than trying to stifle competition, Apple has promoted it, not out of the goodness of its heart but out of its focus on *content*. Amazon's Kindle app, while directly competing with Apple's own ebook offerings, nevertheless offers content for Apple's devices, and this consideration clearly outweighs Apple's alleged desire to use anticompetitive means to expand its share of ebook profits.

III. The wholesale and agency models

9. Books have traditionally been sold using the standard wholesale model. Under this model, publishers sell books to retailers at the wholesale price, but mark each cover with the Recommended Retail Price (RRP), which is usually double the wholesale amount. Retailers, in turn, are free to sell the books at whatever price they choose, but because the RRP is often (at least initially) set as the retail price, it becomes the de facto cost to consumers.

10. When publishers first began selling ebooks to Amazon, they used the standard wholesale model. However, to encourage the purchase of its Kindle devices, Amazon began to sell new releases and best selling ebooks at $9.99, well below the wholesale price, which allowed it to capture upwards of 90 percent of the market.

11. The agency model relies on a different structure, one which takes advantages of electronic delivery methods to build in previously unavailable control and differentiation in pricing by publishers. Here, retailers (platforms) become agents through which consumers purchase ebooks. Prices are set directly by the publisher, and the agent gets a flat percentage of the revenues. Apple pioneered this method of selling ebooks, but the arrangement was largely an adaptation of its standard arrangement for the pricing and sale of music and apps through its iTunes store. eBook publishers, as is the case for app developers and music distributors, split the revenues – 70% to the publisher and 30% to Apple.

12. As it happens, publishers seem to prefer the agency model, preferring to keep control over prices and marketing (but also to retain the full risk of poor sales) in this medium rather than abdicating those decisions (as in the brick-and-mortar model) to a retailer like Amazon. It is actually common knowledge in the publishing industry that the agency model tends to net publishers less revenue, but what they gain is the power of resale price maintenance – ensuring that retailers who sell their products do not inefficiently sacrifice promotional efforts to publishers' detriment.

13. The wholesale model plus RPM is largely equivalent to the agency model, but, of course, dealing with a seller like Apple, which is largely unconcerned about profits from ebook sales (ebook sales generate only about .0005% of Apple's total revenues) suggests that the problems of inefficient promotion and pricing may be substantially more acute. Under a standard model, Apple has little to gain from promotional activities devoted to the sale of ebooks beyond that sufficient to convey the basic information *at the point of sale for its hardware* that such content is available. Perhaps most notably, in the ebooks context, this suggests a diminished incentive on Apple's part optimally to invest in algorithms and site design innovations to effectively match readers' preferences with recommended books.

14. Publishers thus have an incentive to enter into distribution deals – like the agency model – to compensate Apple or other retailers for more extensive and broader promotion of their books, including promotion of their content to *existing* iPad owners, not merely prospective device purchasers. By offering Apple a retail margin sufficient to cover the costs of additional promotional efforts, publishers provide Apple an economic stake in such promotional efforts and facilitate more extensive promotion[43].

IV. Prices under the models

15. Year over year ebook consumption has been increasing at a frenzied clip. From 2008 to 2010, revenues and sales for the publishing industry as a whole grew despite the down economy. Even though they have been around for decades, ebooks really took off in these two years, driven by yearly increases of over 1000 percent. An even greater leap is expected for the coming years.

16. Currently Apple and Amazon compete on a nearly level footing, and prices for most bestsellers are the same for each retailer. But Apple is hardly a behemoth in this market. When Apple entered the digital book market in January 2010, Amazon had nearly 90 percent of the market. With Apple's entry, "Amazon now has about 65 percent of the ebook market, while Barnes & Noble has 20 percent and Apple has 10 percent at most"[44]. This same article avers that "[a]s the market shifted, prices have risen".

43 See B. Klein, "Competitive Resale Price Maintenance in the Absence of Free Riding", 76 *Antitrust L. J.* 431 (2009).

44 D. Bartz, "E-books settlement talks advancing: sources," Reuters, March 30, 2012, available at http://www.reuters.com/article/2012/03/30/us-apple-publishers-ebooks-idUSBRE82T19620120330.

17. But increased prices, the logical consequence of the DOJ's claimed anticompetitive conduct, are not as evident as one would expect. Even though bestsellers have gone up in price, this upward trend has not been followed by the market as a whole. The Yankee Group research firm, for example, notes that the average price of a consumer digital book fell to $8.19 in 2011 from $9.23 in 2009[45]. Industry watchers have noted similar downward trends[46].

18. Downward price movement from a move to the agency model is, in fact, consistent with economic analysis: Because the wholesale model imposes added costs through double marginalization, an effect eliminated by the agency model, a move to the latter can readily produce lower prices. At least one independent ebook distributor has corroborated this prediction, crunching the numbers on Apple sales of the books it distributes and finding that, with all of the free books taken out, average prices have dropped 25% from $4.55 in October 2010 to $3.41 in March 2012[47].

V. The most favored nation clauses

19. Having given up control over prices, Apple has an important remaining problem: no guarantee of being able to offer attractive content at an attractive price if it is forced to try to sell ebooks at a high price while its competitors can undercut it. And so, as is common in this sort of distribution agreement, Apple obtained "Most Favored Nation" (MFN) clauses from publishers to ensure that if they are permitting other retailers to sell their books at a lower price, Apple will at least be able to do so, as well. The contracts at issue in the case specify maximum resale prices for content and ensure Apple that if a publisher permits, say, Amazon to sell the same content at a lower price, it will likewise offer the content via Apple's iBooks store for the same price.

20. The DOJ is fighting a war against MFNs, which is a story for another day, and it seems clear from the terms of the settlement with the three settling publishers that, indeed, MFNs are a big part of the target here. But there is nothing inherently problematic about MFNs. Here, and important among these, they facilitate entry by offering some protection for an entrant's up-front investment in challenging an incumbent, and offer some protection against subsequent entrants undercutting this price and rendering inefficient up-front investments. In this sense MFNs are essentially an important way of inducing retailers like Apple to sign on to an agency or RPM (no control) model by offering some protection against publishers striking a deal with a competitor that leaves Apple forced to price its ebooks out of the market.

21. There is nothing, that we know of, in the MFNs or elsewhere in the agreements that requires the publishers to impose higher resale prices elsewhere, or prevents the publishers from selling through Apple at a lower price, if necessary. Most important, for Apple's negotiated prices to dominate in the market it would have to enjoy market power – a condition, currently at least, that is exceedingly unlikely given its 10% share of the ebook market.

