

Is the Price Right: The European Competition Law Dispute over National Systems of Fixed Book Prices

By Malcolm MacLaren

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I. Introduction

[1] On July 19, 2001, the European Commission announced that it had reopened proceedings regarding the German system of fixed book prices, asserting anti-competitive effects on cross-border Internet bookselling. (1) The Commission's announcement constitutes a new chapter in a long-running dispute over the legality of the so-called *Sammelrevers* system that dominates the book trade in Germany and, *mutatis mutandis*, other European states. The trigger in the present occasion was certain practices alleged of German publishers and book wholesalers regarding the application of the *Sammelrevers* to direct cross-border sales of books to final consumers. The ongoing integration of the continent's economy and the constant introduction of new technologies and ways of distribution have led many commentators to speak in terms of the German book trade vainly "struggling to hold back the tide of unfettered competition." (2)

[2] Although the dispute has undeniably reached a new phase, it is not clear to me that the latest development necessarily represents the beginning of the end of the *Buchpreisbindung* (fixed book price). National systems of fixed book prices are widespread, and there remains considerable political support for the protection of national heritage across Europe. This support may lead to a fettering of competition through the introduction of new EC rules and not the opposite. Moreover, business realities suggest that change, if and when it comes, will come at a slower pace than expected. Incumbent book firms, who still dominate the book trade, are unlikely to give up their market position without a real fight - legal or illegal. The Commission's recent announcement that it has reopened proceedings regarding the German system and the reaction of the firms concerned appear to confirm this view. Accordingly, a new dispute between the German book trade and the Commission over fixed book prices may, practically speaking, 'lead to nothing', as the CEO of the media concern Bertelsmann predicted last year. (3)

II. Background Reading

[3] The provision underlying the *Sammelrevers* in Germany stands out as an anomaly in German competition law. *Buchpreisbindung* is the only such form of vertical restraint permitted in the national *Gesetz gegen Wettbewerbsbeschränkungen* (GWB – Law against Restraints on Competition). In exemption from the strict ban provided for in sec. 14 GWB, fixed prices may be set for *Verlagserzeugnisse* (a broadly interpreted term of art meaning products from publishers) per sec. 15 GWB. The following provision, sec. 16, is intended to prevent abuse of the exemption. The exemption is allowed merely for vertical fixed prices; horizontal restraints, such as price cartels, remain subject to the sec. 1 ban, as they represent agreements between would-be market competitors. (4)

[4] The fixed retail price for books came into being in the late nineteenth century with the whole system of sales and settlement of the trade. By means of the *Bindungsvertrag* (fixed contract) publishers oblige purchasers of their products to resell them at a certain price or to impose the same terms on other intermediaries until the products reach their final consumer. The individual fixed contracts are combined in a framework agreement (*Sammelrevers*) in order to organize them and render them more effective. The administration of the system is the responsibility of *Preisbindungstreuhänder* (fixed price trustees).

[5] The supporting legislative provisions have been closely bound to the goal of the maintenance of a good assortment of such products in terms of quality and quantity. (5) Book prices are agreed on such that popular, high-volume books are overpriced to compensate for the artificially lower prices set for less popular, lower-volume books. To what degree permitting *Buchpreisbindung* actually fulfils its intended goal has been the subject of much academic debate, apparently inconclusive. (6). Nonetheless, the policy enjoys cross-party support in the German Parliament, as displayed most recently during the last round of GWB reforms in 1998. (7)

[6] In contrast, European competition law makes no provision for fixed book prices, let alone a formal distinction between vertical and horizontal restraints corresponding to the German. General rules regarding collusion apply. Art. 81 I of the European Community Treaty prohibits and declares automatically void all agreements and concerted practices that may in object or effect prevent, restrict, or distort trade in the internal market, such as price-fixing agreements (Art. 81 I a). Associations of undertakings as well as undertakings themselves may be the subject to this provision; their decisions may have the effect of coordinating anti-competitive behavior among undertakings without any need for actual agreement. Art. 81 III regulates exemptions from the preceding through block exemptions of

whole categories of agreements and concerted practices or through individual Commission decisions granting exemptions.

