

POLICY ROUNDTABLES

Resale Price Maintenance

1997

Introduction

The OECD Competition Committee debated the use of resale price maintenance for publications and cultural products in February 1997. This document includes an executive summary, an analytical note by Mr. Gary Hewitt of the OECD and written submissions from Australia, Canada, Finland, the European Commission, France, Germany, Hungary, Ireland, Italy, Japan, Korea, Norway, Sweden, the United States and BIAC, as well as an aide-memoire of the discussion.

Overview

Resale price maintenance (RPM) specifies the final price that retailers charge consumers. This roundtable focused on the use of RPM for books, newspapers and similar cultural products.

RPM, like other vertical restraints, may help resolve problems of co-ordination between upstream and downstream firms and thus may increase their combined profits. Issues in the economics of RPM include eliminating double mark-ups and preventing free-riding and “cream skimming”, while guarding against horizontal collusion and prevention of entry.

In the legal treatment of RPM for books and cultural products, views of competition authorities and cultural authorities may conflict. At the time of this roundtable (1997), RPM was generally prohibited in almost all OECD countries, but in many an exemption permitted some form of RPM for books, newspapers and some cultural products (and in some, for medicaments). And some countries have a procedure for authorising RPM case by case.

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RESALE PRICE MAINTENANCE

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Resale Price Maintenance which was held by the Committee on Competition Law and Policy in February 1997.

It is published as a general distribution document under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series names "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les prix de revente imposés qui s'est tenue en février 1997 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Il est mis en diffusion générale sous la responsabilité du Secrétaire général de l'OCDE afin de porter à la connaissance d'un large public, les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "les tables rondes sur la politique de la concurrence".

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BACKGROUND NOTE

Introduction

The purpose of this note is to give some background information focusing on the arguments for and against the practice of allowing resale price maintenance (RPM) for books, newspapers and similar cultural products. (RPM specifies the final price that retailers charges consumers. Variants of this restriction include specifying only a price ceiling or a price floor. Practices that encourage the maintenance of resale prices but that do permit price competition, e.g., non-binding "recommendations" for a retail price or a price floor, and recommended prices advertised by the upstream firm, are generally not considered to be RPM.)

Economic Arguments[1]

RPM, like other types of vertical restraints, may help solve problems of co-ordination between upstream and downstream firms and increase the combined profits available to those firms.[2] Co-ordination problems may exist, for example, over pricing and the provision of retail services. In the case of prices, if both the upstream[3] and downstream[4] firm have market power and do not co-ordinate their pricing, there is the possibility that each firm's pricing decision will result in a final price that is "too high", i.e., higher than the profit maximising price for the vertical chain as a whole.[5] In the case of services,[6] there is the possibility that each downstream firm's decisions about the provision of services will be sub-optimal for the vertical chain as a whole.[7] These arguments are developed in more detail below.

Eliminating double mark-up problems

When both the upstream and downstream firms have discretion over price - that is when both have some horizontal market power - their pricing decisions provide an example of how a vertical externality can harm both profits and social efficiency. The problem arises when both the upstream and downstream firms independently set simple uniform prices: the upstream firm chooses the wholesale price and the downstream firm chooses the retail price.

Each firm chooses a price higher than marginal cost in order to maximise its own profit. The size of each mark-up, and thus of the overall "double mark-up", depends on the elasticity of demand faced by each firm, which in turn depends on the extent of interbrand and intrabrand competition. This "double mark-up" results in a retail price set above the level that would maximise the aggregate profits of the upstream and downstream firms together. This happens because each firm's decisions generates a vertical externality, affecting the profits of the other firm as well as its own profits, but each firm ignores this "spillover". The downstream firm makes any increase in the retail prices that increases his own profits, ignoring the fact that those increases, because they decrease the quantity sold to consumers, also decrease the upstream firm's profits (by an amount roughly equal to the reduction in wholesale volume multiplied by the wholesale mark-up). The retailer marks up the wholesale price considering only the effect on his own profit, and not on the upstream firm's.

This uncoordinated exercise of market power at both the wholesale and retail levels reduces both the profits of the firms and economic efficiency. The upstream and downstream firms can increase aggregate profits by adopting contract provisions that eliminate the vertical externality and lower the retail price. Since correcting the externality leads to lower retail prices, it also benefits consumers and thus improve economic efficiency; this effect can be summarised as "there is nothing worse than a monopoly, except a chain of monopolies". Vertical restraints that only prevent double mark-ups have no effect on the extent of underlying market power, but they do benefit both consumers and firms by reducing both the private and social inefficiency of price-setting.

The conditions that can generate double price mark-up problems may exist in the distribution of books, newspapers and other intellectual property with unique and legally protected editorial content.

The most direct way to eliminate the double mark-up is to use RPM to set a retail price ceiling. Only a price ceiling is needed to solve this problem; a retail price floor does nothing to avoid a double mark-up problem and setting a definite price is more restrictive than is necessary to solve the problem.

Preventing free-riding

Retailers of books and newspapers can provide a variety of services that affect the sale of their products, including sales efforts, such as the provision of information and advice, which can increase demand. Such retail services, though, can generate horizontal externalities among retailers[8]. In such a case, the individual retailer realises less than the full effect on aggregate profits of additional retail services and therefore provides a less than optimal level of service.

The most quoted analyses of this problem refer to the possibility for a retailer to "free ride" on services provided by other retailers. A well-known example arises when retailers provide pre-sale information, such as advice, to consumers who then go and buy from other retailers. Advertising provides another example; consumers can be informed by the advertising of one retailer and purchase from another. Since the retailer who provides the services must charge a higher price to cover his costs, consumers have an incentive to visit the first retailer and then buy from another who gives less service but has lower prices.

Such horizontal externalities give rise to public goods problems in the sense that any one retailer's efforts benefits all or many other retailers; each retailer would like to see the services provided but each also would rather have someone else provide it. In short, the retailers (or consumers) may have incentives to free ride on some retail services provided by other retailers, which may lead to insufficient levels of these services.

Several types of free riding come to mind in the markets under consideration here. One concerns incentives for advertising and promotion of particular titles or authors. One can readily imagine the possibility that discount retailers could free ride on advertising of new titles by full-price retailers. Query, though, whether such free riding could not be remedied by advertising by the upstream firm, the publisher, without resort to RPM.

Another type of free riding is on the provision of advice to potential purchasers, such as advice on the merits of various authors or of the various works by a particular author or of additional titles which might be of interest to the particular reader. Consumers would be free to absorb the knowledge and time of the sales staff and then purchase from a low-service discount seller.

A third type of free riding would be on the "browsing" opportunity provided by the store itself. The recent creation of on-line bookstores selling at discounted prices permits a consumer to browse in a local book shop and then order his or her choices at discount prices on-line.

"Cream skimming"

A separate concern is that discounting, if permitted, would result in the creation of retailers specialised in popular titles sold at a discount. This, it is feared, would make "full line" retailers less profitable and tend to disappear. Thus, RPM could be seen as a cure for "cream skimming".

This argument seems to be belied by the experience in some countries where discounting of books is permitted. In the United States, for example, the development of national chains of moderately-sized stores advertising discounted best-sellers was followed by the development of national chains of large-scale book shops with extensive selection and customer services. In such large-scale shops, discounted best-sellers are used to draw consumers in, much like the use of loss-leaders in supermarkets, in the hope of additional sales of full-price books. In Sweden, which since 1970 has abolished RPM for books, it would seem that the pessimistic predictions of publishers and retailers about the detrimental effects of allowing price competition have not been realised. The United Kingdom's experience leading to the collapse of the Net Book Agreement in 1995 may also undercut the argument in favour of RPM although the expected generally lower prices have not materialised; there has not been a significant increase in the number of bankruptcies of booksellers.

The development of new distribution channels such as the on-line sellers mentioned above raise the possibility that all titles, even the most obscure, can be readily available to consumers without being carried in the local book shop. From this viewpoint, RPM, while it might be an aid to the preservation of particular merchants, could impede the development of new and more efficient distribution systems. Here, dealer-induced RPM could be seen as an attempt to prevent the emergence of new forms of competition.

Collusive effects

RPM could in several ways serve to restrain competition among booksellers and among publishers. Arguments relating to their welfare-reducing potential focus on the fact that RPM may facilitate collusive or cartel behaviour and reduce downstream competition.

It is possible for RPM to promote or maintain horizontal collusion at either the upstream (publisher, importer, distributor) or downstream (retail) level. One argument is that RPM can help to sustain high prices by making it easier for upstream firms such as publishers to monitor cheating on a cartel agreement, which in turn reduces the incentives to cheat.[9] First, RPM would eliminate the incentive of publishers to use secret wholesale price cuts to try to cheat on a cartel agreement without being detected; such price cuts would not increase profits because they could not be passed on without also transparently lowering the controlled resale price. Second, RPM reduces uncertainty about the source of observed changes in retail prices by making it more likely that the change is due to the publisher cheating on a collusive agreement. Moreover, if RPM is widespread in the industry, it may also promote tacit collusion among the upstream firms.

RPM may also be instigated by retailers as a way of implementing a cartel downstream. Thus, book stores which could otherwise compete on price, e.g., through discounting off a recommended price,

may seek to have the resale price fixed by the publisher or importer, eliminating the possibility of price competition at the retail level.

Effects on entry

RPM may also have effects on entry in the longer term. For example, if RPM is used to solve problems of co-ordination between the upstream and downstream levels as mentioned earlier in this note, it should serve to increase aggregate profits to the publisher and its retailers, making entry at either or both levels more attractive. Likewise, if some of the increased profits were shared with authors, one could anticipate increased output (e.g., more manuscripts being submitted) on that level as well. But, as mentioned above, a need to solve problems of double mark-up justifies at most setting a price ceiling, not a fixed or minimum price. RPM which solves the problem of free-riding on services could also lead to greater demand for books, and hence promote entry in the longer term. But, as also mentioned above, this effect must be considered against the potential of RPM to block entry by new forms of distribution.

The legal treatment of resale price maintenance[10]

RPM is generally prohibited in almost all OECD countries, subject to a few exemptions, mostly for books, newspapers and medicaments. Some countries though do have a procedure for authorising the practice if the beneficial effects can be shown to outweigh the detrimental ones. The key argument frequently advanced for general prohibition with the possibility of exemption rather than the case-by-case approach usually applied to non-price vertical restraints is that it minimises enforcement and compliance costs.[11]

Where a recommended price is clearly stated to be non-binding and no attempt is made by the manufacturer or retailer to consider it as a minimum price, it would seem to be allowed in most countries. On the other hand, if the recommended prices are generally taken as fixed and therefore a mere substitute for resale price maintenance, they are condemned in some countries.[12]

Possible questions for discussion

The following are some questions that Delegates may wish to consider:

- If RPM has been allowed for books and other cultural goods, what have been the decisive arguments for allowing it?

- If books etc. have not been granted an exemption, what have been the arguments against allowing it?

- What led to the collapse of the Net Book Agreement in the UK and what have been the effects? In other countries which have abolished RPM for books, what has been the effect of abolition of RPM for books etc. on prices, choice and availability of books, number and variety of booksellers and publishers?

- Is there a conflict of views between the competition authorities and the cultural authorities, where there is overlapping jurisdiction, in relation to RPM for books? How is this resolved?

- Is any consideration being given within governments to revising the current provisions of competition law in relation to RPM? In what manner?

NOTES

1. An extensive presentation of the theoretical arguments can be found, e.g., in the Secretariat's recent publication Competition Policy and Vertical Restraints: Franchising Agreements, OECD (1993). The current note draws upon that publication.

2. The division of those profits is another matter, depending, e.g., on the wholesale price agreed between the upstream and downstream first.

3. Here, the upstream firm could be either the publisher or its importer or distributor.

4. Here, the book store.

5. See, for example, the explanation of double marginalisation set forth in Competition Policy and Vertical Restraints, supra at pp 34-37.

6. Services" are meant broadly, including such areas as advertising, store ambiance, pre-purchase explanation, post-purchase return policies, etc.

7. See Competition Policy and Vertical Restraints, supra at pp 37-44.

8. We leave aside the possibility in other contexts of vertical externalities which benefit the upstream firm.

9. See Competition Policy and Vertical Restraints, supra at pp. 55-56.

10. It should be noted that, at the time of the drafting of this note, relatively few country contributions to this roundtable had arrived. Thus, this section will need to be substantially updated following the roundtable.

11. See, for example, as regards New Zealand: Bollard, A.E. (1989):An Economic Comment on the Commerce Act Review, page 7. Firms wishing to justify RPM, it is argued, should be asked to demonstrate the efficiency gains they claim rather than using scarce competition authority resources to establish the inefficiency of each system. See also the Finnish note.

12. See the Norwegian paper.

NOTE DE REFERENCE

Introduction

Cette note a essentiellement pour objet de confronter les arguments pour et contre la pratique qui consiste à autoriser les prix de revente imposés (PRI) pour le livre, la presse et certains produits culturels similaires. (En régime de PRI, le prix imposé est le prix final que le détaillant applique aux consommateurs. Deux variantes consistent à ne fixer qu'un prix plafond ou un prix plancher. Les pratiques qui favorisent la fixation du prix de revente, mais permettent en fait une concurrence sur les prix, par exemple les prix de détail ou les prix plancher "conseillés", de même que les prix recommandés mentionnés par l'entreprise située en amont dans ses publicités, ne sont généralement pas considérées comme relevant des PRI.)

Argumentation économique[1]

Les PRI, comme les autres types de restrictions verticales, peuvent contribuer à résoudre les problèmes de coordination entre les entreprises situées en amont et en aval et à accroître les bénéfices cumulés de ces entreprises[2]. Des problèmes de coordination peuvent se poser, par exemple, pour la fixation des prix et pour la fourniture de services au niveau du détail. Dans le cas des prix, si à la fois l'entreprise en aval[3] et l'entreprise en amont[4] détiennent un pouvoir de marché et ne coordonnent pas leurs prix, il est possible que les décisions de prix de chacune des entreprises se traduisent par un prix final qui est "trop élevé", c'est-à-dire plus élevé que le prix maximisant le bénéfice pour l'ensemble de la chaîne verticale[5]. Dans le cas des services[6], les décisions de chaque entreprise en aval concernant la fourniture de services pourront être sous-optimales pour l'ensemble de la chaîne verticale[7]. On approfondira ci-après cette argumentation.

Elimination des problèmes de double marge

Lorsque l'entreprise en aval et l'entreprise en amont maîtrisent toutes deux le prix -- c'est-à-dire lorsque toutes deux détiennent un pouvoir de marché horizontal -- leurs décisions en matière de prix illustrent comment une externalité verticale peut nuire à la fois aux bénéfices et à l'efficience sociale. Le problème se pose lorsque l'entreprise en aval et l'entreprise en amont fixent chacune de leur côté des prix uniformes simples : l'entreprise en amont choisit le prix de gros et l'entreprise en aval choisit le prix de détail.

Chaque entreprise choisit un prix supérieur au coût marginal afin de maximiser son propre bénéfice. Le niveau de chaque marge, et donc de la "double marge" globale, dépend de l'élasticité de la demande pour chaque entreprise, cette élasticité étant elle-même fonction de l'intensité de la concurrence intermarques et intramarque. Cette "double marge" fait que le prix de détail est supérieur au niveau qui maximiserait les bénéfices combinés de l'entreprise en aval et de l'entreprise en amont. En effet, la décision de chaque entreprise engendre une externalité verticale, qui influe sur les bénéfices de l'autre entreprise

ainsi que sur les siens, chaque entreprise ignorant toutefois cet effet cumulatif. L'entreprise en aval majore le prix de détail de façon à augmenter ses propres bénéfices, en ne tenant pas compte du fait que cette hausse, parce qu'elle réduit la quantité vendue aux consommateurs, diminue les bénéfices de l'entreprise en amont (d'un montant à peu près équivalent à la réduction du volume des ventes en gros multipliée par la majoration du prix de gros). Le détaillant majore le prix de gros en ne tenant compte que des effets sur ses propres bénéfices, et non des effets sur les bénéfices de l'entreprise en aval.

Cet exercice non coordonné du pouvoir de marché aux niveaux du gros et du détail réduit à la fois les bénéfices des entreprises et l'efficience économique. L'entreprise en aval et l'entreprise en amont peuvent accroître le bénéfice global en adoptant des clauses contractuelles éliminant l'externalité verticale et diminuant le prix de détail. Remédier à cette externalité fait baisser les prix de détail, ce qui est bénéfique pour les consommateurs, et donc pour l'efficience économique ; on peut résumer ce phénomène par la formule "rien n'est pire qu'un monopole, si ce n'est une chaîne de monopoles". Les restrictions verticales qui empêchent seulement les doubles marginalisations n'ont aucun effet sur l'intensité du pouvoir de marché sous-jacent, mais elles bénéficient à la fois aux consommateurs et aux entreprises en réduisant l'inefficience de la fixation des prix pour les consommateurs et la collectivité en général.

. Les conditions susceptibles de créer des problèmes de double marginalisation peuvent fort bien être réunies dans le secteur de la distribution des livres, des périodiques et d'autres biens intellectuels ayant un contenu éditorial spécifique et juridiquement protégé.

La façon la plus directe d'éliminer la double marginalisation est de recourir aux PRI en fixant un prix de détail plafond. Seul un prix plafond peut résoudre ce problème ; un prix de détail plancher ne pourrait en rien éviter un problème de double marginalisation et l'utilisation d'un prix fixe est plus restrictive qu'il n'est nécessaire pour résoudre le problème.

Empêcher l'opportunisme

Les revendeurs de livres et de périodiques peuvent offrir toute une gamme de services influant sur la vente de leurs produits, notamment en fournissant des informations et des conseils, cet effort étant de nature à accroître la demande. Ces services au niveau du détail peuvent engendrer des externalités horizontales entre les détaillants[8]. Dans ce cas, le détaillant ne tire pas pleinement profit des effets que peuvent avoir sur le bénéfice global des services de détail supplémentaires et il n'assure donc pas un niveau optimal de services.

La possibilité, pour un détaillant de "parasiter" les services fournis par d'autres détaillants est celle qui est évoquée le plus souvent par les analystes. Un exemple bien connu est celui des détaillants qui donnent des informations avant la vente (sous forme de conseils, par exemple) à des consommateurs qui iront ensuite acheter le produit chez un autre détaillant. Autre exemple, la publicité : les consommateurs peuvent être informés par la publicité d'un détaillant et acheter ensuite le produit à un autre détaillant. Le détaillant fournissant les services étant contraint de pratiquer un prix plus élevé pour couvrir ses coûts, les consommateurs ont intérêt à se rendre chez ce détaillant et à acheter le produit chez un autre détaillant qui ne fournit pas autant de services, mais pratique des prix moins élevés.

Ces externalités horizontales soulèvent des problèmes du même type que ceux qui se posent pour les biens collectifs, en ce sens que les efforts d'un détaillant bénéficient à tous les détaillants ou à un grand nombre d'autres détaillants ; chaque détaillant souhaite que les services soient fournis, mais préfère qu'ils le soient par les autres. En bref, les détaillants (ou les consommateurs) peuvent être incités à parasiter

certains services au niveau du détail qui sont fournis par d'autres détaillants, ce qui entraîne en définitive un niveau de services insuffisant.

Plusieurs types de comportements opportunistes viennent à l'esprit lorsqu'on envisage les marchés considérés dans cette note. Tout d'abord, en ce qui concerne les opérations de publicité et de promotion en faveur de certains titres ou de certains auteurs, il est facile d'imaginer que des détaillants pratiquant des prix bas parasitent la publicité ou la promotion effectuées pour de nouveaux titres par des détaillants ne pratiquant pas de rabais. On peut néanmoins se demander s'il n'y a pas moyen de corriger ce parasitisme sans recourir aux PRI, dès lors que la publicité est faite par l'entreprise en amont (l'éditeur).

Un autre type de parasitisme est celui qui est susceptible de se produire dans le domaine des conseils aux acheteurs potentiels, notamment pour ce qui est des conseils sur les différents auteurs ou leurs oeuvres, ou sur d'autres titres qui pourraient intéresser le lecteur. Le consommateur pourra fort bien, après avoir tiré parti des compétences des vendeurs et utilisé leur temps, acheter l'ouvrage à un détaillant pratiquant des prix au rabais et n'offrant pas de services.

Un troisième type de parasitisme a trait à la possibilité de consulter les ouvrages dans une librairie. Il existe depuis quelque temps des librairies "en ligne" pratiquant des prix au rabais, auxquelles le consommateur pourra passer sa commande après avoir fait son choix dans une librairie.

"L'écrémage"

Sur un autre point, il est à craindre qu'en autorisant les rabais on voit se créer des points de vente au détail spécialisés dans les titres populaires vendus au rabais. On redoute qu'ainsi les détaillants offrant tous les services dégagent une rentabilité plus faible et aient tendance à disparaître. Par conséquent, les PRI seraient un moyen de remédier à cet "écrémage".

Ce raisonnement semble être infirmé par l'expérience de certains pays autorisant des rabais sur le prix des livres. Aux Etats-Unis, par exemple, on a vu tout d'abord se développer des chaînes nationales de magasins de taille moyenne faisant de la promotion pour les best-sellers, vendus à prix réduit, mais on a vu ensuite se développer des chaînes nationales de grandes librairies offrant un très large choix et des services à la clientèle. Dans ces grandes librairies, les meilleures ventes à prix réduit sont un moyen d'attirer les consommateurs ; comme dans le cas des grandes surfaces vendant des produits vedettes à des prix d'appel, on espère vendre également d'autres livres dont le prix n'est pas réduit. En Suède, les PRI sont interdits depuis 1970 pour le livre ; or il semble que les prévisions pessimistes des éditeurs et des détaillants quant aux effets dommageables d'une concurrence sur les prix ne se soient pas concrétisées. Le cas du Royaume-Uni, où le Net Book Agreement est tombé en désuétude en 1995, va sans doute également à l'encontre des arguments des défenseurs des PRI, bien que la baisse des prix généralement escomptée n'ait pas eu lieu ; en tout cas, le nombre des faillites de libraires n'a pas sensiblement augmenté.

Le développement de nouveaux circuits de distribution comme les librairies en ligne qu'on vient d'évoquer ouvre une nouvelle possibilité : tous les titres, même les moins connus, peuvent être mis à la disposition des consommateurs sans avoir à être distribués en librairie. De ce point de vue, les PRI, tout en pouvant contribuer à maintenir en activité certains commerces spécifiques, risquent d’empêcher le développement de nouveaux circuits de distribution plus efficients. On pourrait voir dans les PRI au niveau de la distribution une tentative d'empêcher l'apparition de nouvelles formes de concurrence.

Effets de collusion

Les PRI pourraient à plusieurs égards être utilisés pour restreindre la concurrence entre les libraires et les éditeurs. Le reproche essentiel qu'on peut faire aux PRI du point de vue de la perte de bien-être qu'ils sont susceptibles d'engendrer réside en ce qu'ils peuvent faciliter une collusion ou des ententes et restreindre la concurrence en aval.

Les PRI peuvent favoriser ou préserver une collusion horizontale en amont (éditeur, importateur, distributeur) ou en aval (détail). L'un des arguments invoqués est le suivant : les PRI peuvent contribuer à un niveau de prix élevé en ce qu'il est plus facile pour les entreprises en amont, par exemple les éditeurs, de contrôler le non-respect d'une entente, ce qui incite moins les entreprises en aval à tricher[9]. Premièrement, les PRI suppriment l'incitation, pour les éditeurs, à recourir à des baisses occultes du prix de gros pour essayer de ne pas respecter une entente sans être découverts ; ces baisses des prix n'augmenteraient pas les bénéfices car elles ne pourraient pas être répercutées sans que soit abaissé aussi de façon transparente le prix de détail contrôlé. Deuxièmement, les PRI réduisent l'incertitude quant à l'origine de la modification observée des prix de détail, car il est alors plus probable que la modification soit due au non-respect, par l'éditeur, d'un accord collusoire. De plus, s'ils sont largement pratiqués dans le secteur, les PRI peuvent également favoriser une collusion tacite entre les firmes en amont.

Les PRI peuvent également résulter d'une initiative des détaillants, dans le but de mettre en oeuvre une entente en aval. Par conséquent, des libraires qui pourraient normalement se concurrencer sur les prix, notamment en pratiquant un rabais sur un prix conseillé, peuvent fort bien essayer d'obtenir de l'éditeur ou de l'importateur un prix de revente imposé, de manière à éliminer la possibilité d'une concurrence sur les prix au niveau de détail.

Effets sur l'entrée

Les PRI peuvent également avoir des effets sur l'entrée à long terme. Par exemple, si les PRI sont utilisés pour régler des problèmes de coordination entre les entreprises en amont et en aval (voir plus haut), ils devraient contribuer à accroître le bénéfice global pour l'éditeur et ses détaillants et rendre ainsi l'entrée plus attrayante à ces deux niveaux. De même, si une fraction des bénéfices supplémentaires est partagée avec les auteurs, on pourra escompter un accroissement de la production (par exemple, davantage de manuscrits seront soumis à l'éditeur) à ce niveau également. Mais, comme on l'a indiqué, la nécessité de régler les problèmes de double marginalisation ne justifie au plus que la fixation d'un prix plafond, et pas celle d'un prix imposé ou d'un prix plancher. Les PRI à même de régler le problème du parasitisme des services pourraient également se traduire par une plus forte demande de livres et donc favoriser l'entrée à long terme. Mais, comme on l'a vu, il faut considérer cet effet en tenant compte également d'un autre effet : les PRI peuvent également empêcher l'apparition de nouvelles formes de distribution.