22. That said, it may well have been everyone's hope that, as the DOJ alleges, the MFNs would operate like price floors instead of price ceilings, ensuring higher prices for publishers. But hoping for higher prices is not an antitrust offense, and it's not even clear that, viewed more broadly in terms of the evolution of the ebook and e-reader markets, slightly higher prices in the short run would be bad for consumers.

VI. The legal standard

23. To the extent that book publishers don't necessarily know what's really in their best interest, the DOJ is even more constrained in judging the benefits (or costs) for consumers at large from this scheme. There is a solid procompetitive story here, and the DOJ will have to contend with *Leegin*[48], which overturned the 100 year-old rule established in *Dr. Miles* that made vertical price fixing per se illegal. Now, vertical price restraints must be judged by the rule of reason, "which requires the fact-finder to weigh all of the circumstances, including specific information about the relevant business and the restraint's history, nature and effect . . . [and] [w]hether the businesses involved have market power"[49]. It allows the court to distinguish between "restraints with anticompetitive effects that are harmful to the consumer and those with procompetitive effects that are in the consumer's best interest"[50].

24. These considerations are potentially quite important here because there is no allegation that the publishers and Apple agreed on price. Rather, the allegation is that they agreed to adopt a particular business model that had the effect of coordinating prices (one that, we would point out, probably resulted in greater variation in price, rather than less, compared to Amazon's traditional $9.99-for-all pricing scheme). If the DOJ can convince a court that this nevertheless amounts to a naked price-fixing agreement among publishers, with Apple operating as the hub, then the case will be evaluated under the per se standard. But while antitrust law is suspicious of collective action among rivals, this change in business model does not alone connote coordinate on prices: Each individual publisher can set its own price, and it's not clear that the DOJ's evidence points to any agreement with respect to actual pricing.

45 Yankee Group, *2011 e-Book Forecast*, January 12, 2011, available at http://www.yankeegroup.com/ResearchDocument.do?id=55383.

46 See, *e.g.*, eBook Market View Blog, http://ebmv.blogspot.com/.

47 M. Coker, "Does Agency Pricing Lead to Higher Book Prices?," Smashwords Blog, March 28, 2012, available at http://blog.smashwords.com/2012/03/does-agency-pricing-lead-to-higher-book.html.

48 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

49 *Id.*

50 *Id.*

25. Nevertheless, as Joshua Wright has noted:

"*The critical question – I suspect – will be about proof of an actual naked price fixing agreement among publishers and Apple, and as a legal matter, what evidence is sufficient to establish that agreement for the purposes of Section 1 of the Sherman Act. The Complaint sets forth the evidence the DOJ purports to have on this score. But my hunch – and it is no more than that – is that this portion of the case will prove more important than any battle between economic experts on the relevant competitive effects*"[51].

VII. Conclusion

26. The background market dynamics in the US ebook market suggest that the alleged conduct between the publishers and Apple may not be particularly troubling. In fact, as we have discussed, there are significant procompetitive justifications for the firms' conduct. While these may not save the firms from application of per se liability under Section 1 of the Sherman Act, it is worth considering these factors in assessing the appropriateness of the case.

27. The relevant antitrust question is not "which business model is better?"; no one really knows what the right model is, least of all antitrust regulators[52]. Like all legal rules, antitrust should be judged by the structure of incentives it creates and the consequences that come about in response to these incentives. In rapidly evolving consumer markets where the consumer welfare effects of a practice are unknown, we should tend toward restraint, lest our regulatory actions of today deter the innovative models of tomorrow. ■

51 J. D. Wright, "Apple Responds to the DOJ e-Books Complaint," Truth on the Market Blog, May 28, 2012, available at http://truthonthemarket.com/2012/05/28/apple-responds-to-the-doj-e-books-complaint/.

52 A point repeatedly reinforced by the US Supreme Court's generally "error-cost" approach to antitrust enforcement. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), *Verizon Comm's, Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004), *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007), and *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009).

Le livre numérique, entre prix unique, droit d'auteur et droit de la concurrence

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1. La loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique pose l'obligation, pour toute personne établie en France qui édite un livre numérique dans le but de sa diffusion commerciale en France, de fixer un prix de vente au public pour tout type d'offre à l'unité ou groupée. Ce prix peut différer en fonction du contenu de l'offre et de ses modalités d'accès ou d'usage (article 2). Le prix de vente ainsi fixé par l'éditeur s'impose aux personnes proposant des offres de livres numériques aux acheteurs situés en France (article 3). Autrement dit, si la fixation d'un prix unique s'impose à l'éditeur, le respect de ce prix unique s'impose de son côté aux distributeurs, détaillants, quel que soit au demeurant leur lieu d'établissement, et cela sous peine d'une amende prévue pour les contraventions de 3° classe[53].

2. Il s'agit donc *in fine* d'imposer, sur le marché des acheteurs de livres numérique situés en France, la fixation (par l'éditeur établi en France) d'un prix unique du livre numérique par type d'offre et compte tenu des modalités d'accès et d'usage.

3. La définition du livre numérique est donnée à l'article 1 de la loi qui dispose qu'elle "… *s'applique au livre numérique lorsqu'il est une œuvre de l'esprit créée par un ou plusieurs auteurs et qu'il est à la fois commercialisé sous sa forme numérique et publié sous forme imprimée ou qu'il est, par son contenu et sa composition, susceptible d'être imprimé, à l'exception des éléments accessoires propres à l'édition numérique*". Cette définition est précisée à l'article 1 du décret n° 2011-1499 du 10 novembre 2011[54].

4. Au regard de cette définition, le livre numérique, mis à part son support et quelques "*éléments accessoires propres à l'édition numérique*", ne présente pas vraiment de spécificité par rapport au livre papier, à tout le moins en tant qu'objet de lecture caractérisé par son contenu et sa composition.

5. Le livre numérique est, en revanche, singulier[55] quant à ses modalités d'accès (il peut par exemple être diffusé en flux – donc lu "en streaming" – ou téléchargé) et d'usage. À cet égard, on soulignera qu'il peut, par exemple, être mis à disposition pour une durée limitée, ce qui apparente dans ce cas sa mise à disposition plus à une location qu'à une vente. Mais le livre numérique peut également, ou non, selon ses modalités de commercialisation, être imprimé ou "copié" par son acquéreur, ou encore transféré sur un autre support de lecture (une autre "liseuse" par exemple).

6. L'initiative de cette loi a suscité des réserves certaines, tant de la part de l'Autorité de la concurrence en France[56], consultée pour avis, que de la Commission européenne qui a formulé deux avis circonstanciés et des observations sur le projet de texte[57].