[7] Broadly speaking, EU Competition policy is committed to the ideal of an European economy without internal barriers. The Commission, which conducts the policy, regards such agreements and concerted practices as serious violations of Art. 81. It has in past often placed this ideal of a fully liberalized market before national interests and above national objections. As it stated bluntly in its announcement, "the Commission cannot tolerate restrictive practices which have effects on trade between Member States." (8)

[8] Specifically, the Commission views the national systems of fixed book prices with real suspicion. It has alone or in conjunction with private parties instituted proceedings against them on several occasions, enjoying mixed success. (9) Two of the most significant jurisprudential developments may be usefully cited. First, the European Court of Justice stated in the *Vlaamse Boekwezen* case that the establishment and the enforcement of a similar *Preisbindung* system through publishers, book dealers, and their associations constituted an inadmissible fixing of prices per the then Art. 85 I a. (10) The treaty requirement that the system affect trade between member states was affirmed as regards *Buchpreisbindung* agreements in cross-border language areas summarily (*Ibid.*). The Court did not in the *Vlaamse Boekwezen* case or in other relevant cases rule out, as has the Commission, the possibility of an exemption for *Buchpreisbindung* under Art. 81 III.

[9] Second, the Court held in the *Leclerc/SARL* case that French legislation that obliged publishers and importers to hold to a national retail book price is permitted by EC law as long as the rules concerning the free movement of goods and services between member states and the respective caselaw are respected. (11) Such national provisions regulated selling arrangements, not requirements to be met by products, and applied to all traders equally. An exception for re-imports of books was deemed permissible if it could be proven that the purpose of the export and re-import was to evade the national fixed book price. Otherwise, such legislation constitutes, according to the Court, an absolutely unjustifiable measure having equivalent effect to a quantitative restriction on imports. (To be accurate, it should be noted that the French system obliges the book trade to fix book prices, while the German system merely permits the book trade to engage in such pricing. Proceedings against France were brought under what is today Art. 28, which regulates state restrictions on imports, rather than Art. 81 I, which regulates enterprise conduct. In the final analysis, while the means in EC law to control national systems of fixed book prices may themselves vary, their end is the same, that is to effect full economic integration in the EC.) In sum, as one commentator speculated, perhaps in recognition of its widespread existence in the Community, the Court has not rejected the idea of national systems of fixed book prices out of hand. It has demonstrated, however, that *Buchpreisbindung* can, whether implemented by private or public means, violate EC law. (12)

III. A New Chapter

[10] In February 2000, the Commission reached an understanding with German publishers and book wholesalers on the future application of the *Sammelrevers*. The understanding is, in the words of the Commission, "aimed at bringing the '*Sammelrevers*' in line with Community law by ensuring that its application has no appreciable effects on trade between Member States leading to an infringement of the competition rules of the EC Treaty." (13) The understanding represents a compromise between the Commission and the German book trade. The Commission originally sought to abolish price fixing outright; the book trade sought an individual exemption for a system of fixed book prices agreed upon in 1993 by the book trade in Germany, Austria, and non-EU member state Switzerland. (The so-called "*Drei-Laender-Revers*" was modeled on the *Sammelrevers* and fixed uniform prices on national and cross-border book sales in the three German-speaking states.) The understanding is based on the principle that national systems of fixed book prices that are based on agreements between undertakings will not be contested by the Commission as long as they have no appreciable effects on trade between member states.

[11] Specifically, the new *Sammelrevers* no longer includes publishers from other EU member states than Germany. Likewise, it limits the application of the fixed book prices to Germany. As of 1 July 2000, books produced by German publishers but re-imported from Austria (or other member states) are generally not to be subject to Germany's fixed pricing law. Re-imports of German books can be the subject of the fixed book prices only if it can be proven that the whole transaction is solely intended to evade the *Buchpreisbindung*. According to the text of the new *Sammelrevers*, the fixed book prices can no longer be imposed on direct cross-border sales by retailers to final consumers. This means, in the opinion of the Commission, that the *Buchpreisbindung* does not apply to such sales via the Internet.

[12] The Commission's decision to reopen proceedings regarding *Buchpreisbindung* against German publishers and book wholesalers is based on a preliminary conclusion that the *Sammelrevers* has not been correctly applied. The decision is tied to the experiences of an Austrian wholesale book chain, Libro, and of a Belgian Internet Bookseller, Proxis. Libro asserts that with the coming into force of the understanding it started selling books to German final consumers through its Internet subsidiary (Lion.cc) at discounts of up to 20 per cent on bestsellers. Soon thereafter,

German publishers and book wholesalers declared a supply boycott against Libro and other Internet book dealers not abiding by the *Sammelrevers* system. The German firms cancelled their boycott at the end of July 2000 after Libro announced that it would stop offering rebates to German consumers. For its part, Proxis asserts that when it sought to start selling German books worldwide at discounted prices from Belgium, the main German book wholesalers refused to do business with it.

