

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 25 November 1981

relating to a proceeding under Article 85 of the EEC Treaty

(IV/428 — VBBB/VBVB)

(Only the Dutch text is authentic)

(82/123/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962⁽¹⁾, and in particular Article 3 thereof,

Having regard to the notifications made pursuant to Article 5 of Council Regulation No 17 on 30 October 1962 by the Vereeniging ter Bevordering van de Belangen des Boekhandels, Amsterdam, the Netherlands, and on 3 November 1962 by the Vereeniging ter Bevordering van het Vlaamsche Boekwezen, Antwerp, Belgium, both referring to Article 2 (2), (4), (6) and (7) (mutual exclusive dealing provisions) of the agreement between the two associations,

Having regard to the application made by the associations, at the time of notification, for negative clearance of the said agreement,

Having regard to the Commission Decision of 7 December 1977 to institute a proceeding in this case,

Having regard to the application made to the Commission on 8 June 1978, pursuant to Article 3 (2) (b) of Regulation No 17, by Maxis BV, Muiden, the Netherlands,

Having heard the associations of undertakings concerned orally, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation

No 99/63/EEC⁽²⁾ on 15 and 16 March 1978 and 18 October 1979,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 10 of Regulation No 17 on 20 May 1981,

Whereas :

I

THE FACTS

1. Subject of the proceeding

- (1) This proceeding concerns an agreement between the Vereeniging ter Bevordering van de Belangen des Boekhandels (Association for the Promotion of the Interests of the Book Trade — VBBB) and the Vereeniging ter Bevordering van het Vlaamsche Boekwezen (Association for the Promotion of Flemish Books — VBVB) governing trade in books between the Netherlands and Flanders, which was signed by the associations on 21 January 1949 and amended on 2 July 1958. The agreement was notified to the Commission, pursuant to Regulation No 17, by the VBBB on 30 October 1962 and by the VBVB on 3 November 1962. The proceeding does not concern the systems of collective resale price maintenance operated in the Netherlands and Flanders.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

2. The parties

(a) *VBBB*

- (2) The VBBB is an association of publishers, book wholesalers, booksellers, importers of books and book club operators, who are established in the Netherlands. The rules of the association distinguish between 'recognized' and 'registered' status.

'Recognized' status is held by publishers, wholesalers, booksellers, importers and book club operators who are recognized as such under the Reglement voor het Handelsverkeer van Boeken in Nederland (Rules for the Book Trade in the Netherlands); 'registered' status is held by retailers registered as such under the same rules. The trade rules are binding on both those with 'recognized' and those with 'registered' status. Those with 'recognized' status may become members of the association if they so wish.

The object of the VBBB is to protect the common interests of booksellers and publishers and to promote cooperation in the book trade in the widest sense (article 1 of the Algemeen Reglement (general rules)). It achieves this by :

- (a) laying down and administering binding rules governing the book trade ;
- (b) establishing, maintaining and managing organizations and funds to promote the interests of the book trade ;
- (c) engaging in consultation on organizational matters in the interests of the book trade ;
- (d) encouraging the settlement of disputes by arbitration and the acceptance of arbitration clauses ;

and finally, taking all measures which appear useful and necessary for the performance of its task (article 2 of the general rules).

- (3) The VBBB may conclude agreements regarding the book trade with organizations in the Netherlands or abroad (article 24 (c) (1) of the general rules). Such agreements are binding on members (article 14 (a) (3) of the general rules). They are also binding on those with recognized or registered status (article 3 (e) of the trade rules).

The trade rules were laid down by the VBBB under article 2 (1) of the general rules; their object is to establish standards and usages governing the book trade in the Netherlands, and to ensure their observance.

(b) *VBVB*

- (4) Until 1971 the VBVB was composed of booksellers, publishers and members of allied trades in the Dutch-speaking part of Belgium. In 1971 it became a federation of incorporated associations of publishers, booksellers, sole distributors of domestic and foreign publishing houses and members of allied trades. Its present members are the Vereniging van Uitgevers van Nederlandstalige Boeken (Association of Publishers of Dutch-language Books), the Algemene Vlaamse Boekverkopersbond (General Flemish Booksellers' Association) and the Bond van Alleenverkopers van Nederlandstalige Boeken (Association of Sole Distributors of Dutch-language Books).

The object of the VBVB is to protect the interests of the book trade in the widest sense. It is required in particular :

- (a) to maintain contact with official bodies where the interests of the association or of the trade require it ;
- (b) to maintain contact with similar associations at home or abroad with a view to the protection of their common interests and, where appropriate, to conclude agreements for this purpose with such associations, or itself to become a member ;
- (c) to promote the settlement of disputes within the trade by arbitration ;
- (d) to promote the conclusion of binding agreements in the book trade and, where efforts at conciliation fail, to ensure that they are respected ;
- (e) to organize services to the book trade ;
- (f) to establish a body to undertake joint advertising to promote books, reading and the book trade ;

and to engage in such other activities as may appear useful and necessary for the performance of its task (article 2 of the VBVB Statuten (Constitution) in force since 1 January 1971).

- (5) In addition to the VBVB Constitution there also existed, until 1972, the Verkoopreglement voor het Vlaamse Boekbedrijf (Rules on Sales in the Flemish Book Trade — the 'sales rules'); these rules set out the main practices and usages applying in the Flemish book trade and were intended to ensure the smooth operation of the trade. Under article 18 (b) of the sales rules, booksellers, exclusive distributors and wholesalers recognized by the VBVB were to under-

take to stock only Belgian and Dutch books published by publishers recognized as such by the VBVB or the VBBB.