Les PRI et la loi[10]

Les PRI sont généralement interdits dans la plupart des pays de l'OCDE, sauf pour quelques produits, essentiellement les livres, les périodiques et les produits pharmaceutiques. Dans certains pays, il est toutefois possible d'autoriser cette pratique s'il est démontré que ses effets bénéfiques l'emportent sur ses effets dommageables. Pour justifier une interdiction générale avec possibilité d'exemption, plutôt que la démarche ponctuelle qu'on applique généralement aux restrictions verticales hors prix, on avance souvent l'argument suivant : cette interdiction générale avec possibilité d'exemption réduit les coûts de mise en oeuvre et de respect des réglementations[11].

Lorsqu'un prix recommandé est clairement dénué de tout caractère obligatoire et que ni le fabricant, ni le détaillant ne l'envisagent comme un prix minimum, il paraît devoir être autorisé dans la plupart des pays. Par contre, si un prix recommandé est généralement considéré comme fixe et n'est donc qu'un simple succédané d'un prix de revente imposé, il est frappé d'interdiction dans certains pays[12].

Questions susceptibles d'être examinées

Les délégués souhaiteront peut-être examiner notamment les questions suivantes :

- Lorsque des PRI sont autorisés pour le livre et d'autres biens culturels, quels sont les principaux arguments sur lesquels on s'est fondé pour les autoriser ?

- Lorsque le livre et d'autres biens culturels ne bénéficient pas d'une exemption, quels sont les arguments sur lesquels on s'est appuyé pour ne pas accorder cette exemption ?

- Qu'est-ce qui a conduit à la non application du Net Book Agreement au Royaume-Uni et quelles en ont été les conséquences ? Dans les autres pays qui ont mis fin aux PRI pour les livres, etc., quel a été l'effet de cette suppression sur les prix, les choix s'offrant aux consommateurs, l'offre de livres, le nombre et l'éventail des librairies et des maisons d'édition ?

- Constate-t-on des divergences d'opinion entre les autorités chargées de la concurrence et celles chargées de la culture, lorsqu'elles sont toutes deux compétentes, à propos des PRI dans le secteur du livre ? Comment les a-t-on résolues ?

- Les pouvoirs publics envisagent-ils de revoir les dispositions actuelles du droit de la concurrence dans le domaine des PRI ? De quelle façon ?

NOTES

1. On trouvera une présentation très étoffée des arguments théoriques dans la publication récente du Secrétariat intitulée "Politique de la concurrence et restrictions verticales : les accords de franchise", OCDE (1993). Cette note s'inspire de cette publication.

2. La répartition de ces bénéfices est un autre problème ; elle dépend, par exemple, du prix de gros convenu entre l'entreprise en amont et l'entreprise en aval.

3. En l'occurrence, l'entreprise en amont pourrait être l'éditeur ou son importateur ou distributeur.

4. En l'occurrence, le libraire.

5. Voir, par exemple, les commentaires concernant la double marginalisation dans "Politique de la concurrence et restrictions verticales", op. cit., pp. 38-41.

6. Il s'agit des services dans un sens très large, y compris la publicité, l'ambiance du magasin, les explications données avant l'achat, la reprise du produit après l'achat, etc.

7. Voir Politique de la concurrence et restrictions verticales, op. cit., pp. 41-49.

8. Nous laisserons de côté la possibilité, dans d'autres contextes, d'externalités verticales bénéficiant à l'entreprise en amont.

9. Voir Politique de la concurrence et restrictions verticales, op cit., pp. 63-64.

10. On notera qu'au moment de la rédaction de cette note assez peu de pays avaient transmis une contribution à la table ronde. Il faudra donc sensiblement remanier cette section après la table ronde.

11. Voir, par exemple, en ce qui concerne la Nouvelle-Zélande : Bollard, A.E. (1989) : An Economic Comment on the Commerce Act Review, page 7. Cet auteur estime que, lorsqu'une entreprise juge souhaitable des PRI, il faut lui demander de faire la preuve des gains d'efficience qu'elle avance, plutôt que d'utiliser les ressources limitées des autorités chargées de la concurrence pour établir l'inefficience de tel ou tel système. Voir également la note finlandaise.

12. Voir la note norvégienne.

AUSTRALIA

Summary

This paper discusses not only the RPM provisions in Australia, but also examines why prices have not fallen to a competitive level in the book industry in Australia. An important conclusion is that the prohibition of RPM is a necessary but not sufficient condition to ensure that book prices fall to competitive levels. What is also needed for the prices of books to fall is for parallel import restrictions to be lifted.

Introduction

Resale price maintenance ("RPM") is a *per se* offence in Australia, that is, the mere fact that there is RPM is a breach of the Trade Practices Act 1974 (the "TPA") irrespective of its effect on competition. Both companies and individuals can be prosecuted by the Australian Competition and Consumer Commission ("the Commission") for breach of this provision or the option of private action exists.

The Australian approach, however, recognises that public benefit and efficiency gains may in some cases conceivably arise from the conduct. Since 1995, conduct that would otherwise breach the RPM provisions of the TPA has been able to be authorised by the Australian Competition and Consumer Commission ("the Commission"). Authorisation is the process of granting immunity, on public benefit grounds, for conduct that might otherwise contravene the TPA.

RPM was formerly a common ingredient of distribution systems in Australian industry[1]. Historically it was linked with horizontal arrangements - it was considered to be a way for competitors to set prices via the wholesaler - and therefore was of an anticompetitive nature[2]. Legislation, together with attention by the Commission and competitors and backed by regular, high profile, litigation has seen some decline in the practice. However, to the surprise of many commentators[3], despite the $10 million dollar fines and the *per se* nature of the practice, RPM still occurs in Australian industries.

The treatment of RPM in Australia is summarised by Smithers J in *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd*[4]:

> "It is clearly the intention of the Parliament to lay down conditions for the conduct of corporate trade and commerce which will ensure that traders operate in competitive conditions and that the public has the benefits which flow there from. So far as resale price maintenance is concerned the object of the Act is to create conditions in which the public will benefit from traders competing with each other in respect of prices unfettered by price restraints imposed by suppliers of goods upon retailers."

The law under the Trade Practices Act

Section 48 of the TPA deems RPM to be a *per se* offence. It prohibits suppliers, manufacturers and wholesalers from specifying a minimum price below which goods or services may not be resold or advertised for resale. Part VIII of the TPA describes conduct that constitutes RPM and includes:

- agreement with a reseller that the latter will not advertise or sell below a specified price (s.96(3)(c));
- setting a minimum price at which resellers should advertise, display or offer their goods for sale or for the resupply of services (s.96(3)(a));
- inducing resellers not to discount, for example by giving special deals to resellers who agree not to (S.96(3)(b));
- taking or threatening to take action against a reseller to force the reseller to sell the goods or resupply services at or above the minimum specified price, for example by refusing to continue supplying them (s.96(3)(d),(e)); or
- indicating a price that is taken by the reseller as a price below which the reseller should not resell (s.96(3)(f)).

Australian courts have recognised that the requisite reasons specified in s. 96 need only be one of the reasons for the conduct[5].

A supplier may recommend a resale price for goods or resupply price for services, provided that the document setting out the suggested price makes it clear that it is a recommended price only and that the supplier takes no action to influence the reseller not to sell or resupply below that price (s.97). Suppliers may specify a maximum price for resellers without infringing the resale price maintenance prohibition.

Section 98(2) permits a supplier to withhold supplies of goods to a person who, within the preceding 12 months, sold goods or resupplied services obtained from the supplier at less than their cost in order to promote business or to attract persons likely to purchase other goods or services ("loss leadering").

The exemption relating to loss leadering does not apply to a genuine seasonal clearance sale of goods or services which were not acquired for the purpose of being sold at that particular sale, nor does it apply where the sale took place with the consent of the supplier (s.98(3)).

Since 1995, section 88(8A) of the TPA has allowed the Commission to authorise a practice that would otherwise constitute RPM. The Act sets out that the Commission must be satisfied in all the circumstances that the conduct would, or would be likely to, result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

Section 100 of the Act creates a rebuttable presumption that in certain circumstances the defendant has engaged in RPM. These circumstances include where supply is stopped after having been supplied during the previous six months in conjunction with some potential reason for stopping supply such as discounting. The full text of ss. 48 and 96 - 100 can be found in Appendix A.

The Federal Court has required a certain level of specificity in indicating the price that has to be maintained by the retailer. For example in the *Bata Shoe case*, Lockhart J held that the statement that Woolworths (one of Australia's largest supermarket chains) must "have a look at its selling price [and] ...sell somewhere near the selling price of Gowings Limited in Sydney"[6] constituted RPM. However, in *Penfolds Wines*[7], the full Federal Court held that the statement "somewhere in line with those charged by Penfolds" was not a breach because there was not sufficient specification of the price that was to be maintained. These cases are hard to reconcile, but show that Courts in Australia are looking for something more than just a general price, they appear to want specificity.

History of RPM in the Australian Act

The RPM provision first appeared in the *Restrictive Trade Practices Act* 1971, the predecessor to the TPA, as a response to highly publicised trade union pressures on particular suppliers accused of practising RPM against a large union supported store in Melbourne. The then Commissioner for Trade Practices, Mr R. M. Bannerman, described the new legislation as "something of a watershed"[8] because the strength of the provision provided support for prohibitions on price agreements *between* competitors and other trade practices provisions. The introduction of the RPM provisions was considered to be impetus for considerable reform of the legislation and strengthening of Trade Practices provisions in Australia[9].

The legislation in 1971 allowed a supplier to apply to the then Trade Practices Tribunal for an exemption from the RPM provisions for the particular goods that it supplies. The Act specified that the interests of consumers and users should be dominant and any other interests should be tested in terms of their effect (including long term effect) on the interests of consumers and users. Exemptions were removed from the legislation in 1974 with the creation of the TPA. The legislation allowed recommended prices or RPM when conducted solely for the purpose of preventing regular loss leadering of the good.

The RPM provision remained substantially unchanged until the far-reaching competition policy reforms in 1995 that revised many aspects of competition policy. These developments allowed certain RPM behaviour to be authorised where the public benefit outweighed the anti-competitive detriment.

Amendments to the TPA in 1993 increased fines for the behaviour considerably from the former $500 000, to a maximum of $10 million per offence. The Court has discretion in deciding the amount of the penalty and has taken into account factors such as the size of the corporation, whether the conduct is a repeat occurrence or deliberate[10], damage caused to others by the conduct or whether senior management initiated or acquiesced in the conduct[11].

Authorisation

Since changes were made to the TPA in 1995, conduct or agreements that would otherwise breach the Act on RPM grounds may be authorised. When the RPM provisions were first introduced in 1971, RPM conduct occurred for mainly anti-competitive reasons. It has been argued over the years that there are other reasons for RPM and the legislation should provide for when it occurs for product safety reasons, amongst others[12]. Reasons that have been recognised include a desire to provide a high quality image for the product or to ensure that retailers provide adequate after sales service and the required level of safety training. The 1993 report by the Independent Committee of Inquiry on National Competition Policy ("the Hilmer Report")[13] concluded that authorisation is the appropriate forum for considering

whether to grant exemption from the Act. Authorisation is a detailed, considered and public process and could include a consideration of "highly technical" arguments.

The new provisions allow the ACCC to authorise RPM conduct if it is satisfied that the public benefit from the conduct will outweigh the anti-competitive detriment. Authorisation is a public process in Australia and allows the ACCC to hear a variety of viewpoints on any given matter. The authorisation provision allows for some flexibility to the otherwise strict prohibition in recognition of the other goals that RPM may serve such as product safety or quality control. The ACCC has not yet received an application for authorisation for RPM conduct.

The new authorisation provisions allow two types of RPM conduct to exist:

i) RPM conduct that results in clear public benefits or efficiency gains;

ii) RPM conduct that has only a minimal effect on competition.

Under the strict, previously non authorisable *per se* test, such conduct would not be allowed even though it had very little impact on the economy or consumers. In this sense the *per se* nature of the Act may be considered to be very strict. However, the authorisation provisions create flexibility in the legislation as RPM conduct that has only a minimal effect on competition needs only a slight public benefit for the Commission to be able to authorise the conduct. Public benefit under the TPA has been broadly construed and can include, *inter alia*, efficiencies, health issues, expansion of employment, growth in export markets, promotion of industry costs savings.

An example of the type of conduct that the new authorisation provisions are designed to catch is the first of two major cases involving chemical company, ICI[14]. In 1983, a manufacturer of pool chemicals was fined $20,000 for RPM conduct. The manufacturer argued that it wanted to maintain prices to ensure that all retailers would provide the level of service and safety training required for handling dangerous chemicals. The type of customer that ICI targeted were small pool owners that would not have great experience. Without RPM, it is argued that there would be no incentive for manufacturers to keep service standards to a maximum and retail outlets that did not provide an adequate level of customer service would be able to charge considerably less for the product. It has been recognised that the RPM conduct in this case was for the purpose of product safety and not to hinder competition[15]. There were no provisions for authorisation in the Act at that time, but today it would be the category of conduct that may be authorised by the Commission.

Rationale of the *per se* prohibition

Proposals that RPM should be subject to a competition test have not been accepted in Australia. The Hilmer report concluded that the *per se* prohibition should be maintained. It argued that that "the committee has not been presented with convincing evidence that efficiency enhancing RPM occurs with such frequency that the *per se* prohibition should be relaxed."[16]

The *per se* prohibition approach is attractive for its low enforcement costs and unambiguity. The Court does not have to consider whether the conduct lessens competition. It only looks to the seriousness of the conduct and likelihood of repetition of the conduct to arrive at a decision on penalty amount and whether to grant injunctions.

As noted, the authorisation process does however, allow for RPM on public benefit grounds but puts the onus on the applicant to demonstrate that an adequate level of public benefit exists.

Case studies in Australia

The benefits and disadvantages of RPM were considered in Australia by the Trade Practices Tribunal, previously known as the Australian Competition Tribunal, case on books in 1972 and subsequent analysis of the case. A major book supplier together with some smaller companies in Australia lodged an application for exemption from the Restrictive Trade Practices Act with the Tribunal on 9 August 1971, the first day of operation of the new provision. Mr Bannerman, the then Commissioner for Trade Practices, contested the application, and was ultimately supported by the President of the Tribunal[17]. The president dismissed the application in 1972[18] and thus refused to grant exemption.

Although the equivalent body in the UK had recently granted the book industry an exemption from the RPM prohibitions, in Australia, the Tribunal did not follow this decision. The President's decision turned on the issue of school text books and library books, whereas the UK body concentrated on commercial trade of books. Economic witnesses gave evidence that under RPM, prices for books used as school text books and for libraries would be higher, but there would be a higher variety and greater stock held by shops as well as a larger number of outlets. RPM restrictions would limit the variety and stock. The president considered that for the library and school text book trade, the detriment from paying higher prices would be greater than the detriment caused by the decreased variety and lower number of retail outlets.

Mr Bannerman summarised the President's further analysis as follows:

> Having regard to the importance of the school text book and library trade in his conclusions, the President considered whether he should grant an exemption in respect of books other than text books and books sold to libraries. He decided that would not be justified as he was not satisfied that the refusal of such an exemption would have any substantial effect on the quality or variety of books available, on the number of establishments, or on the services provided. On the other hand, he thought prices would be higher under resale price maintenance than without it.
>
> Prior to the abolition of RPM on books, there was no discounting of book prices. Since the decision, there has been extensive discounting and fairly vigorous retail competition. There is also very extensive remaindering. In addition, there remain numerous niche bookshops catering to the quality end of the market. Thus, in general, the abolition of RPM has been associated with a sharp increase in retail competition.

However, there is a remaining serious problem with Australian book prices. They are well above North American prices and often above UK prices. The source of the higher prices is not essentially a lack of retail competition - although we discuss this further later. Rather it is because there are restrictions on parallel importation of books from overseas pursuant to copyright law. The effect of this is that bookshops cannot directly import books from overseas for resale even thought they may be - and usually are- on sale at lower prices. The local subsidiary of the overseas publisher has an import monopoly and typically uses it to raise prices in Australia (compared with overseas prices), this being economically possible because of different, more inelastic demand conditions in Australia. There is a lack of close substitutes from nearby markets. In Canada where the same import restrictions apply, prices are far lower than in Australia because if publishers increase prices, bookbuyers switch purchases to nearby USA

markets. There are no nearby markets in Australia to which consumers can go for cheaper books and this enables publishers to raise prices to higher levels than in Canada.)

Parallel import restrictions raise publisher prices to retail outlets, but they probably also affect the state of competition in retail markets. There is little wholesaling, especially because there is no role for import wholesaling. Publisher-retailer relationships may be more stable than if import competition existed. Imports would probably shake up the retail market to a degree with favourable effects on retail competition.

An important conclusion of this analysis is that the removal of RPM agreements is a necessary but not sufficient condition for competitively priced books.

In 1990, a study by the Prices Surveillance Authority (a predecessor to the ACCC) found that book prices in Australia were kept at above their competitive level, because of distribution limitations in Australia[19]. It conceded that copyright protection is provided for books to stop copying and plagiarism, but concluded that to add restrictions on distribution of books creates further protection that is not necessary to protect the authors. Once a book has been validly reproduced, there should no longer be any need for legal restrictions to be imposed on distribution, in particular on international competition in distribution. It was further stated that:

> Although copyright protection provides the owner or assignee of the copyright with exclusive rights over the production and reproduction of an individual book, this is not necessarily inconsistent with a competitive market outcome. This will depend on the availability of books which are close substitutes for each other. In this context, it is significant that copyright does not protect ideas but only the expression of ideas. Hence there may be competitive texts expounding the same economic theories or legal doctrines. If one publisher charges a monopoly price, others can enter the market with a competitive text and offer it at a lower price. The importation provisions extend copyright protection from control in the sphere of production into control over the sphere of *production* into control over the sphere of *distribution.* Economic analysis clearly identifies a market failure associated with copyright products, namely piracy, but it is a market failure associated with production not distribution. In other words, at the stage of book production there is a problem of market failure associated with the problem of copying, since copying leads to underproduction. The problem is fully overcome by copyright laws which prohibit piracy. Once the book has been produced validly, questions arise about its distribution. The presumption is that the market should be allowed to distribute books without legal restrictions on trade or competition, unless a specific failure in that sphere can be identified. There is no reason why copyright restrictions should extend beyond the sphere of production[20].

Magazines and Newspapers

Magazines and newspapers are not subject to any formal price discrimination in Australia, although in general newsagents maintain the same prices and do not discount. However, although there are no RPM agreements, there are exclusive distribution arrangements and monopoly distribution agreements that have been the subject of a controversial authorisation determination by the Commission. These arrangements provide newsagents or magazine outlets with monopoly powers and exclude competition in most areas. In particular this impacts on the home delivery of newspapers.

Interesting developments have occurred in Canberra in the home delivery industry. Although the usual exclusive distribution agreements exist between news-agencies, recently the publisher of *The*

Canberra Times, the major paper in Australia's capital city, has started a service called "Canberra Times Direct" - a home delivery service run by the wholesaler in competition with the retailer. The direct delivery service offers papers on the lawn before 6a.m. (up to an hour earlier than competitors) and discounts of up to 40 percent less than newsagents.

Conclusion

The Australian legislative and case law on RPM is well developed and responsive. It is a *per se* offence, but recently has become authorisable where the public benefit of the conduct outweighs the anticompetitive detriment. Penalty for breach of the provision is up to $10 million maximum, per offence.

The pre-1974 legislation allowed the Tribunal to grant exemption to the RPM provisions of the Act on certain grounds. The book industry applied for exemption on the first day of the operation of the 1971 legislation, but was rejected by the Tribunal, that declined to follow its British counterpart. Nevertheless, book prices have been higher than they should be in Australia through protection of distribution arrangements in the form of parallel importation restrictions. Furthermore, magazines and newspapers are not subject to RPM arrangements, but retail prices are maintained through exclusive distribution arrangements, providing monopolies in retail for each local news-agency. The conclusion to be drawn from this is that the prohibition of RPM in itself is often not sufficient to remove the control of prices from manufacturers.

NOTES

1. Bannerman, RM, Commissioner of Trade Practices Seventh *Annual Report* for year 1973-74, Parliamentary Paper No. 101.

2. Report of the Independent Committee of Inquiry, 1993, *National Competition Policy*, AGPS, Canberra, p. 57

3. See for example, Wang, T, and Davison, M "Resale Price Maintenance: Is the Per Se Prohibition Justified?" (1992) 14 *Adelaide Law Review* 35

4. (1978) 2 ATPR 40-091

5. *Ron Hodgson (Holdings) Pty Ltd v Westco Motors (Distributors) Pty Ltd* (1980) 29 ALR 307

6. *TPC v Bata Shoe Co. of Australia Pty Ltd* (1980) ATPR 40-161

7. *TPC v Penfolds Wines Pty Ltd* (1991) ATPR 41-071 *Trade Practices Commission v Penfolds Wines Pty Ltd* (1992) ATPR 41-163

8. Bannerman, RM, Commissioner of Trade Practices Seventh *Annual Report* for year 1972-73, Parliamentary Paper No. 119.

9. *Ibid.*

10. *Trade Practices Commission v ICI Australia Operations Pty Ltd & Ors* (1991) ATPR 41-153 at 53, 178 (Olney J)

11. *Trade Practices Commission v Mobil Oil Australia Ltd* (1985) 4 FCR 296 at 298 (Toohey J).

12. Hanks and Williams, "the Treatment of Vertical Restraints under the Australian Trade Practices Act" (1987) 15 *Australian Businesss Law Review* 147 at 167, 168 as cited in Corones, S. G., 1994, *Restrictive Trade Practices Law*, The Law Book Company, Queensland, Australia, pp. 303-304

13. Report by the Independent Committee of Inquiry, *Op. Cit.*, p.55

14. *TPC v ICI Australia Petrochemicals Ltd* (1983) 15 ATPR 40-364. The second case in 1991 was not motivated by public benefit reasons, it was done at the request of many manufacturers to stop one retailer from discounting farm chemicals.

15. Hanks and Williams, *Op. Cit.*

16. Report by the Independent Committee of Inquiry, *Op. Cit.*, p.57

17. The Honourable Sir Richard Eggleston

18. *Re Books* (1972) 20 FLR 256

19. Prices Surveillance Authority, 1989, *Inquiry into Book Prices, Final Report,* p.20.

20. Fels, A and Walker J, 1990, "The Market for Books and the Importation Provisions of the Copyright Act 1968" in *Melbourne University Law Reveiw,* V. 17, December 1990, p, 569.

Appendix A

Text of the Trade Practices Act - Resale Price Maintenance Provisions

Resale price maintenance Section 48

A corporation or other person shall not engage in the practice of resale price maintenance.

PART VIII - Resaled Price Maintenance

Acts constituting engaging in resale price maintenance Section 96 (1)

1. Subject to this Part, a corporation (in this section called ``the supplier'') engages in the practice of resale price maintenance if that corporation does an act referred to in any of the paragraphs of sub-section (3).

2. Subject to this Part, a person (not being a corporation and also in this section called ``the supplier'') engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of sub-section (3) where the second person mentioned in that paragraph is a corporation.

3. The acts referred to in sub-sections (1) and (2) are the following:

   a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;

   b) the supplier inducing, or attempting to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier or by a third person who, directly or indirectly, has obtained the goods from the supplier;

   c) the supplier entering into an agreement, or offering to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;

   d) the supplier withholding the supply of goods to a second person for the reason that the second person:

      i) has not agreed as mentioned in paragraph (a); or
      ii) has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than a price specified by the supplier as the price below which the goods are not to be sold;

e) the supplier withholding the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the second person-

i) has not agreed not to sell those goods at a price less than a price specified by the supplier; or

ii) has sold, or is likely to sell, goods supplied to him, or to b supplied to him, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; and

f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold.

4) For the purposes of sub-section (3)

a) where a price is specified by another person on behalf of the supplier, it shall be deemed to have been specified by the supplier;

b) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier;

c) where a formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that formula, that price shall be deemed to have been specified by the supplier; and

d) where the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price ascertained by calculation from, or by reference to, a formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier.

5) In sub-section (4), ``formula" includes a set form or method.

6) For the purposes of sub-section (3), anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.

7) A reference in any of paragraphs (3)(a) to (e), inclusive, including a reference in negative form, to the selling of goods at a price less than a price specified by the supplier shall be construed as including references to:

a) the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale;

b) the displaying of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be displayed for sale; and

c) the offering of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be offered for sale, and a reference in paragraph (3)(d), (e) or (f) to a price below which the goods are not to be sold shall be construed as including a reference to the price below which the goods are not to be advertised for sale, to the price below which the goods are not to be displayed for sale and to the price below which the goods are not to be offered for sale.

Recommended prices Section 97

97(1) For the purposes of paragraph 96(3)(b), the supplier is not to be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods:

(a) by reason only of a statement of a price being applied to the goods as mentioned in paragraph;

99(1) (a) or being applied to a covering, label, reel or thing as mentioned in paragraph 99(1)(b), provided that the statement is preceded by the words ``recommended price''; or

(b) by reason only of his having given notification in writing to the second person (not being a notification by way of a statement being applied as mentioned in paragraph (a)) of the price that he recommends as appropriate for the sale of those goods, provided that there is included in the notification, and in each writing that refers, whether expressly or by implication, to the notification, a statement to the following effect:

``The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation''.

Withholding the supply of goods Section 98

98(1) For the purposes of paragraph 96(3)(d) or (e), the supplier shall be deemed to withhold the supply of goods to another person if:

(a) the supplier refuses or fails to supply those goods to, or as requested by, the other person;

(b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;

(c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, method or place of delivery or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or

(d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this sub-section.

(2) Paragraph 96(3)(d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person-

(a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods; or

b) otherwise for the purpose of promoting the business of that other person.

