

OPINION OF ADVOCATE GENERAL
TRSTENJAK

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1. The present reference for a preliminary ruling concerns a question from the Oberster Gerichtshof (Supreme Court) of the Republic of Austria ('the referring court') asking whether the provisions on the free movement of goods in Articles 28 EC and 30 EC preclude certain elements of a price-fixing system for books introduced in Austria by the Buch-

preisbindungsgesetz (Law on the obligation to sell books at a fixed price) (BGBl. I, 45/2000; 'BPrBG'). The referring court also asks whether the BPrBG is compatible with the Member States' obligation under the second paragraph of Article 10 EC in conjunction with the competition law provisions of Articles 3(1)(g) EC and 81 EC.

2. Consequently the case relates to the dual nature of books as goods and as cultural assets.

I — Legal context

A — *Community law*

3. Under Article 3(1)(g) EC, the activities of the Community include a system ensuring that competition in the internal market is not distorted.

4. Under the second paragraph of Article 10 EC, the Member States are to abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty.

5. Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.

6. According to Article 30 EC, the provisions of Article 28 EC are not to preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

7. Article 81(1) EC provides as follows:

‘The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

...'

B — *National law*

8. Under Article 81(3) EC, the provisions of Article 81(1) EC may be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

10. The Austrian BPrBG includes the following provisions:

'Scope

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

Paragraph 1

- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

9. Under Article 151(4) EC, the Community is to take cultural aspects into account in its action under other provisions of the EC Treaty, in particular in order to respect and to promote the diversity of its cultures.

This Federal Law applies to the publication and importation of, and trade, except for cross-border electronic trade, in German-language books and music. Its purpose is to achieve a pricing system which has regard to the status of books as cultural assets, to the interests of consumers in reasonable prices for books, and to the commercial characteristics of the book trade.

Definitions

retail price for the goods falling within Paragraph 1 which he publishes or which he imports into Austria.

Paragraph 2

For the purposes of this Federal Law:

(1) “publisher” means any person who publishes, manufactures or sells goods falling within Paragraph 1 in the course of business;

(2) “importer” means any person who imports into Austria goods falling within Paragraph 1 in the course of business for sale ...

Price fixing

(2) An importer shall not fix a price below the retail price fixed or recommended by the publisher for the State of publication, or the retail price recommended for Austria by a publisher which has [his] seat elsewhere than in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA), less any value added tax included in it.

(3) An importer who purchases goods falling within Paragraph 1 in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA) at a price which is lower than the normal price may, notwithstanding subparagraph (2) above, apply a discount to the price fixed or recommended by the publisher for the State of publication, or in the case of reimportation the price fixed by the Austrian publisher, proportionate to the commercial advantage he has obtained.

Paragraph 3

(1) The publisher or importer of goods falling within Paragraph 1 shall fix and publish a

(4) Subparagraph (3) does not apply to reimported goods falling within Paragraph 1 if they were exported solely in order to be reimported, in order to circumvent this Federal Law.

(5) The value added tax applicable in Austria to goods falling within Paragraph 1 shall be added to the retail price fixed pursuant to subparagraphs (1) to (4).

Conduct in breach of the obligations relating to fixing the price and to selling at the fixed price

Paragraph 7

Obligation to sell goods at a fixed price

Paragraph 5

(1) Conduct in breach of Paragraph 3(1) to (4), Paragraph 4(1) and Paragraph 5(1) to (3) constitutes conduct within the meaning of Paragraph 1 of the Federal Law against unfair competition, BGBl. No 448/1984, as in force from time to time.

(1) Retailers may sell goods falling within Paragraph 1 to consumers at a price no more than 5% below the retail price fixed pursuant to Paragraph 3.

...

Transitional provisions

(2) Retailers may not, in the course of business and for the purpose of obtaining a competitive advantage, publish any discount given from the fixed price pursuant to subparagraph (1).

Paragraph 10

...

Where goods within the meaning of Paragraph 1 were marketed before this Federal Law came into force at a fixed retail price

which was published in the list of available books, edition of 20 June 2000, that price is deemed to be the price fixed by the publisher or importer within the meaning of this Law.'

prices, that is to say, the prices which retailers could charge their customers. The *Sammelrevers* 1993 obliged retailers to adhere to the retail price as a fixed price set by the publisher,² who was free to set the retail price. However, after it was set, the publisher had to ensure that it was maintained.

II — Facts, main proceedings and questions referred

A — Facts

1. The price-fixing system for books in Austria

11. Until 30 June 2000 there was in Austria, Germany and Switzerland a cross-border price-fixing system for books, organised by undertakings, the so-called *Sammelrevers* 1993, which was a standard-form agreement between the respective publishers, wholesalers and retailers and applied in particular to German-language books. There was no horizontal agreement between the publishers. However, the conclusion and monitoring of individual agreements were carried out on a centralised basis through price maintenance trustees.

12. The main element of the *Sammelrevers* 1993 was the establishment of fixed retail

13. On 8 February 2000, after Austria joined the European Union, the Commission asked for the removal of any cross-border effects of the *Sammelrevers* 1993 by 30 June 2000.³ The Commission was then presented with an amended version of the *Sammelrevers* 1993 which was intended to terminate the vertical price-fixing agreement between German publishers on the one hand and Austrian wholesalers and retailers on the other, and also between Austrian publishers on the one hand and German wholesalers and retailers on the other. The Commission assumed that,

2 — The vertical fixing of retail prices was intended to make compensatory pricing possible for the publishers. The aim was that the publisher's extra earnings from the sale of popular titles at a higher price should be used to help finance less popular titles. In particular, the object was to promote the status of books as cultural assets and the diversity of literary productions on offer, particular titles appearing in small editions and appealing to only a limited readership. Further aims are described in Fezer, K.-H., 'Die Buchpreisbindung im Europäischen Binnenmarkt', *Recht der Internationalen Wirtschaft*, 1991, p. 141. On price fixing for books, see also Heker, H., 'Buchpreisbindung', in Schwarze, J. and Becker, J., *Geistiges Eigentum und Kultur im Spannungsfeld nationaler Regelungskompetenz und europäischem Wirtschafts- und Wettbewerbsrecht*, Nomos, 1998, pp. 116 and 117.

3 — This had been preceded by an application to the Commission by the publishers concerned for a declaration that the *Sammelrevers* 1993 did not fulfil the conditions of Article 81(1) EC (negative clearance) or, alternatively, for exemption of the agreement in accordance with Article 81(3) EC (exemption). The Commission had already served a statement of objections on 22 January 1998. An account of developments up to the enactment of the BPrBG can be found in Engelmann, M., *Die Zukunft der Buchpreisbindung im Europäischen Binnenmarkt*, dissertation.de, 2001, pp. 125 to 165.

in those circumstances, there would be no perceptible effects on trade between the Member States. The Austrian publishers, wholesalers and retailers left the *Sammelrevers* 1993 on 30 June 2000.⁴

under the Austrian BPrBG, while the term ‘German retail prices’ will be used for the retail prices to be fixed under the German Law on the obligation to sell books at a fixed price). The Fachverband monitors whether retailers adhere to the fixed retail prices when advertising fixed-price books for sale under Paragraph 1 BPrBG.

14. The BPrBG was adopted in Austria on 30 June 2000. It lays down a statutory price-fixing system for books which provides for a vertical price-fixing agreement but differs as follows from the *Sammelrevers* 1993. The retail prices are now minimum prices instead of fixed prices. Under Paragraph 3(3) BPrBG, commercial advantages may be taken into account when fixing the retail price. Under Paragraph 5, the retailers’ price may be 5% below the fixed retail price.

16. LIBRO Handelsgesellschaft mbH (‘LIBRO’) carries on business in Austria, where it markets on a large scale books published in Germany (the term ‘German books’ will be used below for books published in Germany, while ‘Austrian books’ refers to books published in Austria; these terms must be distinguished from ‘German-language books’ and ‘other language books’, which are relevant to the scope of the BPrBG).

2. The background to the main proceedings

15. Pursuant to Paragraph 4(2) BPrBG, the Fachverband für die Buch- und Medienwirtschaft (trade association for the book and media trade; the ‘Fachverband’) publishes the retail prices to be adhered to by retailers under Paragraph 3(1) for the sale of books in Austria (the term ‘Austrian retail prices’ will be used below for the retail prices applying

B — *Main proceedings*

17. From August 2006, LIBRO advertised German books in Austria at the same price as the German retail price (EUR 19.90), which was less than the Austrian retail price (EUR 20.50). Consequently the Fachverband applied for an interim injunction ordering LIBRO to refrain from advertising prices lower than the Austrian retail prices.

⁴ — On the *Sammelrevers* 1993 and the procedure before the Commission, see Bunte, H.-J., ‘Die grenzüberschreitende Buchpreisbindung zwischen Deutschland und Österreich’, *Beiträge zum Unternehmensrecht, Festschrift für Hans-Georg Köppensteiner*, Orac Verlag, 2001, pp. 307 to 310.

18. At first instance the court granted the application by the Fachverband. This decision was upheld by the court of second instance. LIBRO's appeal against that decision is to be determined by the referring court as the court of final appeal. The referring court is in doubt as to whether certain elements of the BPrBG are compatible with Community law.

or recommended by the publisher for the State of publication — or in the case of reimports the price fixed by the Austrian publisher — by an amount proportionate to the commercial advantage he has obtained?

C — *The questions referred*

19. The referring court has referred the following questions to the Court of Justice for a preliminary ruling:

- (2) If the first question is answered in the affirmative:

- '(1) Is Article 28 EC to be interpreted as meaning that it precludes the application per se of national provisions which oblige only importers of German-language books to fix and to publish a retail price for books imported into Austria which is binding on the retailer, where the importer cannot fix a retail price which is lower than the retail price fixed or recommended by the publisher for the State in which the book is published, or lower than the retail price recommended for his national territory by a publisher whose seat is not in the territory of a Contracting Party to the Agreement on the European Economic Area (EEA), less any value added tax such price includes, but, by way of exception, permit an importer who purchases in the territory of a Contracting Party to the EEA at a price lower than the usual purchase prices to sell at less than the price fixed

Is the national statutory obligation to sell books at the fixed price which, according to the first question, is per se incompatible with Article 28 EC — in any event on the basis that it constitutes selling arrangements which infringe [the] free movement of goods — justified by reference to Article 30 [EC] or Article 151 EC, on the basis that its purpose is, very generally, described as the need to have regard to “the status of books as cultural assets, to consumers’ interest in reasonable prices for books, and to the commercial characteristics of the book trade, for example having regard to a general interest in encouraging the production of books, a diversity of titles at regulated prices, and a diversity of bookshops, notwithstanding the lack of empirical data which could prove that a statutory obligation to sell books at the fixed price is a suitable means for achieving the intended purposes?

