

# Fixed book prices in a changing market environment

Special Report No 80

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2018

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## Preamble

In its Special Report “Fixed book prices in a changing market environment”, the Monopoly Commission presents an in-depth economic and legal analysis of the legally prescribed fixed book prices in accordance with § 3 in conjunction with § 5 of the Book Pricing Act (*Buchpreisbindungsgesetz – BuchPrG*). With this Report, it draws on earlier analyses or statements in the XIIIth and XIVth Biennial Reports and most recently in Special Report 68, in which it expressed its opinion on fixed book prices, above all from the point of view of competition economics. The Special Report now presented is prompted by current EU case law, although the extension of the statutory fixed book prices to electronic books (e-books) as of 1 September 2016 will also be taken into account. This Special Report is intended to inform the political decision-makers about the possible further jurisprudence on price-fixing law and to show them the economic and legal framework for the protection of books as cultural objects.

As part of the preparation of its Special Report, the Monopolies Commission sought an exchange of views with government agencies, market participants’ associations and experts. A non-public oral hearing was held on 9 May 2017, at which the following institutions were represented:

- Börsenverein des Deutschen Buchhandels e. V.
- Bundesverband E-Commerce und Versandhandel e. V. (bevh) – Fachbereich buch.netz
- Schweizer Staatssekretariat für Wirtschaft (Seco)
- Deutscher Bibliotheksverband e. V. (dbv).

The Verbraucherzentrale Bundesverband e. V. (vzbv) was invited to the hearing, but chose not to attend. The participating associations have submitted written comments to the Monopolies Commission, as have the following associations:

- Bundesverband Deutscher Buch-, Zeitungs- u. Zeitschriften-Grossisten e. V.
- Verband des Schweizerischen Versandhandels (VSV).

The Hauptverband des Österreichischen Buchhandels abstained from submitting an opinion upon request.

In addition, an expert meeting with Professor Dr. Karl-Nikolaus Peifer on relevant copyright issues took place on 9 May 2017. On 20 October 2017, the Monopolies Commission held a telephone conference with the Schweizer Buchhändler- und Verleger-Verband (SBVV) regarding the effects of the abolition of fixed book prices in German-speaking Switzerland.

In addition, there were contacts and discussions between the competent staff of the Monopolies Commission and representatives of other institutions as well as with individual booksellers. The Monopolies Commission wishes to thank everyone involved for their cooperation.

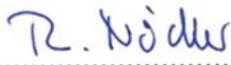
The Monopolies Commission would also like to thank its research assistants Dr. Thomas Weck, LL.M. and Mr. Lars Zeigermann, who were in charge of the Special Report.



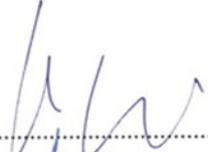
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## Summary

**S1.** The Monopolies Commission submits this Special Report following a judgment delivered in 2016 in which the European Court of Justice (ECJ) ruled that the German fixed prices for medicinal products were incompatible with the free movement of goods in the European Union (EU). The subject of this Special Report is the legal book price fixing obligation pursuant to § 3 in conjunction with § 5 of the German Book Pricing Act (BuchPrG).

**S2.** The protection of books as cultural objects is to be recognized, in principle, as an overriding requirement in the public interest. Nevertheless, both from a legal and an economic perspective there are considerable concerns about the use of fixed book prices as an instrument to this end. It is a competition policy objective of this Special Report that these concerns should be taken into account in terms of the design of future measures to protect books as cultural objects.

**S3.** From an economic point of view, fixed book prices have ambivalent and to some extent unclear effects. It cannot be ruled out that fixed prices may partially benefit the political interest in protecting books as cultural objects, compared with a situation without fixed prices. To this extent, fixed book prices may strengthen competition for ancillary services. In service competition, this prevents competitors from taking advantage of the service efforts of individual booksellers without participating in the associated costs (free-rider effect). Furthermore, fixed book prices may slow down structural change in the brick-and-mortar book trade, curb the increase in concentration in book trade retailing, and decelerate the emergence of booksellers with buying power.

**S4.** However, free price competition may have some effects that serve the interest in protecting books as cultural objects. Free price competition may contribute to the development and expansion of new and efficient retail and distribution concepts as well as lower market entry barriers. Furthermore, free price competition may open access to new customer groups and enable cost advantages to be passed on through lower customer prices.

**S5.** With regard to a number of aspects and objectives pursued by the legislator, the effects of fixed book prices are not clearly identifiable. In particular, this applies to the average price level of books. For example, higher prices for mass-market titles are up against unclear, possibly price-reducing effects for titles with lower demand. Likewise, the connection between fixed book prices, the willingness to stock up and the variety of titles in the book retailing is unclear. The effects of fixed book prices on the earnings situation of publishers and the diversity of published titles are similarly difficult to ascertain.

**S6.** For these reasons, a conclusive statement about the justification of fixed book prices is impossible. On the one hand, book price fixing delays structural and functional change at all levels of the distribution chain without eliminating it. This is particularly evident in the brick-and-mortar book trade, which is continuously losing market share to the online book trade. On the other hand, it is increasingly questionable if the infrastructure potentially protected by fixed book prices (still) plays the role attributed to it. Due to digitalization and the growing affinity of consumers to the Internet, the importance of traditional booksellers and the services they provide is steadily declining. The same applies to traditional publishing – albeit to a lesser extent –, since “self-publishing” offers authors new opportunities to publish their works without a (traditional) publisher.

**S7.** From a legal point of view, the cultural and political interest of the national legislature in books must be weighed against the interest in undistorted competition. Competition is protected within the European internal market by EU law. National rules on fixed book prices significantly interfere with the fundamental freedoms of cross-border trade and constitute a serious market intervention. According to EU law, objective evidence that fixed book prices generate cultural policy added value is required to justify such a market intervention. On the basis of the information available, it is questionable whether such evidence can be provided.

**S8.** It cannot be ruled out – and, with regard to e-books it is even probable – that the ECJ will declare fixed book prices as incompatible with the free movement of goods in a preliminary ruling. This also applies to the principle of loyalty under EU law in connection with EU competition rules. This assessment is based on the development of recent EU case law on fixed prices, as well as on market developments that have occurred since the German

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Book Pricing Act came into force. Other foreseeable developments are a consolidation at various levels of the distribution chain and the increasing importance of the Internet as a distribution channel. In relation to the new provisions made last year to extend fixed book prices to e-books in Germany and certain cross-border issues, the likelihood that the ECJ, on judicial review, will find an infringement of EU law is perceived to be higher. If such a judgment were to be rendered, companies operating across borders could gain a competitive advantage over the – still price-bound – domestic brick-and-mortar book trade by sending discounted printed books or e-books from abroad to German customers. The behaviour of market participants following the ECJ ruling on fixed prices for medicinal products has shown that such a scenario would occur sooner or later.

**S9.** From the Monopolies Commission's point of view – after considering all aspects – fixed book prices constitute a serious market intervention and lack a well-defined cultural protection objective. The effects of this market intervention are ambivalent and unclear. For these reasons, the Monopolies Commission recommends abolishing the statutory rules on fixed book prices. Firstly, the objective of the protection of books as cultural assets must be defined clearly. Secondly, it must be examined whether and to what extent a protection deficit exists. These steps must be taken before deciding, thirdly, which instruments may be used to remedy deficits in the protection of books as cultural objects.

## Chapter 1

### Introduction

**1.** The Monopolies Commission has prepared this Special Report at its own discretion in accordance with § 44 para. 1 sentence 4 of the Act against Restraints of Competition (GWB). The Report was prompted by the current jurisprudence of the European Court of Justice (ECJ).<sup>1</sup> The subject of this Special Report is exclusively the legal obligation to fix retail book prices in accordance with § 3 in conjunction with § 5 of the Book Pricing Act (BuchPrG), not the fixed prices for newspapers and magazines (§ 30 GWB) or other fixed prices.

**2.** It cannot be ruled out that the German courts will in the foreseeable future ask the ECJ for a preliminary ruling (Art. 267 para. 2, 3 of the Treaty on the Functioning of the European Union - TFEU) on whether the statutory fixing of book prices (or its extension to e-books) is compatible with the free movement of goods in the European Union (EU; Art. 34 TFEU). The recent ECJ ruling on fixed medicinal product prices has increased the probability of a referral to the ECJ for cases in which the statutory fixed book prices are legally enforced against non-German distance sellers. A clear legal situation which would make such a referral dispensable (so-called *acte clair*) can probably not be assumed in view of the current ECJ case law.

**3.** Against this background, the Monopolies Commission makes a comprehensive economic and legal assessment of the legally prescribed fixed book prices in the Special Report presented here.<sup>2</sup> In doing so, it takes into account the fact that price fixing constitutes a market intervention that can only be justified, from both a regulatory and legal point of view, under restrictive conditions. In view of this, European antitrust authorities and courts, for example, are in practice taking proactive action against price fixing, which producers use to protect the retail sector against distance selling via the Internet.<sup>3</sup> However, it must also be taken into account that fixed prices may be justified if they are used with a view to a legal objective which could not be achieved in a comparable manner without such market intervention. In the context of fixed book prices, this protection objective can result from the social interest in books as cultural objects.

**4.** From an economic point of view, the effect of fixed book prices is ambivalent and sometimes unclear. It can be assumed that fixed book prices have a protective effect on the traditional bookselling infrastructure and slow down the trend towards concentration. Fixed book prices also strengthen competition on ancillary services and prevent free-rider behaviour in service competition. At the same time, however, they are expected to limit the spread of efficient retailing structures and distribution concepts. Sales via alternative sales channels are inhibited and additional customer groups are not tapped. Cost advantages of efficient merchants cannot be passed on to customers in the form of lower retail prices. Ultimately, it can also be assumed that fixed book prices make market entry into the book market more difficult.

**5.** No clear conclusions can be drawn on a number of aspects. Although it is likely that fixed book prices lead to higher prices for mass titles, the effect on titles that are less frequently demanded remains unclear; although a price-reducing effect cannot be ruled out for at least some of the titles. Nor can a clear link be established between fixed book prices and the diversity of titles in book retailing. It is also unclear what effect fixed book prices have on the earnings situation in the publishing industry and the diversity of published titles.

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<sup>1</sup> See ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung (Arzneimittelpreisbindung), ECLI:EU:C:2016:776; moreover, see Amendment Act to the Fixed Book Prices Act (*Änderungsgesetz zum Buchpreisbindungsgesetz*) of 31 July 2016, BGBl. I p. 1937.

<sup>2</sup> However, this only applies to legal questions which are not affected by the judgment quoted in footnote 1.

<sup>3</sup> See for example Federal Cartel Office (FCO), Decision of 25 September 2009, B3-123/08 - Contact lenses (4th allegation examined); case report (*Fallbericht*) on the decision of 18 June 2010, B5-100/09 - Navigation devices for outdoor use; press release of 18 July 2016 and the further notifications linked there; OLG Wien as Cartel Court, Decision of 8 May 2014, 25 Kt 18/14 - Lurf; see BWB, Press Release BWB/K-288; UK CMA, Decision of 10 May 2016, CE/9857-14 – Bathroom fittings; Decision of 24 May 2016, CE/9856-14 - ITW Ltd; investigation CE/9578-12 – Mobility aids sector.

**6.** Despite their generally structure-conserving effect, there is much to suggest that fixed book prices cannot prevent structural and functional change at all levels of the distribution chain, but can only slow it down. This is particularly evident in the brick-and-mortar book trade, which is continuously losing market share, especially in comparison to the online bookselling. However, digitization and the growing affinity of consumers to the Internet are leading to a steady decline in the importance of the traditional bookshop and the bookselling services it provides. The same applies, to a more limited extent, to traditional publishing, as authors have new opportunities as “self-publishers” to publish their works without having to take the traditional path via a (traditional) publisher.

**7.** From an economic point of view, the fact that the existing fixed book price system represents a serious market intervention with an ambivalent and sometimes unclear effect suggests a negative assessment according to the rules on the protection of the EU internal market. This is reflected in the burden of explanation and proof in relation to justifying the market intervention associated with the fixed prices. If a question for a preliminary ruling were referred to the ECJ, it cannot therefore be ruled out and – with regard to e-books – is even likely that the ECJ will declare the statutory fixed book prices incompatible with the free movement of goods. In this case, fixed book prices – just like fixed medicinal product prices – would no longer be enforceable in cross-border book trade. Other companies could thus gain a competitive advantage over the – still price-bound – brick-and-mortar book trade in Germany by sending printed books or e-books from abroad with discounts to German end-customers. The behaviour of market participants following the ECJ ruling on fixed medicinal product prices showed that such an option would probably be used sooner or later.

**8.** The statements made so far by many market participants in Germany suggest that they would not be prepared for the abolition of fixed book prices in the cross-border trade and for the competitive advances that would then be possible. However, it must be borne in mind that the regulations on statutory fixed book prices are in any case adapted to a market situation that has already changed considerably since it came into force and that will continue to do so in the future. If, for example, the assumption in some of the statements in this Special Report were true that the formerly firmly established brick-and-mortar book trade is increasingly under an existential threat, then this threat is a result of market changes that have developed independently of the legal fixed book prices, or have bypassed them.

**9.** In light of these considerations, it seems appropriate to enter into a broader debate on the concrete political objectives pursued as regards the protection of books as cultural objects and the instruments to be used in the event of statutory fixed book prices cease to be an option. It should be noted that the national legislature is not only free to decide whether it wishes to protect books as cultural objects in general, but that it also has leeway as to how it shapes this legal asset in substance and which instruments it uses for its protection. However, EU law requires the legislature to exercise its decision-making and design responsibilities in accordance with the regulatory framework laid down by EU law.

**10.** Both the task of defining the book as a legally protected cultural asset and the measures for this protection are ultimately tasks of cultural policy-making to be fulfilled by the legislative bodies. These tasks lie outside the competence of the Monopolies Commission, which in the Special Report presented here is also limited to evaluating the measures already taken from a competitive point of view. However, it should be pointed out that the pressure to act for new political solutions would likely increase abruptly and significantly if a ruling by the ECJ were handed down, according to which German statutory fixed book prices are incompatible with EU law. The reactions to the case law on fixed medicinal product prices and in particular the discussion about a legal ban on the distance selling of prescription drugs have shown that after an ECJ ruling finding a violation of national price-fixing rules against EU law, market interventions that are not readily justifiable under European law and competition policy might be considered. The Monopolies Commission therefore recommends that the Federal Government and the legislative bodies take measures now to further develop the regulatory framework for the protection of books as cultural objects in conformity with EU law.

**11.** This Special Report has the following structure: First, an overview of the German book market is given (Chapter 2). Subsequently, some key figures on national book markets in Europe are presented and an overview of

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existing fixed book price regimes in Europe is given. In addition, experience with the abolition of fixed book prices in the United Kingdom and Switzerland will be evaluated (Chapter 3). Afterwards, the cultural policy objectives in connection with the protection of “books as cultural objects” and the effects of the legally prescribed fixed book prices are worked out (Chapter 4). On the basis of recent ECJ rulings, an assessment of fixed book prices for printed books (Chapter 5) and for e-books (Chapter 6) follows. A summary concludes the Report (Chapter 7).

## Chapter 2

### The market for books: product characteristics, market structure and market developments

**12.** The book is not an ordinary product, but is characterized by a dual nature: It is both a cultural and an economic asset. On the one hand, it is considered to be of outstanding cultural importance as a carrier of ideas and an essential element of an open and pluralistic society. A wide range of titles and their distribution is therefore of particular public interest.<sup>4</sup> On the other hand, the book is a product offered on the market and for which the reader is prepared to pay a price. Irrespective of their important function as cultural mediators, publishers, booksellers and – in many cases – authors pursue primarily economic interests and are therefore economic entities that have to take market conditions into account.<sup>5</sup>

**13.** From the dual nature of books, the legislature derives the need to influence the development of the market for books and to promote their role as cultural assets.<sup>6</sup> A market intervention in the form of fixed book prices is intended to serve this interest. In order to be able to carry out an economic evaluation of fixed book prices with regard to the cultural policy objectives associated with them (see Section 4.2), the most important characteristics of the book as an economic good are first highlighted and some key figures on the book production in Germany are presented (Section 2.1). The distribution structure of the book market and the functions of the most important players are then outlined, and the market development of recent years are illustrated on the basis of industry data (Section 2.2).

#### 2.1 The book as an asset

##### 2.1.1 Product features of the book

**14.** The book has a number of characteristics that are not only used to justify fixed book prices but are also relevant in assessing how they work. First of all, it should be noted that books are private and not public goods from an economic perspective, since the buyer can exclude others from use and simultaneous use is difficult. This applies not only to printed books, but also to e-books whose terms of use and technical restrictions are intended to prohibit or prevent the simultaneous use of the same e-book by several users.<sup>7</sup> Therefore there is no market failure due to public goods in the book market.<sup>8</sup>

**15.** In the context of private goods, there are various reasons for market failure that can justify market intervention such as fixed book prices. In the book market, such a market failure could be caused by information problems.<sup>9</sup> Essential for this are the properties of books as so-called experience goods.<sup>10</sup> Experience goods are

<sup>4</sup> See Riehm, U., Buchhandel, in: Kuhlen, R./Seeger, T./Strauch, D. (Ed.), Grundlagen der praktischen Information und Dokumentation. Band 1: Handbuch zur Einführung in die Informationswissenschaft and -praxis, München 2004, p. 527.

<sup>5</sup> See Rürup, B., Die Buchpreisbindung im Lichte der ökonomischen Analyse, in: Börsenverein des Deutschen Buchhandels (Ed.), Die Buchpreisbindung aus europarechtlicher, ökonomischer and kulturhistorischer Sicht, Frankfurt am Main 1997, p. 61.

<sup>6</sup> See Wolf-Csanády, E., Kulturgut versus Ware Buch: Die deutsche Buchpreisbindung im Spannungsfeld zwischen Kulturpolitik, Lobbyismus and europäischer Wettbewerbspolitik, in: Czada, R./Lütz, S. (Ed.), Die politische Konstitution von Märkten, Wiesbaden 2000, p. 196.

<sup>7</sup> However, the effectiveness of these tools is limited and there are numerous illegal download portals that offer e-books. On the problem of e-book piracy, see OECD, E-books: Developments and Policy Considerations, OECD Digital Economy Papers No. 208, Paris, 29 October 2011.

<sup>8</sup> See Canoy, M./van Ours, J./van der Ploeg, F., The Economics of Books, CESifo Working Paper No. 1414, 2005, p. 9.

<sup>9</sup> Another reason for a market failure could be the so-called free-rider problem; see paras 164 and 173 ff. in this Special Report. For possible causes of market failure in the book market, see already Monopolies Commission, XIIIth Biennial Report, Wettbewerbspolitik in Netzstrukturen, Baden-Baden 2000, paras 696 ff.

characterized by the fact that the benefit of the goods is only revealed during use – here, by reading. Observable characteristics of a book, such as its equipment<sup>11</sup>, allow only limited conclusions to be drawn about the intellectual content of the work, so that there is necessarily an asymmetry of information between the publisher or bookseller on the one hand and the reader on the other. In the search for their personal preferences and requirements, book buyers sometimes incur considerable transaction costs. As a result, potential readers could completely forgo a purchase or, due to the lack of information, acquire a title that is not suitable for them.<sup>12</sup>

**16.** The book also has a number of other product features that are characteristic of products of creative industries.<sup>13</sup> Book production involves a relatively large block of fixed costs, such as the author's fees, editing, typesetting and marketing, as well as overheads for the technical and personnel infrastructure.<sup>14</sup> The variable costs of production are comparatively low, resulting in a strong reduction in unit costs with growing numbers. This applies all the more to e-books, as the production of a further copy entails (almost) no additional costs. Furthermore, the demand for books is characterized by a high degree of uncertainty. It is usually difficult for the publisher to predict in advance whether a book will meet the reader's taste and what willingness to pay will arise. This results in the possibility that only a few titles from a publisher's program are commercially successful, while the majority of the titles prove to be unprofitable or even loss-making in retrospect.<sup>15</sup>

**17.** Finally, the book is ascribed the status of a merit good.<sup>16</sup> Merit goods are private goods whose demand remains below the level desired by cultural and socio-political decision-makers, which can justify the state's corrective intervention in consumer sovereignty.<sup>17</sup> With regard to the fixed book pricing examined in this report, it is not clear whether it refers to the book as a merit good. However, this is unlikely to have any effect on results.

### 2.1.2 Title diversity and product categorization

**18.** In 2016, more than 85 thousand new titles were published in Germany, of which around 85 per cent were in their first edition (see Figure 2.1). After title production had grown almost continuously until 2007, the number of new titles has recently declined slightly.

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<sup>10</sup> See Riehm, U., *Buchhandel*, supra, p. 527.

<sup>11</sup> The equipment of a book refers to the format, the binding, the material used and the layout.

<sup>12</sup> Regarding information asymmetries between book buyers and sellers/publishers, see also Bielig, A./Knoth, A. F., *Das deutsche Buchpreisbindungsgesetz aus ökonomischer and europarechtlicher Perspektive*, List Forum für Wirtschafts- and Finanzpolitik 30 (2), 2004, pp. 124-125 and Stumpp, H., *Die Preisbindung für Verlagserzeugnisse: Wettbewerbsbeschränkungen oder Regulierung zur Beseitigung von Marktunvollkommenheiten?*, Baden-Baden 1999, pp. 56-57.

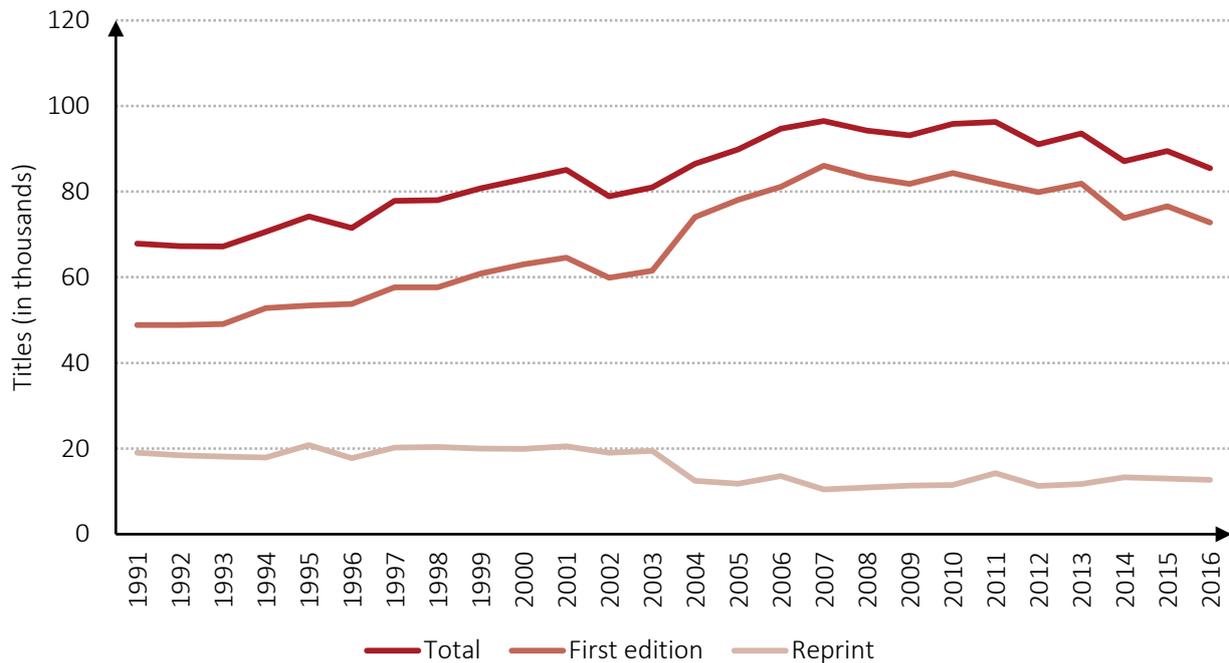
<sup>13</sup> See Caves, R., *Creative Industries: Contracts Between Art and Commerce*, Cambridge Massachusetts 2000 and Canoy, M./van Ours, J./van der Ploeg, F., *The Economics of Books*, supra, pp. 9 ff.

<sup>14</sup> On the cost structure of publishers, see Canoy, M./van Ours, J./van der Ploeg, F., *The Economics of Books*, supra, pp. 19 ff and Homburg, C., *Betriebswirtschaftliche Auswirkungen möglicher Veränderungen der Honorarsituation in Verlagen als Folge der Urheberrechtsnovellierung*, Gutachten im Auftrag des Börsenvereins des Deutschen Buchhandels, Mannheim, 15 October 2003, pp. 20 ff.

<sup>15</sup> See Homburg, C., *Betriebswirtschaftliche Auswirkungen möglicher Veränderungen der Honorarsituation in Verlagen als Folge der Urheberrechtsnovellierung*, supra, pp. 16 ff.

<sup>16</sup> See also Stumpp, H., *Die Preisbindung für Verlagserzeugnisse: Wettbewerbsbeschränkungen oder Regulierung zur Beseitigung von Marktunvollkommenheiten?*, supra, pp. 58 ff.

<sup>17</sup> See already Monopolies Commission, XIIIth Biennial Report, supra, para. 741.

**Figure 2.1: Title production in Germany 1991–2016**

Sources: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen, Frankfurt am Main (various editions); own illustration

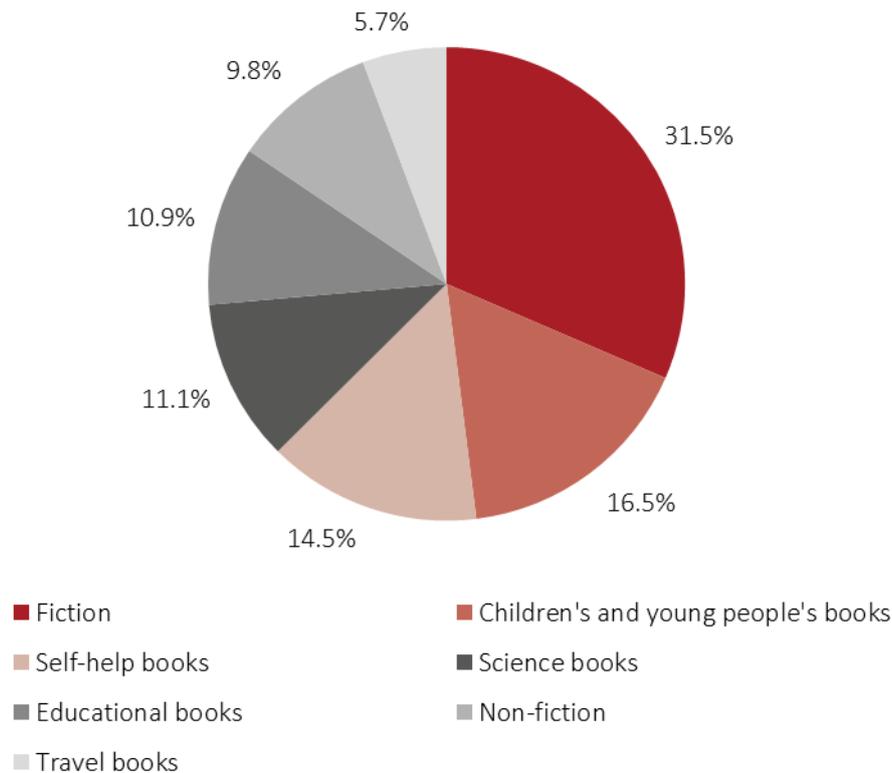
**19.** While the product characteristics described in Section 2.1.1 apply to a varying extent to a large number of books, there is a high degree of product heterogeneity due to the large variety of titles. For this reason, a comprehensive classification is neither useful nor possible. Nevertheless, a classification should be made on the basis of important characteristics that are relevant for the analysis of fixed book prices.<sup>18</sup>

**20.** Books can initially be assigned to different product categories. The most important product category, measured in terms of the share of sales in the book trade, is fiction, followed by children's and young people's books and self-help books (see Figure 2.2).

**21.** Furthermore, a distinction must be made between frontlist and backlist titles. Frontlist titles are all new releases of the current season. The backlist, on the other hand, includes all titles already published that are no longer frontlist but are still available and in demand. Bestsellers, steady- or longsellers and titles to be procured must also be distinguished. A bestseller is characterized by great popularity and a high sales volume. A steady- or longseller is a title that is in constant demand over a longer period. Books to be procured are titles that are no longer available in bookshops but can still be ordered. Available titles that are not frontlist or common backlist titles are also referred to as the "long tail". Titles that are produced in a so-called print-on-demand process are also gaining in importance, i.e., they are only printed as soon as the end-customer places an individual order for the title (print to order) or if a bookseller orders a small number of copies (print to stock).<sup>19</sup>

<sup>18</sup> See also Rürup, B./Kloppfleisch, R./Stumpp, H., *Ökonomische Analyse der Buchpreisbindung*, Frankfurt am Main 1997, section 3.1.2.

<sup>19</sup> See Bez, T., *ABC des Zwischenbuchhandels*, 8th Ed., Frankfurt am Main 2017, p. 39.

**Figure 2.2: Revenue share by category 2016**

Source: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen 2017, Frankfurt am Main 2017, p. 15; own illustration

**22.** Furthermore, there are different types of edition. In addition to hardbacks and paperbacks, e-books have gained in importance in recent years. File format and Digital Rights Management (DRM) are important features of e-books.<sup>20</sup> Portable Document Format (PDF), originally the most widely used format for digital books, has now largely been superseded by the Electronic Publication Format (EPUB). Amazon, however, has set its own standard with the AZW format. Amazon – like Apple with its iBook – is also taking a special approach to digital rights management, which is intended to provide protection against unauthorized distribution and use. While most e-book providers, e.g., the members of the *tolino* alliance, offer an open system, Amazon and Apple rely on proprietary systems. With an open system, the e-books purchased can be displayed on any technically suitable reading devices. In contrast, many e-books purchased through Amazon's Kindle system can only be opened on Kindle readers or via the Kindle application.<sup>21</sup>

**23.** In principle, books also differ with regard to their need for explanation. For well-known titles and bestsellers, often no advice from the bookseller is required. The same also applies to a certain extent to non-fiction books and self-help books that are self-explanatory or for which the necessary information can be taken from the cover text or a reading sample. Less well-known titles, e.g., in fiction or literature on complex topics and specialist literature, on the other hand, often require explanations and qualified advice – e.g., from the bookseller – or detailed background information. However, the degree to which a title needs to be explained does not depend exclusively on the book itself, but also varies between different book buyers.

<sup>20</sup> See OECD, *E-books: Developments and Policy Considerations*, supra, pp. 14 ff.

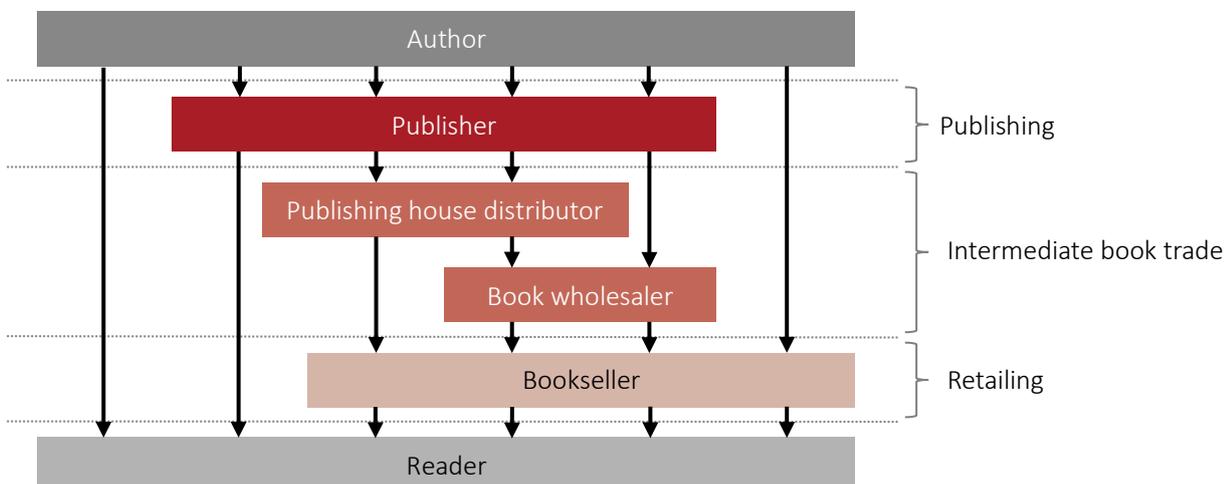
<sup>21</sup> In principle, the publisher is free to decide whether to provide copy protection for an e-book distributed via Amazon. However, if the publisher decides to do so, it only has the copy protection of Amazon at its disposal, which does not permit use outside the Kindle system; see Haupt, J., *DRM: Nirgends so viele Bestseller kopierschutzfrei wie bei Amazon*, lesen.net, 8 April 2016.

**24.** Finally, there are also differences in the substitutability of a title. Textbooks, specialist literature and, to a certain extent, bestsellers by well-known authors or titles from a series cannot be replaced by alternatives, or only to a limited extent. On the other hand, large parts of light fiction, but also self-help books, non-fiction and travel literature, are likely to be largely substitutable for comparable titles.

## 2.2 The structure of the book trade

**25.** An author's work usually reaches the reader through the book market. The book market comprises the entire distribution chain from the production by the publisher, via the intermediate book trade to the booksellers. The steps in the distribution chain from author to reader are shown schematically in Figure 2.3. It illustrates the complexity of the book market: depending on the distribution channel, a book passes through up to four stages on its way from author to reader. Although the e-book differs from printed books in many respects due to its product specifics, in principle the same distribution channels exist.

**Figure 2.3: Structure of the book market**



Source: Riehm, U., Buchhandel, supra, p. 528; own illustration

**26.** After a few remarks about the author (Section 2.2.1), the following provides an overview of the functions of distribution chain from the publisher (Section 2.2.2) via the intermediate book trade (Section 2.2.3) to the bookseller (Section 2.2.4). Special attention is also paid to their role in the distribution of e-books. Due to the great importance for the analysis of fixed book prices, the competitive factors of brick-and-mortar booksellers and online bookshops are discussed and the special role of the American Internet seller Amazon for the German book market is highlighted. Finally, consumer groups are characterized (Section 2.2.5).

### 2.2.1 The author: creator of books and starting point of the book market

**27.** The starting point of the value chain is the author of a manuscript. There are basically two ways to publish and distribute his work as a book or e-book: Traditionally, the author concludes a contract with a publisher in which he leaves the publication and distribution to the publisher. In return, the author receives a fee. The most important legal basis for the relationship between author and publisher is the publishing law; supplementary provisions can be found in the copyright law. However, the Book Pricing Act does not contain any regulations that directly affect the author or his relationship with the publisher.

**28.** As a rule, the authors' negotiating power vis-à-vis the publisher should be limited. This applies in particular to unknown authors and authors of niche titles. Exceptions should only exist for bestselling authors. The relatively weak negotiating position is also reflected in relatively low fees, which for the majority of authors do not represent

a full income.<sup>22</sup> Around 70 per cent of authors earn less than 10 per cent of the net sales price of their printed books.<sup>23</sup> For just under 30 per cent, the fee is 5 per cent or less.

**29.** Alternatively, the author may publish his work on this own, i.e., without recourse to the services of classical publishers. This second option currently plays a subordinate role but is becoming increasingly important as digitalization progresses. The share of sales of so-called “self-publishers” in the German e-book market is estimated at 10 to 15 per cent.<sup>24</sup> Depending on the distribution platform through which self-publishers distribute their work and the amount of the retail price, the commission for self-publishers can amount to up to 70 per cent of the net sales price.<sup>25</sup>

**30.** When publishing their own books, authors can use so-called self-publishing platforms, which support self-publication with various services and assume some of the functions of classic publishing houses, such as editing. An important platform is Kindle direct publishing by Amazon, through which authors can distribute their works both as printed and e-books. There are a number of competing offers for e-books such as tolino media. Authors of e-books can interpose so-called distributors, who distribute the e-book to the various e-book platforms and pay the fees.<sup>26</sup> The distribution of printed books published by the publisher itself is often handled by so-called print-on-demand providers, who only print the copy once it has been ordered in the shops.<sup>27</sup>

**31.** To what extent self-publishers can or must set a binding selling price for their work is still an open question. This presupposes that self-publishers carry out a publishing activity in the sense of § 5 BuchPrG, which is to be determined in the respective individual case.<sup>28</sup>

### 2.2.2 The publisher as duplicator and distributor

**32.** The task of the publisher is to reproduce and distribute the work. The publishing house performs a number of functions, such as editing, production, marketing and sales. Some publishers provide authors with advice during the writing process and grant financial support in the form of advances. By including authors and their works in its publishing programme, the publisher fulfils an important selection function. Pursuant to the provisions of § 5 para. 1 BuchPrG, the publisher is also obliged to set the retail price for a title as binding for all distribution channels. It thus has a task that is traditionally that of the retailer. In addition, § 6 BuchPrG contains provisions on sales conditions between publishers, the intermediate book trade and the bookseller.<sup>29</sup>

**33.** Germany has a diverse publishing landscape with around 3,000 publishers.<sup>30</sup> According to the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels), this figure has remained stable

<sup>22</sup> See Weingartner, M., Zur Not einen Porno schreiben, FAZ online, 22 October 2016.

<sup>23</sup> See Verband Deutscher Schriftsteller (VS), Interessengemeinschaft österreichischer Autorinnen and Autoren and Autorinnen and Autoren der Schweiz (AdS), Jeder dritte Autor ist unzufrieden mit seinem Verlag – 1200 Autorinnen and Autoren aus Deutschland, Österreich and der Schweiz sagen ihre Meinung, Zürich, 22 April 2013, p. 6.

<sup>24</sup> See Matting, M., Schätzung: Wie groß der Marktanteil von Selbstpublishing-Titeln in Deutschland ist, publisherbibel.de, 15 June 2015.

<sup>25</sup> See Matting, M., Self-Publishing 2017: Goldene Zeiten für Autoren, <https://upload-magazin.de/blog/19349-self-publishing-2017/>, accessed: 14 May 2018.

<sup>26</sup> See Matting, M., Wer verteilt mein E-Book? Die wichtigsten Selfpublishing-Anbieter im Vergleich, selfpublisherbibel.de, 5 March 2013.

<sup>27</sup> See Matting, M., Wie ihr Buch seine Leser findet: Selfpublishing-Dienstleister im Vergleich, selfpublisherbibel.de, 23 April 2014.

<sup>28</sup> See Matting, M., Autoren-Tipp: Was das Preisbindungsgesetz verbietet - and was nicht, selfpublisherbibel.de, 22 June 2017 (there, however, without any distinction).

