

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(85) 258 final

Brussels, 29 May 1985

COMMISSION COMMUNICATION TO THE COUNCIL

on the creation of a Community framework system
for book prices

COM(85) 258 final

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Commission Communication to the Council
on the creation of a Community framework system
for book prices

1. Measures to regulate book prices in the interests of culture in general have been called for by various political bodies.

Thus on 13 February 1981 the European Parliament adopted a Resolution on the fixing of book prices.¹ Among other things Parliament there requested the Commission "to put forward the necessary proposals on book prices... in order to guarantee a policy on books in the Community which is worthy of the unique role of this educational and cultural instrument". And according to Recommendation 930 of the Parliamentary Assembly of the Council of Europe, "prescribing fixed prices for books offers the best guarantee for the wide availability of books and the largest possible range of places of sale".²

Council meetings of ministers responsible for cultural affairs have several times discussed policy on books. One important aspect of such a policy is obviously the question of pricing. At their meeting on 22 November 1984, the ministers "expressed their interest in ... the possibility of introducing a pricing system based, among other things, on the possibility of establishing a single price for books".

¹ OJ No C 50, 9.3.1981, p. 103.

² See the report on book pricing by Mr Voogd, Parliamentary Assembly of the Council of Europe, Doc. 4786, thirty third ordinary session, 1.10.1981.

The judgment delivered by the Court of Justice on 10 January 1985 in Case 229/83 Leclerc v Au Blé Vert and Others, where it had to consider the French book pricing system, has brought the question to the forefront of discussion once again.

The Commission's Programme for 1985 includes the preparation of a framework for rules on book prices in the Community.

2. Books raise special problems because of their dual nature. Books are at the same time

- an industrial product, and like other industrial products the subject of economic activity; and
- a cultural product: as a means of expression and a medium of literary creation, of thought and of research, books form part of Europe's cultural heritage, and it is important for European cultural development and the European cultural identity that the production and distribution of books should be promoted in order to encourage the exchange of ideas and of talent.

The difficulties inherent in the special structures of the book trade should be approached in the light of the various interests involved:

- The interests of authors: Authors should be ensured a reasonable chance of having their works published. People who wish to live by their writing should be able to hope that they will make a decent living from their creative activity. To meet these demands a viable system of book publishing and distribution must clearly be maintained.
- The interests of publishers: One of the requirements for cultural vitality is bound up with the number and range of works which are published. But many books sell slowly or with difficulty, particularly works of literary creation, those concerned with human sciences, or science and technology. Success here is more uncertain than in other fields.

The publisher ought to be able to offset the risk he takes in publishing works whose prospects are unpredictable by making an adequate profit on the sale of highly successful books.

- The interests of booksellers: The distribution of books depends in all Community countries on the existence of a network of good bookshops that are alone capable of offering the diversity and wealth of published works to the public, by maintaining a permanent stock of books and by advising customers and tracing particular works. Affording the reader easy access to the range of published works also enables him to play his part in deciding the success of particular works, rather than leaving that function to a small group of arbiters. But book retailing has its constraints; it requires a measure of security of income. It could be endangered by the aggressive commercial practices of certain distributors who follow a selective policy as regards the type of works or the particular titles which they offer for sale.

- The interests of the public: These interests are closely bound up with the existence of a good distribution network: the potential reader needs to be able to find all the books he wants easily and at reasonable prices.

3. These problems of the book trade are at present regulated solely at national level. A table summarizing the schemes applied in the different Member States is attached. The following conclusions can be drawn:

- There is very general recognition of the special nature of books and of the economic and cultural policy objectives outlined above. In most Member States there are special rules on book pricing.
- But the form taken by these rules, where they exist, varies greatly from one Member State to another.

In one Member State, France, the rules are laid down in legislation. In the others they are established by private agreements between the publishers and the other parties concerned.

In France the rules are binding on publishers, who are required to set a retail selling price to be charged for all the books they publish. In the other cases the rules are optional. Publishers are free to set a compulsory price or not, as they wish.

It has to be recognized that the fact that the book trade is organized on a purely national basis in the Community has serious drawbacks.