- (3) If the first question is answered in the negative:

IV — Replies to the questions referred

A — Preliminary remark

Is the national statutory obligation to sell books at the fixed price, as described in the first question, compatible with Articles 3(1)(g) EC, 10 EC and 81 EC, notwithstanding that without interruption in terms of time and substance it succeeded the previous contractual obligation on booksellers to sell at prices fixed by publishers for published works (the 1993 Sammelrevers scheme) and replaced that contractual scheme?

1. The Community law relevance of price-fixing systems for books

21. This is not the first time that the Court has had to give a decision on the compatibility with Community law of a price-fixing system for books.⁵ This is not surprising. By means of price-fixing systems for books, which their supporters justify in terms of the status of books as cultural assets, the importance of a diversity of titles and a supply of books at reasonable prices,⁶ their retail prices are fixed according to the requirements of the publishers or importers. Consequently such systems entail vertical price-fixing agreements.

III — Procedure before the Court of Justice

20. The reference for a preliminary ruling of 13 November 2007 was received at the Court on 29 November 2007. In the written procedure, statements were lodged by LIBRO, the Fachverband, the Austrian, German, French and Spanish Governments, the Commission and the EFTA Surveillance Authority. At the hearing on 16 October 2008 LIBRO, the Fachverband, the Austrian, German and Spanish Governments, the Commission and the EFTA Surveillance Authority made statements.

22. Vertical price-fixing agreements are measures which typically give rise to ques-

5 — See, in particular, Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19; Case 229/83 *Leclerc and Others* [1985] ECR I; Case 355/85 *Cognet* [1986] ECR 3231; Case 254/87 *Syndicat des libraires de Normandie* [1988] ECR 4457; Case C-360/92 *P Publishers Association v Commission* [1995] ECR I-23; and Case C-9/99 *Échirrolles Distribution* [2000] ECR I-8207.

6 — Heker, H. (footnote 2), p. 116.

tions regarding compatibility with Community law. In this connection, a distinction must be made between price-fixing systems for books which are organised by agreements between undertakings and those which are set up by Member States. Where a price-fixing system for books is organised by an agreement between undertakings, a vertical price-fixing agreement in particular raises questions with regard to compatibility with Article 81 EC. Where a price-fixing system for books is set up by a Member State, there is a question of compatibility with the free movement of goods under Article 28 et seq. EC.

23. The present case concerns a price-fixing system for books which is based on a State measure, the BPrBG. As that measure was preceded by a price-fixing system for books organised by undertakings, the further question arises, in addition to compatibility with Article 28 et seq. EC, of whether, by enacting the BPrBG, the Austrian legislature failed in the duty of good faith under the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC.

24. The European Parliament and the Council have expressed a basically positive attitude to national price-fixing systems for books.⁷

⁷ — See the Parliament resolution of 16 December 1999 (OJ 2000 C 296, p. 210) and the Council resolution of 12 February 2001 (OJ 2001 C 73, p. 5).

2. The subject-matter of the questions referred

25. The Court's task in references for a preliminary ruling is confined to replying to the questions referred to it. The national courts alone are competent to assess the relevance to the main proceedings of the questions and to make a reference. That is why the submissions of the parties to the main proceedings can in principle be taken into account only in so far as they are relevant to the reply to the questions.⁸ Therefore I shall not consider the submissions of the parties to the main proceedings that go beyond the questions referred to the Court.

26. The present case largely concerns national provisions such as Paragraph 3 BPrBG, which relates, on the one hand, to Austrian books and, on the other, to books published in other Contracting States to the Agreement on the European Economic Area (EEA). As the main proceedings relate to German books, I shall confine the following discussion to the treatment of Austrian and German books under Paragraph 3 BPrBG.⁹

⁸ — The Court may not take submission by the parties to the main proceedings as a reason for considering questions which have not been submitted to it by the national court (Case 247/86 *Alsatel* [1988] ECR 5987, paragraph 8; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 31; Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29; and Case C-236/02 *Slob* [2004] ECR I-1861, paragraphs 29 and 30. See also *Lenaerts, K., Arts, D. and Maselis, I., Procedural Law of the European Union*, 2nd edition, Sweet & Maxwell, point 2-020.

⁹ — However, these observations also apply to German-language books published in other Member States.

B — *The first question referred*

27. In essence, the national court's first question is whether Article 28 EC is to be interpreted as meaning that a national provision such as Paragraph 3 BPrBG constitutes a measure having equivalent effect to a restriction on imports.

1. Submissions of the parties to the main proceedings

28. The arguments of the parties to the main proceedings may be summarised as follows.

29. In the opinion of *LIBRO*, the *EFTA Surveillance Authority* and the *Commission*, Article 28 EC is to be interpreted as meaning that a national provision such as Paragraph 3 BPrBG constitutes a measure having equivalent effect to a restriction on imports.

30. Paragraph 3 BPrBG lays down various conditions for setting the Austrian retail price.

In the case of Austrian books, the Austrian publisher may set the price at his own discretion. In the case of German books, the importer's price may not in principle be less than the German retail price.

31. The exceptions under Paragraph 3(3) BPrBG, which allows commercial advantage to be taken into account, and Paragraph 5, which allows retailers to grant a discount of not more than 5%, cannot compensate for that unequal treatment.

32. There are serious difficulties in applying Paragraph 3(3) BPrBG, particularly in relation to the terms 'normal price' and 'commercial advantage'. Information on these is not available to the public as they are business secrets and in practice cannot be ascertained.

33. The fact that retailers may give a discount of up to 5% on the Austrian retail price under Paragraph 5 BPrBG is not sufficient to compensate for the discrimination against German books. The discount may not be advertised.

34. In the opinion of the Commission and the EFTA Surveillance Authority, Paragraph 3 BPrBG is not a selling arrangement which applies without differentiation. LIBRO considers that it is doubtful whether it is a selling arrangement. German books are normally sold with the German retail price printed on them or on a label. Because the German and Austrian value added tax rates are different (7% and 10% respectively), relabelling is necessary. Consequently Paragraph 3 is product-related.

35. Finally, LIBRO regards the fact that the BPrBG is limited to German-language books as further discrimination, whereas the Commission does not.

36. In the opinion of the *Fachverband* and the governments of the Member States which are parties to the main proceedings, a provision such as Paragraph 3 BPrBG does not constitute a measure having equivalent effect to a restriction on imports.

37. The fixing of the Austrian retail price is a selling arrangement which treats domestic and foreign products in the same way in fact and in law.

38. A national provision such as Paragraph 3 BPrBG is applicable to Austrian and to German books. The fact that the Austrian retail price of Austrian books has to be set by the Austrian publisher whereas, in the case of German books, it has to be set by the importer of those books, does not constitute discrimination.

39. Furthermore, the Austrian and the German markets are to a large extent homogeneous. In addition, a German publisher may have his own pricing policy for Austria in that he grants the importer commercial advantages which the latter may take into account when setting the Austrian retail price under Paragraph 3(3) BPrBG.

40. In so far as the Austrian retail price of German books is higher than the German retail price because of the different value added tax rates, the retailer can compensate for that in accordance with Paragraph 5 BPrBG by charging up to 5% less than the Austrian retail price. It must also be borne in mind that the Member States have power to set differing rates of value added tax.

41. The fact that the BPrBG is confined to German-language books does not constitute discrimination. Extending the price-fixing

agreement to non-German-language books would lead to a further restriction of trade in goods. It is also justified on objective grounds to confine the BPrBG to German-language books.

cultural assets.¹¹ However, their dual nature does not mean that they are not covered by the free movement of goods.

42. The Austrian Government points out that Paragraph 3 BPrBG meets the requirements laid down in *Leclerc and Others*.¹⁰ It enables importers to take commercial advantages into account when setting Austrian retail prices.

45. The referring court asks whether Article 28 EC must be interpreted as meaning that a national provision such as Paragraph 3 BPrBG is a measure having equivalent effect to a restriction on imports.

43. In the opinion of the German Government, reciprocal adherence to the Austrian and the German price-fixing system for books in relation to the prices fixed for the territory of the other Member State can be understood as a harmonised common market regime which excludes discrimination.

46. Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. The Court has consistently held that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered to be measures having an effect equivalent to quantitative restrictions (the *Dassonville* principle).¹² However, the Court has made it clear that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, so long as those provisions apply to all relevant traders oper-

2. Legal assessment

44. I should like to begin by pointing out that books fall within the substantive scope of the free movement of goods. It is true that books may be at the same time commodities and

11 — Everling, U., 'Buchpreisbindung im deutschsprachigen Raum und europäisches Gemeinschaftsrecht', *Die Buchpreisbindung aus europarechtlicher, ökonomischer und kulturhistorischer Sicht*, Verlag der Einzelhändler-Vereinigung, 1997, p. 7, agrees.

12 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

10 — Footnote 5.

ating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (the *Keck* exception).¹³

to say, the minimum price that retailers in Austria must charge their customers. Therefore such a provision constitutes a selling arrangement both according to its wording and according to the case-law.

47. The outcome of the *Dassonville* principle and the *Keck* exception is that selling arrangements (a) which apply to all relevant traders operating within the national territory (b) constitute a measure having an effect equivalent to a restriction on imports if they do not affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (c).

49. This is questioned by LIBRO.

(a) Selling arrangement

48. The Court has regularly taken the view that pricing rules, particularly those relating to sale to the consumer, are selling arrangements.¹⁴ A provision such as Paragraph 3 BPrBG affects the Austrian retail price, that is

50. In so far as LIBRO argues that the *Keck* exception covers only *certain* selling arrangements but, because of the cross-border dimension, Paragraph 3 BPrBG cannot be classified as such a selling arrangement within the meaning of the *Keck* exception, that argument is not persuasive. First of all, the restriction of the *Keck* exception to *certain* selling arrangements has not, so far, played a significant part in the Court's case-law.¹⁵ Second, I do not think that 'certain' can be understood as meaning that the *Keck* exception should not be applied to situations with a cross-border connection. As the existence of a cross-border connection is a condition for the application of Article 28 EC, any such approach would to a large extent render the *Keck* exception meaningless.

13 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16. I think that application of the *Keck* exception should not lead to Article 28 EC being applied automatically. Where the *Keck* exception is applied, it is necessary to bear in mind the Court's reasoning in paragraph 17 of the judgment, which states that the application of such rules to products from another Member State is not by nature such as to prevent their *access to the market* or to impede access any more than it impedes the access of domestic products. In my view, it depends primarily on whether a national measure is such as to prevent or impede access to the market.