7. Nous ne reviendrons pas sur le contenu de ces avis, auxquels nous renvoyons, ni sur le bien-fondé des motivations du législateur français[58]. Nous nous contenterons pour notre part de souligner le lien entre cette loi et la législation sur le droit d'auteur, qui nous semble justifier, pour une large

53 Fixée par l'article 1 du décret n° 2012-146 du 30 janvier 2012, laquelle contravention sanctionne aussi le fait pour l'éditeur de ne pas avoir fixé ce prix unique.

54 Qui dispose : "*Les éléments accessoires propres à l'édition numérique mentionnés au premier alinéa de l'article 1er de la loi du 26 mai 2011 susvisée s'entendent des variations typographiques et de composition, des modalités d'accès aux illustrations et au texte telles que le moteur de recherche associé, les modalités de défilement ou de feuilletage des éléments contenus, ainsi que des ajouts de textes ou de données relevant de genres différents, notamment sons, musiques, images animées ou fixes, limités en nombre et en importance, complémentaires du livre et destinés à en faciliter la compréhension*".

55 Cette singularité est d'ailleurs prise en compte par le décret du 10 novembre 2011 qui dispose en son article 2 que "*Au sens du deuxième alinéa de l'article 2 de la loi du 26 mai 2011 susvisée :*
(…)
– les modalités d'accès au livre numérique s'entendent des conditions dans lesquelles un livre numérique est mis à disposition sur un support d'enregistrement amovible ou sur un réseau de communication au public en ligne, notamment par téléchargement ou diffusion en flux ("streaming") ;
– les modalités d'usage du livre numérique se rapportent notamment au caractère privé ou collectif de cet usage, à la durée de mise à disposition du livre numérique, à la faculté d'impression, de copie et de transfert du livre numérique sur divers supports de lecture".

56 Avis n° 09-A-56 du 18 décembre 2009 relatif à une demande d'avis du ministre de la Culture et de la Communication portant sur le livre numérique.

57 Avis circonstanciés de la Commission européenne du 13 décembre 2010, n° C (2010) 9338 et du 31 janvier 2011, n° C (2011) 653

58 Le message de notification des autorités françaises à la Commission précise que "*Cette mesure vise à protéger le marché d'une prise de son contrôle par des opérateurs extérieurs à l'économie de la création et dont l'objectif serait la commercialisation d'autres produits ou services, reléguant les oeuvres culturelles au rang de produit d'appel. Elle vise en outre à permettre d'imposer les mêmes conditions à tous les acteurs du secteur, de favoriser la diversité de la diffusion et, partant, la diversité de l'offre, dans le respect des droits d'auteur. Disposition* ad hoc, *elle a enfin l'avantage de ne pas remettre en cause les équilibres de la loi du 10 août 1981*". La *ratio legis* ressort aussi de l'article 8 de la loi selon lequel "*…l'application d'un prix fixe au commerce du livre numérique profite au lecteur en suscitant le développement d'une offre légale abondante, diversifiée et attractive, et favorise une rémunération juste et équitable de la création et des auteurs, permettant d'atteindre l'objectif de diversité culturelle poursuivi par la présente loi*".

part, cette législation imposant un prix unique. Puis nous aborderons le rôle que pourrait jouer le droit de la concurrence à propos du livre numérique, malgré l'existence d'un dispositif légal reposant d'un côté sur une législation imposant un prix unique et d'un autre côté sur le droit d'auteur.

8. S'agissant du bien fondé d'une intervention législative de ce type, il faut toujours garder présent à l'esprit que le couple auteur-éditeur est au fondement du marché du livre. La loi du 26 mai 2011 semble construite autour et sur la base de ce couple. Notamment, la rémunération de l'auteur, en contrepartie de la cession de ses droits d'auteurs, lui est versée par l'éditeur. Autrement dit, en application du dispositif légal figurant dans le code de la propriété intellectuelle (CPI), il est logique que l'éditeur puisse déterminer le prix de vente au public : c'est sur la base de celui-ci que l'auteur recevra, en principe[59], une rémunération proportionnelle. De ce point de vue, un livre n'est pas une marchandise comme les autres ; celui qui l'a créé, l'auteur, est associé directement au produit de ses ventes du fait d'un principe d'ordre public figurant dans le CPI : la rémunération proportionnelle (article L131-4 du CPI). Et depuis la loi du 26 mai 2011, cet ordre public de protection de l'auteur s'est enrichi d'un alinéa 2 ajouté à l'article 132-5 du CPI qui dispose désormais que "*le contrat d'édition garantit aux auteurs, lors de la commercialisation ou de la diffusion d'un livre numérique, que la rémunération résultant de l'exploitation de ce livre est juste et équitable. L'éditeur rend compte à l'auteur du calcul de cette rémunération de façon explicite et transparente*".

9. En définitive, s'agissant d'œuvres protégées, il est possible d'affirmer qu'il existe une réelle complémentarité entre la législation sur le prix unique du livre numérique et celle relative au droit d'auteur[60] : ce prix unique n'est autre, en principe, que l'assiette de la rémunération de l'auteur qui doit lui être versée par l'éditeur. De ce point de vue, la loi du 26 mai 2011 trouve une réelle justification[61].

10. On objectera cependant, à raison, que d'autres secteurs de la création ("produits culturels") ne connaissent pas d'une législation équivalente à celle relative au prix unique du livre. Il en va ainsi, par exemple, des films ou des enregistrements musicaux, tous *a priori* protégés pourtant par le droit d'auteur et soumis au principe de la rémunération proportionnelle.

11. Mais on ne doit pas oublier que la diffusion de musique par les radios ou de films par les chaînes de télévision est enserrée dans des quotas de diffusion d'œuvres d'expression française, et que les films cinématographiques doivent notamment obéir à la fameuse chronologie des médias (sans oublier les obligations d'investissement dans la production qui pèsent lourdement sur les chaînes). On parle d'exception culturelle pour justifier ces dispositions propres au secteur des biens culturels. Exception non pas à la culture, mais aux règles du marché habituelles, à des fins de diversité de la création culturelle. Autrement dit, chaque secteur de la création culturelle peut connaître de mesures d'exception (culturelle) destinées à le soutenir, en dépit du seul libre jeu du marché et de la concurrence.

12. À l'égard du livre, il n'y a pas de raisons, *a priori*, pour que le passage au format (ou support) numérique change la donne relativement à l'existence d'un prix unique imposé, alors même que le principe reste la rémunération proportionnelle versée par l'éditeur, laquelle doit même être "juste et équitable".