The disparity of schemes applied by the different Member States may be responsible for instances of failure to comply with the pricing rules applied in each of them, given the possibility of importation and re-importation.

Member States or firms who wish to remedy these difficulties by individually taking measures affecting import and export business will hardly be able to do so without infringing their obligations under the Treaty, whether under the rules on free movement of goods or the rules

of competition. This is quite clear from the findings of the Court of Justice in its two judgments on book prices:

The Commission had refused to grant an exemption under Article 85(3) of the Treaty in respect of an agreement between the Belgian VBVB (Association for the Promotion of Flemish Books) and the Dutch VBBB (Association for the Promotion of the Interests of the Book Trade); the agreement governed trade in Dutch language books between the Netherlands and Belgium, and obliged booksellers in one country to apply the prices set by publishers in the other. In its judgment in Joined Cases 43 and 63/82 VBVB and VBBB v Commission, not yet reported, the Court upheld the position the Commission had taken .

In Leclerc v Au Blé Vert, not yet reported, the Court held that rules on imported or re-imported books of the kind laid down by the French Act No 81-766 of 10 August 1981 were contrary to Article 30 of the Treaty.

4. The Community must now take up a position on the overall problem of book prices. The alternatives are as follows:

(a) The Community could decide to lay down common rules; two types of rule are conceivable.

- The Community takes the view that there should be complete freedom to determine prices. In that case the common rules would require Member States to abolish the existing pricing systems, or have them abolished, not only with respect to trade in books between Member States but also with respect to the sale on their home markets of books published domestically.

- The Community accepts the objectives pursued by the national pricing schemes. The common rules would then be aimed at widening the existing arrangements to cover the whole Community, either by substituting a Community scheme for the existing national schemes, or by simply laying down a framework for the national schemes by means of a Community Directive.

- (b) Or else nothing is done to introduce pricing rules for books at Community level.

The Commission would, none the less, have to act promptly in condemning the cross-border aspects of existing national systems where they infringe Articles 30 et seq. of the Treaty on the free movement of goods or Articles 85 et seq. on competition, as relevant. Purely domestic aspects, although difficult to dissociate from cross-border aspects, would fall outside the scope of the above provisions insofar as they do not affect trade between Member States.

Before definitively coming down in favour of a Community framework system for book prices, the Commission considers that the different aspects of the book market throughout the community should be studied in greater depth so that the nature and extent of all the interests to be weighed against each other may be assessed as fully and as accurately as possible. In particular, detailed consultations should be conducted to this end with all the professional and other circles involved. None the less, such consultations and studies will be of no avail unless one has an idea of the forms which a Community framework system might take.

- 5. In implementing such a framework system, a number of requirements would have to be met:
 - (a) Some are political in nature: it is important that the system advocated should cause as little upheaval as possible as regards the national

systems already in force in Member States.

- (b) The others are of a legal nature: the fact that it is established at Community level does not mean that a Community framework for book prices need not take account of the Treaty rules on the free movement of goods (cases of importation and re-importation dealt with by the Court) and on competition. Thus, if a national measure had to be condemned as constituting a barrier to imports, in breach of Article 3 of the Treaty, it could not be authorized by a Community act.¹ By the same token, Community rules could not back up or endorse conduct on the part of firms if such conduct were contrary to Article 85 of the Treaty and could not qualify for any of the exemptions under that Article.

All the same, in assessing the impact on the book market of the Treaty requirements on the free movement of goods and unrestricted competition, it is important to take account of the specific features of that market:

- Firstly, with the exception of certain types of books (e.g. manuals, dictionaries, art reproduction books), competition operates mainly between different copies of the same book. Because of its cultural content, a book hardly ever has any competitors other than itself.

¹ See Joined Cases 80 and 81/77 Commissionnaires réunis and Ramel v Receveur des douanes /1978/ ECR 927, where the Court invalidated Article 31(2) of Regulation No 816/70 in so far as it authorized the levying in intra-Community trade of charges having an effect equivalent to customs duties, on the ground that it was incompatible with Article 13 and Articles 38 to 46 of the Treaty.