14 — *Keck and Mithouard* (footnote 13), paragraphs 16 to 18, and Case C-63/94 *Belgapom* [1995] ECR I-2467, paragraph 13.

15 — Müller-Graf, P.-C., in von der Groeben, H. and Schwarze, J., *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, Vol. 1, 6th edition, 2003, Article 28, points 252 and 247, points out that this differentiation has no substantive force for the purpose of assessment or making a distinction.

51. Second, LIBRO argues that Paragraph 3 BPrBG is a product-related measure and therefore not a selling arrangement. The Austrian retail price for German books must not in principle be less than the German retail price. For calculating the Austrian retail price, under Paragraph 3(2) BPrBG the German value added tax of 7% must be deducted and, under Paragraph 3(5), the Austrian value added tax of 10% must be added. This means that the Austrian retail price is in principle higher than the German retail price. The German retail price is normally printed on German books or stuck on a label. Therefore, as a result of Paragraph 3 BPrBG, German books have to be relabelled for sale in Austria.

measure is product-related, this does not mean that it is not a selling arrangement, but it may mean that it is a selling arrangement which does not in actual fact affect the sale of domestic products and products from other Member States in the same way.¹⁷

53. Consequently this is an instance of a selling arrangement. However, it does not mean that the conditions of the *Keck* exception are fulfilled.

52. In this connection, it is sufficient to point out that product-related measures may also be selling arrangements. I cannot infer from the case-law that it distinguishes selling arrangements from product-related measures. Rather, the case-law takes into account the fact that product-related measures, unlike selling arrangements, normally have a de facto discriminatory effect and are therefore likely to affect the sale of domestic products and foreign products in different ways.¹⁶ If a State

(b) Application to all traders in Austria

54. This selling arrangement applies to all traders in Austria. It is true that a measure such as Paragraph 3 BPrBG is addressed on

16 — Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 12; Case C-3/99 *Ruwet* [2000] ECR I-8749, paragraph 46 et seq.; Case C-169/99 *Schwarzkopf* [2001] ECR I-5901, paragraph 39; and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraphs 72 and 73. This is because a product-related measure which requires or prohibits a particular labelling normally compels the trader concerned to pack the goods in question differently, according to the place where they are to be marketed, and this leads to additional packing costs. That is likely to make access to the market more difficult.

17 — For actual discrimination, see footnote 30.

the one hand to Austrian publishers and on the other to importers of German books. Consequently the latter are treated differently from wholesalers and retailers of Austrian books, who do not have to fix retail prices. However, this difference in treatment is justified from a functional viewpoint. It is the importers who market German books in Austria and in that respect (as regards the marketing of books) they are to be placed on the same footing as publishers of Austrian books.¹⁸

(i) Different legal treatment of German and Austrian books

56. Under Paragraph 3 BPrBG, there are various rules for fixing the Austrian retail price. An Austrian publisher may fix the Austrian retail price for his books at his discretion, under Paragraph 3(1) BPrBG. On the other hand, an importer of German books, when fixing the Austrian retail price, may not in principle charge less than the German retail price fixed by the German publisher for selling the book in Germany, under Paragraph 3(2) BPrBG.

(c) Is the selling of Austrian and German books affected in the same way

55. The key question is whether a provision such as Paragraph 3 BPrBG affects the selling of Austrian and German books, in law and in fact, in the same way. In my view, it is very clear that Austrian and German books are not treated in the same way under Paragraph 3 BPrBG (i) and that this may have a negative effect on the selling of German books in Austria (ii).

57. According to the *Dassonville* principle and the *Keck* exception, the question is whether there is equal treatment of foreign and domestic goods in the context of the Member State in question. In the present case, the difference lies in the fact that the Austrian retail price of German books, unlike that of Austrian books, is not discretionary and cannot, therefore, be fixed solely by reference to market conditions in Austria. Accordingly, Paragraph 3(1) and (2) BPrBG gives rise to unequal treatment which relates to the origin of the books.

58. Whether, on the other hand, the German and Austrian retail prices can be set at the same level seems to me to be irrelevant with regard to the *Dassonville* principle and the *Keck* exception.

18 — If the Austrian State wishes to ensure that the price-fixing agreement for books applies to all German-language books marketed in its territory, it is obvious that Austrian publishers and importers should be used as the first link in the distribution chain in Austria.

59. However, the Fachverband and the governments of the Member States which are parties to the main proceedings submit that unequal treatment can be ruled out on the basis of the derogations in Paragraphs 3(3) and 5 BPrBG.

— Commercial advantages

60. Under Paragraph 3 BPrBG, an importer who purchases German books at a price which is lower than the normal purchase price may, when fixing the Austrian retail price, charge less, in proportion to the commercial advantage he has obtained, than the German retail price. In the opinion of the Fachverband and the governments of the Member States which are parties to the main proceedings, this is intended to enable German publishers to implement their own pricing policy for Austria.

61. I am not persuaded by this argument.

62. *First*, a German publisher may, unlike an Austrian publisher, operate his own pricing policy for Austria if he allows the importer a purchase price which is lower than the normal purchase price. Consequently the German publisher must, if necessary, submit to trade terms which reduce his sales in order to give

effect to his pricing policy in Austria, but an Austrian publisher need not do this.

63. *Second*, the application of Paragraph 3 BPrBG appears to involve serious difficulties in practice. It is correctly pointed out that the prices at which wholesalers and retailers purchase from German publishers are normally business secrets and it is therefore hardly possible to determine what a normal price is for the purpose of Paragraph 3(3) BPrBG.

64. *Third*, a German publisher relies on the cooperation of the importer for implementing his pricing policy. Under Paragraph 3(3) BPrBG, the importer has no obligation to charge less than the German retail price in proportion to the commercial advantage received. In contrast, an Austrian publisher does not have to rely on the cooperation of his customers.

65. *Fourth*, it must be borne in mind that a German publisher is not always free to grant commercial advantages to an importer. If it becomes known that a German publisher has granted price concessions to a particular importer, that may be disadvantageous for him in negotiations with other buyers. In that

connection, it must be remembered that a grant of commercial advantages becomes public knowledge when an importer fixes the Austrian retail price of a German book at less than is in principle provided for under Paragraph 3(2) BPrBG.

to the situation, not relevant in the present case, where Austrian books are reimported into Austria.²¹

— Possibility of a 5% discount at retail level

66. For the reasons given above, it cannot be presumed that making allowance, under Paragraph 3(3) BPrBG, for commercial advantages obtained compensates for the unequal treatment in law, on the basis of Paragraph 3(1) and (2) BPrBG, of German and Austrian books when the Austrian retail price is fixed.

68. It is also pointed out that, under Paragraph 5(1) BPrBG, retailers may sell books to consumers with a discount of up to 5% on the Austrian retail price.

67. I should like to take this opportunity to point out that Paragraph 3(3) BPrBG cannot be regarded as giving effect to the requirements of the case-law in *Leclerc and Others*.¹⁹ In fact, as the Court made very clear in that judgment,²⁰ the requirement that commercial advantages must be taken into account relates

21 — In this judgment, the Court examined the importation into France of books published in other Member States and the reimportation of books published in France. With regard to the *importation* of books published in other Member States, in paragraph 25 of the judgment the Court considered whether an importer is in a position to charge the retail price on the market in the importing State that he considers adequate in the light of the cost price in the State in which it was published. This must be distinguished from the Court's observations concerning genuine *reimportation* in paragraphs 26 and 27, to the effect that an importer must be able to pass on in the retail price an advantage resulting from a lower price obtained in the exporting State. This analysis of the judgment shows that the rule in Paragraph 3(3) BPrBG cannot be regarded as giving effect to that judgment in so far as it relates to the *importation* of books from other Member States.

This follows also from the following reasoning. In the case of *reimportation*, the home publisher has already marketed the book in his own country. If, in that case, an importer can procure the book at a more favourable price in a Member State other than his own, the commercial advantages obtained as a result of purchasing the book in another Member State reflect very accurately the benefits of the European internal market. In order for those advantages to take effect for the benefit of consumers also, the importer must pass on the commercial advantages he has obtained. As, in that case, a retail price for the book exists in the State where it was published, it is sufficient for that purpose if the importer can take the commercial advantages into account when fixing the retail price. On the other hand, this consideration cannot be applied automatically to the case of the *importation* of a book from the State of publication into another Member State. In that case, the abovementioned rules apply, and the importer must be able to set a price which is reasonable by reference to his own country.

19 — Footnote 5.

20 — See paragraphs 25 and 26 of the judgment: 'As regards books published in another Member State ..., a provision whereby ... On the other hand, in so far as the legislation applies to books published ... and reimported ...'

69. I am not persuaded by this argument either.

73. Paragraph 5 BPrBG cannot therefore compensate for the unequal treatment of Austrian and German books under Paragraph 3(1) and (2) BPrBG either.

70. *First*, Paragraph 5(1) BPrBG applies to Austrian as well as German books. I fail to see how the existing unequal treatment under Paragraph 3(1) and (2) BPrBG can be compensated for by a rule whereby a 5% discount can be allowed on Austrian as well as German books.

— Conclusion

71. *Second*, this argument appears to be directed at the fact that the Austrian and German retail prices of a book can be fixed at the same level in spite of the different value added tax rates in Austria and Germany. However, that is not relevant in the present case.²²

74. In conclusion, therefore, it must be found that, under Paragraph 3(1) and (2) BPrBG, different rules apply to German and Austrian books and that that difference in law is not compensated for by Paragraph 3(3) or Paragraph 5 BPrBG.

72. *Third*, under Paragraph 5(1) BPrBG, it is not the Austrian retail price that can be reduced, but only the price at which the book is sold to the consumer at the retail level. At first sight, the distinction may appear irrelevant if the importer of the books and the retailer are one and the same undertaking (like LIBRO). Under Paragraph 5(2) BPrBG, in relation to consumers it is only the Austrian retail price that can be advertised, but not the price with the reduction of up to 5%.

(ii) Possible negative effect on the sale of German books

75. In my opinion, the legal distinction is also likely to have an adverse effect on the sale of German books by comparison with Austrian books.

²² — See point 58 of this Opinion.

— Austrian retail prices for German books are aligned with German market conditions

of consumers and may therefore justify a different pricing policy.²⁴

76. The Austrian retail prices are minimum prices below which retailers may not in principle sell a book. Although books are both cultural assets and goods, and in the case of books the author and the subject of the book play an important part, the minimum price of a book, as of other goods, is an important *competition factor* from the viewpoint of the consumer.