13. Pour autant, le livre numérique n'échappe pas à certaines interrogations sur le caractère propice d'un modèle économique qui repose pour partie sur un dispositif légal de prix unique dérogatoire au principe de la liberté des prix et pour une autre partie sur l'exercice de droits d'auteur. Car, comme nous allons le voir, en matière de livre numérique, il n'y a pas que la loi relative au prix unique qui pourrait susciter des pratiques, le cas échéant, anticoncurrentielles : il y a aussi l'exercice de droits d'auteur.

14. En amont de tout livre numérique (lorsqu'il s'agit d'une œuvre non tombée dans le domaine public), commercialisé sous un prix unique, se trouvent des droits d'auteur cédés généralement à l'éditeur. Ce dernier, lorsqu'il donne accès à distance au livre numérique (par l'offre de téléchargement, par diffusion en flux, etc.), ne fait en réalité qu'exercer des droits d'auteur. En cela, par sa dématérialisation et sa numérisation, le livre numérique perd la spécificité du livre papier entendu juridiquement comme un objet matériel faisant l'objet d'une vente du support[62].

15. Les éditeurs peuvent ainsi délivrer une autorisation d'accès au fichier numérique limitée dans le temps (couplée par exemple avec une interdiction/impossibilité de copier le texte numérisé et de l'imprimer)[63].

16. Autrement dit, par exemple des bibliothèques (ou tout autre intermédiaire qui donne un accès au public à des livres numériques) qui se constitueraient des fonds de livres numériques accessibles par diffusion en flux (streaming) pourraient un jour se voir "privées" de l'accès à leurs fonds par le détenteur des droits d'auteur dans la mesure où la mise à disposition du public sous forme numérique d'un texte est un acte d'exploitation qui doit être autorisé (au titre du droit d'auteur) par les auteurs ou leurs ayants droit.

17. L'existence de ces droits d'auteur, tout comme la loi relative au prix unique du livre numérique, auront-ils une influence sur le traitement par les autorités de concurrence d'éventuelles pratiques anticoncurrentielles ?

59 En principe car l'article L. 131-5 du CPI prévoit la possibilité, dans certains cas, d'une rémunération forfaitaire pour l'auteur. On précisera que cette dernière est censée être généralement moins avantageuse pour l'auteur que la rémunération proportionnelle.

60 Ce lien se trouve d'ailleurs dans l'article 1er de la loi qui impose que le livre numérique soumis à la loi soit une "œuvre de l'esprit", mais aussi à l'article 6 qui a modifié l'article L. 132-5 du CPI.

61 Cependant, sous cet angle (la rémunération de l'auteur, le droit d'auteur), la logique de la loi sur le prix unique se justifie *a priori* moins (sinon plus du tout) s'agissant des œuvres tombées dans le domaine public… Fallait-il, pour ces dernières, imposer le prix unique ? Peut-être dans une logique économique, mais pas, semble t-il, dans une logique juridique.

62 Laquelle vente est soumise à épuisement du droit d'auteur : article L. 122-3-1 du CPI.

63 Sans parler du jeu d'éventuelles mesures techniques de protection qui empêcheraient, le cas échéant, le public de bénéficier de certaines exceptions ou pourraient poser des problèmes d'interopérabilité. Ces problèmes relèvent des missions et pouvoirs de l'HADOPI – articles L. 331-31 et s. du CPI.

En effet, le marché du livre numérique pourra susciter de la part de ses acteurs des pratiques anticoncurrentielles : ententes, voire abus de position dominante.

18. Ainsi, outre les pratiques potentiellement anticoncurrentielles de refus d'accès qui viennent d'être évoquées plus haut, on pourrait imaginer que les éditeurs s'entendent entre eux et/ou avec les distributeurs sur la fixation du "prix unique", ce qui affecterait au moins la concurrence inter-marques entre éditeurs.

19. Un autre problème qui pourrait survenir est celui de l'interopérabilité des fichiers numériques. Si un standard de fichier numérique (ou de technologie de lecture de fichiers numériques) émergeait sur ce marché, celui qui "détiendrait" ce standard pourrait être tenté d'en profiter pour asseoir sa situation concurrentielle en évinçant les concurrents auxquels il refuserait l'accès à ce standard. On reconnait là par exemple des faits proches de ceux de l'affaire *Apple c/ Virgin Mega*[64].

20. En réalité, le droit de la concurrence devrait, selon nous, pouvoir s'appliquer à ces pratiques et ainsi jouer un certain rôle dans la régulation du marché du livre numérique.

21. En effet, il est peu probable tout d'abord que la loi du 26 mai 2011 permette d'échapper à l'application du droit de la concurrence par exemple dans les cas évoqués plus haut et cela, malgré l'article L. 420-4 I 1° du code de commerce, qui dispose que : "*Ne sont pas soumises aux dispositions des articles L. 420-1 et L. 420-2 les pratiques : 1° Qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application*". En effet, outre le fait que la loi française suscite des doutes quant à sa conformité au droit de l'Union européenne[65], ce qui pourrait conduire le juge à l'écarter, le bénéfice de la justification posée par l'article L. 420-4 I 1° du code de commerce est enserré dans certaines limites. Il faut ainsi, pour bénéficier de la justification, que l'entente ou l'abus de domination résulte directement et nécessairement du texte législatif ou réglementaire[66]. Il ne faut donc pas, par exemple, que l'entente ajoute des restrictions à celles résultant de l'intervention des pouvoirs publics. Or, par exemple, la loi du 26 mai 2011 ne limite pas la concurrence inter-marque entre éditeurs. De même, cette loi ne saurait justifier *per se* certaines clauses figurant par exemple dans les contrats entre éditeurs et distributeurs, comme des clauses d'exclusivité. De manière générale, si les pratiques anticoncurrentielles ne sont pas la conséquence inéluctable[67] de la loi de 2011 et/ou de ses décrets d'application, l'article L. 420-4 I 1° du code de commerce ne pourra servir de justification à celles-ci.

22. De manière tout aussi générale, on ne voit pas en quoi la loi du 26 mai 2011, qui institue un monopole légal (dans la possibilité de fixer le prix) au profit de l'éditeur, devrait être traitée différemment d'autres textes (comme les dispositions du CPI qui instituent des droits de propriété intellectuelle) qui confèrent également un monopole légal à leur titulaire sans pour autant que celui-ci échappe toujours à l'application du droit de la concurrence.