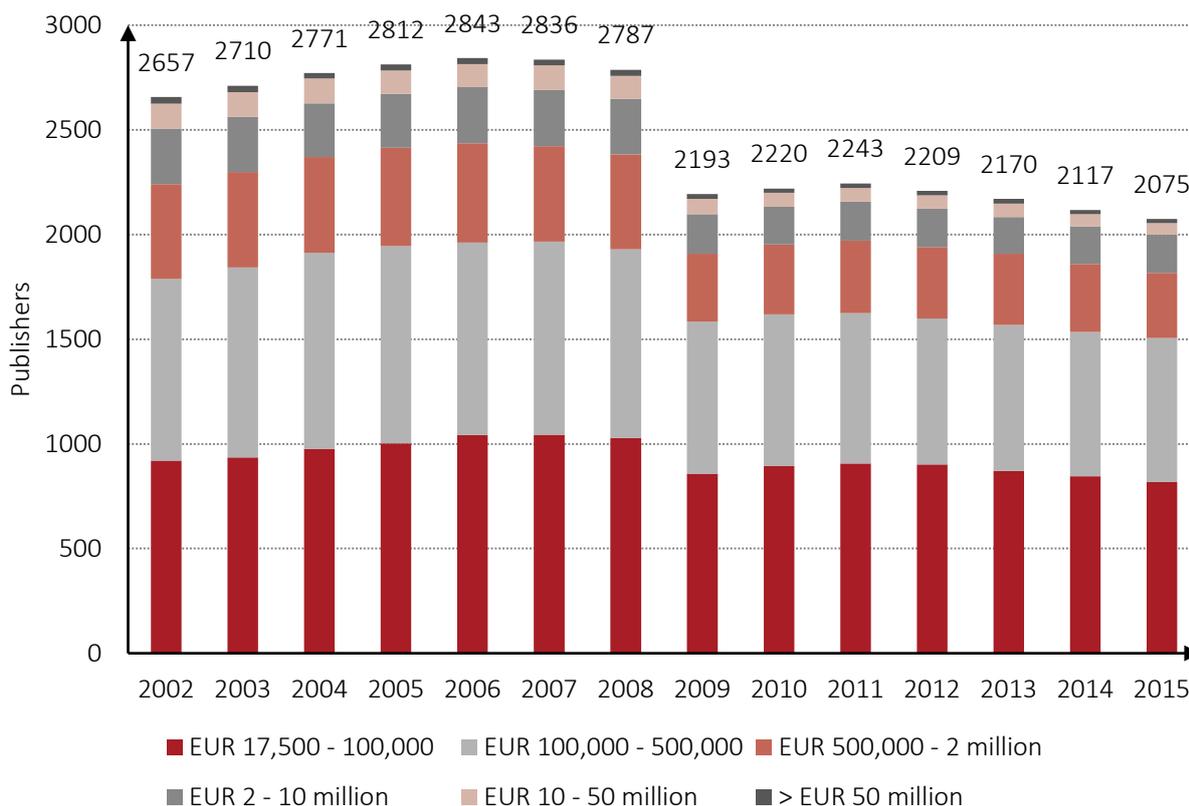
<sup>29</sup> See paras 152 ff. in this Special Report.

<sup>30</sup> See Börsenverein des Deutschen Buchhandels, Verlage in Deutschland 2016, Mediendossier, Frankfurt am Main, 19 September 2017, p. 1.

over the past ten years. The data of taxable publishers from the VAT statistics of the Federal Statistical Office provide similar evidence (see Figure 2.4).<sup>31</sup> The apparent break between 2008 and 2009 is due to a change in the survey methodology in 2009. The number of publishers increased slightly before 2009. Looking at the data from 2009 to 2014, there has recently been a slight decline.

**34.** The largest group in the publishing industry are small publishers with annual revenues of less than EUR 100,000 (846), followed by publishers with revenues between EUR 100,000 and EUR 200,000 (688). Twenty of the major publishers realise an annual sales volume of over EUR 50 million.

**Figure 2.4: Publishers by revenue class 2002–2014**

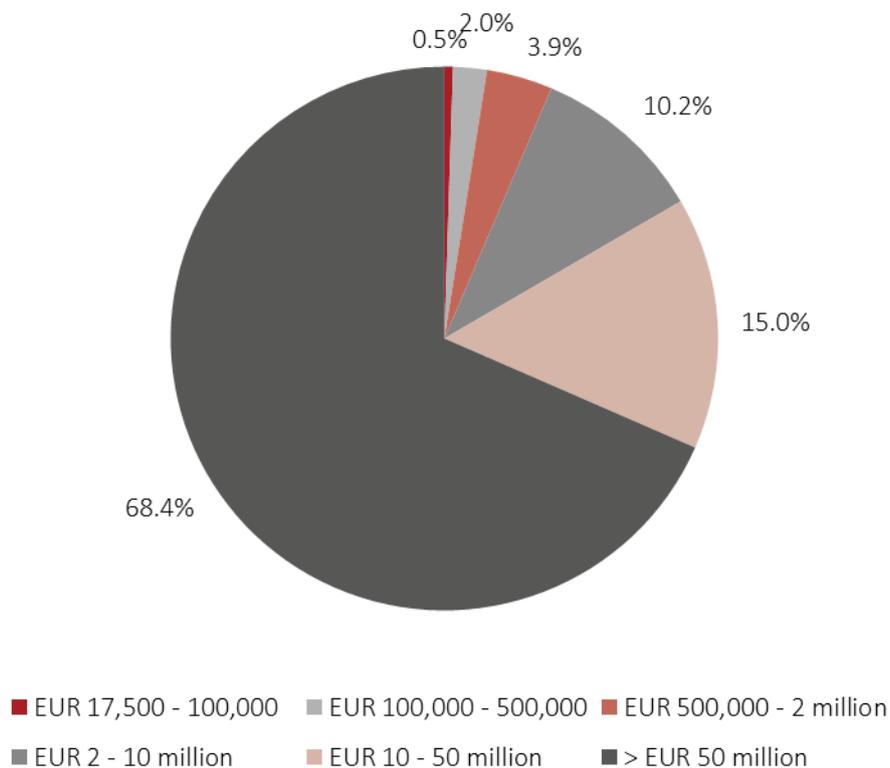


Note: The break between 2008 and 2009 is due to a change in the classification of economic activities.

Sources: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen, Frankfurt am Main (various editions); own illustration

**35.** If one breaks down the share of sales of publishers according to revenue classes, a concentration of sales on the largest publishing houses is evident despite the large number of publishers. The 20 top-selling publishers, with annual sales of over EUR 50 million, account for almost 70 per cent of the market. By contrast, the share of total sales accounted for by the many small publishing houses is small (see Figure 2.5).

<sup>31</sup> The difference between the figures quoted by the German Publishers and Booksellers Association and the revenue tax statistics can therefore be explained by the fact that only publishers with a minimum turnover of EUR 17,500 are shown in the turnover tax statistics and secondly that mailing list publishers are recorded separately from 2009.

**Figure 2.5: Publishers' revenue shares by revenue class 2015**

Source: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen 2017, supra, S 53; own illustration

**36.** The proportion of publishers who also publish e-books has risen to over two thirds.<sup>32</sup> However, there is still a clear discrepancy between large publishing houses, which all carry e-books in their range, and small publishing houses, of which only 57 per cent publish e-books. Even though there are no reliable figures on how many books are now also published as e-books, these figures point to an increasing share.

**37.** The online bookseller Amazon has developed its own publishing service Amazon Publishing. In contrast to the program of traditional publishers, the works published by Amazon Publishing have so far been distributed exclusively by Amazon and could not be obtained through other online retailers or the brick-and-mortar booksellers. Since Amazon entered into a cooperation with the book wholesaler Koch, Neff and Volckmar (KNV) in November 2017, the titles published by Amazon Publishing can also be purchased as printed books from other online retailers and brick-and-mortar booksellers.<sup>33</sup>

### 2.2.3 The intermediate book trade: more than just a logistics service provider

**38.** As a logistics service provider, the intermediate book trade has an intermediary and bundling function between the publisher and the bookseller. Within the intermediate book trade, a fundamental distinction must be made between the publishing house distributors (Verlagsauslieferung) and book wholesalers (Barsortiment).<sup>34</sup>

<sup>32</sup> See Börsenverein des Deutschen Buchhandels, Verankert im Markt – Das E-Book in Deutschland 2013, Kurzfassung, Frankfurt am Main, 3 June 2014, p. 10.

<sup>33</sup> See N. N., KNV beliefert stationären Buchhandel mit Titeln von Amazon Publishing, boersenblatt.net, 28 November 2017.

<sup>34</sup> On the organisation of the intermediate book trade and the difference between publishing house distributors and book wholesalers see also FCO, decision of 29 March 2012, B6-84/11, paras 24 ff.

**39.** Publishing house distributors are publisher-owned or external service providers which take over the storage of the goods, the acceptance of orders, the dispatch and the processing of returns for the publisher.<sup>35</sup> Their services are supplemented in part by financial services such as factoring. As a rule, publishing house distributors manage the entire publishing list of the partner publishers. In principle, publishing house distributors act in the name and for the account of the publisher. There is no contractual relationship with the bookseller. Around 50 publishing house distributors operate in Germany, including some with thematic specializations.<sup>36</sup> 60 per cent of a publisher's sales are distributed by publishing house distributors, the remaining 40 per cent by the publisher itself.<sup>37</sup> By far the largest publishing house distributors are Koch, Neff & Oetinger (KNO) – a sister company of the book wholesaler KNV – and Vereinigte Verlagsauslieferung (VVA), which together deliver more than half of all books distributed by publishing house distributors.<sup>38</sup>

**40.** Book wholesalers, on the other hand, buy the goods from the publishers and supply booksellers from their own stocks.<sup>39</sup> They operate under their own names and for their own account. Booksellers' orders are commissioned overnight and usually delivered to bookstores in the morning. In Germany, Libri, KNV and Umbreit are three general book wholesalers<sup>40</sup> with a broad stock of up to one million titles.<sup>41</sup> This means that book wholesalers cover a large proportion of German-language book production and satisfy on average between 90 and 98 per cent of the needs of bookstores. In addition to books, the book wholesalers also sell by-products. In addition, there is a range of specialist book wholesalers, which are characterized by an extensive stock in selected specialist areas.<sup>42</sup> Book wholesalers obtain books directly from the publisher or via publishing house distributors. Book wholesalers' share, measured in terms of publishers' sales, is around 23 per cent.<sup>43</sup>

**41.** From an entrepreneurial point of view, however, the separation between publishing house distributors and book wholesalers is not strict; as some cooperations exist, the services provided are closely linked or both belong to the same company, as in the case of KNV and KNO. From the point of view of the bookseller, however, they fulfil fundamentally different tasks and are functionally only conditionally interchangeable.<sup>44</sup> Tasks that are not time-sensitive, such as the procurement of new publications and stock maintenance, are primarily handled via publishing house distributors. Customer orders or short-term stock supplements are placed via the book wholesalers, which act as a background storage for booksellers. The most important service of book wholesalers is the overnight delivery of orders in bundled form.

**42.** There are also significant differences between the two forms of the intermediate book trade regarding the discounts they grant booksellers. The discount on the retail price is up to 50 per cent for purchases via the publishing house distributor (or for direct purchases from the publisher). Book wholesalers grant booksellers a lower discount, which on average is between 28 and 35 per cent.<sup>45</sup> The conditions are subject to the general

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<sup>35</sup> See Bez, T., ABC des Zwischenbuchhandels, *supra*, pp. 48-49.

<sup>36</sup> See *ibid.*, p. 50.

<sup>37</sup> See FCO, decision of 29 March 2012, B6-84/11, para. 25.

<sup>38</sup> See *ibid.*, para. 31.

<sup>39</sup> See *ibid.*, paras 32 ff. and Bez, T., ABC des Zwischenbuchhandels, *supra*, pp. 9-10.

<sup>40</sup> A wide storage contains a limited number of copies of many different titles, see Bez, T., ABC des Zwischenbuchhandels, *supra*, p. 31.

<sup>41</sup> See *ibid.*, p. 9.

<sup>42</sup> A wide storage focuses on specific assortments and product groups with large number of copies per title, see *supra*, p. 31.

<sup>43</sup> See *ibid.*, p. 9.

<sup>44</sup> See FCO, decision of 29. March 2012, B6-84/11, paras 43 ff.

<sup>45</sup> See *ibid.*, paras 30 and 33.

freedom of contract; however, the publisher may not supply the intermediate book trade at higher prices or worse conditions than booksellers (see § 6 para. 3 BuchPrG).<sup>46</sup>

**43.** 33 per cent of procurement is via book wholesalers, i.e. the majority of the books are purchased directly from the publisher or via publishing house distributors.<sup>47</sup> The share of books purchased via book wholesalers decreases with the size of the bookseller. While booksellers with annual sales of up to EUR 250,000 procure 37 per cent in this way, book wholesalers account for only 28 per cent of procurement from large booksellers with sales of more than EUR 5 million. However, book wholesalers are also of great importance for larger booksellers, such as chain stores and groups of affiliated bookstores, as some of them outsource the central goods receipt and administration of the central warehouse to book wholesalers.

**44.** As a result of the relocation of the book trade to the Internet, new business areas have emerged in the distribution of printed books for the intermediate book trade.<sup>48</sup> In many cases, large online retailers do not operate their own central warehouse, but instead use book wholesalers that receive, process and send the orders to the customer (so-called fulfilment).<sup>49</sup> Amazon, on the other hand, operates its own central warehouses in Germany, Poland and the Czech Republic.<sup>50</sup> Nevertheless, Amazon also purchases “long tail” titles in particular from book wholesalers.<sup>51</sup> Furthermore, book wholesalers also offer the brick-and-mortar bookstores different business models in order to enable them to participate in online bookselling: Using so-called white label shop solutions, booksellers design their own, individual website, which is managed by a book wholesaler as a full-service provider.<sup>52</sup>

**45.** On the other hand, digital book wholesalers (digitales Barsortiment) and digital publishing house distributors (digitale Verlagsauslieferung) also play an important role in the distribution of e-books.<sup>53</sup> Digital publishing house distributors take over the digitization, data storage and transmission, whereby the delivery can be made directly to the end-customer or to so-called aggregators<sup>54</sup>, wholesalers and retailers. Digital book wholesalers offer both online retailers and brick-and-mortar booksellers a variety of options to enable them to participate in the e-books market, for example through individualized web shops or web terminals in the bookshop. The companies active in the digital intermediate book trade are often the same companies as in the traditional intermediate book trade or are their cooperation partners.<sup>55</sup>

**46.** A special form of the intermediate book trade are so-called rack jobbers, which manage the book assortment for department stores and supermarkets.<sup>56</sup> The rack-jobber equips the available retail space with titles selected by him. In many cases, rack-jobbers rent shelf space which they manage at their own risk but not for their own

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<sup>46</sup> See para 152 in this Special Report.

<sup>47</sup> The results of the Kölner Betriebsvergleich 2016 quoted here are taken from Schulte, C., Überwiegend grüne Zahlen, boersenblatt.net, 14 September 2017.

<sup>48</sup> A systematic presentation of different cooperation models between booksellers and booksellers in the area of Internet retailing can therefore be found at Riehm, U./Orwat, C./Wingert, B., Online-Buchhandel in Deutschland - Die Buchhandelsbranche vor der Herausforderung des Internet, Karlsruhe 2001, section 4.3.2.

<sup>49</sup> See Börsenverein des Deutschen Buchhandels, ABC des Zwischenbuchhandels, supra, pp. 27-28.

<sup>50</sup> See *ibid.*, p. 53.

<sup>51</sup> See *ibid.*, p. 10.

<sup>52</sup> See *ibid.*, p. 52.

<sup>53</sup> See *ibid.*, p. 17.

<sup>54</sup> Aggregators carry out the technical delivery to numerous retailers with whom they have a contract and offer sales, marketing, manufacturing and consulting services, see *ibid.* p. 6.

<sup>55</sup> See *ibid.*, p. 17.

<sup>56</sup> See *ibid.*, pp. 37-38.

account. The largest company active in this field, Buchpartner AG, has been part of the book wholesaler KNV since 2011.<sup>57</sup>

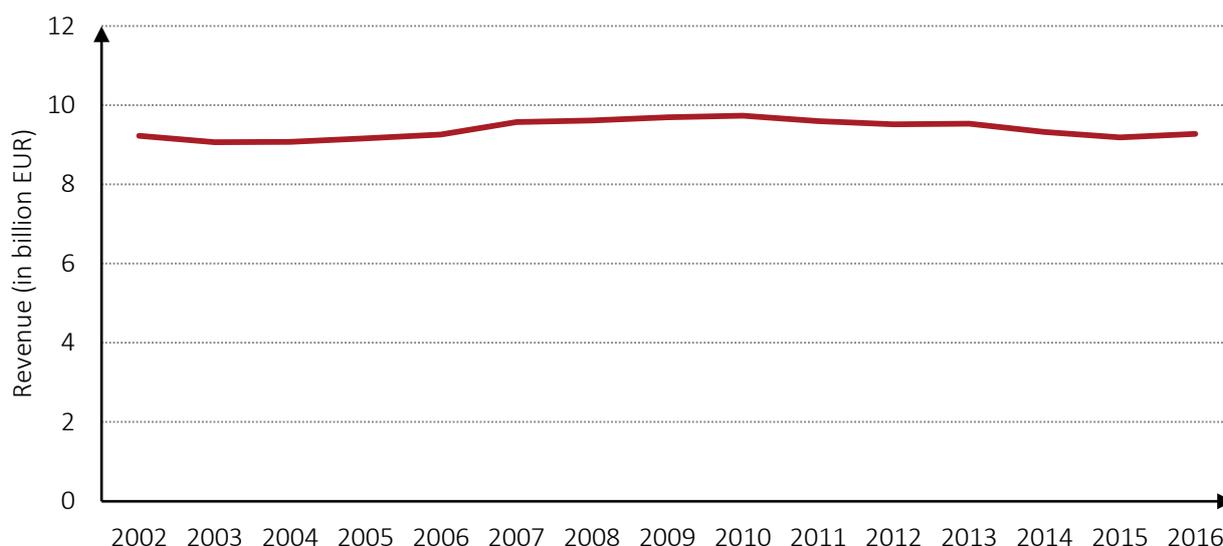
#### 2.2.4 Book retailing: hinge between publishers and readers

**47.** The bookseller fulfils the traditional retailing functions for the sale of books, with the exception of the determination of the retail price, which is the responsibility of the publisher or importer pursuant to § 5(1) BuchPrG. An important function of the bookseller lies in aggregation and selection: it bundles the comprehensive range of titles offered by the various publishing houses and the demand of book buyers and selects titles for its own assortment.

**48.** In addition to brick-and-mortar bookstores, books are sold in a variety of other retail formats, such as mail order and online bookstores, railway station bookstores and department stores with a book department. Other sales channels for books are direct distribution by publishers, sales through book clubs, which have little relevance today, and sales at other non-specialist shops (e.g., petrol stations, garden centres).

**49.** Total sales of all books amounted to around EUR 9 billion in 2016. Following a recent slight downward trend, sales shows a slight increase in 2016 (see Figure 2.6).

**Figure 2.6: Revenue at retail prices 2002–2016**



Source: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen, Frankfurt am Main (various editions); own illustration

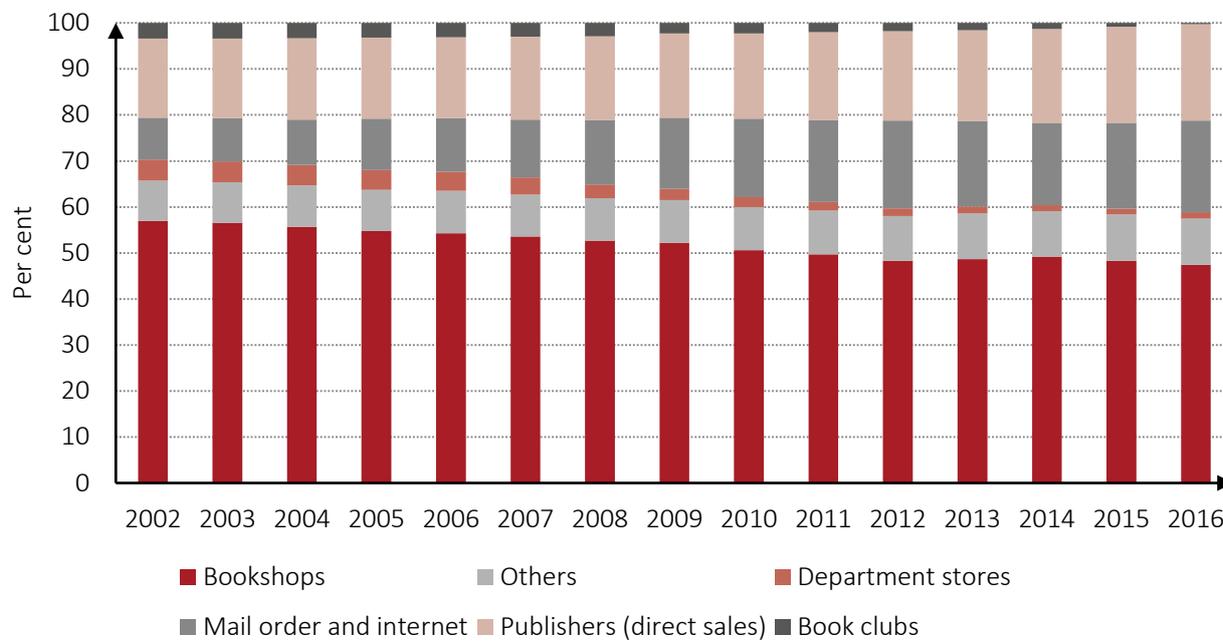
**50.** By far the most important sales channel for books are brick-and-mortar bookshops (see Figure 2.7). Over time, however, their market share has declined noticeably. While in 2002 it was 57 per cent, it was down to only around 47 per cent in 2016. In the same period, the mail order business share more than doubled from 9.1 per cent to 19.9 per cent. The mail order business comprises the traditional mail order business and the online business. While the traditional mail order business is showing a negative development and currently only has a market share of 1.7 per cent, Internet sales have experienced strong growth over the last few years and reached a market share of 18.2 per cent. The American Internet retailer Amazon plays a prominent role among Internet booksellers.<sup>58</sup> Its

<sup>57</sup> Gellert, D., KNV übernimmt Mehrheit beim Darmstädter Rackjobber Buchpartner AG, buchmarkt.de, 20 December 2010.

<sup>58</sup> See section 2.2.4.3 in this Special Report.

share of Internet book trade in Germany is estimated at around 80 per cent for 2013.<sup>59</sup> Direct sales by the publisher are also growing steadily. With a sales share of 20.9 per cent, it is the second most important sales channel after brick-and-mortar bookshops. Department stores and book clubs, however, have lost much of their significance and no longer are a relevant sales channels.

**Figure 2.7: Revenue shares by retail type 2002–2016**



Sources: Börsenverein des Deutschen Buchhandels, *Buch und Buchhandel in Zahlen*, Frankfurt am Main (various editions); own illustration

**51.** According to the German Publishers and Booksellers Association, there were around 6,000 booksellers in Germany in 2016, including around 4,700 traditional bookstores.<sup>60</sup> These are divided into 3,500 independent and 1,200 chain stores. The number of shops where books are not the core assortment, such as petrol stations or grocery retailers, is estimated at 1,200.

**52.** The development of the book retailing landscape over time can be traced by the number of taxable sellers. In the period from 2009 to 2014, the number of booksellers in Germany decreased by almost 12 per cent from just under 4,300 to 3,800 (see Figure 2.8). The decline was most pronounced among the smallest booksellers with annual sales of up to EUR 100,000 and in the revenue class between EUR 1 million and EUR 5 million.

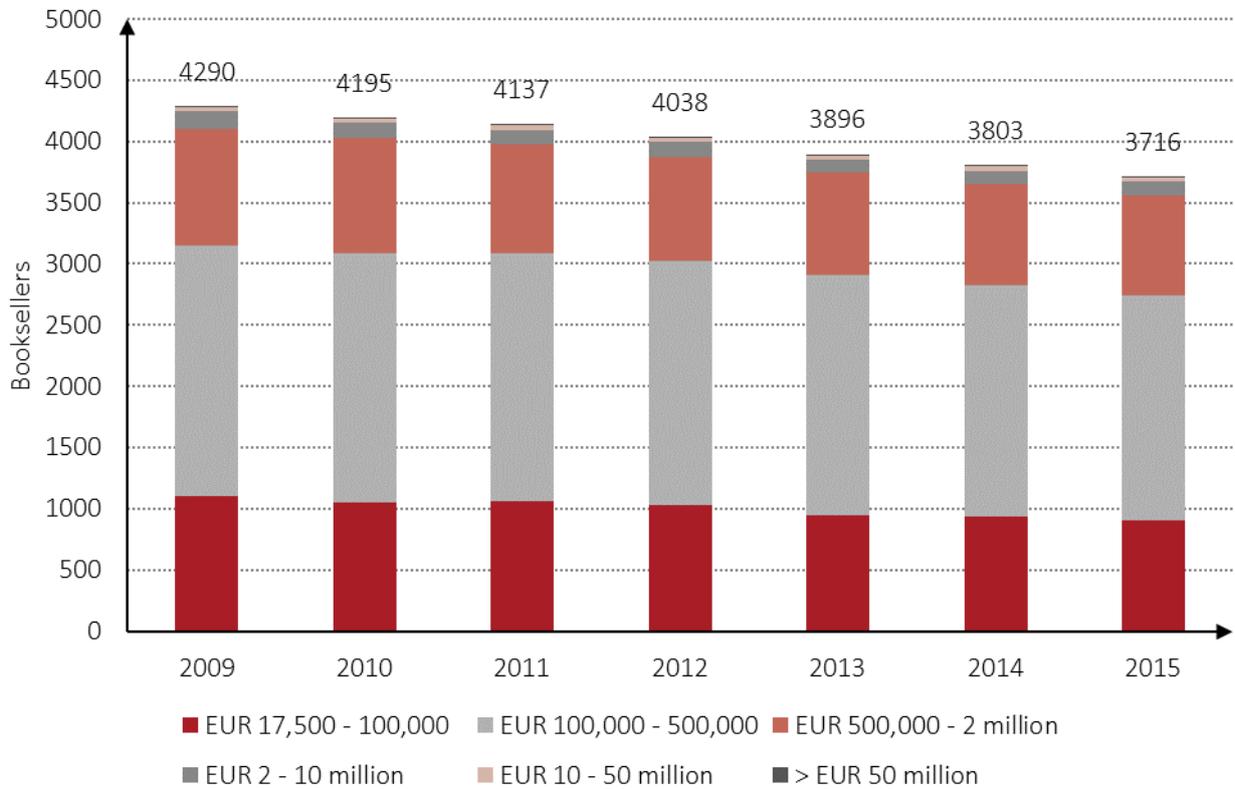
**53.** At 40.2 per cent, by far the largest share of sales of brick-and-mortar booksellers is generated by the few large book chain stores with annual sales of more than EUR 50 million (see Figure 2.9). By contrast, smaller bookstores with annual sales of up to EUR 500,000, which make up the vast majority of the bookstores operating in Germany, only generate just under 14 per cent of total sales. The largest booksellers which accounted for 28 per cent of sales in 2009 have grown steadily over the past few years and last skyrocketed in 2015.<sup>61</sup> By contrast, the opposite trend is evident in almost all other revenue classes.

<sup>59</sup> See Roesler-Graiche, M., *Wie stark ist Amazon wirklich?*, boersenblatt.net, 23 May 2014.

<sup>60</sup> See Börsenverein des deutschen Buchhandels, *Stationärer Buchhandel in Deutschland 2016*, Mediendossier, Frankfurt, 18 September 2017, p. 1.

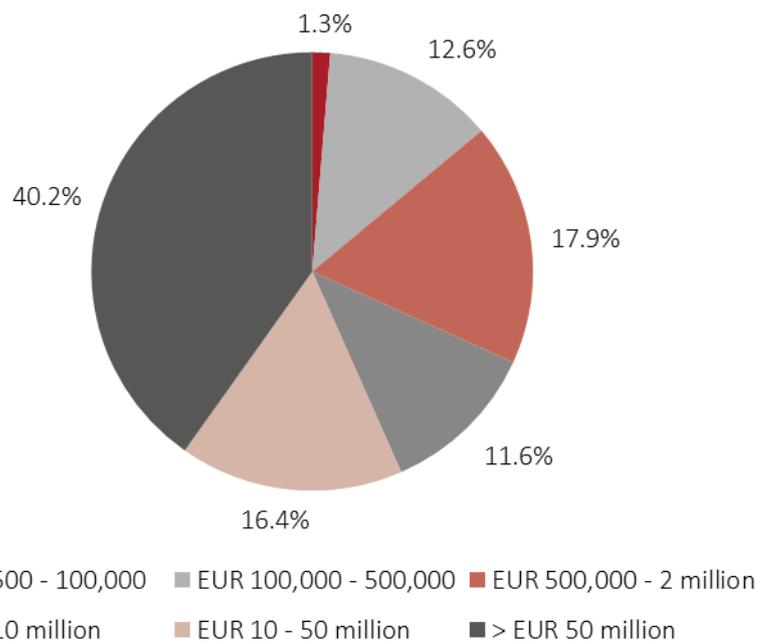
<sup>61</sup> See Börsenverein des Deutschen Buchhandels, *Buch und Buchhandel in Zahlen 2017*, supra, p. 60 and Börsenverein des Deutschen Buchhandels, *Buch und Buchhandel in Zahlen 2013*, Frankfurt am Main 2013, p. 56.

**Figure 2.8: Booksellers by revenue class 2009–2015**



Sources: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen, Frankfurt am Main (various editions); own illustration

**Figure 2.9: Taxable revenue at retail level by revenue class 2015**

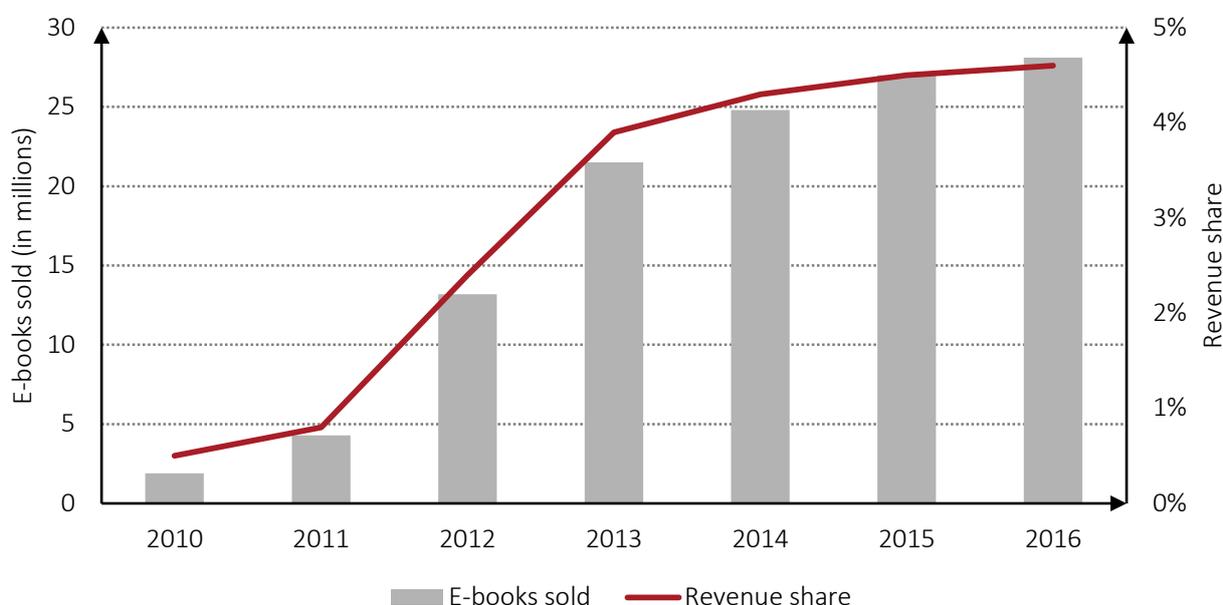


Source: Börsenverein des Deutschen Buchhandels, Buch und Buchhandel in Zahlen 2017, supra, p. 60; own illustration

**54.** The sale of e-books continues to be of secondary importance. After initially high growth rates, the number of copies sold has grown only slowly in recent years and amounted to 28.1 million in 2016 (see Figure 2.10). After a rapid increase between 2010 and 2012, the development slowed down considerably and the share of sales in the public market grew by only 0.1 percentage point to around 4.6 per cent in 2016.

**55.** Amazon is the market leader in this segment with its Kindle system, which was introduced in Germany in 2009 and comprises both the hardware (Kindle reader) and the e-books themselves. Almost every second e-book is sold via Amazon's platform.<sup>62</sup> The leading German booksellers (initially in cooperation with Deutsche Telekom, now with Rakuten Deutschland, the German subsidiary of the Japanese online retailer Rakuten) have gained a market share of 30 to 40 per cent with the tolino alliance formed in 2013, which developed the technical hardware (tolino reader) and created an e-book sales platform.<sup>63</sup> In the meantime, 1,500 independent booksellers are also affiliated to the tolino alliance. Alternative e-book offerings such as Apple's iBook Store or Google's Play Store have low market shares. In addition, the discounter Aldi operates its own e-book store with over one million German and foreign titles since October 2016.<sup>64</sup>

**Figure 2.10: E-book sales and revenue shares 2010–2016**



Source: Börsenverein des Deutschen Buchhandels, *Buch und Buchhandel in Zahlen 2017*, supra, p. 25 u. 27; own illustration

#### 2.2.4.1 Competitive factors in the brick-and-mortar book trade

**56.** The bookseller selects titles from the diverse range of publishing houses according to the needs of its customers.<sup>65</sup> Depending on the sales concept, the range of products available in the bookshop differs considerably. It ranges from a few hundred titles in small bookstores to over 100,000 titles in so-called book superstores with a sales area of several thousand square metres. In addition, there are specialist bookstores offering a wide range in selected areas.<sup>66</sup> Further distinguishing features of the brick-and-mortar book shops are

<sup>62</sup> See FCO, press release of 20 January 2017.

<sup>63</sup> See *ibid.* and Börsenverein des Deutschen Buchhandels, *Stationärer Buchhandel in Deutschland 2016*, supra, p. 3.

<sup>64</sup> See Haupt, J., *Aldi life: eBooks of Discounter*, lesen.net, 10 October 2016.

<sup>65</sup> A wide assortment includes many titles from a variety of different product groups.

<sup>66</sup> An extensive assortment includes many comparable titles of a special field.

the location and accessibility, the ambience, the opening hours, the scope of the bookseller's service as well as the range of non-book articles, reading and sitting areas and gastronomic services.

**57.** By designing the displays in the shop and sorting them according to subject areas, the booksellers presents different titles on one subject. The customer thus has the opportunity to browse through the book offers, browse through books and experience their feel. In addition to the pure presentation of the titles, another function of the brick-and-mortar book shop is the qualified and personal advice by specialist staff. Titles not in stock at the bookshop can be ordered, usually for the following day.

**58.** The brick-and-mortar book trade thus pursues a business model in which not only the demand for titles already known to the reader is met; it also aims to create demand for titles unknown to the reader by maintaining and presenting a certain variety of titles, coupled with expert advice ("supply-oriented business model"). As a result, publishers, especially those of less well-known titles, benefit from the willingness of booksellers to stock their book and to give specialist advice.<sup>67</sup> At the same time, the booksellers transmit information on customer preferences and sales figures to publishers.

**59.** Bookstores play a certain role in spontaneous purchases, whereby two types are to be distinguished.<sup>68</sup> Firstly, there are purchases that are only made because a customer is spontaneously encouraged to buy through a shop window display without having any prior intention to buy (outlet effect). Secondly, spontaneous purchases are made when the customer enters a bookstore with a firm intention to buy and comes across interesting (additional) titles while browsing, which are then acquired. These purchases are made, in the first case, due to the availability of a bookstore or, in the second case, due to the book range held and presented in the bookstore and would otherwise not have been made.

**60.** Brick-and-mortar booksellers are not only pure sales outlets for books, but also contribute, in addition to schools and libraries, for example, to the promotion of culture and reading. Examples include authors' readings, signing sessions, theme evenings, reading clubs for children, etc.

#### **2.2.4.2 Competitive factors of Internet booksellers**

**61.** The major online booksellers, and Amazon in particular, have a wide range and depth of products and deliver by post. In addition, there are specialist bookstores on the Internet that offer a wide range of products in a specific area, as well as web shops of brick-and-mortar bookstores. Since small booksellers and specialist bookstores play a subordinate role in e-commerce, the following analysis mainly refers to the large providers.

**62.** Internet bookstore offer a simple search for titles, immediate information on availability, (customer) ratings, simple payment processing, the possibility of changing current orders and the right to return orders. Usually the shipment, as well as the return, is free of shipping costs. In addition, some online booksellers provide reading samples, as well as (professional) reviews or information on authors. In contrast to customers of brick-and-mortar bookshops who value presentation, ambience and advice in the bookshop, online customers benefit from the convenience of being able to order from their computer at home. Independence from the opening hours is also likely to play an important role. There are no additional costs that can arise from the trip to the bookseller when one buys online.

**63.** Although the range of online booksellers is likely to exceed the number of titles in stock at brick-and-mortar bookstores, the business model aims more strongly at making the titles desired by customers available quickly and easily ("demand-driven business model"). Personalized recommendations can also attract the reader's attention to

<sup>67</sup> See May, F. C., *Der gebundene Buchpreis. Eine ökonomische Betrachtung*, Arbeitspapier des Instituts für Rundfunkökonomie, Heft 132, Köln, June 2000, p. 43.

<sup>68</sup> See Hanreich, H. P. u. a., *Buchpreisregelungen in Europa als Mittel der Kulturpolitik Wirksamkeit and wohlfahrtsökonomische Bedeutung*, Studie im Auftrag des Fachverbandes Buch- and Medienwirtschaft der Wirtschaftskammer Österreich, Endbericht, Wien, October 2009, section 8.8.2.

unknown works that fit the customer's buyer profile or are requested by other customers who have shown interest in similar books. However, the automated recommendations of online retailers are likely to be more closely thematically oriented to the preferences expressed by search queries or previous purchases, so that the attention is focused on a more limited radius in terms of content than on the broad range of products presented in bookstores.

**64.** In general, it can be assumed that the infrastructure to be maintained is less costly in online selling than in brick-and-mortar bookstores, which have to finance shop space and sales personnel, for example. Large online retailers (but also large bookstore chains) should also benefit from better purchasing conditions in the form of discounts granted by publishers compared to small and medium-sized brick-and-mortar booksellers. On the one hand, this is likely to be due to cost advantages in the purchase of large quantities and, on the other hand, to the resulting negotiating power as a buyer with high revenue.<sup>69</sup> When selling via the Internet, retailers also have advantages over brick-and-mortar bookstores in terms of the reach of their products and the possibility of addressing customers with them.

**65.** In addition to online retailing of printed books, the sale of e-books is an important business area. The main advantages of e-books are their immediate availability, regardless of location, opening times or shipping times. However, they require a suitable reading device. Although computers, tablets or smartphones are also suitable for this in principle, an e-book reader is necessary for comfortable reading, which, depending on the equipment, can be associated with comparatively high acquisition costs.

**66.** In addition to the selling of e-books, new business models for the distribution of e-books have been established.<sup>70</sup> These include subscription or flat rate models, where users pay a monthly usage fee and then have unlimited access to the titles held by the provider. Here, too, Amazon is the market leader with its Kindle Unlimited, which includes a total of over 1 million German and foreign-language titles.<sup>71</sup> Its direct competitor is the German provider Skoobe, which offers a limited range of around 175,000 mainly German titles.<sup>72</sup> An alternative product is the application readfy, which is financed by advertising and free of charge for the user, offering around 100,000 titles.<sup>73</sup> In October 2017, the founding members of the tolino alliance, Thalia, Weltbild and Hugendubel, announced that they would launch their own curated e-book subscription under the name tolino select, offering 40 new selected titles of various genres per month instead of many titles, from which the subscriber can choose four.<sup>74</sup> The Dutch platform bookchoice, which has also been available in Germany since October 2017, pursues a similar concept.<sup>75</sup>

### 2.2.4.3 Amazon's special role in the online book market

**67.** Amazon occupies a special position among online booksellers in various respects. It is probable that Amazon, as by far the largest supplier, not only has the cheapest cost structure, but also has further competitive advantages as an internationally active company with a broad range of products.

**68.** There are many reasons for possible cost advantages for Amazon. It is likely that Amazon, as by far the largest player in the German book market, can generate economies of scale. Another decisive advantage should be that Amazon has its own infrastructure with warehouses and is therefore – in contrast to most of the online

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<sup>69</sup> See also para. 192 in this Special Report.

<sup>70</sup> See para. 54 in this Special Report.

<sup>71</sup> See Amazon, <https://www.amazon.de/gp/feature.html?docId=1002872331>, accessed: 14 May 2018.