78. A German publisher who wishes to bring the Austrian retail price more into line with Austrian market conditions must, in so far as he has to charge less than the German retail price (less German value added tax, plus Austrian value added tax), accept the above-mentioned disadvantages.²⁵ This leads, in my view, to the likelihood of an adverse effect on the sale of German books, so that this point need be discussed no further.

77. As mentioned above, the Austrian retail price for Austrian books can be determined by reference to Austrian market conditions, but in the case of German books the Austrian retail price is determined by the German retail price in so far as a lower price may not in principle be charged. Consequently an essential competition factor for the sale of German books is in principle determined, not by reference to Austrian market conditions, but by reference to German market conditions.²³ It cannot be presumed that the retail price fixed by reference to Germany is reasonable in all conceivable circumstances for Austria also. Differences in the legal and economic systems of individual Member States and also cultural and social differences may affect the attitude

— Additional considerations

79. Just for the sake of completeness, I should like to make the following observation. Because of the different rates of value added

23 — This is not contradicted by the fact that a German publisher may also take Austrian market conditions into account when fixing the German retail price. Even if that were the case, which is doubtful in view of the significantly smaller Austrian market, German retail prices would not be fixed *solely* by reference to the Austrian market.

24 — For instance, the authors of some books are particularly well known in one Member State. Thus, a cookery book by a cook who appears mainly in the German media may command a higher retail price in Germany than in Austria. Against that background, the argument that with the BPrBG and the corresponding German price-fixing law for books Germany and Austria created a common market regime which in itself excludes unequal treatment is not convincing.

25 — See points 62 to 65 of this Opinion.

tax in Germany (7%) and Austria (10%), the Austrian retail prices of German books are in principle higher than the German retail prices.²⁶ Therefore if the German retail prices for German books are set by reference to assumed psychological price thresholds,²⁷ the Austrian retail prices in principle exceed those thresholds.

the basic minimum Austrian retail price which is tied to the German retail price (less German value added tax, plus Austrian value added tax) may have a negative effect on the sale of German books.

80. Even if the selling price to the consumer at retail level can be reduced by 5% under Paragraph 5 BPrBG and thereby compensate for the difference between the German and Austrian retail prices, the lower price cannot be advertised.

83. If, in response to this, it is objected that the Member States have a discretion with regard to the rate of value added tax and that that discretion must be respected, I am not convinced.

81. On the other hand, an Austrian publisher may take into account assumed psychological price thresholds when setting the Austrian retail prices and advertise the resulting retail prices.

84. The restriction on the importer with regard to setting the Austrian retail price is not caused by the difference in German and Austrian value added tax rates, but by the fact that the importer cannot in principle charge less than the German retail price fixed by the publisher.²⁸ If that obligation did not exist, the Austrian retail price for German books could be fixed at less than the German retail price,²⁹ but could still take into account the higher rate of Austrian value added tax. In that case, the Member States would retain their discretion in relation to the value added tax rate, but the importer would be free to set a reasonable Austrian retail price for German books.

82. This example shows very clearly, in my opinion, how, in the case of German books,

26 — According to the basic rules, the German value added tax of 7% is to be deducted from the retail price set by the German publisher for Germany and then the Austrian value added tax of 10% is to be applied.

27 — This means the prices which are perceived by consumers as price barriers above which the demand for the product in question falls significantly. Psychological prices are just below that barrier; for example, EUR 9.99, EUR 14.99 and EUR 19.99.

28 — Less German value added tax, plus Austrian value added tax.

29 — Less German value added tax, plus Austrian value added tax.

(iii) Conclusion

85. In conclusion, therefore, German books are treated differently in law from Austrian books. This unequal treatment is likely to affect adversely the sale of German books in Austria.

86. Whether a provision such as Paragraph 3 BPrBG also leads to discrimination in fact is therefore immaterial.³⁰

87. Finally, it seems to me that the restriction of the BPrBG to German-language books cannot, simply as a matter of logic, constitute an independent restriction of trade. Extending

a rule such as Paragraph 3 BPrBG to non-German-language books would not result in a wider restriction of the movement of goods.³¹

(d) Conclusion

88. As a provision such as Paragraph 3 BPrBG does not in law affect Austrian and German books in the same way, it does not fall within the *Keck* exception. Therefore such a provision constitutes a measure having equivalent effect to a restriction on imports within the meaning of Article 28 EC.

C — *The second question*

89. The second question from the referring court is whether, if a national provision such as Paragraph 3 BPrBG constitutes a measure having equivalent effect to a restriction on imports, it can be justified for overriding

30 — Consequently it is unnecessary to consider whether there is discrimination in fact by reason of the need for relabelling. In any case, I doubt whether the commercial need for price-related relabelling can constitute actual discrimination over and above the discrimination in law already found. *First*, it must be observed that relabelling is not directly required by a national measure. Therefore it is doubtful whether this is a case of a State measure within the meaning of Article 28 EC. *Second*, even if it were, I would be sceptical as regards actual discrimination. It is true that labelling requirements have a discriminatory effect. However, I wish to point out that actual discrimination is closely bound up with the country-of-origin principle. I do not think that this principle confers a right to sell goods in all Member States at the same price. If the right to market access under Article 28 EC were construed so widely, the indirect consequence would be that all differences between the legal systems and economic regimes of the Member States which may justify price differences would have to be regarded as measures having an equivalent effect to restrictions on imports.

31 — This does not mean that the restriction of the BPrBG to German-language books is irrelevant to the free movement of goods. It may have to be taken into account with regard to justification. According to the case-law, restrictions on fundamental freedoms may be justified only if they are of a consistent and systematic nature (see Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 67). Consequently the different treatment of German-language books and non-German-language books may have to be taken into account in that connection.

reasons in the public interest pursuant to Article 30 EC or Article 151 EC.

1. Submissions of the parties to the main proceedings

90. The submissions of the parties to the main proceedings on this question may be summarised as follows.

91. *LIBRO*, the *EFTA Surveillance Authority* and the *Commission* consider that the unequal treatment of German and Austrian books cannot be justified.

92. They agree that a discriminatory measure of that kind may be justified only by Article 30 EC. However, the aim pursued by the BPrBG of maintaining the diversity of books is not covered by Article 30 EC. In particular, the BPrBG is not a measure for the protection of national treasures possessing artistic, historic or archaeological value.

93. Furthermore, the measure is disproportionate. In that connection, the *EFTA Surveillance Authority* points out that the aims cited

in justification cannot be attained by permitting an importer of German books to fix the Austrian retail prices without being bound by the German retail prices fixed by the German publisher as a minimum. It is also possible to enable German publishers to fix the Austrian retail prices. Publishers in States which are not members of the EEA are permitted to do this.

94. *LIBRO*, the *EFTA Surveillance Authority* and the *Commission* also consider that there is no justification under Article 151 EC, which is a legal basis for the *Commission's* activity, not an exception from the scope of Article 28 EC. In addition, unequal treatment of German and Austrian books is not necessary for the attainment of the aims underlying Article 151 EC.

95. Moreover *LIBRO* asserts that the Austrian price-fixing system for books cannot be justified *as such* by reference to overriding reasons in the public interest. Putting forward general cultural interests is not sufficient for that purpose and the price-fixing system for books is not a proportionate means of pursuing the aims in question. The *Commission* and the *EFTA Surveillance Authority* point out that in the present case it is not a question of justifying the price-fixing system for books *as such*, but only of justifying the unequal treatment of German and Austrian books.

96. The *Fachverband* and the governments of the Member States which are parties to the main proceedings consider that the price-fixing system for books is not discriminatory and is therefore justified for overriding reasons in the public interest.

97. As overriding reasons in the public interest, they refer in particular to the protection of books as cultural assets, to consumers' interest in reasonable prices for books and to the need for an adequate supply of books for the population through a wide and diversified network of retailers. A provision such as Paragraph 3 BPrBG is a proportionate means of pursuing those aims.

98. The *Fachverband* and the French Government concede that the protection of creativity and the cultural diversity of the book trade are not covered by Article 30 EC.

99. The *Fachverband* and the governments of the Member States which are parties to the main proceedings also claim that a measure having equivalent effect to a restriction on imports may be justified under Article 151 EC. Under that article, the Member States are responsible for cultural policy. Under Article 151(4) EC, the Community must take cultural aspects into account in its action under other provisions of the Treaty. Consequently the Community must take

account of the powers of the Member States to make their own arrangements in relation also to the movement of goods.

2. Legal assessment

100. First of all, I would like to point out once again that, in the context of a reference for a preliminary ruling under Article 234 EC, it is incumbent on the Court only to reply to the questions referred to it by the national court.³² As I understand it, the present question is only whether the unequal treatment as between Austrian and German books found in reply to the first question can be justified for overriding reasons in the public interest under Article 30 EC or Article 151 EC. Consequently the question concerns only the justification for that unequal treatment, not justification for the price-fixing system for books as such.

101. With regard to the justification for unequal treatment, I find first that the submissions of the *Fachverband* and the

³² — See point 25 of this Opinion.

governments of the Member States which are parties to the main proceedings are basically limited to justifying the Austrian book price-fixing system as such. In the submissions of those parties, I can see no justification for unequal treatment as between Austrian and German books.

stated that Article 30 EC must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Accordingly, the Court expressly stated that it could not be extended to cover the protection of creativity or cultural diversity in the realm of publishing.³⁵

102. It also seems to me difficult to justify such a measure.

103. *First*, in my opinion there is no admissible ground of justification.

104. Overriding reasons in the public interest within the meaning of the *Cassis de Dijon* judgment³³ can justify only measures that apply without distinction to domestic and imported products.³⁴ Consequently such reasons can be ruled out as justification in the present case.

105. There is no question of justification on the basis of Article 30 EC in the present case. In *Leclerc and Others*, the Court expressly

106. Neither do I see any ground for justification in Article 151(4) EC that would go beyond the abovementioned overriding reasons in the public interest. Article 151 EC is a provision concerning the powers of the Member States and of the Community. It is true that, under Article 151(4) EC, the Community takes cultural aspects into account, particularly in order to respect and to promote the diversity of its cultures. However, Article 151(4) EC does not amount to a 'cultural escape clause' in relation to other provisions of the Treaty.³⁶ Consequently the Member States can derive from it no discretionary power to enact measures that result in discrimination in selling goods from other Member States. Therefore the different treatment of German and Austrian books cannot be justified on the basis of Article 151(4) EC.

107. *Second*, even supposing there were an admissible justification, the unequal treatment of Austrian and German books could not be regarded as proportionate. There should be more moderate ways of attaining the desired objectives, particularly the protec-

33 — Case 120/78 Rewe-Zentral [1979] ECR 649 (*Cassis de Dijon*), paragraph 8.