- (6) The year 1975 saw the conclusion of an 'Oveerenkomst tussen de Bonden' ('Agreement between the Associations', i.e. between the member associations of the VBVB); this agreement provided that retail prices⁽¹⁾ fixed by the publisher were to be respected. It did not contain any provision regarding compliance with the agreement between the VBBB and VBVB. The agreement took the place of the former sales rules dating back to 1929 and in its content was not materially different from them.
- (7) In April 1979 the 'Agreement between the Associations' was replaced by a new Reglement Handelsverkeer ('trade rules'). These rules were agreed by the VBVB and the three member associations; they require the member associations to comply with agreements concluded by the VBVB or by the member associations with other organizations at home or abroad.

3. The main clauses of the agreement

- (8) The agreement signed between the VBBB and the VBVB on 21 January 1949 is concerned with the trade in books between Belgium and the Netherlands.
- (9) The main provisions of the agreement as amended on 2 July 1958 are as follows:
- (a) Publishers and booksellers who are active in one of the two countries and are members of the association of that country may on application be admitted as members of the association of the other country, with the same rights and obligations as the publishers and booksellers in the other country who are members of that association.

Membership is not open to persons who, while being members of the association in one country, carry on business as publishers or booksellers in the other country without being recognized as such by the association of that country (article 1).

⁽¹⁾ No distinction is made in this Decision between the expressions 'retail price', 'price to the public' and 'price to individuals' which are used as synonyms in the various rules in question.

- (b) Books may not be sold or offered for sale in Belgium or the Netherlands at a price below the retail price fixed by the Dutch or Belgian publishers, converted at the rate laid down by the Flemish and Dutch associations. Discounts on these prices may be permitted only to booksellers and wholesalers recognized as such by the associations in the two countries.

Books published in one country by publishers not recognized in that country may not be sold, stocked or promoted in any way in the other country.

No-one may be appointed as sole distributor or depository in the other country who in that country presents himself to the public as a publisher, bookseller or importer, either systematically or occasionally, even for a single title, without being recognized as such by the association of that country (article 2).

- (c) Articles 3 and 4 of the agreement specify the rules to be observed by publishers and booksellers, recognized as such in one country, when they carry on business in the other. Publishers and booksellers recognized as such in Belgium who wish to carry on business in the Netherlands must respect the following rules:

- The publisher must fix a single retail price for each format in which each of his titles appears.
- In addition to this retail price, he may also fix a lower price for sales under circumstances specified in the agreement. Such publications must also be obtainable at the lower price through a bookseller. The lower price must never be presented as a reduction on the retail price.
- The publisher may reduce the retail price of one or more of his publications under circumstances specified in the agreement.
- The agreement also states which sales are to be considered sales below the retail price fixed by the publisher.
- Publishers must always clearly indicate that titles mentioned in circulars, prospectuses, catalogues and advertisements can be obtained through booksellers.

- The impression may not be conveyed in any notices intended for the public that books are being sold below the fixed retail price.
 - No-one may be appointed or paid as a door-to-door salesman who is not a door-to-door salesman by occupation.
 - No establishment other than a branch, or outlet considered equivalent to a branch under the Dutch trade rules, may be allowed to take orders for or to sell any of the publications listed in article 3 (a) of the same rules (article 3).
- (d) Publishers and booksellers recognized as such in the Netherlands who wish to carry on business in Belgium must respect the following rules :
- The publisher must fix a single retail price for each of his publications at the time of publication, together with any special prices for whole sets, bonuses and any other benefits which may be offered to the final purchaser.
 - He may reduce these retail prices under the circumstances specified in the agreement.
 - The impression must not be conveyed by any means whatsoever that books are being sold below the fixed retail price.
 - 'Prize books' (given as prizes at school) may be offered to schools and public institutions by booksellers and publishers only during a fixed period and at a fixed discount, which are laid down in the agreement.
 - Where publishers distribute publications for the account of public authorities, societies and associations, they may sell directly to the specified categories of buyers at a reduced price, provided they mention this in their offers and in the notice appearing in the organ of the VBVB.
 - Publishers are required clearly to indicate that publications can be obtained from recognized booksellers.
 - A publisher, sole distributor, wholesaler or bookseller who sells through agents or door-to-door salesmen is responsible for

their observance of the rules of the VBVB (article 4).

4. The distribution and pricing of Dutch-language books in the Netherlands

4.1. Distribution

- (10) Between the end of the 1940s and the mid-1970s, the book trade in the Netherlands grew at the rate of 6 to 7 % per annum. Since then the market for books, especially those of general interest, has been static⁽¹⁾. About 65 000 Dutch-language titles are on sale in the Netherlands. 8 000 to 8 500 new titles and 5 000 reissues are published each year.

The main traders in books in the Netherlands are those recognized by the VBVB as publishers, wholesalers, booksellers, importers or book club operators, or those registered with it as retailers.

- (11) In total, about 1 000 undertakings in the Netherlands are concerned, exclusively or otherwise, with publishing books. Of these, about 500, accounting for about 72 % of all books sales in the Netherlands, are recognized by the VBVB.

Of the recognized publishers, nearly 100 are connected with one or other of the large publishing groups such as De Boer, Combo, Elsevier, ICV, Kluwer and VNU. These groups have a share in the market for general-interest books of 50 %. The other half is accounted for by the remaining independent book-publishers. Despite this concentration, there appear to be good chances for the small independent publishers to hold their ground or even to enter the market as newcomers, especially in small specific market sectors. This is shown *inter alia* by the fact that the number of publishers recognized by VBVB has increased in recent years. Moreover, the concentration does not prevent publishers which are taken over from frequently remaining in existence as companies trading under their own names. Some large publishers have acquired interests in bookshops and book clubs.

⁽¹⁾ According to the Structuuronderzoek Boeken (Books Structural Study), general-interest books represent 66 % of the total, educational books 20 % and scientific and technical books 14 %.

- (12) About 80 % of wholesalers are recognized by the VBBB, and it should be noted that the only wholesaler covering the whole country supplies only to recognized booksellers.