<sup>72</sup> See Skoobe, <https://www.skoobe.de/press/kit/das-buchangebot-auf-einen-blick>, accessed: 14 May 2018.

<sup>73</sup> See Readfy, <https://www.readfy.com/de/>, accessed: 14 May 2018.

<sup>74</sup> See N. N., Thalia, Weltbild and Hugendubel setzen auf ein eigenes eBook-Abo-Modell, [buchmarkt.de](http://buchmarkt.de), 11 October 2017.

<sup>75</sup> See N. N., Bookchoice startet in Deutschland, [boersenblatt.net](http://boersenblatt.net), 4 October 2017.

competition – more independent of the logistics service providers of the intermediate book trade. As a result, Amazon's share of the value chain in the book market is probably larger than that of its competitors. Amazon should also benefit from significant economies of scope. Amazon sells products from almost all areas of life and book sales of around EUR 1.6 billion in 2015<sup>76</sup> account for less than 15 per cent of total sales in Germany.<sup>77</sup> As a result, costs for the warehouse and sales infrastructure are spread across many product groups. Although other online booksellers are increasingly offering articles from the non-book segment, their importance is in no way comparable to that of Amazon.

**69.** Amazon's size gives it potentially considerable bargaining power vis-à-vis business partners. Amazon is the most important sales channel for publishers, so it can be assumed that Amazon will be able to obtain very good purchasing conditions.<sup>78</sup> Amazon is also likely to be able to negotiate more favourable conditions with parcel service providers through which goods are delivered to end-customers due to the large volumes involved.

**70.** The high user and sales figures allow Amazon to build up extensive personalized customer data bases. On this basis, Amazon can provide precise book recommendations and alternative suggestions and tailor offers to individual customer preferences. While these opportunities are generally available and used by other online booksellers, they have only access to less information about consumer behaviour. In addition, the expertise in evaluation of such information is also likely to be less developed than at Amazon, which is regarded as a leading company in this field.

**71.** In addition, Amazon pursues comprehensive customer loyalty strategies. These include the Amazon Prime membership programme, which is subject to a fee and includes free express delivery when books are ordered. In the e-book segment, Amazon is also trying to bind customers to its Kindle products in the long term. Unlike the Tolino alliance, Amazon relies on a closed system for this purpose: only Kindle e-books purchased from Amazon can be displayed on Amazon's Kindle reader.<sup>79</sup> It is also not possible to read e-books purchased from Amazon on other e-book readers than the Kindle-reader. Although Kindle e-books can also be accessed on other devices such as computers, tablets or smartphones, this requires a Kindle application and a login via an Amazon account. As soon as the customer has decided to buy an e-book from Amazon, it is no longer possible to switch to an alternative provider of both e-books and e-readers without noticeable switching costs ("lock-in effect").

**72.** In contrast to most of its online competitors, which are also directly or indirectly active in the brick-and-mortar book trade, Amazon does not currently have any shops in Germany. Amazon was therefore able to expand its online book business – also in the form of subscription models – without having to fear cannibalization effects in the brick-and-mortar book trade. However, Amazon Publishing entered into a cooperation with book wholesaler KNV at the end of November 2017, so that the approximately 800 titles published by Amazon can also be sold by other booksellers as printed books.<sup>80</sup> Amazon also announced in December 2017 that it would open stores in Germany.<sup>81</sup>

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<sup>76</sup> See Renner, K.-H., Warum Amazon in Deutschland keine Chance hat, *supra*.

<sup>77</sup> Amazon's revenue in the German market is estimated at around EUR 12.6 billion for 2015; see Kolf, F., Versandhändler bricht sein Schweigen, *Handelsblatt online*, 29 January 2016.

<sup>78</sup> On Amazon's (relative) market power vis-à-vis publishers see Monopolies Commission, Sondergutachten 68, Wettbewerbspolitik: Herausforderung digitale Märkte, Baden-Baden 2015, paras 385 ff. and para. 402.

<sup>79</sup> See para. 22 in this Special Report.

<sup>80</sup> See N. N., KNV beliefert stationären Buchhandel mit Titeln von Amazon Publishing, *boersenblatt.net*, 28 November 2017. However, a number of major bookstore chains have announced that they will not distribute Amazon publishing's titles, see N. N., „Ihr sägt an dem Ast, auf dem wir sitzen“, *boersenblatt.net*, 29 November 2017.

<sup>81</sup> See N. N., Amazon will Geschäfte in Deutschland eröffnen, *Wirtschaftswoche online*, 18 December 2017.

### 2.2.5 Great heterogeneity on the customer side

**73.** On the customer side, a fundamental distinction must be made between private and institutional customers. Even if private book buyers are not the addressees of the Book Price Fixing Act, fixed book prices have the direct effect that customers find identical prices for a book title irrespective of the distribution channel. For a number of institutional customers, the BuchPrG provides in § 7 for staggered discounts on the fixed customer price, most of which are fixed in terms of amount.

**74.** Much higher sales are likely to be generated by booksellers and publishers directly selling to private customers. The group of private book buyers can be regarded as highly heterogeneous, for example with regard to the financial resources available for the purchase of books, the interest in reading, the motivation to buy, the need for advice or the preferred distribution channel. A large number of buyer typologies have been developed in literature that classify book customers.<sup>82</sup> However, statistical surveys on the significance of the different customer groups are often lacking. One exception is the study “Buchkäufer und -leser” of the Börsenverein des Deutschen Buchhandels, most recently published in 2015.<sup>83</sup> Some results which provide relevant information for the valuation of fixed book prices in this Special Report are summarized below.

**75.** The share of book buyers, i.e., those who bought at least one book within a year, was 59 per cent in Germany in 2015, 2 percentage points higher than in the previous survey in 2008.<sup>84</sup> The largest share of book buyers are casual buyers (less than 8 books per year) at 42 per cent, followed by average buyers (8 to 14 books) and frequent buyers (more than 14 books) by a wide margin (see Figure 2.11).

**76.** The picture is highly differentiated by age group.<sup>85</sup> While only 45 per cent of the youngest group of up to 19-year-olds purchased a book in the previous year, this figure rises continuously with increasing age and reaches 70 per cent among the over 60-year-olds. A similar picture emerges in terms of average per capita intensity: with an average of 12.6 books per year, the over 60-year-olds buy more than twice as many books as customers under 19 years of age.<sup>86</sup>

**77.** In contrast to the moderate increase in the share of book buyers, the proportion of people who have read at least one book in the past 12 months fell from 90 per cent to 83 per cent between 2008 and 2015.<sup>87</sup> The largest group of readers is 41 per cent of casual readers (fewer than 10 books per year). Average readers (10 to 18 books) and frequent readers (more than 18 books) account for 20 and 22 per cent respectively (see Figure 2.11). Unlike the buyer share, the reader share is almost identical between the different age groups and only decreases slightly among readers over 60.<sup>88</sup>

**78.** When asked how they became aware of the books they had bought, 64 per cent of book buyers said they bought their books after browsing through the bookstore (see Figure 2.12). Second place went to personal recommendations from the social environment (43 per cent) and third to browsing online (32 per cent).

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<sup>82</sup> See Bramann, K.-W./Cremer, P., *Wirtschaftsunternehmen Sortiment - Der Buchhandel in Deutschland zu Beginn des 21. Jahrhunderts* (Band 4), 4. Ed., Frankfurt am Main 2011, section 6.2 and Rürup, B./Klopffleisch, R./Stumpp, H., *Ökonomische Analyse der Buchpreisbindung*, supra, section 3.2.3.1.

<sup>83</sup> See Börsenverein des Deutschen Buchhandels, *Buchkäufer und -leser 2015: Profile, Motive, Einstellungen*, Frankfurt am Main, Pressemappe, 14 October 2015. The data basis of the study is the representative GfK Verbraucherpanel MediaScope book with 25,000 people who were asked about their private book purchases, see supra, p. 3.

<sup>84</sup> See *ibid.*, p. 11.

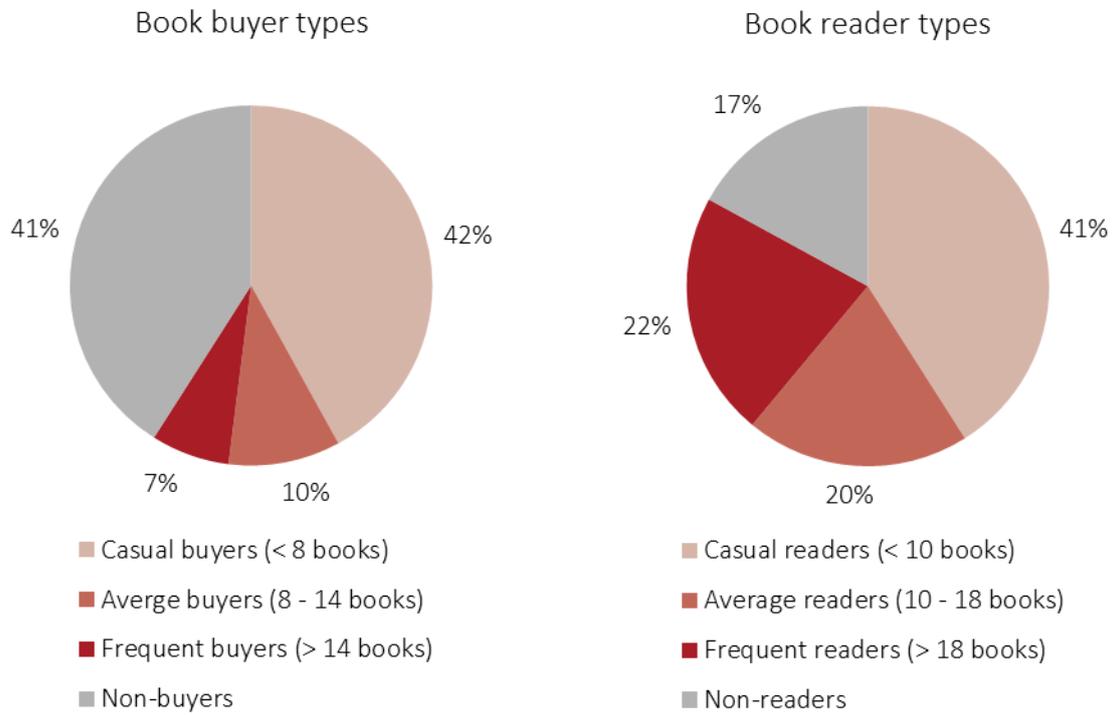
<sup>85</sup> See *ibid.*, p. 13.

<sup>86</sup> See *ibid.*, p. 19.

<sup>87</sup> See *ibid.*, p. 25.

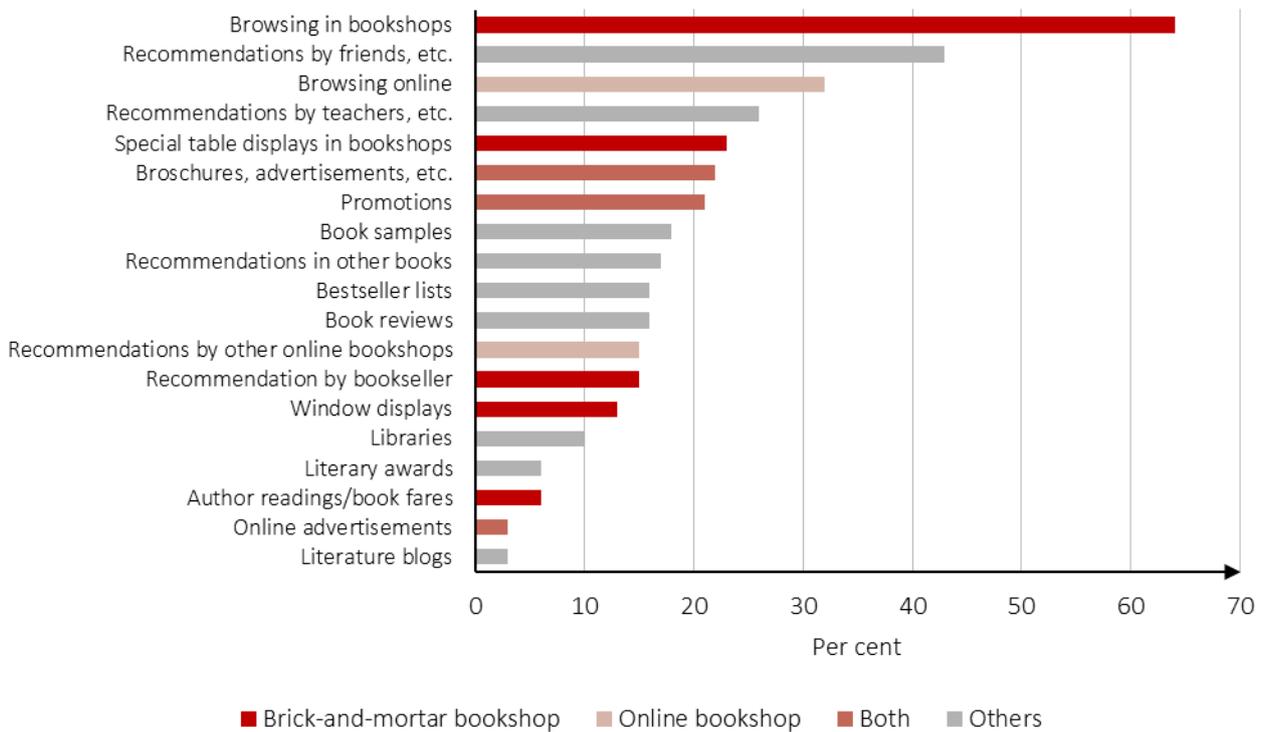
<sup>88</sup> See *ibid.*, p. 27.

**Figure 2.11: Book buyer and reader types 2015**



Source: Börsenverein des Deutschen Buchhandels, Buchkäufer und -leser 2015: Profile, Motive, Einstellungen, supra, p. 11 and 25; own illustration

**Figure 2.12: Sources of attention for book purchases**



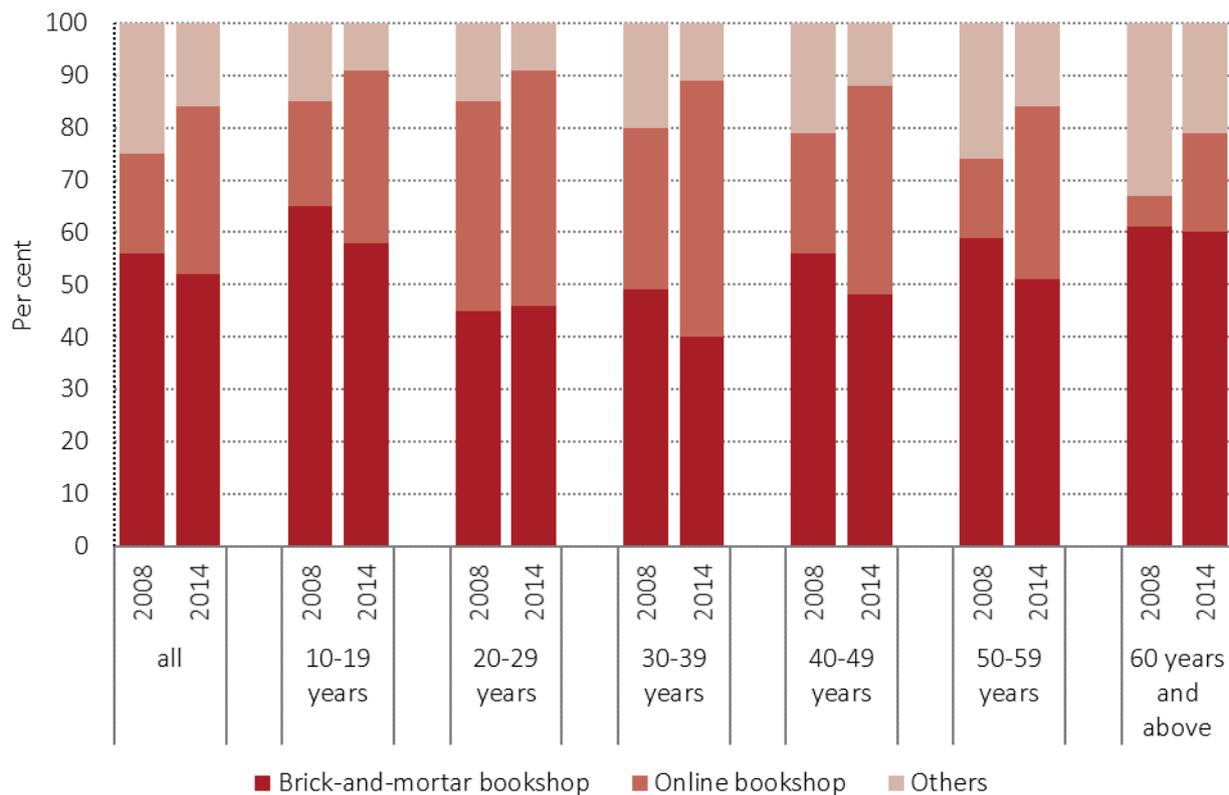
Source: Börsenverein des Deutschen Buchhandels, Buchkäufer und -leser 2015: Profile, Motive, Einstellungen, supra, p. 37; own illustration

**79.** Assigning these sources of attention to brick-and-mortar bookstore or online sellers, two things become apparent. Firstly, respondents attach greater importance to the sources associated with the brick-and-mortar book trade. Browsing through a bookstore attracts more than twice as much attention from customers as does browsing on the Internet. Secondly, however, it is also apparent that many sources of attention can either come from both types of business and/or from publishers (e.g., advertising, brochures) or are completely independent of the distribution chain (e.g., recommendations, bestseller lists).

**80.** The study also shows that customers often buy a title where it has attracted their attention.<sup>89</sup> Two thirds of respondents stated that they always or occasionally discover books in a bookshop and buy them there. For Internet purchases that share was 39 per cent. The results also show that more customers buy titles found on the Internet in brick-and-mortar bookstores (24 per cent) than vice versa (17 per cent).

**81.** The importance of the different distribution channels varies substantially between the different age groups (see Figure 2.13). Brick-and-mortar bookshops play a particularly important role among the youngest and oldest book buyers. The share of expenditure on the Internet is highest among book customers between the ages of 20 and 39. Compared with the data from the previous study of 2008, there is a clear trend in favour of the Internet. The share of purchases in the brick-and-mortar bookshops has fallen in almost all age groups, in some cases drastically. The picture is similar for other shopping locations, which have clearly lost importance.

**Figure 2.13: Book expenses by age group and retail type 2008 and 2014**



Source: Börsenverein des Deutschen Buchhandels, *Buchkäufer und -leser 2015: Profile, Motive, Einstellungen*, supra, p. 46; own illustration

<sup>89</sup> See *ibid.*, p. 42.

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**82.** The number of e-book buyers in 2016 was 3.8 million.<sup>90</sup> E-book buyers, i.e., the percentage of the population aged 10 and older who bought an e-book, thus only reached 5.6 per cent. After strong growth between 2010 and 2013, this figure has remained almost constant since.<sup>91</sup> However, the buying intensity continues to increase. It amounts to an average of 7.4 copies per e-book buyer.

**83.** The second group of customers includes private and public institutional customers such as enterprises, law firms, schools, libraries and public administration. According to § 7 Abs. 2 BuchPrG booksellers can grant scientific libraries a discount of up to 5 per cent and public libraries even up to 10 per cent. For group orders of books by schools, sellers grant discounts of between 8 and 15 per cent, depending on the total value of the order and the number of copies, in accordance with § 7 (3) BuchPrG. If schools order from their own budget, a fixed discount of 12 per cent is granted. In contrast to private book buyers, some institutional customers are expected to have a certain buying power, as individual buyers have a large budget and order a large number of books.<sup>92</sup>

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<sup>90</sup> See Börsenverein des Deutschen Buchhandels, Buch and Buchhandel in Zahlen 2017, *supra*, p. 30.

<sup>91</sup> On the development of the distribution of e-books in the German book market, see also paras 54-56 in this Special Report.

<sup>92</sup> See Rürup, B./Klopfleisch, R./Stumpp, H., *Ökonomische Analyse der Buchpreisbindung*, *supra*, p. 62.

## Chapter 3

### Book markets in Europe and experience with the abolition of fixed book prices

**84.** Due to linguistic and cultural, but also economic and legal differences, national book markets in Europe are to be assumed, which are connected to varying degrees. In the following, the situation regarding fixed book prices in the 28 countries of the EU and the four countries of the European Free Trade Association (EFTA)<sup>93</sup> is described.<sup>94</sup> In addition, some key figures are presented which are regarded as important indicators for a functioning book market (Section 3.1). Finally, the consequences of abandoning fixed prices in the UK and Switzerland are examined in more detail (Section 3.2).

#### 3.1 European book markets: an overview

##### 3.1.1 Fixed book prices in Europe: a mixed picture

**85.** Within Europe, the picture regarding the price regime is mixed (see Figure 3.1). Of 32 countries in Europe, 14 have fixed retail prices for books.<sup>95</sup> The most important countries with fixed retail prices, as measured by annual sales, are Germany, France, Italy and Spain.<sup>96</sup> Due to the competition concerns of the European Commission against industry agreements, many countries, including Germany in 2002, have adopted a legally binding fixed book price system.<sup>97</sup> A book price law has existed in Spain since 1975 and in France since 1981, and since then fixed book price laws have been introduced, e.g., in Iceland (1995), Portugal (1996), Greece (1997), Austria (2001), Italy (2002) and the Netherlands (2005), often following the model of the French book price fixing law known as the “Loi Lang”.<sup>98</sup> An exception is Norway, where fixed book prices continue to be regulated by industry agreements.

**86.** The structure of the book price system varies between countries with regard to the products covered, the duration of the price fixing, possible exceptions and the level of permissible discounts for private and institutional customers such as libraries, schools and book clubs.<sup>99</sup>

**87.** In the remaining 18 countries book prices are not fixed. By far the largest book market in terms of sales with free prices is the United Kingdom, followed by Poland and Sweden. This group includes some countries that previously had a system of fixed prices, mostly by industry agreement, and then switched to free book prices. In Sweden and Finland, for example, the existing agreements were already repealed in 1970 and 1971 respectively.

<sup>93</sup> EFTA member states are Iceland, Liechtenstein, Norway and Switzerland.

<sup>94</sup> Fixed book prices exist outside Europe in only a few countries, see Appelman, M., Fixed book price, in: Towse, R. (Ed.), *A Handbook of Cultural Economics*, Cheltenham 2003, p. 237. Exceptions are e.g. Japan, Mexico and South-Korea, see International Publishers Association, *Global Fixed Book Price Report*, Brussels, 23 May 2014.

<sup>95</sup> See Rønning, H. u. a, *Books – At what price? Report on policy instruments in the publishing industry in Europe*, Report for the Norwegian Ministry of Culture and the Ministry of Education and Research, Oslo, 15 February 2012, Chapter 3 and Frankfurter Buchmesse, *Buchmärkte*, [http://www.buchmesse.de/de/international/buchmaerkte\\_weltweit/index.html](http://www.buchmesse.de/de/international/buchmaerkte_weltweit/index.html), accessed: 14 May 2018.

<sup>96</sup> See Federation of European Publishers, *The Book Sector in Europe: Facts and Figures 2017*, Brussels, 7 March 2017, p. 8.

<sup>97</sup> See Rønning, H. u. a, *Books – At what price? Report on policy instruments in the publishing industry in Europe*, supra, p. 8.

<sup>98</sup> See Börsenverein des Deutschen Buchhandels, *Buchpreisbindungen und Mehrwertsteuersätze in Europa*, <https://www.boersenverein.de/sixcms/media.php/976/Buchpreisbindung%20Fago.pdf>, accessed: 14 May 2018 and Stockmann, D. (2004). *Free or Fixed Prices on Books-Patterns of Book Pricing in Europe*, *Javnost-The Public* 11(4), p. 50.

<sup>99</sup> See Rønning, H. u. a., *Books – At what price? Report on policy instruments in the publishing industry in Europe*, supra, pp. 26-27.

Belgium (1981), Ireland (1989), Iceland (1995), the United Kingdom (1995), German-speaking Switzerland (2007) and most recently, Denmark (2011) followed.<sup>100</sup>

**Figure 3.1: Countries with and without fixed book prices**



Sources: Börsenverein des Deutschen Buchhandels, *Buchpreisbindungen und Mehrwertsteuersätze in Europa*, supra; [https://www.boersenverein.de/sixcms/media.php/976/Buchpreisbindung\\_Fago.pdf](https://www.boersenverein.de/sixcms/media.php/976/Buchpreisbindung_Fago.pdf); Rønning, H. u. a., *Books – At what price? Report on policy instruments in the publishing industry in Europe*, supra., p. 26 f. and International Publishers Association, *Global Fixed Price Report*, a. a. O.; own illustration

**88.** Recently there have been efforts to introduce fixed price laws in countries or regions without fixed book prices. In the Belgian region of Wallonia, for example, fixed book prices came into force on 1 January 2018.<sup>101</sup> In Poland, too, the introduction of statutory book price fixing was initiated by the Polish Book Chamber, the industry association of Polish publishers and booksellers, and is being assessed by the Polish Ministry of Culture.<sup>102</sup>

<sup>100</sup> See *ibid.*, section 3.4.

<sup>101</sup> See N. N., *Wallonien führt Buchpreisbindung ein*, buchreport.de, 2 November 2017.

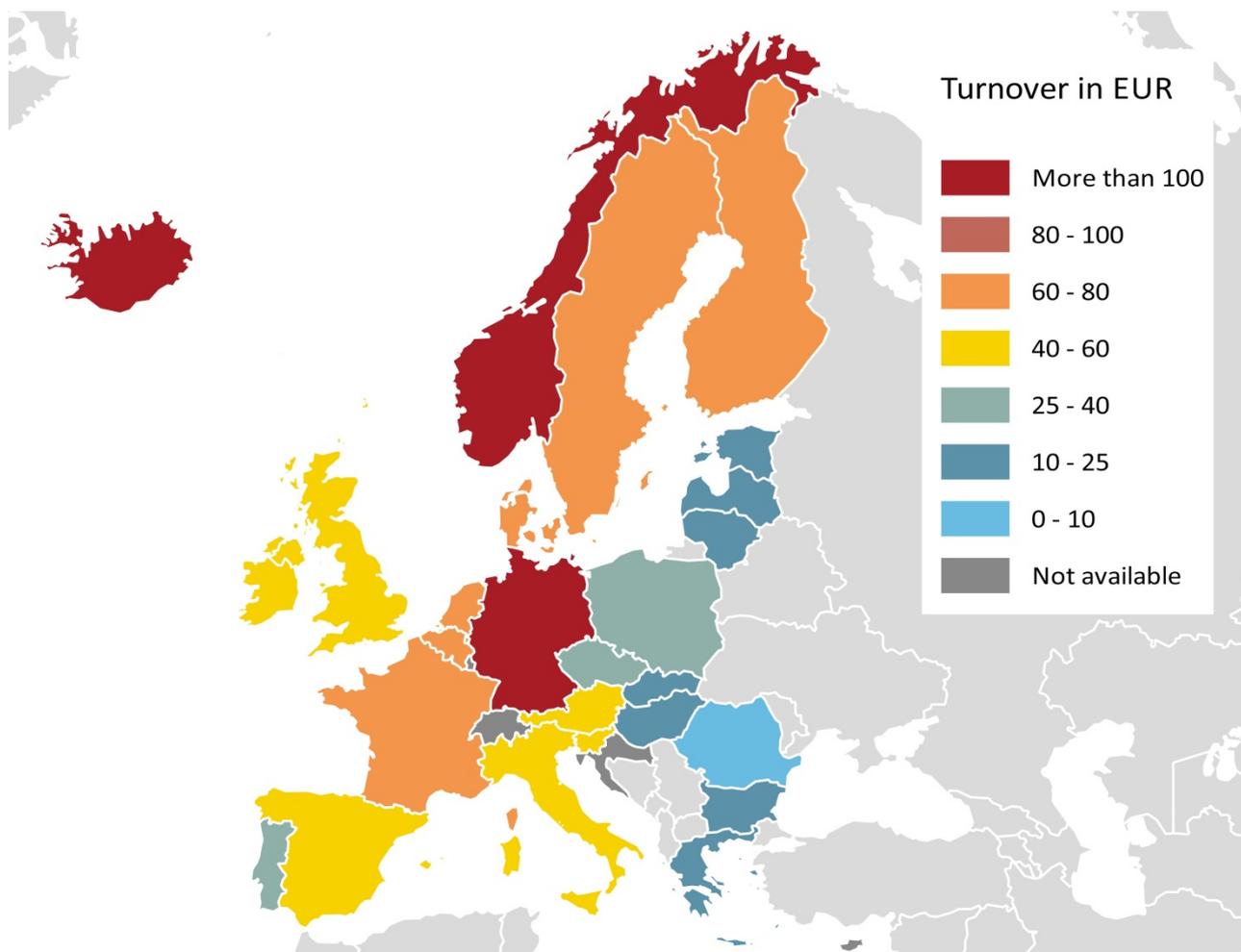
<sup>102</sup> See Adamows, J., *Polish Publishers call for Book VAT reductions and make another bid for fixed prices*, publishersperspective.com, 27 March 2017.

### 3.1.2 Clear differences between national book markets in Europe

#### 3.1.2.1 Per capita book sales vary widely

**89.** A comparison of per capita sales shows drastic differences between the European book markets (see Figure 3.2). Per capita revenues vary between less than EUR 10 and more than EUR 100 per year.

**Figure 3.2: Book markets revenues per inhabitant 2015**

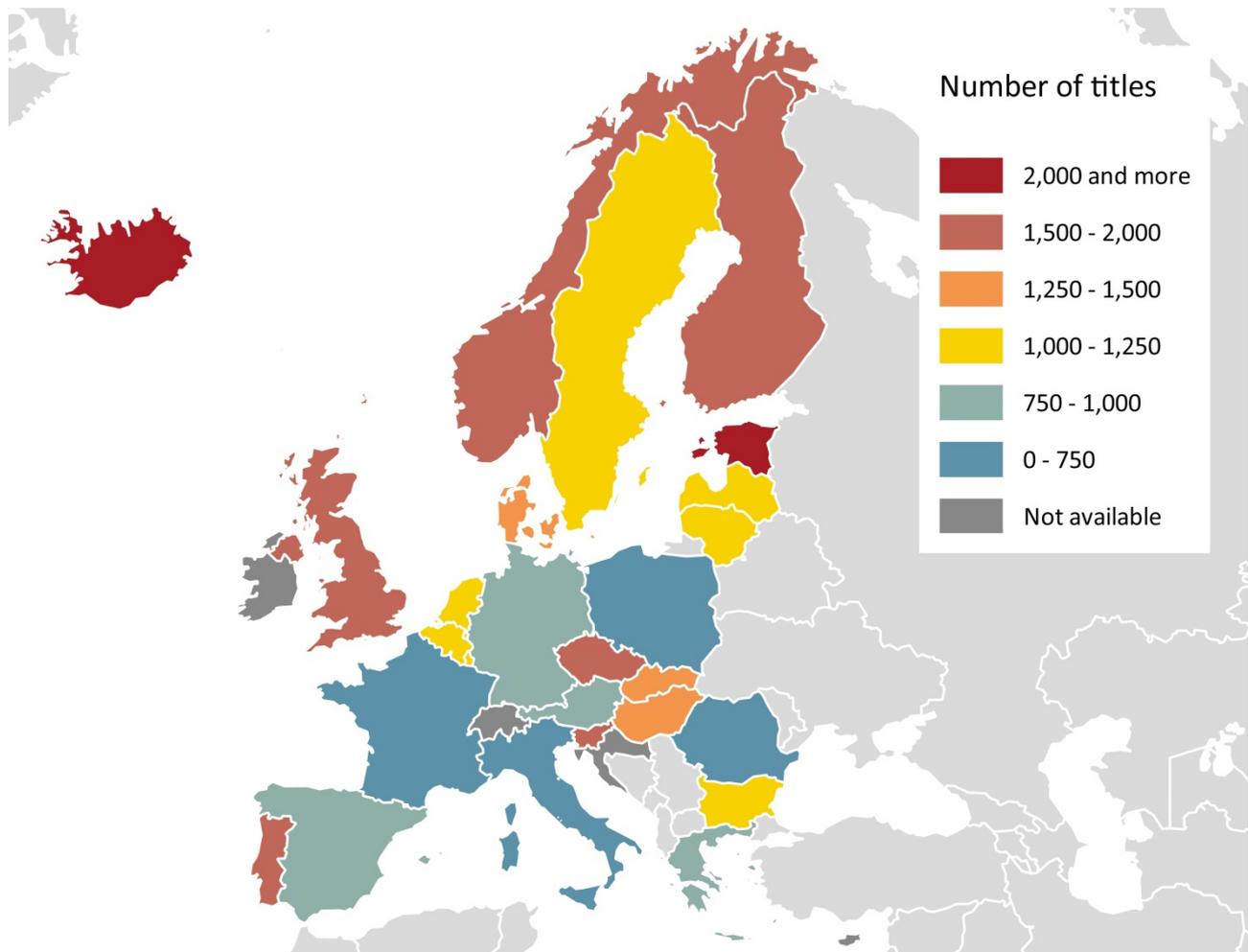


Source: Federation of European Publishers, *The Book Sector in Europe: Facts and Figures 2017*, supra, p. 8; own illustration

**90.** With a revenue of more than EUR 100 per inhabitant, Germany, Norway and Iceland occupy top positions, followed by France, Belgium, the Netherlands, Sweden and Finland, where books worth EUR 60 to EUR 80 are sold per person. Average per capita sales of EUR 40 to EUR 60 are generated in the United Kingdom, Ireland, Italy and Austria. The countries of Eastern Europe, Portugal and Greece are in the lower sales classes.

#### 3.1.2.2 Large differences in title production

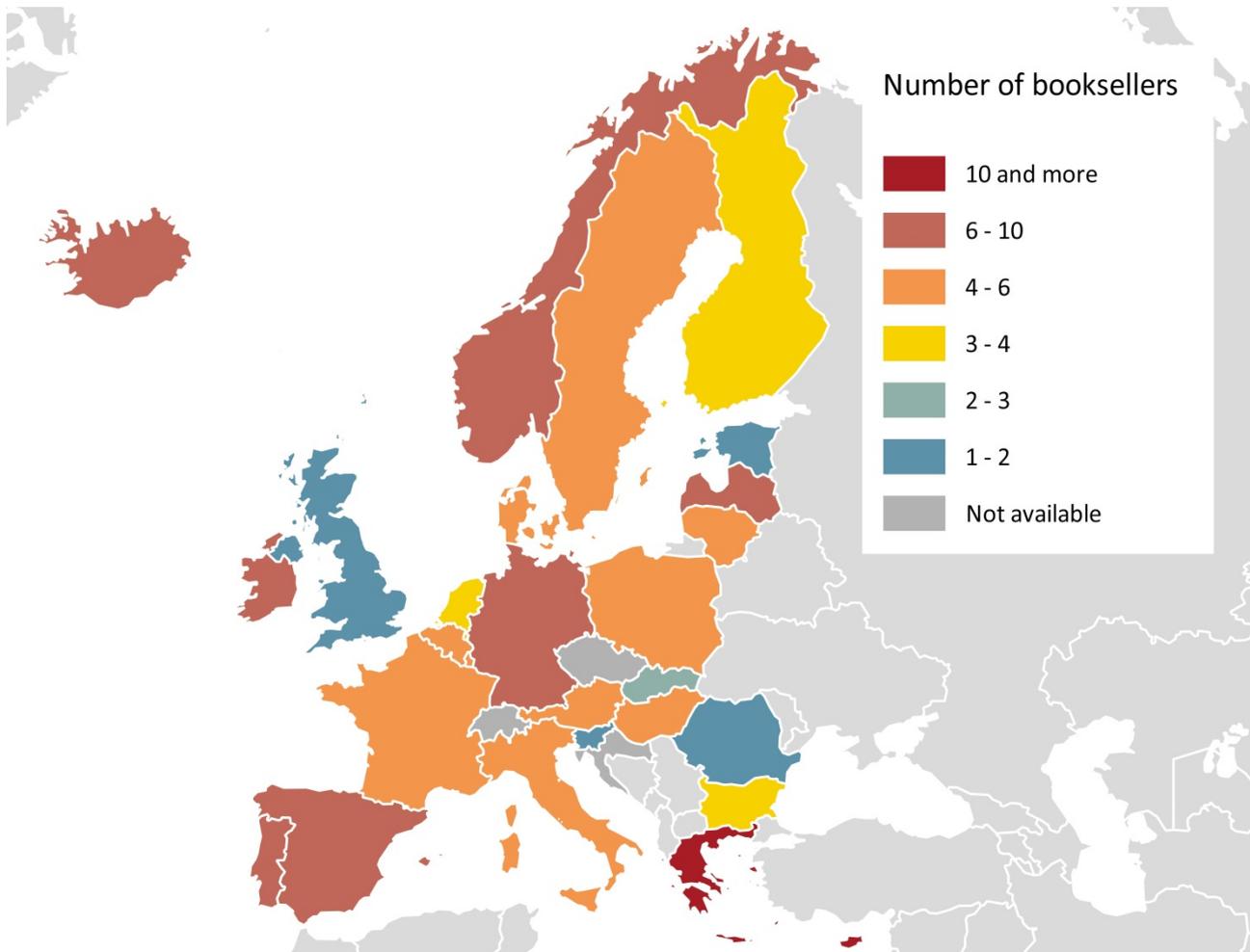
**91.** A comparison of the average number of new titles produced between 2010 and 2015 also shows clear differences between book markets in Europe (see Figure 3.3). While Iceland and Estonia publish more than 2,000 titles per million inhabitants, the average title production in France, Italy, Poland and Romania is less than 750 per million inhabitants. With an average of 750 to 1,000 publications, Germany is in one of the last places.

**Figure 3.3: Average number of new titles per million inhabitants 2010–2015**

Source: Federation of European Publishers, *The Book Sector in Europe: Facts and Figures 2017*, supra, p. 7; own illustration

### 3.1.2.3 Bookseller density in Europe is very heterogeneous

92. There are also drastic differences between countries in the number of booksellers per million inhabitants (see Figure 3.4). Greece and Cyprus have the largest number of booksellers relative to the population, with more than 100 bookshops per million inhabitants. With just 10 to 20 booksellers per million inhabitants, this figure is lowest in the United Kingdom, Estonia, Slovenia, Croatia and Romania. In Germany, the book trade density is relatively high, with 60 to 100 booksellers per million inhabitants.

**Figure 3.4: Number of booksellers per million 2014**

Source: Federation of European Publishers, *The Book Sector in Europe: Facts and Figures 2017*, supra, p. 13; own illustration

### 3.1.3 Fixed book prices are neither a prerequisite nor a guarantee for a functioning book market

**93.** Whether fixed book prices can contribute to the functioning of a book market or even counteract, it cannot be deduced from the key figures presented here. As mentioned above, there are many cultural, legal and economic differences between the European book markets in addition to the respective pricing policy. This makes it impossible to clearly attribute national differences to the existence or non-existence of fixed book prices.

**94.** Nevertheless, it is permissible to conclude that fixed book prices are neither a necessary nor a sufficient condition for the economic functioning of a book market: regarding indicators such as title diversity, per capita sales and density of booksellers, both countries with and without fixed book prices occupy top positions. Therefore, fixed book prices are no guarantee that a certain market result will be achieved and, for example, that the book as a cultural asset will be promoted economically. Moreover, the indicators presented here do not necessarily point in the same direction. For example, there are countries that achieve top scores in one category, but perform significantly worse in others. Germany, for example, is in the highest sales category and has an above-average density of bookstores, while per capita title production is below the European average.