23. Il est ainsi, ensuite, peu probable que les éditeurs puissent opposer dans tous les cas les droits d'auteur dont ils sont titulaires pour échapper au grief d'entente, voire d'abus de position dominante. On sait en effet que, de longue date, la jurisprudence de la Cour de justice de l'UE, relayée en France par la pratique de l'Autorité de la concurrence, a posé une articulation entre propriété intellectuelle et droit de la concurrence. L'exercice d'un droit de propriété intellectuelle par son titulaire est susceptible, dans certaines circonstances, de constituer une pratique anticoncurrentielle, sans qu'il soit toujours possible de justifier celle-ci par l'existence même du droit de propriété intellectuelle. Peu importe à cet égard que la pratique en cause provienne de l'exercice contractuel d'un droit de propriété intellectuelle ou, plus en amont, d'un refus d'autorisation d'exploitation[68] (même si, pour ces deux cas les règles jurisprudentielles d'articulation entre droit de la concurrence et droits de propriété intellectuelle ne sont pas les mêmes). Ainsi, le droit de la concurrence pourra être un précieux instrument pour faire cesser et sanctionner, le cas échéant, des pratiques anticoncurrentielles de titulaires de droits d'auteur sur le livre numérique.

24. En conclusion, la prudence s'impose et il convient de mesurer ce qu'impliquera le passage du livre au numérique, particulièrement quant aux pratiques des éditeurs, de ceux qui fabriquent les "liseuses", mais aussi des distributeurs et diffuseurs de livres numériques, ou plus généralement des intermédiaires ou prestataires du commerce électronique qui interviendront sur le marché du livre numérique…

25. On pourra certes objecter que la loi relative au prix unique du livre numérique ne permet pas d'empêcher certaines pratiques. C'est vrai. Mais l'on rappellera seulement que cette loi a pour champ d'application les livres numériques susceptibles d'être imprimés ou faisant l'objet, en parallèle, d'une publication papier : l'un des objectifs poursuivis par le législateur est bien de ne pas démanteler le système de prix unique sur lequel repose l'économie du livre papier. Autrement dit, en choisissant de ne pas prendre le risque de tuer économiquement dès maintenant le livre papier du fait du livre numérique, on donne un choix au lecteur. Celui-ci pourra acheter la version papier ou la version électronique. Et l'on se donne du temps pour apprécier l'évolution (et les implications) de l'offre légale de livres numériques.

26. Adopter une loi sur le prix unique du livre numérique en France, était finalement, de notre point de vue, la solution la plus sage, et la moins mauvaise, en tout cas si l'on se situe du côté des créateurs, et de leurs partenaires que sont les éditeurs, et peut-être même, du côté du public, c'est-à-dire des lecteurs. Sachant que, du point de vue de l'application du droit de la concurrence, cela ne change finalement, toujours de notre point de vue, pas grand-chose.

64 Cons. conc. déc. n° 04-D-54, 9 nov. 2004, BOCCRF 31 mars 2005, p. 188. Il s'agissait cependant en l'espèce de DRM.

65 Sur lesquelles cf. Avis circonstancié de la Commission européenne du 31 janvier 2011, précité.

66 Cons. conc. déc. n° 03-D-03, 16 janv. 2003, Pratiques du barreau de Marseille en matière d'assurance, BOCCRF 11 juin 2003, p. 323.

67 Sur cette condition, cf. *Lamy Droit économique*, 2011, n° 1167.

68 Sur cette question, cf. notamment Conseil de la Concurrence, Rapport 2004, Etude thématique : "les droits de la propriété intellectuelle et le droit de la concurrence", p. 111 et s. Plus récemment, C. Maréchal, *Concurrence et propriété intellectuelle*, Préface de G. Bonet, IRPI, Le droit des affaires, vol. 32, 2009.

e-Books in the EU: Competition, pricing, and the expansion of a new digital market

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I. Introduction

1. On 6 December 2011, the European Commission ("Commission") opened a formal investigation into the European e-Book market to examine whether various e-Book publishers, possibly in conjunction with Apple, Inc., had engaged in anticompetitive conduct to manipulate the price of e-Books in the European Economic Area ("EEA"). This paper will give background on the antitrust proceedings currently on-going in Europe, as parties to the investigation recently proposed to settle the case with the Commission. Furthermore, to better understand the market conditions in which e-Books were (and are being) introduced in EU Member States, this paper will provide a closer look into the publishing industry's traditional pricing practices and regulations in hopes of shedding some light into the complex and conflicting nature of the relationship between national publishing regulations and EU competition law. Finally, we explore various cultural factors influencing the reception and adoption of e-Books in Europe, and conclude with future projections and policy recommendations to ensure a strategic, pragmatic approach to a sector expanding rapidly on a global scale.

II. The Commission's investigation: Background and concerns

2. The Commission's investigation follows unannounced inspections conducted in March 2011 at the premises of various e-Book publishing companies in several different Member States, on the grounds that the concerned parties may have violated European Competition rules – in particular, Article 101 of the Treaty of the Functioning of the European Union[69]. Parties to the proceedings include: Hachette Livre (France), Harper Collins (US), Simon & Schuster (US), Penguin (UK), and Verlagsgruppe Georg von Holzbrinck (Germany).

3. This matter had originally been under investigation by the United Kingdom's Office of Fair Trading ("OFT") following a number of complaints from the public. In January 2011, the OFT began looking into whether pricing arrangements put in place between certain publishers and retailers for the sale of e-Books breached UK competition rules[70]. The OFT, however, announced late last year on 6 December 2011 (the same day the Commission announced its decision to open formal proceedings) its decision to close its investigation on the grounds of the OFT's administrative priorities. Following discussions with the Commission, the OFT concluded that the Commission was "*well placed to arrive at a comprehensive resolution of this matter and will do so as a matter of priority*"[71]. UK and EU regulators have been working in close cooperation, and will continue to do so as the case moves forward.

4. According to the Commission, its investigation examines (i) whether Apple and certain e-Book publishers have engaged in illegal agreements or practices that would have the object or the effect of restricting competition in the EU or in the EEA, and (ii) the character and terms of the agency agreements entered into by the five named publishers and retailers for the sale of e-Books. The Commission is concerned that these alleged practices may breach EU competition rules that prohibit cartels and restrictive business practices. In particular, the Commission suspects that by shifting the power to determine the price of e-Books from retailers to publishers, retailers have lost the power to independently set prices, which could result in higher e-Book prices for consumers.

5. At the centre of the Commission's investigation is the "agency model", a newer type of pricing strategy in the e-Book market which allows the publisher to set the price of the e-Book, and then retailers, such as Apple, receive a 30% commission off of the retail price[72]. The Commission

* The authors would like to thank Katarzyna Pawlikowska for her research assistance. The views presented here are their own and do not represent the view of the firm or of its clients.