[13] At the time, the Commission argued that as cross-border book sales to final consumers over the Internet are not governed by the *Buchpreisbindung*, Libro was acting lawfully in pursuing an aggressive price policy and that the German firms were acting unlawfully in declaring the supply boycott. (14) A year later, the Commission has confirmed this opinion: "contrary to the aforementioned understanding, direct cross-border sales of books to final consumers via the Internet at a price other than the fixed book price for Germany have been systematically regarded as a circumvention of the system." (15) The Commission has also come to the preliminary conclusion that the refusals by the German firms concerned to supply Internet booksellers established outside Germany were based on illegal collusion and therefore infringe the EC's competition rules as well.

IV. The Other Side of the Story

[14] The Commission has formally moved against the publishers participating in the *Sammelrevers*, the Börsenverein des Deutschen Buchhandels as the German association for the book trade, the Verlagsgruppe Random House GmbH as the publishing branch of the Bertelsmann group and Koch, Neff & Oetinger & Co. GmbH as the biggest German book wholesaler. The reopening of proceedings gives the German firms and trade association concerned the right to reply to the preliminary conclusions within three months and to have a hearing, likely in autumn. If it is proven that the firms agreed to the supply boycott, they would be faced with heavy fines, even if the restrictive practices have since ended.

[15] To date, the German firms and trade association concerned have reacted angrily to the Commission's allegations. They have variously called them incomprehensible; accused the Commission of pursuing a vendetta against German publishers; and claimed that each German publisher has thereby been unfairly branded a lawbreaker. According to the trade association, it has always sought to conduct its affairs in accordance with the EC competition rules. The trade association believes that the dispute has put *Buchpreisbindung* itself again in question and has committed itself to *Buchpreisbindung's* defense on behalf of the over 1700 mostly small and mid-sized publishers affected by the allegations. As long as *Buchpreisbindung* exists, it must also apply to the Internet, argues the trade association. It will not agree to the abolition of *Buchpreisbindung*, as it is indispensable to the maintenance of a good assortment of books in the German market. Likewise, it will not agree to supply any and every foreign retailer with books. The latter requirement would violate the principle of freedom of contract and discriminate against publishers in relation to all other enterprises, argues the trade association. (16) For its part, the German government declared itself astonished. It stated that plans for new legislation regarding *Buchpreisbindung* will be carried out regardless of the outcome of the Commission proceedings. (17)

V. The Next Plot Turns?

[16] As noted, according to the text of the new *Sammelrevers*, the fixed book prices for Germany can no longer be imposed on direct cross-border sales by retailers to final consumers. The statement by the Commission that the *Buchpreisbindung* does not therefore apply to such sales via the Internet is, however, an inference. The text of the understanding makes no explicit provision in this regard. Whether or not Internet book sales would be exempted from *Preisbindung* was to the bitter end of the negotiations between the Commission and the German book trade disputed. (18) Ultimately, such a provision was not included in the understanding.

[17] The Commission believes that if the *Sammelrevers* is correctly applied, it does not have appreciable effects on trade between member states and would not infringe EC competition rules. "Therefore, the Commission could accept the '*Sammelrevers*' for the future if the above-mentioned practices are definitely discontinued and a lawful application of the '*Sammelrevers*' is guaranteed by the publishers and booksellers." (19) As for the new *Buchpreisbindung* legislation that the German government is planning, the Commission could tolerate it as long as the rules concerning the free movement of goods and services between Member States and the respective case-law (particularly the ruling in "Leclerc") are respected. (20)

[18] If EU competition law is enforced as the Commission envisages, say commentators, the mid-term sustainability of any system of *Buchpreisbindung* comparable to that currently existent is highly unlikely. (21) The traditional book trade in Germany is already under considerable pressure. If *Buchpreisbindung* does not apply to cross-border Internet sales, so the prevailing opinion goes, the system will no longer be effective. A large hole will have been breached in its coverage, which will be profitably exploited by innovative firms pursuing an aggressive pricing policy across Europe. Specifically, it is argued that the new technologies and ways of distribution that are being constantly

introduced do not respect national borders or authorities. The primary concern of the businesses behind these innovations is competitive advantage not cultural heritage. Lastly, consumers will choose to enjoy the resultant cost advantages. Despite the fact that Internet book sales are still negligible (comprising in early 2000 a German market share of merely 1.2% (22)), the free interplay of these three dynamics are claimed to ensure the beginning of the end of national systems of fixed book prices in Europe. (And, as one especially fatalistic commentator would add, the falling of the last bulwark against the pervasive trend to monoculture. (23))