3) For the purposes of sub-section (2), there shall be disregarded:

(a) a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale; or

(b) a sale of goods that took place with the consent of the supplier.

Statements as to the minimum price of goods Section 99

99(1) For the purposes of paragraph 96(3)(f), if:

a) a statement is applied to goods, whether by being woven in, impressed on, worked into or annexed or affixed to the goods or otherwise;

(b) a statement is applied to a covering, label, reel or thing in or with which goods are supplied; or

(c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to lead to the belief that it refers to goods, the statement shall be deemed to have been used in relation to those goods.

(2) For the purposes of sub-section (1), ``covering'' includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and ``label'' includes a band or ticket.

Evidentiary provisions Section 100

100(1) Where, in proceedings under this Act by a person (in this section referred to as ``the plaintiff'') against another person (in this section referred to as ``the defendant''), it is claimed that the defendant has engaged in the practice of resale price maintenance and it is established that-

(a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 98(1)(a), (b), (c) or (d);

(b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and

(c) during the period of six months immediately before the time when the defendant so acted, the defendant became aware of a matter or circumstance capable of constituting a reason referred to in paragraph 96(3)(d) or (e) for the defendant's so acting, then, subject to sub-

section (2), it shall be presumed, unless the contrary is established, that that matter or circumstance was the reason for the defendant's so acting.

(2) Sub-section (1) does not apply where the plaintiff establishes the matter mentioned in paragraph

98 (1) (b) or (c) but the terms disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

(3) In the application of this section in proceedings by the Commission for an injunction, references to the plaintiff shall be construed as references to a person specified in the application for the injunction as the person in relation to whom the defendant is claimed to have acted as mentioned in paragraph (1)(a).

[subs (3) am Act 88 of 1995 s 67].

CANADA

This paper outlines the treatment of resale price maintenance (RPM) under the Canadian *Competition Act*. It provides a summary of the legislative history of RPM in Canada, some economic theoretical perspectives, a short discussion of recent enforcement activity and the current enforcement stance toward this practice.

Legislative History of RPM in Canada

In the early 1950s, Canada became one of the first industrialised countries to adopt a specific legislative ban on resale price maintenance and related activities.[1] This ban was in response to the recommendations of a federal government committee on competition legislation (the MacQuarrie Committee) and the apparent growth of price maintenance in several merchandising industries as a result of their experience under regulation by the Wartime Prices and Trade Boards.[2] The existing provisions of the *Combines Investigation Act* were considered inadequate to deal with such activities, and in December 1951, the government passed an amendment to the *Combines Investigation Act* that made it an offence to fix minimum resale prices, although suggested resale prices were still allowed.

In 1960, the *Combines Investigation Act* was amended to provide a defence to the prohibitions of RPM in certain circumstances, including where a manufacturer believed that his product was being used as a loss leader. In 1976, the resale price maintenance provisions of the *Combines Investigation Act* underwent a number of further revisions. First, the provisions were extended to cover services as well as articles. Second, the wording of the section was broadened to cover not merely the specification of minimum resale prices but, more generally, attempts to influence upward or discourage the reduction of the prices at which goods are sold. The revised wording applies to *horizontal* as well as to vertical instances of price maintenance. The 1976 amendments also clarified that the prohibition of price maintenance applies to holders of patents, trademarks, copyrights or registered industrial designs. Parliament also added to the *Act* a specific sub-section dealing with attempts to induce refusal to supply for reasons of price cutting.

Current Canadian Law on Price Maintenance

Currently, section 61(1)(a) of the *Competition Act* makes it an offence for any person engaged in the business of producing or supplying a product:

> a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada.[3]

Two points should be noted regarding the scope of section 61(1)(a). First, the section applies to conduct directed at any "other person engaged in business in Canada," rather than just to persons who

resell products. Thus, in the Canadian context, it is more accurate to refer to the statutory prohibition of *price maintenance* than to resale price maintenance.

Second, it should be noted that section 61(1)(a) prohibits price maintenance *whether by agreement or unilateral action* such as a threat. In this respect, the prohibition of price maintenance in Canada is broader than the corresponding prohibition of resale price maintenance in the US In particular, the Canadian statute does not provide an exception comparable to the *Colgate* doctrine in the US jurisprudence, which permits unilateral (as distinct from concerted) price maintenance activities.[4]

In addition to the basic offence of price maintenance in section 61(1)(a), the *Act* creates two additional offences. First, under section 61(1)(b) of the *Act*, it is an offence to:

b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person; (i.e. refusal to supply a discounting purchaser).

Finally, subsection 61(6) of the *Competition Act* provides that:

No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

The latter provision is directed at the perceived role of dealers initiating refusal to supply for the purpose of price maintenance. Two limitations to subsection (6) may be noted. First, this section does not apply to situations where a person has not attached a "condition of his doing business with the supplier" to the price maintenance inducement. Secondly, it does not apply to a situation where the demand of the retailer is not to have the supplier cut off his competitor (e.g. a retailer may simply demand that the supplier coerce the competing discount retailer to raise its prices).

The foregoing provisions apply to all products, including services as well as articles. Penalties for violation of these provisions include a fine set at the discretion of the court, or up to five years in prison, or both.

In reflecting on the scope of the price maintenance provisions of the *Competition Act*, it is important to note the limitations incorporated in section 61(10) of the *Act.* Essentially, this section provides a limited defence to any person charged under 61(1)(b) with refusing to supply a dealer for reasons of price discounting, if he can satisfy the court that:

a) the other person was making a practice of using products supplied by the person charged as loss leaders, that is to say, not for the purpose of making a profit but for purposes of advertising ;

b) that the other person was making a practice of using the products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers in the hope of selling them other products; i.e. bait and switch;

c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

d) that the other person made a practice of not providing the level of service that purchasers of the product might reasonably expect from the other person.

To some extent, these exceptions accommodate possible positive rationales for resale price maintenance which are discussed below. It should be noted, however, that these exceptions apply only in respect of the prohibition of refusal to supply for reasons of a low-pricing policy in section 61(1)(b). They do not apply to the basic offence of price maintenance under section 61(1)(a), nor to the offence of inducement to engage in refusal to supply under section 61(6).

With respect to the definition of a loss leader, the courts have ruled that this occurs when a sale is priced below invoice cost. They have rejected a test of loss leading based on whether the retailer sells a product for the purpose of making a profit on it or for the purpose of advertising.[5] The courts have also examined the level of servicing test and determined that the level is of servicing expected by customers and not the level desired by the manufacturer.[6]

In sum, the *Competition Act* creates several specific offences relating to the various aspects of price maintenance. In particular it creates three separate offences dealing with price maintenance, refusal to supply discounters and inducement to engage in refusal to supply The basic offence of price maintenance is broader than the corresponding US law, in that: *(i)* it applies to all sellers and not just re-sellers; and *(ii)* it prohibits price maintenance both by agreement and by unilateral action. To some extent, the statutory exceptions incorporated in section 61(10) accommodate possible pro-competitive rationales for RPM which are discussed in the economic literature (see below). These exceptions are, however, carefully circumscribed both in statutory design and in judicial interpretation.

Economic Theoretical Perspectives Regarding Resale Price Maintenance

Economic theoretical perspectives regarding resale price maintenance can be broadly placed in two categories -- those which purport to identify ways in which the practice can be welfare enhancing, and those that highlight its anti-competitive potential. The first of these perspectives essentially revolves around the issue of dealer incentives to provide special services, while the second centres on the role of RPM in facilitating the operation of cartels.[7]

The services argument for RPM derives from the observation that, given a fixed wholesale price, it is normally in the supplier's best interest to have a low retail price in order to maximise sales. In such a scenario, the practice of RPM may seem counter-intuitive. Demand does not, however, depend on price alone, but on many other factors including services such as pre-sale information, quality certification and post-sale service. Under the circumstances where demand for a product is a function of service, and the dealer is an effective means of providing service, a supplier may have an incentive to impose RPM in order to induce dealers to invest in services.[8] The non-price selling activities of the dealer shift the demand for the brand outward leading to an increase in the demand greater than the decrease which results from the higher price, ultimately leaving the supplier better off. The dealer can only be induced to make the necessary investments in services if he/she is guaranteed an adequate return.[9]

According to this argument, RPM, by increasing the dealer's margin on sales, increases the dealer's desire for additional sales of that brand, which in turn induces the dealer to invest in the services. RPM, thus, serves as a means of aligning supplier and dealer incentives so that the resulting combination of price and service maximises the value of the product. The actual service may not involve anything more complicated than a decision to carry the product.

Under this scenario, since the demand curve shifts outward increasing the total amount of consumer and producer surplus available, RPM is generally welfare enhancing. The possibility remains that the privately optimal price-service combination is not socially optimal - that it entails too much service. This may not, however, be a problem if there are competing suppliers.

On the other hand, economic theory indicates clearly that RPM is likely to be welfare-reducing if its purpose is to facilitate either an upstream or downstream cartel.[10] In the case of an upstream cartel, if retail prices are more readily observable than wholesale prices, it may be easier to fix retail prices so that cheating can more readily be detected. Furthermore, if retail prices cannot be easily reduced, suppliers have less of an incentive to cheat on a wholesale price fixing agreement since cheating would not result in increased market share.

In the case of a dealer cartel, dealers use the supplier to enforce downstream price fixing through a policy of RPM. A dealer's incentive to cheat on the cartel is reduced by the threat of having his/her supply cut. This presumes that the dealers have enough power to induce the supplier to behave in a way that is not only illegal but which does not benefit him/her.

When used in conjunction with either an upstream or downstream cartel, RPM is likely to be welfare reducing since it results in an increase in price *without* the compensating shift in demand emphasised by the services theories. Consequently, cases involving the use of RPM across competing brands raise very serious concerns.

Another theory relates to the imposition of RPM as a form of compensation for retailers' holding inventory during periods of slack demand. In this particular model, RPM is employed "as a mechanism to increase the manufacturer's distribution in order to better serve *existing* demand, rather than to *expand* demand" (italics added); additional services or quality do not play a role.[11] The model assumes that: *(i)* there is an uncertain demand for the product; *(ii)* retailers need to stock the product before this uncertainty can be resolved; *(iii)* retailers must incur some expense in carrying unsold inventory. In this context, price discounters can sell at low prices because there is a low expectation on their part that they will have to carry unsold inventory in the face of slack demand.

Conversely, facing a similar demand environment, full price retailers are in a position to carry unsold inventory in the expectation they can sell it later at a higher retail price. Manufacturers have a strong incentive to prohibit discounting in the face of uncertainty, motivating imposition of RPM. Uniform pricing can support larger inventories and sales of a manufacturer's product and, is crucial to a manufacturer's ability to maintain distribution and thus the viability of the product. By preventing discounting, the manufacturer can induce inventory adequate to service high demand states.

Recent Enforcement Activity

In Canada, RPM has been employed for products as sophisticated as pharmaceuticals and as simple as pet food. A recent review of RPM prosecutions over the period 1986 - 1993 identifies three broad classes of cases:[12] *(i)* those which are strictly horizontal, i.e., they occur at a single stage of production or distribution and involve demands by one dealer that another dealer raise the price at which it sells a particular product; *(ii)* cases which are strictly vertical, where one supplier imposes a resale price on a reseller; and *(iii)* mixed horizontal and vertical cases, which involve the use of vertical restraints either in concert with the suppliers of competing brands or in response to complaints or threats of downstream resellers of the supplier's own brand.

Csorgo and McFetridge find that of the 37 prosecutions, there was one strictly horizontal case, nine strictly vertical cases and 27 cases that had both horizontal and vertical elements. Concerning the four strictly vertical cases, while the supplier acted unilaterally, there was evidence that the supplier had concerns about discounting within its dealer network. Regarding the 27 cases with horizontal and vertical elements, six involved attempts to restrict interbrand competition. Two of these involved gasoline retailing, two involved an arrangement among distributors of motorcycles, one concerned printers of business forms and the sixth involved the retailing of women's clothing.

The remaining 21 cases in the sample involved attempts to curtail price competition among retailers of the same brand. Of these, four involved attempts by an integrated supplier-dealer to reduce price competition from non-integrated dealers supplied by it (parallel distribution cases). The remaining 17 involved a response, at least in part, by an upstream supplier to complaints from within its dealer network regarding intrabrand price competition.

Two types of cases which appear prominent in the data may merit further study from a theoretical perspective. First, there are four cases involving limited edition prints, pottery, sports cards and stamps. These products are purchased in part in anticipation of capital appreciation. The significance of this factor merits consideration from a theoretical point of view. Second, a number of cases appear to involve disputes between integrated supplier-distributors and non-integrated distributors. This raises the intriguing question of why it would be in the interest of integrated supplier-dealers to supply potentially competing non-integrated dealers and why the terms of this competition cannot be controlled by setting wholesale prices appropriately.[13]

RPM and the Competition Bureau's Enforcement Priorities

In general, resale price maintenance and related practices remain subject to strict criminal prohibition in Canada. Any persons engaging in such practices are subject to possible prosecution and the criminal penalties.

Enforcement of the law against price maintenance by the Competition Bureau, however, is guided by the Bureau's overall enforcement priorities, which in turn take account of relevant resource constraints. A recent statement of the Bureau's enforcement priorities indicated as follows:

> Although some price maintenance cases figure prominently, using the [Bureau's economically-based] case screening criteria as a guide means that much more of the Bureau's criminal enforcement effort is directed towards conspiracy and bid-rigging cases, those very activities that strike at the heart of an otherwise dynamic and efficient market economy by

> suppressing rivalry among firms and enabling some to function as collective monopolies or cartels. The Supreme Court of Canada recently lauded competition law for being "central to Canadian public policy in the economic sector," and summed up the conspiracy provision as "one of the pillars" of that law. For these reasons, conspiracy and bid-rigging cases have the highest priority among the criminal provisions of the *Competition Act*, and they are vigorously pursued by the Bureau.[14]

On this basis, it can be argued that, while price maintenance and related activities in Canada remain subject to strict criminal prohibition, the application of the relevant statutory provisions by the public enforcement authority is guided by general enforcement priorities which give precedence to other sections of the Act, particularly those focusing on horizontal anti-competitive practices. Of course, even if they avoid the attention of the Competition Bureau, persons who engage in resale price maintenance or related practices can be subject to private actions for damages under the *Act*.[15]

NOTES

1. R.D. Anderson and S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Resale Price Maintenance," *Canadian Competition Policy Record*, vol. 6, no. 4, December 1985, pp.1-17.

2. *Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance* (Ottawa, Queen's Printer, 1952).

3. The *Competition Act*, R.S., 1985, as amended.

4. U.S. v. Colgate, 250 U.S. 300 (1919). The *Colgate* doctrine was affirmed by the U.S. Supreme Court in its landmark 1984 decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). For commentary, see R.D. Anderson and S.D. Khosla, "The Monsanto Case and the Evolution of RPM Policy in the U.S.,"*Canadian Competition Policy Record*, vol. 5, no. 3, September 1984, pp. 9-16.

5. R. v. H. D. Lee, (1981) 57 *C.P.R.* (2d) 186.

6. R. v. H. D. Lee, *id.*

7. Of course, the rationale for the existing prohibition of price maintenance is not necessarily limited to the theoretical concern with cartels. Rather, the law clearly reflects the view that efforts to influence prices upward, even absent horizontal effects, are harmful *per se*.

8. Lester G. Telser, "Why Should Manufacturers Want Fair Trade," *Journal of Law and Economics*, vol. 3, 1960, p.86.

9. Howard P. Marvel and Stephen McCafferty, "The Welfare Effects of Resale Price Maintenance," *Journal of Law and Economics*, Vol. XXVIII (May 1985).

10. See L. A. Skeoch, "Canada," in Basil S. Yamey, *Resale Price Maintenance* (Chicago: Aldine, 1966), pp. 25-29.

11. Raymond Deneckere, Howard Marvel and James Peck, "Demand Uncertainty, Inventories, and Resale Price Maintenance," *Quarterly Journal of Economics*, Vol. CXI, Issue 3, 1996.

12. L. Csorgo and D. McFetridge, *The Economics of Resale Price Maintenance: Evidence from Canadian Cases* (Competition Bureau, Draft, 1995).

13. Csorgo and McFetridge, *supra*, note 10.

14. Harry Chandler, *Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada (*Remarks before the Insight and Globe and Mail Conference on Emerging Issues in Competition Law, Toronto, March 10, 1994).

15. Section 36 of the Act enables private parties to sue for damages arising out of either: (i) a violation of a criminal provision of the Act; or (ii) a remedial order issued by the Competition Tribunal in a non-criminal case.

ESPAGNE

I. Introduction

De façon générale, les législations de défense de la concurrence interdisent les accords entre entreprises limitant ou faussant la concurrence par le biais de la fixation de prix. Mais il existe en outre, d'autres pratiques de fixation de prix, effectuées individuellement par une entreprise et pouvant donner lieu à une restriction de la concurrence.

Dans ce dernier cas, une entreprise peut utiliser le prix comme arme pour expulser ses concurrents du marché (Prix d'éviction), forcer l'achat de certains produits à l'acquisition d'autres ("Tie-in sale") ou fixer un prix minimum pour le distributeur qui va revendre ses produits ("Resale price maintenance"). Ces conduites sont souvent associées à un certain degré de pouvoir dans le marché.

Les raisons qui ont porté la majorité des pays occidentaux à restreindre la fixation des prix de revente (RPM) sont les suivantes :

1. il s'agit d'un instrument qui réduit la concurrence entre les vendeurs d'un produit d'un fabricant (concurrence intramarques) ;

2. il peut favoriser la collusion entre producteurs (restriction de la concurrence entre marques).

II. Analyse économique

Les fabricants utilisent différents circuits pour vendre leurs produits. Ainsi, par exemple, il est possible que le producteur traite directement les utilisateurs finaux (biens industriels, banques et assurances, etc.) ou qu'il le fasse indirectement par l'intermédiaire de distributeurs (alimentation, livres, textiles, etc.). Dans certains cas, les deux formes de distribution, directe et indirecte, peuvent coexister.

Lorsque les fabricants vendent directement, il peuvent déterminer le prix final, mais lorsqu'ils le font indirectement, ils doivent tenir compte de la conduite des intermédiaires au moment de fixer leur politique de prix. Dans ce cas, il faudrait considérer les facteurs suivants :

- réponse des ventes au prix final ;

- politique des prix des distributeurs ;

- Positions de pouvoir relatives des fabricants et des distributeurs.

La relation entre producteurs et distributeurs est toujours difficile de par la création d'intérêts opposés aussi bien dans la poursuite du bénéfice commun maximum que dans la distribution du bénéfice total entre les deux parties.

Dans ces cas, il arrive souvent que les distributeurs possèdent une position relative plus forte, non seulement grâce à leur concentration croissante dans le cas de la distribution de certains biens, mais aussi parce que l'accès au consommateur est devenu un facteur extrêmement important ("Bottleneck factor").

Les situations suivantes peuvent se présenter :

1. le producteur fixe le prix d'usine ("Ex factory price") et le prix final. De cette façon il détermine aussi la marge commerciale ;

2. le producteur fixe le prix d'usine mais n'a pas le poids suffisant pour déterminer le prix final ;

3. le distributeur fixe le prix d'usine: le fabricant peut l'accepter ou le refuser ;

4. les deux parties (fabricant et distributeur) coopèrent pour la fixation des prix et essayent de porter leur bénéfice au maximum.

La fixation du prix de revente typique serait donc incluse dans le cas 1) puisque les deux paramètres principaux (prix d'usine et de revente) qui déterminent la marge bénéficiaire, sont sous le contrôle du fabricant.

Du point de vue économique, cette pratique a été soumise à des critiques fondamentalement centrées sur les restrictions à la concurrence qu'elle provoque dans le secteur de distribution au détail, et en plus petite partie, dans celui des fabricants.

Ainsi, au niveau de la distribution, la fixation du prix de revente empêche que les vendeurs rivalisent, étant donné qu'il existe un prix commun et unique pour un même produit. A long terme cette situation donne lieu à des hauts prix qui nuisent au consommateur et favorisent les entreprises moins efficaces.

En outre, la fixation du prix de revente a un effet de découragement, puisque les choix du consommateur se réduisent. Celui-ci se trouverait face à une combinaison de prix et de services -l'offre des derniers augmentant pour compenser la fixation du prix -- sans pouvoir choisir entre les deux possibilités simultanément, comme il le ferait s'il n'y avait pas de restriction.

Nous pourrions résumer les inconvénients du RPM en signalant qu'il rend le développement et l'expansion de nouvelles formules de distribution au détail plus difficiles, qu'il empêche au consommateur de choisir entre les prix plus bas ou les services additionnels, et surtout, qu'il décourage les réductions de prix comme méthode plus efficace de concurrence.

Comme mentionné plus haut, la fixation du prix de revente peut aussi restreindre la concurrence entre fabricants. Le principal argument en faveur de cette thèse s'appuie sur le fait qu'en fixant des prix minimum, les fabricants réduisent l'incertitude dans le marché et rendent plus faciles les conditions pour aboutir à un accord.

S'il n'y avait pas de fixation du prix de revente, les fabricants devraient discuter les prix avec les distributeurs. De cette façon, leurs concurrents auraient plus de mal à connaître les prix finaux et ne sauraient pas s'ils sont la conséquence de la politique commerciale du fabricant ou de celle des détaillants.

Malgré tout, il existe des arguments en faveur de la fixation du prix de revente que nous résumons ci-dessous :

1. besoin de protéger les petits commerces -généralement moins concurrentiels ;

2. il permet aux fabricants de disposer d'un réseau de distribution plus ample et plus stable, étant donné que les coûts structurels des vendeurs sont très variables.

3. sauvegarder les intérêts de certains secteurs de la population ayant moins de mobilité et une moindre capacité pour s'informer ;

4. empêcher l'apparition de commerçants parasites qui profitent des services techniques des concurrents pour offrir des bas prix. Ce cas est fréquent dans les ventes d'équipements très sophistiqués: les clients s'informent auprès des commerces ayant un personnel qualifié et les meilleurs services, pour acheter ensuite à meilleur marché dans les établissements qui n'ont pas fait ces investissements.

5. maintenir l'image d'une "marque", notamment dans les produits à prix "élevé", justifié soi-disant par la qualité.

Cependant, les arguments contre la RPM ont gagné du terrain depuis les années soixante et montrent une tendance marquée à poursuivre dans cette voie.

III. Cas

La fixation du prix de revente est une pratique restrictive interdite par la législation espagnole (Article 1.1.a) de la Loi de défense de la concurrence), ainsi que par la réglementation communautaire (Article 85.1.a) du Traité de l'UE).

Il existe en Espagne deux secteurs exemptés -- livres et médicaments -- qui disposent de législations spécifiques.

Secteur Pharmaceutique

Dans le secteur pharmaceutique, nous pouvons relever le cas suivant :

Produits cosmétiques dans les Pharmacies

L'Union des consommateurs d'Espagne (UCE) a dénoncé en 1991, devant le Tribunal de défense de la concurrence (TDC), l'existence d'un système de distribution exclusive de produits cosmétiques permettant aux fabricants/importateurs de réserver aux pharmacies la possibilité d'être leurs distributeurs à l'exclusion d'autres circuits comme les parfumeries et la grande distribution.

L’Association nationale des moyennes et grandes entreprises de distribution (ANGED) a déposé une autre plainte contre les mêmes entreprises et, par extension, contre les coopératives de pharmaciens qui agissent comme grossistes distributeurs et contre les Associations officielles de pharmaciens passant des contrats d’exclusivité avec les fabricants de produits cosmétiques.

Au moment de préciser les faits, il a été décidé de formuler des actes individuels d’accusation étant donné que l’existence d’accords horizontaux entre les entreprises objet d’instruction judiciaire n’a pas été constatée. Les accords étaient verticaux.

Les charges imputées à chaque entreprise ont été les suivantes :

– fixation de prix de revente ;

– distribution exclusivement par l’intermédiaire des pharmacies.

La fixation du prix de revente a été suffisamment constaté, puisque les entreprises, dans leurs accords avec leurs distributeurs, incluaient le prix de vente au public des produits cosmétiques qu’elles fournissaient pour la revente.

Les entreprises dénoncées ont invoqué à leur décharge :

1. qu’elles ne connaissaient pas l’interdiction d’indiquer le prix ;

2. qu’étant donné que les produits cosmétiques représentent une production moindre par rapport à celle des médicaments, elles leur ont appliqué par défaut les mêmes règles de commercialisation ;

3. que le fait de signaler les prix ne constituait pas vraiment une fixation de prix puisqu’il ne s’agissait que d’ajouter le pourcentage que les pharmaciens appliquaient normalement au prix de vente du fabricant.

Tous ces arguments ont été facilement réfutés étant donné que :

1. l’ignorance n’est pas excusable puisqu’il s’agit de conduites recueillies dans la Loi 110/1963 de Répression des Pratiques Restrictives de la Concurrence (actuellement dérogée) ;

2. les médicaments sont soumis à un régime légal exceptionnel qui ne peut pas s’étendre à d’autres produits ;

3. ce qui est imputé n’est pas le montant du prix mais le fait même de son indication.

En outre, les entreprises impliquées ont adjuré que les prix étaient simplement recommandés et qu’elles n’avaient jamais exigé leur respect aux distributeurs.

Le Tribunal de Défense de la Concurrence (TDC) a précisé que le prix recommandé n’est admissible que lorsqu’il y a une concurrence suffisante entre revendeurs. Dans ce cas, il devient le prix maximum et permet au consommateur de comparer les offres qui se distinguent par le pourcentage de remise pour le même produit.

