PRICE FIXING (BOOKS): THE BDB CASE

Subject: Price fixing
Trade between Member States

Industry: Book publishing and selling

Parties: Börsenverein des Deutschen Buchhandels eV
(German publishers' and booksellers' association)
Verlagsgruppe Random House GmbH
Koch, Neff & Oetinger GmbH

Source: Commission Statement IP/02/461, dated 22 March 2002

(Note. This is not the happiest of arrangements made by the Commission, which seems to have gone out of its way to say that, while it is – rightly – concerned about trade between Member States, it regards price fixing systems in the book industry as being in the national interest and "aimed at preserving cultural and linguistic diversity in Europe". It is a perfectly fair point that, if a national price fixing system does not affect trade between Member States, the system falls outside the scope of the Community's rules on competition. But it is unfortunate that the Commissioner should lend his authority to the old fallacy that price fixing systems have some special justification in the book trade.)

The Commission will no longer pursue competition proceedings regarding the German book price fixing system. Following the sending of a Statement of Objections, the Börsenverein des Deutschen Buchhandels e.V. (German publishers' and booksellers' association), as well as the publisher Verlagsgruppe Random House GmbH and the bookseller Koch, Neff & Oetinger GmbH, submitted an Undertaking (set out in the Annex below). This meets fully and definitively the objections raised by the Commission. It guarantees the freedom of direct cross-border selling of German books to final consumers in Germany, in particular, via the Internet. In parallel, it establishes an exclusive list of conditions under which the Commission exceptionally accepts that a circumvention of the national price fixing occurs. These conditions ensure that German publishers and booksellers cannot consider direct cross-border Internet selling of cheaper books by foreign retailers to be a circumvention of the system. Nor can they hinder these sales by means of a collective embargo. As a result, if correctly implemented, the current German price fixing system has no appreciable effect on trade between Member States and thus does not infringe the European Community's competition rules.

"On the basis of EU competition law the Commission has no problem with national book price fixing systems which do not appreciably affect trade between Member States. By clearing the German price fixing system the Commission, in view of subsidiarity, also takes account of the national interest in maintaining

these systems which are aimed at preserving cultural and linguistic diversity in Europe," Competition Commissioner Mario Monti said.

The Commission in July 2001 initiated proceedings with a Statement of Objections triggered by indications that the German publishers and booksellers with the participation of the Börsenverein des Deutschen Buchhandels e.V. (German publishers' and booksellers' association), the publisher Verlagsgruppe Random House GmbH as well as the bookseller Koch, Neff & Oetinger GmbH applied the price fixing system in a way that, according to the preliminary findings of the Commission, appreciably affected trade between Member States and, therefore, amounted to an infringement of Article 81 of the EC Treaty.

The Commission had also received complaints from Austrian bookseller Libro AG and its affiliated Internet branch Lion.cc, who sold German best-sellers to German final consumers via the Internet at prices far below the fixed prices, as well as from Belgian Internet bookseller Proxis who planned similar rebate sales on the German market. The complaints were essentially based on the suspicion of a concerted embargo at the expense of foreign Internet booksellers that, according to the Commission's preliminary judgment, served to block cross-border Internet trade in cut-price books with German final consumers.

In parallel to ongoing formal proceedings, including a Hearing on 30 November 2001, the Commission, together with the Börsenverein, Verlagsgruppe Random House GmbH and Koch, Neff & Oetinger GmbH, reached agreement on the submission of an Undertaking which, in the Commission's view, definitively and fully meets the objections raised.

The Undertaking, the full wording of which is annexed hereto, guarantees the freedom of direct cross-border selling of German books to final consumers in Germany, in particular via the Internet, including ancillary services, such as cross-border advertising. At the same time, it establishes an exclusive list of conditions under which German booksellers and publishers can exceptionally stop cross-border selling to German final consumers if found to be a circumvention of the price fixing agreement. In that case, the Undertaking makes it clear that for circumvention to take place it would require a German bookseller bound by the fixed price to take the initiative of circumventing the price fixing possibly by means of or with the help of a foreign bookseller. The listed categories of circumvention behaviour are to be interpreted restrictively. Moreover, the burden of proof for the relevant "objective circumstances" rests with the publishers and booksellers invoking circumvention.

The Undertaking and its defined list of circumvention behaviour merely concerns the issue of inapplicability of Article 81 paragraph 1 of the EC Treaty. In the Commission's view, the price fixing system, as long as it is interpreted and applied in conformity with this Undertaking and the Commission Notice pursuant to Article 19 paragraph 3 of Regulation No. 17 of 10 June 2000, does not appreciably affect trade between Member States in the sense of Article 81(1) of the EC Treaty. The Undertaking's content, however, has no bearing on the assessment of issues related to the national book price fixing in the light of EC

law as a whole, in particular, the free movement of goods and services as well as the freedom of establishment. Moreover, the Undertaking's validity in time is limited until the entry into force of a German law on fixed book prices or comparable State measures that replace the contractual price fixing system.

The detailed definition of the notion of circumvention in the Undertaking promotes legal certainty not only for the publishers participating in the price fixing system and the booksellers bound by it, but also for foreign booksellers who aim at starting sales activity vis-à-vis final consumers on the German market for books. The Undertaking ensures that the Commission will intervene in case of concerted blocking of direct cross-border Internet book selling to German customers. For this reason, the complainant Libro agreed with both the Undertaking and the closure of the proceedings while Proxis had already withdrawn its complaint shortly before. Therefore, the Commission intends not only to terminate the pending competition proceedings, but also to grant a so-called negative clearance that confirms the compatibility of the price fixing system with the competition rules of the EC Treaty. However, the Commission reserves the right to intervene again should the application of the system lead to an adverse effect on trade between Member States.