[19] To prevent such a development coming about, supporters of fixed book prices have striven to influence EU policymaking. They believe that with increasing economic integration, the limited jurisdictional scope of national regulatory activity such as *Buchpreisbindung* is diverging ever more widely from the expanding geographical scope of markets. A community framework for the book trade is therefore required to ensure legal security for the book trade. (24) Supporters of policymaking at the EU level sought first to obtain a group exemption for *Buchpreisbindung*. Having failed to obtain an individual exemption for the *Drei-Länder-Revers*, they are now seeking to preserve *Buchpreisbindung* through the introduction of new EC rules. Various legal instruments have been proposed, taking the form of either a regulation, guideline, or treaty reform per Art. 83 II c EC Treaty or Art. 48 EU Treaty. The possibility of recourse to Art. 87 III d EC Treaty, which allows for state aid to promote culture, is doubtful, as "such aid [is] not to affect trading conditions and competition in the Community to an extent that is contrary to the common interest."

[20] Ultimately, whether new EC rules favorable to *Buchpreisbindung* are introduced is a matter of political will. There is nothing in the rationale behind the European project generally or in EC competition law specifically that would prevent books being prioritized as a *Kulturgut* (cultural item) rather than as a *Wirtschaftsgut* (business item). The constitutive treaties offer member states considerable leeway in economic policymaking, as EC competition policy already manifests, balancing as it does the pursuit of competition with wider goals (such as the protection of small and mid-sized enterprises). The fact that political consensus exists in Germany over the legitimacy of *Buchpreisbindung* and that systems of fixed book prices of various designs still exist in member states Austria, Belgium, Denmark, France, Italy, Luxembourg, and the Netherlands give supporters of fixed book prices at the EU level hope.

VI. An Alternative Interpretation

[21] Although relating to books, the on-going dispute over *Buchpreisbindung* is anything but bookish. The way in which the dispute is settled will have drastic ramifications for all the firms concerned as well as for the trade itself. Taking a business perspective on the recent developments presents them in a different light. Indeed, it makes one wonder whether it is business realities rather than EU or national law that is determining and will continue to determine how the situation develops.

[22] Most immediately, the success of the Commission's proceedings against the German firms and trade association concerned will go a long way to determining the success of the pending restructuring of Libro. The Austrian firm has suffered severe financial difficulties in the last year, unable to put into effect its ambitious expansion plans in Germany and the Internet. (25) In addition to filing complaints with the Commission, Libro has filed some 17 suits for damages against the German publishers. (26) It has already succeeded in obtaining a ruling from regional courts in Berlin and Munich that it was boycotted by the firms. (27) Art. 81 I EC treaty together with sec. 823 2 of the *Bürgerliches Gesetzbuch* (BGB -- German Civil Code) could support a claim for compensatory damages and, arguably, a claim for future supply of product. All may come, however, too little and too late.

[23] The inability of Libro to realize its vision of an unregulated book market is in large part the result of the stance taken by the German book trade. As noted, Libro stopped offering rebates to German consumers in the face of their boycott. It negotiated instead a compromise with the German firms, with which it at once competes and on which it is heavily dependent, to ensure the continued supply of books. Last July, this withdrawal may have seemed "tactical" and "clever": "[i]n view of the rising importance of electronic retailing, [Libro] can do this without jeopardizing [its] objective of total liberalization of the book trade." (28) The withdrawal has since been revealed to have been a recognition of its position of weakness.