69 Article 101 of the TFEU, implemented by Council Regulation N° 1/2003, prohibits agreements and concerted practices which may affect trade and prevent or restrict competition.

70 The Competition Act 1998 prohibits agreements, practices and conduct that may have a damaging effect on competition in the UK. The Chapter 1 prohibition covers anti-competitive agreements and concerted practice that have the object or effect of preventing, restricting or distorting competition in the UK or a part of it and which may affect trade in the UK or a part of it.

71 *See* OFT Statement of 6 December 2011: http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/e-books.

72 The alternative and more traditional pricing strategy is the "wholesale model", where the publisher charges a price to the retailer, and based on this, the retailer sets the price for the consumer.

will need to determine whether the agreements between Apple and publishers satisfy various conditions necessary to qualify as agency agreements; otherwise, these e-Book agreements could amount to resale price maintenance, in breach of EU competition rules. Under the Guidelines on Vertical Restraints[73], agency agreements are regarded as generally falling outside the scope of Article 101 TFEU. However, only agency agreements meeting the criteria set in the Guidelines[74], can benefit from the exemption. Other agency agreements need to be assessed in accordance with general rules applicable to vertical restraints provided for in the Guidelines drawn on the relevant case law of the European Courts[75].

6. Resale price maintenance constitutes a hard-core restriction on competition and as such cannot benefit from a block exemption provided for in Regulation 330/2010 on the application of Article 101(3) to categories of vertical restraints and concerted practices[76]. According to the Commission Guidelines, price fixing by suppliers restricts competition in various ways leading to higher prices, possible price collusion and reduction of retailers' efficiency[77]. Nevertheless, as ruled by the General Court in *Matra Hachette v. Commision*[78] and repeated in the Guidelines, even hard-core restrictions, including resale price maintenance, can be subject to justification under Article 101(3) TFEU.

7. Therefore, the Commission will need to assess the nature of the agency relationship between Apple and publishers and determine whether Apple acted on behalf of its suppliers or rather as an independent retailer[79] and to what extent it bore the financial and commercial risk of the activity in question[80]. In the event the Commission finds that an "agency" pricing model does not meet the criteria set out by the Guidelines and decides to assess its effects on competition in the market for e-books, parties to the agreement could defend the distribution model under 101(3). However, it would require evidence of the pro-competitive effects of the scheme.

8. Another component that deserves attention - and one that is central to the U.S. Department of Justice's case - is the most-favoured-customer principle, or in other words, most-favoured-nation (MFN) clause in contractual agreements. In the Hollywood studios case[81], the Commission's concerns arose from the fact that the contracts in question required integrators to offer to Hollywood studios the same conditions as those proposed to small distributors[82]. The MFN clause in the contracts gave studios the right to benefit from the most favourable terms agreed between a pay television company and any of of the studios. In other words, any increase in price agreed with one major Hollywood studio, would trigger parallel increases with other studios. The Commission's preliminary assessment found that the cumulative effect of the MFN clauses was an alignment of the prices paid to the major Hollywood studios, and the Commission recognised that such an alignment of prices is "*at odds with the basic principle of price competition*". While this particular scenario differs from the MFN clause in Apple's contracts, the possible effect these provisions may have in aligning prices is no doubt under review by the Commission.

9. It is difficult to say to where exactly the Commission investigation would have led, given the most recent developments in the European proceedings. Apple and all of the publishers except Penguin, have offered to settle, as announced in a statement by Competition Commissioner Joaquin Almunia on 11 April 2012. Commissioner Almunia has welcomed the parties' proposals, and has indicated that the Commission will discuss and "*assess any final proposals of commitments and we will test them with third parties in order to check whether they are sufficient to preserve competition for the benefit of consumers in this fast-growing market*." The Commission has neither disclosed the details of the proposed settlement nor indicated as to when a settlement could be reached, but given the outcome of the Hollywood studio case[83], the Commission could be pushing for similar commitments from Apple and e-Book publishers to withdraw MFN-like clauses in its agreements, if any. It will be interesting to see what kind of settlement is reached, especially considering the developments occurring across the Atlantic[84].

73 *European Commission Guidelines on Vertical Restraints*, OJ 2010/C 130/1, 19 May 2010.

74 *European Commission Guidelines on Vertical Restraints*, paragraphs 12-17.

75 The Guidelines provide for three types of financial or commercial risk that are relevant to the definition of an'agency agreement': contract-specific risks, risks related to market-specific investments and risks related to other activities required by the principal to be undertaken in the same product market. See also cases: T-325/01 *DaimlerChrysler AG v. Commission* [2005] ECR II-3319; C-217/05 *Confederación Espanola de Empresarios de Staciones de Servicio v. Compañía de Petróleos* [2006] ECR I-11997.

76 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23 April 2010.

77 *European Commission Guidelines on Vertical Restraints*, paragraph 224.

78 Case T-17/93 *Matra Hachette v. Commision* [1994] ECR II-595.

79 *European Commission Guidelines on Vertical Restraints*, paragraph 12.

80 See *European Commission Guidelines on Vertical Restraints*, paragraphs 12-17. See also: case T-325/01 *DimlerChrysler AG v. Commission* [2005] ECR II-3319, paragraphs 96-103 and 105-113; case C-217/05 Confe*deración Espanola de Empresarios de Staciones de Servicio v. Compañía de Petróleos* [2006] ECR I-11997, paragraps 60-61.

81 *See* the Commission Press release of 26 October 2004 *Commission closes investigation into contracts of six Hollywood studios with European pay-TVs*, IP/04/1314: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1314&format=HTML&aged=1&language=EN&guiLanguage=en.

82 However, it is worthwhile mentioning that in early case law the Commission considered that standard agreements between BMW and dealers containing uniform terms and conditions of cooperation had pro-competitive effects and therefore met conditions provided for in Article 85(3) of the Treaty Establishing the European Economic Community: Commission Decision of 13 December 1974 IV/14.650 – *Bayerische Motoren Werke AG*, OJ L 29.

83 In a settlement with the Commission, all of the parties withdrew their MFN clauses, and indicated that they would not seek to implement such provisions in the future.