Undertaking

By the Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH given in the proceedings COMP/C-2/34.657 Sammelrevers and COMP/C-2/37.906 Internetbuchhandel

The Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH give the subsequent Undertaking with respect to the Commission Notice, in particular its paragraphs 7, 8 and 10, pursuant to Article 19(3) of Regulation No 17 on the granting of a negative clearance by reason of the inapplicability of Article 81(1) of the EC Treaty to the German book price fixing system (O.J. C No. 162 of 10 June 2000, p. 25). The Undertaking exclusively refers to the lack of applicability of Article 81(1) EC Treaty to the system and, in particular, has no effect on the assessment and interpretation of either its provisions or future State measures for the regulation of the price fixing of books and other printed products in the light of EC law as a whole, in particular, on the free movement of goods and services as well as the freedom of establishment:

I.

1. *The German book price fixing system does not apply to cross border activities*, in particular, cross border sales of books and other printed products to end consumers in Germany including ancillary services, such as cross border advertising. This includes cross border activities in the above sense via the Internet.

2. As an exception to paragraph 1, the German book price fixing system is only applicable to cross border sales of books and other printed products to German

end consumers if it is shown on the basis of objective circumstances that a bookseller bound by the system circumvents the retail price maintenance. Circumvention in this sense takes place only if

- a bookseller bound by the system colludes at the retail level with a book seller not bound by the system in order to sell, on the basis of a common plan, books and other printed products to end consumers in Germany at prices below the fixed price. Collusion in this sense takes place, in particular, where the bookseller bound by the system, on the basis of the common plan, makes available Internet access or other communication devices to the bookseller not bound by the system.
- a bookseller bound by the system exports books and other printed products in another Member State for the sole purpose of reselling them to end consumers in Germany, either unilaterally or by means of an affiliated undertaking or a third party not bound by the system.
- a bookseller bound by the system or an undertaking either controlled by or affiliated and intentionally co-operating with the former creates or gains control over an establishment in another Member State for the purpose of circumventing the retail price maintenance under the system."

II.

3. The German book price fixing system applies to cross border sales of books and other printed products to booksellers only if it is shown on the basis of objective circumstances that they were exported for the sole purpose of re-importing them in order to circumvent the retail price maintenance under the system.

III.

4. The clauses under paragraphs 2 and 3 constitute exceptions to be interpreted narrowly.

5. The burden of proof for the presence of objective circumstances establishing circumvention of the retail price maintenance in the sense of paragraphs 2 and 3 lies with the party invoking the exception. The further interpretation of the notion of circumvention is left to the national courts, however, subject to the competence of the European Court of Justice to give preliminary rulings and the Notice on the co-operation between the Commission and the national courts of 13 February 1993 (J.O. C No. 39 of 1993, p. 6).

6. The German book price fixing system is to be applied by the publishers in accordance with proportionality.

IV.

7. This Undertaking is only valid during the maintenance in force of the German book price fixing system 2000 governing the retail price maintenance of books and other printed products in Germany. As soon as the system is repealed by State measures governing the retail price maintenance this Undertaking ceases its validity.

Date and signatures ■

The Huntsdown Case

In the Commission's view, from which it is hard to dissent, the refusal of planning permission by the local planning authority does not amount to an abuse of a dominant position by the national government. The Commission has decided to reject a complaint from Huntstown Air Park and Omega Aviation Services, two companies owned by Irish businessmen (the McEvaddy brothers), against the Irish government's refusal to grant permission to build a second passenger terminal at Dublin airport. In particular, the Commission rejected allegations that the refusal amounted to an abuse of dominant position by airport authority Aer Rianta and a breach of the rules on public undertakings.

In their complaint, Huntstown Air Park Ltd and Omega Aviation Services Ltd, two companies which own land in the immediate vicinity of Dublin airport, contested a decision taken in 1997 by the Irish Minister of Transport denying the complainants access to runways at Dublin Airport. The Irish decision had been taken in the context of the procedure followed by the local planning authority – Fingal County Council -- set up to examine Huntstown Air Park's application for outline planning permission to build a second passenger terminal at Dublin Airport. The Minister for Transport at the time found that, both from an airport planning and from an economic point of view, the existing terminal should be developed to its maximum capacity before it would be appropriate to develop a second terminal.

The complaint also involves Aer Rianta, a public undertaking which is fully owned by the Irish State and which operates Dublin Airport. It is at present the sole supplier of passenger terminal services at the airport. The complainants had attacked the denial by the Irish Minister of Transport of access to runways at Dublin Airport. They alleged in particular that the runways were an essential facility to which they should have a right of access and that the attitude of the Irish State was in breach of article 82 of the EC treaty (abuse of dominant position) and article 86(1) (applying the competition rules to public undertakings). The latter article requires that Member States must not enact nor maintain in force any measure, which may have the effect of violating competition rules, in relation to undertakings which are granted special or exclusive rights.

After examination, the Commission concluded that there was no breach of the EC rules on competition. The decision by Fingal County Council to refuse to grant Huntstown Air Park Ltd outline permission to build a second terminal at Dublin Airport was based on considerations of aeronautical safety, general planning and environmental impact. Without planning permission, any authorisation of access to runways at Dublin Airport given to Huntstown Air Park Limited and Omega Aviation Services Ltd would have been purely notional. Ireland has recently announced that it is now considering the construction of a second terminal at Dublin Airport to face the future increase of passenger traffic. The construction of this facility will be the subject of an open tender.

Source: Commission Statement IP/02/440, dated 20 March 2002