The fastest-growing distribution medium is the book club, of which there are about 10 in the Netherlands.

Their market share grew by 50 % in four years ; in 1979, 24 % of all books were sold through these clubs. The five largest are ECI, NBC (which both have members in Flanders), NLK Boek en Plaat, VCL and Silhouette. The book clubs possess some 25 to 30 shops, where members only can buy at discounts of up to 50 %. Some large publishers have acquired substantial interests in these clubs.

There are about 10 000 sales outlets for books of which about 1 900 are recognized as booksellers by the VBBB. These recognized booksellers sell about 55 % of all general-interest books sold in the Netherlands. Booksellers work on a 30 % gross profit margin. Between 300 and 500 bookshops stock a wide selection.

4.2. Prices

- (13) The trade rules require recognized publishers to fix a single retail price for each title they publish, although certain specified exceptions are provided for (articles 5 and 6). Books may not be sold or offered for sale below this price. Discounts may be given only on supplies to recognized or registered firms, on supplies to firms registered on the commercial register of the Chamber of Commerce exclusively as retailers of specified articles, if the subject-matter of the book is closely related to the articles sold by the retailer, and on supplies of general-interest books, below the price threshold of Fl 35, to retailers and wholesalers on the commercial register (articles 12 and 13).

5. The distribution and pricing of Dutch-language books in Belgium

5.1. Distribution

- (14) In 1977 the total value at consumer prices of book sales in Flanders was roughly 96 million ECU for a Dutch-speaking population of 6

million. Book consumption per head is lower than in the Netherlands. About 25 % of all books sold in the Dutch-speaking part of Belgium and in the bilingual region of Brussels are published by Flemish publishers. The number of titles on sale rises by about 2.5 % per annum. The number of new titles coming out each year is about 5 000, of which about a third are from Flemish publishers and the other two thirds imported from the Netherlands.

Some 140 publishers (about 80 % of the publishers in the Dutch-speaking part of Belgium), including all the large ones, are members of the Association of Publishers of Dutch-language books. Many of the publishers in Flanders have been taken over by Dutch concerns. The surviving Flemish publishing houses are generally small.

- (15) About half of the wholesalers in the Dutch-speaking part of Belgium and in the bilingual region of Brussels belong to the General Flemish Booksellers' Association. There are only 13 book wholesalers operating in the Dutch-speaking part of Belgium. The three largest hold about 80 % of the market, the smaller ones having chiefly regional significance.
- (16) Of the booksellers proper, that is to say, those whose main business is trade in books, some 700 (or about 90 %) are members of the General Flemish Booksellers' Association. There are also about 2 250 newsagents in the Flemish part of the country who also sell books. About 45 % of all book sales are made by the book trade proper.

5.2. Prices

- (17) The trade rules require publishers or sole distributors to fix a single retail price for each of their books, although certain specified exceptions are provided for (articles 3 and 4). Books must not be sold or offered for sale below this price. Discounts on this price may be given only on supplies intended for resale. Where the persons reselling the books are not themselves members, the terms of sale must include the obligation to apply the fixed retail price and to pass on this obligation when reselling to others, right up to the final purchaser stage.

6. The trade in Dutch-language books between the Netherlands and the Dutch-speaking part of Belgium

6.1. Imports of Dutch-language books into the Netherlands

- (18) The precise number of importers in the Netherlands is not known, but of those concentrating exclusively on the import of books there are 10 recognized by the VBBB.

In addition, there are several depositories of foreign publishers in the Netherlands from which the publishers supply the Dutch book trade. The depositories do not import on their own account or at their own risk.

Certain Dutch publishers also import some foreign titles on their own account and at their own risk as sole distributors.

In addition to full-time book importers, there are another 44 or so 'scientific and own-import booksellers' for whom the import of books, mainly scientific works, accounts for an important part of their business. With one exception all of these are recognized.

The market share in the Netherlands of Dutch-language books published abroad is about 7 %.

The value of books imported from Belgium into the Netherlands is growing at the rate of approximately 7 % per year and in 1979 stood at about 18 million ECU. About half are strip cartoons.

6.2. Imports of Dutch-language books into the Dutch-speaking part of Belgium

- (19) Of all books sold in the Dutch-speaking part of Belgium and in the bilingual region of Brussels about 80 % are imported from the Netherlands (value in 1977 : 36 million ECU) and about 5 % from other countries.

Nine of the 10 importers of Dutch-language books established in the Flemish provinces and Brussels are members of the Association of Sole Distributors of Dutch-language Books. About 90 % of books imported from the Netherlands go through importers who hold the sole importing rights for the titles of a Dutch publisher for the Belgian market.

7. The prices of Dutch-language books imported into the Netherlands and the Dutch-speaking part of Belgium

7.1. The prices of books imported into the Netherlands

- (20) For foreign books (see also paragraph 13 above), prices are determined by converting the retail price fixed by the foreign publisher at the exchange rate set periodically by the VBBB on the advice of the Conversion Rates Commission. Since 1978 the authorities have included conversion rates in the Imported Books Prices Order. These rates are a factor in the determination of the maximum prices which may be charged under the Order for imported books other than paperbacks.

An importer may himself determine the price of an imported paperback where he is the sole distributor and allows unsold books to be returned to him. The Imported Books Prices Order requires him not to exceed a set maximum price level.

7.2. The prices of books imported into the Dutch-speaking part of Belgium

- (21) Foreign book prices (see also paragraph 17 above) are determined by converting the retail price fixed by the publisher at the exchange rate set by the Prices Commission of the Ministry of Economic Affairs on the basis of the Ministerial Order of 13 June 1974. This Order makes the set conversion rate a factor in the determination of the maximum price which can be charged.