## 3.2 Experience after the abolition of fixed book prices in selected countries

**95.** Since the 1970s, a number of countries have abandoned fixed book prices in favour of free prices. Due to the special features of national book markets, however, a direct transfer of the knowledge collected there to Germany

is not possible. This is particularly true since the liberalization of many European book markets came at a time when the digitalization of the book market was either still imminent or in its infancy.<sup>103</sup> Nevertheless, experience in other countries may allow conclusions to be drawn on the effectiveness of fixed prices. They can also provide important indications of the development that would emerge in Germany if fixed book prices were to be abolished.

**96.** The effects of a change from fixed to free prices will therefore be analysed below using the example of the United Kingdom (Section 3.2.1) and German-speaking Switzerland (Section 3.2.2).<sup>104</sup> The findings from these countries are included in the valuation of fixed book prices in Germany taking into account the respective context (see Section 4.2).

### **3.2.1 The United Kingdom: title production, sales figures and publishing sales increase, brick-and-mortar book trade loses**

**97.** In the United Kingdom, the Net Book Agreement (NBA) had been in place since 1900 as a system of fixed retail prices for books.<sup>105</sup> It was a voluntary horizontal agreement between publishers, who were free to decide whether a work should be considered a “net book” and thus be subject to fixed prices. The vertical price fixing between the publisher and the book trade was affected by corresponding prohibitions in the contractual conditions to sell below the fixed minimum price.

**98.** The NBA was a court-approved exception to the UK cartel law, which also applied in Ireland. From the early 1990s, the NBA was attacked from various sides.<sup>106</sup> Both the European Commission and the European Court of First Instance saw the cross-border fixing of book prices as a violation of the antitrust prohibition of Article 85 of the EEC Treaty (now Article 101 TFEU). As a result, the application of the NBA in Ireland was suspended in 1991. In 1994, the Irish competition authority declared any price fixing on the book market inadmissible. Although the first court decision was partially annulled in 1995 and referred back to the Commission, no new decision was reached. Since the early 1990s, major bookselling chains had repeatedly broken the NBA contract terms and granted discounts to customers. The decision of some major publishers to leave the NBA in October 1995 finally triggered a chain reaction that practically put an end to fixed book prices in the UK. In 1997 the NBA was formally abandoned.<sup>107</sup>

**99.** Following the abolition of the NBA, the market shares of the various forms of distribution, measured in terms of sales, have changed significantly (see Figure 3.5). A negative trend was particularly evident in the brick-and-mortar book trade, which lost more than 20 percentage points between 1998 and 2014. The same applies to traditional mail order businesses and book clubs, which no longer represent a relevant sales channel. In contrast, supermarkets and particularly online sellers increased their share of book sales.

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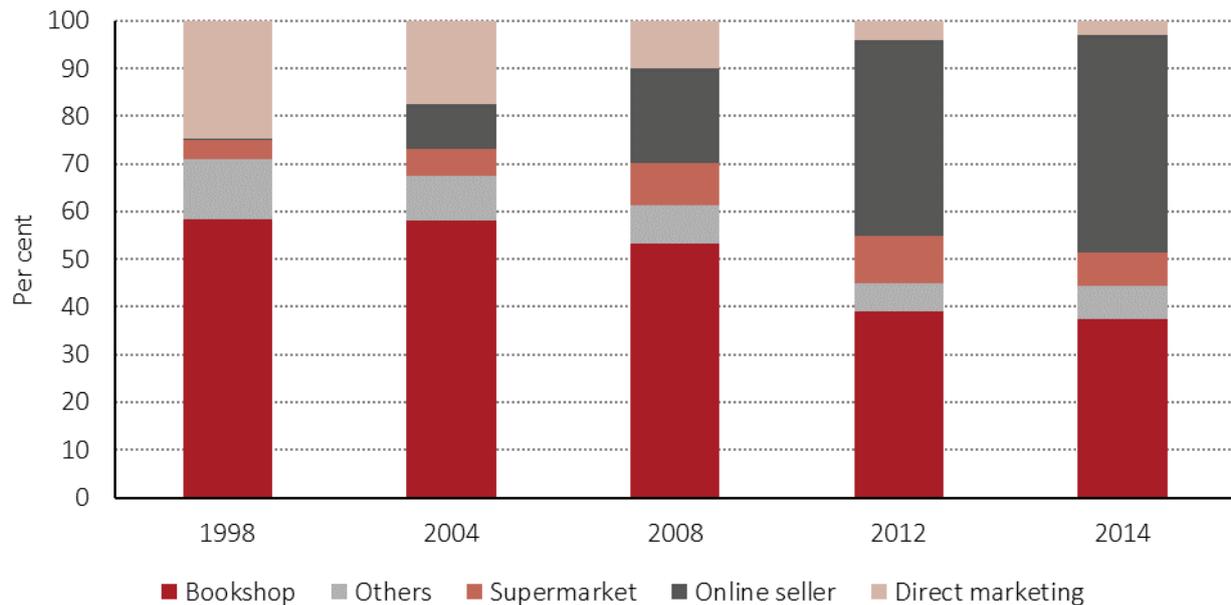
<sup>103</sup> See para. 87 in this Special Report.

<sup>104</sup> Another prominent and well-documented example is Sweden. Since the abolition of fixed book prices there dates back more than 40 years and the market situation in Sweden at that time can hardly be transferred to the present time in Germany, it should be dispensed with at this point. For a brief description of the development, see Monopolies Commission, XIIIth Biennial Report, *supra*. A detailed analysis can be found in Richter, T., *Die Aufhebung der Preisbindung für Bücher - Fallbeispiel Schweden*, Wiesbaden 1995.

<sup>105</sup> See Wilson, C., *The Net Book Agreement*, DTI Economics Paper No. 9, p. 31 ff. and Dearnley, J./Feather, J., *The UK Bookselling Trade Without Resale Price Maintenance: An Overview of Change 1995–2001*, Publishing Research Quarterly, 2002, pp. 16 ff.

<sup>106</sup> On the case of the Net Book Agreement in the United Kingdom see also Monopolies Commission, XIIIth Biennial Report, *Wettbewerbspolitik in Netzstrukturen*, *supra*, section 3.2.2, and, e.g., Goldschmitt, R., *Grenzüberschreitende Buchpreisbindung und internationaler Buchmarkt*, Wiesbaden 2000, pp. 60 ff.; Utton, M., *Books Are Not Different After All: Observations on the Formal Ending of the Net Book Agreement in the UK*, *International Journal of the Economics of Business* 7(1), 2000, pp. 115 ff. and Wilson, C., *The Net Book Agreement*, *supra*, pp. 32 ff.

<sup>107</sup> UK Restrictive Practices Court, Decision of 13 March 1997 – *Re Net Book Agreement*.

**Figure 3.5: Revenue shares by retail type in the United Kingdom 1998–2014**

Source: Nensel, A. K., *Discounted and Digital: British Publishing in the Wake of the Net Book Agreement*, in: Nensel, A. K./Reinfandt, C., *The Literary Market in the UK*, Universität Tübingen, 2017, p. 48, with additional sources; own illustration

**100.** Separately analysing the four or five largest book chains on the one hand and all other brick-and-mortar booksellers on the other offers a more differentiated picture.<sup>108</sup> The largest chain stores were initially able to increase their market share, but it began to fall already in 2004 and was slightly below the level of 1998 in 2007. The reason for the initially growing market share may have been the massive expansion of sales space, but also the market entry and the strong expansion of the American book chain Borders.<sup>109</sup> However, there was a consolidation due to company takeovers, e.g., of the bookselling chain Ottakar's by its competitor Waterstone's in 2006.<sup>110</sup> The branch network of the large chains has been noticeably thinned out, at the latest since Borders exited the market and closed its branches in 2009.<sup>111</sup>

**101.** The market share of the remaining, predominantly smaller brick-and-mortar bookstores halved in the first ten years after fixed prices were abolished.<sup>112</sup> The loss of market share in this segment was particularly pronounced in the early years. After an initial sharp decline, however, the number of brick-and-mortar booksellers has stabilized in recent years and has recently even been able to grow slightly. Smaller bookstores in particular have reacted to the new market conditions by adapting their business strategy by sharpening their individual profiles, increasingly serving niches, expanding their services or intensifying their activities online.<sup>113</sup> Furthermore,

<sup>108</sup> See Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, *International Journal of the Economics of Business* 15(3), 2008, p. 369.

<sup>109</sup> See Wilson, C., *The Net Book Agreement*, *supra*, p. 44.

<sup>110</sup> See N. N., *Do bookshops have a future?*, *The Independent* online, 14 March 2011.

<sup>111</sup> See Woo, Z./Finch, J., *End of a chapter for Borders*, *The Guardian* online, 26 November 2009.

<sup>112</sup> See Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, *supra*, p. 369.

<sup>113</sup> See Dearnley, J./Feather, J., *The UK Bookselling Trade Without Resale Price Maintenance: An Overview of Change 1995–2001*, *supra*, p. 25.

there are indications that some independent booksellers have increased their sales areas following the example of bookselling chains.<sup>114</sup>

**102.** The fastest growing sales channel was the online book trade. By 2014, its market share had increased to around 46 per cent. Since then, the development has slowed down and in 2016 sales by the brick-and-mortar booksellers have grown more strongly than the online book sales.<sup>115</sup> The most important bookseller in the United Kingdom is Amazon, with an estimated 70 per cent share of the online market (as of 2011).<sup>116</sup> Book Depository, a new online bookseller was founded in 2004, which by the time it was acquired by Amazon in 2011 had a market share of 5 per cent in the online market and showed high growth rates.<sup>117</sup> Although there were some concerns about the acquisition,<sup>118</sup> the Office of Fair Trading, which investigated the case, saw no need to refer it to the Competition Commission, which could have prohibited the acquisition.<sup>119</sup> Book Depository continues to operate independently after the acquisition by Amazon and, according to its own statements, holds 18 million titles which it ships to over 100 countries.<sup>120</sup>

**103.** Another important trend in recent years has been the meanwhile rapid increase in e-books shares. After peaking at 19 per cent in 2014, the e-book's market share, measured in terms of publishers' domestic sales, declined to around 15 per cent in 2016.<sup>121</sup> While consumer spending grew by six per cent in 2016 compared to the previous year, e-book sales declined by 4 per cent.<sup>122</sup> Amazon is by far the most important e-book provider, with an estimated market share of almost 80 per cent in the e-book segment.<sup>123</sup>

**104.** In addition to the online book trade, the sales of books in supermarkets was also stimulated. Unlike on the Internet, the range of books available in supermarkets comprises only a few popular mass titles. Their market share of supermarkets in the top 5,000 titles in 2016 is estimated to be over 20 per cent, with a significantly higher share for bestsellers.<sup>124</sup> An exception is the British retail chain Tesco, which has introduced a wider range of books in selected stores. The supermarket chains Tesco and Sainsbury's temporarily operated their own e-book platforms, but left this market in 2015 and 2016, respectively.<sup>125</sup>

**105.** After the end of the NBA, recommended prices replaced fixed prices, which are not binding and on which sellers may grant individual discounts. After discounts were initially limited to a few high-selling titles, the number of discounted books has increased significantly over time.<sup>126</sup> The reason for this was, on the one hand, that supermarkets expanded their book range and, on the other hand, the online book trade, following the example of

<sup>114</sup> See *ibid.*, p. 21.

<sup>115</sup> See The Publishers Association, *The Book Industry in Statistics 2016*, *supra*, section 3.2.

<sup>116</sup> See The Booksellers Association, *The Proposed Acquisition of the Book Depository by Amazon - Submission from the Booksellers Association to the Office of Fair Trading*, London, 18 July 2011, p. 5.

<sup>117</sup> See *ibid.*, p. 10.

<sup>118</sup> On the position of the Booksellers Association and the Publishers Association see e.g. Campbell, L., *BA and PA set to oppose Amazon-Book Depository merger*, *The Bookseller online*, 7 July 2011.

<sup>119</sup> See Office of Fair Trading, *Anticipated acquisition by Amazon.com Inc of the Book Depository International Limited*, London, 14 December 2011.

<sup>120</sup> See Book Depository, <https://www.bookdepository.com/help/topic/HelpId/35/About-us#helpContent>, accessed: 14 May 2018.

<sup>121</sup> See The Publishers Association, *The Book Industry in Statistics 2016*, *supra*, section 2.

<sup>122</sup> See *ibid.*, section 3.2.

<sup>123</sup> See Wischenbart, R. u. a., *Global eBook: A report on market trends and developments. Update spring 2014*, Bericht der Rüdiger Wischenbart Content and Consulting, Wien, April 2014, p. 21.

<sup>124</sup> See Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, *supra*, p. 369.

<sup>125</sup> See Bridle, J., *Tesco shows how to get out of e-books gracefully*, *The Guardian online*, 8 February 2015 and Campbell, L., *Sainsbury's exits e-book market*, *The Bookseller online*, 20 September 2016.

<sup>126</sup> See Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, *supra*, pp. 368-369.

Amazon, granted discounts on almost all available titles. In recent years, the average actual selling price has been around 25 per cent below the recommended retail price.<sup>127</sup> The average discounts vary greatly between the different product groups and average over 40 per cent for non-fiction books, for example.<sup>128</sup> Since publishers have simultaneously raised their recommended prices, no conclusions can be drawn about the actual consumer price level from the amount of the discount.

**106.** The development of actual consumer prices in the years after 1995 has been examined in a number of studies.<sup>129</sup> To this end, repeated attempts have been made to determine the general price level for books and to put it in relation to the general rate of inflation. In addition to the limited availability of data, however, a number of difficulties arise, such as the question of how a price difference between different sales channels is to be valued and the weighting with which the prices of different stocks are to be included in the index. Some authors have come to the conclusion that book prices have risen faster than the average price level in the years after the end of the NBA.<sup>130</sup> Others conclude that real prices have remained relatively stable since the abolition of fixed prices, after having risen significantly in previous years.<sup>131</sup> The authors basically agree that bestselling titles have become cheaper, partly because they are aggressively priced and used as an attraction offered by supermarkets and online sellers. No clear statements can be made for titles of the “long tail”. Nevertheless, it cannot be ruled out that some of these titles have become more expensive. One explanation for this development could be that publishers generally set the recommended retail price higher than at the time of the NBA.<sup>132</sup> For titles that ultimately turn out to be bestsellers, the major providers on the market enter into intense competition by granting large discounts. These sellers do not offer less successful titles, or they are in a less intense competitive relationship due to the lower visibility of these titles. For this reason, some of the discounts can be so low that the actual prices are above the level of fixed prices.

**107.** The improved availability and visibility of books, thanks to the presence in supermarkets or the expansion of chain stores, triggered positive demand impulses.<sup>133</sup> For example, real expenditure on books had risen by around 5 per cent by the year 2000.<sup>134</sup> The positive effect was most pronounced among customers from the lowest income groups. The additional expenditure is not (solely) due to possible price increases, but also to the increase in the number of copies sold. This effect was driven in particular by the top 100 titles, whose sales figures were 38 per cent higher in 2000 than in 1995.<sup>135</sup>

**108.** The effects of abandoning fixed retail prices for the British publishing industry are less well documented than those on the retail side. Revenue growth adjusted for inflation amounted to 3.4 per cent in the period from 1997

<sup>127</sup> See The Booksellers Association, UK Book Sales - ASP v RRP Discount 2005–2014, <https://www.booksellers.org.uk/BookSellers/BizFormFiles/8b36d872-0e60-4326-a8a0-467e4a20fb20.pdf>, accessed: 14 May 2018.

<sup>128</sup> See The Booksellers Association, UK Book Sales – Key Categories 2005–2014, <https://www.booksellers.org.uk/BookSellers/BizFormFiles/2e55a060-411e-4520-8179-fc26d821e526.pdf>, accessed: 14 May 2018.

<sup>129</sup> See e.g. Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, supra, p. 361 ff.; Dearnley, J./Feather, J., *The UK Bookselling Trade Without Resale Price Maintenance: An Overview of Change 1995–2001*, supra, pp. 26 ff. and See Wilson, C., *The Net Book Agreement*, supra, pp. 39 ff.

<sup>130</sup> See E.g. Fishwick, F., *Two sides of the same coin*, London Book Fair Preview, 23. February 2001, p. 18 f. and Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, supra, pp. 361 ff.

<sup>131</sup> See Wilson, C., *The Net Book Agreement*, supra, pp. 40-41.

<sup>132</sup> See Fishwick, F., *Book Prices in the UK Since the End of Resale Price Maintenance*, supra, p. 370 and para. 243 in this Special Report.

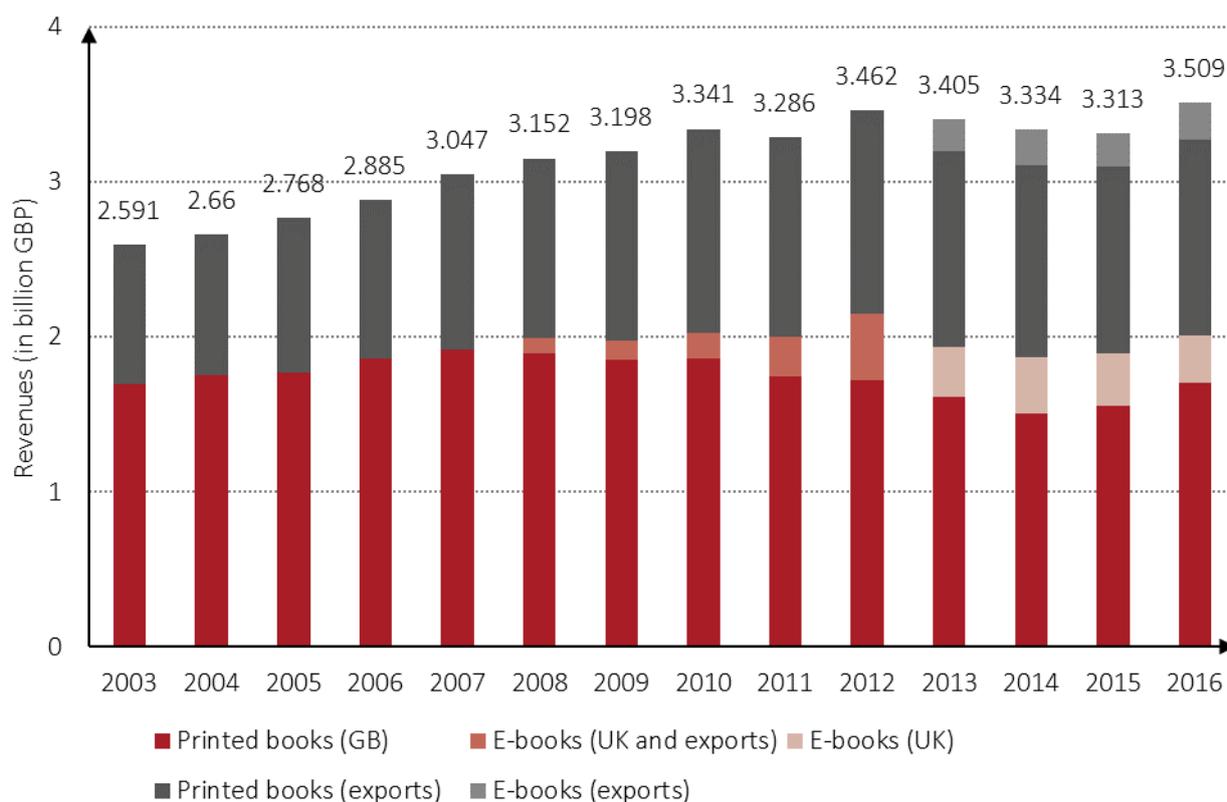
<sup>133</sup> See Wilson, C., *The Net Book Agreement*, supra, p. 45 f. and Fishwick, F., *Two sides of the same coin*, supra, p. 16 and Dearnley, J./Feather, J., *The UK Bookselling Trade Without Resale Price Maintenance: An Overview of Change 1995–2001*, supra, p. 28.

<sup>134</sup> See Fishwick, F., *Two sides of the same coin*, London Book Fair Preview, supra, p. 16 f. See also Dearnley, J./Feather, J., *The UK Bookselling Trade Without Resale Price Maintenance - An Overview of Change 2005–2001*, supra, p. 28.

<sup>135</sup> See Fishwick, F., *Two sides of the same coin*, supra, p. 17.

to 2007.<sup>136</sup> More precise data on the development of domestic and foreign net publishing revenues are available from 2003. Since 2008 and 2013 respectively, they are also differentiated by printed books and e-books (see Figure 3.6). Nominal sales rose sharply during this period.<sup>137</sup> While the trend in the first few years was driven by both domestic sales and the export market, the export of books in particular contributed to growth from 2008 onwards. Sales of digital and printed books on the national market subsequently declined noticeably until 2014, but have since recovered significantly. The positive development of recent years is solely attributable to increased sales of printed books. Domestic and foreign e-book sales showed strong growth rates until 2014, but declined thereafter due to a sharp decline in the domestic market.

**Figure 3.6: Publisher revenues in the United Kingdom 2003–2016**



Note: Between 2008 and 2012, e-book sales cover both the domestic market and exports.

**109.** The number of titles produced doubled between 1994 and 2014. The recent stronger growth is mainly due to the fact that in addition to hardcover and paperback editions, more and more works are also being published as e-books. Paperbacks still account for the largest share of the edition forms. The e-book has already replaced hardcovers as the second most important form of edition in 2011.<sup>138</sup>

**110.** A comparison of customer prices with publishers' selling prices shows that the latter have fallen in relative terms. This could be an indication that the negotiating power has shifted in favour of booksellers. One possible

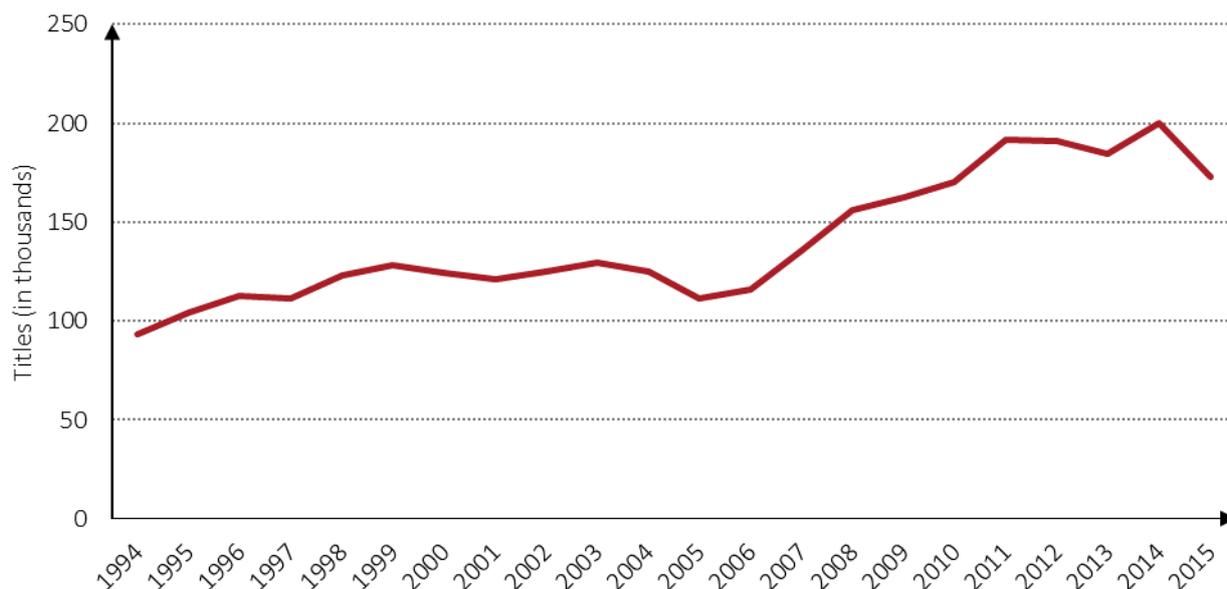
<sup>136</sup> See Nensel, A. K., *Discounted and Digital: British Publishing in the Wake of the Net Book Agreement*, in: Nensel, A. K./Reinfandt, C., *The Literary Market in the UK*, Universität Tübingen, 2017, pp. 46-47.

<sup>137</sup> See The Booksellers Association, *UK Book Sales - 2003-2014*, <https://www.booksellers.org.uk/BookSellers/BizFormFiles/9ec99f87-1c59-4928-b420-f5bdee143ca5.pdf>, accessed: 14 May 2018 and The Publishers Association, *The UK Book Industry in Statistics 2016*, supra, p. 1.

<sup>138</sup> See The Publishers Association, *The Book Industry in Statistics 2016*, supra, section 5.2.

reason for this could be the increased importance of chain stores, supermarkets and above all Amazon, which gain higher discounts of up to 70 per cent on the recommended retail price from the highly fragmented publishing landscape.<sup>139</sup> Since the conditions are the result of bilateral negotiations between publishers and booksellers and are, unlike in many European countries and the USA, are not subject to regulation, there may be such large differences in conditions that the retail prices of large sellers are below the publishers' selling prices that smaller competitors pay. This could also have contributed to smaller booksellers focusing less on bestselling titles than was the case before 1995.<sup>140</sup>

**Figure 3.7: Title production in the United Kingdom 1994–2015**



Sources: Nielsen Book, More Books Published in 2008, press release from 4. February 2009 (data until 2003), The Publishers Association, The UK Book Industry in Statistics 2016, supra, section 5.1 (data since 2004); own illustration

**111.** Summing up the development of the British book market since 1995 gives a mixed picture. While the density of brick-and-mortar bookstores has declined and a price increase for niche titles cannot be ruled out, the availability of literature – at least of mass titles – has increased, consumer spending has been stimulated and strong discounts have been observed for bestsellers. In addition, there is an increasing variety of titles and higher publishing revenues.

**112.** However, the developments presented here are not exclusively attributable to the abolition of fixed book prices, but were also largely determined by the digitalization of the book market, first by online book-selling, later by the spread of e-books. It seems plausible that the possibility of free pricing has contributed to the fact that digitalization in the UK is more advanced than in other European book markets.

### 3.2.2 Switzerland: Abandonment of fixed book prices has not endangered the book market

**113.** In German-speaking Switzerland, fixed book prices were introduced in 1976 at the instigation of the Swiss Booksellers and Publishers Association (SBVV).<sup>141</sup> The system of fixed prices was regulated by horizontal and vertical agreements within the framework of market regulations and organized by the SBVV. On 1 October 1993,

<sup>139</sup> See Fishwick, F., Book Prices in the UK since the End of Resale Price Maintenance, supra, p. 370.

<sup>140</sup> See para. 101 in this Special Report.

<sup>141</sup> See Monopolies Commission, XIIIth Biennial Report, supra, section 3.2.1.

these market regulations were replaced by the common agreement (Sammelrevers) with Germany and Austria. In French-speaking western Switzerland, fixed book prices were abandoned in the 1990s. In the Italian-speaking part of Switzerland, the book price has always been free.

**114.** Following an investigation by the Swiss Competition Commission (WEKO), price fixing was classified as an unlawful restriction of competition at the retail level and thus declared incompatible with antitrust law. It was not until eight years later that the prohibition became effective by a final decision of the Federal Supreme Court in 2007. A parliamentary initiative was launched back in 2004 with the aim of introducing a fixed book price law for the whole of Switzerland. In 2011, the Federal Assembly passed a law to this effect, against the will of the Federal Council. In a referendum in 2012, 56.1 per cent of the population spoke out against the reintroduction of fixed book prices.<sup>142</sup> The population in German-speaking Switzerland voted against fixed book prices, while the majority of the population in French-speaking Switzerland supported them.

**115.** Before the abolition of fixed book prices, advocates of fixed book prices had expressed fears that free book prices could lead not only to higher prices, but also to a threat to the nationwide supply of brick-and-mortar booksellers and the variety of titles published.<sup>143</sup> A report commissioned by the Federal Office of Culture arrived at a less drastic, albeit also pessimistic assessment. According to this, the abolition of fixed book prices was expected to accelerate the concentration process, as a result of which the number of exits in from the brick-and-mortar book trade would continue to rise.<sup>144</sup> Lower prices would only be likely in the bestseller segment; otherwise price increases were expected.

**116.** Just one year after the abolition of fixed book prices, the Swiss State Secretariat for Economic Affairs (SECO) commissioned the University of Applied Sciences Northwestern Switzerland to evaluate the effects of the abolition of fixed book prices.<sup>145</sup> Data as of 1 March 2007 and 1 March 2008 were collected and compared. The list prices for the calculation of a book price index are based on data supplied by the Swiss Book Centre (SBZ), on the basis of which the Swiss Federal Statistical Office calculates its book price index. Differences between list prices and actual selling prices in March 2008 were identified using bookseller surveys. Data for French-speaking western Switzerland were evaluated as a benchmark.

**117.** The study concluded that the abolition of the fixed book price system had not triggered any significant changes in book prices in German-speaking Switzerland.<sup>146</sup> Although list prices have risen noticeably, this development has also taken place in western Switzerland and is attributable to a strong economy and the associated increase in demand for books, as well as the strong euro against the Swiss franc from mid-2007. A year after the end of the fixed book price system, many booksellers, including some large bookstores, would still have strictly aligned their retail prices with the list prices. However, some booksellers had moved to a differentiated pricing policy and granted discounts on the list price. Shortly after the abandonment of fixed book prices, price differences could already be observed, whereby not only online sellers but also brick-and-mortar bookshops granted discounts on the list price.<sup>147</sup>

**118.** In the following years, book prices and book sales fell by more than 20 per cent (see Figure 3.8). However, this development cannot be attributed to the abolition of fixed book prices, but is primarily due to the strong

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<sup>142</sup> See N. N., Volksentscheid: Die Mehrheit sagt Nein, boersenblatt.de, 11 March 2012.

<sup>143</sup> See SBVV, Der Nutzen der Buchpreisbindung in der Schweiz, [http://www.sbv.ch/UserFiles/File/Preisbindung/Argumentarium\\_Preisbindung\\_2006.pdf](http://www.sbv.ch/UserFiles/File/Preisbindung/Argumentarium_Preisbindung_2006.pdf), accessed: 14 May 2018.

<sup>144</sup> See Prognos, Buchmarkt and Buchpreisbindung in der Schweiz, Schlussbericht für das Bundesamt für Kultur, Kurzfassung, Basel, September 2001, p. 7.

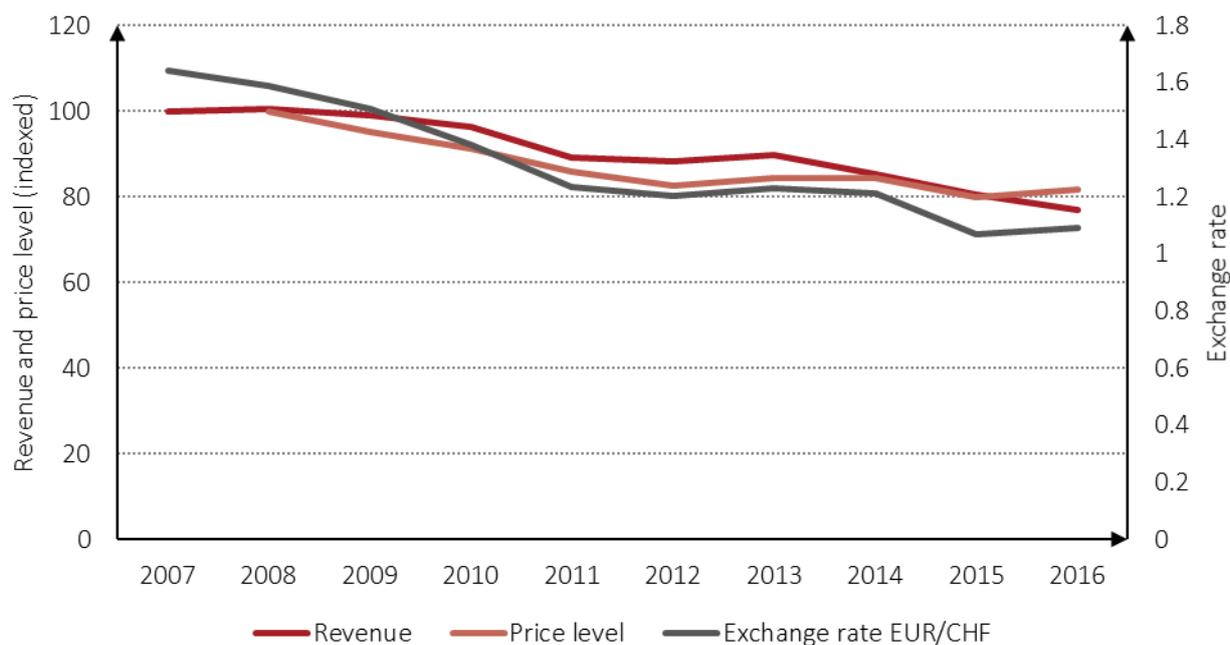
<sup>145</sup> See Hullinger, B. u. a., Erste Auswirkungen der Abschaffung der Buchpreisbindung, Technischer Bericht and Vertiefung, Studie im Auftrag des Staatssekretariats für Wirtschaft, Bern 2009.

<sup>146</sup> See *ibid.*, pp. 9-10 and 87-88.

<sup>147</sup> See *ibid.*, p. 84.

Swiss franc. Around 80 per cent of the books sold in Switzerland are published abroad, so that the decline in the exchange rate has led to favourable purchasing conditions for imports from the euro zone, which is reflected in lower retail prices.<sup>148</sup> Adjusted for currency effects, however, it cannot be ruled out that book prices in Switzerland have risen slightly, apart from some highly discounted bestseller titles. However, it is unclear whether this development is primarily due to the abolition of fixed book prices. It is also conceivable that the now looser link to book prices in Germany and Austria has led the Swiss book trade to adjust its prices to the higher purchasing power in Switzerland.

**Figure 3.8: Revenues and prices in German-speaking Switzerland 2007–2016**



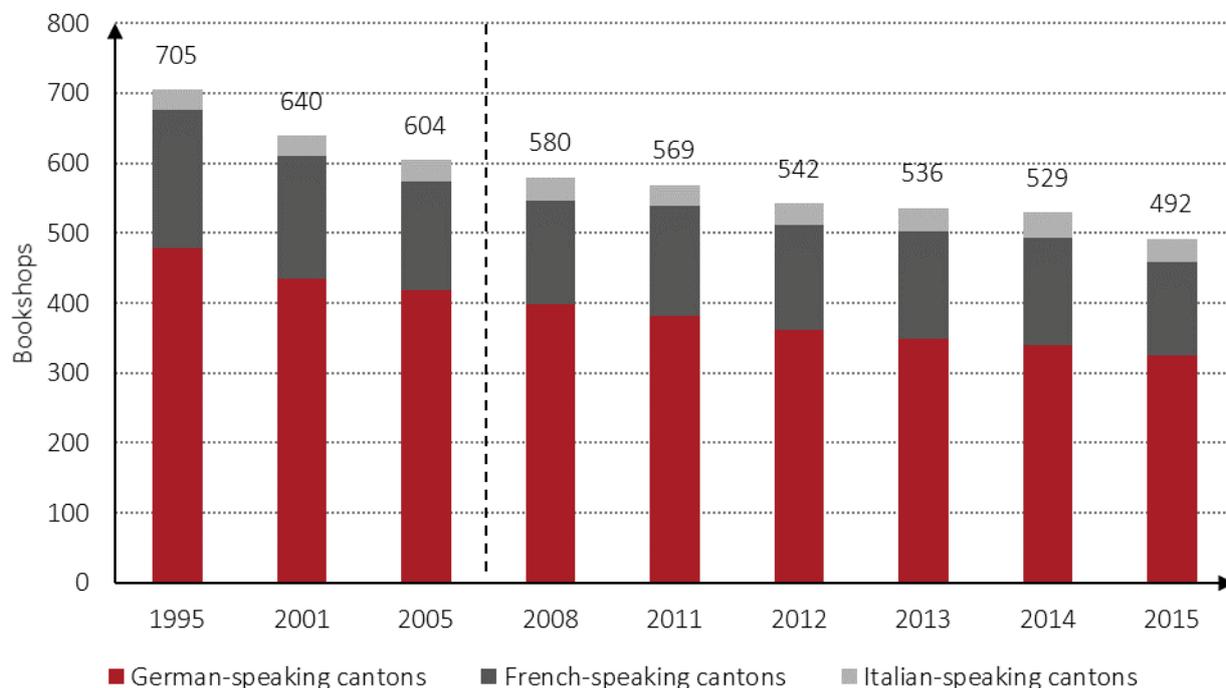
Note: Sales and prices are indexed. The base year for sales is 2007 (index 2007 = 100 per cent) and 2008 for price (index 2008 = 100 per cent). The exchange rates are the average exchange rates of the respective year.

Sources: SBVV, Deutschschweizer Buchmarkt: Marktreport, Zürich (various editions), Oanda currency converter; own illustration

**119.** Data on the number of booksellers in Switzerland is provided by the Federal Business Census until 2008 and the Statistics on the Corporate Structure from 2011 onwards, although direct comparisons of absolute figures over time are not possible due to the different data sources. Nevertheless, it becomes clear that the density of brick-and-mortar bookstores declined continuously both before 2011 and afterwards (see Figure 3.9). A comparison of the data from 1995 to 2005, i.e., before the abolition of fixed prices in German-speaking Switzerland, between the German and French-speaking cantons shows a decline in both parts, but it varies greatly: while the number of bookstores in western Switzerland fell by around 25 per cent, the decline in German-speaking Switzerland was just under 13 per cent. In the period since 2011, the pace of decline in brick-and-mortar book trade in both parts of the country has converged and amounted to around 15 per cent in 5 years. Most recently, Ex Libris, the leading bookseller in Switzerland, announced at the beginning of 2018 that due to competitive pressure in the digital market, it would close 43 of its existing stores and would concentrate primarily on its online business in the future.<sup>149</sup>

<sup>148</sup> See SBVV, Deutschschweizer Buchmarkt: Marktreport 2016, Zürich, January 2017, p. 4.

<sup>149</sup> Aiolfi, S./Schmutz, C. G., Ex Libris geht über die Bücher, NZZ Online, 11 January 2018.

**Figure 3.9: Number of bookshops by language group 1995–2015**

Note: The dashed line marks the end of fixed book prices in German-speaking Switzerland in 2007.