84 On 11 April 2012 the U.S. Department of Justice (DoJ) filed a lawsuit against Apple, Hachette, Harper Collins, Macmillan, Penguin and Simon & Schuster, alleging that the companies colluded to raise prices on e-Books. See DoJ's Complaint U.S. v. Apple, Inc. et al: http://www.justice.gov/atr/cases/f282100/282135.pdf. Hachette, Harper Collins, and Simon & Schuster have agreed to settle. Apple responded on 22 May 2012, and has called the DoJ's lawsuit "*fundamentally flawed as a matter of fact and law*"and alleges the U.S. government of siding with Amazon's monopoly in the e-Book market. See Apple's answer to the DoJ's complaint: http://ia701206.us.archive.org/6/items/gov.uscourts.nysd.394628/gov.uscourts.nysd.394628.54.0.pdf

III. Pricing practices in the EU: Print vs. electronic

10. Given the central focus in the e-Book investigation rests on prices, it is helpful to take a closer look into the pricing practices and regulations that govern the European publishing sector.

11. By way of background, it is common for many EU Member States to fix book prices, a business practice often stipulated by national law. Last year, France extended its "*Lang Law*", which regulates book pricing, to cover e-Books. In Germany, the book market is governed by *Buchpreisbindung*, or "fixed book pricing", which requires all booksellers to abide by the prices publishers set. The German trade association *Börsenverein* is lobbying to extend current regulations to extend into the e-Book market. A similar fixed-price structure also exists in Spain, where the Spanish bookseller's association *CEGAL* recently filed a lawsuit in May 2012 against Amazon, its reason being that Amazon does not "observe the fixed price of books."

12. Fixing book prices has remained the traditional business practice in much of continental Europe, and can help explain the higher prices faced by consumers in the EU compared to their counterparts in the UK and in the U.S. Thus, it is interesting that the Commission is investigating potential price fixing in the e-Book sector, after apparently having turned a blind eye to government-instituted price controls in the print book market for many years. While the publishing industry and print books have enjoyed these kinds of protective measures for some time, the Commission will need to carefully consider its scrutiny and involvement in this sector or otherwise risk seeming inconsistent in its application of EU law.

13. Another significant factor affecting e-Book sales is the varying rate of Value Added Tax (VAT). In many European countries, the prices of printed books are subject to a special, reduced VAT. With the expansion of digital products in recent years, however, the question of whether the scope of these existing regulations covers e-Books has become increasingly unclear.

14. In May 2009, the Commission amended the 2006/112/EC directive on reduced rates of VAT with the new Council Directive 2009/47/EC. This Directive allows Member States to apply reduced VAT rates to printed books, newspapers, and periodicals. For example, in the UK and in Germany, printed books are sold at a reduced VAT rate of 0% and 7%, respectively. e-Books, however, are not exempt by the EC Directive and are thus subject to the regular VAT rates of 20% and 19%, respectively. The reason for this lies in the varying definitions of a printed book and e-Book: printed books are defined as a product, while e-Books are considered to be an electronically-rendered service for which the consumer acquires a licence. In addition to the UK and Germany, other European countries applying this differentiated VAT scheme for books include Spain (4% reduced rate versus 18% regular rate), The Netherlands (6% reduced rate versus 19% regular rate), Austria (10% reduced rate versus 20% regular rate), Italy (4% reduced rate versus 20% regular rate), and Sweden (6% reduced rate versus 25% regular rate)[85].

85 Wischenbart, Ruediger. *The Global eBook Market: Current Conditions and Future Projections.* Tools of Change and O'Reilly Media. (2011). http://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/000/522-1.pdf.

15. France and Luxembourg, on the other hand, implemented in January this year their own measures reducing the VAT on e-Books, setting the rate equal to that of printed books. In France, e-Books are now subject to a reduced VAT of 5.5%, and in Luxembourg, a mere 3%. In lowering VAT rates, the two countries create more favourable conditions for e-Book consumers in Europe who are wondering why they should pay higher taxes on a book simply because it is published in a different format.

16. Governmental bodies in the EU seem to be aware of the current, somewhat puzzling state of affairs. In a December 2010 report, the Commission acknowledged that:

there are still inconsistencies in the VAT rates applied to comparable products or services. For instance, Member States may apply a reduced VAT rate to certain cultural products but have to apply the standard rate to competing on-line services such as e-books and newspapers. The 'Digital Agenda for Europe' stipulates that the challenges of convergence between the online and the physical environment should be addressed in all reviews of public policy, including tax matters. To cope with these discriminations, two possible options exist: either to maintain the standard VAT rate, or to transpose into the digital environment the reduced rates existing for goods in traditional supports[86].

17. It would appear that the general sentiment in the EU institutions leans toward the second option proposed by the Commission. Following the release of the Commission's Green Paper on VAT, the Federation of European Publishers issued a reply in May 2011 calling for the extension of reduced VAT for e-Books[87]. Subsequently, the European Parliament passed a non-binding resolution in October 2011 advocating a reduction on taxes for e-Books[88]. That same month, Neelie Kroes, Vice Prsident of the European Commission and Commissioner for the Digital Agenda, delivered a speech at the Frankfurt Book Fair in which she addressed the need to reform e-Book pricing:

"*currently, there is discrimination against e-books, which are subject to a higher VAT rate than printed books in the vast majority of member states. My colleague Algirdas Semeta is working on this matter. My personal view is well known: I just cannot explain why e-books and printed books are taxed differently*"[89].

86 See European Commission Green Paper on the Future of VAT Towards a simpler, more robust and efficient VAT system. December 2010: http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/future_vat/com(2010)695_en.pdf.

87 See FEP Submission on the Green Paper on the future of VAT: http://www.fep-fee.be/documents/FEPsubmissiontotheEuropeanCommissionGreenPaperontheFutureofVAT.pdf.

88 See European Parliament Press Release of 13 October 2011 *Parliament calls for VAT reforms to target fraud, help small firms and NGOs and promote green products*: http://www.europarl.europa.eu/news/en/pressroom/content/20111012IPR29115/html/MEPs-call-for-VAT-reforms-to-target-fraud-and-help-small-firms-and-green-goods.

89 See Commission Press Release of 13 October 2011 *Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda Books in the 21st century Frankfurt Book Fair – Opening address to representatives & members of Federation of European Publishers Frankfurt, 13 October 2011:* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/660&type=HTML.

