

Fixed book prices in a changing market environment

Special Report No 80 – Summary

Special Report by the Monopolies Commission pursuant to Section 44(1)(4) of the Act Against Restraints on Competition

2018

Summary

K1. 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).

K2. 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.

K3. 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 competition concerning services, 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 book trade concentration, and decelerate the emergence of booksellers with buying power.

K4. 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.

K5. 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 offset by 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 trade is unclear. The effects of fixed book prices on the earnings situation of publishers and the diversity of published titles are similarly intransparent.

K6. For these reasons a conclusive statement about the justification of fixed book prices is impossible. On 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 digitalisation and the growing affinity of consumers to the internet, the importance of the traditional book trade and the services it provides 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.

K7. From a legal point of view, the cultural and political interest of 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.

K8. 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 Book Pricing Act originally 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.

K9. From the Monopolies Commission's point of view – after considering all aspects — fixed book prices constitute a serious market intervention, which 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.