Sources: Schweizer Bundesamt für Statistik, Eidgenössische Betriebszählung BZ (until 2008) und Statistik der Unternehmensstruktur (STATENT) (since 2015); own illustration

**120.** A breakdown of the business statistics for German-speaking Switzerland by company size shows that medium-sized booksellers with 10 to 49 employees are more affected (minus 19 per cent) than small booksellers with fewer than 10 employees (minus 14 per cent).<sup>150</sup>

**121.** Since 2007, there has been an increasing shift of the book trade to the Internet.<sup>151</sup> This can be seen on the one hand in the sale of printed books and on the other in e-book sales. The share of online selling of printed books in the overall book market has been around 25 per cent since 2014 and has stagnated at this level since then. Ex Libris's decision to significantly reduce its brick-and-mortar business and to focus more strongly on the online market could lead to a further shift in favour of online bookselling.<sup>152</sup> The e-book also shows revenue growth. Its market share in the book market is estimated at around 10 per cent for 2016.<sup>153</sup>

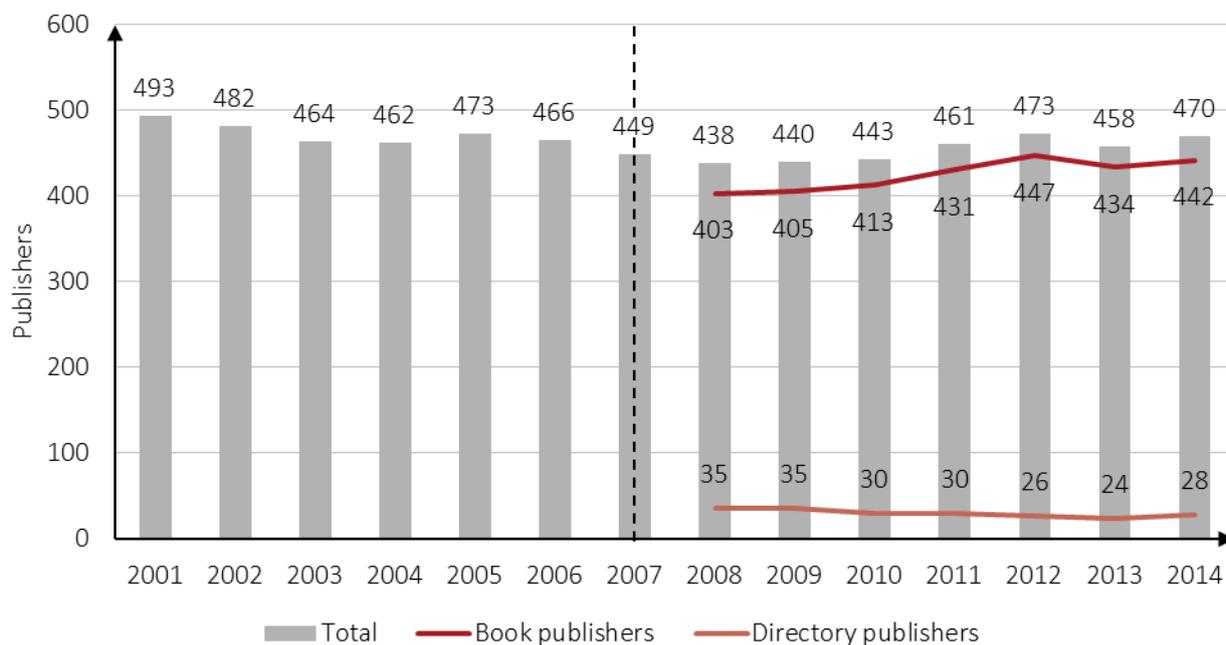
**122.** A more positive trend can be observed in publishing, especially since 2008 (see Figure 3.10). Although earnings have declined, the number of Swiss publishers included in the VAT statistics, which fell from 493 to 427 between 2001 and 2008, has risen noticeably since 2008, most recently to 470.

<sup>150</sup> The number of large booksellers with more than 50 employees has decreases from 8 to 6 in this period.

<sup>151</sup> See SBVV, Marktreport: Deutschschweizer Buchmarkt, Zürich (various volumes).

<sup>152</sup> See para. 119 in this Special Report.

<sup>153</sup> See SBVV, Deutschschweizer Buchmarkt: Marktreport 2016, supra, p. 3.

**Figure 3.10: Number of Publishers in Switzerland**

Note: Book publishers and directory publishers will not be shown separately until 2008. The data up to 2007 include both book and directory publishers. The dashed line marks the end of fixed book prices in German-speaking Switzerland in 2007.

Source: Eidgenössische Steuerverwaltung, Mehrwertsteuerstatistik; own illustration

**123.** A comparison of the development between German-speaking Switzerland, western Switzerland and Italian-speaking Ticino based on data from the Swiss Business Census and the Statistics on Corporate Structure show that the share of German-speaking Swiss publishers, measured in terms of the number of statistically recorded operating sites in the whole of Switzerland, has remained almost unchanged at around 69 per cent since 1995.<sup>154</sup>

**124.** The share of Swiss publishers in the German-Swiss book market, which increased significantly from 14.7 to 18.1 per cent between 2012 and 2016, shows a positive trend.<sup>155</sup> This development is particularly remarkable as import conditions have developed favourably for foreign publishers due to the fall in the euro exchange rate. At the same time, their sales share in the German book market has increased from just under 2.4 per cent in 2012 to 3 per cent in 2016, despite the unfavourable exchange rate-related export conditions from a Swiss perspective.

**125.** To sum up, there have been no drastic cutbacks in the German-Swiss book market as a result of the abolition of fixed book prices. The, in some cases, significant price reductions and thus declining revenues are primarily attributable to the changed exchange rates of the Swiss franc and the euro. A connection with the abolition of book fixed prices cannot be established. The decline in the brick-and-mortar book trade also dates back to before 2007 and is therefore not directly attributable to the abandonment of fixed prices, but has tended to accelerate since then. In contrast, the number of Swiss publishers has recently even increased, as has their share of sales in the Swiss and the German book markets.

<sup>154</sup> See Schweizer Bundesamt für Statistik, Eidgenössische Betriebszählung for data until 2008 and Schweizer Bundesamt für Statistik, Statistik der Unternehmensstruktur (STATENT) for data since 2009.

<sup>155</sup> SBVV, Marktreport: Deutschschweizer Buchmarkt, Zürich (various volumes).

## Chapter 4

### Objectives and effects of the German Book Price Fixing Act

**126.** The German Fixed Book Prices Act serves the main cultural policy objective of protecting and promoting books as cultural objects. Furthermore, the legislator formulates a series of sub-objectives or intermediate objectives which are intended to contribute to achieving this main objective. The interest of the legislature in protecting books as cultural objects must be acknowledged in principle in competition law and economic assessment (Section 4.1).

**127.** The legally prescribed fixed book prices should enable market participants to contribute to the protection of books as cultural objects. However, they constitute a market intervention with ambivalent or unclear effects. In this context, it is also questionable whether the assumptions on the effectiveness of fixed book prices, on which the Book Price Fixing Act adopted in 2002 is based, still adequately reflect the changing market environment (Section 4.2).

#### 4.1 The objectives of the Act

**128.** The objectives of the German Book Pricing Act are laid down in § 1 BuchPrG. The provision establishes a set of targets. § 1 BuchPrG:

*“The law serves to protect the book as a cultural asset. The fixing of binding prices for the sale to end-customers ensures the receipt of a wide range of books. The law also ensures that this offer is accessible to the general public by promoting the existence of a large number of points of sale.”\**

**129.** In the following sections, firstly, the relationship between the objectives bundled in § 1 BuchPrG is determined (Section 4.1.1). Secondly, the main objective of protecting the “cultural asset book”, which is based on a problematic constitutional basis of competence (Section 4.1.2), is addressed. Thirdly, uncertainties are pointed out between the objectives of the law and the means used, which lead to a conflict of jurisdiction with European law (Section 4.1.3).

##### 4.1.1 Protection of the book as a cultural asset and related sub-objectives/intermediate objectives

**130.** According to § 1 sentence 1 BuchPrG, the “protection of the book as a cultural asset” constitutes the main objective of the law. However, it is not clear from the wording of the law what the German legislature wants to protect exactly: the law itself does even not define what the legislature regards as a “book”.<sup>156</sup> It also remains open what the book is supposed to constitute as a “cultural asset”. Legal protection can be understood, in absolute terms, purely quantitatively (high number of books), but also qualitatively (high diversity of titles). In addition, further cultural and educational policy objectives can be combined with the protection of the book as a cultural asset. This is possible both on the supply side (e.g., high cultural value of the books distributed) and on the demand side (e.g., attracting readers, achieving a high level of education).

\* Informal translation. In German: „Das Gesetz dient dem Schutz des Kulturgutes Buch. Die Festsetzung verbindlicher Preise beim Verkauf an Letztabnehmer sichert den Erhalt eines breiten Buchangebots. Das Gesetz gewährleistet zugleich, dass dieses Angebot für eine breite Öffentlichkeit zugänglich ist, indem es die Existenz einer großen Zahl von Verkaufsstellen fördert.“

<sup>156</sup> This is not changed by § 2 BuchPrG (“Books in the sense of this law are also [...]”), since this provision merely extends the concept of books. See also Kübler in: Ulmer-Eilfort/Obergfell, Verlagsrecht, Stuttgart 2013, 1 K para. 31, according to whom – insofar remaining unspecified – the book must be a product regarded as “typical for publishing or bookselling”; further, *ibid.*, paras 37 ff. The legal situation in Austria is similar in this respect; see Tonninger, Buchpreisbindung in Österreich, 2nd ed., Wien 2015, § 1 para. 2: It is only “relevant whether the products concerned are described as ‘books’ in everyday language”.

**131.** The main objective of protecting the “book as a cultural asset” is supplemented by several intermediate or partial objectives in § 1 sentences 2-3 BuchPrG. These concern the “preservation of a wide range of books” (i.e., the presence of sales outlets and/or the range) and the “accessibility” of books. It follows that the book as a cultural asset is only protected in Germany with regard to commercially distributed books. In contrast, access to books made available free of charge in libraries is not protected as such.

**132.** The fact that the protection only applies to books as commercial products indicates that it seems to be precisely marketability that matters to the legislature. However, it remains open why, from the point of view of the legislature, the above-mentioned characteristics of the book as a cultural asset justify limiting protection to books as commercial products. Certainly, it is conceivable that the book could be protected as an edited product or as a means of conveying intellectual creations. However, if the book were to be protected as an edited product, it would remain unclear why only books (including e-books) are subject to fixed prices, but not other products used to convey the same content (e.g., audio books). If the book were to be protected as a means of conveying intellectual creations, it would be unclear how the protection sought by the Book Price Fixing Act relates to copyright protection. Even in countries without a fixed book price law, titles are published and distributed which must be regarded as high-quality in terms of their copyright content. Apart from this, the connection between protection and fixed book prices and the resulting market intervention remains unclear. This means that copyrighted content can also be distributed on sound and image carriers (CDs, DVDs, etc.). In addition, many titles of particular importance as a cultural asset in Germany were written long before the introduction of fixed book prices. It therefore does not appear to be imperative that the protection of books requires fixed prices.

**133.** Irrespective of these questions of content, the protection refers in any case precisely to those books which are offered via the book distribution structures existing at the time the law was enacted.<sup>157</sup> This follows on the one hand from § 1 sentences 2-3 BuchPrG and on the other hand from the structure of the fixed book prices according to § 3 in conjunction with § 5 BuchPrG. In an overall view, these provisions show that the diversity of titles and accessibility to book titles should be guaranteed, particularly with regard to books published by

- publishing houses and to
- book retailing companies (“sales outlets”) with traditional business models and a cost structure typical of non-digital distribution.

**134.** However, the law remains unclear as to the question whether the legislature also intends to protect books offered through new forms of distribution – especially those that call into question the traditional distribution infrastructure. This is not precluded by the fact that the fixed book price system also applies to books that are offered through new distribution channels.

**135.** The history of the law confirms that books should be protected as cultural objects marketed through traditional distribution structures. In this respect, reference should be made to the justification of the government bill and statements made by individual members of parliament in the legislative procedure.<sup>158</sup> According to the bill, books and book printing made an outstanding contribution to the current state of culture in German society, which is why publishing products should be promoted as a cultural asset and medium.<sup>159</sup> In the future, it will

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<sup>157</sup> Regarding the background of this protection purpose, see, e.g., Kübler in: Ulmer-Eilfort/Obergfell, Verlagsrecht, 1st ed. 2013, K 1 para. 27; see also KG Berlin, Order of 23 September 1983, Kart. 26/82 – Schulbuch-Sammelbestellungen, WuW/E OLG 3154 (3155) (concerning §§ 16-17 GWB [old version]).

<sup>158</sup> See German Federal Government, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagserzeugnissen, BT-Drs. 14/9196 of 3. June 2002, p. 8; observations of the Bundesrat, *ibid.* (Appendix 2), p. 15; draft bill of several members of parliament of the SPD and Bündnis 90/Die Grünen parties, BT-Drs. 14/8854 of 23 April 2002, p. 6 (this bill was disposed of in the legislative procedure).

<sup>159</sup> German Federal Government, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagserzeugnissen, BT-Drs. 14/9196 of 3 June 2002, p. 8.

continue to be a question of “enabling a lively and diverse literary landscape in Germany in a stable and differentiated system of independent publishers and bookstores”.<sup>160</sup>

**136.** Moreover, it was pointed out that the book “served as a means of communication of languages and dialects”. In this way, it was claimed that it contributed to the integration of homogeneous linguistic areas, [to] promot[e] regional integration of European cultural areas and at the same time [to] presen[t] the cultural diversity of Europe”.<sup>161</sup> These statements may suggest a particular interest in the protection of fiction (literature, poetry). However, it should be noted that such an interest, which would not necessarily include the protection of technical or trivial literature, for example, is not reflected in the wording of the law.

**137.** The government’s draft of the Book Pricing Act shows that German lawmakers have also oriented themselves towards legislation in other EU Member States, above all, in France and Austria.<sup>162</sup> The French *Loi Lang* pursues three objectives, namely the preservation of title diversity, the securing of a nationwide bookselling infrastructure and the prevention of market concentration.<sup>163</sup> The direction of protection thus appears to be even more market-related than in the case of the German Book Price Fixing Act, in which, for example, the prevention of market concentration does not constitute an independent protection objective. Although the Austrian Book Pricing Act is based on the *Loi Lang*, in contrast to the *Loi Lang* and the German Act it explicitly aims “at pricing that takes into account the position of books as cultural assets, the interests of consumers in reasonable book prices and the economic necessities of the book trade” (§ 1 p. 2 *öBuchPrG*).<sup>164</sup> Here too, the market-relatedness of the law is emphasized more strongly than in Germany’s § 1 *BuchPrG*.

**138.** In an objective-teleological interpretation of the German Book Price Fixing Act, the Act should serve primarily cultural purposes, while market aspects are of secondary importance. The preservation of existing book distribution structures cannot be seen independently of the main objective, the protection of books as cultural objects. However, the legislature refrains from describing in any detail the cultural-political functions that the book is intended to fulfil. Rather, the protection as a book covers everything that is actually marketed as a book, without any further restriction.<sup>165</sup> The legislator also refrains from describing any cultural services in connection with book distribution which are to be safeguarded by the market interventions provided for in the Book Price Fixing Act. The definition of such services is instead left to the market participants. According to the explanations in the following sections, however, the law and in particular the statutory fixed book prices have ambivalent economic effects which can influence the culturally related features of book distribution (e.g., promoting the pleasure of writing and reading; bookstores as places for cultural exchange) in different ways.<sup>166</sup> It makes no difference whether books with or without a cultural claim have an impact. In the absence of a more detailed definition, it is obvious that the cultural objectives of the law encompass all the effects in question.

<sup>160</sup> Bundestag, 2<sup>nd</sup> session, plenary protocol 14/243 of 14. June 2002, p. 24534B (Pfeifer, CDU); similarly, p. 23535C (Vollmer, Grüne): to maintain the “status quo in relation to books and music” in order to protect the “slow and thoughtful” that characterizes books [informal translations].

<sup>161</sup> Bundestag, 2<sup>nd</sup> session, plenary protocol 14/243 of 14. June 2002, p. 24533B (Griefahn, SPD).

<sup>162</sup> See German Federal Government, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagserzeugnissen, BT-Drs. 14/9196 of 3 June 2002, p. 8; identical: draft bill of several members of parliament of the SPD and Bündnis 90/Die Grünen parties, BT-Drs. 14/8854 of 23. April 2002, p. 6 (this bill was disposed of in the legislative procedure).

<sup>163</sup> *Loi n° 81-766 du 10 août 1981 relative au prix du livre*. Cf. Autorité de la concurrence, avis of 18 December 2009, 09-A-56, paras 43, 61 ff.

<sup>164</sup> Cf. Tonninger, *Buchpreisbindung in Österreich*, Praxiskommentar zum *BPrG*, 2nd ed. 2015, Vor § 1 para. 18, 23 ff.

<sup>165</sup> The definition of “cultural property” in § 2(1) No. 10 of the Act for the Protection of Cultural Property, a law issued after the Book Price Fixing Act, does not appear transferable. This definition applies only to books “of artistic, historical or archaeological value or from other areas of cultural heritage, in particular paleontological, ethnographic, numismatic or scientific value” [informal translation].

<sup>166</sup> Cf. Chapter 3 in this Special Report.

**139.** The explicit extension of the statutory fixed book prices on e-books in the Second Amendment Act to the Book Price Fixing Act has not changed the original objective of the Book Price Fixing Act.<sup>167</sup> The government bill justified the extension of the statutory fixed book prices with the “preservation of a broad range of books and accessibility for the general public”, whereby once again the focus was on offerings via conventional publishing houses and bookstores. In addition, “legal certainty” with regard to the equal treatment of e-books with printed works should be established. In this respect, the government draft adopted the position of the Börsenverein, which had previously taken the view that fixed book prices also applied to e-books.

**140.** The partial or interim objectives of the German Book Price Fixing Act in connection with the protection of books as cultural objects lastly represent a difference from the already judicially reviewed fixed medicinal product prices under the Regulation on the pricing of medicinal products, whose objective is limited to ensuring health care. The protection of the commercial supply of medicinal products or access to points of sale is not an explicit objective of the Regulation.

#### **4.1.2 First problem: unclear protection objective makes practically effective protection difficult**

**141.** The fact that the cultural policy objectives of the law have not yet been defined more precisely – as outlined in the previous section – may be due to the fact that the legislative competence for the Book Pricing Act is not unproblematic. The law is based on Article 74(1) no. 11 of the German Basic Law (*Grundgesetz – GG*), which establishes the federal competence for commercial law.<sup>168</sup> In fact, however, the German legislature is striving for a cultural-political exception to the otherwise applicable commercial law.<sup>169</sup> Although the Parliament is not entirely forbidden to regulate cultural policy, the competence for legislation in the cultural field lies fundamentally with the Länder (Article 70.1 of the Basic Law). The legislator possibly wanted to exclude or avoid a conflict between federal and state competences by formulating the law in an open way. However, the vagueness of the legal objectives makes it more difficult to pursue them in practice.

**142.** This is demonstrated by the fact that it has remained unclear at least in practice why the Book Price Fixing Act protects books as cultural objects. There is only a consensus among industry representatives and the public that such protection is legitimate. Nevertheless, only relatively vague and individually divergent views exist on what constitutes the book as a “cultural asset” at all. On the one hand, the unique importance of books for literature and science is emphasized. It is alleged that the (printed) book has an intellectual-historical exceptional position, which cannot be compared with that of sound and image carriers for music and films (CDs, DVDs, etc.). However, it is also argued that the specific form of books as culturally valuable economic goods (publishing products) is precisely why they are protected within the framework of the Book Pricing Act. The essential difference to music, films or pictures should then consist in the fact that books are usually not substitutable among themselves. Whether this really makes a difference remains to be seen. The decisive factor is that beyond the postulated special position of the book, it remains unclear which characteristics ultimately set the book apart from other media.

<sup>167</sup> See German Federal Government, Entwurf eines Zweiten Gesetzes zur Änderung des Buchpreisbindungsgesetzes, BT-Drs. 18/8043 of 6 April 2016, p. 1.

<sup>168</sup> German Federal Government, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagserzeugnissen, BT-Drs. 14/9196 of 3 June 2002, p. 9. As concerns the competence to protect cultural assets, see, e.g., Degenhart in: Sachs, Grundgesetz, 6. ed. 2011, Art. 73 para. 24.

<sup>169</sup> In the legislative procedure, see explicitly Bundestag, 2<sup>nd</sup> session, plenary protocol 14/243 of 14 June 2002, p. 24533B (Griefahn, SPD), according to whom in the case of “the [book as a] cultural asset, the European provisions on the movement of goods do not [fit] without modification” – “books cannot and must not be treated like any other commodity in the movement of goods”; p. 24534C (Pfeifer, CDU), according to which the “production and distribution [of books may] not be treated solely according to the criteria of general competition law”; 24535C (Vollmer, Bündnis 90/Grüne): “one more building block in our cultural policy”; 24535D f. (Otto, FDP): Price maintenance as an “exception of the regulatory principle of pricing according to supply and demand” [informal translations].

**143.** The positions appear even more inconsistent when it comes to protecting books as cultural objects in the form of e-books. Proponents highlight some the characteristics of the conventional printed book (e.g., “intellectual-historical exceptional position”), which are not necessarily present in the same way in the e-book. In contrast to this position, there is also the view that the cultural value of books has little to do with their physical form.

**144.** Furthermore, the discussion sometimes mixes up distinguishable legal assets. This is the case, for example, to the extent that the protection of books is claimed to contribute to the diversity of public and, where appropriate, scientific discourse. Even assuming that the title diversity of books – as has been claimed – may be an expression of diversity of opinion, the book as a cultural asset and the diversity of opinion appear to be legal assets that can be separated from one another.

**145.** The uncertainty of legal users as to what is meant by the “book as a cultural asset” is probably a burden for the effective protection of this legal asset. In case of doubt, it must be assumed that the Book Price Fixing Act is intended to protect books as comprehensively as possible. However, it is impossible to say when actual protection does not meet the legal requirements determined by the protection objective. In this respect, some auxiliary considerations can be made, e.g., that books should be protected at least as they are presently protected by the law. Even then, however, it remains questionable why the actual scope of protection should be measured against this arbitrarily chosen scale. If deficiencies in protection cannot therefore be determined with certainty, then the protection offered cannot ultimately be guaranteed either. It should also be borne in mind that the protection of books of different types (fiction, specialist literature, etc.) may have to meet different requirements from a cultural policy perspective. A uniform approach to the protection of books as cultural objects cannot meet these requirements.

**146.** The Monopolies Commission acknowledges the cultural policy decision of the legislature to protect books as cultural objects. At the same time, however, it sees it as the legislator’s duty to define the aforementioned protection objective so clearly that legal users are given a legal benchmark against which actual market practice can be measured. The definition of such a standard does not necessarily lead to a lower scope of protection than previously intended. On the contrary, on the basis of the foregoing considerations, it can help to ensure effective protection of books as cultural objects in the first place.

### **4.1.3 Second problem: confusion of objectives and the means used to achieve them**

**147.** The objective of the Book Price Fixing Act does not make a clear distinction between the protection objective of the “book as a cultural asset” and the functions that publishers and booksellers fulfil in pursuing this protection objective.<sup>170</sup> Behind this confusion of objectives and functions, another conflict of competence appears, this time between the competence of the federal legislature for economic matters (Article 74.1 No. 11 of the Basic Law) and the EU competence to shape and protect the internal market of the European Union (Article 3.3 sentence 1 of the TEU; see also Articles 26, 114 TFEU).

**148.** The reasoning of the government draft suggests that the Book Price Fixing Act is not primarily intended to protect books as cultural objects in reality, but rather to promote the book distribution structure for books existing when the law was enacted.

**149.** For example, in the government bill on the Book Pricing Act, which is still authoritative in this respect, the Federal Government explained:

*“The fixed prices for books in the German-speaking cultural area contribute decisively to the fact that  
- a wide variety and number of titles is available,*

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<sup>170</sup> See para. 131 in this Special Report.

- *culturally valuable books are published that are not expected to have a large circulation in the first place,*
- *books are available everywhere at the same prices,*
- *the supply of books not only in urban centres, but throughout the entire area is guaranteed by a high density of widely sorted bookstores and that*
- *there is a wealth of small and medium-sized publishing houses, which in turn enables a large number of German authors to publish their works.*<sup>171</sup>

The Act was not only intended to protect distribution at the final trade stage, since also publishers should be enabled to produce “culturally valuable[r] books”. Nevertheless, the government bill focused on the broad availability of books in the trade.

**150.** The fact that the Book Price Fixing Act is primarily intended to protect distribution structures also follows from the delimitation of press distribution, to which the government bill stipulates:

*“The distribution of press products is characterized by its own distribution structures and other calculation principles. These differences in practical handling require a separate regulation for newspapers and magazines.”*<sup>172</sup>

**151.** The protection sought by the law is granted largely without any obligations.<sup>173</sup> In particular, the law does not contain any provisions that oblige publishers to produce or booksellers to distribute certain books in the cultural interest. Such services may be rendered voluntarily or due to market forces, but their provision is not ensured by the law.

**152.** The only provision that contains qualitative requirements apart from fixed prices is § 6 BuchPrG. This provision lays down the following legal obligations:

- According to § 6 para. 1 sentence 1 BuchPrG, publishers must “take appropriate account of their contribution to the nationwide supply of books and the service they provide when setting their sales prices and other sales conditions vis-à-vis smaller bookstores”.<sup>\*</sup>
- According to § 6(1) sentence 2 BuchPrG, the discounts granted may not be based solely on the sales generated with the dealer.
- Publishers may not discriminate against booksellers in relation to other customers (§ 6 para. 2 BuchPrG) and intermediaries in relation to final sellers (§ 6 para. 3 BuchPrG).

**153.** § 6 BuchPrG also refers only to aspects of book distribution. Section 6 para. 1 BuchPrG establishes a mandatory correction of the conditions that would arise between the contracting parties. The obligations laid down in this provision apply exclusively to publishers. However, the provision does not take into account the strong bargaining power of large dealers and does not provide for a duty of cooperation for them. Since the contractual terms of larger dealers are trade secrets, it is also likely to be difficult for the protected smaller bookstores to prove that they are not disadvantaged vis-à-vis larger dealers illegally.

<sup>171</sup> Informal translation; see German Federal Government, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagszeugnissen, BT-Drs. 14/9196 of 3 June 2002, p. 8. In addition, see the materials concerning § 3 BuchPrG, *ibid.*, p. 10.

<sup>172</sup> Informal translation; see German Federal Government, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagszeugnissen, BT-Drs. 14/9196 of 3 June 2002, p. 8.

<sup>173</sup> See para. 138 in this Special Report.

<sup>\*</sup> Informal translation; in German: „Verlage müssen bei der Festsetzung ihrer Verkaufspreise und sonstigen Verkaufskonditionen gegenüber kleineren Buchhandlungen den von ihnen erbrachten Beitrag zur flächendeckenden Versorgung mit Büchern sowie den erbrachten Service angemessen berücksichtigen.“

**154.** The purpose of § 6 para. 2 BuchPrG is probably to reward the specialist trade, which provides consulting and services – and thus makes an important contribution to the promotion of books as cultural objects. However, it is again likely very difficult to enforce.

**155.** The provision of § 6 para. 3 BuchPrG is intended to ensure that large end-customers are not supplied more cheaply than the intermediate trade. In the intermediate trade there are oligopoly structures which facilitate the enforcement the interests of the intermediate trade. Thus, enforcement is again subject to the existing market conditions, without the law taking this circumstance into account.

**156.** The practical relevance of § 6 BuchPrG is unclear. There is little evidence that the rules are enforced on the market or in court.<sup>174</sup> There are no possibilities for checking compliance, if only because the respective conditions of sale represent trade secrets.

**157.** Even if one disregards the design of § 6 BuchPrG, the confounding of the protection objective “book as a cultural asset” and the functions which publishers and book trade fulfil with regard to this objective is problematic in the Book Price Fixing Act.<sup>175</sup> The fact that the protection of books as a cultural asset is a legitimate objective does not mean that the same applies to the protection of the activities of publishers and booksellers. The argument that the contribution of publishers and bookstores in particular is worthy of protection in order to ensure the diversity of and accessibility to books can also be applied to other products. National legislation could thus also provide for fixed prices to protect the existing distribution infrastructure for any other goods and services (e.g., for the protection of bakers, corner shops, etc.). In contrast, the EU fundamental freedoms and competition rules protect the commercial distribution of books without differentiating between distribution structures. On the contrary, they provide for all sales channels to be treated equally.<sup>176</sup>

**158.** The problem can, of course, be resolved by an interpretation of the objective in § 1 BuchPrG in conformity with EU law. Accordingly, the existing infrastructure of publishing houses and bookstores would only be protected by the Book Price Fixing Act if this is necessary to protect books as cultural objects. Any further protection of the distribution infrastructure is likely to come into conflict with EU law for the above reasons and would therefore not be covered by the statutory objective. In such an interpretation, the interest pursued by the Fixed Book Prices Act in protecting the traditional distribution structure for books should be compatible with EU law.

## 4.2 Ambivalent effects of statutory fixed book prices

**159.** In many markets, competition leads to efficient market results, where the pricing mechanism plays a central role for the efficient allocation of limited resources. However, there are many exceptions to this rule that can justify a restriction of competition from a welfare perspective due to specific market characteristics. To what extent a market intervention in the form of fixed book prices is necessary to achieve the cultural policy objectives in the book market is the subject of what follows. It is also important to consider whether fixed book prices (at present) still offer an effective solution to problems that may exist.

**160.** The following provides a brief summary of the economic literature on vertical price fixing (Section 4.2.1) and some remarks on the transferability of these results to fixed book prices in Germany (Section 4.2.2). This is followed by a detailed analysis of the impact of German fixed book pricing law, looking at the different levels of the value chain. Since a system of fixed retail prices eliminates one of the central functions of the retailing level, the effects of the Book Pricing Act are likely to be most immediate and significant for booksellers. The analysis

<sup>174</sup> See Menche, B., Im Konditionen-Clinch, boersenblatt.net, 4 March 2015.

<sup>175</sup> Regarding a similar constellation, see Monopolies Commission, XXth Biennial Report, 1st ed. 2014, paras 1786 ff.

<sup>176</sup> See, e.g., Art. 4 lit. a Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102 of 23 April 2010, p. 1; and European Commission, Guidelines for the assessment of vertical restraints, OJ C 130 of 19 May 2010, p. 1, paras 48, 223 ff.

therefore starts at the retail level (Section 4.2.3), before examining the consequences for the intermediate book trade (Section 4.2.4) and publishing (Section 4.2.5).

#### 4.2.1 Ambiguous welfare effects of vertical price fixing in economic theory

**161.** Vertically fixed prices, where manufacturers set binding prices at the retail level, have long been the subject of research in economic theory. The literature is correspondingly extensive and sheds light on many different aspects and constellations. A fundamental question is: Why should a manufacturer make use of a vertical price-fixing mechanism that prevents price competition at the retail level?<sup>177</sup> After all, it is in the manufacturer's interest if dealers compete on price, demand the lowest possible prices and sell a large quantity of the product. However, economic theory shows that it can be profitable for market participants to vertically bind retail prices in a number of constellations. With regard to the welfare effect, however, it does not come to a clear conclusion: vertical price fixing is per se neither harmful nor useful, but must be assessed in the respective context.<sup>178</sup>

**162.** Some studies show that vertical price fixing can be a mechanism for enforcing collusive behaviour.<sup>179</sup> Collusion can take the form of both manufacturer and dealer cartels. Vertically fixed prices can also be used to prevent potential competitors from entering the market.<sup>180</sup>

**163.** In addition to these clearly anti-competitive and welfare-damaging effects, which can be attributed to producer or trade-side market power, there are many alternative explanations. They show that manufacturers' fixed prices can be used to effectively counteract so-called external effects that may occur in the relationship between manufacturers and retailers.

**164.** In some constellations, market failure can be effectively prevented through vertical price fixing and positive welfare effects can be achieved. The starting points here are often the so-called service or free-rider argument and the assumption that service has a positive influence on the demand for goods.<sup>181</sup> According to this, free price competition regularly leads to an undersupply of service, since service-oriented dealers are always exposed to the risk that customers will seek advice from them and later buy from cheaper competitors. Vertical price fixing prevents such free-rider behaviour. The retailers raise the level of service offered, which generates additional

<sup>177</sup> See Elzinga, K./Mills, D., *The Economics of Resale Price Maintenance*, in: *Issues in Competition Law and Policy*, ABA Section of Antitrust Law, 2008, p. 1841 and Mathewson, F./Winter, R., *The Law and Economics of Resale Price Maintenance*, *Review of Industrial Organization* 13, 1998, p. 64.

<sup>178</sup> A systematic literature overview, differentiated by efficiency-increasing and efficiency-reducing effects, can be found, for example, in Mathewson, F./Winter, R., *The Law and Economics of Resale Price Maintenance*, supra.; Gundlach, G. T., *Resale Price Maintenance: A Review and Call for Research*, American Antitrust Institute Working Paper No. 14(3), 2014 and Elzinga, K./Mills D., *The Economics of Resale Price Maintenance*, supra. Interesting in this context is the controversy triggered by the *Leegin* decision of the American Supreme Court, in which for the first time a per se ban on fixed prices was abandoned in favour of an individual case assessment; see Lao, M., *Resale Price Maintenance: A Reassessment of its Competitive Harms and Benefits*, in: Drexler, J. u. a. (Ed.), *More Common Ground for International Competition Law?*, Cheltenham 2011 and Bennett, M. u. a., *Resale Price Maintenance: Explaining the Controversy, and small Steps towards a more nuanced Policy*, *Fordham International Law Journal* 33(4), 2011, pp. 1277-1299.

<sup>179</sup> See e.g., Yamey, B., *Origins of Resale Price Maintenance*, London 1954; Bowman, W. S., *Resale Price Maintenance - A Monopoly Problem*, *Journal of Business* 25, 1955, pp. 141-155; Overstreet, T., *Resale Price Maintenance: Economic Theories and Empirical Evidence*, Bureau of Economic Staff Report, FTC, Washington 1983; Jullien, B./Rey, P., *Resale Price Maintenance and Collusion*, *Rand Journal of Economics* 38(4), 2007, pp. 983-1001 and Grimes, W., *A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation*, *Antitrust Bulletin* 55, 2010, pp. 101-149.

<sup>180</sup> See e.g., Yamey, B., *Origins of Resale Price Maintenance*, supra or Overstreet, T., *Economic Theories and Empirical Evidence*, supra.

<sup>181</sup> The service argument goes back to Telser, L. G., *Why should Manufacturers want Fair-Trade?*, *The Journal of Law & Economics* 3, 1960, pp. 86-105 and has been further developed by others, see e.g., Bork, R., *The Rule of Reason, and per-se Concept: Price fixing and Market Division*, *Yale Law Journal* 75, 1966, pp. 373-475 and Marvel, H. P./McCafferty, S., *Resale Price Maintenance and Quality Certification*, *Rand Journal of Economics* 15(3), 1984, pp. 346-359.

demand and ultimately increases manufacturers' profits and consumer welfare. Even in cases where there is no free-rider problem, price fixing can prevent too strong price competition to the detriment of quality competition from a welfare perspective.<sup>182</sup> Furthermore, vertically fixed prices can create incentives for retailers to stockpile goods or add new products to their portfolios when facing uncertain demand.<sup>183</sup> Ultimately, fixed prices can contribute to maintaining the sales infrastructure required by manufacturers and increase supply density, which in turn has a positive effect on demand.<sup>184</sup>

**165.** However, there are also numerous counterarguments according to which vertical price fixing can be harmful to welfare even without collusion. The reasons are, for example, an excessively high level of services or excessive service costs.<sup>185</sup> There is also a risk that additional revenues generated by fixed prices will not be used to increase service levels or that the increased sales efforts of retailers will not generate any additional benefits.<sup>186</sup>

**166.** Although fixed book prices are widespread at least in Europe<sup>187</sup> and an exception to the general prohibition of vertical price fixing, comparatively few theoretical studies explicitly deal with the situation on the book market.<sup>188</sup> As in the general literature on vertical price fixing, the results are contradictory in terms of (consumer) welfare, the number of titles published, the number of copies sold, etc. and are strongly driven by the underlying assumptions.<sup>189</sup>

#### 4.2.2 Theoretical models only partially applicable to fixed book prices in practice

**167.** The models of vertical price fixing are, naturally, simplified and cannot adequately reflect the complexity of the distribution chain, product diversity and consumer heterogeneity in the book market. This applies not only to the general fixed-price models, but also for papers that explicitly model the special features of the book market. Therefore, the theoretical findings cannot be directly applied to fixed book prices in Germany. However, the arguments presented and the mechanisms shown are to be incorporated where appropriate in the impact analysis of fixed book prices and acknowledged in the respective context.

<sup>182</sup> See Winter, R., Vertical Control and Price versus Nonprice Competition, *The Quarterly Journal of Economics* 108(1), 1993, pp. 61-76.

<sup>183</sup> See Deneckere, R./Marvel, H. P./Peck, J., Demand Uncertainty, Inventories, and Resale Price Maintenance, *Quarterly Journal of Economics* 111(3), 1996, pp. 885-913; Deneckere, R./Marvel, H. P./Peck, J., Demand Uncertainty and Price Maintenance, *American Economic Review* 87(4), 1997, pp. 619-641 and Marvel, H. P., The Resale Price Maintenance Controversy: Beyond the conventional Wisdom, *Antitrust Law Journal* 63(1), 1994, pp. 59-92.

<sup>184</sup> See Areeda, P. E./Hovenkamp, H., *Antitrust Law*, New York 2004 and Gould, J. R./Preston, L. E., Resale Price Maintenance and Retail Outlets, *Economica* 32, 1965, pp. 302-312.

<sup>185</sup> See Comanor, W., Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy, *Harvard Law Review* 98, 1985, p. 983-1002 and Comanor, W./Kirkwood J., Resale Price Maintenance and Antitrust Policy, *Contemporary Economic Policy* 3, 1985, p. 9-16 and Grimes, W., A Dynamic Analysis of Resale Price Maintenance: Inefficient Brand Promotion, Higher Margins, Distorted Choices, and Retarded Retailer Innovation, *Antitrust Bulletin* 55, 2010, pp. 101-149.

<sup>186</sup> See *ibid.*

<sup>187</sup> On the spread of fixed book prices in Europe, see also section 3.1.1 in this Special Report.

<sup>188</sup> So also Poort, J./van Eijk, N., Digital fixation: the law and economics of a fixed e-book price, *International Journal of Cultural Policy* 23(4), 2017, p. 5.

<sup>189</sup> Two comprehensive model theoretical considerations show that the results are strongly driven by the assumptions and no clear effect of fixed book prices on the book market can be derived; see von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, Dissertation, Universität Würzburg, 2004 and Henning, H. G., *Marktstruktur and Marktverhalten im deutschen Buchmarkt – Eine industrieökonomische Analyse der Buchpreisbindung*, Baden-Baden 1998. Another theoretical work, which is strongly oriented towards the book market, finds no clear correlation between price maintenance, price and service levels and overall welfare; see Schulz, N., Does the Service Argument Justify Resale Price Maintenance?, *Journal of Institutional and Theoretical Economics* 163(2), 2007, pp. 236-255. A greater variety of titles and a higher bookselling density with higher prices and lower sales per title can be found at Canoy, M./van Ours, J./van der Ploeg, F., *The Economics of Books*, *supra* and van der Ploeg, F., Beyond the Dogma of the Fixed Book Price Agreement, *Journal of Cultural Economics* 28(1), 2004, pp. 1-22.

**168.** Another difficulty arises from the fact that fixed book prices were initially regulated by a collective agreement with sanction mechanisms and were enshrined in law in 2002. Most theoretical work assumes that the use of vertically fixed prices is based on a free decision of market participants and bilateral agreements whose stability is always threatened by market mechanisms: although in many cases vertical price fixing can be profitable from a collective standpoint, it often does not occur or collapse simply because individual market participants can deviate profitably (so-called commitment problem).

### 4.2.3 The importance of fixed book prices for the book trade in general

**169.** A system of fixed retail prices prevents price competition at the retail level and protects booksellers from competition by cheaper rivals. The fact that such a restriction of competition is in the interest of the traditional brick-and-mortar book trade is already evident from the history of fixed book prices in Germany.<sup>190</sup> Its introduction in 1888 was pushed forward with the explicit and openly stated goal of protecting brick-and-mortar bookshops from aggressively pricing mail-order businesses. The protection of books as a cultural asset – today the main argument of fixed book pricing supporters – was not at the centre of the debate at the time.<sup>191</sup>

**170.** A fixed book price agreement was only made possible by the German Association of Booksellers (Börsenverein der Deutschen Buchhändler) which bundled the interests of the many brick-and-mortar booksellers and ultimately achieved a cartel of the small-scale and competitive retail side. The establishment of sanction-enforced contracts for fixed prices made it possible to ensure nationwide compliance.<sup>192</sup> Over the years, the system of fixed prices has been further developed and in 1928 it was transformed for the first time into the so-called *Sammelrevers*, which was later adapted several times and finally replaced by the Book Price Fixing Act in 2002. The law and the explanatory statement to the law show that the protection of the traditional retailing structure continues to be a central concern of book price fixing.<sup>193</sup>

**171.** In the following, the effects of fixed book prices on the brick-and-mortar book trade are worked out. In particular, it is examined whether this far-reaching market intervention can unfold the protective effect for the brick-and-mortar book trade attributed to it and to what extent it contributes to achieving the main and subgoals formulated by the legislator.