34 — Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* [1991] ECR I-4151, paragraph 13, and Case 25/88 *Wurmser* [1989] ECR 1105, paragraph 10; Fezer, K.-H. (footnote 2), p. 144.

35 — Footnote 5, paragraph 30.

36 — See, on this point, Everling, U., *Buchpreisbindung im deutschen Sprachraum und Europäisches Gemeinschaftsrecht*, Nomos, 1997, p. 34.

tion of books as cultural assets and consumers' interest in reasonable prices for books. One way of doing this would be to allow importers in principle to use their own discretion when fixing the Austrian retail price of German books.³⁷

which was the price-fixing system for books operated by undertakings before the BPrBG was enacted.

108. To conclude, the unequal treatment of German and Austrian books cannot, in my opinion, be justified either by overriding reasons in the public interest or by virtue of Article 30 EC or Article 151 EC.³⁸

1. Submissions of the parties to the main proceedings

110. In essence, the submissions of the parties to the main proceedings are as follows.

D — *The third question*

109. The third question from the referring court is whether the Member States' duty of loyalty under the second paragraph of Article 10 EC, in conjunction with the competition law requirements of Articles 3(1)(g) EC and 81 EC, is to be interpreted as meaning that the enactment of the BPrBG is compatible with it although, in the opinion of the referring court, the BPrBG represented a seamless transition in terms of time and substance from the *Sammelrevers* 1993,

111. *LIBRO* considers that the statutory book-pricing system in the BPrBG is contrary to the principle of good faith vis-à-vis the Community as the practical effectiveness of the Community competition rules is adversely affected.

112. It is true that Article 81 EC does not apply directly to measures of the Member States. However, a Member State may not facilitate or encourage infringements of competition law by private undertakings or aggravate the effects of such infringements. For such an infringement, there must be a connection between national legislation and the anti-competitive conduct of a private undertaking which is contrary to competition law. *LIBRO* sees such a connection in the fact that, with the BPrBG, the Austrian legislature

37 — The parties to the main proceedings have put forward no arguments against this. In my view, it cannot be objected either that importers, unlike Austrian publishers, would not take sufficient account of the aims of the BPrBG when setting Austrian retail prices. If there were any fear of this, it would be sufficient to set up an appropriate form of control for the fixing of Austrian retail prices by publishers and importers.

38 — The fundamental freedom of expression is not a convincing argument either. First of all, it is not clear to what extent the freedom of expression is affected in the present case. In addition, it is impossible to see why the unequal treatment of Austrian and German books should be necessary for taking account of the principle of freedom of expression.

essentially took over the rules of the anti-competitive *Sammelrevers* 1993. This is clear from the accompanying circumstances and the legislative documents.

113. Strengthening the existing agreement does not require the statutory system and the agreement to correspond completely. It is sufficient if elements were adopted which were at risk under competition law. The Austrian legislature not only linked up, in terms of time and substance, with a price-fixing agreement which was contrary to competition law, but also adopted essential elements such as the fixing of retail prices by publishers. The connection is also proved by the transitional provision of Paragraph 10 BPrBG and by the fact that the BPrBG, like the *Sammelrevers* 1993, is confined to German-language books.

114. In the opinion of the Fachverband, the governments of the Member States which are parties to the main proceedings, the EFTA Surveillance Authority and the Commission, there is no breach of the Member States' duty of good faith.

115. The Member States are in principle free to take economic policy measures even if they have the same anti-competitive effect as agreements between undertakings. It is true that such freedom is limited by the fact that,

under the second paragraph of Article 10 EC, the Member States may not take measures which could jeopardise the practical effectiveness of the competition rules applying to undertakings. However, a measure of that kind arises only where a Member State requires or facilitates the adoption of agreements, decisions or concerted practices contrary to Article 81 EC or reinforces their effects, or deprives its own rules of the character of legislation by delegating to private traders responsibility for taking decisions affecting the economic sphere.

116. However, the BPrBG does not aim to require or facilitate the conclusion of anti-competitive agreements. The vertical price-fixing system is already provided for by statute. Consequently the fixing of retail prices does not constitute an agreement.

117. Nor is this a case of strengthening an anti-competitive agreement. That may be presumed only where a Member State confines itself to taking over such an agreement and compels or induces business undertakings to comply with the system. If the State concerned acts without any incentive and on the basis of considerations of public interest, there is no breach of the duty of good faith.

118. So far as the provisions of the BPrBG are concerned, it adopts a central element of the *Sammelrevers* 1993, namely the retailer's commitment in principle to apply the fixed retail price. However, the national provisions are not limited to adopting elements of the *Sammelrevers* 1993. They amount to a comprehensive modification and introduce a new system of price fixing for books. This is demonstrated by the alteration of the retail price from a fixed price to a minimum price, by the possibility of taking commercial advantages into account and by the possibility of allowing a discount of not more than 5%. The Fachverband points out that Paragraph 10 BPrBG was only a transitional provision by means of which the Austrian legislature wished to free publishers and importers from the obligation to set retail prices for all titles immediately after the entry into force of the BPrBG.

119. The Commission considers that even if the strengthening of an existing agreement, decision or concerted practice is to be presumed for the purpose of the second paragraph of Article 10 EC in conjunction with Article 81(1) EC, it is necessary to determine whether the agreement is exempt under Article 81(3) EC. The order for reference does not offer a sufficient basis for a reply to that question.

120. The EFTA Surveillance Authority points out that a paradoxical situation would arise if it were presumed that there was a breach of the duty of good faith. A measure enacted by a Member State in which no corresponding agreement between undertakings existed at the date of the enactment of the measure

would not be contrary to Article 81 EC, but a measure enacted by another Member State in which a corresponding agreement between undertakings existed at the date of the measure would be unlawful.

121. The Fachverband, the governments of the Member States which are parties to the main proceedings, the EFTA Surveillance Authority and the Commission add that the Austrian legislature did not deprive the BPrBG of the character of legislation by delegating to private traders responsibility for taking decisions affecting the economic sphere.

122. This is a case of a unilateral act of the publishers and not an agreement. The obligation to adhere to the minimum price is provided for by statute. The fixing of the retail price by the publisher affects competition only because it is provided for by statute. The Commission points out that otherwise it would be a case of a recommended price for the retailer, which is in principle permissible under competition law.

123. Finally, the governments of the Member States which are parties to the main proceedings point out that there is no Community competition policy in the field of national price-fixing systems for books. The Austrian

Government observes that purely national price-fixing systems for books are to be presumed to exist where a national law subjects books marketed in the territory of the Member State in question to a price-fixing agreement. Also where the system applies to imported or reimported books, it is presumed to be a national price-fixing system for books.

tion with the competition law provisions of Articles 3(1)(g) EC and 81 EC is to be interpreted in such a way that the enactment of the BPrBG is compatible with it.

124. The German Government doubts whether the second paragraph of Article 10 EC applies in conjunction with Articles 3(1)(g) EC and 81 EC. If a measure does not fall within the ambit of the *Dassonville* principle or fulfils the conditions of the *Keck* exception, Articles 28 EC and 30 EC are to be regarded as special provisions which oust the application of the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC.

126. This question requires a reply only if a national provision such as Paragraph 3 BPrBG does not constitute a measure having equivalent effect to a restriction on imports within the meaning of Article 28 EC.

2. Legal assessment

125. The referring court asks whether the Member States' duty of good faith under the second paragraph of Article 10 EC in conjunc-

127. Article 81 EC is addressed to undertakings and it applies where there is an agreement or concerted practice between undertakings. Consequently it is not, in principle, applicable to sovereign acts of the Member States. However, the second paragraph of Article 10 EC requires the Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Under Article 3(1)(g) EC, the activities of the Community include a system ensuring that competition in the internal market is not distorted. The Commu-

nity's competition policy is formulated in Article 81 EC. Consequently, under the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC, the Member States must refrain from any measure which may render Article 81 EC ineffective.³⁹ This applies also to measures adopted by Member States by law or regulation.⁴⁰

128. On the other hand, it is recognised that not every measure of a Member State which affects competition can constitute a breach of the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81(1) EC.⁴¹ Such a broad application of the duty of good faith would lead to the Member States becoming subject to the control of Community law even in spheres where they, and not the Community, are competent by virtue of the principle of limited individual powers.⁴²

129. This differentiation is not a simple matter, as shown by, for example, the fact

that legislation of Member States in the area of economic policy or cultural policy for which they are competent under Articles 98 et seq. EC and 151 EC may affect competition. If all national legislation in those areas were reviewed on the basis of the duty of good faith for its effects on competition, the Member States would be forced into a 'competition law straitjacket' even in relation to measures in those areas. This is not consistent with the principle of limited individual powers.

130. The Court's case-law⁴³ in this field is therefore characterised by, on the one hand, the need to safeguard the powers of the Member States and, on the other, the requirement for the Community's competition policy not to be undermined by measures of the Member States.

131. It is now settled case-law that an infringement of the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81(1) EC may be presumed only where a Member State requires (*first group of cases*) or favours (*second group of cases*) the adoption of agreements, decisions

39 — See, inter alia, Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraph 31; Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 14; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 35; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 20; and Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14. Regarding this case-law, see Emmerich, W., in Dausies, M., *Handbuch des EU-Wirtschaftsrechts*, H. I. § 1, 9. Ergänzungslieferung, point 11, and Wollmann, H., in Mayer, H., *Kommentar zu EU- und EG-Vertrag*, Manz, 2006, Art. 81 EGV, 72. Lieferung, point 3, with reference to the problem of the Austrian BPrBG in this regard.

40 — *Van Eycke* (footnote 39), paragraph 16, and *Delta Schiffahrts- und Speditionsgesellschaft* (footnote 39), paragraph 14.

41 — See the Opinion of Advocate General Darmon in *Reiff* (footnote 39), paragraph 32.

42 — Emmerich, W. (footnote 39), point 12.

43 — For a comprehensive discussion of this case-law, see Henriksen, Ü.B., *Anti-Competitive State Measures in the European Community*, Handelshøjskolens Forlag, 1994, and Schwarze, J., 'Der Staat als Adressat des europäischen Wettbewerbsrecht', *Europäische Zeitschrift für Wirtschaftsrecht*, 2000, p. 613 et seq., 616 to 622.

or concerted practices contrary to Article 81 EC or reinforces their effects (*third group of cases*) or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere (*fourth group of cases*).⁴⁴

1993 in particular⁴⁶ may be regarded as an anti-competitive agreement with which a State measure could have been linked.