8. The course of the proceeding in this case, the new proposals made by the parties and proceedings in the national courts

8.1. The course of the proceeding in this case

- (22) On 19 December 1977 and 12 January 1978, respectively, the Commission sent the VBBB and the VBVB a statement of objections, in which it announced its intention of finding that the agreement with which this Decision is concerned was contrary to Article 85 (1) and stated that there was little prospect of its exemption under Article 85 (3). In their written replies to the objections and at the oral hearing the two associations maintained that the agreement was no longer operative and existed only on paper.

- (23) On 8 June 1978, the complaint which Maxis BV, a self-service department store in Muiden, the Netherlands, had previously lodged with the Commission, under Regulation No 17, against the VBBB's trade rules was extended to include the agreement between the VBBB and VBVB. Maxis imports books from Belgium into the Netherlands, so that it has the necessary legitimate interest in the case required by Article 3 (2) (b) of Regulation No 17. In this Decision, however, the Commission has not based itself on the arguments advanced by the complainant.

8.2. *The new proposals made by the parties*

- (24) Following the oral hearing on 15 and 16 March 1978, referred to above, a number of conversations took place between the parties and Commission representatives about the case. In a letter dated 22 September 1978 the Commission was sent the text of a proposed new agreement⁽¹⁾, the most important provisions of which were as follows :

- (a) The two associations would undertake to maintain in their respective countries the fixed retail prices of books supplied from the other country.
- (b) The associations would take steps to ensure that publishers fixed a retail price not only for their own but also for the other country. Differences in VAT rates apart, the price for the other country must not be lower than that for their own.
- (c) The two associations would undertake not to sell in their respective countries books published in the other country at below the fixed retail price applicable in the other country.
- (d) Members of the three Flemish trade associations and persons bound by the trade rules in the Netherlands would be bound, when conducting business in the other country, to observe the provisions of that country's trade rules regarding such matters as special prices and discounts, price increases and the lifting of fixed prices.
- (e) Both associations would ensure that prices were in fact fixed by publishers or importers in the two countries.
- (f) Where books were reimported from the other country, the original fixed retail price would apply and be enforced. The associa-

tions would take steps to ensure that a publisher or dealer who was bound by the national trade rules did in fact impose the final price on the buyer when he re-exported books.

- (25) After further investigation of the case, the Commission informed the two parties by letter on 9 August 1979 that its objections to the agreement in the proposed new form still stood, and invited them to reply to the objections in writing and orally. An oral hearing was held on 18 October 1979.

- (26) The associations then considered proposals for replacing the collective resale price maintenance system for Dutch-language books by less rigid arrangements. On 15 February 1980 they sent the Commission a set of proposals⁽¹⁾ which included the following points :

- (a) Collective resale price maintenance for books would apply only for one year after the book was first published.
- (b) The price referred to under (a) above would cease to apply after one year, unless the publisher individually and freely decided in the case of any book to maintain the fixed price.
- (c) The rules stated under (a) and (b) above would apply to all general-interest books and, where possible, also to school books and technical books, but not to certain exempted categories.
- (d) The fixing of retail prices for the first year would be as under the trade rules ; maintenance of the fixed price at the publisher's option after the first year would be decided in the same way.
- (e) The maintenance of fixed retail prices across the national borders would be possible through an exemption granted by the Commission to the agreement between the VBBB and the VBVB. Affiliates would be under an obligation to observe retail price maintenance on books from the other country under the trade rules ; a similar obligation would be imposed on others by the contractual terms of supply on importation.

- (27) Later, in September/October 1980, a new set of proposals⁽¹⁾ was brought to the Commission's attention. Under these proposals the exclusive dealing arrangements based on a recognition system would be discontinued and all collective

⁽¹⁾ This proposed agreement was never the subject of a notification to the Commission in terms of Council Regulation No 17.

⁽¹⁾ These proposals were never the subject of a notification to the Commission in terms of Regulation No 17.

obligations in the book trade between Belgium and the Netherlands abolished. The proposals can be summarized as follows :

- (28) 1. Terms of supply of Dutch-language general-interest books subject to fixed retail prices in Belgium and the Netherlands :
- (a) Publishers and sole distributors of general books in the Dutch language would be entitled, but not obliged (¹), to fix the price at which any of their books should be sold to the public ; dealers who purchased books with a fixed retail price would be required to impose on booksellers to whom they resold the books an obligation to maintain the fixed retail prices.
 - (b) The fixed retail prices referred to under (a) above could not be lifted until at least two years after the title was first published.
 - (c) Exemptions from the fixed retail prices would be obtainable in certain cases and at certain times (e.g. prices to subscribers or members, for sets or combined offers, credit or book-token sales).
 - (d) The standard terms of supply must be shown in the letter confirming the order and/or the invoice when books subject to a fixed retail price were sold to dealers ; by placing his order the bookseller would accept these terms and undertake to abide by them.
 - (e) Retail price maintenance clauses would be obligatory in contracts for the supply of books from the Netherlands to dealers in Belgium and vice versa, such clauses also being applicable in the event of reimportation into the original country ; similar obligations would be imposed in the case of resale to other dealers.
 - (f) The retail selling price would not apply to book clubs satisfying certain conditions.
2. Agreement between the VBBB and the VBVB :
- (29) Regarding the system for maintenance of the fixed retail prices of Dutch-language books, publishers and sole distributors in both countries would ensure that where books subject to fixed retail prices were exported and resold, they would also be subject to the arrangements governing fixed retail prices in the country to

which they had been exported ; the same system would apply on reimportation.

- (30) On 13 November 1980, the Commission informed the parties involved that it could not grant an exemption regarding the new proposals. The arguments presented by the parties were of such a nature that the Commission could not justify an exemption relating to an obligation to apply fixed prices beyond the frontier of a Member State, even if the prices were set individually.
- (31) After a meeting held on 19 March 1981 between representatives of the parties involved and the Commission, the former were informed by letter dated 27 March 1981 that the Commission maintained its objections to the notified agreement. In the same letter it was confirmed that neither the notified agreement nor the subsequent proposals could benefit from an exemption. The parties had been informed, on different occasions, of the reasons why an exemption could not be granted to an agreement having as its object the application of fixed prices for the sale of goods, in this case books, in trade between Member States. The parties were requested to terminate within one month the application of the notified agreement and to inform the Commission of the measures taken to stop its implementation definitively. The parties did not accede to this request.