#### 4.2.3.1 Service instead of price competition

**172.** The direct and intended effect of fixed book prices is to eliminate price competition at the retail level.<sup>194</sup> As a result, however, competition between different types of business and bookseller does not completely come to a standstill, but shifts to ancillary or service competition.<sup>195</sup> All parameters that are not to be regarded as price competition are to be understood as services. In the brick-and-mortar book trade, for example, this includes expert and personal advice, the depth and width of the product range available and its presentation in the

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<sup>190</sup> On the origins of fixed book prices, see Kühnert, J., *Die Geschichte der Buchpreisbindung in Deutschland: von ihren Anfängen bis ins Jahr 1945*, Wiesbaden 2009, Chapter 3.

<sup>191</sup> See von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, supra, p. 35.

<sup>192</sup> Without the sanction mechanisms, there would be incentives to undercut the fixed prices of the competition and thus attract great demand, in the same vein: May, F. C., *Der gebundene Buchpreis - Eine ökonomische Betrachtung*, supra, pp. 15-16.

<sup>193</sup> See section 4.1 in this Special Report.

<sup>194</sup> Practice shows that the BuchPrG does not fully fulfil this purpose. On legal and illegal practices and business models that run counter to this underlying idea; see section 4.2.3.2 in this Special Report.

<sup>195</sup> See e.g. Riehm, U., *Buchhandel*, supra, p. 528 and Bielig, A./Knoth, A. F., *Das deutsche Buchpreisbindungsgesetz aus ökonomischer and europarechtlicher Sicht*, supra, pp. 9-10.

bookstore.<sup>196</sup> In online selling, this includes the provision of information on books, simple search and purchase processing as well as favourable shipping conditions.<sup>197</sup>

**173.** It can be assumed that the average service level in book retailing can be increased by fixed book prices.<sup>198</sup> Instead of low prices, competing booksellers try to set themselves apart from its competitors and increase their market shares by offering a particularly attractive range of services tailored to the needs of their customers. A second reason why fixed prices can lead to an increased range of ancillary services is the prevention of free-rider behaviour.<sup>199</sup> With free book prices, inexpensive discount bookstores or other sales outlets – which offer no or only limited bookselling services – could benefit from the services provided by service-oriented booksellers. Customers in need of advice could visit these service-oriented booksellers and then make a purchase at a cheaper bookseller that does not provide comparable services. As a result, service-oriented booksellers would limit their services in order to avoid free-rider behaviour. This would lead to an undersupply of services.

**174.** At first glance, the service argument often used to justify fixed book prices seems plausible. Books are experience goods and there is a strong asymmetry of information between the seller and the buyer, and buyers are sometimes confronted with considerable search costs.<sup>200</sup> As a result of the service effort stimulated by fixed book prices, these search costs are reduced, so that customers can obtain interesting titles with less effort. Above all, books which require advice, for example high or specialist literature, can be supported in this way. In many cases, the advice and presentation generates attention and latent demand for such titles. Nevertheless, the service argument is to be assessed critically for various reasons.

**175.** First of all, it should be noted that the elimination of price competition does not necessarily mean that all booksellers will have to expand their range of services. Retailers who are only competing with others to a limited extent due to their geographical location or a special product range, for example, may have less strong incentives to offer additional service than booksellers in a highly competitive market. It is also generally assumed that the service level of a bookstore is difficult to assess for the customer and that service differences are less directly noticeable than price differences. It can therefore be expected that service competition will not display the same competitive pressure as price competition.<sup>201</sup>

**176.** At the same time, it is possible that the stimulated competition for ancillary services could lead to an oversupply of service.<sup>202</sup> This is the case if the service costs exceed the additional benefit for the customer. If one realistically assumes that the customers' appreciation for bookselling services varies, not all buyers benefit (to the same extent) from the service provided.<sup>203</sup> However, the additional costs must also be borne by the buyers, who did not need any or only less extensive advice. Fixed book prices can lead to higher sales figures and higher publishing profits, but at the same time social welfare can decline. The same applies if one assumes informed customers (through other sources) and uninformed customers, since only the latter profit from the advice

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<sup>196</sup> See also section 2.2.4.1 in this Special Report.

<sup>197</sup> See also section 2.2.4.2 in this Special Report.

<sup>198</sup> See Canoy, M./van Ours, J./van der Ploeg, F., *The Economics of Books*, supra, pp. 23-24.

<sup>199</sup> On free-riding in bookselling see e.g. von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, supra, p. 139 f. and Rürup, B./Klopfleisch, R./Stumpp, H., *Ökonomische Analyse der Buchpreisbindung*, supra, pp. 25 ff.

<sup>200</sup> See para. 15 in this Special Report.

<sup>201</sup> See von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, supra, pp. 53-54.

<sup>202</sup> See already Monopolies Commission, XIIIth Biennial Report, supra, para. 709.

<sup>203</sup> See e.g. Comanor, W., *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, supra; Scherer, F., *The Economics of Vertical Restraints*, *Antitrust Law Journal* 53, 1983, p. 697-704 and da Graca, T./Masson, R. T., *The "Services" Explanation for Resale Price Maintenance: Deleterious Results Missed in the Economics Literature and in Legal Decisions*, *Southern Economic Journal* 79(2), 2012, pp. 450-463.

provided by booksellers.<sup>204</sup> Ultimately, it is an empirical question whether the benefits of the additional services exceed the service costs.<sup>205</sup>

**177.** There is also the question of the practical significance of free-rider problems in the book trade. First of all, it should be noted that this phenomenon is not specific to the book market, but affects many product markets. The book market may even be less susceptible to free-rider behaviour than other markets. The reason is that most books are relatively low-priced goods.<sup>206</sup> The absolute savings by switching to a cheaper seller would therefore be small and would probably not seem worthwhile for many customers with regard to the transaction costs incurred when switching providers.<sup>207</sup> Furthermore, it cannot be ruled out that some book buyers may regard the bookseller not purely as a point of sale, but rather give it a special role as a cultural mediator in the dissemination of a cultural asset or may have an emotional connection to the local bookshop. As a result, free-rider behaviour could be less pronounced in the book market than elsewhere.

**178.** Practice also shows that identical prices between the sales channels can curb free-riding, but do not completely eliminate it. Moreover, it falls too short to assume that such behaviour only takes place at the expense of brick-and-mortar booksellers. For example, there are currently not only customers who obtain information or browse in local brick-and-mortar bookstores to order them on the Internet (at a later date). Buyers also use online shops to obtain information before purchasing a book in the appreciated atmosphere of a brick-and-mortar bookshop. Surveys even show that currently, i.e., with fixed prices, more customers obtain information on the Internet in order to purchase the book in a brick-and-mortar bookshop than vice versa.<sup>208</sup>

**179.** It cannot be ruled out that fixed book prices may even prevent the emergence of particularly service- and consulting-oriented bookstores in some cases. This is the case if book buyers are prepared to pay a higher price than the fixed price, for example if this is accompanied by a special shopping experience or an assortment of uncommon niche titles. Due to fixed book prices, however, the bookseller cannot raise prices despite the customers' willingness to pay in order to be able to cover the costs of the service requested.

**180.** In summary, fixed book prices are likely to stimulate service competition, leading to an, on average, higher level of service. However, the associated welfare effect is not necessarily positive. In addition, there are a number of side-effects that could be problematic in terms of cultural policy.

#### **4.2.3.2 Fixed book prices cannot completely prevent price competition**

**181.** Despite the Book Pricing Act, which is intended to eliminate price competition, several attempts have been made in the past to circumvent fixed book prices. Amazon in particular has repeatedly tested the limits of statutory fixed book prices.

**182.** One example is an advertising campaign by Amazon in which participants in the trade-in programme for used books received a 5 euro voucher in addition to purchase price, which could also be used for the purchase of new books with a fixed price.<sup>209</sup> In July 2015, the Federal Supreme Court (BGH) ruled that the addition of vouchers for

<sup>204</sup> See Schulz, N., Does the Service Argument Justify Resale Price Maintenance?, *supra*, pp. 236 ff.

<sup>205</sup> Concerning the question if positive welfare effects exceed service costs, see also Bielig, A./Knoth, A. F., Das deutsche Buchpreisbindungsgesetz aus ökonomischer and europarechtlicher Perspektive, *supra*, p. 16.

<sup>206</sup> See Monopolies Commission, XIIIth Biennial Report, *supra*, para. 699 and May, F. C., Der gebundene Buchpreis. Eine ökonomische Betrachtung, *supra*, pp. 50-51.

<sup>207</sup> However, innovations such as the smartphone and apps with product scanners that lead directly to the selected product in online shops can reduce transaction costs and encourage free rider behaviour.

<sup>208</sup> See para. 80 in this Special Report. Free-riding behaviour on the information provided by Internet traders is facilitated by the fact that there are usually no access restrictions and the information is thus a public good; see von Gottberg, H.-D., Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland, *supra*, p. 214.

<sup>209</sup> See Jahn, J., Amazon-Rabattaktion verstieß gegen Buchpreisbindung, FAZ online, 23 July 2015.

no consideration, which can also be used for buying books, is not permitted.<sup>210</sup> By contrast, affiliate programmes with school support associations to which Amazon has paid between 5 and 9 per cent of the purchase price as commission for each order of a textbook have been declared to be compatible with the Book Price Fixing Act by the Federal Supreme Court.<sup>211</sup> Following the BGH ruling in favour of Amazon, Thalia and the online bookseller bücher.de have also set up comparable affiliate programmes, some of which grant even higher commission payments than Amazon.<sup>212</sup> Amazon's advertising campaign to give away an international bestseller as an e-book free of charge was not regarded as a violation of the Book Price Fixing Act by the Berlin Chamber of Appeal, as the law only applies to selling books and does not cover donations.<sup>213</sup>

**183.** These examples show that some market participants, such as Amazon, are making considerable use of the scope left by the German Book Pricing Act to set retail prices. Although the competitive advances may be welcome from the customer's point of view, they reveal a key problem. When in doubt, large providers are better able to find ways and means to find room to manoeuvre and exploit it. Small and medium-sized retailers, whose protection is a subgoal of the Book Price Fixing Act, on the other hand, can only react to such advances to a limited extent by offering attractive and innovative products of their own, due to their traditional business model and the restrictions imposed by the Book Price Fixing Act.

**184.** In addition to these not per se unlawful advances on the part of competitors, according to the report of the trustee for fixed book prices (Buchpreisbindungstreuhand), clear violations of the provisions of the Book Price Fixing Act in the form of intentional damaging of books occurs time and again.<sup>214</sup> Books are deliberately damaged in order to be able to declare them as damaged copies. This eliminates the obligation to adhere to a fixed book price as damaged books can be sold at lower prices. According to expert estimates, intended damaging occurs at all stages of the distribution chain, including publishers who urge retailers to sell (unlawfully) damaged books. Indications that these are not intermittent cases are provided by the statement of the trustee for fixed book prices that this is "well-organized damaging" and his threat to issue warnings and the consequent legal prosecution of such price fixing violations.<sup>215</sup> This example shows that book price fixing law cannot completely prevent price competition, which is perceived as harmful by its supporters.

**185.** The introduction of flat-rate and subscription models that allow users to access a large number of e-book titles for a monthly fee also fundamentally undermines the idea of a fixed book price.<sup>216</sup> Since the reader does not buy the e-books, but only receives temporary access, these models are not covered by the provisions of the Book Pricing Act. Nevertheless, from the e-book reader's point of view it is practically the same whether the e-book becomes his property or only the contents are made available to him for reading. Thus, the different subscription models of competing providers are not only competing in price and service, but also with printed books and e-books. Traditional sellers of printed books and e-books have a disadvantage because of the unequal treatment by the Book Pricing Act.

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<sup>210</sup> See BGH, Judgment of 23 July 2015, I ZR 83/14.

<sup>211</sup> See BGH, Judgment of 21 July 2016, I ZR 127/15.

<sup>212</sup> See N. N., Verweisen lukrative Provisionen auf viel Luft bei den Buchpreisen?, buchreport.de, 8 March 2017 and N. N., Kunden mit 12%-Prämie locken, buchreport.de, 16 February 2017.

<sup>213</sup> See KG Berlin, Order of 8 April 2016, 5 W 73/16.

<sup>214</sup> See N. N., Händler and Verleger strapazieren die Preisbindung, buchreport.de, 4 September 2017.

<sup>215</sup> See N. N., Mit Hammer, Meißel and Geldspritzen, buchreport.de, 6 September 2017.

<sup>216</sup> On a possible loss of significance of fixed book prices due to e-book subscriptions see Haucap, J./Heimeshoff, U., Ordnungspolitik in der digitalen Welt, DICE Ordnungspolitische Perspektiven No. 90, June 2017, p. 42.

### 4.2.3.3 (Small) brick-and-mortar booksellers are also under pressure in service competition

**186.** As can be seen from the discussion of the different retail concepts, these differ considerably in terms of the services provided in the sale of books. A general assessment of which sales channel has advantages in service competition cannot be made simply because the preferences and needs of customers are heterogeneous.<sup>217</sup> It should be undisputed, however, that the increase in ancillary service competition caused by the fixed book prices necessarily entails additional expenditure in all sales channels. However, the level of these additional costs is likely to differ between the different retailing concepts.

**187.** Initially, it can be assumed that a high level of service will place a disproportionately heavy burden on brick-and-mortar booksellers compared with online bookselling. This can be illustrated by a few examples. Good advice at a brick-and-mortar bookstore trade entails considerable personnel costs. Costs arise not only during the actual customer consultation, but also because the specialist personnel have to be familiar with the titles offered in order to be able to make appropriate recommendations. The provision and preparation of information on the Internet is based on the presentation of the information provided by the publisher as well as a presentation and evaluation of customer reviews and evaluations, which are usually free of charge. The aggregation of information provided by others is largely automated and causes lower costs. The same applies to the provision of a wide and deep range of products. The stockpiling and presentation of a large variety of titles in a brick-and-mortar bookshop necessitates a large storage and presentation area, the maintenance of which is probably more expensive than the central warehousing of an Internet retailer. This applies in particular to Amazon, which operates a highly specialized warehouse and distribution system with several central warehouses distributed throughout Germany. Other online retailers should also have cost advantages over retail booksellers. This applies in particular to online booksellers who have their orders processed by book wholesalers and do not have their own warehouses. They do not incur any additional storage costs and risks due to the large number of titles that can be ordered, as these are borne by the book wholesaler.

**188.** Since considerable innovations in online retailing are to be expected in the course of the ongoing digitization and the share of Internet-oriented book buyers is likely to increase further, it can be assumed that competitive pressure from the Internet on brick-and-mortar booksellers will continue to increase in the future.<sup>218</sup>

**189.** However, there is not only a cost gap in favour of Internet trading, but also between small booksellers on the one hand and larger bookstores and book chains on the other. Large booksellers and, above all, bookstore chains with several branches are likely to have economies of scale and network advantages, for example when it comes to the variety of titles on offer, attractive opening hours, a wide range of non-book articles, gastronomic offers and advertising. Personal support and comprehensive bookselling advice, through which small brick-and-mortar booksellers can set themselves apart from larger competitors, can only be guaranteed with considerable personnel costs.

**190.** In order to counteract this imbalance, § 6 para. 1 BuchPrG privileges small brick-and-mortar booksellers by imposing obligations on publishers regarding their conditions: they must take due account of the contribution made by small brick-and-mortar booksellers to the nationwide supply of books and the bookselling service they provide.<sup>219</sup> A linear discount structure based solely on sales is not compatible with this.<sup>220</sup>

**191.** From a theoretical point of view, Section 6(1) of the Book PrG plays a key role in protecting the brick-and-mortar book trade and its bookselling services. This is based on the idea that high-turnover customers can obtain

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<sup>217</sup> See also section 2.2.5 in this Special Report.

<sup>218</sup> On the growing importance of online book trading, see also para. 81 in this Special Report.

<sup>219</sup> On the objectives of § 6 BuchPrG, see also paras 152 ff. in this Special Report.

<sup>220</sup> See Mende, B., *Das neue Buchpreisbindungsgesetz - Leitfaden für Verlage und den verbreitenden Buchhandel*, Frankfurt am Main 2002, p. 21.

advantageous conditions due to their negotiating power. However, since small booksellers may not be disadvantaged solely because of lower sales and an excessive rebate spreading is inadmissible, even the comparatively weak small bookseller benefits from the negotiating power and the good purchasing conditions of the big competitors.

**192.** However, there are considerable doubts as to its effectiveness not only due to the legal structure of § 6(1) BuchPrG.<sup>221</sup> In the past, there have been repeated reports of very advantageous conditions for large customers and a wide spread in the conditions to the disadvantage of small booksellers.<sup>222</sup> A further indication of this is that the retail margins of large retail bookstores with annual sales of over EUR 5 million are almost five percentage points above the average of 37.5 per cent.<sup>223</sup> The cost disadvantages in the retail book trade and the low practical significance of § 6 para. 1 BuchPrG thus allow the conclusion that the brick-and-mortar book trade is also under considerable pressure in service competition.

#### **4.2.3.4 Unclear relationship between fixed book prices, willingness to stockpile and variety of titles**

**193.** The book as an economic good is characterized by a great uncertainty of demand: for the majority of titles, perhaps with the exception of perhaps works important authors or from popular series, it is not clear from the outset whether they will be commercially successful.<sup>224</sup> The selection and stockpiling of book titles therefore represents an entrepreneurial risk for the bookseller. From the history of legislation, it can be deduced that the legislator had the securing of a broad and varied book range in the brick-and-mortar book trade in mind as a partial objective of the Book Price Fixing Act.<sup>225</sup> However, the connection between fixed book prices and the willingness to stock a wide variety of titles is not clear.

**194.** In economic theory, a positive correlation between price fixing and willingness to stockpile is shown in some studies. Under certain circumstances, in the event of uncertain demand, retailers may be able to maintain and ultimately sell a larger number of copies at fixed retail prices – and thus a secured retail margin<sup>226</sup> – than in the case of price competition, where retailers have a smaller inventory for cost reasons.<sup>227</sup> Fixed retail prices can also encourage retailers to make the investments necessary to generate demand for new stock.<sup>228</sup> Since the uncertainty and the necessary sales efforts are generally higher for non-bestselling titles, fixed book prices should therefore be of particular benefit to them.

**195.** However, it can also be argued that fixed book prices increase the bookseller's risk. It deprives it of the opportunity to react to the actual demand by adjusting prices.<sup>229</sup> If a title turns out to be less popular than expected, the bookseller cannot increase the sales figures by means of discounts or special prices, for example. The lack of the possibility of making price adjustments is therefore particularly detrimental to the most uncertain

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<sup>221</sup> See para. 156 in this Special Report.

<sup>222</sup> See N. N., *Soli für den Riesen?*, buchreport.de, 28 March 2014; Dausien, D., *Es reicht nicht zum Leben und nicht zum Sterben*, buchreport.de, 16 November 2011; N. N., *Nach Hachette: Bonnier in der Konditionen-Mangel*, boersenblatt.net, 16 May 2014 and Menche, B., *Im Konditionen-Clinch*, boersenblatt.net, 4 March 2015.

<sup>223</sup> See Börsenverein des Deutschen Buchhandels, *Buch und Buchhandel in Zahlen 2017*, supra, p. 132.

<sup>224</sup> See para. 16 in this Special Report.

<sup>225</sup> See para. 135 and 149 in this Special Report.

<sup>226</sup> The gross margin is defined as the difference between the selling price of the publisher and the retail price.

<sup>227</sup> See Deneckere, R./Marvel, H. P./Peck, J., *Demand Uncertainty, Inventories, and Resale Price Maintenance*, supra and Deneckere, R./Marvel, H. P./Peck, J., *Demand Uncertainty and Price Maintenance*, supra.

<sup>228</sup> See Areeda, P. E./Hovenkamp, H., *Antitrust Law*, supra.

<sup>229</sup> See Appelmann, M., *Fixed book price*, supra, p. 239.

titles. The fact that in the event of an unexpectedly strong demand and a high willingness to pay cannot be reacted to by price increases should also have a negative effect on a bookseller's willingness to take risks.

**196.** The importance of fixed book prices for the willingness to stock up and to take risks when taking unknown titles into the assortment should, however, be small, as the retailer is usually granted a right of return.<sup>230</sup> This reduces the risk of stockpiling and largely passes it on to the publishers. The risk remaining with the booksellers for works that have proven to be unable to sell at the fixed retail price is limited to the return and opportunity costs due to the suboptimal use of storage and sales areas.

**197.** A frequent argument in favour of fixed book prices is that the additional revenues from the secured high margins for mass titles would only create the basis for including works that are less demanded in assortment. While a certain amount of financial means may increase the willingness to take risks, there is no obligation to include such titles. Rather, fixed book pricing generates the opposite incentive for booksellers to concentrate on a limited range of fast-moving bestsellers with comparatively high and secure margins.<sup>231</sup>

**198.** Ultimately, if there is a connection between fixed book prices, the willingness to stock up and the variety of titles at all it is mainly in the brick-and-mortar book trade. Online retailers have larger storage capacities and are not limited by the size of the store space. Customers can even order titles that are not in stock in their own warehouse, as in these cases a book wholesaler can be used, which carries out the delivery on behalf of the online seller. For online sellers without an own warehouse, who use book wholesalers as a central warehouse, the problem of limited storage capacity does not arise from the outset. Due to systematic differences, this problem does also not exist for e-books either.

#### 4.2.3.5 Fixed book prices slow down structural change without preventing it

**199.** A partial objective formulated by the legislator is to maintain a nationwide bookselling infrastructure, not only in cities but also in the countryside.<sup>232</sup> As the previous analysis illustrates, fixed book prices largely eliminate price competition. Traditional brick-and-mortar booksellers in general and small booksellers in particular are thus protected from strong competitors such as book chains or online booksellers. Fixed book prices therefore have a preserving effect on the structure of the book market, which guarantees a certain level of protection for the brick-and-mortar book trade and, as intended by the legislator, generally contributes to a higher supply density by traditional brick-and-mortar booksellers.<sup>233</sup> In addition, fixed book prices counteract an increase in concentration and the emergence of powerful booksellers. At the same time, however, fixed book prices have some undesirable side effects.

**200.** Initially, fixed book prices impair the distribution of books through alternative distribution channels. Book price fixing represents a barrier to market entry for alternative forms of retailing which, for systematic reasons, cannot offer bookselling advice and are only able to compete at a low price.<sup>234</sup> This applies to grocery retailers and

<sup>230</sup> See May, F. C., *Der gebundene Buchpreis. Eine ökonomische Betrachtung*, supra, pp. 52-53.

<sup>231</sup> See von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, supra, p. 53; Appelman, M., *Fixed Book Price*, supra, p. 239 oder Poort, J./van Eijk, N., *Digital Fixation: The Law and Economics of a Fixed E-Book Price*, supra, p. 10. There are indications for a stronger focus on bestsellers among both chain stores and small, traditional booksellers, see for example Ahne, P., *Büchläden in Zeiten von Amazon und Co.*, *Frankfurter Rundschau* online, 9 November 2011; N. N., "Für uns ist das leicht verdientes Geld", *boersenblatt.net*, 11 October 2017 and Herbold, A., *Die Goldesel der Belletristik*, *Zeit* online, 6 December 2012.

<sup>232</sup> See para 149 in this Special Report.

<sup>233</sup> On the structure-conserving effect of fixed book prices see von Gottberg, H.-D., *Die Wirkungsanalyse der Buchpreisbindung in Deutschland*, supra, section 5.12, May, F. C., *Der gebundene Buchpreis. Eine ökonomische Betrachtung*, supra, pp. 52-53 and Wolf-Csanády, E., *Kulturgut versus Ware Buch: Die deutsche Buchpreisbindung im Spannungsfeld zwischen Kulturpolitik, Lobbyismus und europäischer Wettbewerbspolitik*, supra, pp. 202-203.

<sup>234</sup> See also section 4.2.3.7 in this Special Report.

other retail formats as well as discount bookstores. This will hinder the development of new customer groups who do not visit bookshops or order books on the Internet.

**201.** The fixed book price system also prevents efficient retailers and sales structures from passing on their advantages to customers in the form of lower book prices. As attractive prices and special offers cannot be used to win new customers and expand the market share, incentives to increase one's efficiency are weakened. Ultimately, the viability of inefficient providers is increased and the dissemination of efficient and innovative sales concepts in the brick-and-mortar book trade is inhibited.<sup>235</sup>

**202.** At the same time, fixed book prices ensure a high margin for low-cost providers. Big book chains and online seller profit. The reasons for this lie both in economies of scale and scope as well as in better purchasing conditions which large customers can enforce due to their better negotiating position and the minor practical significance of § 6(1) BuchPrG.<sup>236</sup> Thanks to fixed book prices, Amazon in particular is in a comfortable position, as it can continuously expand its market share while maintaining margins that are probably above average compared to those of its competitors, without being drawn into margin-damaging price competition.

**203.** Industry figures from the book market show that a fundamental structural change has been taking place in the book trade for some time. The number of brick-and-mortar booksellers has been declining for many years, with the negative trend emanating in particular from small brick-and-mortar bookstores with low sales.<sup>237</sup> The loss of importance of the brick-and-mortar sales infrastructure is also manifested in its declining sales share.<sup>238</sup> At the same time, online retailing in particular, but also direct sales by publishers, significantly gain market shares. The fixed book price system therefore fulfils the subgoal formulated by the legislator of maintaining a nationwide bookselling infrastructure, at least in its current form, only to a limited extent.

#### 4.2.3.6 Declining importance of brick-and-mortar booksellers for customers

**204.** The previous remarks show that fixed book prices cannot effectively guarantee comprehensive protection of brick-and-mortar bookshops despite their generally structure-preserving effect. The reasons for this include changing consumer behaviour and innovations in online retailing. The question also arises as to whether the brick-and-mortar booksellers still have the same significance today in achieving the cultural-political objectives of the Book Price Fixing Act.

**205.** Initially, it should be true that an expanded and diversified bookselling infrastructure benefits the distribution of books. However, this infrastructure consists not only of brick-and-mortar bookshops, but also of the infrastructure of mail-order and online businesses. Originally, legislation was based on the premise that brick-and-mortar booksellers were necessary for the distribution of books and that the supply of books in rural areas was not guaranteed without the brick-and-mortar booksellers.<sup>239</sup> If one looks at the online booksellers' offerings already existing today, the necessity of brick-and-mortar booksellers appears to be reduced.<sup>240</sup> Almost all published and still available titles, the backlist, can be found and ordered on the Internet without great effort. Brick-and-mortar booksellers, on the other hand, only have a small selection from the title universe available and is thus visible to

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<sup>235</sup> See Appelman, M., Fixed book price, supra, p. 239 and May, F. C., Der gebundene Buchpreis. Eine ökonomische Analyse, supra, pp. 47-48.

<sup>236</sup> See also para. 192 in this Special Report.

<sup>237</sup> See para. 52 in this Special Report.

<sup>238</sup> See para. 50 in this Special Report.

<sup>239</sup> Bundestag, 2. Beratung, BT-Plenarprotokoll 14/243 of 14 June 2002, p. 24533B and D (Griefahn, SPD), p. 24536C (Fink, PDS), p. 24538A (Nida-Rümelin); See also BReg, Entwurf eines Gesetzes zur Regelung der Preisbindung bei Verlagserzeugnissen, BT-Drs. 14/9196 of 3 June 2002, p. 9, 11 f.

<sup>240</sup> See Appelman, M., Fixed book price, supra, p. 240 and Bielig, A./Knoth, A. F., Das deutsche Buchpreisbindungsgesetz aus ökonomischer and europarechtlicher Perspektive, supra, p. 137.

the customer. The likelihood of finding niche titles in small, non-specialized bookstores with small sales areas and storage capacity is likely to be low.<sup>241</sup> From the bookseller's point of view, there is also an incentive to sell books in stock instead of suggesting better alternatives that would have to be ordered first.

**206.** The e-book should also promote the universal availability of books regardless of the local sales infrastructure: it is immediately available to readers regardless of their place of residence and the opening hours of the bookseller. Although many titles are still available today exclusively as printed books, the number of works published as e-books is steadily increasing.<sup>242</sup>

**207.** Brick-and-mortar booksellers are losing their importance not only with regard to the pure availability of books, but also regarding bookselling services. On the one hand, it is argued that a personal conversation with trained specialist staff in the ambience of a bookstore could not be substituted on an equal footing and was indispensable for the promotion of books as a cultural asset. Events such as readings organized by the brick-and-mortar book trade are also not possible online. On the other hand, it is argued that online retailers already know the individual preferences and needs of potential book buyers better than local booksellers due to the elaborate analyses of personalized data.<sup>243</sup> Unlike in online retailing, the expertise of booksellers, due to the large variety of titles, is inevitably limited. Ultimately, the question of which sales channel can provide the better targeted consulting service depends on the individual requirements and preferences of the buyer. However, there is no doubt that online retailing is likely to increase in importance. There are two reasons for this.

**208.** Firstly, it is to be expected that, in the course of digitization, considerable improvements in customer data-based advice can be provided through book recommendations and proposals for alternative titles. Complex, constantly evolving algorithms and a constantly increasing volume of available customer data enable online sellers to filter out relevant information for individual customers in order to suggest titles that correspond to their preferences. While the future possibilities of digitization cannot be estimated from today's perspective, no comparable far-reaching innovations are expected in traditional brick-and-mortar bookselling. Due to new delivery concepts of online retailers, the existing advantage of brick-and-mortar bookstores, i.e., that available titles can be taken home immediately, is likely to lose importance. The pioneer of this development is Amazon, which already offers same-day deliveries in some metropolitan regions and delivery within just two hours in two cities.<sup>244</sup> Compared to e-books, the advantage of immediate availability at a brick-and-mortar bookstore does not exist anyway.

**209.** The shift in favour of Internet sellers is also being reinforced by social change. Customer surveys show that the younger generations buy a disproportionately large number of books online and that the proportion of Internet-oriented book buyers in all age groups has grown in recent years.<sup>245</sup> For these reasons, it seems increasingly questionable whether the business models privileged by fixed book prices still make a decisive contribution to the protection of books as a cultural asset today. This applies even if they were suitable for this purpose in the past.

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<sup>241</sup> On the stronger focus of the booksellers on bestsellers see para. 197 in this Special Report and the associated fn. 231.

<sup>242</sup> See para. 36 in this Special Report.

<sup>243</sup> See, e.g., Haucap, J./Heimeshoff, U., Ordnungspolitik in der digitalen Welt, supra, p. 41 oder Knorr, A./Schulz, C., Die Neuregelung der Buchpreisbindung in Deutschland - Eine wettbewerbspolitische Analyse, supra, pp. 251-252.

<sup>244</sup> See Amazon, <https://primenow.amazon.de/onboard> and Amazon, <https://www.amazon.de/b?node=7013565031>, accessed: 14 May 2018.

<sup>245</sup> See Figure 2.13 in this Special Report.

#### 4.2.3.7 Fixed book prices complicate market entry

**210.** At first glance, fixed book prices appear to facilitate market entry for new booksellers:<sup>246</sup> price transparency and secure margins prevail. Both factors minimize the uncertainties associated with market entry and consequently the business risk. On closer inspection, however, there are a number of reasons that make market entry more difficult. A distinction is to be made between brick-and-mortar and online booksellers.

**211.** Obviously, fixed book prices prevent the emergence of discount booksellers. Since they, due to their business model, cannot compete via services and since the fixed book prices deprive them of the possibility of offering favourable prices, the market entry of such providers is systematically hindered. Fixed book prices also represent a barrier to market entry for non-specialized retailers, as it is not possible to expand the product range with popular and titles requiring little explanation at low prices.

**212.** Another aspect that makes market entry at fixed prices more difficult is the lesser importance of service competition compared to price competition.<sup>247</sup> A new bookseller would have to invest a great deal of time and effort in its services in order to achieve the same competitive pressure as through an aggressive pricing policy. This is all the more true as lower prices are not only relatively easy to communicate, but also benefit all buyers. However, a high level of service does not appeal to all customer groups to the same extent and is also less effective in advertising. Often, new providers may also lack the necessary experience and market knowledge to be able to prevail against the established competitors in service competition.

**213.** In online book retailing, fixed book prices can also potentially prevent market entries. This is particularly true because Amazon is well established in the market as a foreign online retailer. In the current situation in which Amazon, as a strong market player in the Internet book market, mainly competes with the online offerings of the major German bookselling chains, it is likely to be extremely difficult to enter the market successfully as a seller from outside the branch or as a foreign seller. Due to Amazon's experience, advantage and high innovative power, it seems unlikely that an online retailer will be able to prevail solely on the basis of a better service offer. However, if there were the possibility of setting prices free, favourable and possibly less service-oriented business models could also establish themselves in online bookselling.

**214.** In the e-book market, which is dominated by Amazon and the tolino alliance, it will probably also be difficult to enter the platform competition with established providers without attractive price models.<sup>248</sup> This is all the more true since existing customers are bound to the selected platform due to lock-in effects and a change of provider is associated with transaction costs. This applies all the more to Kindle users, who are bound by the strict terms of use for Kindle readers and e-books.<sup>249</sup>

**215.** Some smaller e-book providers do exist, and isolated market entries can be observed, such as recently by Aldi.<sup>250</sup> Nevertheless, it seems unlikely that these providers will be able to significantly expand their market position, as fixed book prices prohibit them from using discounts and special offers to acquire new customers or to win over customers from other providers. The comparison with flat-rate models, which are not covered by the German Book Price Fixing Act, provides an indication that fixed book prices prevent market entries and innovative business models. New, innovative concepts have been developed in this business area by both established and foreign suppliers who have entered the market.<sup>251</sup>

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<sup>246</sup> See also von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, supra, pp. 88-89.

<sup>247</sup> See para. 175 in this Special Report.

<sup>248</sup> On tolino-Allianz and Amazon kindle see also paras 22, 55, 64 and 71 in this Special Report.

<sup>249</sup> See also paras 22 and 71 in this Special Report.

<sup>250</sup> See para. 55 in this Special Report.

<sup>251</sup> See para. 64 in this Special Report.

#### 4.2.4 Fixed book prices slow down functional change in the intermediate book trade

**216.** Fixed book prices affect the intermediary book trade only indirectly. Neither the purchase price the intermediate book trade pays to the publisher nor the selling price to the booksellers is regulated, with the exception of the provisions of § 6 para. 2 BuchPrG. However, since fixed book prices have a strong impact on the upstream level, publishing, and especially the downstream level in the distribution chain, retailing, the fixed book prices also have an impact on the intermediate book trade.

##### 4.2.4.1 Traditional business areas are protected, the expansion of new ones is inhibited

**217.** In its initial function, book wholesalers serve as a background storage for brick-and-mortar booksellers. Titles that cannot be kept in stock in the shop due to limited storage and sales space are ordered by the bookseller when needed or at the customer's request, and are then delivered overnight by the book wholesaler. A large number of traditional booksellers ensures book wholesalers not only have a high order volume, but also have cost advantages in the provision of this service. The thinner the network of booksellers, the more expensive it would be to deliver to individual booksellers, as orders from different booksellers could no longer be bundled to the same extent.<sup>252</sup>

**218.** The slowdown in the decrease of brick-and-mortar bookstores due to fixed book prices is thus also beneficial for the traditional business model of book wholesalers. However, book wholesalers already serve several alternative channels and also performs key tasks for those retail formats whose expansion is hampered by fixed book prices. This initially applies to large booksellers and chain stores that have restricted their own warehousing and outsourced logistical services such as goods receipts and the management of the central warehouse to the inter-book trade.<sup>253</sup>

**219.** Book wholesalers also play a central role in the digitization of the book trade.<sup>254</sup> They offer a variety of services for online sellers. For example, many Internet bookstores do not maintain their own warehouses and forward customer orders to book wholesalers, which then process them independently on behalf of the retailer. Such services bring book wholesalers closer to the customer and they cover a larger part of the value chain.<sup>255</sup> Book wholesalers also play an important role in the distribution of e-books, although the value added generated by them cannot be clearly defined.<sup>256</sup>

**220.** The effects of fixed book prices on book wholesalers are therefore ambivalent. Whether the protection for traditional brick-and-mortar businesses outweighs the disadvantages of the limited expansion and further development of new business areas cannot be conclusively assessed at this point. However, the fact that fixed book prices are likely to prevent Amazon in particular from growing even faster will benefit book wholesalers. Amazon operates its own warehouses and is not as dependent on book wholesalers as the majority of competing online booksellers.<sup>257</sup>

**221.** The same applies to publishing house distributors, which play a central role in supplying all retailing formats: The structure-conserving effect of fixed book prices on the retail side is also slowing down the gradual shift from

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<sup>252</sup> See von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, supra, pp. 83-84.

<sup>253</sup> See Bez, T., *ABC des Zwischenbuchhandels*, supra, pp. 31 and 50.

<sup>254</sup> On the importance of book wholesalers for online booksellers, see also para. 44.

<sup>255</sup> See Riehm, U./Orwat, C./Wingert, B., *Online-Buchhandel in Deutschland - Die Buchhandelsbranche vor der Herausforderung des Internet*, supra, p. 178.

<sup>256</sup> See para. 45 in this Special Report and Bez, T., *ABC des Zwischenbuchhandels*, supra, p. 17.

<sup>257</sup> See para. 44 in this Special Report.

supplying traditional brick-and-mortar booksellers to alternative forms of distribution, such as online selling, without, however, leading to a standstill.<sup>258</sup>

#### 4.2.4.2 Fixed book prices secure negotiating power of the intermediate book trade

**222.** General book wholesalers are organized as an oligopoly and should therefore be able to impose good conditions against brick-and-mortar booksellers.<sup>259</sup> This strong position is secured by fixed book prices as it is counteracting an increase in concentration on the retailing side and at least slows down the emergence of booksellers with buyer power.

**223.** Due to the oligopolistic market structure at the level of the intermediate book trade, the emergence of customers with market power could certainly be advantageous for the customer. It would create a counterweight to the market-dominant oligopoly of book wholesalers (so-called countervailing power theory) and possible improvements in purchasing conditions would be passed on to customers at least in part.<sup>260</sup> Nevertheless, the fixed book price system counteracts an even wider spread in publisher's selling prices between small booksellers and already strong retail chains and online retailers.

**224.** Since publishing house distributors have no contractual relationships with the booksellers, they do not directly benefit from the concentration-inhibiting effect of fixed book prices on book retailing. However, indirect positive effects are conceivable, since the publishers for whom they operate are protected by fixed book prices from the emergence of powerful booksellers, at least to a limited extent.<sup>261</sup>

#### 4.2.5 Effects on the publishing industry

**225.** While the advantages of fixed book prices are immediately obvious for a large part of the brick-and-mortar booksellers, their significance for publishers is less clear.<sup>262</sup> Nevertheless, there are a number of arguments and theories according to which fixed book prices benefit publishers and lead to a large variety of titles. Some of these arguments are directly linked to the publishing industry, such as the widespread cross-subsidization argument, according to which publishers can only co-finance less popular titles thanks to the supposedly better earnings situation for mass titles. Others attribute an indirect positive effect on publishers' publishing activities to fixed book prices. According to this argument, fixed book prices ensure a nationwide retail infrastructure and a high level of bookselling advice, which in turn increased the demand for books.

**226.** The direct and indirect effects is analysed below, the latter also in light of the structural change on the retail side and the increasingly unclear role of the protected infrastructure of brick-and-mortar bookseller for the consumers.<sup>263</sup> As with the retail side, the necessity and effectiveness of fixed book prices with regard to the main and sub-goals associated with them are also examined for the publishing industry.

##### 4.2.5.1 Fixed book prices change publishers' competitive parameters

**227.** In a market without fixed book prices, the publisher's selling price, i.e., the price at which booksellers can purchase a book, is the publisher's main competitive instrument. If a fixed book price exists, the end-customer price to be fixed by the publisher in accordance with § 3 in conjunction with § 5 BuchPrG is an additional

<sup>258</sup> See section 4.2.3.5 in this Special Report.