- Secondly, the potential market for a book greatly depends on the culture with which it deals and the language in which it is written. Consequently, with the exception of English and French, and German in the case of scientific books, it is very unlikely that two books written in two different languages would compete with one another, whatever the prices involved. Apart from the exceptions mentioned, therefore, it is scarcely possible to talk of a Community-wide market for every book: the market is determined by the community's linguistic areas, the frontiers of which do not always coincide with national frontiers.

It will be noted that the difficulties which may arise, from the point of view of the Treaty, in applying the national systems are generated mainly by the disparity between those systems.

In any event, if the abovementioned legal requirements are to be respected, a Community framework for book pricing systems could not confine itself merely to endorsing existing national measures and practices. To do so would amount to perpetuating the existing disparities between the national arrangements, and accepting any infringements of Community law which they may involve; this would be contrary to the whole justification for Community intervention, and is obviously out of the question.

The important thing is to avoid partitioning the domestic markets and guarantee free movement for books. The pricing rules to be applied to books in order to achieve the objectives set out above must cease to be strictly national in scope, as they are at present, and be extended to the Community as a whole. Such regulation at Community level must at one and the same time remove any advantage inherent in any artificial commercial channels, thereby eliminating their grounds for existence, and abolish barriers to trade; to this end, the measures provided for should apply in each Member State without distinction to books published in that State and imported (or re-imported) books.

6. As regards the content of the measures which a Community framework system for book pricing might contain, the Commission considers that two types of solution might be adopted, while the possibility of a third solution or of intermediate solutions should not be ruled out.

A choice may be made between applying the arrangements

- either to the retail prices of books;
- or to the prices publishers charge their direct buyers.

A. SOLUTION I

7. The first solution consists in organizing a pricing system for books at the retail stage. That would mean making the following provisions in the Directives:

- the retail price to be charged by booksellers throughout the Community would be fixed by the publisher;
- the price fixed by the publisher can be either a minimum price calculated in such a way as to allow a sufficient margin for retailers, who would be free to charge higher prices, or else a prescribed price on which retailers could grant appreciable discounts;
- strict limitation of the period during which the price would be charged. The period during which the publisher fixes the retail price for the whole Community should in fact be a maximum, at the end of which freedom in regard to pricing is restored, and not, as in the case of certain national systems (United Kingdom for example), a minimum period at the end of which the publisher may either allow a return to unrestricted pricing or extend the prescribed price.

The fact that the pricing system envisaged would have to be a common one does not mean that it would necessarily have to be absolutely rigid, thus denying the publisher any freedom to differentiate the retail prices he fixes for the various Member States. But he could be allowed only a very narrow latitude here, solely in order to take account of objective differences relating to the situation and structure of the market in the Member States concerned (transport costs or other particular requirements).

8. A Community framework for book pricing systems developed on these lines would in no way preclude limiting its scope wherever justified by market conditions.

- First of all, there is no reason why certain particular channels of book distribution should not be exempted from the Community pricing rules, in line with practices which are fairly widespread in the application of national pricing systems at present. In particular,

such exemptions might be laid down for:

- paperbacks;
 - book club editions;
 - books supplied to public libraries;
 - school books.
- Community pricing rules need not necessarily be exactly the same for every book published in the Community. Depending on the cultural field they deal with, or the language they are written in, the potential area of distribution of books published in the different Member States may be restricted to the Member State of production or may include readers in the other Member States or certain other Member States. There may also be situations where the fixing of a single price for the whole Community would be pointless. There is nothing in Community law to prevent exemptions or more flexible rules in certain situations on the express condition that there are objective considerations which justify them. Limited exceptions on grounds of this kind are not likely to pose a threat to the unity of the common market. The books in question would obviously have to be able to circulate in the Community without price constraints in such situations.

9. The following points may be put forward in favour of such a system:
- the possibility it affords of achieving the objectives pursued as regards price security at the two levels where this is considered necessary: publishers and booksellers;
 - the fact that, by introducing a single retail price for the entire Community, it allows the Treaty rules on the free movement of goods to be respected;
 - the fact that the leeway granted to booksellers as regards charging publisher's fixed price and the strict limits as to the period during which that price is to be charged guarantee that the principles of competition are respected.