8.3. *Proceedings in the national courts*

- (32) (a) Netherlands

The agreement to which this Decision relates was cited in the judgment given by the President of the Amsterdam Arrondissementsrechtbank (District Court) on 26 May 1977 in a dispute between the VBBB and a number of publishers on the one hand, and Maxis BV on the other. The judgment held that books published in the Netherlands which can be shown to have been bought abroad may be sold in the Netherlands at a retail price below that set by the publisher. The essential findings of the judgment were upheld by the Amsterdam Gerechtshof (Regional Court of Appeal), on 28 December 1977. A final appeal judgment was given by the Hoge Raad (High Court) on 18 May 1979, but did not throw any new light on the issues raised in this case.

- (33) (b) Belgium

In a judgment given on 18 June 1979 by the President of the Commercial Court of Brussels in a dispute between the department store chain GB-INNO-BM, plaintiff, and the VBVB and a number of publishers, defendants, the defen-

(¹) For school books and technical books, publishers would be obliged to fix a retail price for each of their titles, but this obligation would not be based on the provisions of the agreement between the VBBB and the VBVB but on the rules which each association had declared applicable to distribution in its own country.

dants were ordered to cease 'making the sale of Dutch-language books conditional upon the obligation on the plaintiff to conform to the price fixed by the supplier for sale to consumers'. The Court also decided that the trade rules were incompatible with Article 85 (1) of the EEC Treaty, and that it had not been demonstrated that there was any great probability that the Commission would make use of its powers under Article 85 (3). An appeal against this judgment is pending.

II

APPLICABILITY OF ARTICLE 85 (1)

- (34) Article 85 (1) of the EEC Treaty prohibits 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 directly or indirectly fix purchase or selling prices or any other trading conditions.

A. AGREEMENTS BETWEEN UNDERTAKINGS

- (35) The agreement between the VBBB and the VBVB which is the subject of this Decision has the formal characteristics of an agreement between associations of undertakings, bringing together publishers, book club operators, importers, sole distributors, wholesalers and booksellers. Their members and other affiliates are undertakings within the meaning of Article 85 (1), as they engage in business.
- (36) Recognized and registered affiliates of the VBBB are, under article 14 of the VBBB general rules and article 3 of its trade rules (see paragraph 3 above), bound by the agreements which the VBBB concludes regarding the book trade with organizations in the Netherlands or abroad. Similarly, members of the member associations of the Flemish VBVB are, under the trade rules concluded between the VBVB and its member associations (see paragraph 7 above), bound by agreements concluded by the VBVB with other organizations at home or abroad.
- (37) The agreement between the VBBB and the VBVB which is the subject of this Decision is an agreement that is binding on the abovementioned members and affiliates of the VBBB and the VBVB as if it were an agreement between

the members or affiliates themselves, and is thus an agreement between undertakings within the meaning of Article 85 (1) ⁽¹⁾.

- (38) The fact that the parties have assured the Commission that the agreement now exists only on paper and that the clauses relating to collective exclusive dealing will in any case be left out of a new version of the agreement does not alter this finding. The agreement is still the subject of the notification referred to in paragraph 1 above and has not been terminated by the parties. The proposals which the parties have brought to the Commission's attention (see paragraphs 28 and 29 above) have not led to the original agreement being terminated and, accordingly, do not affect these proceedings relating to the original agreement.

B. RESTRICTION OF COMPETITION WITHIN THE COMMON MARKET

1. The collective exclusive dealing system

- (39) Article 2 of the agreement provides that discounts on the retail price may be given only to recognized parties. It is also provided that books published in one country by a non-recognized publisher may not be sold, stocked or promoted in the other. Lastly, the article provides that only recognized publishers, booksellers or importers in the other country may be appointed as sole distributors or depositories.
- (40) These provisions have as their **object** the restriction of competition within the common market. They mean that the major part of the trade in books between Belgium and the Netherlands is limited to undertakings recognized by the relevant association in one or both countries. This prevents recognized publishers and booksellers from trading with non-recognized publishers and booksellers in the other country. On the other hand, the purchasing and sales opportunities of undertakings which are not recognized, because they do not meet the requirements for recognition or do not wish to do so, are restricted, in that they may not sell books to recognized parties in the other country, or purchase books from them.

2. Collective resale price maintenance

- (41) The agreement contains a number of provisions designed to prevent books published in one country from being sold in the other country at

⁽¹⁾ See Commission Decision of 25 July 1974 in Case IV/26.602 (Frubo) (OJ No L 237, 29. 8. 1974), upheld by the judgment of the Court of Justice of the European Communities of 15 May 1975 in Case 71/74.

a retail price other than that set by the publisher for the original country. Anyone selling books or offering them for sale must respect the prices fixed by the Dutch or Belgian publisher (converted in accordance with set conversion rates) (article 2). A publisher or bookseller in one country who wishes to conduct business in the other is subject to a series of obligations regarding prices. The most important of these is that the publisher must fix a single retail price for each of his publications.

- (42) The collective resale price maintenance scheme across national frontiers has as its **object and its effect** the restriction of competition within the common market. It prevents efforts at price competition for a single title between booksellers in the two countries. This means that booksellers are prevented from increasing their market shares through their own independent competitive efforts, by selling books at below the prices fixed by their publishers and by passing on the benefits of the rationalization to consumers. The scheme also restricts the freedom of action of publishers and importers. They are prevented from promoting in one country the sale of books published in the other by making temporary or permanent reductions in the price, and from passing on the benefits of any cuts in costs to consumers in the former country.