(i) Anti-competitive agreement?

(a) Requiring or favouring the adoption of an anti-competitive agreement or reinforcing its effects

132. An essential condition of the first three groups of cases is that the Member State's legislation links up with an anti-competitive agreement. To that extent it is possible to speak of an *accessory* act of the Member State.⁴⁵ In the present case, the *Sammelrevers*

133. Under the system of the *Sammelrevers* 1993, Austrian retailers were bound by the retail prices set by German publishers. These were fixed prices. As the vertical fixing of selling prices is one of the examples given in Article 81(1)(a) EC, I have no serious doubt that this was an agreement that restricted competition.⁴⁷ In my opinion, its effects are

⁴⁴ — Consistent case-law since *Van Eycke* (footnote 39), paragraph 16. See also Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14; *Reiff* (footnote 39), paragraph 14; and Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, paragraph 10.

⁴⁵ — This term is used by Schwarze, J. (footnote 43), p. 621.

⁴⁶ — The modified version of the *Sammelrevers* 1993, which came into force on 30 June 2000, does not provide for the participation of Austrian publishers, wholesalers and retailers. Therefore the Commission found that the modified version was unlikely to affect trade between the Member States. To that extent, it appears that even then there was no *anti-competitive* agreement.

There would also be a (rather theoretical) possibility that the BPrBG itself constitutes an anti-competitive agreement. According to the case-law, measures may have a dual nature, that is to say, they may be attributed to the State as legislation as well as to undertakings (Case 123/83 *Clair* [1985] ECR 391, paragraphs 19 and 20). However, this would presuppose that the BPrBG, notwithstanding its legal nature, constitutes an *agreement* between the undertakings concerned. In my opinion, that cannot be the case here. The fact that the parties concerned proposed the legislation and were heard in the course of the legislative procedure is not sufficient to presume an agreement between private undertakings in the form of a law.

⁴⁷ — I do not think there is a convincing case for the view that the *Sammelrevers* 1993 did not lead to a restriction of competition (as claimed by Vranes, E., *Buchpreisbindung und rule of reason*, Manz, 1999, pp. 38 to 41). As I have already stated in my Opinion in Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraphs 51 to 58, not every potential benefit for consumers from an agreement results in a restriction of competition. For the assessment of cross-border price maintenance systems from the viewpoint of competition law, see *VBVB and VBVB v Commission* (footnote 5), paragraphs 44 to 46.

also manifest.⁴⁸ As it is not disputed in the present case that a large proportion of the books sold in Austria are German books, it must be presumed that an adverse effect on trade between the Member States was likely. Consequently the system of the *Sammelrevers* 1993 would probably have fulfilled the conditions of Article 81(1) EC.⁴⁹

on the referring court to consider whether the conditions of that provision were fulfilled,⁵¹ that is to say, whether the system of the *Sammelrevers* 1993 contributed to improving the production or distribution of goods or to improving technical or economic progress, while allowing consumers a fair share of the resulting benefit, without imposing on the undertakings concerned restrictions which were not indispensable to the attainment of those objectives and without affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

134. It must however be noted that Article 81 EC is constructed in two stages. An agreement may be presumed to be contrary to Article 81 EC only where it is not exempted under Article 81(3) EC.⁵⁰ Therefore a Member State cannot be alleged to have required or favoured, or reinforced the effects of, an agreement exempted under Article 81(3) EC. It is therefore incumbent

135. A comprehensive investigation of the facts is necessary before this problem can be considered.⁵² Therefore I think it is expedient first to deal with the question whether the Austrian legislature required, favoured, or reinforced the effects of, the *Sammelrevers* 1993.

48 — In this connection, it must be observed that, according to the system of the *Sammelrevers* 1993, although there was no provision for a horizontal agreement between publishers, the agreements as a whole, which followed a model agreement and were managed by a trustee, are to be regarded as a bundle (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 19 et seq.).

49 — Hofmann, T., 'Buchpreisbindungen auf dem Prüfstand des Europarechts', *Gewerblicher Rechtsschutz und Urheberrecht*, 2000, pp. 561 and 562, agrees.

50 — See Case 136/86 *Aubert* [1987] ECR 4789, paragraph 21, in which the Court touched upon Article 81(3) EC.

51 — When Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) came into force, the system of prohibition subject to exemption was replaced by a self-assessment system (Article 1(1) and (2) of Regulation No 1/2003). Since then, the Member States have been required to examine the conditions of Article 81(3) EC (see the Commission notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 EC and 82 EC (OJ 2004 C 101, p. 54)).

I find that, in the second question, the referring court assumes that there are no empirical data which could prove that statutory price maintenance for books is an appropriate means of attaining the aims of promoting the production of books, diversity of titles at regulated prices and variety of retail booksellers. However, I do not assume that the referring court wished to show that it took evidence concerning the existence of the conditions of Article 81(3) EC and was satisfied that they were not fulfilled.

52 — A survey of the judgments on the compatibility of the *Sammelrevers* 1993 with Article 81(3) EC may be found in Hofmann, T. (footnote 49), pp. 562 to 567, and Engelmann, M. (footnote 3), pp. 125 to 165.

(ii) Requiring, favouring, or reinforcing effects

constituted a link and, third, whether a substantive link may be sufficient.

136. The case-law presumes that the effects of an anti-competitive agreement are reinforced where a Member State merely reproduces all or some of the elements of an anti-competitive agreement between undertakings.⁵³ The Court regards measures that encourage undertakings to do so as requiring or favouring an anti-competitive agreement.⁵⁴

— Direct link with the *Sammelrevers* 1993?

139. In the present case, it cannot be presumed that the BPrBG follows on directly from the *Sammelrevers* 1993, if only because the Austrian publishers, retailers and wholesalers were no longer parties to the *Sammelrevers* 1993 when the BPrBG came into force.

137. As the price-fixing system for books laid down by the State by means of the BPrBG replaced the *Sammelrevers* 1993, in the present case there may be a reinforcement of the effects of the *Sammelrevers* 1993 by legislation.

— Link on the basis of the transitional provision of Paragraph 10 BPrBG?

138. As I have already mentioned,⁵⁵ the essential feature of this group of cases is that the national legislation is *accessory* to an anti-competitive agreement between undertakings. In the present case, therefore, the first question arising is whether the BPrBG followed on directly from the *Sammelrevers* 1993, second, whether the transitional provision of Paragraph 10 BPrBG may have

140. A link could perhaps be established by the fact that Paragraph 10 BPrBG provided for the prices shown in the list of available books in the edition of 20 June 2000 to be applied on a transitional basis. According to my understanding, the list contains retail prices set in the framework of the *Sammelrevers* 1993 system.

141. However, it must be borne in mind that, although Paragraph 10 BPrBG may link up with the prices which were agreed upon under

53 — *Van Eycke* (footnote 39), paragraph 18, and *Meng* (footnote 44), paragraph 19.

54 — Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraphs 49 and 52, and Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 54. See also Schwarze, J., (footnote 43), p. 621.

55 — See point 132 of this Opinion.

the Sammelrevers 1993 system, it does not link up with the other rules of the Sammelrevers 1993. The rules of the Sammelrevers 1993 and the BPrBG differ in that, under the BPrBG, minimum prices rather than fixed prices are set, commercial advantages are taken into account, and retailers may charge up to 5% less than the Austrian retail price.⁵⁶

142. Therefore Paragraph 10 BPrBG does not make the BPrBG accessory to the Sammelrevers 1993.

— Is a substantive link sufficient?

143. Consequently the question arises of whether the effects of the Sammelrevers 1993 may be presumed to have been strengthened if the BPrBG has a substantive link with it.

144. In the present case, this question is particularly pertinent because the Austrian legislature has left no doubt that it wished in principle to retain the vertical resale price maintenance provided for by the Sammelrevers 1993 and because the date when the

BPrBG entered into force was closely bound up with the withdrawal of the Austrian publishers, wholesalers and retailers from the system of the Sammelrevers 1993.

145. In spite of the circumstances mentioned by the referring court, I do not think that any strengthening of the effects of the Sammelrevers 1993 can be seen in the fact that the BPrBG links up with elements of it.

146. This view is supported by the *wording* of the case-law, which states that a strengthening of the effect of an anti-competitive agreement occurs only where the Member State *simply reproduces, either wholly or in part*, the elements of the agreements between undertakings.⁵⁷

147. The Austrian legislature did not reproduce the Sammelrevers 1993 in its entirety. Nor can partial reproduction within the meaning of the case-law be presumed, in my opinion. I understand 'partial reproduction' as occurring only where the anti-competitive agreement is objectively severable and the Member State reproduces only part of the agreement, without modifying its substance. To go back to the idea of accessory legislation, I think that the case-law covers only legisla-

⁵⁶ — Incidentally, the books that are the subject of the main proceedings do not appear to have been included in the list of available books in the edition of 20 June 2000. Therefore Paragraph 10 BPrBG does not appear to be relevant to the present proceedings.

⁵⁷ — *Van Eycke* (footnote 39), paragraph 18, and *Meng* (footnote 44), paragraph 19.

tion of Member States that is *strictly accessory* to a part of the existing agreement between undertakings.⁵⁸ This is also supported by the fact that, according to the case-law, the Member State must *simply reproduce* the part in question.

State measure affects competition is not a decisive criterion.⁶¹

148. It is true that, in the present case, the Austrian legislature created a link with the *Sammelrevers* 1993 in the context of the legislative procedure, but it modified the substance of that system, as described above.⁵⁹ Therefore it cannot, in my view, be presumed that it simply reproduced part of the *Sammelrevers* 1993.

150. I think this principle speaks against regarding a statutory measure as strengthening the effects of an anti-competitive agreement merely because the measure in question has a similar object or effect of restricting competition. In those cases, as the present case clearly shows, it would be possible only with considerable difficulty, if not impossible, to differentiate between a permissible independent national measure and a proscribed substantive reproduction in any particular case.

149. I also consider that only this restrictive interpretation of the case-law is compatible with the principle of limited individual powers. As shown above,⁶⁰ with regard to the duty of good faith under Article 10 EC, it is necessary to bear in mind that a Member State is in principle free, in its spheres of competence, to adopt measures which have the object or effect of restricting competition. Consequently whether, and to what extent, a

151. A restrictive, strictly accessory approach will avoid the paradoxical situation where national legislation constitutes in one Member State an infringement of the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC merely because undertakings have previously concluded an agreement with a similar

58 — See, for example, Case 311/85 *VVR* [1987] ECR 3801, paragraph 23. See also Weuster, A., *Die Neuregelung der Buchpreisbindung in Deutschland*, Boorberg, 2007, pp. 216 and 217.