A cet égard, il convient de souligner qu'il n'y a généralement pas de concurrence intramarque dans le système pharmaceutique, qui constitue un circuit fermé régit par le *numerus clausus* et où la concurrence de prix entre pharmacies est interdite par les Associations Officielles de Pharmaciens, pour des raisons déontologiques et de protection de la santé difficilement justifiables.

Ce comportement non concurrentiel, issu du fait que les affaires pharmaceutiques sont centrées sur le médicament, a tendance à s'étendre à d'autres marchandises -produits cosmétiques -- ne jouissant pas d'exemption légale.

Le prix recommandé dans le circuit pharmaceutique est donc équivalent à un prix fixe. En effet, une fois respecté par tous, il permet de maintenir les mêmes marges et encourage le fonctionnement non concurrentiel du marché.

Le TDC a décidé qu'il s'agissait d'une pratique restrictive normalisée par l'article 1.1.a) de la LDC et a infligé les amendes correspondantes.

Livres

Le secteur du libre, de son côté, est réglementé par la Loi 9/1975, du 2 mars et par le Décret royal 484/1990, du 30 mars sur les Prix de vente de livres au public.

Tout le système est basé sur l'existence d'un prix fixe sur l'offre et la vente de livres au public.

Dans l'exposition des motifs cités par le Décret Royal susmentionné, nous relevons les idées suivantes :

1. il s'agit d'un marché à grande importance culturelle et économique ;

2. Le système de prix fixe favorise une offre d'éditions et de livres plurielle. En outre, il assure que les éditions de rotation rapide ne déplacent pas celles de plus longue durée.

3. Le prix fixe permet que la concurrence entre établissements au détail de différente taille soit établie sur la base d'autres facteurs que le prix.

Ceci impliquerait une offre plurielle et un plus grand nombre de points de vente, au profit du consommateur final.

En somme, tout éditeur ou importateur de livres est obligé à établir un prix de vente au public ou au consommateur final des livres édités ou importés indépendamment du lieu de la vente.

Le prix de vente au public, au comptant, peut varier entre 95 pour cent et 100 pour cent du prix fixe. La remise maximum pourra être de dix pour cent dans certaines circonstances (Jour du Livre, Foires du Livre, Congrès, Expositions).

Certains cas concrets -- livres de bibliophiles, artistiques, usés, hors catalogue -- sont exemptés de l'obligation de vente à prix fixe.

L'avis du TDC est contraire à la permanence de cette législation et peut être résumée comme suit :

1. le fait que dans le marché de distribution de livres, le prix soit fixé par l'éditeur, constitue une pratique fortement restrictive de la concurrence. Le Décret Royal 484/1990, en établissant un prix fixe, réduit la concurrence à d'autres facteurs vu que la possibilité d'offrir des remises supérieures à cinq pour cent n'existe pas ;

2. S'il n'y avait pas de prix fixe, le contraste entre le pouvoir oligopolistique -- et parfois monopolistique -- de l'éditeur et la concurrence entre un nombre élevé de libraires -- de différente nature et avec des coûts d'exploitation différents -- se traduirait par la diversité des prix -- expression claire de la concurrence ;

3. Cette diversité serait la conséquence aussi bien des différentes structures des coûts que des comportements de la demande et des stratégies des entreprises ;

4. La concurrence en prix et services, simultanément, contribuerait à la rationalisation du secteur et serait favorable au consommateur.

Voici quelques commentaires sur certains cas du marché de distribution de livres.

Grands Magasins FNAC ESPAÑA S.A.

L'Association des petites et moyennes librairies et librairies-papèteries de Madrid a dénoncé la FNAC ESPAÑA S.A. pour vente de livres avec remise aux clients possédant un carnet jeune fourni par la communauté de Madrid. Cette opération était incluse dans une campagne de publicité sur la presse et autres moyens de communication.

Les dénonciateurs estimaient que les remises étaient supérieures au pourcentage (cinq pour cent) autorisé par la legislation (DR 484/1990) sur les prix de vente de livres au public. Ceci pouvait supposer une concurrence déloyale.

Le Service de défense de la concurrence (SDC) a classé la plainte, celle-ci ne remplissant pas ce qui est requis pour être classée comme conduite interdite d'après la LDC (Article 7) :

1. existence d'un comportement déloyal selon la Loi 3/1991 de Concurrence déloyale ;

2. existence d'un comportement portant atteinte à l'intérêt public et à la libre concurrence ;

3. perturbation grave des mécanismes réglant le marché.

Le SDC a indiqué que le comportement dénoncé ne portait pas atteinte de manière sensible à l'intérêt du public, c'est à dire, à la libre concurrence -- bien juridique protégé par la Loi 16/1989 de Défense de la Concurrence (LDC) -- ni ne faussait les mécanismes de marché, par manque d'entité suffisante.

Du fait de ne pas remplir les formalités citées, du moins la 2ème et la 3ème, les faits dénoncés n'entraient pas dans le domaine d'application de l'article 7 de la LDC.

Le classement de la plainte a été appelé par devant le TDC.

Ce dernier a soutenu les thèses exprimées par le SDC, étant donné qu'à son avis, les campagnes visant à réduire le coût d'acquisition des livres sont favorables à l'intérêt public pour deux raisons fondamentales :

1. la réduction du prix augmente le salaire réel des citoyens ;

2. La réduction du prix se traduit par une augmentation de la quantité de livres acquis par les lecteurs puisque l'élasticité-vente de la demande de livres est positive.

Par conséquent, la vente de livres avec remise encourage l'augmentation du dénommé "excédent du consommateur", ce qui améliore l'efficacité des marchés concernés.

Le TDC a indiqué également que l'objectif de la LDC et des organes de concurrence n'est pas la défense du concurrent et encore moins celle de l'inefficace contre l'efficace. Dans cette ligne, il a ajouté que, bien que la campagne de promotion mise en place par la FNAC a pu diminuer les ventes des plaignants, ceci ne signifie pas qu'elle soit illégale ni qu'elle doive être interdite.

Les demandes des opérateurs dénonciateurs ont été considérées démesurées étant donné que, sur la base d'une interprétation extensive du Décret Royal 484/1990, elles prétendaient forcer la disparition de toute forme de concurrence.

Les plaignants ont décidé de renoncer à leurs actions et le TDC a considéré le dossier clos.

Corporation des Libraires de Valence

La Corporation des Libraires de Valence a porté plainte contre "El Corte Inglés S.A." pour concurrence déloyale dans la vente de livres. Ceci pouvait supposer une infraction prévue par l'article 7 de la LDC.

Les actions déloyales dénoncées consistaient dans la vente de livres avec une remise de dix pour cent et présent d'un autre livre, pendant les journées prévues pour le Jour du Livre, en dehors de l'enceinte de la foire.

Les plaignants ont considéré que "El Corte Inglés S.A." avait enfreint la Loi 3/1991 de Concurrence Déloyale et le Décret Royal 484/1990 établissant le système de prix fixe pour la vente de livres au public.

La plainte a été déposée devant le SDC sur la base de l'article 7 de la LDC.

Comme nous avons déjà noté, pour qu'une conduite déloyale entre dans le domaine d'application de la LDC, les suivantes formalités doivent être remplies :

1. existence d'un comportement déloyal selon la Loi 3/1991 de Concurrence déloyale ;

2. que le comportement susmentionné porte atteinte à l'intérêt public.

3. Que les mécanismes réglant le marché s'en trouvent sensiblement perturbés.

Le SDC a estimé que seule la première formalité était remplie puisque la courte période pendant laquelle les actions déloyales se sont déroulées, était insuffisante pour toucher l'intérêt public et encore plus pour déformer les mécanismes du marché.

Pour ces raisons, la plainte ne remplissait pas les formalités de l'article 7 de la LDC.

La Corporation de Libraires a appelé devant le TDC de cette décision en soutenant fondamentalement que :

1. l'intérêt public était touché par le préjudice causé aux objectifs culturels de la Foire du Livre de Valence ;

2. La pratique de la remise touchait négativement le fonctionnement du marché étant donné que les libraires ont vu leurs ventes se réduire.

Le TDC a réfuté ces arguments de la suivante façon :

1. la promotion réalisée par "El Corte Inglés S.A." ne porte pas atteinte à l'intérêt public culturel poursuivi par la Foire du Livre, puisqu'elle a favorisé l'achat de livres par la population de Valence ;

2. la législation du livre établit clairement les conditions des remises autorisées. Il ne peut pas être admis que l'utilisation de la faible marge de concurrence tolérée par les normes soit considérée comme une perturbation grave au fonctionnement des mécanismes du marché.

Pour ces raisons, l'appel a été débouté.

A titre de rappel, nous pourrions dire que :

1. la fixation du prix de vente de livres au public en Espagne, avec des remises rigidement taxées, suppose une exception -qui restreint gravement la concurrence -- à la regle générale de liberté des prix ;

2. cette restriction ne peut pas être persécutée par le TDC étant donné que, d'après l'article 2 de la LDC, les pratiques résultant de l'application d'une loi sont exemptées ;

3. dans ces cas, le TDC ne peut que formuler une proposition motivée au Gouvernement pour la modification ou suppression des restrictions citées ;

4. le TDC considère inacceptable l'utilisation des instructions de la LDC, comme était l'intention des plaignants dans les cas cités, dans le but de supprimer les faibles marges que la législation du livre permet au fonctionnement du marché.

1. Dans le cas concret du secteur du livre espagnol, la fixation du prix de vente par l'éditeur, en plus de supprimer pratiquement la concurrence à niveau du détail, introduit des rigidités dans la relation entre les éditeurs et les vendeurs.

FINLAND

Introduction

Competition policy has three basic strategies for dealing with resale price maintenance (hereinafter RPM). RPM could either be deemed unconditionally legal or illegal by the competition law, or the courts or agencies responsible for implementing the law could have the freedom to apply the rule of reason. In Finland, the law is closest to the second basic strategy, with the refinement that the parties can apply for an exemption to use RPM.

The inefficiencies caused by the inability to use RPM can be partly offset by two mechanisms. First, the parties can adjust their uses of other, legal, contracting instruments to regain some of the welfare losses. Second, the use of RPM can be exempted. In Finland, the Office of Free Competition (hereinafter OFC) can grant the exemption provided *(i)* the applicants can establish that RPM will lead to an increase in efficiency *(ii)* the major fraction of which is captured by the consumers.

This paper shall chart RPM in the Finnish competition law and policy, and the application of the law in some cases involving RPM. Particular concentration shall be paid on the economic justifications for the current law and on how this economic reasoning has influenced the OFC’s policy and case-work.

Chapter 2 shall briefly introduce the main provisions of Finnish competition law. Chapter 3 contains the opinions and economic justifications for RPM set forth by the Committee revising the Act on Competition Restrictions, and Chapter 4 discusses how the economic reasoning has shaped the policies of the OFC. Chapter 5 discusses some aspects of five cases that included RPM. These cases were chosen on the basis of casting light on the OFC's policy with respect to RPM and vertical restraints in general. The paper ends with some concluding remarks.

RPM in the Finnish Competition Law

Article 4 of the Finnish Act on Competition Restrictions provides that "In the process of trade, it shall be prohibited to request from the subsequent sales level that, in the domestic sale or rental of commodities offered, a certain price, compensation or determination thereof shall not be exceeded or undercut." The verb "request" here means that those exposed to the request find that engaging in or continuing a business relationship or practising trade is endangered unless the request is complied with. Price recommendations by an upstream firm are allowed if these cannot be considered as tying the downstream firm.

Recommended pricing, too, may be considered harmful if the product does not have any major competitors and if the pricing of the product has become rigid in the retail sales level. In such a case, the OFC does not intervene with recommended pricing on the basis of Article 4; instead, Article 9 lists separate criteria, on the basis of which a vertical competition restraint may be considered harmful.

Although the use of RPM is forbidden in the Act on Competition Restrictions, under Article 19, a company may apply for an exemption if the use of RPM promotes the production or distribution of commodities or technical or economic development and if the benefit primarily accrues to the clients or the consumers.

The Government Proposition for the Act on Competition Restrictions

The current competition legislation entered into force on May 27th, 1992. Compared with the previous legislation, the ban on RPM was tightened to the extent that, in addition to forbidding the imposing of a minimum sales price, the imposing of a maximum price for the subsequent sales level was also prohibited. A provision on allowing recommended prices was deleted from the law, although their use was still not prohibited.

In its motivation for the present Act on Competition Restrictions, the Government came to the conclusion that the harmful effects of a competition restraint were the more obvious the more a competition restraint enabled the maintenance of an even price level in the distribution of a commodity. In a state of effective economic competition, price formation in the markets is based on the independent pricing of an entrepreneur and the market mechanism guiding it. Companies shall be allowed, on each level of vertical chain, to independently determine their prices based on their own competitive scene and the genuine costs incurred. If the upstream level determines the minimum or maximum sales price of the downstream level, the freedom of retailers to decide about their own sales prices or conditions is prevented.

Both minimum and maximum prices have their pitfalls. The Government particularly emphasised the rigidity caused by RPM in the dynamics of the economy. Some entrepreneurs may offer supplementary services when selling a commodity, such as user guidance, maintenance and warranties, with the costs of these services being added to the price of the product. Although the buyers of the products are thus forced to pay a higher price, they may still rather choose a product whose purchase contains these added bonuses. If the previous distribution level has imposed the maximum prices, the development of such new business designs becomes more complicated.

Of the static effects of RPM, the Government paid attention to the given price margins changing into genuine prices. Allowing maximum prices would lead to these prices becoming those generally charged of a product; commodities would thus be priced towards the higher end of the scale. This would result in decreasing price competition and a likely increase in the price. Allowing the imposing of minimum prices would lead to problems in the granting of volume discounts generally used.

Application of RPM Clause at the OFC

The leading idea behind the Finnish competition legislation is the promotion of well-operating competition and market mechanism. The OFC has paid close attention to this intent of the law in its decisions, and has approved arrangements which foster competition and the market mechanism, and revoked ones which do not.

In reality, however, the operation of markets can be far from perfect, and non-competitive prices can persist. Some of the most important reasons for these are incompleteness and asymmetry in information; incompleteness of contracts; excessive market power; and missing markets. The inefficiencies caused by market imperfections can be partly mitigated by contracting instruments such as

RPM. The strict prohibition of RPM can therefore hinder the efficient operation of markets and contracts. Some of these efficiency losses can be regained by adjustments in other, legal, contracting instruments, such as sales bonuses; exclusive territories; quotas and other quantity restrictions; two-part tariffs and other non-linear pricing rules; and/or yardstick competition. RPM differs from many other contracting instruments in that it is more likely to introduce rigidities in prices, and, hence, to reduce the economy's ability to react to external demand and cost shocks.

In the view of the OFC, the strict prohibition of RPM coupled with the exemption procedure is a better strategy for dealing with the issues involved with RPM rather than a pure rule-of-reason approach. First, should the parties consider RPM to increase the efficiency of the transactions, they have an incentive to demonstrate this to the OFC. Hence, not all justifiable uses of RPM remain unexploited. Second, the parties involved with the contract are insiders intimately involved with all the relevant issues and aspects of the markets in question, whereas agencies such as the OFC are necessarily outsiders. Thus, the parties are in a better position to establish the efficiency of the RPM than the OFC is in establishing the opposite; it seems to be more efficient to put the burden of proof to the insiders. Furthermore, unlike under the rule-of-reason system, the agency need not spend its scarce resources in analysing all those cases where the welfare gains or losses can not easily be shown.

The OFC has received only a handful of applications that involve RPM, and has yet to issue the first exemptions for the use of RPM. Is this due to the fact that the contracting parties have enough other instruments to increase the efficiency of their transactions, and evidence against the need for RPM? Or, is it due to the firms' inability to establish and guarantee the welfare gains by the final consumers?

Cases

Recently, there have been several cases at the OFC that were directly involved with RPM, five of which shall be discussed in more detail below. These are Esso's "The Right Price" system, resale price recommendations in groceries and in some pharmaceutical products, and exemption applications for the use of RPM by the Shell Corporation and by the Finnish Petroleum Federation.

"The Right Price" (March 7, 1995)

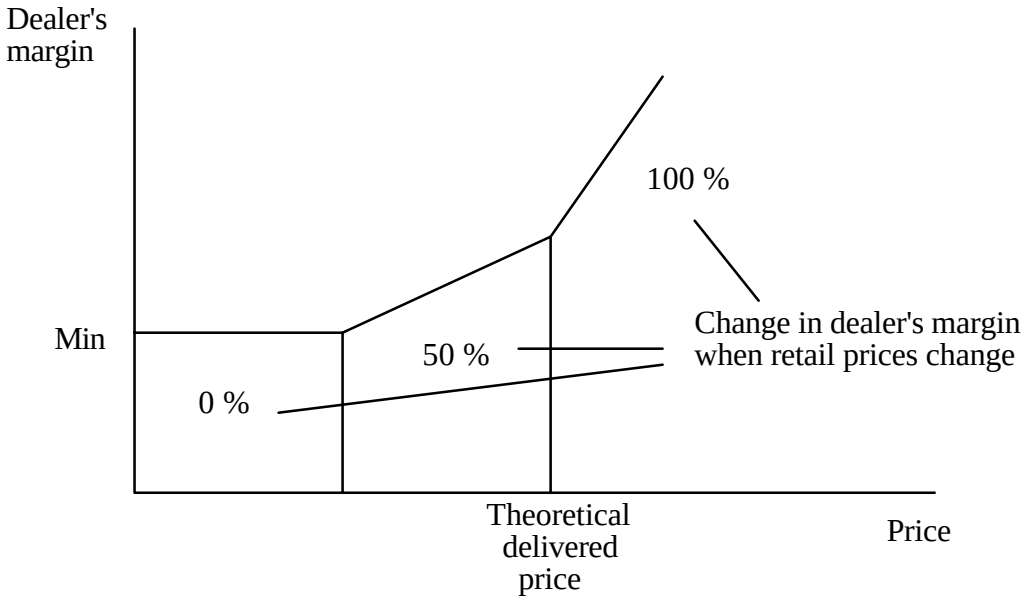
From the late 1980s, Finland experienced a severe recession, which, e.g., caused the fuel demand to contract. Simultaneously, unmanned stations and other automated gas pumps started to become more widespread. The results of these were tightened competition in motor fuel markets; smaller resale margins; and, particularly, declines in Esso’s market share and dealers' profits. To answer these trends, in 1991, Esso established a contracting policy called "The Right Price". Its purpose is to support the dealers’ ability to compete, particularly when they cannot profitably answer the price competition in their area.

The Right Price system operates roughly as follows. The contract between Esso and the dealers stipulates, e.g., that the dealers must report the prices charged by the selected nearby competitors to the Finnish Esso Headquarters. The contract also specifies conditions under which the dealers can ask for wholesale price-reduction. This can be done by filing a specific form. Esso then announces the decision, and the conditions under which the support is granted. The discount usually lasts one week at a time. The dealers are never obliged to apply for the discount, nor are any of them obliged to join the Right Price system, and the support is never retroactive.

The subsidy is calculated by a formula in which the crucial variables are the theoretical delivered wholesale prices and the local retail prices for all the different motor fuels. The theoretical delivered price includes all delivery and storage costs, and a theoretical resale margin. The discount is at most half the difference between the theoretical delivered price and the local retail price charged by the specified competitors.

The arrangement also guarantees a minimum margin between wholesale and retail prices under all conditions. The guaranteed margin is below the level required by the dealers in the long run, but covers direct operating costs. Should the local retail price drop to a level where they would not earn the minimum margin with this formula, the wholesale price is reduced accordingly. Picture 1 depicts the Right Price system.

Picture 1. Wholesale Price-Reductions in the "Right Price" System.



Obviously, stations operating under consignment contracts do not qualify for the Right Price system – they receive the contracted sales bonus irrespective of the local competition. Their role is to report the local retail prices to Finnish Esso Headquarters to keep them informed on the market conditions.

Why did the OFC accept this resale contracting practice, considering the strict ban of all RPM arrangements in the Finnish competition law? There are several reasons for this. First, with this contracting system, the upstream firm does not set the resale price, nor does it impose maximum or minimum prices. There is a requirement that the dealers charge the price they used in the application. This was not considered to be RPM, since the dealers choose the retail price. Second, each dealer has a realistic option not to apply for wholesale price-reduction, and even not to join the Right Price system at all, although all entrepreneur dealers did join in.

Third, the Right Price system increases the dealers' ability to answer price competition. This can have two effects. The first possible effect is an increase in competition in the motor fuel markets and a reduction in the average consumer prices. The second effect is the opposite, as the logic of "tacit collusion" suggests. The Right Price system enables the dealers to answer the price competition more ferociously. Knowing this, the other dealers want to avoid price wars and try to restrict price competition;

hence, retail prices could actually rise. The opinion of the OFC was that the first effect will dominate the second.

Fourth, the system could be seen as a tool to manage price risk. With the arrangement, a part of the retail price risk is transferred from the dealers to Esso, which is likely to be efficient.

Most importantly, the arrangement increases the dealers' abilities to vary their prices as the local market conditions change. Thus, it obeys the intent of the competition law and the expressed opinions of the Committee the law was based upon, as discussed above (cf. Chapter 3).

Retail Price Recommendations in Groceries (7 November 1995)

The Office of Free Competition investigated the retail price recommendations of groceries, targeting all food-stuffs.

Recommended pricing of groceries was common practice, based not on the view of each manufacturer held on the retail prices of their products, but on the practice and pricing coefficients developed during price regulation and control. Opinions of manufacturers and trade associations on the appropriate compensations for the retailers formed the background for recommended pricing. But even after the regulated period, according to almost all manufacturers, the maintenance of price recommendations was based on the wishes of the retail industry. Moreover, manufacturers did not present any such reasons or objectives for their pricing recommendations which could have been considered as increasing competition. In its judgement, the OFC thus found the price recommendations of groceries a harmful competition restraint, and at the request of the Office, manufacturers lifted recommended pricing off their products by April 1995.

The OFC did allow the price recommendations of Valio and Meijeriosuuskunta Milka for cheeses of varying weight, due to the producers offering these products at several different prices, even without fixed unit prices, and the fact that the sales prices could be printed on the products more inexpensively on the cheese production lines. Each producer also delivered cheeses with the retail prices chosen by the retailers.

Retail Price Recommendations in Pharmaceuticals (26 January 1993)

Leiras, a manufacturer of pharmaceuticals, printed recommended prices on the packages of its "AO" brand of non-prescription drugs and other self-care products, such as vitamins and skin-care products. The price recommendations were between five percent and 20 percent less than the prices of the most popular comparable products.

According to the complaint, this restricted the freedom of pharmacists to set prices, and caused rigidity in prices. However, the pharmacies were allowed to sell the products without the packages, and charge any prices within the limits set for medical products. Furthermore, there were several alternative products available for consumer use.

The main argument presented by the appellant for abandoning price recommendations was that the low prices gave the consumers an impression that AO products were old, old-fashioned, or otherwise of a lesser quality. The counter-argument considered the regulations and monitoring of pharmaceutical products. The introduction of the AO brand with the low recommended prices caused prices of some other

related goods to be lowered. Moreover, there was no evidence that indicated that Leiras required or monitored the use of recommended prices.

In Finland, the market entry of new pharmacies as well as the retail price margins are regulated by governmental agencies. Thus, the claim that the AO brand introduces rigidity in retailing is without a justification. To the contrary, the introduction of the AO brand with price recommendations increased competition in the retail market, and actually promotes the market mechanism.

Thus, the OFC did not require Leiras to lift the resale price recommendations. The major reason should be obvious from the above discussion. The introduction of the AO brand with low recommended prices introduced price competition to the area that had successfully avoided competition. A prohibition would only have led to higher prices. In this case, the price recommendations were found to promote the main purpose of the competition law.

The Finnish Petroleum Federation's Exemption Application (5 January 1993)

In 1992, the Finnish Petroleum Association applied for an exemption to use so-called competition contracts as the agent for all oil companies selling motor fuel at the time. These contracts contained a condition according to which petroleum retailers part of a specific chain were obliged, at the request of the oil company, to lower their prices to meet the corresponding prices or sales conditions of a competitor. The costs caused by the reduction in prices were split between the oil company and the retailers part of the chain.

In its exemption application, the Finnish Petroleum Federation justified the use of the competition contracts by the gas station keepers not being obliged to follow a specific maximum price confirmed by the company - they were only provided with flexible limit which depended on local conditions. The Federation further held that the aim was a lowering of the general price level through price competition and that lower prices are beneficial for consumers.

In its decision, the OFC stated that this signified an instance of a RPM under Article 4 of the Act on Competition Restrictions, for which an exemption may be granted. The OFC did not do this, however, because it found that price competition did not increase due to the competition contracts because the system did not contain incentives for an increased competition in either the wholesale or the retail sales level. The contracts led to a uniform price level in the regional or local markets but the prices thus formed did not correspond with the prices of a well-operating market mechanism. On the contrary, the competition contracts gave cause to reciprocal price agreements between companies in the retail level.

Additionally, the system could hinder competition in the wholesale level, as the marketing agreements stabilise the market shares of the gas station chains. According to the OFC, the oil companies may, by their actions, contribute to retailers not using prices which are too high and which decrease the demand. The OFC also stated that in addition to selling motor fuels, the gas station retailers are able to offer additional services, if their costs may be included in the prices of motor fuels. If the previous level imposes the maximum prices, the development of such new business designs will be impeded.

Shell's Exemption Application (22 February 1993)

Not long after the case described above, the OFC received Shell's exemption application where Shell applied for an exemption for the cost distribution contracts of discount shares used in the credit card trade in the event that the OFC would find the said contracts contrary to Article 4 of the Act on Competition Restrictions and thus prohibited.