3. Appreciable effect

- (43) The system of collective exclusive dealing and collective resale price maintenance set up by the agreement appreciably restricts competition. Most of the undertakings active in the book trade in Flanders and the Netherlands (publishers, book club operators, importers, sole distributors, wholesalers and booksellers) are recognized by or affiliated to the two associations. The provisions of the agreement are binding on them. Sanctions are provided for in cases of infringement. It is therefore very difficult for a non-recognized or non-affiliated undertaking to purchase or sell books in Belgium or the Netherlands. In the case of publishers, it should be borne in mind that in the Netherlands recognized publishers hold a total market share of more than 70 % and that in Flanders 80 % of all publishers are affiliated to the VBVB. It can be deduced that in all probability a very large proportion of the books imported from the

Netherlands into Flanders or from Flanders into the Netherlands originate with recognized or affiliated publishers, and are therefore subject to the rules of collective exclusive dealing and collective resale price maintenance which the agreement lays down. Booksellers are therefore prevented from engaging in price competition with other dealers in respect of a large share of the books which they sell.

C. EFFECT ON TRADE BETWEEN MEMBER STATES

- (44) The agreement governs trade in books between **Belgium and the Netherlands. It lays down rules for this trade which remove the freedom of publishers and distributors of Dutch-language books in one country, independently to determine their purchasing and sales channels in the other country, and the terms on which they will purchase or sell. The agreement is therefore such as to influence the freedom of trade between Member States in such a way that free competition between booksellers is no longer possible, and thus may affect trade between Member States.**
- (45) **The Treaty between the Kingdom of Belgium and the Kingdom of the Netherlands on the Dutch-language Union signed on 9 September 1980 but not yet ratified, which seeks to promote integration between the Netherlands and the Dutch-speaking community in Belgium in the fields of language and literature and to some extent covers the publishing and distribution of books, cannot diminish the applicability of Article 85 (1) where there is an effect on trade between Member States, in this case Belgium and the Netherlands.**
- (46) This effect on trade is appreciable. There is a very substantial trade flow in books between the Netherlands and Belgium. About 80 % of books sold in Flanders originate in the Netherlands, representing in 1977 some 36 million ECU. The market share in the Netherlands of books published in Flanders is admittedly much smaller but nevertheless represented in 1979 a value of 18 million ECU. As mentioned above (paragraph 43), a very large proportion of the books imported have in all probability been published by recognized or affiliated publishers. A very large proportion of the trade in books between the two countries is therefore governed by the agreement.

III

APPLICABILITY OF ARTICLE 85 (3)

(47) Pursuant to Article 85 (3), the provisions of Article 85 (1) of the EEC Treaty may be declared inapplicable in the case of any agreement between undertakings 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:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(48) In regard to the collective exclusive dealing system, it should be pointed out that the parties advanced no arguments for the exemption of this part of the agreement in question in their written observations or in their oral elucidations. Moreover, the parties stated that this clause would not appear in a new agreement. In this connection the Commission considers that the collective exclusive dealing system makes no contribution to the improvement of the production or distribution of the products concerned, namely books, in view of the fact that that clause has the object and effect of establishing a system of market protection for the benefit of the publishers and traders connected with the associations in question, whereby undertakings in the book trade in the one country who are not recognized or registered are restricted in their scope for purchases and sales in the other country, and the free development of other distribution channels and sales methods is limited or hindered.

In regard to the collective resale price maintenance system in trade in Dutch-language books between the Netherlands and Belgium, the Commission believes that it would be useful to look more closely at the parties' arguments in relation to all the conditions of Article 85 (3), although it is, in principle, unnecessary to consider whether an agreement satisfies all the conditions of Article 85 (3) when it has already

been found to fail one of those conditions. The Commission's counter-arguments reflect its position on this part of the agreement which is the subject of this Decision.

The Commission also wishes to point out that this Decision discusses certain aspects of collective resale price maintenance in general, since the assessment of the agreement for the fixing of prices of books in inter-State trade cannot be separated from that subject.

A. CONTRIBUTION TO IMPROVING THE PRODUCTION OR DISTRIBUTION OF GOODS

(49) The system of collective resale price maintenance which the agreement establishes for trade in books between Belgium and the Netherlands does not contribute to improving the production of the goods concerned, namely Dutch-language books, or to improving the distribution of such books.

(50) The parties have claimed that the collective resale price maintenance scheme established by the agreement contributes to improving the production and distribution of the goods concerned, since the fixed price for Dutch-language books, even beyond national borders, allows subsidization of less popular books by fast-selling books and thus enables publishers to place a wide range of titles on the market. According to the parties, the fixed price represents a certain security for publishers when they decide to publish a book and such security is necessary if a wide range of titles is to be maintained. With a fixed price, the publisher is sure that the organized book trade will be prepared to stock and promote the sale of less-popular books. The fixed price also makes it possible for smaller publishers, who are often engaged in the publishing of commercially not very attractive books, to hold their own. On the distribution side, the fixed price means that the bookseller can stock a large and varied range of titles in his shop by subsidizing the costs on slow-moving titles from the profit on fast-moving ones. This profit enables him to offer ancillary services to the public and to place orders for individual customers.

(51) The parties' argument is based on the existence of a link between the principle of cross-subsidization as practised both by the producer,

i.e. publisher, and the distributor, i.e. bookseller, and the system of collective resale price maintenance. The Commission cannot accept this argument, because cross-subsidization, assuming it is a valid economic or commercial consideration in this case, is not necessarily dependent on a system of collective resale price maintenance.