59 — See point 141 of this Opinion.

60 — See points 128 and 129 of this Opinion.

61 — See Joliet, R., National Anti-competitive Legislation and Community Law, *Fordham International Law Journal*, 1989, p. 174, and Henriksen, U.B. (footnote 43), p. 69. The case-law takes a negative view of any assessment based on the substance or effect on competition of national legislation (see *Van Eycke* (footnote 39), paragraph 18, and *Meng* (footnote 44), paragraphs 14 to 22). On the *Van Eycke* judgment, see Henriksen, U.B. (footnote 43), p. 114. On the other hand, Emmerich, W. (footnote 39), point 15, proposes such an assessment.

effect, but the enactment of that legislation is permitted in another Member State because no agreement between undertakings with corresponding provisions previously existed in that State.

which is likely to undermine the *practical effect* of the Community's competition policy.

152. I see no contradiction in the fact that, although a Member State is permitted on its own initiative to enact a law with the object or effect of restricting competition, its duty of good faith prohibits it from strengthening the effects of a similar agreement between undertakings. There would be a contradiction in this only if it were relevant, by virtue of the duty of good faith, whether the law has the object or effect of restricting competition. However, according to the principle of limited individual powers,⁶² that interpretation cannot be used as a basis. Rather, a Member State cannot be denied the right to enact legislation with provisions similar to an agreement between undertakings, provided that it does so on its own initiative.

154. In the substantive link between the BPrBG and the *Sammelrevers* 1993, therefore, I consider that there is no strengthening of the effects of the latter.

(iii) Conclusion

155. In conclusion, therefore, irrespective of the assessment of the *Sammelrevers* 1993 in competition law, the enactment of the BPrBG cannot be regarded as requiring or favouring, or strengthening the effects of, an anti-competitive agreement.

153. In the present group of cases, therefore, the principle of good faith is limited to prohibiting Member States from reinforcing the effects of an agreement between undertakings contrary to Article 81 EC by reproducing all or part of that agreement in a strictly accessory way, without modifying it or explaining its provisions. The Commission has rightly observed that such conduct on the part of Member States has a signal effect

(b) Delegation to private traders of responsibility for taking decisions affecting the economic sphere

156. As stated above with regard to the fourth group of cases,⁶³ if a Member State deprives its own legislation of its official character by

62 — See points 128 and 129 of this Opinion.

63 — See point 131 of this Opinion.

delegating to private traders responsibility for taking decisions affecting the economic sphere, that may amount to a failure in the duty of good faith on the part of that Member State. Examination of this fourth group of cases taken into account in the settled case-law shows that this goes back to *Leclerc and Others*.^{64 65}

(i) Accessory legislation unnecessary

159. Some commentators claim that, for this group of cases, the legislation in question must be strictly accessory to an agreement between undertakings which is contrary to Article 81 EC.⁶⁷

157. In principle, the delegation of government powers to private traders falls to be considered where they are authorised by legislation to lay down prices with binding effect for third parties, without the prices being subject to government control.⁶⁶

160. I am not persuaded by that argument.

158. In the present case, it is argued that this group of cases does not apply because there is no agreement between undertakings (i), no delegation of decisions to private traders (ii) and because there is no Community competition policy in the sphere of national resale price maintenance systems for books (iii).

161. *First*, I find no support in the case-law for the proposition that the legislation must be strictly accessory to an anti-competitive agreement between undertakings

⁶⁴ — Footnote 5, paragraph 15.

⁶⁵ — See the analysis in Henriksen, U.B. (footnote 43), pp. 114 and 115.

⁶⁶ — See also Niemeyer, J., 'Die Anwendbarkeit von Art. 85 und 86 EG-Vertrag auf staatliche Maßnahmen', *Wirtschaft und Wettbewerb*, 1994, pp. 721 et seq., 723.

⁶⁷ — See Weuster, A. (footnote 58), p. 219; Niemeyer, J. (footnote 66), pp. 730 and 731; and Schwarze, J. (footnote 43), pp. 620 to 622.

162. In fact, in *Leclerc and Others* the Court took into account the fact that national legislation which renders corporate behaviour of the type prohibited by Article 81(1) *superfluous* by making the book publisher or importer responsible for freely fixing binding retail prices detracts from the effectiveness of Article 81 EC and is therefore contrary to the second paragraph of Article 10 EC.⁶⁸ It is true that, in that judgment, the Court did not expressly find that a national resale price maintenance system for books falls within the fourth group of cases.⁶⁹ However, in that case, in which there was undeniably no prior agreement between undertakings, the Court went on to consider breach of the duty of good faith and accepted the possibility of such a breach under certain circumstances.⁷⁰ I do not think it can be concluded from this that, for the fourth group of cases, the Court requires the legislation in question to be strictly accessory to an existing anti-competitive agreement between undertakings.⁷¹ I

cannot see from later judgments that the Court has abandoned this position.⁷²

163. *Second*, I do not think it appropriate to confine this group of cases to legislation which is accessory to anti-competitive agreements between undertakings. It is true that whether State legislation has any effect, and, if so, what effect, on competition is not the only relevant factor, as shown above.⁷³ However, that is not a subject of the fourth group of cases. Rather, the wrongful conduct of the Member States covered by the fourth group consists in evading the requirement, laid down by Article 81 EC, for an *agreement between undertakings*. The aim is to catch legislation

68 — See *Leclerc and Others* (footnote 5), paragraph 15.

69 — In this connection, it must be borne in mind that the four groups of cases were 'consolidated' in *Van Eycke* (footnote 39), paragraph 16, that is to say, after the *Leclerc and Others* judgment was given.

70 — See paragraph 20 and the operative part of *Leclerc and Others* (footnote 5).

71 — Hoffman, A.B., 'Anti-competitive State Legislation Condemned under Articles 5, 85 and 86 of the EEC Treaty: How Far Should the Court Go after Van Eycke?', *European Court Law Review*, 1990, p. 17, conjectures that an earlier draft judgment examined this question and gave a positive reply. In the opinion of Joliet, R. (footnote 61), p. 172, the Court found that in principle the legislation was incompatible with the second paragraph of Article 10 EC and Articles 3(1)(g) EC and 81 EC. Henriksen, U.B. (footnote 43), pp. 59 and 140 considers that, although the Court did not give an express reply, it may be inferred from the judgment that the Court intended to reply to the question in the affirmative. Schwarze, J. (footnote 43), p. 618, takes the view that the Court raised the question, but gave no reply.

72 — Particularly in *Meng* (footnote 44), *Ohra Schadeverzekeringen* (footnote 44) and *Reiff* (footnote 39) there is no indication that the Court has abandoned this position. In those cases, the Court dealt with the question whether it should extend the application of the duty of good faith beyond the cases it had covered up to then to other cases (for an analysis of this question, see Niemeyer, J. (footnote 66), p. 725). The issue in those cases was whether legislation of the Member States was contrary to the second paragraph of Article 10 EC and Articles 3(1)(g) EC and 81 EC merely because it had the object or effect of restricting competition in a way similar to that of an anti-competitive agreement between undertakings. In *Reiff* (footnote 39), paragraph 22, the Court went on to apply the criterion discussed above, but found that there was no infringement because, in its opinion, there had been no delegation of the decision to private economic agents.

73 — See points 128 and 129 of this Opinion.

which is only a statutory ‘shell’ devoid of content, which protects private traders from the application of Article 81 EC. In such cases, the *practical effectiveness* of Article 81 EC may be adversely affected.⁷⁴

(ii) Delegation of responsibility to private traders

164. *Third*, a further point against the argument that, in this group of cases also, the legislation in question must be strictly accessory to an agreement is that this consideration would otherwise be broadly irrelevant because the legislation delegating to private traders responsibility for taking decisions affecting the economic sphere has the result precisely that an agreement contrary to Article 81 EC is superfluous.

165. In conclusion, I presume that, in the present group of cases, there can be no requirement for legislation to be strictly accessory to an agreement between undertakings which is contrary to Article 81 EC.

166. Consequently the key question is whether the BPrBG delegates to private traders the responsibility for fixing prices. For that purpose, a distinction must be made between Austrian and German books.

167. *First*, it is necessary to determine whether the power to fix prices has, in the final analysis, been reserved to the public authorities themselves. If so, it cannot be presumed that responsibility has been delegated to private traders.⁷⁵ In this connection, the German Government refers to the judicial review of the legality of fixed retail prices provided for by Paragraph 7 BPrBG in conjunction with Paragraph 1 BPrBG. At the hearing the Austrian Government provided no substantiated information on the nature of the judicial review. However, it appears that, under those provisions, a court cannot proceed *ex officio* if the retail prices are not appropriate by reference to the aims of the BPrBG.⁷⁶ In those circumstances, I do not think it can be presumed that the power to fix prices is, in the final analysis, reserved to the public authorities.

74 — I find the position taken by Advocate General Lenz in his Opinion in *VVR* (footnote 58), point 42, persuasive (but only with regard to the fourth group of cases). He points out that the national measure replaces the requirement of ‘agreements, decisions and concerted practices’ in Article 81 EC and thereby renders it superfluous. This depends on the Member State conferring on private traders a State power to take decisions affecting competition, and it must be possible for private traders to take such decisions affecting the economic sphere. This is the distinguishing feature from permissible independent decisions of the Member States in the economic sphere under the second paragraph of Article 10 EC. Schwarze, J. (footnote 43), p. 621, is critical of this position.

75 — *Delta Schiffahrts- und Speditionsgesellschaft* (footnote 39), paragraphs 21 and 22; *Centro Servizi Spediporto* (footnote 39), paragraph 27; *Reiff* (footnote 39), paragraphs 20 to 23; and Case 231/83 *Cullet* [1985] ECR 305, paragraph 17.

76 — This, in my opinion, is where the difference from the cases cited in footnote 75 lies.

168. *Furthermore*, it must be observed that, so far as breach of the duty of good faith is concerned, it is immaterial whether private traders have an obligation or only a power to fix prices.⁷⁷

whom the power to fix the price could be delegated is the German publisher.⁷⁸

169. In the present case, therefore, it is necessary to determine whether the BPrBG delegates the responsibility for fixing prices to private traders.

172. Against the argument that the German publisher is responsible, it could be objected that the German publisher fixes only the German retail price and that the Austrian retail price is aligned with it. It could be concluded from this that the fixing of the Austrian retail price is not the responsibility of the German publisher, but that the German retail price is only one factor on which the Austrian retail price is based in accordance with the requirements of the BPrBG.⁷⁹

170. In the case of Austrian books, the publishers may fix the Austrian retail prices at their unfettered discretion. Consequently the responsibility for fixing the prices of those books is delegated to private traders.