In the context of the credit card trade, in many instances, Shell granted discounts to so-called major customers. According to the terms of the contracts, Shell and the gas station retailer were obliged to divide the discounts used in the credit card trade according to the discount table: Shell determined the size of the discounts granted to the customers during the invoicing, and afterwards, issued a separate bill to the retailer which showed the client, the amount of petroleum sold by the retailer to the customer and the share of the retailer of the discounts. Shell also chose the customers who qualified for the retailer's discount.

Shell held that this was not an instance of price determination to the retailer, since this independently set the gross price. Instead, the cost sharing contracts of discount shares enabled a systematic carrying out of each party's financial operations and the best possible anticipation of the result. The essential thing from the point of view of the gas station retailer was, according to Shell, that the cost factor caused by the reductions was foreseeable when the principle to be followed in its distribution was separately agreed upon. By allowing the anticipation of the result, according to Shell, it also had a positive effect for the distribution system. Shell found that the benefit accruing to the consumers was that received in the context of the discounts related to the credit card agreement.

The above is a borderline case both with respect to RPM and the competition effects resulting from it. Yet, the OFC found that the cost-sharing contract used by Shell set a limit to the gas station's pricing in the credit card trade, as the principle was that the gas station retailer was not free to collect his or her share of the costs from the credit card customer. In a corresponding manner, the retailer was forced to sell petroleum to them at a specified, lower price fixed in the discount distribution contract than to other customers. According to the OFC, this was an instance of maximum price determination under Article 4 of the Act on Competition restrictions, since, in practice, the retailer had no choice but to accept the contract.

In its decision, the OFC held that the discount system increased competition between the distribution channels of motor fuels as the credit card customers tendered the oil companies before making a decision. Discount competition was considered beneficial for the petroleum trade where the products are homogeneous and the public listed prices for different chains the same in a specific market area. But the OFC did not find this as a sufficient justification for the granting of an exemption. The reductions did accrue to the credit card customer but the costs of the discounts were transferred for other customers to bear. The OFC found that the last group could not be considered as any worse, i.e., causing any more costs than the credit card customers, from the point of view of the gas station. In this sense, the system did not benefit the customers.

There is competition on credit card customers not only between oil companies but between the distribution channels on the gas station level. According to the OFC, the discount system did not offer proper incentives for price competition between gas stations. A station which would seek competition benefits with inexpensive listed prices and to specifically attract other than credit card customers would lose more from its margin than a gas station holding a higher price level. The distribution of discounts did not boost production or distribution in a manner specified in the law. The OFC further held in its decision that the discount distribution contract was not a necessary prerequisite for attracting credit card customers. The oil company granting the discount may be responsible for the entire discount and transfer the costs in

the usual way to its wholesale prices. On the above grounds, the OFC found that the preconditions for the granting of the discount did not exist.

Position of the OFC on RPM

Although RPM is forbidden in Finland under the Act on Competition Restrictions, the exemption procedure ensures that companies have an opportunity to use it, if the preconditions set for the exemption in the law exist. The Office exemption decisions and other case-law contain the criteria on the basis of which the Office has examined whether a company has been found guilty of forbidden RPM under the Act on Competition Restrictions and whether the preconditions for an exemption exist in a specific case. The criterion which the Office has constantly emphasised in its case-law has been whether an effective competition and market mechanism are promoted by the arrangement

The prices caused by a well-operating competition, which, at their very best, lead to a situation where the sales price equals the marginal costs is the point of comparison against which a market price or a price produced by vertical agreements is compared. If a vertical agreement does not contain incentives for an increased competition on the wholesale and retail level, it is likely to have effects which decrease it. For instance, the so-called competition contracts presented in the Finnish Petroleum Federation's exemption application produced incentives for a mutual price fixing between the companies of the retail trade. Additionally, the said contracts stiffened the market shares in the wholesale level. However, the price recommendations of the AO brand products were accepted because they added to the competition in the pharmaceutical field.

In its decisions, the OFC has also paid attention to what kind of incentives vertical agreements offer to the market parties. In the Finnish Petroleum Federation's exemption decision, the Office held that determining the maximum sales price for the retail level provided wrong incentive to the gas station retailer with respect to additional services because the retailer was not free to include these costs in the product's price. Esso's Right Price system, for its part, was designed in a manner which increased the retailers' incentives for price competition by reducing the variations in their margin with respect to the retail price.

The appropriate distribution of costs from a competition viewpoint ranked as an important criterion in the evaluation of RPM; the discount system exploited by Shell did not distribute the costs in a proper way that would have been based on the genuine costs incurred. In its decision on the case, the OFC applied a wide interpretation of the prohibition on RPM: the upstream firm did not specifically impose the price to the downstream firm but only the size of the price reduction.

The use of RPM often improves the competitive position of a specific brand with respect to other brands. In its decisions, the OFC has also considered the meaning of intra-brand competition: if this has been significantly reduced by a vertical arrangement, the Office has held that the effectiveness of competition has not increased although inter-brand competition may have. This may be discerned, e.g., in the Shell decision where the Office paid attention to the internal competition of the retail chain on a gas station level. But in the case of the price recommendations of groceries, printing the retail prices of cheeses on the production level was accepted because the manufacturers used many different unit prices;

the prices chosen by the retailers; and also sold cheeses without a unit price. According to the Office, these actions were enough to guarantee a continuing intra-brand competition for cheeses irrespective of the system.

FRANCE

Le prix imposé, procédé suivant lequel le producteur, et non le distributeur, fixe le prix final de vente au consommateur d'un produit connaît plusieurs modalités : prix minimum de revente, prix maximum de revente, prix conseillé apparaissant -dans les trois cas- sur l'emballage ou dans les publicités diffusées à l'occasion de campagnes promotionnelles. Il faut souligner que ce type de pratique est relativement difficile à mettre en œuvre pour les opérateurs économiques pour surveiller ou vérifier que des réductions de prix déguisées ne sont pas mises en œuvre par le distributeur. Généralement, les pratiques de prix imposés s'accompagnent donc d'autres restrictions verticales.

Remarques sur les effets économiques des pratiques de prix imposés

La note de référence produite par le secrétariat présente bien les deux arguments soulignant l'utilité pro-concurrentielle des restrictions verticales sur les prix et les deux arguments soulignant au contraire les conséquences anti-concurrentielles de ces restrictions.

Les deux arguments en faveur des restrictions verticales sur les prix sont qu'elles favorisent la concurrence inter-marques entre producteurs (qui cherchent toujours rationnellement à maximiser leurs débouchés) et qu'il peut être efficient du point de vue économique que les producteurs exercent un contrôle contractuel sur leurs distributeurs, sauf si les producteurs disposent d'un pouvoir de marché, dans le cadre d'une position dominante : cet aspect est intéressant du point de vue de la structure du marché du livre en France, comme il sera observé plus bas.

A l'opposé, deux arguments tendent à souligner l'effet négatif des restrictions verticales sur les prix, dans la mesure où -d'une part- de telles restrictions favorisent les ententes collusives soit au niveau des producteurs, soit des distributeurs, soit des deux, et -d'autre part- empêchent les distributeurs de se concurrencer effectivement pour offrir le plus bas prix possible au consommateur.

Bref examen du droit applicable en France en matière de prix imposés

La pratique de prix imposé fait en France l'objet d'un double cadre d'analyse, comme aux Etats-Unis, c'est dire que :

- d'une part, dans le cadre de la lutte contre les pratiques de concurrence déloyale, un texte pénal -l'article 34 de l'ordonnance de 1986 relative à la liberté des prix et de la concurrence- interdit les prix minimum imposés, mais laisse libre la pratique de prix maximum imposé ou la pratique de prix conseillés. Ce texte fait l'objet d'une procédure uniquement devant les juridictions de droit commun, et punit d'une amende de 5 000 à 100 000 Francs de telles pratiques ;

- d'autre part, dans le cadre du droit de la concurrence dont le Conseil de la concurrence veille à l'application, les pratiques de prix minimum imposés directement ou indirectement à un

réseau de distribution sont interdits par l'article 7 de l'ordonnance de 1986 déjà citée. Plus généralement, toute entente ayant pour objet ou pouvant avoir pour effet de provoquer un alignement des prix (minimum ou maximum) ou des marges pratiqués au sein d'un réseau de distribution constitue une pratique anti-concurrentielle : ce qui est condamné, c'est l'effet ou le risque d'uniformisation des conditions de vente des différents distributeurs d'un produit ou des différents prestataires d'un service. Par ailleurs, la pratique de prix imposés peut constituer l'un des éléments d'une pratique abusive de position dominante au sens de l'article 8 de l'ordonnance de 1986 déjà citée soit s'il s'agit d'un prix abusivement bas soit qu'il s'agisse d'un prix minimum de revente imposé par suite de l'élimination de la concurrence par les prix entre les revendeurs du produit.

En revanche, la pratique de prix conseillés ou indicatifs dans le contexte de relations verticales est tolérée : un producteur est libre de diffuser un prix conseillé auprès de ses distributeurs, la frontière entre prix *imposés* et prix conseillé*s* étant souvent matériellement très ténue. Elle sera appréciée par rapport à la structure du marché et la nature des relations contractuelles qui encadrent le prix conseillé.

Examen des systèmes de distribution en vigueur dans le secteur des biens culturels

Les biens culturels - livres et disques - représentent deux domaines dans lesquels la situation est très variable. Néanmoins, la structure des marchés observables apporte des enseignements précieux sur la validité et l'efficacité économique des pratiques de prix imposés. Les prix imposés sont la règle dans le secteur du livre et sont interdits dans le secteur du disque. Dans le secteur de la presse, il n'est pas possible de parler de pratiques de prix de revente imposés dans la mesure où le bien demeure la propriété du producteur jusqu'à l'acte de vente par le distributeur.

Le marché du Livre et de l'édition

La conjoncture et la structure du marché du livre sont fortement différentes de celles du disque. Le marché du livre fait l'objet d'une réglementation spécifique depuis 1981, la « loi Lang » qui prévoit un régime de "prix unique" imposé par les producteurs aux distributeurs. Le livre n'a pas fait l'objet d'une révolution technologique analogue à celle du disque compact. Mais en revanche le livre imprimé subit et subira toujours davantage la concurrence du multimédia (Internet mais aussi systèmes informatiques personnalisés).

L'objectif du prix imposé

La Loi Lang avait pour but de soutenir et encourager la lecture et la création littéraire. Pour accroître la consommation du livre, il a été considéré que l'accès au livre devait être facilité, grâce aux conseils donnés par les libraires et ne devait pas être discriminant : le prix payé pour un même ouvrage doit être le même sur tout le territoire. Par ailleurs, le prix unique devait contribuer au maintien d'un réseau de librairies traditionnelles permettant de stimuler la lecture, et de promouvoir -grâce à la disparition de la concurrence par les prix -- la réalisation et la diffusion -- des œuvres de qualité dont la rotation des stocks est lente.

En effet, l'un des arguments en faveur des systèmes de prix imposé est le maintien d'un réseau de distribution déconcentré, non homogène. Pour certains biens dont le livre, il est apparu au législateur

que l'absence de réglementation pourrait conduire à un marché dominé par des détaillants homogènes, n'offrant aucun service et pratiquant des prix très faibles réduisant les marges des producteurs et créateurs.

En outre, pour les biens accompagnés généralement d'une prestation de conseil, d'un service lors de la vente, la présence simultanée de deux types de commerce - l'un offrant ce service et incluant son prix dans le coût final et l'autre ne proposant aucun service avec un prix donc plus faible- peut entraîner un comportement de « passager clandestin » (*free riding*) : les consommateurs vont se renseigner chez le premier et vont s'approvisionner chez le second. Ce phénomène conduit nécessairement à la disparition des professionnels offrant des services.

Ainsi, les partisans de l'autorisation des restrictions verticales ont souligné que tant qu'il n'existe pas de barrière à l'entrée sur les marchés en amont et en aval, c'est à dire tant que demeure une réelle concurrence horizontale, la diminution de la concurrence interne de la branche, résultant de contraintes verticales, est sans incidence et peut même permettre l'efficience au profit des consommateurs.

D'un autre côté, le prix imposé supprime la concurrence entre détaillants et conduit à élever le prix moyen. Toutefois, des effets différents peuvent être constatés selon les détaillants : prix plus faibles chez les petits détaillants (qui pratiqueraient les prix les plus élevés sans prix imposés) et prix plus élevés pour les revendeurs appartenant à une grosse structure (qui pratiqueraient un prix inférieur aux prix imposés sur les ouvrages les plus demandés), augmentant leurs profits.

La pratique de prix imposés tend donc à accroître les prix affichés, si ce n'est chez les petits détaillants indépendants du moins chez les autres distributeurs. Elle transfère le poids du service supporté par le producteur ou le détaillant sur le consommateur, mais avec l'exercice d'une concurrence importante sur la quantité et la qualité de l'offre de services proposés.

Les effets de la pratique du prix imposé sur le marché du Livre

Ce système existant depuis 1981, on dispose d'une perspective suffisamment longue pour l'apprécier. La structure du marché s'analyse suivant deux types d'intervenants :

a) les éditeurs : le nombre de maisons d'édition est demeuré assez stable jusqu'au seuil des années 1990 (383 entreprises , dont cinq pour cent possédaient un C.A. supérieur à 250 MF). La Loi Lang a donc contribué à un maintien d'un nombre relativement important d'éditeurs, bien qu'une certaine concentration soit perceptible et s'accentue actuellement (15 entreprises, soit cinq pour cent du total, représentaient en 1991, 55 pour cent du CA total) ;

b) les distributeurs : Les parts de marché des libraires traditionnels s'effritent lentement depuis 20 ans, mais sont demeurées supérieures à 65 pour cent, les grandes surfaces ont progressé, tandis que la vente de livres par correspondance est restée stable.

En outre, le pluralisme de la création a été maintenu, voire accru, en termes de nombre de titres (25 602 en 1981 contre 39 492 en 1991), en terme de croissance brute du nombre d'ouvrages vendus (345 923 en 1981 pour 376 125 en 1991), bien que le nombre moyen de tirages d'ouvrage soit en baisse (13 512 en 1971 contre 9 524 en 1991).

Ces chiffres montrent donc les tendances lourdes suivantes, imputables pour une partie importante aux prix imposé, répondant aux intentions du législateur de 1981 et en dépit de l'explosion de la concurrence multimédia :

- un maintien des positions de la distribution traditionnelle, très déconcentrée ;

- une augmentation des titres publiés ;

- une baisse relative de la consommation des ménages (baisse des tirages) avec une tendance à la hausse des prix de détail.

Le marché du disque

Le disque est actuellement le bien culturel dominant en France, avant le livre. Reflétant les innovations technologiques intervenues dans le secteur, sa consommation a été multipliée par t*rois* en volume dans la décennie 1980. En 1995, pour témoigner de la dynamique des ventes, le marché a crû en en volume de 9,6 pour cent en 1995.

Sur longue durée, le prix du disque tend à la baisse tandis que la demande s'est fortement accrue. Toutefois, les éléments observables ne signifient pas nécessairement une importante élasticité de la demande au prix. L'innovation représentée par l'apparition du Disque Compact (CD) semble plutôt justifier la forte croissance des ventes enregistrée à partir du milieu des années 1980. D'ailleurs, les prix de vente des CD sont sensiblement plus élevés en France que chez les pays voisins (environ 30 pour cent au-dessus du prix moyen pratiqué au Royaume-Uni). Corrélativement, la France consomme moins de disques par habitant que ses principaux voisins.

La décomposition des structures de coûts d'un CD de nouveauté se décompose en trois parties équivalentes :

– la réalisation proprement dite, comprenant la partie artistique et la fabrication du disque ;

– la structure commerciale (publicité) ;

– la marge des éditeurs (ten pour cent) et du réseau de distribution (30 pour cent).

Il semble que le prix élevé des CD de nouveauté soit déterminé par une structure commerciale hypertrophiée destinée à assurer des lancements incorporant d'importantes dépenses publicitaires. La distribution est assurée à 90 pour cent par de grandes surfaces (généralistes ou spécialisées).

En amont, la structure du marché est caractérisée par une concentration relativement importante, puisque 80 pour cent du chiffre d'affaires du secteur de l'édition d'enregistrements sonores est assuré par les sept "majors" suivantes :

- Polygram ;

- Sony Music Entertainment ;

- EMI ;
- BMG ;

- Warner Music ;

- Virgin ;

- Carrere.

Au plan mondial, cinq entreprises mondialisées se partagent également environ 80 pour cent du marché : Bertelsmann, Thorn Emi, Phillips, Time Warner et Sony. Leurs filiales françaises assument la double tâche de relayer la diffusion des catalogues internationaux d'artistes confirmés détenus par les maisons-mères et de développer un catalogue domestique avec des artistes nationaux générateurs de marges plus substantielles. La stratégie des majors, largement diversifiée dans l'audiovisuel, vise à contrôler verticalement l'ensemble de la filière à ses quatre niveaux d'activités :

a) la production ;

b) l'édition ;

c) la fabrication (ou reproduction) ;

d) la distribution (le plus souvent assurée par les majors qui contrôlent les éditeurs nationaux indépendants).

Enfin, les nouveautés assurent 80 pour cent du C.A. des éditeurs. Sur le marché plus spécifique des CD 80 pour cent du C.A. est assuré par 20 pour cent des références. A contrario, 80 pour cent des références n'assurent que 20 pour cent du chiffre d'affaires des éditeurs ("le fond de catalogue"). Or 70 pour cent des achats sont réalisés par les consommateurs sur ce dernier fond, dont les unités sont vendues à la moitié du prix des nouveautés.

Concernant la distribution, le marché du disque est maintenant détenu à 90 pour cent par des distributeurs gérés industriellement. Ces distributeurs sont :

- soit des généralistes, tels que grandes surfaces alimentaires (hypermarchés et supermarchés), qui drainent 50 pour cent du marché à partir d'un choix restreint (10 000 références) ;

- soit des spécialistes (multispécialistes et chaînes de disquaires) qui captent 40 pour cent du marché en offrant une gamme dix fois plus étendue de produits (100 000 références).

Il faut souligner que les autres formes de distribution, notamment la vente par correspondance (VPC), a été réduite à dix pour cent de parts de marché en 1992 (alors que la VPC est également restée stable en matière de distribution de livres). Ce chiffre s'est encore réduit ces dernières années.

D'un point de vue purement économique, il n'est pas erroné d'affirmer que la concentration observée dans la distribution du disque n'est que l'aboutissement d'un processus de rationalisation de la gestion. La rentabilité d'un point de vente dépend de l'équilibre qui est trouvé entre l'offre de références (le catalogue), l'ajustement de la demande (la gestion des stocks) et le prix pratiqué. Toujours d'un point de vue économique, le catalogue doit être attractif sans être pléthorique, s'agissant du cycle de vie du produit concerné : le réglage est délicat à effectuer sur un marché où des centaines de références nouvelles sont mises sur le marché tous les mois, dont seules quelques-unes deviendront des succès, et dont l'essentiel aura disparu quelques mois après leur première commercialisation. La volatilité de la demande, puis sa focalisation sur les succès du "top", impliquant une gestion complexe et un engagement financier important sont peu compatibles avec une gestion artisanale. Et, de fait, le refus des éditeurs de reprendre les CD invendus , alors qu'ils le faisaient pour les disques vinyles, a sans doute, contribué pour une large part à la disparition des disquaires.

Au total, le secteur du disque en France augmente ses parts de marchés et s'avère très profitable (la marge nette des éditeurs -huit pour cent- se situe nettement au-dessus de celle de la moyenne de l'industrie -un pour cent-), avec toutefois des prix finaux élevés par rapport aux marchés voisins (de 30 pour cent par rapport au Royaume-Uni). L'interdiction du prix imposé démontre donc que la concentration du secteur en amont et en aval a été facilitée, sans nécessairement procurer un bénéfice réel pour le consommateur en termes de niveaux de prix pratiqués, voire de services.

Conclusion

La situation très contrastée dans la distribution du livre et du disque en France a fait l'objet de remarques importantes dans l'opinion, soulignant en particulier la disparition de structures commerciales de proximité et spécialisées dans le domaine du disque, susceptibles de répondre pour ce produit au même type de besoins culturels que les librairies traditionnelles vis à vis du livre.

Pour cette raison, la question a été soulevée sur l'opportunité d'établir en France un système de prix imposé du disque équivalent au prix imposé du livre. Une autre question peut être posée sur les moyens de reconstituer un réseau de distribution traditionnelle lorsque celui-ci a disparu, sauf à suggérer une démarche de diversification des librairies traditionnelles, qui pourraient être attirées par le disque par la certitude de n'être confrontés qu'à une concurrence intermarque dont les éléments seraient la nature artistique intrinsèque du produit, le service portant sur le produit dans la distribution et non le prix. Une autre méthode -proposée par le ministère de la culture et le ministère de l'Economie et des Finances (DGCCRF) -- pourrait être de proposer l'usage plus systématique de remises qualitatives visant à rémunérer l'offre de disques en fonction de l'importance du stock, du nombre et de l'originalité des références proposées, étant souligné que le principe de reprise des invendus a disparu dans le domaine du disque avec l'apparition des CD.

GERMANY

The Regulation of Resale Price Maintenance[1] in the Act against Restraints of Competition (ARC)

The German legal system has known of resale price maintenance (RPM) for branded goods and publications for more than 100 years. Opinions on the necessity of RPM and on the reasons for its justification have however changed in both areas over the course of time :

The legal situation prior to the introduction of the ARC

RPM for branded goods[2] had already been widely implemented in Germany towards the end of the last century. However, public criticism of RPM grew constantly in the years to follow. This was particularly the case during the Great Depression from 1929 onwards, when it was shown that RPM, along with the then wide-spread cartels, was often impeding the reductions in prices required in the face of market trends. RPM for publications, especially books, also has a tradition spanning more than 100 years in Germany. In 1888, after much conflict with publishers, booksellers succeeded in bringing to an end the freedom to determine prices. RPM for books was intended to protect weaker booksellers from particularly efficient forms of distribution such as mail-order for example.

The freedom to maintain resale prices was restricted for the first time in 1930 and RPM was finally prohibited by the decartelisation laws enforced by the Allies. This ban has, however, never been systematically enforced.

The Regulation of RPM in the ARC of 1957 and the Second Revision of the Act in 1973:

The first version of the ARC provided for a general ban on RPM with exemptions for branded goods and publications, however:

The lawmaker's motives for the admissibility of RPM for branded goods[3] in 1957 and its justifications:

Whether RPM should be allowed for branded goods was a highly controversial topic during the consultations relating to the ARC. The following were among the arguments put forward against such an exemption from the general ban on RPM[4]:

- exclusion of price competition in retailing;
- hampering of rationalisation of the distribution system;

– fear that the manufacturers of branded goods would (in some cases) gain so much power that the retail business would become completely dependent on the manufacturing sector.

The legislator's decision was, however, initially in favour of RPM for branded goods. The decisive factor for this was the view that the restraints of competition associated with RPM were acceptable since the consumer considered a "psychological association" to exist between the fixed price and the quality of the goods. Another reason given by the advocates of RPM was that manufacturers of branded goods had a legitimate interest in guaranteeing constant prices for their products in the long term. It was also stated that RPM would promote long-term pricing policy and thus stabilise the entrepreneurial planning and decision-making of manufacturers and retailers. Since the prices of goods would only have to be calculated at longer intervals, RPM could simplify the calculation and make it less expensive.

RPM for branded goods was made subject to abuse control by the Bundeskartellamt, however. Thus, the Bundeskartellamt was able to declare manufacturers´ RPM systems to be of no effect, inter alia, if these led to an increase in the prices of the price-maintained goods that was not justified by the overall economic situation or if the manufacturers did not succeed in ensuring the effective enforcement of their RPM systems.

The abolition of RPM for branded goods during the Second Revision of the ARC in 1973 and its justification

There was growing criticism of RPM again as its economic disadvantages became increasingly apparent after the ARC came into force. The following points were among the criticisms:

- RPM operates like a price cartel of retailers and thereby impedes not only a reduction in consumer prices, but also prevents the development of efficient forms of distribution systems;

- Manufacturers often understood RPM as a signal to abandon price competition;

- RPM considerably increases prices:

  – retailers themselves had pointed to the fact that the margins and prices for certain branded goods are excessive;

  – the prices in many markets - despite the existence of RPM - were not so fixed and uniform as could have been expected. On the contrary, a "second market" had developed for many products. Consumers who were prepared to "shop around" were able to buy the same goods up to 30 percent cheaper (e.g. from wholesalers and retailers);

  – this observation was also indirectly confirmed by the fact that newcomers made use of the high price level for price-maintained goods by offering similar products without RPM - at considerably lower prices.

However, these considerations and findings did not determine the German lawmaker's decision to prohibit RPM for branded goods. What was more important was the pressure to which RPM systems were exposed from two sides in practice. On the one hand, from the beginning of the 1970s large-scale forms of distribution had been increasingly developing besides the retail trade, which is traditionally characterised by medium-sized firms, and these large-scale forms of distribution with their more favourable cost structure considered RPM for branded goods in competition as a constraint on their price

policy and therefore often did not adhere to RPM. On the other hand, the "watertightness" required for RPM systems was no longer ensured as a result of parallel imports from other EC Member States which took advantage of the price differential in the EC.

The legislator's motives for allowing RPM[5] for publications in the ARC as adopted in 1957

At least some of the above-mentioned disadvantages of RPM for branded goods also apply to RPM for publications. The price-raising effect of RPM for publications is supported, for example, by an analysis of the markets for hotel guides, travel guides and road maps carried out by the Bundeskartellamt in 1978. Maintained prices to ultimate consumers in Germany were found to exceed French prices of identical products by 200 to 300 percent[6].

Weighing up the pros and cons of RPM for publications in the hope of reaching the right decision, seems to be a most difficult exercise, particularly where competition law considerations are not the only ones involved in the weighing process.