A publisher's decision to offset to some extent the costs of titles that are not very attractive commercially against the profits made on those printed in large number is, in general, an individual, independent decision by each publisher when he sets his selling prices to the trade. For the publisher to be able to pursue his chosen policy there is no need for a system under which the resale price of every book is set by the publisher right down to the final stage of distribution, i.e. sale to the customer, and has to be applied by all recognized, registered or affiliated distributors in the other country. It should be sufficient for publishers to bring out a number of popular books of which they can sell the whole printing so that the relatively high earnings which result enable them to publish less-commercial titles. It cannot be accepted that this necessarily involves resale price maintenance, especially as in practice the publishers of general-interest books generally do not engage in publishing short-run books such as specialized books or the less popular literary works. Nor can the Commission subscribe to the parties' argument in this connection with regard to booksellers. In spite of the resale price maintenance scheme there has clearly already been a sharp drop in the number of general booksellers in the Netherlands, partly due to the rise of self-service shops selling almost exclusively popular books and magazines and the fairly substantial growth in the turnover of book clubs, which generally offer a fairly limited range of books.

- (52) In determining whether particular restrictions of competition may be exempted from the ban on restrictive practices under Article 85 (3), all that matters is whether the restrictions objectively achieve improvements over the situation which would exist without them. That the cross-border system of collective resale price maintenance may have advantages for certain market operators is not therefore a decisive aspect. It would have to be shown that individual decisions to allow commercially unattractive titles to depend on the publication and sale of books that sell well were not possible or could not reasonably be expected in the prevailing industrial and commercial context. It would also have to be

demonstrated convincingly that the continued existence of smaller specialized publishers would be in serious danger under a system of free trade and free price determination. No evidence of this has yet been supplied.

- (53) In any event the Commission considers that any objective advantages which might derive from the agreement are outweighed by its disadvantages from the viewpoint of competition. The Commission would maintain that the agreement to which this Decision relates has an adverse rather than a favourable effect on the distribution of books, because the system of collective resale price maintenance eliminates any price competition in the distribution of a given title. This is particularly damaging since, in the absence of significant competition between different titles, competition on the price of individual titles within the distributive trade is an important means of rationalizing and improving the distribution system.

B. FAIR SHARE OF BENEFIT FOR CONSUMERS

- (54) The parties have claimed that the consumer receives a fair share of the benefits for the production and distribution of books resulting from the system of resale price maintenance in the trade in Dutch-language books between Belgium and the Netherlands. As far as the production or publishing of books is concerned, they have maintained that a broader range of titles is available than would be the case without resale price maintenance. In view, among other things, of the fact that many publishers do not publish both general-interest and less-popular books, but restrict themselves to the one or other type, this condition is not considered to be satisfied. Nor can the argument go unchallenged that booksellers would be unable or unwilling to provide ancillary services such as providing full information to customers and passing on individual orders unless there is a system of resale price maintenance. As long as they are able to earn a fair return for the services they provide there is no reason why booksellers should not be able to carry on a normal business without resale price maintenance. Moreover, this system denies the consumer the opportunity of deciding for himself whether to buy books at a price that includes a service charge or to take his custom to a bookseller who does not provide any services and from whom he can buy books more cheaply. The consumer

pays the same price for a Dutch-language book published in the other country regardless of his preferences as to additional services; and he is obliged to pay the service charge even if he does not wish to use the service, as is apparently often the case.

- (55) Secondly, it must be pointed out that even if a wide range of titles and the availability of services are to be regarded as benefiting the consumer, the consumer generally cannot benefit from the advantages of any rationalization that takes place in the book trade. Booksellers are not allowed to grant discounts to good customers. Since the price of the product is, for many consumers, an important element in their decision to purchase — and this applies to books as much as to other products — the Commission considers that the consumer is not receiving a fair share of any benefits resulting from the agreement to which this Decision relates.

- (56) A further result of the system of collective resale price maintenance for Dutch-language books is that the main group of consumers, which tends to favour the more popular books, is forced to contribute to the cost of publishing short-run titles, which are generally intended for a smaller part of the population. In assessing the relative advantages and disadvantages of any agreement such as that concerned in this case, it cannot be accepted that the advantages it involves for a small minority of the population outweigh the disadvantages for the majority of consumers.

C. INDISPENSABLE NATURE OF THE RESTRICTIONS IMPOSED BY THE AGREEMENT

- (57) As regards the third condition of Article 85 (3), the parties have alleged that resale price maintenance in trade in Dutch-language books between the Netherlands and Belgium is indispensable if the production and distribution of books are to be improved. In the absence of the system, specialist booksellers would lose the major part of their sales of best-sellers to cash-and-carry stores, and as a result would no longer be able to defray the cost of stocking slower-selling titles and of providing ancillary services to the consumer out of profits from best-sellers. They would therefore have to make drastic cuts in the number of slow-selling titles they stocked. Publishers would thus no longer have the assurance that they could sell these titles through booksellers. They would be less prepared to publish limited-interest works. This

would lead to the disappearance of the smaller specialized publishers.

- (58) The Commission believes that in order to achieve an improvement in the production and distribution of Dutch-language books by specialist booksellers a collective resale price maintenance scheme entailing the imposition of restrictions on competition in trade between Belgium and the Netherlands such as are contained in the agreement that is the subject of this Decision, is not indispensable. If there has been a deterioration in the production or distribution of Dutch-language books in recent years, this phenomenon does not necessarily have anything to do with the question of whether or not a system of cross-frontier resale price maintenance was in operation, but may just as well be attributable to the general worsening of the economic climate. The Commission believes that the parties could use less restrictive means to improve the publication and distribution of Dutch-language books.

- (59) Again, the Commission recognizes the important role which books play as a cultural medium, among others such as the theatre, music, the cinema and painting. It agrees with the parties that a situation must not be allowed to develop in which works of cultural value can no longer be published, but resale price maintenance for all categories of books in trade between Member States is not necessary for this purpose. It must be possible to find other ways of achieving this which do not affect the position of books as a cultural medium but which are more in line with the competition rules of the EEC Treaty.