[24] It may well prove to be the case that the new technologies and ways of distribution bring about the end of *Buchpreisbindung*. However, it should be remembered that the Internet is merely a tool that may be used by future competitors of the incumbent firms to revolutionize the book trade; it is not a competitor itself. Would-be competitors like Libro must profitably exploit its commercial possibilities. Due to the current control of the market and the stance collectively taken by the incumbent firms, Libro was unable to do so. It is hard to see how the national market will be opened, as long as German publishers and book wholesalers do not supply would-be competitors. (Hence the effort on the part of the trade association to characterize the German firms' refusal to supply foreign retailers such as Libro as non-discriminatory and objectively justified. (29))

[25] Likewise, as long as German publishers and book wholesalers agree to maintain fixed book prices, Buchpreisbindung may well continue indefinitely. As sec. 16 GWB does not oblige but merely permits fixed prices, German firms may lift the controls on the retail price for books. The Net Book Agreement in England, which similarly provided for fixed book prices, collapsed in 1996 after the withdrawal of three large British publishers. Should one of the large German publishers decide to no longer fix prices for some of its products, the end of *Buchpreisbindung* would be in view.

[26] In sum, the real threat to *Buchpreisbindung* and similar national systems of fixed book prices may not come from Brussels as expected, but from 'within', that is to say from the publishers and wholesalers concerned themselves. It is they and not bureaucrats or legislators who may one day bring about its end. (30)

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- (1) European Commission Press Release, IP/01/1035, 2001-07-19.
 - (2) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 31 July 2000 (archived at newspaper website without page citation).
 - (3) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 27 July 2000 (archived at newspaper website without page citation).
 - (4) See, Fritz Rittner, WETTBEWERBS- UND KARTELLRECHT, 6. Aufl. Heidelberg 1999, chapter 9.
 - (5) CD-ROM Case, BGH NJW 1997, 1911, 1912.
 - (6) See, e.g., Sebastian Jungermann / Klaus Heine, DIE BUCHPREISBINDUNG - ELEKTRONISCHE MEDIEN UND DER MARKT FUER VERLAGSERZEUGNISSE, CR 2000, 526, 535.
 - (7) Sebastian Jungermann, *Neues zur Buchpreisbindung*, NJW 2000, 2172, 2173.
 - (8) European Commission Press Release, IP/01/1035, 2001-07-19.
 - (9) See generally, Christiane Huppertz, *Die Buchpreisbindung nach nationalem und europaischem Wettbewerbsrecht*, GRUR 1998, 988.
 - (10) EuGH GRUR Int. 1985, 187, 189.
 - (11) EuGH GRUR Int. 1985, 190 ff. and judgment of 3 October 2000 in case C-9/99 "Echirrolles."
 - (12) Hans-Jürgen Ahrens / Volker M. Jänich, *Der gebundene Preis fuer CD-ROM-Produkte - ein Irrweg der Rechtsprechung*, GRUR 1998, 599, 602.
 - (13) European Commission Press Release, IP/01/1035, 2001-07-19.
 - (14) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 2 August 2000 (archived at newspaper website without page citation).
 - (15) European Commission Press Release, IP/01/1035, 2001-07-19.
 - (16) FRANKFURTER ALLGEMEINE ZEITUNG, 21 July 2001, at 14.
 - (17) FRANKFURTER ALLGEMEINE ZEITUNG, 23 July 2001, at 43.
 - (18) Sebastian Jungermann / Klaus Heine, *Die Buchpreisbindung - elektronische Medien und der Markt fuer Verlagserzeugnisse*, CR 2000, 526, 533.
 - (19) European Commission Press Release, IP/01/1035, 2001-07-19.
 - (20) *Ibid.*
 - (21) FRANKFURTER ALLGEMEINE ZEITUNG, 16 February 2000, at 19; and 28 February 2000, at 18.
 - (22) Sebastian Jungermann / Klaus Heine, *Die Buchpreisbindung - elektronische Medien und der Markt fuer Verlagserzeugnisse*, CR 2000, 526, 533.
 - (23) BADISCHE ZEITUNG, 20 July 2001, at 1.
 - (24) See, e.g., Karl-Heinz Fezer, *Elektronische Verlagserzeugnisse als Gegenstand der kartellrechtlichen Preisbindung*, NJW 1997, 2150, 2152.
 - (25) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 28 June 2001 (archived at newspaper website without page citation).
 - (26) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 27 July 2000 (archived at newspaper website without page citation).
 - (27) FRANKFURTER ALLGEMEINE ZEITUNG, 23 July 2001, at 43.
 - (28) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 31 July 2000 (archived at newspaper website without page citation).
 - (29) FRANKFURTER ALLGEMEINE ZEITUNG, 21 July 2001, at 14.
 - (30) Sebastian Jungermann / Klaus Heine, *Die Buchpreisbindung - elektronische Medien und der Markt fuer Verlagserzeugnisse*, CR 2000, 526, 535.