Irrespective of the above-mentioned economic disadvantages of RPM for publications, the German lawmaker made a legal policy value judgement in favour of retaining RPM for publications on cultural and educational policy grounds[7] . In doing so, the legislator wanted to ensure a diverse, even and nation-wide supply of books as "cultural goods" to the public. The underlying idea was that this goal could not be achieved in book retailing unless a "fixed retail price" was retained that was advantageous to authors, publishers and booksellers alike.

In addition, the advocates of RPM have advanced the following arguments.

Justice would not be done to the dual nature of books as economic and cultural goods if the sale of books were treated in the same way as that of other consumer goods.

Moreover, RPM ensures that popular books are sold at a guaranteed price thereby helping to finance books which are not in great demand. Apart from safeguarding the diversity of publishing and a representative choice in bookshops, RPM ensures not only a nation-wide structure of the book trade, but also one that is characterised by small and medium-sized firms. Another reason given for exempting publications from the ban on RPM is that it heightens the chances of innovative publishers and small booksellers entering the market.

RPM for publications as a narrow exemption

In the Bundeskartellamt's view, the exemption of publications from the ban on RPM is to be applied to classical publications only. It therefore does not cover substitutes that are not comparable to books, e.g. the CD-ROM version of a book. A Bundeskartellamt decision prohibiting RPM for the CD-ROM version of publications was recently upheld by the Berlin Court of Appeals[8]. The proceeding is now pending before the Federal Supreme Court.

Is Current Enforcement Policy in Need of Reform?

Concerning changes in RPM provisions in the proposed amendment of the Act against Restraints of Competition

The Federal Government set up a "Competition Act Revision Working Party", which comprises officials from the Federal Ministry of Economics and the Bundeskartellamt. In the summer of 1996 the Federal Ministry of Economics submitted cornerstones for the 6th revision of the ARC. These cornerstones do not provide for the ban on RPM and the exemption for publications to be changed. Reintroducing RPM for branded goods is not under discussion.

In the context of RPM for publications the Bundeskartellamt monitors developments in the field of new forms of markets and distribution and their effects on RPM and the ranges of products involved. Efficient and hence low-price "book supermarkets" have meanwhile been established in many places. However, this otherwise commendable development might result in the nation-wide structure of booksellers offering diversity of choice (also in rural areas) being replaced by "book supermarkets" with a comparatively limited selection of books and/or without offering outlets throughout the country. In that case, the lawmaker may be prompted to reconsider the legal treatment of RPM for publications.

RPM for publications and EC law

In a comfort letter to the Börsenverein des Deutschen Buchhandels e.V. (German Publishers and Booksellers Association representing many of the booksellers doing business in Germany) the European Commission has provisionally cleared cross-border RPM currently operated between Germany and Austria - pending completion of its examination.

Distinction between Maximum and Minimum Prices

Under the ARC publishers are allowed to set specific prices at which their publications are to be resold. In the past, the prevailing view was that the wording of the ARC allowed only one fixed price to be set at all levels of distribution so that the maintenance of maximum and minimum prices was considered illegal. The Federal Supreme Court rejected this view for the wholesale level of distribution and allowed the maintenance of maximum and minimum prices[9]. However, this court decision referred to RPM for branded goods, which was admissible at the time.

In Germany, only specific prices of books are maintained. In such cases RPM is infringed if price-maintained publications are sold together with other items at an overall price which is bound to result in the maintained price of the books concerned being undercut.

Distinction between Vertical Price Restraints and Non-price Vertical Restraints

Unlike EC law (Article 85 (1) of the EC Treaty), the German ARC treats vertical restraints of competition differently per se from horizontal restraints of competition. While the latter are illegal in principle, vertical restraints of competition are largely subject to the principle of abuse control in the German law system. RPM between manufacturers and retailers is prohibited in principle (as explained above), with the exception of publications.

German law is clearly more liberal as regards the treatment of distributional restraints and exclusive dealing. In general a manufacturer is free to choose any sales system he wishes for his products. Consequently, also distributional restraints and exclusive dealing are permitted in principle under German law. Such restraints of competition may offer competitive advantages, including the following:

- the distribution costs can be reduced because the number of sales outlets is limited as a result of vertical restraints;

- vertical restraints enable the manufacturer to ensure that his trading partners provide the amenities in services and the advice and information necessary for selling the product. In the absence of such restraints, free-riders might be in a position to take advantage of such services provided by other retailers and they could thus jeopardise the sale of the product as such;

- vertical restraints can enhance product quality - e.g., by intensifying inter-brand competition.

However, if they proliferate in a market, vertical restraints can become barriers to new market entry that are difficult to overcome.

Therefore, the restraints that are applied by the business community are subject to abuse control by the Bundeskartellamt[10].

Ban on Price Recommendations

Under the ARC price recommendations are illegal in principle; they are only permitted if certain conditions are satisfied[11]. The ban not only covers the recommendation of specific prices but also costing methods or price ranges.

The exception from the general ban on price recommendations which is most important in practice is that manufacturers of branded goods have the possibility of issuing non-binding price recommendations[12] . When abolishing RPM for branded goods the lawmaker regulated price recommendations for branded goods in the ARC. The new regulation was to enable the manufacturers of branded goods, at least for a transitional period, to issue price recommendations which were to serve as consumer guidance. Price recommendations for branded goods only conform to the ARC if they are expressly declared to be non-binding. No economic, social or other pressure must be exerted to enforce the price recommendation.

As far as competition policy is concerned, there is, however, the danger that non-binding price recommendations when applied in the context of selective distribution systems may have RPM effects even if no pressure is exerted.

Another exemption from the general ban on price recommendations exists in the form of so-called "Mittelstandsempfehlungen" (recommendations issued by small or medium-sized enterprises)[13]. This exemption enables an association of small or medium-sized enterprises to issue price and costing recommendations to its members. Large enterprises are excluded from this privilege. Also in this case no pressure must be exerted to enforce such recommendations.

NOTES

1. As of February 1997.

2. Under the ARC branded goods are products regarding which the price-recommending enterprises guarantee delivery in consistent or improved quality and: *(i)* which themselves, or *(ii)* whose packaging or presentation for delivery to the consumer, or *(iii)* whose containers in which they are sold are provided with a mark indicating their origin (a firm's symbol, a word or other sign).

3. Section 16 as amended on 3 January 1966 states: Section 15 (ban on RPM) "shall not apply, insofar *(i)* as an enterprise binds the purchasers of its branded goods, which compete with similar goods of other manufacturers or traders, or *(ii)* a publishing enterprise binds the purchasers of its publications by legal or economic means to observe certain resale prices or to impose the same obligation upon their own customers down to the resale to the ultimate consumer."

4. BT-Drucksache II/1158, p. 3

5. Section 16 of the Act against Restraints of Competition, as amended on 20 February 1990, reads as follows: Section 15 (ban on RPM) "shall not apply, insofar as a publishing enterprise binds the purchasers of its publications by legal or economic means to observe certain resale prices or to impose the same obligation upon their own customers down to the resale to the ultimate consumer".

6. 1978 Activity Report of Bundeskartellamt, BT-Drucksache VIII/2980, p. 83.

7. Economic Committee Report, BT-Drucksache VII/765, p. 4.

8. Decision of Berlin Court of Appeals of 17 May 1995, Kart 14/94 (CD-ROM products).

9. BGHZ 54, 227, 235

10. Section 18 of the ARC

11. Section 38 (1) No. 11 of the ARC

12. Section 38a (1) Section 38 (1) No. 12 of the ARC

13. Section 38 (2) of the ARC

HUNGARY

Dealing with agreements restricting competition Chapter III of the Hungarian Competition Act which was in force until the end of 1996 prohibited the full range of horizontal agreements. However, from the vertical agreements restricting competition it prohibited only resale price maintenance. Though the wording of the Act did not distinguish whether a minimum price or a maximum price was fixed, the prohibition was to be applied only in the case if the resale price maintenance may have resulted in the restriction or exclusion of the economic competition.

The practice of the Office of Economic Competition which developed on the basis of the above provision of the Competition Act, was upheld and confirmed also by the Court during the court review proceedings, relies on the approach that fixing the minimum level of resale price may result in the restriction of economic competition because in this case the retailer who is entitled to sell the product and faces the concrete local marketing conditions cannot decide on selling the product cheaper than the fixed price, i.e. he cannot compete in this way with other market players.

There were some proceedings when the supplier (e.g. the manufacturer) and the buyer (e.g. a dealer) reached an agreement that the dealer would not sell the products of the given manufacturer at a higher price than fixed jointly ensuring also a sufficient interest of the dealer (or he would not charge a profit margin higher determined jointly). In these cases generally no competition restricting effect could be ascertained.

In compliance with what have been mentioned above in the course of proceedings up to now the Office of Economic Competition:

- qualified the maintenance of minimum prices in each case as restricting competition while
- did not regard till now as an infringement the maintenance of maximum prices in either case.

However, even fixing the minimum price did not automatically infringe the Competition Act, namely the agreement was exempted from the prohibition if 'the concomitant restriction or exclusion of economic competition did not exceed the extent which was necessary to attain economically justified common goals and the concomitant advantages outweighed the concomitant disadvantages' [Art. 17(1) of the Hungarian Competition Act].

When assessing the possibility of granting an exemption the Office of Economic Competition regards as a basic principle that economic competition is not an objective but an instrument. It is an instrument to enforce effective economic activity serving the public welfare, the interests of consumers. However, in this context price competition is desirable only if it does not compel the market players to deteriorate marketing conditions (or the quality of the goods) in such a manner which is in final analysis detrimental to consumers. In the present Hungarian economic situation commercial activities are namely characterised by lack of capital. Under these circumstances the manufacturer’s endeavour to stimulate the dealer to provide certain (eventually of minimum extent) commercial services and to stipulate a minimum price or a minimum profit margin for this may be justified.

An undertaking producing lighting articles wanted to reach an agreement with its partners in which the wholesaler undertook to keep on stock continuously a full range of articles produced by his partner and not to reduce, in order to finance these stocks his resale profit margin below 12%. The parties reaching the agreement applied for exemption from the prohibition of fixing the resale price in the contract. The Office of Economic Competition held that the aim of the agreements that economic competition should not compel the dealers to save costs that would result in deteriorating the quality of service to the detriment of consumers' interests was economically justified and it could not be challenged either that fixing a minimum of the price gap and thus the minimum of the resale price was necessary to attain this aim. For this reason the Office of Economic Competition exempted the agreement from the prohibition on condition that the parties are required to apply for a further exemption in two years.

The maintenance of the maximum price may have a particular content in the case where the supplier has a dominant position vis-à-vis the seller (dealer) and the resale price stipulated in the contract reflects actually not an agreement expressing the joint interest of both parties but a constraint applied by the supplier may be hidden behind it in order to ensure for the supplier the highest possible portion of the overall profit which can be realised in the final consumer price. Up to now in the practice of the Office of Economic Competition three proceedings of this kind were carried out, in each case on the request of the reseller, however, the supplier's dominance was not proved in either case and thus the maintenance of maximum prices was not qualified as a violation of the Competition Act, either.

It is a special case of resale price maintenance when the supplier himself is also participant of the market on which those resellers vis-à-vis which he fixed resale prices are operating. A brewery sold beer partly directly to retailers, partly to wholesalers and for the latter it stipulated to sell this beer to the retailers *not cheaper* than the brewery itself. Beside violating the prohibition of resale price maintenance the Office of Economic Competition qualified this maintenance of minimum prices also as an infringement fixing a horizontal price among competitors.

As from the beginning of 1997 the Hungarian Competition Act was changed in such a way that it contains a general prohibition (covering equally horizontal and vertical agreements restricting competition), however, with the stipulation that determined groups of agreements may be exempted from the prohibition by virtue of regulations. Resale price maintenance does not belong to the field of group exemption, therefore changing the law does not touch the regulation described above and the practice developed on this basis.

IRELAND

Introduction

The Competition Authority has dealt specifically with the question of RPM in the context of books in two separate decisions under the Competition Act. The first case involved arrangements by UK book publishers for the imposition of a minimum net price on most of their books sold within the State.[1] The arrangements, comprising eight agreements in total are known as the Net Book Agreement (NBA) and had operated in that form since 1957. The Authority concluded that the arrangements were anti-competitive and that they did not satisfy the requirements for exemption. In total almost 400 UK publishers were parties to the agreement. It was estimated that 88 percent of the non-school book market or 67 per cent of all books sold within the State were imported from the UK. Extracts from the Authority decision are set out below. In a separate decision the Authority refused to exempt arrangements whereby Irish publishers imposed RPM on their books.[2]

Summary of Competition Authority decision in respect of the Net Book Agreement

Analysis of effect on competition

The basic provision of the agreement was clause *(i)* which provided that, except in specified circumstances, net books cannot be sold at less than the net published price. Such net prices were determined by individual book publishers who also had to decide whether or not to classify a particular book as a net book. While the NBA did not require that the publishers designate any particular book or even the majority of their books as net books, in practice the publishers involved in the agreement do so designate the vast majority of books published by them. It was conceded that up to 75 percent of books published were designated net books. Having designated a book to be a net book, however, the publisher was bound to apply the standard conditions governing net books including the terms upon which discounts could be granted in respect of such a book. In certain circumstances a net book could be sold below the net price i.e. where the book has been in stock for some considerable time or in the case of second hand copies of net books. In addition the agreement allowed net books to be sold below the net published price to certain classes of customer subject to certain conditions, in particular relating to prices. A series of related agreements set the terms to be applied to various categories of customer e.g. book clubs, schools, libraries etc.

The agreement, according to the Publishers Association, was designed to enable publishers to operate a system of individual RPM. In the Authority's view it involved a mixture of individual and collective RPM. The Authority concluded that the NBA eliminated price competition between retailers in respect of every book which has been designated a net book by its publisher. Consequently to the extent that each individual book title constituted a unique product, price competition at the retail level was therefore eliminated in respect of any book designated a net book. The Authority believed that to some degree certain books are substitutes for one another i.e. while some consumers wish to buy a particular book by a particular author, others are looking for a particular type of book, whether a thriller or one on

gardening, and therefore choose from among the range of titles available in that particular category. As the majority of UK published books were net books, price competition between retailers in respect of different titles was also restricted. Although not all books of a particular type retailed at a uniform price, where books which could be considered substitutes were designated net books, the possibility of retailers offering discounts on such books was eliminated and so competition was restricted between different titles.

The Authority considered that the NBA had some features at least of a horizontal cartel between publishers. It concluded that the agreement also restricted competition between publishers as all the publishers who are parties to the agreement must apply uniform terms in respect of the resale of all books designated by them as net books. In addition once a book was designated as a net book by a publisher, the publishers of rival titles could set their prices in the knowledge that the designated book will not be sold below the designated net price. Consequently the agreement reduced the element of uncertainty regarding a competitor's response to a firm's marketing strategy which the Authority regarded as an essential feature of competitive markets. Allen and Curwen, for example, argued that:

> "In general, given the existence of the NBA, we would expect publishers to price similar products as though they were operating a cartel. The fact that they can fix the price of a specific title at any level they wish is very far from what is meant by "conditions of free competition". In conditions of free competition there would be constant downward pressure upon prices in order to clear the market, so that over time prices, on average, would rise more slowly than elsewhere in the economy where free competition did not exist.[3]"

While the Authority did not consider that the NBA necessarily amounted to a fully fledged horizontal price fixing arrangement, it nevertheless believed that it went some considerable way towards reducing uncertainty regarding competitors' pricing decisions in the publishing industry and that such uncertainty was normally an essential part of the competitive process. As the vast bulk of UK published books were net books and these accounted for the majority of books sold within the State, price competition between retailers and between publishers was restricted in respect of a substantial part of the book market within the State. The Authority concluded therefore that the NBA had the object and effect of restricting competition in the market for books within the State.

Reasons for refusing an exemption

It was submitted by the PA that the various restrictions involved in the NBA and associated arrangements satisfied the requirements for a licence (exemption). In particular it argued that the restrictions in the NBA, by preventing discounting, enabled specialist book shops to provide a comprehensive service to consumers which included, *inter alia*, services such as ordering particular titles as well as general advice. In addition it was argued that preventing discounting allows book shops to stock a wide range of less popular titles, thereby providing consumers with a wider choice of book titles. In the absence of the price restrictions contained in the NBA it was submitted that non-specialist shops and some discount booksellers would offer popular titles at reduced prices. This would force specialist booksellers to reduce their prices on such titles. The reduction in margins on popular titles would reduce the ability of specialist booksellers to provide back-up services such as ordering for which they do not charge. In addition they would have to recoup the loss in margin on more popular books by increasing their margins on less popular titles or by reducing their stock of such titles. The effect of this, it was claimed, would be to eliminate a number of smaller booksellers while reducing the range of titles currently available to consumers. It was further argued that in the absence of RPM the risks involved in publishing books would be increased and this in turn would make publishers less willing to publish titles by new or less popular authors and on subjects which were of minority interest.

The Authority recognised that, in the absence of RPM, the price of some book titles at least would be reduced. The Authority accepted that some stores might well discount the more popular titles in order to increase their sales and that many non-specialist book shops would offer such discounts while stocking only a limited range of books. The Authority believed that the effect might well be to increase sales of such books. Consequently the abolition of RPM would, to this extent, benefit consumers, those retailers offering discounts, and authors who would benefit from an increase in sales of their works.

The PA's case was that, in the absence of the NBA, there would be limited discounting of the most popular book titles. Shops would have to raise the prices of less popular book titles to counter such discounting. In effect this implies that RPM results in higher prices of popular book titles than would otherwise be the case, but that this permits cross-subsidisation of less popular titles and of back-up services provided by specialist booksellers. It is widely recognised in economic theory that cross-subsidisation results in a misallocation of resources since consumers do not bear the true cost of individual products. The PA claimed that in the longer run the effect of discounting would be to increase the risks in publishing thereby raising costs and leading to higher overall book prices. The Authority does not accept this argument. The economics of the publishing business have changed significantly due to technological developments over the past thirty years and it is no longer the case that producing shorter print runs would result in much higher book prices.

The Authority recognised that price discounting of books might result in a loss of business by specialist book shops to other types of retail outlet, or that larger book shops would gain at the expense of smaller ones. It considered that the purpose of the Competition Act was to protect competition not competitors and concluded that the fact that some competitors may be harmed by the elimination of a particular restrictive practice could not justify the continuance of such a practice. To the extent that RPM prevented the emergence of new competitors and of innovative methods of retailing such as discounting, it could not be said to result in any improvement in the distribution of goods or in the promotion of economic progress. The PA have argued that, as a result of the NBA, the number of specialist booksellers was greater than it would otherwise be, and that without it, many rural book shops would close.

The claim that discounting would cause booksellers to reduce the range of titles covered also appeared unrealistic in the Authority's opinion. Rural book shops were considerably smaller than those in Dublin. By definition therefore they carried a far more limited range of stock and presumably concentrated on the more popular titles anyway. Consequently even if the argument regarding stocks was valid, it would only apply to some book shops in Ireland. The validity of the argument itself was questionable. As the EC Commission noted in the Dutch Books case:

> "As the holding of stock is the essential characteristic of a book shop it would be illogical to consider reducing it; book shops might usefully improve their efficiency by specialising."

The Authority considered that although the abolition of the NBA might result in the closure of some shops these were likely to be replaced by new entrants.

The Authority did not believe that the abolition of RPM would have serious adverse effects on the availability of minority interest books. The price of such books may well increase reflecting the slower turnover and higher costs of stocking such titles. Those wishing to purchase such books would have to pay higher prices because they were no longer being subsidised by purchasers of more popular titles. The subsidisation of a minority of consumers by the majority could not, in the Authority's opinion, be regarded as efficiency enhancing or contributing to the promotion of economic or technical progress.

Nor was the Authority persuaded by the argument that the abolition of RPM in the Net Book Agreement will lead to fewer books being published. It pointed to modern technological developments which have greatly altered the economics of the book publishing industry. The Authority noted that as a result of such technological advances many new small scale specialist book publishers had emerged in the UK in recent years. Many were engaged in publishing books which have a very limited minority appeal and which would not previously have been published by mainstream publishers. Desk top publishing had also enabled many authors particularly in the academic field to publish their own works. It has been claimed that the cost of producing a book using desk top publishing techniques may be as low as stg£1. The low cost of desk top publishing greatly reduced the risk of publishing minority interest books. The fact that new technology has enabled the publication of many titles which would not have been published by established UK publishing firms under the NBA undermined the argument that in its absence fewer books would be produced. The Authority took the view that it was advances in publishing technology rather than the NBA which had enabled an ever growing range of titles to be published.

Subsequent Developments

Subsequent to its decision to refuse an exemption to the NBA the Authority found that the issuing by the Irish Booksellers Association of a currency conversion chart, to enable its members to set uniform retail prices for UK books with a net price expressed in sterling, was in breach of the Competition Act and did not meet the requirements for an exemption.[4] In a separate decision the Authority found that the inclusion in the standard terms and conditions of a number of Irish book publishers of a provision requiring retailers to sell books at the cover price was in breach of the Act and did not merit exemption.

Following the Authority's decision in respect of the NBA a number of large book shops in Dublin City engaged in widespread discounting across the range of titles during the pre-Christmas period. More recently the tendency has been for stores to offer discounts on a limited range of popular titles. The Authority has not conducted any investigation into the effects of the abolition of RPM on books. There is little anecdotal evidence of any significant decline in the number of book shops or in the numbers of Irish based publishers.

NOTES

1. Competition Authority decision no. 336, 10.6.1994.

2. Competition Authority decision no. 365, 28.10.1994.

3. W. Allen and P. Curwen, (1991), *Competition and Choice in the Publishing Industry*, London, Institute for Economic Affairs.

4. Competition Authority decision no. 348, 2.9.1994.

ITALY

The association of large scale retail trade firms (FAID) notified to the Competition Authority an agreement, signed in June 1995, between the Italian Booksellers Association (ALI) and four publishing firms accounting for 55.7 percent of the books sold in Italy, excluding textbooks (Instituto Geografico De Agostini, Arnoldo Mondadori Editore, RCS and Messaggerie Italiane). The agreement provided that the four publishing firms would have stopped to supply books to large retail stores (e.g. department stores, supermarkets, hypermarkets, cash&carry etc.) whenever they had made discounts on book sales larger than 15 percent up to April 1996 and larger than ten percent thereafter. Moreover, the publishing firms would have stopped to give any favourable economic treatment to other bookshops which had allowed discounts larger than 5 percent on the price of books sold to the general public.

Meanwhile, a draft law establishing a general resale price maintenance rule for book sales in Italy had been introduced to the Italian Parliament. So far, the draft law has not been discussed by Parliament.

Compliance by large retail stores with the resale price maintenance provisions of the agreement was monitored by a company, Mach 2, whose shareholders are the four publishers and which was granted the exclusive right to distribute their books to large retail stores. Mach 2's competitors were therefore forced to purchase books from Mach 2 itself, rather than referring directly to publishers. Following the exclusive distribution agreement, Mach 2 strengthened significantly its market position with respect to smaller competitors and reached a share of approximately 90 percent in the distribution of books to large retail stores. The Italian Booksellers Association, on the other hand, undertook to adopt disciplinary measures against those bookshops which did not respect the provisions of the agreement. Another relevant fact is that one of the four publishers which took part in the agreement is the largest independent book distributor to traditional bookshops in Italy (accounting for 20 percent of their total sales).

In 1994, book sales (excluding textbooks) in Italy amounted to 2580 billion lire. Excluding direct mail and door to door sales, the turnover from book sales by retailers was of 1 338 billion lire (Table 1), and increased by 10.7 percent with respect to 1990. The share of traditional bookshops was 76 percent (9 percent higher than in 1980) and that of large retail stores was 15 percent (in 1980 it was negligible). In 1995 books were sold in more than 21 000 retail shops, 3 000 of which made more than 50 percent of their turnover from book sales. Only 1700 retail shops were "pure" bookshops (they did not sell anything but books). Since 1990, the number of "pure" bookshops constantly increased, at an average rate of 4 percent a year.

On the other hand, only 9 percent of the bookshops (1800 shops) have a yearly turnover exceeding 300 million lire. They include some multibranch specialised bookshops and account for 54 percent of total sales of books in the country.

Currently, approximately one third of the existing supermarkets and hypermarkets sell books; a further development of this retail distribution channel is expected in the coming years. Large retail stores

offer a limited assortment (varying from a few hundreds to two thousand titles), which is comparable to that of traditional retail stores which include books in their assortment but is certainly smaller than the choice available at "pure" bookshops.

The agreement was such as to involve a plurality of local markets for retail distribution of books, altogether corresponding to the whole national territory.

According to the parties, traditional bookshops, given their limited profitability and self-financing ability, are not in a position to respond to an aggressive discount policy by large retail stores. However, an analysis of balance sheets of a sample of bookshops of different sizes showed an average return on investment of 20 percent (of 14 percent for the members of the Italian Booksellers Association) and an average well-balanced financial structure. This evidence is consistent with the observed entry on the market by new specialised bookstores in the last five years. The parties objected that data from balance sheets do not include the cost of labour of the owner of the bookshops and the members of his/her family, who often co-operate with the owner at small bookshops. Moreover, the parties remarked that large retail stores usually obtain a more favourable economic treatment from publishers than bookshops, resulting in lower costs.

Finally the parties asked for an individual exemption, under Section 4 of the Italian Competition law, from the prohibition of the agreement since:

- resale price maintenance would have ensured equality of access and a large choice to consumers;

- price competition would increase the share of popular books sold by large retail stores with respect to bookshops; moreover, it would result in the exit of some bookshops from the market, in the reduction of the quantities of books different from best sellers sold on the market and in a cut in the variety of books put on the market by publishing firms.

