

Commission ends competition proceedings regarding German book price fixing agreements following acceptance of an undertaking on cross-border sales

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Introduction

The Commission has been dealing with the system of fixed book prices in Germany and Austria since its first notification in 1993 because it was based on cross-border agreements between publishers and booksellers. The Commission had objected to these agreements because they infringed Article 81(1) of the EC Treaty and the conditions for an exemption under Article 81(3) were not fulfilled. As a compromise solution a new 're-nationalised' book price fixing agreement ('Sammelrevers') limited in its scope of application to Germany was notified in March 2000. However, before the Commission could definitively clear the amended 'Sammelrevers' it received complaints by foreign Internet book traders in summer 2000 alleging infringements of Article 81(1) of the EC Treaty on the part of the Börsenverein des Deutschen Buchhandels e.V. (the German publishers' and book traders' association), German publishers and booksellers. The investigation initiated by the Commission eventually led to an Undertaking given by the Börsenverein, the publisher Verlagsgruppe Random House GmbH and the German book wholesaler Koch, Neff & Oetinger GmbH. As a consequence, on 22 March 2002 the Commission announced that it would no longer pursue proceedings. ⁽¹⁾ Finally, in April 2002 DG COMP issued a negative clearance comfort letter for the amended 'Sammelrevers' as interpreted in the light of the Undertaking.

Indeed, the Commission does not contest truly national book price fixing systems as long as they have no appreciable effect on trade between Member States. According to the text of the amended 'Sammelrevers', books can be sold by retailers directly to final consumers in other Member States at reduced prices. This means, in particular, that no fixed price applies to cross-border Internet sales. The fixed prices only apply to re-imports into Germany when the sole purpose

of the export and re-import is to circumvent the national price fixing system.

Investigation

On 10 June 2000 the Commission published a Notice pursuant to Article 19(3) of Regulation No. 17 announcing its intention to clear the amended 'Sammelrevers' as it was presumed not to have an appreciable effect on trade between Member States. ⁽²⁾ However, clearance was not possible at the time because of two complaints submitted respectively by the Austrian bookseller Libro AG including 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 implied the suspicion of a concerted embargo at the expense of foreign Internet booksellers that served to block cross-border Internet trade in books at reduced prices with German final consumers. These allegations indicated that the concerted embargo was ultimately based on an interpretation and application in practice of the 'Sammelrevers' by the German publishers and booksellers (with the participation of the Börsenverein) in a way that still affected trade between Member States. Prosecution of the concerted practice therefore necessarily implied the challenging of the new 'Sammelrevers', i.e. its anti-competitive interpretation and application.

The investigation resulted in July 2001 in the initiation of formal proceedings by issuing a Statement of Objections. ⁽³⁾ A Hearing was held in November 2001. In subsequent discussions with the Börsenverein, the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH agreement was reached on the text of an Undertaking that definitively and fully met the objections raised. In accepting the Undertakings

⁽¹⁾ IP/02/461 of 22 March 2002, 'Commission accepts undertaking in competition proceeding regarding German book price fixing'.

⁽²⁾ O.J. No. C 162 of 10 June 2000, p. 25.

⁽³⁾ IP/01/1035 of 19 July 2001.

given by the parties the Commission also showed its readiness to take into account the national interest in maintaining systems that are aimed at preserving cultural and linguistic diversity in Europe.

The full wording of the Undertaking is annexed to this article.

Undertaking

The Undertaking 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 ‘Sammelrevers’. 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(1) of the EC Treaty. The ‘Sammelrevers’, as long as it is interpreted and applied in conformity with this Undertaking and the Commission Notice pursuant to Article 19(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 whatsoever 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 (currently in preparation) or comparable State measures that replace the contractual price fixing system. ⁽¹⁾

It should be noted that the detailed definition of the notion of circumvention in the Undertaking promotes legal certainty not only for the publishers participating in the ‘Sammelrevers’ and the booksellers bound by it, but also for foreign booksellers who aim at starting sales activity, in particular, via the Internet, with final consumers on the German market for books.

End of proceedings

The Undertaking ensures that the Commission will intervene in case of concerted blocking of direct cross-border Internet book selling to German final consumers. Therefore, the complainant Libro agreed with both the Undertaking and the closure of the proceedings. ⁽²⁾

As a consequence of the Undertaking and the agreement by the complainants, the Directorate General Competition of the Commission terminated the proceedings and granted a so-called negative clearance comfort letter for the ‘Sammelrevers’ based on the lack of appreciable effect on trade between Member States.

⁽¹⁾ This mechanism not only takes account of the fact that the law on fixed book prices will replace the ‘Sammelrevers’ but also makes it clear that the Undertakings do not prejudice the Commission’s future assessment of such national laws in the light of EC law as a whole and, in particular, the market freedoms under the EC Treaty including secondary legislation, such as the e-commerce directive.

⁽²⁾ Proxis had already withdrawn its complaint shortly before.

Undertaking ⁽¹⁾

by the Börsenverein des Deutschen Buchhandels e.V., the Verlagsgruppe Random House GmbH and the Koch, Neff & Oetinger GmbH given in the proceedings

COMPIC-2/34.657 Sammelrevers
COMPIC-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 Sammelrevers (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 Sammelrevers 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 Sammelrevers 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 Sammelrevers 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 Sammelrevers circumvents the retail price maintenance. Circumvention in this sense takes place only if

- a bookseller bound by the Sammelrevers colludes at the retail level with a book seller not bound by the Sammelrevers 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 Sammelrevers, on the basis of the common plan, makes available Internet access or other communication devices to the bookseller not bound by the Sammelrevers.
- a bookseller bound by the Sammelrevers 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 Sammelrevers.
- a bookseller bound by the Sammelrevers 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 Sammelrevers.

II.

3. The Sammelrevers 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 Sammelrevers.

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 Sammelrevers 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 Sammelrevers 2000 governing the retail price maintenance of books and other printed products in Germany. As soon as the Sammelrevers is repealed by State measures governing the retail price maintenance this Undertaking ceases its validity.

Date and signatures

⁽¹⁾ Unauthorised translation; only the German text – available under IP/02/461 of 22 March 2002 – is authentic.