

Compatibility of FBP Systems With European Law

Workshop on the Economics of
Fixed Book Price (FBP) Systems

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Overview

A. Introduction

- Key messages of the ECJ judgment of 19 Oct. 2016 (Case C-148/15) relating to fixed prices for prescription drugs in Germany; possible consequences for FBP systems.
- Special Report No. 80 of the German Monopolies Commission („Die Buchpreisbindung in einem sich ändernden Marktumfeld“/“Fixed Book Prices in a Changing Market Setting“).

B. Key Issues and Theses

I. Compatibility of Statutory FBP Systems with the Principle of Free Movement of Goods (Art. 34 TFEU)

1. No impediment to market access for foreign mail order/online book trade
2. Justification of a (hypothetical) impediment on the grounds that the protection of books as essential cultural goods is an overriding requirement in the public interest

II. Compatibility of Statutory FBP Systems with European Competition Law

1. No direct applicability of Art. 101 TFEU to state actions
2. No violation of the loyalty obligation of member states to the Union by rendering ineffective the European competition rules (Art. 4 par. 3 TEU in conjunction with Art.101 TFEU).

Key Issues and Theses (1)

I. Compatibility of Statutory FBP Systems with the Principle of Free Movement of Goods (Art. 34 TFEU)

1. No impediment to market access for foreign mail-order business in the book sector
 - The conclusions of the ECJ in the prescription medicines case cannot be transferred to the book market. Whether fixed price systems have a potentially negative effect on market entry for mail-order business from other EU member states must be evaluated under the special conditions of the markets concerned.
 - In the book market the exclusion of price competition on the retail level does not affect the online book trade to a greater extent than stationary bookstores.

Key Issues and Theses (2)

- Unlike online pharmacies which are (in the same way as stationary drugstores) subject to heavy regulatory burdens, in particular a ban on advertising with regard to prescription medicines, online booksellers from other EU member states have plenty competition measures other than price in order to gain not only a foothold on the German book market, but even a strong position and to remain competitive.
- This is demonstrated, e.g., by a steady increase in the market share of the mail-order book trade over the years, e.g. from 17.9 percent in 2017 to 20.7 percent in 2018 (half of which is attributable to the online retailer Amazon which has become the largest retail bookseller in Germany).
 - By contrast, the market share of mail-order pharmacies is at 1.3 percent in the German market of prescription pharmaceuticals.

Key Issues and Theses (3)

2. Justification of a (hypothetical) impediment to the free movement of goods
 - In the case law of the ECJ the protection of books as essential cultural goods is generally recognized as an overriding requirement in the public interest which can justify restrictions to the free movement of goods – provided that the measures meet the condition of proportionality, i.e., are suitable and necessary to promote this target objective.
 - In the prescription drug case the Court increased the demands relating to proving the suitability and necessity of measures. General considerations will not suffice, objective evidence, e.g., statistical data or similar well-founded proof, is required.
 - However, the demands may not be excessive: the yardstick ought to be an objective, scientifically justifiable demonstration that the prospective positive effects of the measure in question, or the likely negative effects of its abolishment, will occur with a sufficient probability.

Key Issues and Theses (4)

- Recent research studies (e.g. by Götz et al.) demonstrate that the German system of FBPs does in fact have a positive impact to the distribution of books and the enhancement of cultural diversity.
- Moreover, there is no less restrictive alternative to the FPB system. At best, similar incentives might be provided by widespread and comprehensive state subsidies to publishers and bookstores. However, this would not only be entail tremendous costs to be borne by the tax payers, it would also raise serious questions in terms of constitutional law, regulatory and competition policy.

Key Issues and Theses (5)

II. Compatibility of Statutory FBP Systems with European Competition Law

1. No direct applicability of Art. 101 TFEU to state actions

- Art. 101 TFEU is applicable only to undertakings. The German system of FBPs is directly implemented by legislative order without regard to an agreement or concerted practice between undertakings. Publishers are obligated by law to set a price for the sale of books to end-users, booksellers must adhere to said price.

Key Issues and Theses (6)

2. No adverse impact on the practical effectiveness of EU competition law (Art. 4 par. 3 TEU in conjunction with Art.101 TFEU)
 - In its jurisprudence on the so-called “*effet utile*” doctrine the ECJ has developed four case groups in which it has recognized a violation of the loyalty obligation of member states, i.e. if the member state:
 - (1) prescribes the conclusion of anticompetitive agreements by undertakings,
 - (2) alleviates such behavior,
 - (3) enhances the effects such agreements, or
 - (4) delegates the competence to take interfering measures in the market to private undertakings.
 - In each of the case groups the Court demands a relation to an anti-competitive behavior of undertakings. Statutory FBP systems such as the one in Germany (but also, e.g., in Austria and France) do not meet this requirement.

Key Issues and Theses (7)

- From a pure competition point of view the approach of the ECJ leaves large loopholes for market intervention by the member states. So far, however, the Court has shown no willingness to extend its “*effet utile*” doctrine in order to include, e.g., state measures which make obsolete but have the same effect as anticompetitive agreements between undertakings.
- Therefore, such an extension does not seem likely; it is also very doubtful whether it could be regarded as an admissible development of the law by judicial decisions. Rather, an explicit amendment to Art. 106 par. 1 TFEU would be necessary.
- Even if the ECJ extended its jurisprudence in the future, the system of FBP would not constitute a breach of competition rules, since the criteria of the legal exemption according to Art. 101 par. 3 TFEU appear to be met, at least if interpreted in the light of the cultural competences of the member states (Art. 167 par. 4 TFEU).

Key Issues and Theses (8)

- The positive effects the statutory FBP system has on the market and consumers would offset any adverse effects caused by an elimination of “product-internal” price competition at the retail level. FBP contributes to an overriding number of efficiencies, including the following:
 - the preservation of a comprehensive network of stationary bookstores,
 - increases in the demand for and sale of books,
 - an improved service level,
 - lower average prices of books,
 - reductions in transaction costs, and
 - better market access for small publishers and unknown authors.
- Customers will also benefit to an appropriate extent from these efficiencies which cannot be achieved with less restrictive means.

Key Issues and Theses (9)

- Competition is not entirely eliminated; rather, there continues to be an intense competition between publishers as well as between book-sellers, for example with regard to services (customer service, product range design, product presentation, live author readings, ordering processes and delivery services).
- Moreover, in view of the variety and great number of publishers and the substitutability of most book titles there is also no risk of a „producers cartel“ which might set excessively high prices.

Key Issues and Theses (10)

- In any case, if the ECJ were prepared to extend its “*effet utile*” doctrine and thereby to constrain the freedom of the member states with regard to choosing their own economic policy, the member states would have to be granted an opportunity to justify certain state measures restricting competition on the grounds of overriding requirements of public interest just as they are under the principles relating to the free movement of goods.
- In the end, possible negative effects of a statutory FBP system, not already covered by the exemption of Art. 101 par. 3 TFEU, could be justified by the necessity of protecting books as cultural goods, as long as the principle of proportionality is observed.

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