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Justice Department Proposes Remedy for Apple's Antitrust Violations in e-Book Market

Jeffrey May (Wolters Kluwer) · Sunday, August 4th, 2013

The Department of Justice Antitrust Division on Friday filed its proposed remedy with the federal district court in New York City, addressing Apple Inc.'s role in a conspiracy among publishers to fix retail prices for electronic books, or e-books. Following a bench trial, the court last month found Apple liable in an action brought by the Justice Department and 33 states and territories. At that time, the court said it would entertain the plaintiffs' request for injunctive relief and damages at a later date.

According to the government's Memorandum of Law in Support of Proposed Injunction, the proposed final judgment "will halt Apple's anticompetitive conduct, restore lost competition, and prevent recurrences of the same or similar violations of the antitrust laws." The proposed final judgment incorporates key aspects of the consent decrees entered against the settling publisher defendants—Hachette Book Group (USA), HarperCollins Publishers L.L.C., Simon & Schuster Inc., Holtzbrinck Publishers LLC, which does business as Macmillan, and Penguin Group (USA). However, it also includes other requirements that the government contends are "tied to the Court's specific findings regarding Apple's misconduct."

The government identifies three types of obligations that the proposed final judgment imposes on Apple:

1. prohibitions on conspiratorial conduct for which Apple was found liable, such as fixing prices, facilitating collective action by publishers, enforcing existing retail price most favored nation (MFN) clauses against publishers or agreeing to any new ones;
2. affirmative obligations to undo the harm caused by the conspiracy, such as terminating its existing agency agreements with each of the publisher defendants and allowing competing e-bookstores to include hyperlinks to their own e-bookstores within their e-book apps; and
3. antitrust compliance and oversight requirements, including the hiring of a new full-time internal Antitrust Compliance Officer and the court appointment of an External Compliance Monitor to oversee Apple's compliance with the proposed final judgment and to oversee Apple's internal antitrust compliance provisions.

With respect to the conduct restrictions, the government contends that the "provisions largely mirror provisions of the Publisher Defendant consent decrees." It was noted, however, that there

are two “expansions” to restrict Apple’s pricing authority. The MFN restriction on Apple lasts for five years rather than two as with the settling publishers. In addition, there is no carve-out allowing Apple to agree that its gross margins must be at least zero across a Publisher Defendant’s entire catalog.

The proposed final judgment also contains provisions that are intended to prohibit Apple from using its position as a powerful app distributor to stifle competition in the trade e-books market. For two years, Apple is required to permit any e-book retailer, such as Amazon or Barnes & Noble, to include in its e-book app a hyperlink to its own e-bookstore, without paying any fee or commission to Apple. “This provision is intended to reset competition among trade e-book retailers and deny Apple the benefits of its conspiracy,” according to the Justice Department.

Apple’s Response

In its response to the Justice Department’s proposed final judgment, Apple took issue with the government’s efforts to “dictate terms for e-book retailer apps available through the App Store and regulate Apple’s dealings with app providers, as well as in several other content markets.” These provisions are “untethered to the actual findings of antitrust liability in this case,” according to Apple.

The company also questions the requirement that it renegotiate its lawful agreements with the publishers. In addition, Apple argues that the consent decrees between the government and the publishers already accomplish the government’s objectives in pursuing the case. The compliance monitorship was called unprecedented and unwarranted.

The case is *U.S. v. Apple, Inc.*, Case No. 12 Civ. 2826 (DLC).

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