171. In the case of German books, however, the *actual decision* on the basic amount of the Austrian retail price and the *fixing* of that price are delegated to two different undertakings at different market levels. Although the Austrian retail price of a German book for marketing in Austria is fixed by the importer, he is in principle bound by the German retail price and therefore the actual decision on the Austrian retail price lies with the German publisher. Therefore the private trader to

173. However, it must be borne in mind, first, that a German publisher may, in the case of a book marketed in Germany and Austria, include marketing in Austria in his calculations, and the volume of sales in Austria may vary according to the publisher and the book. Furthermore, a German publisher may influence the retail price for Austria by granting commercial advantages, even though this may have drawbacks.⁸⁰

77 — *Commission v Italy* (footnote 54), paragraph 55; Weuster, A. (footnote 58), p. 218, agrees.

78 — In the case of imports, the decision on whether the importer grants a purchase price lower than the customary purchase price normally depends on the publisher.

79 — See *Cullet* (footnote 75), paragraph 17.

80 — See points 62 to 65 of this Opinion.

174. The key question in this connection seems to me to be, not how free the German publisher is in taking his decision, but whether the fixing of the Austrian retail price remains ultimately in the hands of State authorities or in the hands of private traders. As, in the present case, the fixing of the Austrian retail price for German books remains ultimately in the hands of the German publisher, I presume that the BPrBG delegates the responsibility for fixing prices, at least partly, to the German publishers.

concluded from this that, as Community law stood at the time, the Member States' obligations under the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC were not specific enough to preclude them from enacting legislation on competition in the retail prices of books, provided that such legislation was consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods.⁸²

175. In conclusion, I presume that legislation such as the BPrBG delegates to private traders the responsibility for taking decisions affecting the economic sphere. This is confirmed by the Court's approach in *Leclerc and Others*, which I have discussed above.⁸¹

177. I think the wording of that judgment contains all the essential elements for a finding in the present case, but that the judgment requires some amplification.

(iii) Powers of the Member States in the cultural sphere

176. In *Leclerc and Others*, the Court, after implicitly finding that an infringement could in principle occur as a result of an anti-competitive agreement being rendered superfluous, found that no Community competition policy exists in relation to purely national price-fixing systems for books. The Court

178. *First*, the observation that no Community competition policy exists in relation to national price-fixing systems for books must be understood as meaning that special Community rules for that sector must be taken into account, in so far as they exist. However, no special Community law measures have yet been adopted for that sector.

⁸¹ — See point 162 of this Opinion.

⁸² — *Leclerc and Others* (footnote 5), paragraph 20.

179. *Second*, the abovementioned observation cannot be understood as meaning that, as there are no special rules, there is no Community policy in this field. In fact, the basic prohibition of vertical price-fixing agreements under Article 81 EC forms part of Community policy which covers all sectors, from which books are in principle not excepted.⁸³ As the case-law shows, the Court examines the fourth group of cases in other sectors even where there are no special rules for a sector.⁸⁴

180. *Third*, it is true that the reference to purely national price-fixing systems for books could be understood as meaning that, in *Leclerc and Others*, Article 81 EC did not apply because there was no likelihood of trade between Member States being affected. This interpretation is likewise unconvincing because that case concerned the importation into France of books published in other Member States and reimportation of books published in France. In the present case, because of the substantial imports from Germany, it cannot be presumed either that this is a purely national matter.⁸⁵

181. Against that background, the Court's reference to the fact that no Community competition policy exists in relation to purely national price-fixing systems for books can, in my view, only be interpreted as meaning that, in the context of the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC, the Court takes into account national price-fixing systems for books as an expression of the powers of the Member States in the cultural sphere.⁸⁶

182. Theoretically, taking account of price-fixing systems in that way can be justified as follows. The present case does not involve the direct application of Article 81 EC. In so far as the Member States have indirect obligations arising from the duty of good faith under the second paragraph of Article 10 EC, it is necessary to take into account not only the aims of Article 81 EC, but also the Member States' power in the cultural sphere.⁸⁷

183. As an interim conclusion, I find that, on the basis of the case-law and the abovementioned fact that the cultural sovereignty of the Member States must be taken into account, the fourth group of cases does not

83 — Any such exception must be expressly provided for in the EC Treaty (see Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 40).

84 — See, for example, the case-law cited in footnote 75.

85 — If it were only a question of fixing the prices of Austrian books, it would be necessary to consider whether that would be likely to affect significantly trade between Member States. Although a cross-border aspect cannot be entirely ruled out even in that case (purchases by persons crossing a border), it is doubtful whether trade would be significantly affected.

86 — Weuster, A. (footnote 58), pp. 211 to 224, expresses the same opinion.

87 — In this connection, see points 19 and 22 of the Opinion of Advocate General Darmon in *Leclerc and Others* (footnote 5), who several times stresses the need to take cultural powers into account. See also Fezer, K.-H. (footnote 2), p. 143, and Hofmann, T. (footnote 49), p. 559.

in principle apply to price-fixing systems for books.

184. However, it must be borne in mind that the case-law lays down two conditions for taking account of cultural sovereignty. The system in question must be purely national and the national legislation must not conflict with other provisions of the EC Treaty, particularly those concerning the free movement of goods.

— Purely national price-fixing system for books

185. First, the system in question must be a purely national price-fixing system for books. It is clear from *Leclerc and Others*⁸⁸ that that is still the case where the system covers books imported from other Member States. I also think that, so far as failure on the part of a Member State to comply with the duty of good faith is concerned, it makes no difference whether the retail price of an imported book is actually set by the importer in the State concerned or by the publisher in another Member State.

186. However, what I think is questionable in the present case is that the Austrian retail price for German books depends in principle on the German retail price. This means that the Austrian retail prices for those books are not necessarily governed by criteria which are justified as regards the Austrian market.⁸⁹ I have serious doubts as to whether the BPrBG can be described as a purely national price-fixing system for books within the meaning of *Leclerc and Others*.

— Not contrary to other provisions of the EC Treaty, particularly those concerning the free movement of goods

187. Second, in *Leclerc and Others* the Court found that there was no breach of the duty of good faith, provided that the national legislation on the price-fixing system for books was consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods.⁹⁰ If this negative condition is formulated in positive terms, it means that a breach of the duty of good faith is

⁸⁸ — Footnote 5.

⁸⁹ — See point 173 of this Opinion.

⁹⁰ — Footnote 5, paragraph 20.

to be presumed if the national price-fixing system for books is contrary to the provisions on the free movement of goods or other provisions of the EC Treaty.⁹¹

188. Consequently, in *Leclerc and Others*, the Court did not begin by considering whether there was a breach of the duty of good faith, finding that there was none and then examining the provisions concerning the free movement of goods. In fact, it rules out breach of the duty of good faith in the fourth group of cases only where the national price-fixing system for books is otherwise compatible with the provisions of the EC Treaty.

189. As I see it, this assumption is based on the following consideration. As stated above, a price-fixing system for books which is provided for by legislation delegates to private traders responsibility for taking decisions affecting the economic sphere. In principle, therefore, failure in the duty of good faith in the fourth group of cases cannot be ruled out. However, national price-fixing systems for books are taken into account as an expression of the Member States' power in the cultural sphere, but that is justified only where the Member States comply in other respects with Community law when organising their price-fixing systems for books.

91 — Footnote 5, paragraph 20.

190. Since a provision such as Paragraph 3 BPrBG is contrary to Article 28 EC, the Austrian price-fixing system for books is not, according to the case-law, to be taken into account as an expression of the power of the Member States in the cultural sphere.

(iv) Conclusion

191. In conclusion, I find that the power conferred upon publishers and importers by State price-fixing systems for books to fix the retail prices of books is not, in principle, incompatible with the obligation of the Member States under the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC, but that in the present case there are special circumstances by reason of which such incompatibility is to be presumed.⁹²

192. In the present case, this incompatibility is to a large extent due to the same factors as an infringement of Article 28 EC. Nevertheless,

92 — A further possibility is to consider applying Article 81(3) EC by analogy. In my view, with regard to the present group of cases, this would entail considering whether all possible decisions delegated to private traders would fulfil the conditions of Article 81(3) EC. Extension to all possible decisions is appropriate because, in that group of cases, the Member State delegates responsibility to all private traders. As it is, I doubt whether a system that discriminates against German-language books from other Member States is essential for attaining the objectives of the price-fixing system for books.

contrary to the opinion of the German Government, it can be presumed that there is no relationship of *lex specialis* between Article 28 EC on the one hand and the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC on the other because those provisions pursue different objectives.

conditions that the price-fixing system for books is purely national and that the rules of that system are not contrary to Community law, particularly the provisions on the free movement of goods. In the present case, the second condition at least is not fulfilled.

V — Summary

193. To sum up, I conclude that a measure such as the BPrBG is not compatible with the provisions on the free movement of goods. Therefore I propose that the reply to the first question referred should be in the affirmative and that to the second in the negative.

194. Furthermore, the adoption of a State-organised price-fixing system for books is not, in principle, a breach of the duty of good faith under the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC in the group of cases where an anti-competitive agreement is rendered superfluous. This, however, is subject to the

195. As the third question is referred only in the event of a negative reply to the first question, I propose that the Court should not reply to the third question.

196. Should the third question fall to be answered, I would propose that the Court's reply, in accordance with its present case-law, should be that, as Community law stands at present, the second paragraph of Article 10 EC in conjunction with Articles 3(1)(g) EC and 81 EC does not prohibit the Member States from enacting legislation requiring the retail price of books to be fixed by the publisher or importer of a book, provided that the price-fixing system for books in question is a purely national system and that such legislation is consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods.

VI — Conclusion

197. In my opinion, therefore, the replies to the questions from the Oberster Gerichtshof should be as follows:

- (1) The concept of a measure having equivalent effect to a restriction on imports under Article 28 EC is to be interpreted as covering legislation of a Member State under which domestic publishers and importers fix and publish a minimum selling price binding on consumers, but, in the case of books published in another Member State, importers may not charge less than the retail price fixed or recommended by the publisher for that other Member State (less the value added tax applying in that other Member State, plus the value added tax applying in the importing State).

This applies even where the importer of such a book can charge less than the retail price fixed or recommended by the publisher for that other Member State in proportion to the commercial advantage which he obtains by purchasing the book at a price lower than the normal price.

- (2) Articles 28 EC, 30 EC and 151 EC are to be interpreted as meaning that such legislation cannot be justified by the status of books as cultural assets or by the interests of consumers in reasonable prices for books or by the commercial characteristics of the book trade.