On the other hand, representatives of large scale retail trade remarked that, so far, the development of a new distribution channel, through large retail stores, resulted in an increase in the volume of books sold on the market.

The Authority decided that the agreement had the effect of restricting competition between the four publishing firms, at least as far as the conditions applied to retailers were involved. Moreover, it prevented competition in book selling between large retail stores (which usually base their commercial strategy on price competition) and bookshops (where the quality of service is an important ingredient of competitiveness). The agreement prevented promotional sales to take place, even occasionally; therefore, it would have limited the development of sales, especially with respect to irregular and marginal readers. As a matter of fact, during the last five years the availability of the retailing channel represented by large retail stores favoured an increase in book sales in Italy.

The Authority ruled that the resale price maintenance agreement restricted competition significantly on the relevant markets and was therefore prohibited. Moreover, taking into account the observed effects of the development of the new distribution channel on book sales, the Authority deemed the agreement not strictly necessary to ensure the survival of “pure” bookshops and therefore not deserving an exemption under Section 4 of the Italian Competition Act. The parties terminated the resale price maintenance agreement as well as the exclusive distribution agreement stipulated with Mach 2.

Table 1. Book sales at cover price in Italy
(clear of returns; billion lire)

	1980	**1990**	**1993**	**1994**
Bookshops	180	935	995	1018
	(67.9%)	(77.3%)	(76.1%)	(76.1%)
Supermarkets and hypermarkets	-	115	191	197
		(9.5%)	(14.6%)	(14.7%)
Newspaper kiosks	75	152	110	111
	(28.3%)	(12.6%)	(8.4%)	(8.3%)
Book fairs and bookstalls	10	7	11	12
	(3.8%)	(0.6%)	(0.9%)	(0.9%)
Total sales	265	1,209	1,307	1,338
	(100.0%)	(100.0%)	(100.0%)	(100.0%)

JAPAN

Outline of regulations on Resale Price Maintenance (RPM) in Japan

In Japan, RPM falls under the category of unfair trade practices prohibited by Section 19 of the Antimonopoly Act (AMA, the Japanese Competition Law), and thus is, in principle, illegal.

However, the AMA exempts certain cases, under specific conditions, from the general prohibition on RPM (Section 24-2 of the AMA). The system for exempting certain types of RPM from general prohibition (herein after referred to as the "RPM system") was introduced in 1953.

Currently, commodities for which the "RPM system" applies are the following:

i) commodities designated by the Fair Trade Commission of Japan (JFTC) (hereinafter referred to as the "designated commodities")

(a) certain cosmetics with a retail price of less than 1, 030 Japanese Yen (14 items)

(b) certain non-prescription medicines for general use (14 items)

ii) copy-righted works (books, magazines, newspapers, record disks, music tapes, and music Cds.

Since the middle of the 1960s, the JFTC has at several times, repealed some of the "designated commodities". Thus, the scope of "designated commodities" has been substantially reduced. The remaining items of "designated commodities" are to be repealed as of April 1997.

Review of the RPM System on Copyrighted Works

The purpose of allowing the RPM system on copy-righted works has often been explained as follows (although such explanation was not explicitly given when the systems were first introduced):

i) selling copy-righted works at "fixed prices" had been an established business practice before the enactment of the AMA. It was felt necessary to make it clear that such sales at fixed prices were not illegal;

ii) from the viewpoint of maintaining a certain cultural standard, it was considered necessary to maintain a system under which a large variety of books could be made readily accessible throughout the nation for the same price.

However, a complete review of all the exemption systems from the AMA has been carried out along with the government's comprehensive deregulation efforts. These efforts are intended to enhance deregulation, to further liberalise Japanese markets and also to ensure consumer benefits. The government of Japan had made it clear in several cabinet decisions that the "RPM system" on copy-righted works would be subjected to a thorough review.

In 1994, the government established the Administrative Reform Committee for the promotion of deregulation. This Committee has since been studying, amongst other questions, that of the "RPM system" on copy-righted works.

In April 1992, the JFTC announced that it would commence a comprehensive study on the RPM system on copy-righted works. As a part of the ensuing study, the JFTC carried out research on the actual distribution situation of books, magazines, newspapers, music CDs, etc. The JFTC then organised the "Subcommittee on RPM-related Questions" (chaired by Professor A. Kaneko of the Keio University) as a subordinate body of "the Study Group on the Government Regulations and Competition Policy". The Subcommittee examined the questions, mainly from the theoretical point of view, related to the copy-righted works under the RPM system. In July 1995, an interim report of the Subcommittee was made public. This report is expected to contribute to the deepening of discussions among a wide segment of the Japanese public on this issue.

The outline of the interim report of the Sub-committee is as follows (seethe Appendix for details):

i) the RPM system allows, exceptionally, certain acts that otherwise violate the AMA. Hence, if a RPM system on a specific commodity is to be allowed to continue, there need to be both clear and specific reasons satisfying all sectors of the Japanese population;

ii) with regard to books, magazines, newspapers and music CDs where in the RPM system is applicable, following are the specific harmful effects which have been observed as a result of the system:

a) the markets are oligopolistic. Concerted behaviours are often observed, with regard to the setting of prices, etc.

b) the distribution systems have become excessively inflexible. They can not respond adequately to consumer needs.

c) inefficient business practices are often observed

iii) the industries concerned have expressed the view that the RPM systems have contributed to the diffusion of culture in Japan by enlarging the variety of books displayed in shops and enabling the home delivery of newspapers. However, the "RPM systems" themselves apparently do not play any role in amplifying the display of books or maintaining home delivery of newspapers. Furthermore, it is rather doubtful that the consumers' purchasing options have in any concrete manner improved due to the "RPM systems".

Actual Conditions of Market Structures and Distribution Systems in the Industries Concerned

According to the report on the above-mentioned JFTC research, the actual conditions of the market structures and distribution systems in the industries concerned are as follows:

Newspapers

The total circulation of daily newspapers for the general audience is 44 million. The publisher with the highest market share publishes 9.8 million copies. There are 84 different newspapers, including local ones. On the national market, there are five newspapers with nation-wide circulation and the total shares of the top three publishers, in terms of the volume of circulation, are 82.7 percent.

97.5 percent of general daily newspapers are sold from the publishers to the consumers through newspaper dealers. Out of those newspapers, 98 percent are home delivered.

The newspaper publishers restrict dealers from handling newspapers from other companies, and maintain strict territorial zones by assigning a business area for each dealer.

Books

The number of titles of new books published each year in Japan is about 45 000, while the number of copies of new books published annually is about 1.4 billion, and that of magazines, 4.8 billion.

With regard to the number of entrepreneurs in the publishing businesses, there are approximately 4 000 publishers, 100 intermediaries, and 20 000 retailers. In terms of the concentration ratio of the top three companies, it is 25.8 percent for publishers and 7.2 percent for retailers. In the case of intermediaries, the ratio is as high as 69.3 percent, in which the top two take quite a large share.

Intermediaries play the key role in the distribution of both books and magazines. The distribution channel of "publishers-intermediaries-retailers" constitutes by far, the most common line.

The main transaction forms for both books and magazines are:

i) consignment (in reality a sale with the option of returning unsold goods); and

ii) ordinary sale. Retailers have the option of returning unsold books on a *de facto* basis.

Music Cds

More than 50 companies are engaged in the planning and production of music CDs. Out of these, 16 companies sell music CDs. There are four companies, with their subsidiaries, which are engaged in all four processes, *i.e.*, planning, production, manufacturing and sale of Cds.

The near entirety of the distribution business of music CDs is carried out by two companies. Both of them were established by capital investment from record producing companies. The concentration ratio of the top three companies producing music CDs is 41.5 percent, and that of the top five is 55.6 percent. There are certain types of music for which concentration ratios are particularly high.

The form of transaction in this industry is usually ordinary sale. But in certain cases, the option of returning unsold goods is allowed.

The Present State of Review of the "RPM System" on Copyrighted Works

Since the publication of the interim report of the Sub-Committee, the JFTC has been eliciting opinions of the industries concerned as well as those of consumer organisations on this issue. Their opinions are richly varied and touch upon such matters as the cultural or public value of the copy-righted works, their nature, etc. They also relate to such matters as relevant systems and practices in the industries concerned.

The main opinions expressed up until this point are as follows:

Newspapers

Opinions for the RPM system

i) if the "RPM system" is abolished, the resulting price competition will wipe out shops with weak sales. As a consequence, the market structure will become even more monopolistic than at present. Home delivery services of newspapers will be ceased where they are found to be unprofitable. Thus the system of quick and secure home delivery will collapse.

ii) if the "RPM system" ceases to exist, competition will destabilise the existing distribution systems. This will jeopardise the smooth distribution of newspapers. The competition will also bring about a situation in which newspapers will tend to carry only those articles which cater to the readers' enjoyment. Thus the quality of journalism will be lowered. Moreover, a substantial portion of the newspaper companies may go bankrupt, resulting in a marked reduction in the variety of newspapers.

Opinions against the RPM system

i) home delivery services have been established because they were needed by readers. Such services also assure the suppliers of maintained sales. Hence, it is inconceivable that, even if the "RPM system" is abolished, newspaper dealers would unilaterally cease home delivery services. In other words, there doesn't seem to be a direct relationship between home delivery services and the "RPM system";

ii) the quality of a newspaper is determined by the readers' choices. If the quality is lowered against the wishes of its readers, its volume of circulation will undoubtedly be reduced. Hence, the newspaper publisher cannot wilfully lower the paper's quality;

iii) the price setting method has become excessively inflexible. For example, no discount is given for long-time readers. There are many other problems regarding the practice of sales promotions, etc.

Books and Magazines

Opinions for the RPM system

i) if the "RPM system" is abolished, the transaction of books will be done mainly on a "sales basis" (as opposed to a "consignment basis"). The retailers will retain mainly those books which sell well. They will have difficulty in broadening the scope of books displayed. Publishers will also find it difficult to maintain the variety of books at the present level;

ii) if transactions are done on a sales basis, the number of copies published will decrease. This will in turn push up book prices.

Opinions against the RPM system

i) even without the "RPM system", book retailers can carry out transactions of books with the option of returning unsold books. There is no direct linkage between the "RPM system" and the variety of displayed books;

ii) book prices might well decrease due to the lowered distribution costs resulting from the decrease in the number of returned books, as well as from price competition;

iii) Destroying returned books is wasteful. They should be sold at a discount.

Music Cds

Opinions for the RPM system

If the RPM system is abolished, shops will carry mainly those music Cds that sell well. As a consequence, the variety of music CDs in the shops will diminish.

Opinions against the RPM system

The sale of music CDs depends very much upon the taste of listeners. Hence, the variety of music CDs in shops will not decrease, even without the RPM system.

Future Development of the Review of the RPM System on Copyrighted Works

The government of Japan decided, in the "Deregulation Action Plan" adopted in March 1996, to go ahead with the review of the RPM system on copy-righted works. The Administrative Reform Committee is to carry out studies on each kind of copy-righted work, *i.e.* books and magazines, newspapers, music CDs. The Committee has expressed hope that discussions on this issue will be deepened in the various sectors of the nation.

The JFTC also intends to study this issue based on the opinions of wide-ranging segments of the Japanese population and on the systems and practices in the industries concerned, as well as on the

practices employed in foreign countries. The JFTC intends to present a conclusion by the end of March 1998.

NORWAY

In 1990 a committee was appointed to propose a new Norwegian Competition Act, which entered into force in 1994. The committee considered whether to prohibit resale price maintenance (RPM). In chapter 1 we will provide an abstract of the analysis of the committee, which lead to a conclusion that RPM should be prohibited *per se*. This prohibition is a continuance of the prohibition which entered into force in 1957.

Because RPM has been prohibited since 1957 we have only limited experience with the competitive effects of RPM. Nevertheless, cases involving RPM have occurred in connection with applications for exemptions from and enforcement of the prohibitions. In Chapter 2 we will give an overview of some typical exemption cases and the exemption for the Trade Agreement on Books. In Chapter 3, two enforcement cases are described. Some concluding remarks are made in Chapter 4.

The proposal of the committee which reviewed the Competition Act

The committee proposed a continuance of the statutory prohibition of RPM. The prohibition should apply to binding resale prices, as well as minimum resale prices. Recommended resale prices as well as maximum resale prices should be allowed. However, the ministry disagreed with the committee with respect to the latter, and the prohibitions of the new Competition Act also encompass maximum resale prices.

The committee pointed to some well-known pro-competitive motivations for imposing RPM:

- compete more effectively towards other suppliers by communicating a certain price profile directly to end consumers;
- avoid the double marginalisation problem by stipulating maximum resale prices;
- prevent free-riding on pre-sale services by stipulating minimum resale prices.

The committee also underlined that due to alternating market and cost conditions suppliers generally do not have sufficient information to stipulate optimal resale prices. Often the resellers are in a better position to evaluate the proper pricing of the supplier’s goods, taking local market conditions into consideration. End users may have differing preferences with respect to price/service combinations. The effect upon sales efforts from maintaining high profit margins is insecure, and may vary from one product to another. In many markets opinions of «normal» mark-ups may be based on historical records rather than reflecting current conditions, and may act as a protection for inefficient resellers.

When it comes to anti-competitive effects the committee considered that RPM would limit competition to a greater extent if the market for supplies is concentrated. Only suppliers with some market power will be able to maintain resale prices, and if there is market power upstream it may be beneficial for economic efficiency to preserve effective competition downstream. Furthermore, the potential for RPM to

decrease interbrand competition is greater if the market is concentrated. Norwegian markets will often be concentrated, due to the small population and barriers to imports. It was therefore considered vital to design the law in order to maintain effective intrabrand competition.

RPM may be used as a sham for downstream price cartel. Under many circumstances it may be difficult to reveal whether RPM is imposed unilaterally by the supplier, or if it is imposed after pressure from the resellers themselves. An upstream cartel may also be stabilised by means of RPM, by increasing market transparency and making price cuts less attractive.

RPM may also make tacit collusion more likely, provided that the market is concentrated. If RPM is imposed by most suppliers, it would be difficult for discounters to operate. Resellers are reduced to passive instruments in the distribution of the suppliers' goods, at terms imposed by the suppliers. Apart from benefiting consumers directly (ignoring the free-rider argument), increased downstream competition will force the resellers to look for more profitable supply sources, thereby stimulating upstream competition. For short, tacit collusion is more likely because the number of independent decision makers in the market has been reduced.

The committee also considered RPM in conjunction with other types of vertical restraints, especially exclusive distribution systems. If the competition authorities have accepted exclusive distribution systems, it seems inconsequent to intervene against other kinds of restraints. An approval of an exclusive distribution system means to a large extent that the parties in the period of the agreement are regarded as constituting one single economic unit.

Nevertheless, the committee did not propose an exception from the prohibitions for suppliers using exclusive distribution systems. Firstly, it would be difficult to consider what should be regarded as an exclusive distribution system. The degree of exclusiveness between resellers and supplier may be difficult to infer from agreements and contracts. Secondly, an exception would be easy to circumvent by formulating agreements etc. which would not give genuine expression for how the distribution is organised.

. The committee also considered whether to propose a prohibition for recommended resale prices (RRP). RRP may have the same effect as binding resale prices, indicating that perhaps also the first ones should be banned. On the other hand, RRP are not legally binding, it is up to the reseller himself if he wishes to respect the inherent request in the price signal. Possible gains from RRP are more efficient price calculations, communication of a price profile directly to end consumers, and more generally, that suppliers in this way can advise on the resale without binding the reseller.

The committee concluded that recommended resale prices should still be allowed, provided that the supplier in all written communication explicitly denotes the prices as being recommended.

. Finally, the Committee considered whether maximum resale prices should be excepted from the prohibition. The arguments for a prohibition against RPM did not seem to be valid if a supplier does not restrict price competition but rather prevents resellers from charging higher prices than what is considered appropriate by the supplier. Even by allowing RRP the law may involve an unwanted risk for a dialogue between supplier and resellers with respect to prices. The commission nevertheless accepted recommendations, due to established practise and because the appellation «recommended» signals to both consumers and resellers that the restraints are not legally binding. A similar system should without major additional difficulties be applied to maximum resale prices, meaning that resellers are free to charge lower prices.

The committee therefore concluded that both recommended and maximum resale prices should be allowed. These exceptions from the prohibitions would not preclude that the competition authorities may intervene if competitive harm is shown.

The Ministry disagreed with the committee with respect to maximum resale prices. It reasoned that in most circumstances it will be difficult for resellers to charge higher prices than the recommended resale prices. The difference is that maximum resale prices would be legally binding for the resellers. It would be difficult to distinguish between maximum resale prices and prohibited RPM. A general exception would therefore weaken the enforcement of the prohibition against RPM. Thus, there are no exception for maximum resale prices in the Norwegian Competition Act.

Exemptions

Franchising

The most frequent of the exemption cases concern RPM in connection with advertising campaigns organised by the franchiser. Fixation of resale prices is necessary because customers may react negatively if they are promised lower price in the advertisement than they actually have to pay. Exemptions have regularly been granted on the following grounds:

- increased interbrand competition;
- the franchise chain possesses small market shares;
- the sale campaigns only applies to a limited selection of products; and
- reduced advertising costs.

Some of the exemptions relate to stipulations of resale prices that are not explicitly labelled as recommended. Often the franchisees are free to charge lower prices than those stipulated in the advertisement, *i.e.* the stipulated resale prices are maximum prices.

Exemptions have also been granted for RPM imposed on the resale of goods in general. The argument for RPM is typically a wish to maintain as homogeneous outlets as possible, so that the customers know that they can get the same products to the same price in every shop. Interbrand competition may be enhanced by reducing the costs of discovering market prices. Again the basic grounds for the exemptions have been that the franchise possesses no market power, based on an evaluation of the relevant market and the market shares of the firm. The franchisees often operate in separated markets, meaning that RPM will not decrease intrabrand competition. It is expected that if anything, the RPM will prevent excessive prices in concentrated local markets.

The same pro-competitive effects of RPM are witnessed in more loosely organised groups, which collaborate on marketing of their products.

RPM is prohibited under the Norwegian Competition Act , while non-price vertical restraints are allowed. Most franchises include non-price restraints that restrict intra-brand competition, namely exclusive distribution. Banning RPM would not foster intrabrand competition unless such other non-price restraints are eliminated. Furthermore, intrabrand price competition will not induce franchisees to look for better inputs unless they are free to choose between different supply sources. However, most franchise

agreements restrict the franchisees' freedom to market other products than those supplied by the franchiser. Again the primary obstacle to competition does not seem to be RPM, but rather non-price vertical restraints.

What is stated in the paragraph above does not mean that non-price vertical restraints should be banned in most franchise arrangements. On the contrary, the Norwegian Competition Authority generally regards competition between franchises as effective competition. The point is that *if* market competition is reduced because of the chain co-operation, it seems appropriate both to intervene against exclusive arrangements and refuse to grant an exemption for RPM.

RPM in non-exclusive distribution arrangements

By non-exclusive distribution arrangements we mean transactions where basically no other restraints are agreed upon or unilaterally imposed than RPM, in particular that there are no long-term exclusive distribution or purchasing relationship between the supplier and his customers.

Maximum resale prices in intermediary markets have been granted exemptions because the RPM has been deemed necessary in order to allow price cuts from the supplier to be passed on from market dominating resellers to the consumer. The direct effect of the exemption is reduced possibilities for the reseller to execute market power, the indirect effect is increased incentives for suppliers to compete. However, we have experienced that a minor supplier may have little chance of success when trying to restrict the pricing policy of a market dominant customer.

Exemptions are very seldom granted for stipulation of minimum resale prices. Nevertheless, exemptions have occasionally been granted because of the need to protect retailers' margins. In one case minimum resale prices were considered necessary in order for entry into the Norwegian market to be successful. A supplier of consumer data systems feared that price dumping from mail-order sales of their products would make it unprofitable for specialised retailers to market their products. The information provided by such retailers and the product credibility that such retailing signalled to consumers were seen as a pro-competitive reason for granting an exemption for a limited period of one year.

More generally, suppliers' attractiveness for retailers depends on retailers' mark-up for their products. Apart from expectations of large sales of their products, large suppliers may be more attractive to retailers than small suppliers because of their ability to maintain high mark-ups, especially under the potential threat of refusals to deal with discount stores. Smaller suppliers will often lack the power to protect reseller's margins and will therefore experience a competitive disadvantage. This may be an argument for treating smaller suppliers more leniently than larger suppliers, especially when entering the market.

Trade Agreement on Books

The Trade Agreement on Books is an agreement between the Norwegian Publishers' Association (NPA) and the Norwegian Booksellers' Association (NBA). The aim of the agreement is to promote culture, literature and knowledge, stimulate reading, promote the Norwegian language and preserve the market structure of booksellers in Norway.

The agreement stipulates the commercial sales conditions for books, including RPM. Other restraints concern discounts, returns and an obligation for booksellers to store and supply books to the

consumers. The agreement has been granted exemption from the prohibitions of the Competition Act because of the cultural objectives, and in particular to:

- contribute to the publishing of a variety of literature;
- secure the existence of small book stores in sparsely populated areas; and
- promote the Norwegian language.

One of the main arguments for an exemption has been to secure the existence of small book stores in sparsely populated areas. The agreement establishes a monopoly for book stores to sell school books to elementary schools, high schools and university students. This monopoly is of special importance for book stores in sparsely populated areas, where the demand for other books is generally low. For instance, it precludes schools from buying directly from the publishers. In addition, RPM restricts price competition, thereby enhancing the protection of book stores.

The NBA insists that the agreement is necessary in order to prevent unemployment, bankruptcy and reduced access to literature in the districts.

Since every book store offers the same price, efficient book stores indirectly cross-subsidise less efficient book stores. The agreement preserves a market structure with a lot of small and inefficient book stores with a weak financial basis. The main reason for this is the stipulated RPM and the book stores' monopoly of school books.

The Competition Authority has suggested that both the cultural aims and maintenance of small book stores can be reached with other forms of regulations than RPM, *e.g.* direct budget transfers to authors, publishers and small book stores. This would lead to a more efficient market and lower prices of books. However, the Competition Authority has not succeeded in convincing the authorities that such direct transfers can be a better way to reach both the cultural aims and to preserve small book stores in searsely populated areas.

In 1995 the NPA and the NBA re-negotiated the Trade Agreement on Books in an attempt to reduce the vertical restrictions connected to school books. The Norwegian Competition Authority examined the new agreement in order to decide whether to grant a renewed exemption from the Competition Act. The Competition Authority was not satisfied with the regulations in the agreement and granted an exemption on conditions that school books were excluded from the agreement. The NPA and the NBA made a complaint to the Ministry of Administration which repealed the Competition Authority's decision and the agreement was granted an exemption without any conditions.

Enforcement of the prohibition

Windscreens for cars

Two Norwegian wholesalers of windscreens for cars were reported to the police for colluding on wholesale prices and retail prices. Investigations by the competition authorities revealed that most glaziers and car repair shops charged the same prices as those that were recommended by the two wholesalers. The recommendations were strongly normative for the price behaviour, leading to a situation with very weak price competition. The Competition Authority intervened and prohibited the price recommendations.

A subsequent investigation by the Competition Authority unveiled two price lists, which were issued jointly by the two wholesalers. One of the lists concerned retailers' sales of windscreens, while the

other stipulated wholesale prices. The two wholesalers accepted fines amounting to NOK 150 000 (ECU 19 000) and NOK 200 000 (ECU 25 000).

Some possible lessons to be learnt from this case is that recommended prices may under certain circumstances be a substitute for binding resale prices, at least if the resellers are depended upon the supplier. Secondly, it is of vital importance to investigate possible transgressions of interventions, especially if there are no customers with incentives or good enough information to report possible transgressions to the Authority. Thirdly, the case illustrates that a price cartel may be more stable if they also agree upon the resale prices.

Locks and other security systems

A market dominating Norwegian supplier of security systems violated the prohibition of RPM when it influenced its wholesalers not to sell below minimum resale prices. These minimum prices was denoted «net prices», which was the price wholesalers had to pay before having subtracted bonuses and discounts. The intention was that the wholesalers' gross margin at least should consist of bonuses and discounts.

The Norwegian supplier accepted a fine amounting to NOK 2 000 000 (ECU 250 000). Three employees accepted fines amounting to NOK 80 000 (ECU 10 000).

The motivation for the RPM seems primarily to be to protect the margins of the wholesalers. Such a policy may make the products of particular value to the wholesalers. Smaller existing competitors and future entrants may not have the same opportunity to protect the margins of their resellers, making entry less likely.

Concluding Remarks

It is disputed whether RPM should be prohibited, and also why the legal treatment of RPM should differ from other vertical restraints. For instance, RPM is prohibited under the Norwegian Competition Act while exclusive distribution is permitted, even if the impact on intrabrand competition is much the same. One reason for the design of the Competition Act with respect to vertical restraints is probably that this system has lasted for several years, and also resembles the legal systems of other OECD countries. However, there are also other arguments for the system based on experience with the restraints in question.

Exclusive distribution and exclusive dealing are normally entered into in connection with long-term agreements between a supplier and his resellers, especially in connection with franchise agreements. Such agreements are generally pro-competitive, unless a franchise becomes dominant in a relevant market. The latter proviso is seldom experienced. Selective distribution restricts some aspects of competition, especially price competition from discount stores, but it is not permitted to restrict price competition between the outlets that are part of the system.

Since non-price vertical restraints are generally pro-competitive they should not be prohibited. If such restraints proves to be anti-competitive, the Norwegian Competition Authority can intervene and forbid them upon individual analysis of the case in question.