10. The question remains of whether, in the system to be introduced, the fixing of a retail price by the publisher should be made compulsory or optional:

- in the first case, every publisher would be required to fix a retail selling price for every book published;
- in the second, the framework directive would simply require Member States to authorize publishers established in their territory to use the system envisaged if they so wish.

The first solution would pave the way for a truly common and flawless system, since those involved could not opt out.

The second solution, on the other hand, would, because of its flexibility, impose little change on the systems currently applied. It would also allow greater room for competition.

B. SOLUTION II

11. The second solution would have the effect of limiting Community involvement in book pricing and would also be compatible with the principles established by the Commission and the Court regarding free competition in the book trade, since it would be concerned exclusively with the prices at which publishers sell books to direct buyers.

The directive would thus require publishers to sell their books in principle at the same price to all customers. They could not therefore sell them at a lower price, for example to book clubs or to wholesalers in other Member States.

The arguments in favour of this system are as follows:

- it would encourage the publishing of cultural books, since the poor return on "difficult" books could be made up by higher profit margins on books printed in large numbers;

- it would leave national systems of fixing book prices intact. At a purely national level, therefore, it would still be possible to fix the retail prices of books to protect booksellers; it would only be in intra-Community trade that this would not apply;
- freely determined retail prices in intra-Community trade would have only a negligible impact on purely national systems, since:
 - competition operates mainly between different copies of the same book and probably to a very limited extent between low-priced foreign books and national books;
 - experience in the Netherlands since 1979 has shown that the maintenance of the purely national system in that country has never been jeopardized by the fact that imports and re-imports were excluded from it;
 - the obligation on publishers to apply the same selling price to different buyers throughout the Community will considerably reduce the economic benefit to be gained from re-importing books.
- a system of this kind would rule out the danger that a precedent would be set for a system of retail price maintenance in other sectors (for example, pharmaceutical products and insurance), a danger which must be removed at all costs;
- its implementation would be unlikely to raise practical difficulties, since it would simply be necessary to stipulate that publishers could not apply a discriminatory pricing policy towards their buyers. It would be necessary to check that these provisions were observed only in the country of the publisher (for example, through checks on his invoices).

12. Conclusions

As it has already stated, the Commission intends as soon as possible to engage in detailed consultations with all interested parties on the basis of the ideas set out in this memorandum.

It also hopes that this memorandum will provide the Council with a basis for a policy debate on the problem of book pricing. The Commission intends, for its part, to continue actively with its studies and analytical work.

It reserves the right to present appropriate proposals to the Council in the light of the results of those consultations, discussions and work.

ANNEX

Situation in the Member States concerning resale price maintenance for books

1. Member States with statutory resale price maintenance

France

By virtue of the Law of 10 August 1981 (the Lang law), publishers and importers are obliged to fix the retail price for books they publish or import.

As far as imported books are concerned, a distinction must be made between books published and re-imported into France and those published in other countries.

For books published and re-imported into France, the retail price to be fixed by the importer has to be at least equal to that fixed by the French publisher.

An amendment to the law is being prepared in order to take account of the consequences of the Court of Justice's ruling in the Leclerc case and which provides that the rules on retail prices should not apply to re-imported books, in so far as the exports and re-imports were not aimed at circumventing such rules. The law was adopted recently by the French Parliament. However its consequences are not yet clear.

For books published outside France a distinction should be made between those published in other Member States and those published in third countries.

For books published in other Member States, the decree of 28.2.1985 (which was adopted in order to take account of the Leclerc ruling) provides that the retail price to be fixed by the importer must not be less than the retail price prescribed or recommended for France by the foreign publisher or, if such a price does not exist, then the retail price prescribed or recommended by the foreign publisher in the country of publication.

For books published in third countries it is the importer, who is required to lodge the book with the National Library (Dépôt Légal), who must fix the retail price (which price has to be respected whether the books are already in free circulation, following their importation from another Member State, or not).

Retailers are obliged to charge prices which do not differ by more than 5% from the price fixed by the publisher or importer, unless the most recent edition of the books was published or imported more than two years previously.