<sup>259</sup> See FCO, decision of 29 March 2012, B6-84/11.

<sup>260</sup> The theory of countervailing power goes back to Galbraith, K., *American Capitalism - The Concept of Countervailing Power*, Boston 1952.

<sup>261</sup> See section 4.2.5.5 in this Special Report.

<sup>262</sup> See para. 161 in this Special Report.

<sup>263</sup> See sections 4.2.3.5 and 4.2.3.6 in this Special Report.

competitive parameter. In the following, the differences resulting from this for competition for customer prices are dealt with first. Subsequently, the effects of fixed book prices on competition in publisher's selling prices are presented.

**228.** As a result of fixed book prices, price competition for the fixed retail price takes place at the publisher's level instead of price competition between booksellers.<sup>264</sup> The intensity of price competition depends largely on the substitutability of a title from the customer's point of view. The easier it is to replace one title with another, the more intense is the price competition.<sup>265</sup> For popular authors, titles from popular series or books, such as specialist literature, which are not or only partially interchangeable, the competitive pressure is less. If there is no fixed book price, however, the intensity of price competition at the retail level depends on the competitive situation in the book retailing market in addition to the aspects mentioned above. The more booksellers are available and the greater their exchangeability from the customer's point of view, the stronger price competition is likely to be. If there are few alternatives, if booksellers have a loyal customer base or if they offer added value over its competitors, the intensity of price competition decreases.

**229.** Competition between publishers in the publisher's selling price exists independently of the existence of a fixed book price. Publishers compete to be included in the bookseller's assortment, which, due to limited storage and sales space, can only cover a selection of the titles available. By offering attractive purchasing conditions in the form of low publisher's selling prices, publishers create incentives for booksellers to stock up on their titles and offer them with appropriate bookselling services. However, fixed book prices have an impact on the influence that publishers can have on retail product ranges due to their purchasing conditions. This has far-reaching consequences for the structure of the book markets and the services it provides.

**230.** In a situation without fixed book prices, low publisher selling prices increase the incentive to include a title in the assortment. However, they do not automatically ensure an adequate gross retailer margin. The retailer margin is rather the result of competition between booksellers. Favourable purchasing conditions are passed on to customers, at least in part, in the form of lower customer prices. As a result, booksellers who work at higher costs can only survive against low-cost retailers to a limited extent. This applies not only to inefficient booksellers, but also to those who have to charge higher prices due to a stronger service orientation or because of a more cost-intensive sales concept in order to be profitable. This is also likely to be due to the fact that good service has a less competitive effect than lower prices.<sup>266</sup>

**231.** It cannot be ruled out that publishers will grant better conditions to booksellers whose bookselling services are of particular benefit to them. However, it is questionable whether publishers are generally in a position to compensate for the cost disadvantages to a sufficient extent without themselves incurring losses. Rather, it is to be expected that the high-revenue bookselling chains and online booksellers will be able to obtain better conditions due to their negotiating power. As a result, service-oriented and more cost-intensive sales concepts are being pushed back. This would mainly be at the expense of books that require individual advice and cannot be presented on an equal footing in alternative distribution channels, such as online bookshops. However, the crowding-out effect is likely to be particularly strong for inefficient booksellers who work at high costs without offering the customer noticeable additional benefits over price-oriented booksellers.

**232.** The situation is fundamentally different with fixed book prices. Because the publisher not only determines the publisher's selling price, in negotiation with the bookseller, but also sets a binding retail price, it can control

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<sup>264</sup> Appelman, M., Fixed book price, *supra*, p. 238; Backhaus, J./Hansen, R., Resale price maintenance for books in Germany and the European Union: A Legal and economic analysis, in: Marciano, A./Josselin, J.-M. (Ed.), *From Economic to Legal Competition New Perspectives on Law and Institutions in Europe*, Cheltenham 2003, p. 98 and von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, *supra*, p. 112.

<sup>265</sup> On the effects of fixed book prices on the general price level, see paras 227 ff. in this Special Report.

<sup>266</sup> See para. 175 in this Special Report.

the gross retail margin.<sup>267</sup> If the publisher depends on its titles being held in stock by many booksellers, it must grant a high margin. This is the only way to ensure that booksellers with higher costs can also sell the book profitably. If the publisher reduces the gross retail margin, only low-cost retailers can profitably include the title in their product range. The publisher has the choice between a higher publishing margin or a lower retail price, which would potentially increase sales. At the same time, however, there would be the risk that many customers would not be reached, as the book would only be offered by a few booksellers and the advisory service would be limited.

**233.** Which strategy is ultimately most profitable for the publisher depends on many factors, such as the willingness to pay for a title and the importance of presentation in bookshops and of bookselling services for demand.<sup>268</sup> Nevertheless, the fact that the gross retail margin is protected and thus independent of the competitive situation in the retail sector has a number of far-reaching consequences. Unlike a market without fixed book prices, the publisher does not have to compensate for a retailer's additional costs compared to its low-cost competitors. Rather, it is sufficient to give the bookseller with higher costs an adequate margin to enable him to survive in the market.

**234.** As a result, there is likely to be less cut-throat competition, and brick-and-mortar booksellers, especially small independent bookstores, will be better able to survive in the market despite its presumable cost disadvantages. One expected advantage for publishers is the resulting stronger service orientation in retailing, which is likely to benefit sales of titles that require explanation and are less well-known. However, this also means that inefficient booksellers are protected, which neither bring decisive added value to the customer nor make a noticeable contribution to a better distribution of the books in the interest of the publisher. In addition, fixed book prices prevent publishers from benefiting from the advantages of efficient booksellers. Cost advantages cannot be passed on to the end-customer by efficient booksellers and therefore no additional demand can be generated. Rather, fixed book prices ensure such retailers a high margin. This is also likely to be helped by the fact that those customers are often strong negotiators, such as chain stores and online booksellers, who are likely to be able to earn higher margins.<sup>269</sup> Ultimately, the ability to grant high margins is likely to be limited for less financially strong publishers. This is the case, since those conditions can only be achieved through a low publisher margin or through retail prices that exceed the willingness to pay of many potential customers and thus endanger sales. The ability of publishers to control retailers is further limited by the fact that gross retail margins cannot be determined unilaterally but are the result of bilateral negotiations between the publisher and the respective bookseller. Another limitation is that a significant share of the books sold is not purchased directly from the publisher, but via book wholesalers.<sup>270</sup>

**235.** The obligation to determine the retail price under § 3 in conjunction with § 5 BuchPrG also results in a number of disadvantages. Firstly, the publisher is further away from the customer and therefore less well informed about potential buyers than the bookseller. This also applies to the willingness to pay, which is the basis for pricing. In addition, fixed book prices prevent differentiated prices based on the costs of the distribution channels used by the publisher and the respective willingness to pay of the various customer segments. Such individual pricing at the retail level could improve the earnings situation of both booksellers and publishers and would not necessarily have to be at the expense of customers. Rather, new business strategies and alternative sales concepts reaching

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<sup>267</sup> On the importance of the gross margin as a competitive instrument of the publisher in a system of fixed retail prices, see also May, F. C., *Der gebundene Buchpreis. Eine ökonomische Betrachtung*, Arbeitspapier des Instituts für Rundfunkökonomie, *supra*, pp. 46 ff. and von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, *supra*, pp. 54 ff.

<sup>268</sup> See also von Gottberg, *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, *supra*, pp. 56-57.

<sup>269</sup> See para. 192 in this Special Report.

<sup>270</sup> See von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, *supra*, p. 55.

new customer groups could be developed.<sup>271</sup> This applies, for example, to price-sensitive buyers, but also to very demanding customers who require a particularly high level of service that cannot be provided at a fixed price to cover costs.

**236.** Another problem is likely to be that the retail price must be fixed before the title is published. Since the demand for books is subject to a great deal of uncertainty and can hardly be estimated in advance, it would be in the publisher's interest to be able to continually adjust the price to actual demand.<sup>272</sup> Although the Book Pricing Act permits a change in the fixed prices, this entails additional expenditure. This is illustrated by the Regulations for the German Book Trade (Verkehrsordnung), a non-binding recommendation of the Börsenverein des Deutschen Buchhandels notified to the Federal Cartel Office, which contains regulations in the event of a price adjustment. For example, changes in retail prices for printed books must be reported 14 days in advance in accordance with § 3 para. 3 and for e-books 4 days in advance in the list of German books in print (Verzeichnis lieferbarer Bücher, VLB). If the publisher raises the price, the dealer can return the copies acquired in the past 12 months in accordance with § 3 para. 7. In the event of a price reduction, the bookseller has the choice of either a right of return under § 3 para. 8 or he will be reimbursed the difference of the net prices, calculated on the basis of the originally granted discount rate. Regardless of these hurdles, the publisher should only receive limited and delayed information on how well a title is selling anyway, and for this reason, the ability to react quickly through adequate price changes is limited.

#### 4.2.5.2 No clear correlation between fixed book prices, price levels and publishers' earnings

**237.** A central question in the discussion about fixed book prices is the effect on retail prices and the earnings situation of publishers. There are three fundamental difficulties in responding to them. Firstly, if fixed book prices exist, the pricing mechanisms differ significantly from those in a market where price competition is permissible.<sup>273</sup> Another aggravating factor is that fixed book prices are likely to have a noticeable influence on the market structure and the players in the market and their role in the market.<sup>274</sup> Finally, a generally valid statement on the effect of fixed book prices on the price level and the earnings situation of publishers does not seem possible because the heterogeneity of booksellers on the one hand and book buyers on the other hand means that a large number of different and sometimes countervailing effects are to be expected.<sup>275</sup>

**238.** Despite these difficulties, some fundamental relationships between fixed book prices, prices levels and publishing revenues can be established, also taking into account the findings from Switzerland and the United Kingdom. To this end, a distinction is to be made between bestseller titles and titles with a lower circulation.

**239.** In principle, it can be assumed that the price of bestsellers of light entertainment literature and popular non-fiction is likely to be higher in a market with fixed book prices than in a market without. Bestsellers are often titles of well-known authors or titles of a series that cannot easily be substituted from the customer's point of view. The competitive pressure from alternative titles is likely to be limited and give the publisher some leeway in pricing, which may be reflected in a higher price. In a system of free prices, on the other hand, the popularity of bestselling titles and their wide circle of addressees should have the opposite effect. Booksellers could use bestsellers to address many customers and stimulate sales through an aggressive pricing policy. This possibility should also be considered for supermarkets in particular, which can offer such titles without offering bookselling

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<sup>271</sup> The example of the United Kingdom has shown that after the end of the Net Book Agreement, considerable increases in expenditure on books could be observed, especially in the lowest income classes. This is therefore due to the fact that bestsellers have since been offered at highly discounted prices in supermarkets, see para. 107 in this Special Report.

<sup>272</sup> See para. 16 in this Special Report.

<sup>273</sup> See para. 228 in this Special Report.

<sup>274</sup> See also paras 200-203, 231 and 234 in this Special Report.

<sup>275</sup> On the heterogeneity of books, see paras 19 ff., and on the heterogeneity of customers, see section 2.2.5 in this Special Report.

service due to the low need for explanation. It cannot be ruled out that attraction offers for bestsellers could be used as a marketing instrument, which could only be profitable due to additional sales by customers attracted into the shops in this way. Experience from the United Kingdom and Switzerland provides evidence that free prices can lead to intense price competition with sometimes considerable discounts.<sup>276</sup>

**240.** The effects of fixed book prices on publishing revenues from the sale of mass titles are ambivalent. On the one hand, fixed book prices should lead to lower sales figures in this segment. The reasons for this are the presumably higher price level and the limited presence in alternative sales channels such as supermarkets and the lower advertising intensity. This is indicated by the jump in sales of bestsellers in the UK after the Net Book Agreement was abandoned.<sup>277</sup> On the other hand, it is obvious that fixed book prices lead to higher margins for publishers. In the case of price competition, it can be assumed that publishers will have to bear the lower retail prices by granting high discounts on sales to retailers, especially as negotiating power is likely to shift further in favour of large booksellers in a system of free prices.<sup>278</sup> Whether the positive effect of fixed book prices in the form of higher margins outweighs the lower sales figures is an empirical question that cannot be answered here. However, an often-postulated positive correlation between fixed book prices and the profitability of bestsellers is not necessarily a given.

**241.** The price effect of fixed book prices for less popular titles is also ambiguous. This holds not only for fiction and popular non-fiction literature, but also for technical and specialist literature, for which the respective market conditions must also be taken into account. It should be noted that less popular titles are less suitable for marketing campaigns due to the typically smaller circle of customers and the lower level of awareness. In addition, less popular titles are only partially suitable for mass distribution (e.g., in supermarkets) due to the slower turnover rate and the increased need for explanation in some cases. As a result, even in a market without fixed book prices, the less demanded titles are not likely to be subject to similarly aggressive price strategies as bestsellers. Nevertheless, even non-bestsellers are likely to face price competition between booksellers, which is likely to have a generally price-reducing effect. In particular, large and less service-oriented retailers could use their cost advantages to gain market share through lower prices.

**242.** However, there are also arguments in favour of non-bestsellers being more expensive in a book market without fixed book prices, at least at some booksellers. One possible reason for this could be that small booksellers cannot survive the fierce price competition for bestsellers and have to compensate for the loss of secure income from fast-moving mass titles, by offering titles that are less frequently demanded at higher prices. Price increases could in particular affect titles that require intensive advice and are not available at all brick-and-mortar bookshops and that are targeted at wealthy customer segments.

**243.** Another explanation is closely linked to recommended retail prices, which are often used in the book market as an alternative to fixed prices, for example in the United Kingdom and Switzerland.<sup>279</sup> A high recommended non-binding price can have an anchoring effect on the one hand, but on the other hand it can also leave considerable scope for discounts by retailers. In the case of bestselling titles, this will lead to intense competition in the retail market, as a result of which price reductions may outweigh the higher recommended price. Titles that do not generate comparably strong demand and are not in the focus of price-aggressive retailers are in doubt discounted less or not at all, so that the recommended price – which is higher than the fixed price – actually results in higher selling prices. However, if the titles are perceived by customers as too expensive and the sales figures are correspondingly low, the retail price can be reduced. With fixed book prices, however, a comparably high retail

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<sup>276</sup> See Hanreich, H., *Buchpreisregelungen in Europa als Mittel der Kulturpolitik - Wirksamkeit and wohlfahrtsökonomische Bedeutung*, supra, p. 148.

<sup>277</sup> See para. 107 in this Special Report.

<sup>278</sup> See also section 4.2.5.5 in this Special Report.

<sup>279</sup> A comparison of recommended and fixed retail prices in the context of the book market can be found at Olczak, M., *The impact of recommended retail prices on bilateral bargaining and retail pricing*, Aston Business School Working Paper, 2011.

price would entail a higher risk, as the price rigidity means that subsequent adjustment is only possible to a limited extent.<sup>280</sup> In order to reduce this risk, prices could be set lower in individual cases, even though it turns out afterwards that the market would certainly allow a higher price.

**244.** A general statement about the development of prices of all titles not classified as bestsellers cannot be made. The reason for this is that those titles, which represent the vast majority of all available titles, are extremely heterogeneous, for example with regard to the type of literature, the target group, the degree of substitutability and the need for explanation. It also remains unclear how fixed book prices affect the sales figures of the various titles, as this depends not only on prices, but also, for example, on availability in the various distribution channels and the bookselling service offered. As a result, no reliable statements can be made regarding the relationship between fixed book prices and publishing revenues for non-bestsellers.

**245.** It is also unclear how fixed book prices affect the ratio of the price of a printed book to the e-book price of the same title. In principle, it can be assumed that e-books and printed books are in a certain substitution relationship to each other and that the price decision for one type of edition also has an effect on the sales volume in the other. For the German book market, there are indications that publishers set relatively high e-book prices. A survey shows that 14 per cent of publishers charge identical prices for printed books and e-books and more than 40 per cent of publishers grant discounts of less than 20 per cent compared to printed books.<sup>281</sup> The possible reasons for this could be that publishers want to protect their traditional business area and counteract an increased cannibalization of printed books by e-books. An additional reason why publishers may want to prevent e-books from gaining market share at the expense of printed books could be that they depend on the platforms of Amazon and Tolino-Allianz for the distribution of e-books. These should be in a position to enforce very advantageous conditions against publishers. In a book market without fixed book prices, it cannot be ruled out that e-books would be offered at lower prices due to the probably lower production and distribution costs and could also exert a certain pricing pressure on printed editions.

**246.** For institutional customers, fixed book prices should lead to higher prices.<sup>282</sup> In the case of free prices, it can be assumed that such customers will be able to obtain more favourable conditions due to the sometimes considerable budget and the large number of titles or copies to be acquired. The Book Pricing Act does allow for discounts and rebates for institutional customers such as libraries, public libraries and schools.<sup>283</sup> However, these are limited in amount and it is likely that institutional customers in a book market without fixed book prices could obtain higher discounts and better conditions than currently permitted by the Book Pricing Act. This initially applies to university libraries, which may only be granted discounts of up to five per cent. Public libraries and schools, which receive a maximum discount of ten and 15 per cent respectively, should also be able to benefit from the possibility of negotiating prices individually.<sup>284</sup>

#### **4.2.5.3 Unclear relationship between fixed book prices and title diversity**

**247.** A widespread argument in favour of fixed book prices is that the additional revenues generated by fixed prices for mass titles are used to include probably less demanded and unprofitable titles in the publishing

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<sup>280</sup> See para. 236 in this Special Report.

<sup>281</sup> See Börsenverein des Deutschen Buchhandels, *Verankert im Markt - Das E-Book in Deutschland 2013*, Kurzfassung, Frankfurt am Main, 3 June 2016, p. 13.

<sup>282</sup> See Backhaus, J./Hansen, R., *Resale price maintenance for books in Germany and the European Union: A Legal and economic analysis*, *supra*, p. 101.

<sup>283</sup> See para. 83 in this Special Report.

<sup>284</sup> In this context, however, it should be borne in mind that larger book orders would have to be put out to tender in the absence of fixed book prices, which would entail greater administrative effort.

programme.<sup>285</sup> This could benefit demanding literature and books that are not expected to have large print runs in the first place and hence ensure a greater variety of titles.

**248.** This so-called cross-subsidization argument must be assessed critically. Firstly, the basic assumption that fixed book prices improve the revenue situation for bestsellers is not necessarily given.<sup>286</sup> It is also conceivable that the revenues from the sale of bestsellers will be lower due to the presumably lower sales figures. But even if this assumption was correct, the argumentation is not convincing for the following reasons.

**249.** In this context, a fundamental distinction must first be made between ex-ante and ex-post cross-subsidization.<sup>287</sup> In the case of ex-post cross-subsidization, titles that have later proved unprofitable are co-financed by the successful ones. Due to the high uncertainty of the demand for a title, this is likely to have a great practical relevance in the book market, as many titles ultimately turn out to be unprofitable. However, this issue is neither specific to the book market nor is it related to fixed book prices. A mixed calculation, in which successful products finance less successful ones, can be observed in multi-product companies in all industries.

**250.** The Book Pricing Act and the explanatory statement by the legislator show that the fixed book price is intended to achieve ex-ante cross-subsidization.<sup>288</sup> Through alleged additional revenues from the sales of mass titles, the publisher is put in a position to publish titles that are culturally valuable, but cannot be expected to be commercially successful from the outset. However, it is highly doubtful that such behaviour will actually occur in practice. If one assumes that publishers are profit maximizers, it is hardly to be expected that the publishing programme will be deliberately expanded to include expected loss-makers. Nevertheless, it cannot be ruled out that titles may also be included for which expected losses are accepted.<sup>289</sup> This can be the case, for example, in order to tie promising young authors to the publishing house or to enhance the reputation through particularly high-quality titles. However, these are business strategies of an economic actor. There is much to suggest that such a strategy would also be pursued in a book market without fixed book prices.

**251.** A positive effect of fixed book prices on the diversity of titles published could only result from the fact that the alleged additional revenues from bestsellers with strong sales could provide publishers with the necessary financial resources to be able to take greater risks in the composition of the title portfolio. However, secured high revenues for mass publications should provide the opposite incentive to concentrate the publishing portfolio on this segment.<sup>290</sup>

**252.** Moreover, the scope of the cross-subsidization argument is likely to be limited simply because bestselling titles are often limited to large publishing houses. The extent to which these publishers also publish niche titles, culturally particularly valuable titles and specialist literature is unclear according to the information available. It should also only be applicable to small and niche publishers to a limited extent, as these, with the exception of surprise successes, generally have no high-circulation titles in their portfolio.

**253.** Furthermore, the connection between title diversity and the existence of a broad publishing landscape is likely to diminish also because authors can increasingly publish their works (commercially successful) as self-publishers without publishers and make them accessible to a broad public.<sup>291</sup> This applies in particular to unknown

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<sup>285</sup> On the cross-subsidization argument, see already, e.g., Monopolies Commission, XIIIth Biennial Report, *supra*, para. 702 ff.; von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, *supra*, section 4.1.3; Canoy, M./van Ours, J./van der Ploeg, F., *The Economics of Books*, *supra*, section 5.3 and Appelman, M., *Fixed Book Price*, *supra*, p. 238.

<sup>286</sup> See para. 227 in this Special Report.

<sup>287</sup> See already Monopolies Commission, XIIIth Biennial Report, *supra*, paras 702 ff.

<sup>288</sup> See para 149 and paras 300 ff. in this Special Report.

<sup>289</sup> See von Gottberg, H.-D., *Wirkungsanalyse der gesetzlichen Buchpreisbindung in Deutschland*, *supra*, p. 124.

<sup>290</sup> See *ibid.*

<sup>291</sup> See para. 29 in this Special Report.

authors and authors of niche titles who have only limited earning opportunities with traditional publishers or who are even denied admission to the publishing programme.

**254.** Finally, the experience for Switzerland and especially the United Kingdom does not suggest that fixed book prices have a positive influence on title diversity. Rather, the number of new publications in the United Kingdom has continued to grow even after the end of the Net Book Agreement, while the number of publications in Germany has recently even declined.<sup>292</sup>

#### **4.2.5.4 Declining importance of the protected retailing infrastructure for publishers**

**255.** In addition to the alleged direct advantages of fixed book prices, their supporters point to indirect positive effects for the publishing industry that arise from the protection of brick-and-mortar booksellers. Firstly, they say that publishers are absolutely dependent on a nationwide bookselling infrastructure in order to sell their books.<sup>293</sup> This is the only way to ensure that their titles are available to the customer and can ultimately be purchased. The second argument is based on the assumption that publishers are dependent on comprehensive bookselling services, which brick-and-mortar booksellers can only provide thanks to fixed book prices.<sup>294</sup> Both arguments are examined in more detail below.

**256.** The preceding analysis of the effects of fixed book prices on booksellers has already shown that a brick-and-mortar bookselling infrastructure is no longer absolutely necessary for the availability of books, even in rural regions.<sup>295</sup> However, it is far more difficult to answer the question of the importance of the brick-and-mortar booksellers' presence on the demand for books. Advocates of fixed book pricing argue that customers are often prompted to buy spontaneously by the presence of a bookseller (so-called outlet effect) and that the infrastructure protected by fixed book prices thus creates additional demand.<sup>296</sup>

**257.** For bestsellers of light fiction and popular non-fiction, this argument is not convincing. Rather, fixed book prices inhibit their availability, for example in supermarkets, and prevent even greater attention generated through price discounts. Also for niche titles that are hardly to be found in the usual brick-and-mortar bookstore due to the limited storage and sales areas such an effect is hardly to be expected. In view of the distribution conditions, it could even be beneficial for the sale of such titles if book buyers switch to online booksellers, where these titles are more likely to be represented. A positive correlation between the infrastructure protected by fixed book prices and sales figures is only obvious for titles that are prominently placed in brick-and-mortar booksellers or that are difficult to present on the Internet.

**258.** It should also be noted that fixed book prices have proved to be only partially successful in protecting the brick-and-mortar booksellers in practice.<sup>297</sup> Accordingly, their indirect impact on the publishing industry appears to be limited.

**259.** The situation is similar with the bookselling service offered by brick-and-mortar bookshops. Thanks to the considerable improvements in the course of digitization, the quality of service on the Internet is continuously increasing.<sup>298</sup> At the same time, the proportion of Internet-oriented customers who are increasingly able to make

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<sup>292</sup> See Figure 2.1 and Figure 3.6.

<sup>293</sup> On the importance of point-of-sale density for publishers, see also Rürup, B./Klopfleisch, R./Stumpp, H., *Ökonomische Analyse der Buchpreisbindung*, supra, pp. 23 ff.

<sup>294</sup> On the importance of service levels for publishers, see also *ibid.*, p. 25 ff.

<sup>295</sup> See also paras 205-208 in this Special Report.

<sup>296</sup> See also para. 59 in this Special Report.

<sup>297</sup> See section 4.2.3.5 and Figure 2.7 in this Special Report.

<sup>298</sup> See paras 207 f. in this Special Report

better use of the diverse services offered by online booksellers is rising.<sup>299</sup> Conversely, this means that publishers are less and less reliant on services offered by brick-and-mortar booksellers for the distribution of their books. In addition, it has also been shown that, although the fixed book price system should lead to a higher average level of service, the brick-and-mortar book trade, also due to the limited practical relevance of § 6 para. 1 BuchPrG, is also under considerable pressure in service competition and can only maintain a high level of service to a limited extent.<sup>300</sup> At the same time, fixed book prices prevent the emergence of particularly service-oriented bookselling concepts, which could only be implemented if book prices were higher and, above all, could benefit publishers of little-known and service-intensive titles.

#### **4.2.5.5 Fixed book prices protect publishers' negotiating position only to a limited extent**

**260.** It can generally be assumed that the slowdown of the structural change in the book market protects the publishers' negotiating position. Small independent booksellers, who are not typically likely to have a strong negotiating position vis-à-vis publishers, can better survive in the market and the negotiating power of large bookselling chains and online booksellers remains more limited. All publishers should benefit from this and should be able to obtain better conditions than in a presumably more concentrated bookselling market without fixed book prices.

**261.** However, practice shows that fixed book prices cannot prevent an increasing concentration despite their structure-conserving effect and that the negotiating power of large booksellers is increasing.<sup>301</sup> This is reflected in larger margins of larger booksellers and the sometimes drastic discounts that they obtain from publishers. Examples show that not only small publishers are affected by this, but also high turnover publishing groups.<sup>302</sup> As a consequence, this leads to an increased spread in conditions, contrary to the requirements of § 6 para. 1 BuchPrG, which endangers the existence of brick-and-mortar booksellers.<sup>303</sup>

**262.** Furthermore, fixed book prices can only protect the publishers' negotiating position vis-à-vis the booksellers, but not readily vis-à-vis the oligopolistic book wholesalers. As a result, the protective effect of fixed book prices is limited, especially for small publishers of titles that are less suitable for mass circulation, as such titles are held less frequently available in brick-and-mortar bookshops and increasingly ordered via book wholesalers at the customer's request.

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<sup>299</sup> See also para. 81 in this Special Report.

<sup>300</sup> See section 4.2.3.3 in this Special Report.

<sup>301</sup> See section 4.2.3.5 in this Special Report.

<sup>302</sup> See Fritz, P., Nach Hachette: Bonnier in der Konditionen-Mangel, boersenblatt.net, 16 May 2014.

<sup>303</sup> See also paras 190 ff. in this Special Report.

## Chapter 5

### Legal assessment of the current fixed prices for printed books

#### 5.1 Introduction

**263.** The statutory obligation under § 5(1) in conjunction with § 3 BuchPrG to fix book prices serves objectives which the national legislature has defined in view of a primarily cultural concern (the “protection book as cultural objects”). As a rule applying in an economic context, however, that statutory obligation is also relevant for the development of the EU internal market. The relevance to the internal market may have arisen in part only as a result of market changes taking place after the Book Pricing Act came into force. To the extent that the statutory obligation to fix the prices of books interferes with EU competences, they must be measured specifically against the EU’s free movement of goods and EU competition rules.

**264.** With regard to the free movement of goods, the ECJ ruling of 2016 on the German rules concerning the fixing of medicinal product prices contains statements that go beyond previous case law on statutory price maintenance.<sup>304</sup> In this judgment, the ECJ examined whether the applicable German regulation according to which pharmaceutical entrepreneurs have to prescribe uniform pharmacy prices for prescription-only human medicines within the existing regulatory framework is compatible with the free movement of goods. The ECJ ruled that the regulation in question constituted an unjustified restriction on the free movement of goods. As a result, it declared the regulation inapplicable at least in cross-border traffic.

**265.** In an overall view of European case law, taking into account the judgment on fixed medicinal product prices, it cannot be ruled out that also the statutory obligation to fix book prices violates the free movement of goods in the EU to the extent that it applies to cross-border sales of books published in Germany, excluding re-imported books (section 5.2). In the event of such a violation, it is likely for reasons of legal consistency that the legal requirements additionally violate the principle of loyalty under EU law in connection with the EU competition rules (Art. 4 para. 3 TEU in conjunction with Art. 101 para. 1 lit. a TFEU) (section 5.3).

**266.** Legal issues not covered by the ECJ ruling on fixed prices for medicines are not discussed in this section. This concerns in particular the question whether the rules of the Book Price Fixing Act for books not published in or imported into Germany are compatible with the EU free movement of goods, and the compatibility of fixed book prices within Germany with EU competition rules.

#### 5.2 Potential infringement of the free movement of goods (Art. 34 ff. TFEU)

**267.** The free movement of goods, as an individual fundamental freedom, prohibits quantitative import restrictions, and all measures having equivalent effect, between EU Member States. However, this prohibition has to recede in the cases referred to in the EU Treaties and because of overriding requirements in the general interest, provided that interference with the free movement of goods can be justified in light of the objectives pursued.

##### 5.2.1 Possible finding of a “measure having equivalent effect” (e.g., a quantitative restriction)

**268.** The obligation under § 5(1) sentence 1, 1<sup>st</sup> alternative, in conjunction with § 3 BuchPrG to fix prices for books published and not re-imported in Germany does not constitute a quantitative import restriction. Still, it cannot be ruled out that, in the event of a judicial review, the obligation may be considered to be a measure having equivalent effect to a quantitative restriction. In ECJ case law, such a measure may be found in

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<sup>304</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung (fixed medicinal product prices); moreover Änderungsgesetz zum Buchpreisbindungsgesetz of 31 July 2016, BGBl. I p. 1937; see also para. 1 above.

*“all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.”*<sup>305</sup>

**269.** It does not constitute a measure having equivalent effect if Member States’ rules are applied to products from other Member States which restrict or prohibit only certain selling arrangements. This is at least the case if the relevant rules apply to all economic operators operating in the domestic market and affect the sale of domestic products and products from other Member States in the same way in law as they do in fact. Under these conditions, the provisions in question are not likely to prevent or impede market access for foreign products to a greater extent than is the case for domestic products.<sup>306</sup>

**270.** However, according to the recent ECJ ruling on German fixed prices for medicinal products, a uniform statutory fixed price requirement is not in every case merely a sales modality, but can certainly be a measure with the same effect as a quantitative restriction.<sup>307</sup> The ECJ justified this with the following considerations:

*“It must be found that [...] traditional pharmacies are, in principle, better placed than mail-order pharmacies to provide patients with individually-tailored advice given by the staff of the dispensary and to ensure a supply [...] in cases of emergency. In so far as mail-order pharmacies cannot [...] adequately replace such services, it must be held that price competition is capable of providing a more important factor of competition for mail-order pharmacies than for traditional pharmacies, since price competition lays the basis for their potential to access the German market directly and to continue to be competitive in it.”*<sup>308</sup>

In addition,

*“sales by mail order constitute a more important means of accessing the German market directly for pharmacies established in Member States other than Germany”.*<sup>309</sup>

In these circumstances, uniform statutory price fixing does not affect the companies concerned in Germany or abroad in the same way. Rather, it has a greater impact on foreign companies and may hinder market access for medicines from other Member States more than for domestic products.<sup>310</sup>

**271.** The last considerations made appear prima facie transferable to the legally prescribed fixed book prices for books that are published in Germany and not re-imported. Here too, providers from other European countries are more dependent on distance selling than domestic booksellers. As a result, they are more severely affected by fixed prices. In addition, it is also true in the book trade that price competition is particularly important for dealers from other Member States who do not have a market presence in Germany and want to attract customers for the first time. In contrast, the offer of advice represents a competitive advantage for companies already established on the domestic market.

**272.** However, the question as to whether the case law on fixed drug prices can be applied to fixed book prices has not yet been settled in court. It should be borne in mind that the more recent ECJ rulings run counter to a view held in the past that fixed book prices are a sales modality that can be applied indiscriminately. Furthermore, the

<sup>305</sup> ECJ, Judgment of 30 April 2009, C-531/07 – Fachverband der Buch- und Medienwirtschaft („Libro“), ECR 2009, I-3717, ECLI:EU:C:2009:276, para. 16; see also: ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 22; ECJ, Judgment of 11. July 1974, 8/74 – Dassonville, ECR 1974, 837, ECLI:EU:C:1974:82, para. 5; Judgment of 26 April 2012; C-456/10 – ANETT, ECLI:EU:C:2012:241, para. 32.

<sup>306</sup> Cf. GmS-OGB, Order of 22 August 2012, GmS-OGB 1/10, para. 40, referring to ECJ, Judgment of 24 November 1993 - C-267 and 268/91 – Keck and Mithouard, ECR 1993, I-6097, ECLI:EU:C:1993:905, paras 16 f.

<sup>307</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, paras 26 f.

<sup>308</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 24.

<sup>309</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 25.

<sup>310</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, paras 25-27.

question arises as to whether peculiarities of the distribution of medicinal products stand in the way of a transfer of the above-mentioned case law.

### No indiscriminately applicable sales method

**273.** The proponents of the statutory book pricing provisions in Germany and Austria refer to a 2009 preliminary ruling of the ECJ under Article 267 TFEU that concerned the Austrian Fixed Book Prices Act. The ruling was interpreted as meaning that the ECJ generally confirmed the admissibility of national statutory price fixing obligations, since they were only selling arrangements.<sup>311</sup> However, this interpretation goes too far.

**274.** It is true that the judgment states:

*“In so far as the national provisions on book pricing [...] do not concern the characteristics of those goods, but solely the arrangements under which they may be sold, it must be regarded as concerning selling arrangements”.*<sup>312</sup>

**275.** It should be noted, however, that the ruling – in accordance with the questions referred – only concerned the design of an import provision within the Austrian Fixed Book Prices Act, which the ECJ moreover declared to be incompatible with the free movement of goods.<sup>313</sup> Admittedly, the ECJ also stated that the objective of the specifically examined provision could

*“be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the Austrian market which takes the conditions of that market into account.”*<sup>314</sup>

**276.** With a broad interpretation, this might be understood as meaning that the ECJ recognized the statutory obligation to fix book prices in Austria, at least if an opening clause were included, according to which publishers or importers would be permitted to set a price suitable for the market concerned. This was apparently also the understanding in Austria, where it was argued in reaction to the ruling that the ECJ had confirmed the core of the fixed book price system.<sup>315</sup>

**277.** In the context of a reference for a preliminary ruling, however, the ECJ is only competent to answer the questions put to it by the national court.<sup>316</sup> The ECJ’s statement refers to the fact that the protection objective of the specifically examined scheme would not be affected if the publisher or importer were allowed to set a price suitable for the market concerned. That being said, the – more far-reaching – question as to whether a legal requirement regarding binding retail prices is otherwise permissible was not the subject of the review.

<sup>311</sup> GmS-OGB, Order of 22 August 2012 - GmS-OGB 1/10, para. 41; Austrian Federal Ministry for Education, Arts and Culture, press release of 30 April 2009, [https://www.ots.at/presseaussendung/OTS\\_20090430\\_OTS0152/kulturministerium-buchpreisbindung-bleibt-bestehen](https://www.ots.at/presseaussendung/OTS_20090430_OTS0152/kulturministerium-buchpreisbindung-bleibt-bestehen), accessed on 25 May 2018; further, see the statements quoted in no author/APA, ECJ: Österreichs Buchpreisbindung ist EU-widrig, Die Presse of 30 April 2009.

<sup>312</sup> ECJ, Judgment of 30 April 2009, C-531/07 – Fachverband der Buch- and Medienwirtschaft, ECR 2009, I-3717, ECLI:EU:C:2009:276, para. 20.

<sup>313</sup> GA Trstenjak, Opinion of 18 December 2008, C-531/07 – Fachverband der Buch- and Medienwirtschaft, ECLI:EU:C:2008:752, para. 100; see also paras 48 ff. in depth on the question of a selling arrangement.

<sup>314</sup> ECJ, Judgment of 30 April 2009, C-531/07 – Fachverband der Buch- and Medienwirtschaft, ECR 2009, I-3717, ECLI:EU:C:2009:276, para. 35.

<sup>315</sup> See Austrian Federal Ministry for Education, Arts and Culture, press release of 30 April 2009, [https://www.ots.at/presseaussendung/OTS\\_20090430\\_OTS0152/kulturministerium-buchpreisbindung-bleibt-bestehen](https://www.ots.at/presseaussendung/OTS_20090430_OTS0152/kulturministerium-buchpreisbindung-bleibt-bestehen), accessed on 25 May 2018; further, see the statements quoted in no author /APA, ECJ: Österreichs Buchpreisbindung ist EU-widrig, Die Presse of 30 April 2009.

<sup>316</sup> ECJ, Judgment of 5 October 1988, 247/86 – Alsatel, ECR 1988, 5987, ECLI:EU:C:1988:469, para. 8; Judgment of 10 July 1997, C-261/95 – Palmisani, ECR 1997, I-4025, ECLI:EU:C:1997:351, para. 31; Judgment of 6 July 2000, C-402/98 – ATB et al., ECR 2000, I-5501, ECLI:EU:C:2000:366, para. 29; Judgment of 12 February 2004, C-236/02 – Slob, ECR 2004, I-1861, ECLI:EU:C:2004:94, paras 29 and 30.

### No legally relevant peculiarities of the medicinal products market

**278.** The possibility to apply the case law on fixed medicinal product prices to fixed book prices is not excluded by any special features of the distribution of medicinal products. In the case of fixed book prices, it is even more obvious than in the case of fixed medicinal product prices that they restrict the free movement of goods as a measure having equivalent effect.

**279.** In accordance with the 2009 judgment cited above, the decisive criterion for determining a measure having equivalent effect is whether the relevant national

*“provisions apply to all relevant traders operating within the national territory and [whether] they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.”*

According to case law, this is not the case if the relevant provisions

*“have the effect of restricting the ability of [market participants operating across borders] to compete, as the latter cannot act freely on their market unlike [domestic market participants] who are their direct competitors.”<sup>317</sup>*

In summary, it is therefore essential that the economic operators affected by the measure compete with each other on the relevant domestic market, so that the measure may have an impact on their competitiveness.

**280.** In this respect, however, the distribution of medicinal products and the book trade appear to be quite comparable. On the one hand, both traditional pharmacies and mail-order pharmacies with cross-border operations serve the same demand in their domestic operations and are therefore in competition with each other. On the other hand, traditional booksellers already operating in the country as well as those wishing to set up distance selling from other Member States also serve the same customer demand.

**281.** Differences exist primarily with regard to the regulation of the respective economic activities. Pharmacies are required to ensure a supply of medicines irrespective of the specific market conditions (e.g., also in emergency services and in sparsely populated areas). The market intervention associated with the fixed prices for medicines examined by the ECJ thus establishes an obligation on the part of pharmacists to guarantee a supply of medicines beyond what the market can afford on its own initiative.

**282.** In contrast, there are no requirements for the book trade to provide readers with access to books that could not be sold with an economically calculated offer. According to § 6 BuchPrG, there are only certain requirements for the publishing houses that set the book price, with which the services of the conventional book trade and in particular of smaller bookstores are to be rewarded. However, no provision exists that would oblige retailers to participate in the implementation of § 6 of the BuchPrG.<sup>318</sup>

**283.** Thus, the regulatory differences only concern the question of whether the economic entities concerned must also make an offer where an economically calculated offer would not be possible without regulation. They do not therefore concern an economic activity carried out under normal market conditions to meet demand, as protected by the fundamental freedoms.