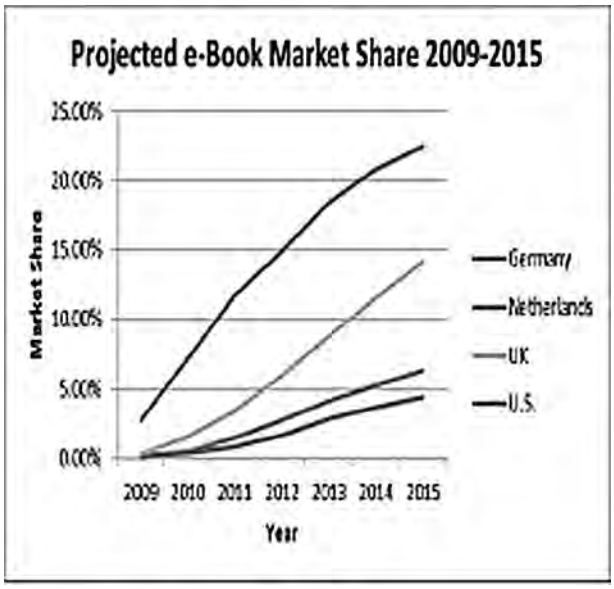
18. A month later, in an address at the Forum d'Avignon, Commissioner Kroes brought the issue to light once again: "*Isnt it just common-sense to think that eBooks should benefit from the same reduced VAT rates as physical books? The legal regime – the EU's own, I admit – makes it illegal to do that. Not just discouraged, but illegal. Personally, I find this very difficult to explain*"[90].

19. As the European e-Book market continues to expand, there is clearly a growing awareness amongst EU governing bodies that the existing regulatory structures must be reformed to provide a flourishing sector with better conditions in which to effectively compete in not only Europe's, but the global digital economy. The EU plans to implement new VAT rules in 2015[91], but given the nature of a rapidly-evolving technology sector and high potential for growth in the e-Book market from now until then, the planned revision begs the question: is 2015 too late for a regulatory overhaul? Indeed, the unilateral decisions of France and Luxembourg to modify the Commission's VAT directive demonstrate that Member States are willing to take matters into their own hands, so as to make purchasing conditions more favourable to consumers in their own national markets.

IV. The rise and future of e-Books in the EU

20. Digital books have encountered a fair share of pushback since their introduction into the European market. Books, after all, are a strong identifier of national and literary culture – something not only publishers, but also consumers, are keen to preserve. In Germany for example, 78% of the population claim to not want to read on a screen, and 85% claim to love "printed books too much", believing that a device does not provide the same reading experience[92]. France, while initially an early leader in the digitisation of its culture (e.g., France's national digital library Gallica), was at the forefront of the opposition to Google's library digitisation of out-of-print copyrighted works[93]. Germany and France, in particular, illustrate two key factors impacting the adoption of e-Books in Europe in the last few years: (i) a strong national literary culture whose traditions, which include the way books are read, are deeply engrained in the population and (ii) the perceived threat of global (i.e., foreign) companies out to completely disrupt an industry whose last major revolution was Gutenberg's printing press.

21. Despite any resistance, however, – whether it is in the name of national culture or simply a refusal to acknowledge the changing landscape of the global book market – e-Book market share is projected to substantially rise over the next few years. e-Books are expected to claim more than one-fifth of the U.S. book market by 2015, with the UK following closely behind at 14.2%. Growth in Germany and the Netherlands is expected to be a bit slower, but steady nonetheless.



Data taken from PricewaterhouseCoopers' *Turning the Page: The Future of e-Books* market study.

22. According to PricewaterhouseCoopers' e-Book market study *Turning the Page: The Future of e-Books*:

"*the book industry is undergoing a process of change. And it is up to the industry itself to ensure that the digitising process does not pass by…Publishers that resist change, consider the digitising process to be merely an additional cost, and attempt to defend their existing content and business models, will face the greatest risks*"[94].

23. So what does all of this mean?

24. To continue fostering growth in a sector that has rapidly evolved over the past few years – and continues to do so – all of the major actors involved will need to work together to bring about smart policy changes required to better align current structures with the reality of an increasingly digitally-driven economy. These include retailers, publishers, national and EU governing bodies, and citizens alike.

90 See Commission Press Release of 19 November 2011 *Neelie Kroes Vice-President of the European Commission responsible for the Digital Agenda Who feeds the artist? Forum d'Avignon 19 November 2011, Avignon, France:* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/777.

91 Currently, EU VAT rules stipulate that a consumer pays the VAT rate of the Member State in which the supplier is located, e.g., a UK consumer buying a product on Amazon would pay Luxembourg's VAT rate since that is the Member State in which Amazon has been established in the EU. The new rules effective 1 January 2015 will require businesses to charge the VAT rate of the Member State in which the consumer is established/normally resides.

92 Wischenbart, p. 11.

93 Recently, however, Google and French publishers announced a ground-breaking agreement under which French authors and publishers will drop lawsuits over Google scanning out-of-print books without permission, and publishers will begin selling digital versions of these books. The deal gives publishers control over which e-Books are sold, and requires Google to keep a list that keeps track of copyright for authors.

94 *Turning the Page: The Future of e-Books.* PricewaterhouseCoopers. (2010). Pg. 29. http://www.pwc.com/en_GX/gx/entertainment-media/pdf/eBooks-Trends-Developments.pdf.

25. As regards regulation, the Commission can begin by reforming its current VAT regime[95], or risk losing credibility as more Member States are under pressure to grant lower VAT rates for e-Books[96]. France and Luxembourg and have already by-passed EU rules; who will be next? The Commission has initiated discussions with e-Book publishers on this issue, among others, but whether these talks will result in real policy changes is yet uncertain.

26. Ultimately, the newer, digital forms of literary pursuits are bringing to light not only regulatory inconsistencies on part of the Commission, but also what seems to be a generational culture clash in the publishing industry: an age-old tradition of price-fixing for print books to protect the traditional publishing model vs. the instant, digital dissemination of content and culture to the masses at the lowest price for the consumer. The Commission itself seems well aware of this burgeoning sector's significance and potential, as Commissioner Joaquin Almunia referred to the Commission's probe as "*an important investigation because the e-Book market is growing very fast*".

27. The failure of the music industry to readily adapt to the digitisation of its ecosystem can serve as a cautionary tale. Print books are certain to remain, but with global and national players increasingly active in the European market, the tide has turned for e-Books; the next few years will indeed prove to be an interesting period of growth, innovation and competition in a sector that has experienced little disturbance until recent years. ■

95 Commissioner Kroes recently held a round table discussion with e-Book Market players on 26 June 2012 to discuss the importance of implementing a neutral VAT regime, and other issues including interoperability of e-Books on reading devices, and free movement of goods. These discussions signal a step forward, as the talks resulted in all participants signing a declaration emphasizing the importance of addressing these issues in the e-Book market. For more information, see the Commission's website here: *http://ec.europa.eu/information_society/media_taskforce/publishing/e_book/index_en.htm*

96 The UK Publishers'Association has been lobbying its government to grant digital books the same, VAT-free status as print books, with consumers joining in and organising petitions: http://epetitions.direct.gov.uk/petitions/114.

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