- (60) In an attempt to show why it is essential that the resale price maintenance scheme operated by Dutch publishers should also extend to Flanders, even though the improvements in distribution, which the VBBB's rules are alleged to achieve, affect only the territory of the Netherlands, and that the converse situation should apply in the Netherlands as regards the VBVB's rules, the parties have advanced the further argument that because of their cultural unity the Netherlands and Flanders form a single market for Dutch-language books. In order to maintain the unity of the market and to make possible the development of Dutch-language culture, prices fixed by the publisher must be respected not only in each of the two territories but also in trade between them. Without such a system the cultural unity of the Dutch-language area would be endangered.

In the Commission's view, however, the termination of resale price maintenance in trade between Belgium and the Netherlands will not endanger the cultural unity of the Dutch-language area. Apart from the fact that Dutch-language books form only one element in this cultural unity, the agreement which is the subject of this Decision is only one of the ways in which cultural unity with regard to Dutch-language books manifests itself. The emphasis should rather be placed on forms of cooperation which, while safeguarding the freedom of expression of authors, would act to the advantage of all categories of readers, and which would leave the greatest possible measure of freedom to firms involved in the organization of the distribution of books.

The Commission also takes the view that it is not for undertakings or associations of undertakings to conclude agreements on cultural questions, which are principally a matter for government (although the Commission recognizes that undertakings can also play a valuable part in the dissemination of culture. The Commission is sure that the Member States concerned would not hesitate to take action to protect certain cultural interests should this be necessary. It would refer in this connection to the Treaty on the Dutch-language Union concluded between the Kingdom of Belgium and the Kingdom of the Netherlands, which seeks to bring about integration in the field of Dutch language and literature in the widest sense and also makes provision for measures in the field of the publishing and dissemination of books.

D. ELIMINATION OF COMPETITION IN RESPECT OF A SUBSTANTIAL PART OF THE PRODUCTS IN QUESTION

- (61) Lastly, the parties have claimed that collective resale price maintenance in trade in Dutch-language books between Belgium and the Netherlands does not eliminate competition in respect of a substantial part of the products in question. There is a group of non-recognized publishers who do not take part in the collective system. Recognized publishers compete with one another within individual categories of books. And booksellers compete with one another in the areas of stocking, specialization, service offered and ordering facilities.

- (62) Even if booksellers can indeed compete on the prices of books published by non-recognized publishers, the fact is that these publishers' share of total sales of books is small in comparison with that of the recognized publishers. By far the largest proportion of books published in one country and sold in the other is governed by the system of collective resale price maintenance. Booksellers cannot compete on prices for any of these titles. The other forms of competition — stocking, specialization, service offered and ordering facilities — must be regarded as secondary to price competition, certainly from the point of view of the consumer who is often not particularly interested in highly specialized books. Among booksellers, then, competition is eliminated in respect of a substantial part of the products in question.

This conclusion is in no way affected by the fact that a degree of price competition does exist between publishers. Competition of this kind is in any case limited to a small number of titles or series. As a rule most books are completely original works, written by an author following his inspiration at the time of writing. They cannot be compared with one another. In a number of cases, certainly, it is not the author's subjective creativity which is the principal feature, but rather the objective information which the book is intended to convey. Books covering the same ground can therefore to some extent be regarded as substitutes, and may thus constitute a single market. But these works account for only a limited share of the total number of books on the market.

- (63) As the four conditions of Article 85 (3) are not satisfied, the agreement notified cannot be exempted from the prohibition in Article 85 (1).

IV

APPLICABILITY OF ARTICLE 3 OF REGULATION No 17

- (64) Article 3 (1) of Regulation No 17 states that where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 of the EEC Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

As has been explained above, the notified agreement between the VBBB and the VBVB infringes Article 85. The associations of undertakings concerned must therefore be required to bring the infringement to an end forthwith and to do so in a formal manner.

- (65) To ensure that it is clear to all firms operating in the book trade that the restrictions on competition in trade in Dutch-language books between Belgium and the Netherlands laid down in the agreement between the VBBB and the VBVB have in fact been brought to an end, the associations of undertakings concerned must be required to inform their members and affiliates and other parties recognized by or registered with them, in writing, of the ending of the said restrictions, setting out the practical effects which this will have on the terms under which trade in books is carried on between Belgium and the Netherlands. A proposal for a notice to this effect should be submitted to the Commission within four months of receipt of this Decision,

HAS ADOPTED THIS DECISION :

Article 1

The agreement between the Vereeniging ter Bevordering van de Belangen des Boekhandels and the Vereeniging ter Bevordering van het Vlaamsche Boekwezen, concluded on 21 January 1949 and amended on 2 July 1958, making provision for collective exclusive dealing and collective resale price maintenance in trade in books between Belgium and the Netherlands, infringes Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The application for exemption of the agreement under Article 85 (3) of the Treaty establishing the European Economic Community is dismissed.

Article 3

The associations of undertakings referred to in Article 5 shall bring the infringement referred to in Article 1 to an end forthwith.

Article 4

The associations of undertakings referred to in Article 5 shall inform their members and affiliates and other parties recognized by or registered with them, in writing, of this Decision and of the fact that the restrictions on competition laid down in the agreement referred to in Article 1 have been brought to an end, stating the practical effects that this will have on the terms under which trade in books is carried on between Belgium and the Netherlands. They shall submit a proposal for a notice to this effect to the Commission within four months of receipt of this Decision.

Article 5

This Decision is addressed to the following associations of undertakings :

1. Vereeniging ter Bevordering van de Belangen des Boekhandels,
Postbus 5475,
NL-1007 AL Amsterdam ;
2. Vereeniging ter Bevordering van het Vlaamsche Boekwezen,
Frankrijklei 93, bus 3,
B-2000 Antwerpen.

Done at Brussels, 25 November 1981.

For the Commission

Frans ANDRIESEN

Member of the Commission