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<sup>317</sup> See ECJ, Judgment of 30 April 2009, C-531/07 - Fachverband der Buch- und Medienwirtschaft („Libro“), ECR 2009, I-3717, ECLI:EU:C:2009:276, paras 17, 24.

<sup>318</sup> See paras 151 ff. above in this Special Report.

## 5.2.2 On the justification of the price fixing requirements

### 5.2.2.1 Benchmark: Relevant items of protection and verification requirements

**284.** According to the ECJ case law, restrictions on the free movement of goods in connection with fixed book prices are not covered by the legal justifications expressly set out in Article 36 TFEU.<sup>319</sup> However, in the 2009 ruling on the Austrian Fixed Book Prices Act, which has already been mentioned, the ECJ further stated:

*“the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it.”*<sup>320</sup>

The ECJ has not yet given any further ruling on the question as to which characteristics constitute the book as a cultural asset in detail and under which conditions measures restricting the free movement of goods can be justified for its protection.

**285.** In its recent ruling on German fixed medicinal product prices, however, the ECJ pointed out in view of the objective of health care that

*“price competition could be capable of benefiting the patient [as end-customers] in so far as it would allow, where relevant, for prescription-only medicinal products to be offered in Germany at more attractive prices than [in a system with fixed prices].”*

This is because effective protection of the relevant legal interests

*“demands, inter alia, that medicinal products be sold at reasonable prices”.*<sup>321</sup>

This consideration should in principle also apply to the book trade. It can be assumed that price competition, insofar as it would entail price reductions, would enable additional readership to purchase commercially distributed books. This is not precluded by the fact that such price competition may not have a price cutting effect for all titles.<sup>322</sup>

**286.** Apart from this, according to European case law, it is still open whether the national legislature has leeway as to the level at which it wishes to guarantee the protection of books as cultural objects. In contrast to national measures in the field of public health, the ECJ has so far not explicitly recognized any margin of discretion in measures for the protection of books as cultural objects. It should be borne in mind that among the goods and interests protected by the EU Treaties, people’s health and lives are the most important.<sup>323</sup> However, the ECJ has so far been reluctant to recognize a Union policy at all in the field of the distribution of books.<sup>324</sup> In these circumstances, it should, in principle, remain for the Member States, within the limits of their powers, to determine at what level they wish to guarantee the protection of books as cultural objects.

<sup>319</sup> ECJ, Judgment of 30 April 2009, C-531/07 – Fachverband der Buch- and Medienwirtschaft, ECR 2009, I-3717, ECLI:EU:C:2009:276, para. 32.

<sup>320</sup> ECJ, Judgment of 30 April 2009, C-531/07 – Fachverband der Buch- and Medienwirtschaft, ECR 2009, I-3717, ECLI:EU:C:2009:276, para. 34.

<sup>321</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 43.

<sup>322</sup> For more details, see sections 4.2.5.1 and 4.2.5.2 in this Special Report, especially paras 239, 241 ff.

<sup>323</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 30.

<sup>324</sup> ECJ, Judgment of 10 January 1985, 229/83 – Leclerc, ECR 1985, 1, ECLI:EU:C:1985:1, paras 19 f.; confirmed in: ECJ, Judgment of 3 October 2000, C-9/99 - Échirrolles Distribution SA/Association du Dauphiné et al., ECR 2000, I-8224, ECLI:EU:C:2000:532, paras 23 ff.

**287.** This, however, does not change the fact that in the case of restrictions on the free movement of goods, the protection of which falls within the competence of the EU, the burden of proof that the conditions for justification of the restrictions are fulfilled lies with the Member State concerned. The case law of the ECJ contains detailed explanations of the requirements to be observed in this respect. Thus,

*“it is for the Member State which claims to have a reason justifying a restriction on the free movement of goods to demonstrate specifically the existence of a reason relating to the public interest, the necessity for the restriction in question and that the restriction is proportionate in relation to the objective pursued.”*<sup>325</sup>

**288.** In addition, the reasons which may be invoked by a Member State by way of justification must be accompanied by

*“appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated”.*<sup>326</sup>

**289.** Finally, when a national court examines national legislation to determine whether it may justify a restriction on the free movement of goods, it must

*“examine objectively [...] whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods”.*<sup>327</sup>

**290.** In the following sections, in line with the structure of the Book Price Fixing Act, it is examined separately for the cultural property of the book (§ 1 sentence 1 BuchPrG) and the contribution of the distribution structure envisaged by the German legislature (sentences 2-3 BuchPrG) whether this protection can justify any restrictions on the free movement of goods that go hand in hand with the legally prescribed free movement of goods.

### 5.2.2.2 Books as cultural objects

**291.** According to case law, the protection of books as cultural objects pursuant to § 1 sentence 1 BuchPrG may in principle be an imperative requirement of the general interest. It should not matter that different views exist on what exactly constitutes books as “cultural objects”.<sup>328</sup> In any case, the book is a legal asset for the protection of which the national legislator is free, taking into account the division of competences between the EU and the Member States. This protection should also be in the general interest, since the protection of cultural interests is in principle a legitimate national interest and the EU Treaties do not impose any restrictions with regard to the scope of protection by national law.<sup>329</sup>

**292.** The only question is whether the restrictions on the free movement of goods associated with fixed book prices are appropriate and necessary to ensure the protection of this cultural asset (“imperative requirement”). As explained in note 131, fixed book prices are based on a sales structure in which

- publishers publish books and supply them to
- book retailers with traditional business models and a cost structure typical of non-digital distribution.

<sup>325</sup> ECJ, Judgment of 8 May 2003, C-14/02 – ATRAL, ECR 2003, I-4431, ECLI:EU:C:2003:265, para. 69.

<sup>326</sup> ECJ, Judgment of 7 June 2007, C-254/05 – Commission/Belgium, ECR 2007, I-4269, ECLI:EU:C:2007:319, para. 36; in the same vein: ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 35.

<sup>327</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, para. 36.

<sup>328</sup> See section 4.1.2 in this Special Report.

<sup>329</sup> See para. 126 and para. 141 ff. in this Special Report.

The uniformly prescribed price can then be set by the publisher or importer in such a way that a certain margin is reserved for retail booksellers; at least if publishers and intermediaries do not skim off this margin.

**293.** However, due to market changes it can be less and less assumed that these conditions are fulfilled in the book trade. On the one hand, these changes result in an unequal treatment that distorts competition, in particular because publishers or importers are not able to set prices based on the cost of the distribution channel through which the book is offered.<sup>330</sup> In addition, there are now business models for printed books or (competing) e-books in which there is no one-sided pricing by a conventional publisher or importer and in which the bookseller has exclusive or at least non-exclusive influence on pricing (self-publishing, flat-rate models).<sup>331</sup> On the other hand, the changes reduce the incentives for the booksellers protected by the fixed book prices to fulfil the functions assigned to them, namely, to contribute to the diversity of titles and to broad accessibility to book titles (including culturally higher-quality titles) instead of striving for sales with mass titles.<sup>332</sup> Thus, it is increasingly doubtful whether fixed book prices are an appropriate instrument to ensure that the cultural policy objectives of the Book Price Fixing Act are met.

**294.** The alleged need for fixed book prices is becoming increasingly doubtful as well. Justification of the distortions of competition, which are becoming more and more pronounced as a result of market changes, could only be justified if the main objective – the protection of books as cultural objects – could be achieved more effectively through one distribution channel than through another. However, there is no certain evidence to date that the distribution of books through novel distribution channels (e.g., online platforms) contributes to the protection of books as cultural objects to a greater or lesser extent than through traditional distribution structures.<sup>333</sup>

**295.** The over-the-counter retail bookselling business provides (further) culturally relevant services in addition to pure book distribution. In individual cases, bookshops contribute to the promotion of culture and reading, sometimes in cooperation with schools and libraries. They offer author readings or satisfy the demand in market niches, which benefits cultural diversity.<sup>334</sup> However, this does not explain why, with fixed book prices, such additional services require an instrument that, apart from retail bookstores, also benefits pure points of sale for self-service (e.g., in department stores) and mail order booksellers.<sup>335</sup> In the event of a judicial review of the fixed book prices, it would also be necessary to prove to what extent the book trade actually provides the alleged services. For many brick-and-mortar bookstores, their cultural activities may be limited to the mere display of their merchandise.

**296.** Furthermore, alternative instruments for the promotion of books as cultural objects are conceivable – even if the legislature’s margin of discretion is taken into account – which can be balanced in a more nuanced fashion, e.g., financial subsidies to individual publishers or bookstores or, conversely, conditions imposed on (e.g., market-dominant) companies. Under EU State aid rules (Art. 107(2), (3) TFEU), subsidies could only be granted in the event of objective justification. The market interventions associated with such instruments would thus be linked to concrete services provided in return; and – unlike fixed book prices – they would not necessarily have an effect on every book sale in the retail trade.

**297.** Moreover, it is generally pointed out that bookstores are the remaining “cultural oases” in the town centres that nobody seriously wants to miss. However, the problem of the impending desertification or cultural

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<sup>330</sup> See para. 235 in this Special Report.

<sup>331</sup> See paras 28, 64, 185 in this Special Report.

<sup>332</sup> See section 4.2.3.4, but also section 4.1, particularly again 4.1.2 (unclear legal objective), each in this Special Report.

<sup>333</sup> See paras 205 ff. above in this Special Report.

<sup>334</sup> See already para. 60 in this Special Report.

<sup>335</sup> See para. 234 in this Special Report.

impoverishment of towns is a problem that is detached from books as cultural objects and is also not specific to the book trade. This problem must therefore also be solved with other instruments.

### 5.2.2.3 The contribution of traditional distribution infrastructure

**298.** The contribution of the traditional distribution infrastructure to the protection of books as cultural objects is unlikely to be a protected asset in its own right. It was already pointed out in the preceding sections that the cultural asset “book” is identified as the object of protection by the Book Price Fixing Act (§ 1 sentence 1 BuchPrG) and that the Act only protects the distribution infrastructure of publishers and bookstores to the extent that this distribution infrastructure in turn contributes to the protection of books as cultural objects (§ 1 sentences 2-3 BuchPrG).<sup>336</sup>

**299.** According to European case law, a different understanding would also be problematic. It would mean that a legally designated distribution infrastructure for books would be protected as such, irrespective of their contribution to the protection of books as a cultural asset. According to settled case law, however,

*“rounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty”.*<sup>337</sup>

According to the case law cited, EU law assumes in principle that market participants can best protect themselves by adapting to the market.<sup>338</sup> Measures restricting fundamental freedoms must therefore not only benefit certain economic operators, but must also serve broader legitimate objectives. In the present context, it therefore does not appear to be enough for the statutory fixed book prices to be exhausted in order to prevent revenue losses due to price competition if it is not guaranteed at the same time that the associated benefits are used to protect books as cultural objects.

**300.** Further aspects have been raised in the political discourse in order to demonstrate the positive economic effects of fixed book prices and their contribution to the protection of books as cultural objects.<sup>339</sup> The aspects raised essentially relate to the fact that the conventional distribution infrastructure of publishing houses and (brick-and-mortar) bookstores increases the availability of books at favourable conditions. In summary, fixed book prices should have the following effects in particular:

- Higher-quality titles could be cross-subsidized by bestsellers, since at the book retail level, fixed book prices increase the willingness to stock up. It would also increase the scope at the publishing house level to allow publishers to increase the variety of titles. Overall, this would lead to an increase in volume while at the same time maintaining price competition at the manufacturer level.
- Books in Germany are on average cheaper, as fixed book prices lead to a reduction in the price level.
- Finally, fixed book prices lead to an increase in the number of dealers and thus ensure the continued existence of a nationwide (retail) infrastructure.

<sup>336</sup> See section 4.1.3, especially paras 157 f., in this Special Report.

<sup>337</sup> ECJ, Judgment of 26 April 2012, C-456/10 – ANETT, ECLI:EU:C:2012:241, para. 53; in the same vein: Judgment of 16 January 2003, C-388/01 – Commission/Italy, ECR 2003, I-721, ECLI:EU:C:2003:30, paras 19, 22; Judgment of 5 June 1997, C-398/95 – Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion/Ypourgos Ergasias, ECR 1997, I-3091, ECLI:EU:C:1997:282, para. 23; Judgment of 26 April 1988, 352/85 – Bond van Adverteerders/Netherlands State, ECR 1988, 2085, ECLI:EU:C:1988:196, para. 34.

<sup>338</sup> The same is generally true within the framework of German competition law; see FCO, Activity Report 1979/1980, BT-Drs. 9/565 of 25 June 1981, p. 99: „[Die Buchpreisbindung] könnte allerdings of Markt her in Gefahr geraten, wenn eine weitgehende Verlagerung des Buchabsatzes von den traditionellen Buchhandlungen auf Geschäfte erfolgt, die ihr Angebot auf Bestseller and nicht beratungsbedürftige, schnell verkäufliche Bücher beschränken. Diese Betriebsformen nehmen die Vorteile der Buchpreisbindung in Anspruch, ohne daß sie die buchhändlerischen Leistungen erbringen, deretwegen der Gesetzgeber die Preisbindung für Verlagserzeugnisse zugelassen hat.“

<sup>339</sup> See also paras 135 f. in this Special Report.

It has also been argued that fixed book prices lower the market entry barriers for new providers, counteract the development of dominant positions on the book markets and reduce transaction costs and information costs for consumers.

**301.** However, the ECJ has already rejected the three main aspects mentioned above for lack of sufficient evidence that the alleged positive effects actually occur.<sup>340</sup> The effectiveness of fixed book prices has also remained unclear following the relevant judgment.<sup>341</sup> Apart from this, it should be borne in mind that research to date has not dealt with the relevant question of how a restriction of cross-border trade in goods accompanied by national systems of fixed book prices can be assessed in economic terms or in terms of cultural policy objectives. The associations consulted in preparation of this Special Report have also not made any comments or provided any evidence suggesting, from the point of view of the Monopolies Commission, a different judicial assessment of the above aspects.

**302.** Where it has been argued that fixed book prices lower the market entry barriers for new providers, it is sufficient in this context to point out that, in accordance with the case law of the ECJ, fixed book prices restrict the free movement of goods precisely because they lead to an increase in market entry barriers for market participants operating across borders.<sup>342</sup>

**303.** Furthermore, according to what has been said so far, it cannot be completely ruled out that the effects of existing market power of other market participants could be mitigated by statutory fixed book prices.<sup>343</sup> However, fixed book prices have so far appeared unsuitable to prevent such market participants from at all attaining, possibly, a dominant position. It is therefore not clear why fixed prices should be suitable for preventing their expansion or active use. Moreover, it is solely the task of the competition rules and not of the Book Pricing Act to combat distortions of competition.

**304.** Lastly, it has been argued that fixed book prices reduce transaction and information costs for consumers. Such economic advantages for consumers may be of relevance in so far as the legal production of a restriction of competition in accordance with Article 101(3) TFEU in conjunction with Article 4(3) TEU is concerned that goes hand in hand with fixed book prices. However, it is unclear whether they are also legally significant as far as the protection of books as a cultural asset is concerned.<sup>344</sup> In any case, benefits in terms of transaction and information costs should only be taken into account under the same conditions as under EU competition rules.<sup>345</sup>

#### 5.2.2.4 Doubtful relevance of further cultural policy objectives

**305.** In the past, various other legal provisions have been invoked in literature and political discourse, which define independent cultural policy objectives and which were therefore claimed to be a basis for justifying the restrictions on the free movement of goods and competition that go hand in hand with the legally prescribed fixed book prices. Reference was made in particular to Article 167 TFEU, Article 22 of the Charter of Fundamental Rights and Article 5 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. However, the ECJ has already ruled on Article 167 TFEU that the provision contains no justification for Member States' measures restricting fundamental freedoms.<sup>346</sup> It should also be noted that the relevant provisions do not

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<sup>340</sup> ECJ, Judgment of 17 January 1984, 43/82 – VBVB and VBBB, ECR 1984, 19, ECLI:EU:C:1982:119, paras 54-58.

<sup>341</sup> See section 4.2 in this Special Report.

<sup>342</sup> Cf. ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, paras 22-27.

<sup>343</sup> See section 4.2.3.5 in this Special Report.

<sup>344</sup> In this context, see again section 4.1.3 in this Special Report, especially paras 157 f.

<sup>345</sup> See section 5.3 in this Special Report.

<sup>346</sup> ECJ, Judgment of 30 April 2009, C-531/07 – Fachverband der Buch- und Medienwirtschaft, ECR 2009, I-3717, ECLI:EU:C:2009:276, para. 33.

release the Member States from their obligations under Articles 34 ff. TFEU to respect the free movement of goods by market participants.

### **5.3 Possible infringement of the competition rules (Art. 101 ff. TFEU in conjunction with Art. 4(3) TEU)**

**306.** In the event of a violation of the freedom of movement of goods, it is possible that the ECJ would also declare the statutory fixed book prices for books published in Germany and not re-imported to be incompatible with the principle of loyalty in a preliminary ruling. For the same reasons that make a restriction of the free movement of goods likely, the provisions on fixed book prices can also be regarded as a legally prescribed restriction of competition within the meaning of Article 101(1) TFEU in conjunction with Article 4(3) TEU, which has a particularly detrimental effect on domestic and foreign distance sellers. Furthermore, based on the current information available, it is likely that the existing legal regulation is not justified for competitive or non-competitive reasons. If this assessment were confirmed, Germany would have violated its duty of loyalty (loyalty to the Union) with the current statute, at least with regard to cross-border sales.

### **5.4 Interim result**

**307.** Based on the considerations in this section, it cannot be ruled out that the ECJ will declare the statutory fixed book prices for books published in Germany and not re-imported to be incompatible with the free movement of goods in Europe in a preliminary ruling procedure. There are indications that statutory fixed book prices restrict the free movement of goods as a so-called measure with equivalent effect to the detriment of foreign distance sellers. There is also evidence that the existing legislation is not justified for the purposes of protecting books as cultural objects. In particular, no evidence is apparent that the legal rules are appropriate for this purpose. Furthermore, it is questionable whether fixed book prices are compatible with the principle of loyalty under EU law.

**308.** In the event of a violation of the free movement of goods, fixed book prices would be inapplicable to the cross-border distribution of books.<sup>347</sup> If the ECJ were to declare the statutory fixed book prices incompatible with the free movement of goods, companies operating across borders could gain a competitive advantage over the – still price-bound – brick-and-mortar book trade in Germany by sending printed books from abroad with price reductions to German end-customers. The behaviour of market participants following the ECJ ruling on fixed drug prices has shown that such an option would probably be used sooner or later.

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<sup>347</sup> See Declaration No 17 accompanying the EU Treaties, OJ C 115 of 9 May 2008, p. 344.

## Chapter 6

### Legal assessment of the price fixing requirements for e-books

**309.** The statutory fixed book prices were extended to e-books by the Second Act amending the Book Price Fixing Act. E-books are data sets which, according to the customary understanding in the industry, should be regarded as independent electronic editions of works and for which a separate price should be set.<sup>348</sup> Therefore, the question arises not only with regard to printed books but also with regard to e-books as to whether the restrictions associated with statutory price maintenance are compatible with the EU fundamental freedoms and EU competition rules (Sections 6.1 and 6.2).

**310.** This review is again limited to the legal issues touched upon by the ECJ ruling of 2016 on German fixed pharmaceutical prices and therefore only concerns e-books published in Germany and not re-imported. The explanations in this section are also supplemented by the annex to this report.

#### 6.1 Potential infringement of the free movement of goods

##### 6.1.1 Possible finding of a measure having equivalent effect

**311.** The legally prescribed book price fixing is likely to restrict the free movement of goods with regard to e-books for the same reasons as for printed books. For e-books, too, the price fixing in question limits the possibilities for senders from other Member States, who do not have any physical presence in Germany and who may therefore be dependent on price competition, to draw the attention of potential customers in Germany to their offer.

**312.** Such a restriction is even particularly obvious for e-books.<sup>349</sup> This is because e-books have a format that requires the Internet in some form for their distribution. In any case, licenced access to data is required, which can only be provided to the user electronically. E-books, as data sets, are also particularly suitable for distribution via the Internet. Price competition is again particularly important on the Internet, as providers there cannot, from the outset, resort to the same infrastructure for presentation or consulting as brick-and-mortar retailers.<sup>350</sup> Dealers from other Member States who are unable to attract attention through the brick-and-mortar book trade channel or through price surges in the online business with products other than e-books have disadvantages if they can only offer e-books at the same price as dealers already active in Germany.

**313.** Apart from the restriction of price competition, the statutory fixing of book prices may lead to additional costs for online traders from other Member States if they have to adapt their websites to potential consumer groups in different countries in order to meet fixed price requirements in different Member States. It should be noted, however, that some larger providers have been able to establish themselves in the market in Germany (especially Amazon) despite such additional costs and that it is customary for such providers to maintain websites differentiated by country for the various sales markets; for example, the Amazon.de page differs from Amazon.fr or Amazon.it. However, especially where special software is required to determine prices for the respective Member States, the additional costs are likely to be particularly burdensome for smaller suppliers from other Member States. The extension of book price fixing can therefore make the German e-book market particularly attractive for existing providers and not for smaller new providers.

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<sup>348</sup> According to the legal opinion of the Börsenverein confirmed in the government draft of the Second Amendment Act to the Book Price Fixing Act, the inclusion of electronic books in the legal definition in § 2 para. 1 no. 3 BuchPrG is merely a legal clarification.

<sup>349</sup> Cf. section 4.2.3 and para. 271 in this Special Report concerning market entry and generally the competitive situation in the distributing book trade.

<sup>350</sup> In that respect, see ECJ, Judgment of 9 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, paras 23, 25 (regarding the equivalent situation in the online distribution of medicinal products); further, see para. 214 in this Special Report (concerning market entry barriers due to the existence of other suppliers).

**314.** The e-book markets – like the printed book market – have special characteristics over other markets for products sold via the Internet (e.g., the music market), as they are strongly structured according to linguistic areas. Notwithstanding such market limits, the existing fixed book price requirements only apply to German-language books sold to end-customers in Germany. They do not therefore cover the entire German-speaking area in the EU, but rather cut through it along national borders. Nor can the linguistic differences between the EU Member States be taken as an argument for the fact that the German price fixing requirements would not restrict the movement of goods within the internal market.

## **6.1.2 On the justification of fixed prices**

### **6.1.2.1 On ensuring a balanced market development**

**315.** One reason for the Second Amendment Act to the Fixed Book Prices Act may have been the consideration that the extension of fixed book prices to e-books could ensure a balanced market relationship between printed books and e-books. This is at least suggested by various arguments raised in the statements and in the political discourse on the law. Assuming this potential objective, a distinction would have to be made between the book as a cultural asset (§ 1 BuchPrG) and its forms as a printed work or electronic book (§ 2 BuchPrG). In this respect, the law would serve to ensure that no form can replace the other, i.e., neither the printed book the e-book nor vice versa.

**316.** In fact, it was already pointed out that additional sales of e-books could be at the expense of sales of printed books.<sup>351</sup> This could be prevented by giving traditional publishers control not only over the price of printed books but also over the price of e-books. However, the structure of the Book Price Fixing Act, like the requirements of EU law, militates against the idea that an extension of fixed book prices to e-books might be justified with the objective of ensuring a balanced market development.

**317.** With regard to the structure of the Book Pricing Act, it should be noted that e-books and printed books are equal in every respect under § 1 in conjunction with § 2 BuchPrG – also with regard to the statutory scope of protection. Apart from this, the materials of the legislative process do not explicitly address the relationship between sales of printed books and sales of e-books. The assumption that the law should promote printed books at the expense of e-books is therefore unlikely to find any basis in the law.

**318.** Moreover, the protection of balanced market structures is already provided by EU law. Such protection cannot be guaranteed at the same time by national law, given the primacy of EU law; nor could an economic objective set by national law justify restrictions on EU fundamental freedoms.<sup>352</sup> In fact, the attempt to control the development of e-book retail prices in order to stabilize prices at a high level through coordinated behaviour by publishers and individual retailers has already been the subject of an antitrust investigation for non-compliance with competition rules at the EU level.<sup>353</sup>

### **6.1.2.2 On the protection of books in the form of e-books as cultural objects**

**319.** The question of whether e-books merit protection as cultural objects – unlike, for example, audio books – has remained controversial in terms of legal policy. On one side of the spectrum is the position of the book traders association (*Börsenverein*), according to which e-books are in any case products that reproduce or substitute books in the sense of the earlier version of § 2 BuchPrG.<sup>354</sup> According to this position, e-books are simply

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<sup>351</sup> Cf. para. 185 above in this Special Report.

<sup>352</sup> See again the case law cited in fn. 337 in this Special Report.

<sup>353</sup> See European Commission, Decision of 25 July 2013, 39.847 – E-Books, paras 26 ff. and, previously, Decision of 12 December 2012, paras 22 ff. (as a reaction to Amazon's flat rate model). The proceeding concerned at least one German publishing house.

<sup>354</sup> Cf. Kübler in: Ulmer-Eilfort/Obergfell, *Verlagsrecht*, 1st ed. 2013, K 1 para. 44.

electronic versions of books.<sup>355</sup> On the other hand, there is the position, for example, of the consumer centres, according to which the rules applicable to printed books are not transferable to e-books. In view of the changes in the market environment and changing user behaviour, these rules are no longer up to date. The international nature of the e-book market makes it virtually impossible to achieve a uniform price level across the board.<sup>356</sup>

**320.** However, the dispute may remain undecided for the purposes of the present investigation. In any case, there are serious doubts that the restriction of the free movement of goods associated with the extension of fixed book prices to e-books is at all appropriate for contributing to the protection of books as a cultural asset (“imperative requirement”).

**321.** In this respect, political discourse has so far focused on the experience garnered with the fixed book prices for printed books. The legally fixed prices for books have already contributed in the past to the fact that a large variety and number of book titles are available in Germany and that culturally valuable books are published that do not promise a large circulation from the outset. It has further been claimed that these positive effects of the prescribed price maintenance could also be expected for e-books.

**322.** Nevertheless, it is more than doubtful whether it is precisely the restriction of the free movement of goods associated with an extension of the fixed book price system to e-books that is able to produce the positive effects attributed to it. In this respect, it should be borne in mind that publishers are encouraged to set the price of e-books relatively high so as not to jeopardize the sale of printed books.<sup>357</sup> It is therefore questionable from the outset whether fixed book prices can benefit e-books as well as printed books. On the contrary, there is some evidence that the law even hinders the marketing of e-books.

**323.** Having said that, price fixing for e-books can in practice also easily be undermined by merchants by renting several e-books in bundles for a flat rate or by offering them through an online book club.<sup>358</sup> If distribution under such models also includes e-books provided by publishers in a specific case, the respective package requires at least an agreement between the publishers concerned and the bookseller. It can be deduced from the market success of such models that the pricing sovereignty of e-books in practice lies not exclusively with the publisher but also with the trade selling the products and that this also corresponds to the interests pursued by the parties involved. However, the market development contradicts the concept of legally prescribed price maintenance for e-books.

**324.** Apart from this, the Second Amendment Act was not accompanied, as far as can be seen, by an impact assessment of the volume of cross-border book sales or the volume of cross-border online sales potentially affected by the new rules and their economic impact on the book industry. This is another factor militating against the idea that the concerns regarding the suitability of the restrictions imposed by the law with regard to the protection objectives pursued in this way can be postponed.

### 6.1.2.3 The contribution of traditional distribution infrastructure

**325.** As in the case of printed books, the contribution of the traditional distribution infrastructure to the protection of books as cultural objects in the form of e-books cannot be regarded as an independent protected asset. In this respect, too, the aim of promoting the existence of a large number of sales outlets cannot in itself constitute an imperative requirement of the general interest, irrespective of the protection of books as cultural

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<sup>355</sup> Kübler in: Ulmer/Eilfort/Obergfell, *Verlagsrecht*, 1st ed. 2013, K 1 para. 43.

<sup>356</sup> vzbv, *Buchpreisbindung bei E-Books*, submission of 18 May 2015 concerning the proposed bill of the Federal Ministry for Economic Affairs and Energy concerning an amendment to the book price fixing law, pp. 3 ff.

<sup>357</sup> See para. 245 in this Special Report.

<sup>358</sup> See para. 185 in this Special Report; further, see Weiss, „Sind E-Book-Flatrate and Buchpreisbindung vereinbar? Justiziar des Börsenvereins: Es ist kompliziert, aber nein“, <http://neunetz.com/2011/10/11/sind-e-book-flatrate-und-buchpreisbindung-vereinbar-justiziar-des-boersenvereins-es-ist-kompliziert-aber-nein/>, accessed on 14 May 2018.

objects.<sup>359</sup> Moreover, it is true here again that the possible promotion of existing market participants may even run counter to the goal of maintaining and promoting a culturally rich offer.<sup>360</sup>

**326.** In the case of e-books, there are further arguments militating against a justification for the interference in the free movement of goods associated with price fixing. This applies, among others, with regard to the expected economic effects of fixed prices. It was already pointed out that bestsellers are typically attractive for both retailers and publishers because of their good saleability at low costs for each individual copy.<sup>361</sup> Therefore, even with fixed final prices, retailers and publishers have incentives to promote the sale of bestsellers as far as possible compared to the sale of other titles. This applies to printed books as well as e-books. In the case of e-books, however, it should also be possible to produce the individual copies of an e-book more cost-effectively than the copies of printed books, regardless of the content, at least after the producer has made the necessary up-front investments in the necessary production infrastructure.<sup>362</sup> Conversely, e-book formats are unlikely to be an option for higher-quality titles, for which physical processing (art books, bibliophilic editions) is particularly important, or in the case of specialist books.

**327.** Apart from this, a conventional publishing and trading infrastructure does not appear indispensable for e-books. In this respect, it should be remembered that the sale of e-books in any case requires the use of the Internet (see para. 312). However, there are a large number of service providers on the Internet that provide suitable sales channels for different data formats. In any case, there is not enough evidence to show that the situation is different, especially with e-books. Moreover, the individual characteristics of an e-book are determined even more strongly than those of a printed book by the intellectual creation embodied in the data set. Therefore, it does also not appear cogent that the publisher should be authorized to set prices for e-books. After all, the rights to intellectual creation are actually held solely by the author and not by the publisher.<sup>363</sup>

**328.** As regards e-books, it is therefore much more doubtful than with regard to the printed book whether the restrictions associated with price-fixing are appropriate and necessary to ensure a possible contribution of the traditional distribution infrastructure to the protection of the book as cultural objects in the form of the e-book. In addition, according to the explanations regarding the printed book (paras 298-299), it would have to be shown that these restrictions enable or promote services of the conventional book trade that are independent of supply and demand and thus represent a specific cultural contribution of the conventional book trade (e.g., e-book readings, etc.). This, however, is not apparent at all.

## 6.2 Potential violation of the competition rules

**329.** In the event that the price fixing obligation for e-books violates the freedom of movement of goods, it is also possible in relation to e-books that the ECJ will declare the statutory fixed book prices incompatible with the principle of loyalty in a preliminary ruling. For the same reasons in favour of restrictions on the free movement of goods, the provisions on fixed book prices can also be regarded as a legally prescribed restriction of competition within the meaning of Article 101(1) TFEU in conjunction with Article 4(3) TEU, which has a particularly detrimental effect on domestic and foreign distance sellers.

## 6.3 Interim result

**330.** According to the explanations in this section, there is an even higher probability with regard to e-books published in Germany and not re-imported than in the case of printed books that the ECJ will declare the statutory

<sup>359</sup> Cf. again ECJ, Judgment of 26 April 2012, C-456/10 – ANETT, ECLI:EU:C:2012:241, para. 53.

<sup>360</sup> See, in the same vein, paras 298 ff. in this Special Report (concerning printed books).

<sup>361</sup> Cf. paras 197, 241 f. in this Special Report.

<sup>362</sup> See para. 16 in this Special Report.

<sup>363</sup> In this context, see BGH, Judgment of 21. April 2016, I ZR 198/13 – Verlegeranteil, paras 22 ff., especially para. 39.

fixed book prices incompatible with the free movement of goods in a preliminary ruling. Further, it is questionable as well whether fixed book prices are compatible with the principle of loyalty under EU law. If the ECJ should declare the fixing of book prices incompatible with EU law, it appears even more likely for e-books than for printed books that companies will sell them across borders in order to circumvent the fixing of prices.

## Chapter 7

### Summary Conclusion

**331.** In this Special Report, the Monopolies Commission comprehensively has examined the legally prescribed fixed book prices from a competition economic and legal perspective. From an economic perspective, it cannot be ruled out that fixed book prices may have economic effects which may benefit the political interest in protecting books as cultural objects as compared to a situation without fixed prices. In this respect, the following possible effects should be noted in particular:

- Strengthening of service competition and prevention of free-rider behaviour in service competition;<sup>364</sup>
- Slowdown of the structural change at the expense of the brick-and-mortar booksellers;<sup>365</sup>
- Slowdown of the increase in concentration in the book retailing sector and of the emergence of powerful booksellers.<sup>366</sup>

**332.** In contrast to a book market with fixed prices, however, a number of positive effects can also arise in free price competition, which can serve the protective purpose pursued by the legislator:

- Creation and expansion of efficient retailing structures and distribution concepts;<sup>367</sup>
- Development of alternative sales concepts and development of new customer groups;<sup>368</sup>
- Passing on cost advantages in the form of lower end-customer prices;<sup>369</sup>
- Reduction of barriers to market entry on the retailing side.<sup>370</sup>

**333.** With regard to a number of aspects or partial objectives pursued by the legislature, it is not possible to identify a clear causal link with fixed book prices, even taking into account the experience in the United Kingdom and Switzerland:

- The effect on the average price level is not clear: higher prices for mass titles are up against unclear, possibly price-reducing effects for titles with lower demand;<sup>371</sup>
- The connection between fixed book prices, the willingness to stock up and the variety of titles in the book retailing is unclear;<sup>372</sup>
- The impact of fixed book prices on the earnings situation of publishers and the diversity of published titles are not clear.<sup>373</sup>

**334.** For these reasons, no clear final statement on the effect of fixed book prices can be made. This is all the more true because, on the one hand, despite their generally structure-preserving effect, fixed book prices can only slow

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<sup>364</sup> See para. 173 in this Special Report.

<sup>365</sup> See para. 199 in this Special Report.

<sup>366</sup> Ibid.

<sup>367</sup> See para. 201 in this Special Report.

<sup>368</sup> See para. 200 in this Special Report.

<sup>369</sup> See para. 234 in this Special Report.

<sup>370</sup> See paras 211 ff. in this Special Report.

<sup>371</sup> See paras 239 and 241 ff. in this Special Report.

<sup>372</sup> See paras 193 ff. in this Special Report.

<sup>373</sup> See paras 237 ff. in this Special Report.

down the structural and functional change at all levels of the distribution chain without, however, preventing it.<sup>374</sup> This is particularly evident in the brick-and-mortar book trade, which is continuously losing market share, mainly to the benefit of the online book trade.<sup>375</sup> On the other hand, it is increasingly questionable whether the infrastructure possibly protected by fixed book prices (still) plays the role assigned to it. Due to digitalization and the growing affinity of consumers to the Internet, the importance of traditional booksellers and the bookselling services they provide is steadily declining.<sup>376</sup> The same applies, to a more limited extent, to traditional publishing, since self-publishing offers authors new opportunities to publish their works without having to take the traditional path via a (traditional) publisher.<sup>377</sup>

**335.** German lawmakers are free under EU law to decide whether they wish to protect the book as a cultural asset at all. In addition, they have some leeway as to how they frame this protection objective and which instruments they use for the protective purpose.

**336.** However, to the extent that protection is accompanied by market intervention in the form of legally prescribed price maintenance, ECJ case law on fixed prices for medicinal products shows that the German legislature must define the objectives pursued so precisely, at least for cross-border book sales, that objective evidence can be used to check whether the price maintenance in question is appropriate and necessary to achieve the objectives pursued.<sup>378</sup> Further ECJ rulings show that these requirements must also be met in the case of other measures which interfere with fundamental freedoms and competition protected under European law with regard to such book sales.<sup>379</sup>

**337.** In detail, it can be inferred from the jurisprudence that in case of doubt the cultural asset “book” must be so clearly defined that it can be understood which items are protected as books (printed works, e-books, etc.) and what the cultural objective of this protection is, depending on the respective sales item (number or diversity of books produced, acquisition of readers, possibly more far-reaching educational policy objectives). With regard to economic objectives (e.g., protection of the brick-and-mortar book trade), it should be noted that EU law makes largely conclusive provisions in this respect (e.g., protection of equal competitive opportunities for all providers).<sup>380</sup> However, this does not exclude the possibility that the national legislator, taking into account European requirements, may weigh up the economic objectives of EU law against the cultural objectives of national law and take measures to shape them on this basis.

**338.** If the cultural and possibly other objectives pursued are defined with regard to the relevant legal assets, it also follows from case law that the instruments used must be appropriate and necessary for this protection.<sup>381</sup> Measures associated with market interventions in cross-border distribution and thus benefiting certain market participants (e.g., the brick-and-mortar book trade) probably only fulfil this requirement if binding requirements are in place to ensure that market participants provide a service in return which is oriented to the defined cultural objectives and appropriate to this end.<sup>382</sup> For assets such as books marketed across borders via a multi-level distribution chain, it should also be noted that interventions at one level (here, for example, the level of the book

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<sup>374</sup> See paras 199 and 217 ff. in this Special Report.

<sup>375</sup> See para. 203 in this Special Report.

<sup>376</sup> See paras 204 ff. in this Special Report.

<sup>377</sup> See para. 253 in this Special Report.

<sup>378</sup> See paras 288-289 in this Special Report.

<sup>379</sup> See para. 287 in this Special Report.

<sup>380</sup> See para. 285 in this Special Report.

<sup>381</sup> See paras 291 ff., 298 ff. in this Special Report.

<sup>382</sup> See paras 151-155 and paras 285, 299-301 in this Special Report.

trade) can also have an impact at the other levels (here, for example, at the level of publishers, authors or even end-consumers) and that this can both encourage and hinder the pursuit of the defined cultural objectives.

**339.** Finally, it should be noted that European case law also takes market changes into account in its assessment of national legal measures, such as the increasing enforcement of Internet sales.<sup>383</sup> This is likely to apply equally to pharmaceuticals, books and other assets. It is therefore recommended that the national legislature consider from the outset that rules involving market intervention in cross-border distribution may remain in effect despite market changes and in this case also come into conflict with the requirements of EU law.

**340.** In the opinion of the Monopolies Commission – after consideration of all aspects, the pricing requirements in § 5(1) in conjunction with § 3 BuchPrG constitutes a serious market intervention. This market intervention lacks a well-defined cultural protection objective. The effects of this market intervention are ambivalent or unclear and do not take adequate account of market developments since the law was passed. If statutory fixed book prices in cross-border book trade were to be declared incompatible with the free movement of goods, companies operating across borders could also gain a competitive advantage over the – still price-bound – brick-and-mortar book trade in Germany by sending printed books or e-books to German end-customers from abroad at discounts. The behaviour of market participants following the ECJ ruling on fixed drug prices has shown that such an option would probably be used sooner or later.

**341.** On the basis of this assessment, the Monopolies Commission recommends that the statutory rules be abolished on fixed book prices. Firstly, the objective of the protection of books as cultural assets must be defined clearly. Secondly, it must be examined whether and to what extent a protection deficit exists. These steps must be taken before deciding, thirdly, which instruments may be used to remedy deficits in the protection of books as cultural objects.

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<sup>383</sup> ECJ, Judgment of 19 October 2016, C-148/15 – Deutsche Parkinson Vereinigung, ECLI:EU:C:2016:776, paras 23 f.