2. Member States with r.p.m. by virtue of private agreements, which are exempted or excluded from a total or partial legal prohibition of resale price maintenance agreements

Denmark

General prohibition of enforcement of r.p.m. agreements, from which books (amongst some other goods) have been exempted by the Monopolies Control Authority. Under the books r.p.m. agreement, prices are fixed by the publisher or, in the case of foreign books, by the principal or sole importer. Of the total turnover of Danish books, 85% are covered by the r.p.m. agreement.

(Imported books account for some 10% of total book turnover.)

Germany

General prohibition of r.p.m. agreements, except for vertical agreements on r.p.m. for publications, whereby the publisher fixes the retail prices of his publications.

Most publishers have concluded such agreements with their resellers, who are obliged to respect the fixed prices. It seems that these agreements generally secure adherence to the said prices in the case of books which are re-imported into Germany.

The Commission has no information indicating that foreign publishers have fixed prices for their books imported into Germany. The period during which r.p.m. is enforced by publishers seems to vary.

Exports account for some 13-14% (of which more than 50% goes to Austria and Switzerland) of national turnover, whereas imports appear to account for roughly half of the value of exports (more than 40% coming from Austria and Switzerland).

Luxembourg

General prohibition of r.p.m. but books are exempt. However r.p.m. agreements do not apply to imported books, which account for the majority of total book sales in Luxembourg.

Netherlands

Prohibition of collective r.p.m. agreements and of individual r.p.m. agreements for some products (such as audio-visual products and records).

A collective r.p.m. agreement has, however, been exempted by ministerial decree. This agreement obliges publishers and importers, who are party to it, to fix retail prices for books for at least two years. Following decisions of the Dutch courts since 1979, the agreement is, however, not applicable to imports and genuine re-imports.

The Dutch publishers who are party to the agreement publish some 70% of all books sold in the Netherlands.

United Kingdom

General prohibition of r.p.m. agreements. An exemption has been granted in the case of the Net Book Agreement by the Restrictive Practices Court, whereby publishers and importers who are party to the agreement may fix the retail prices of their books (which they may select to that end). Most publishers are party to the agreement and apply it.

The fixed retail prices also apply to exports to Ireland and re-imports. Some 35-40% of the production of UK publishers is exported, some 20% of such exports going to other EEC countries. The value of imports amounts to 50% of that of exports. A fairly substantial proportion of imports comes from other Member States.

3. Member States without statutory r.p.m. for books, but where r.p.m. for books is provided for only by private agreements

Belgium

Only in the Dutch-speaking area is there an r.p.m. agreement. Publishers and importers who are members of the organizations concerned are obliged to fix the retail prices for Dutch language books for at least two years.

More than 75% of such books are imported from the Netherlands. In the French-speaking area no r.p.m. agreement exists.

Ireland

As far as books imported from the UK are concerned, the British Net Book Agreement applies.

More than 80% of Irish book sales are accounted for by imported books, more than 80% of which come from the UK, generally under the British Net Book Agreement. It is, however, rather difficult to evaluate fluctuations of exchange rates in regard to the effect of this agreement in Ireland.

Italy

According to information supplied to the Commission by the Italian Booksellers Association, no r.p.m. agreements exist, except for schoolbooks.

Mention should be made, however, of an agreement containing rules for calculating prices for imported books through the application of notional exchange rates. This agreement does, however, not appear to constitute a resale price maintenance system in the proper sense of the term.

4. Member States where r.p.m. is prohibited and where no private agreement, exempted from such prohibition, exists

Greece

In Greece r.p.m. is prohibited. Exemptions have not been granted, even for books.

5. Final remark

In general, it should be borne in mind that in the Member States where resale price maintenance for books is applied, several exceptions exist. In such cases no r.p.m. applies or discounts are possible to a greater or lesser extent. Such is for example the case with sales to libraries, with schoolbooks, with sales by bookclubs. Such sales are additional to those not covered by r.p.m. because the publishers or importers concerned do not apply r.p.m. All these sales constitute a significant proportion of total book sales, although this varies in the different Member States.