But why not treat RPM in the same way? Economic theory does not give us a clear-cut answer. In addition, knowledge about how the markets would function if it was permitted is limited, since RPM has been prohibited since 1957. Nevertheless, we know that different systems, providing customers with varieties of price/services options, can live side by side. Price discounters are often a vital and important part of market competition and transgressions of the prohibitions have proved to be detrimental to competition.

When that is said, RPM may also be pro-competitive in many instances, and in these cases the prohibition should not apply. Under the Norwegian system there are two ways to design the law optimally, attempting to prohibit only anti-competitive RPM.

Firstly, one could have a system with block exemptions for distribution arrangements normally considered to be pro-competitive, for instance for franchise agreements. The problem with this system is that it is hard to define exactly what kinds of distribution systems that fall within the block exemptions. There is a danger that administrative resources are excessively focused on interpreting whether the block exemption applies. The result may be that the block exemption acts as a strait-jacket, inhibiting innovations of new distribution systems.

Secondly, one could have a system with exemptions being granted upon individual scrutiny of the RPM in question. The problem with this system is the danger of wasting resources, both at within the competition authority and the enterprises concerned. On the other hand, it is our experience that the resources being spent on clear-cut exemption cases are limited. It is the big cases, for instance the Trade Agreement on Books, that are really resource demanding.

SWEDEN

Introduction

The Swedish Competition Act (1993:20) came into effect on 1 July 1993. It is based mainly on the same principles as those applicable in the EC. The Act contains two general prohibitions, one against anticompetitive co-operation between undertakings (Article 6) and one against abuse of a dominant position (Article 19). EC case-law shall be taken into account when applying the Act. The former competition legislation, however, which was built mainly on the abuse principle, contained a per se prohibition on resale price maintenance (RPM).

Agreements or concerted practices that directly or indirectly fix purchase or selling prices fall within the scope of prohibition under the Competition Act. Also agreements between competitors on recommended sales prices are prohibited. A recommended sales price may, or may not, be followed, but it facilitates for any undertaking to predict with a reasonable degree of certainty what the pricing policy pursued by its competitors will be. Exemptions for horizontal agreements on recommended sales prices, *e.g* between retailers, will normally not be granted. In a number of decisions the Swedish Competition Authority has prohibited lists of recommended sales prices issued by trade associations for their members. However, the horizontal aspects that may exist in the relationship between suppliers and retailers will not be dealt with here as RPM is generally confined to vertical restraints on competition.

Vertical price recommendations

In Sweden it has for a long time been customary that suppliers in many industries issue price recommendations for their retailers which appear in advertisements, price-lists or product catalogues handed out to consumers. The Competition Authority has taken decisions in a number of cases regarding vertical price recommendations where companies have applied for negative clearance or an individual exemption. When considering these cases, the question of how prices have been decided and by whom has been of conclusive significance. In cases where the recommendation has been unilaterally decided by the supplier, i.e. without consultations with retailers, the conduct has been considered not to violate the Swedish Competition Act since no agreement exists. However, if the retailers are in any way forced by the supplier to maintain the recommended price, the vertical price recommendations would violate the Competition Act. The Competition Authority considers that it must be clearly stated in a price-list that the prices are only to be seen as recommendations by the supplier and that the retailers are free to set their own prices.

Vertical price fixing

Two recent cases on RPM are cited below as examples of the application of the Competition Act

RPM - watches

Seiko Sweden AB, which is a company within the world-wide Seiko Corporation, carried out an advertising campaign, in which some of Seiko's retailers participated. The campaign included coupons upon which a fixed price was printed. The customers were supposed to hand in the coupons when buying a watch included in the campaign. The Competition Authority found that the campaign, because of the coupons, constituted a concerted practice between the supplier Seiko and its retailers concerning pricing to consumers thereby infringing Article 6 of the Competition Act.

Price advertising - motorcycles

KGK Suzuki AB, the sole distributor in Sweden of Suzuki motorcycles, provided in its conditions of sale that advertising which mentioned prices should be made by KGK Suzuki and that a retailer was not allowed to run such advertising without permission. KGK Suzuki terminated a distribution agreement with a local retailer, arguing that the retailer had engaged in nation-wide advertising and had stated prices in the advertisements. The Competition Authority held that KGK Suzuki by entering and applying the clause on price advertising had infringed the prohibition against anti-competitive agreements in the Competition Act. KGK Suzuki was obliged not to restrict a retailer's right to advertise prices in such a way.

The treatment of RPM in the sale of books, newspapers and magazines

Sale of books

The Competition Act is fully applicable to the book market. On 1 April 1970 the Swedish RPM system for the prices of books was abolished. One of the main reasons was that the system was not compatible with the Swedish competition legislation according to which vertically administered fixed prices were prohibited. For more than ten years the RPM system had been under debate and the Swedish Market Court had twice granted an exemption from the prohibition. The exemption was finally put to an end.

The Swedish Competition Authorities strongly supported the abolition of the exemption having argued that the RPM system preserved an inefficient market structure and led to unnecessarily high prices for consumers. They also argued that the fixed gross retail margins had a horizontal effect that could limit output.

The experience from free pricing in the Swedish book market could shed some light on what the consequences are when a RPM system is abolished. Since 1970 the Swedish book market has been monitored and analysed in several government reports as well as in studies by trade associations for publishers and retailers. Their main findings are, in short, the following.

After the liberalisation the market structure changed considerably. A number of bookstores closed down and new forms of distribution emerged. The most significant change in the market structure to date is that the market shares of mail-order companies (mainly book clubs) and department stores have

increased considerably. The number of specialised bookstores as well as sales of all kinds of books except school books, i.e. "general literature", have increased considerably.

The main effects on the Swedish book market can be summarised as follows:

1. sales of general literature increased by at least 50 per cent in real prices from 1970 to 1990. The sales volume thus increased considerably. The average share of sales of general literature out of total sales has remained unchanged;

2. the stocking of the booksellers has not decreased since 1970 and the number of non best-sellers is approximately the same, partly as a result of state aid. The sales-area of bookstores has on average increased by 35 per cent;

3. the decline in the number of booksellers has more or less followed the general decline in the number of retail outlets experienced in the retail sector in Sweden since the 1970s. However, in several small cities and municipalities book stores have closed down;

4. in real terms the prices of books, on average, have decreased slightly, presumably as a result of new forms of distribution, primarily book-clubs.

5. the new forms of distribution have provided better access to books for Swedish consumers;

6. the market concentration has remained at approximately the same level during the last decades. The number of publishers has not changed significantly.

A governmental commission has been appointed to examine recent developments in the Swedish book market and the functioning of state aid to book publishing. A report of the commission is expected before the end of August 1997.

Newspapers and magazines

Newspapers and magazines are sold on commission with the right for the retailer to return unsold copies. The publisher determines the price that is printed on each copy. The newspaper market benefits from state aid in the form of a special support scheme to the press. Today about 80 morning papers benefit from direct support.

The Competition Authority has examined several standard agreements between distribution firms and retailers/vendors. Typically such agreements contain provisions concerning payment, prices and deliveries including the right to return unsold copies. A retailer cannot refuse to sell single copies of newspapers or magazines included in the product range agreed on with the distribution firm. However, the retailer is not obliged to charge the customer the price printed on the newspaper or magazine, i.e. the price determined by the publisher. For each copy the retailer receives a commission set as a percentage of the price printed on the copy. In its assessment of these distribution agreements the Competition Authority has concluded that there must not be any obstacles for the retailers to share their commission with the customers.

UNITED STATES

Vertical price-fixing, also known as resale price maintenance, refers to agreements between sellers and buyers operating at different levels in the distribution of the same product or service to fix prices at one or more market levels at a set amount or within a prescribed range. Since the Supreme Court's 1911 decision in Dr. Miles Medical Co. v. John D. Park & Sons Co.[1], the courts consistently have applied a *per se* standard of illegality to vertical price fixing agreements.

The Dr. Miles case involved express agreements between a manufacturer of trade-marked proprietary medicines and its authorised dealers fixing their minimum resale prices. The Court reasoned that once Dr. Miles sold its product, it no longer had any right to deprive the public of "whatever advantage may be derived from competition in the subsequent traffic."[2] The Court rejected Dr. Miles' argument that vertical price fixing was a reasonable restraint under common law doctrine and equated the effects to horizontal price fixing among dealers:

> "[Dr. Miles] can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavoured to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to [Dr. Miles] cannot be regarded as sufficient to support its system."[3]

Subsequent cases have not dealt with the reasonableness of the alleged vertical price restraint but with the issues of *(i)* whether the challenged conduct is properly characterised as falling within the boundaries of the *per se* rule; and *(ii*) whether the concerted action or "agreement" requirement of Section 1 of the Sherman Act has been met.

In Albrecht v. Herald Co., the Supreme Court confronted the issue of whether the *per se* rule against vertical price fixing encompassed a newspaper's contractual limitation on the maximum price that its carriers could charge their customers. The Court answered in the affirmative.[4] Its rationale was that "agreements to fix maximum prices 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgement.'" [5] The dissenting opinion of Justice Harlan argued that minimum and maximum resale prices have different effects.[6]

But the majority, while acknowledging this point, nevertheless rejected the rationale of the dissent because: 1) "by substituting the perhaps erroneous judgement of a seller for the forces of the competitive market, [maximum resale price-fixing] may intrude upon the ability of buyers to compete and survive in that market;" 2) "maximum prices may be set too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay;" 3) "maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition;" and 4) "if the actual price charged under the maximum price scheme is nearly always the fixed minimum price ... the scheme tends to acquire all the attributes of an arrangement fixing minimum prices."[7]

In Continental T.V., Inc. v. GTE Sylvania Inc.[8], while the Supreme Court overruled precedent and announced a rule-of-reason standard for evaluating non-price vertical restraints, it reaffirmed its intent to apply the *per se* rule of illegality against vertical price-fixing:

> "We are concerned here only with non-price vertical restrictions. The *per se* illegality of price restriction has been established firmly for many years and involves significantly different questions of analysis and policy .... some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same for nonprice restrictions. There are, however, significant differences that could easily justify different treatment .... unlike nonprice restrictions, '[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands .... Industry-wide resale price maintenance might facilitate cartelizing.'"[9]

Supreme Court decisions have carved out certain "exceptions" to the *per se* rule that are largely premised on the distinction between unilateral and concerted conduct. For example, the courts have narrowed the scope of the *per se* rule by excluding from its reach certain distribution arrangements that the courts have deemed not to involve an actual purchase or sale. In United States v. General Electric, the question arose whether the *per se* rule applied where the distributor or dealer was the manufacturer's agent and received the products on consignment.[10] The Supreme Court held that "genuine contracts of agency" do not violate Section 1 of the Sherman Act since the "owner of the article" is not prohibited from "fixing the price by which his agents transfer the title directly from him to [a] consumer."[11] The Court has not hesitated to find a violation where the consignment arrangement was a sham.[12]

Another important "exception" was established in *United States v. Colgate & Co.*, in which a manufacturer of soap and toilet articles announced by various means uniform prices to be charged for its products, urged dealers to adhere to such prices, announced that no sales would be made to dealers who did not comply, monitored compliance, sought assurances of future compliance from offending dealers, and refused to sell to dealers who failed to give such assurances. The Supreme Court held that in the absence of any purpose to create or maintain a monopoly, a manufacturer has the right "freely to exercise his own independent discretion as to parties with whom he will deal" and "may announce in advance the circumstances under which he will refuse to sell."[13]

As clarified by subsequent decisions[14], the "Colgate doctrine" establishes the right of a manufacturer to deal or not with a distributor based on the latter's pricing activities, to communicate its views on resale prices, for example by providing suggested price lists,[15] and to induce (but not coerce) dealers to use its suggested prices[16] provided the manufacturer does so unilaterally and any acquiescence by the dealer in following the suggested resale price is the result of its independent decision. In other words, a violation will not occur if no "agreement", express or tacit, exists between the manufacturer and its complying dealers.

After Colgate, a basic problem faced by the courts has been the difficulty of distinguishing unilateral conduct that is legal from concerted action -- an "agreement" -- that is not. In the course of making this distinction, the courts have limited the scope of the *per se* rule by more narrowly construing the definition of an "agreement" between sellers and buyers. The seminal Supreme Court decision, Monsanto Co. v. Spray-Rite Service Corp.[17], is illustrative.

In Monsanto, a herbicide manufacturer terminated a cut-rate distributor for failure to comply with various service requirements after also receiving complaints from other distributors about the price-cutting practices of this distributor. The Seventh Circuit Court of Appeals upheld a jury finding of a price

conspiracy based on proof of a termination following competitor complaints. The Supreme Court, however, rejected the Seventh Circuit's standard of illegality, finding that the evidence of such dealer complaints alone was insufficient to establish the element of concerted action required to support a Section 1 price-fixing claim.[18] Rather before a *per se* rule is applied, there must be "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'"[19] To show a "common scheme" dealer compliance with the suggested price is insufficient, evidence also must be presented "both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer."[20]

In explaining its rationale, the Court observed that two important distinctions need to be drawn. The first is between concerted and independent action, since independent refusals to deal by manufacturers and individual decisions to acquiesce by dealers are legal under Colgate and its progeny. The second is between concerted actions to set prices, which are *per se* illegal under Dr. Miles, and concerted actions on nonprice restrictions, which are judged under a rule of reason under Sylvania.

The Court noted that though these distinctions are clear in principle, they are often "difficult to apply in practice" for the following reasons:

> "The economic effect of all of the conduct described above -- unilateral and concerted vertical price setting, agreements on price and nonprice restrictions -- is in many, but not all, cases similar or identical. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable. For example, the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restraints that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere. Thus the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more that the Colgate doctrine allows"[21] (Citations omitted).

The Court cautioned that if the inference of a vertical price-fixing agreement can be satisfied by "highly ambiguous evidence, there is considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded."[22] While the Supreme Court in Monsanto found the Seventh Circuit's standard too loose, it reached the same conclusion. Combining evidence of dealer complaints with such other circumstantial evidence as meetings and verbal assurances by the manufacturer that action would be taken to force compliance, the Court found an illegal agreement to fix resale prices.

In Business Electronics Corp. v. Sharp Electronics Corp.[23], the Supreme Court further increased the plaintiff's burden of proof and narrowed the definition of what constitutes an agreement. This case involved an agreement between Sharp, a manufacturer of electronic calculators, and one of its distributors who had complained of discounting by another distributor, Business Electronics, and threatened to terminate its relationship unless Sharp terminated the discounter. Sharp thereafter terminated Business Electronics who then sued. The jury found an illegal price-fixing agreement and the Fifth Circuit reversed, holding that "to render illegal *per se* a vertical agreement between a manufacturer and a dealer to

terminate a second dealer, the first dealer 'must expressly or impliedly agree to set its prices at some level, though not a specific one.'"[24]

The Supreme Court affirmed the appellate decision and in doing so explained that the following premises of Sylvania and Monsanto guided its approach:

> "There is a presumption in favour of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view toward protecting the doctrine of GTE Sylvania."[25]

Based on these premises, the Court found no showing that an agreement between a manufacturer and a dealer to terminate a price cutter, without a further agreement on the price or price levels to be charged by the remaining dealer, "almost always tends to restrict competition and reduce output."[26] Rather the Court observed that "without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organise and hold together a retailer-level cartel."[27] The Court, therefore, treated the agreement to terminate the price cutter as a vertical nonprice restraint since "any assistance to cartelizing that such an agreement might provide cannot be distinguished from the sort of minimal assistance that might be provided by vertical nonprice restraints."[28]

In recent years, US law concepts of "standing to sue" and "antitrust injury" in private actions[29] by competitors also have weakened the *per se* rule against maximum resale price maintenance. In the 1990 Supreme Court decision in Atlantic Richfield Co. v. USA Petroleum Co.[30], the Court held that while maximum resale price-fixing remains *per se* illegal[31], a manufacturer's maximum resale price maintenance did not cause a competitor the type of antitrust injury that conferred standing to sue in the absence of predatory pricing. The Court noted that in Albrecht, it held that a maximum resale price agreement was *per se* unlawful because of its potential effects on dealers and consumers, not because of its effects on competitors. The respondent's asserted injury in Atlantic Richfield did not resemble any of the potential dangers described in Albrecht.

As the foregoing court decisions reveal, vertical price fixing remains *per se* illegal. But the Supreme Court has narrowed the prohibition by imposing stringent evidentiary requirements for showing the requisite unlawful "agreement" or "conspiracy" to fix resale prices[32]. By doing so, the Court has fortified the Colgate doctrine of protected unilateral conduct[33] and, by its own admission, avoided adoption of legal rules that would frustrate "the market-freeing effect" of its decision on nonprice vertical restraints in Sylvania.[34]

The record at the enforcement agencies has been uneven. In the 1980's, few resale price maintenance cases were brought. More recently, some cases have been brought where there also was evidence that the agreements had injured competition by facilitating collusion among suppliers or among their distributors. And some recent cases have rested squarely on the rule of *per se* illegality.

In the academic community the appropriate enforcement standard for vertical price fixing is a continuing topic of lively and discordant debate. Various anticompetitive and pro-competitive theories have been advanced to explain supplier use of vertical price fixing. The theories, briefly described below, include dealer collusion, supplier collusion, and non-collusive consumer injury as well as various efficiency motivations. [35]

The most common anticompetitive explanation, which the Supreme Court initially recognised in its Dr. Miles decision, is that vertical price fixing facilitates dealer cartels, either at the retail or wholesale level, by providing a cartel enforcement mechanism where dealers cannot police the agreement themselves. Proponents of this theory point to evidence that some dealers in the past, often through trade groups, have pressured manufacturers to institute resale price maintenance and act as the enforcer of the dealer cartel.[36] The result is a more stable and durable cartel than a purely horizontal arrangement.

Vertical price fixing sometimes also may facilitate supplier collusion. It reduces a supplier's incentive to cheat on the cartel by cutting the wholesale price. Because a reduction in wholesale price will not produce a lower retail price, it will not increase the supplier's sales and only the dealer, not the supplier, may reap the higher profits. In addition, where a supplier sells to a dealer who then resells the product, detection of cheating may be eased by establishing a clear retail price and monitoring it.

There are other anticompetitive theories of how resale price maintenance may cause consumer injury. One theory is that while vertical price fixing may induce the provision of pre-sale services (see discussion below on procompetitive theories), many customers who do not "consume" these services are forced to pay higher prices for them if an unbundled package is not available.[37] A second non-collusive theory of anticompetitive effect is that in some cases intrabrand competition, which is prevented by vertical price fixing, is more critical to consumers than the services that are encouraged.[38] Vertical price fixing may reduce competitive pressures on high price (and high service) retailers to cut their prices to compete with discounters and, in turn, to secure price concessions from upstream suppliers. In addition, vertical price fixing may suppress the ability of more efficient dealers to pass on to consumers any realised efficiencies.

With respect to procompetitive theories, perhaps the best known argument advanced by proponents of vertical price fixing focuses on dealer services to consumers. A manufacturer may independently determine that a particular mix of price and service competition maximises sales of its products. Dealers may not be willing to provide costly services essential to the success of the manufacturer if competing dealers, unburdened by comparable costs, can offer the same product at lower prices - the so-called "free-rider" problem. According to this theory, by restricting intrabrand price competition, a manufacturer can reduce or eliminate free riding and maintain adequate incentives for dealers to provide costly pre- and after-sale services.

Other efficiency theories are that vertical price fixing enables manufacturers to induce dealers to carry large inventories (or provide desirable shelf space) or to attract new dealers when demand is highly uncertain for the manufacturer's product. Another theory focuses on product image and "loss leaders". The argument is that where the manufacturer invests resources to create a product image of quality or its product is an "image item", such as perfume, price reductions may actually reduce sales volume, or, in the case of "loss leaders" discourage dealers from ordering inventories.

There is much disagreement about the extent to which each of these anticompetitive or procompetitive theories underlies the actual use of vertical price fixing in the marketplace[39]. Each theory has its critics. The controversy in turn has resulted in different policy prescriptions for vertical price fixing -- *per se* illegal, rule of reason standard, and *per se* legal. In the meantime, the rule of *per se* illegality, though circumscribed in its application by the courts, continues to be the legal standard in the US.

NOTES

1. 220 U.S. 373 (1911).

2. Id.at 407-408.

3. Id. at 408.

4. 390 U.S. 145 (1968).

5. Id. at 152.

6. "[W]hile resale price maintenance establishes what is the equivalent of a single horizontal restraint on otherwise competitive sellers, price ceilings establish merely a series of distinct vertical relationships between manufacturers and seller, with no one seller economically interested in the maintenance of the vertical relationship with any other seller." Id. at 159-50 n. 4.

7. Id. at 152-153.

8. 433 U.S. 36 (l977).

9. Id. at 51 n.18.

10. One critical point in the Dr. Miles decision was that the purchaser had taken title to the property and thus the vertical price-fixing agreement contravened the common law right of alienation of property.

11. 272 U.S. 476, 488 (1926).

12. See Simpson v. Union Oil Co., 377 U.S. 13 (1964).

13. 250 U.S. 300, 307 (1919).

14. E.g. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (l922); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). See generally Antitrust Section of the American Bar Association ("ABA"), ANTITRUST LAW DEVELOPMENTS (THIRD) at 104 at 107-108 and cases cited therein.

15. This also includes printing suggested resale prices on the product or a pricing tab and advertising suggested resale prices to dealers' customers. See ABA, supra note 14 at 107-108.

16. The issue of alleged vertical price fixing has arisen in the context of price promotion, temporary dealer assistance, and cooperative advertising programs. Generally these programs have been upheld where the dealer is free to determine its resale price. See ABA, supra note 14 at 110-113.

17. 465 U.S. 752 (l984)

18. "[C]omplaints about price cutters are 'natural...reactions by distributors to the activities of their rivals [that] arise in the normal course of business and do not indicate concerted action.'" 465 U.S. at 763 (citations omitted).

19. Id. at 753.

20. Id. at 764 n. 9.

21. Id. at 763.

22. Id.

23. 485 U.S. 717 (l988).

24. 780 F.2d 1212, 1218 (1986).

25. 485 U.S. at 725. The Court in Sharp added that the authorities cited in its Sylvania decision "suggested how vertical price agreements might assist horizontal price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not pass on lower prices to consumers) or might be used to organize cartels at the retailer level." Id. at 725-726.

26. Id. at 726-727.

27. Id.

28. Id.

29. A private plaintiff may not recover damages under section 4 of the Clayton Act without proving the existence of antitrust injury, that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-mat, Inc., 429 U.S. 477, 489 (1977).

30. 495 U.S. 328 (1990).

31. Commentators and the Seventh Circuit Court of Appeals have pointed out that the Supreme Court in this decision was willing to assume only arguendo that Albrecht was correctly decided (495 U.S. at 335 n.5) and in fact cited critical academic commentary on the case (id. at 343 n.13). See ABA, supra note 14 at 104; Khan v. State Oil Co., No. 96-1309 (7th Cir., August 29, l996) reported in 71 ATRR 244 (Sept. 12, l996).

32. Some observers believe that the decisions circumscribing application of the per se rule reflect the courts' discomfort with that rule.

33. See, e.g., Arquit, Resale Price Maintenance: Consumers' Friend or Foe?, 60 ANTITRUST L J 447, 449 (1992).

34. Sharp, 485 U.S. at 726.

35. See, e.g., H. Hovenkamp, FEDERAL ANTITRUST POLICY (1994) §§ 11.2 -11.3.; H. Marvel, The Resale Price Controversy: Beyond Conventional Wisdom, 63 ANTITRUST L J 59 (1994); R. Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 GEORGETOWN L J 1487 (l983); Arquit, supra note 33.

36. See, e.g., T. Overstreet, Resale Price Maintenance : Economic Theories and Empirical Evidence, FTC Bureau of Economics Staff Report (1983) at 133, 145.

37. See Comanor, Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 HARVARD L REV (1985).

38. See, e.g., R. Pitofsky, Why Dr. Miles Was Right, REGULATION, Jan. l984, at 27.

39. See, e.g., Hovenkamp, Marvel, Pitofsky, Arquit, supra note 35 and authorities cited therein.

EUROPEAN COMMISSION

THE LEGAL TREATMENT OF RESALE PRICE MAINTENANCE IN THE EUROPEAN UNION, PARTICULARLY IN THE SALE OF BOOKS

Precedents and pending cases

Both the European Court of Justice and the Commission have dealt with retail price maintenance systems for books on several occasions. Two decisions were taken under Article 85: the Commission decision of 25 November 1981 prohibited an agreement between the Dutch and Flemish book trade associations on the trade of books between the Netherlands and Flanders/Belgium. According to this agreement, retailers in one country had to comply with the prices fixed by the publishers in the other country. In addition, retailers in one country could not buy books from publishers not recognised by the association in the other country. The Commission's prohibition decision was upheld by the Court of Justice in 1984.

The second Commission decision (of 1988) concerned the UK Net Book Agreement (NBA). This agreement was concluded within the framework of the UK Publishers' Association and comprised both members and non-members of this association. The agreements provided for uniform standard conditions of sale for so-called net books, i.e. books for which the publisher set a retail price. Each retailer in the UK and Ireland selling net books had to comply with the retail price set by the publisher and the uniform sales conditions set by the Publishers' Association. The Commission prohibited the agreement insofar as it applied to book exports from the UK to Ireland and in general sales in the UK and Ireland of books imported or re-imported from other Member States. While the Court of First Instance (CFI) upheld the decision in 1992, the Court of Justice (ECJ) annulled the Commission's decision, however only for the formal reason of lack of motivation. The ECJ said that the Commission should have considered for its decision two decisions of the UK Restrictive Practices Court of 1962 and 1969.

The NBA has been abandoned in autumn 1995 after several large publishers withdrew from it and stopped setting net prices for their titles. However, the notification to the Commission has been maintained. The NBA is also under examination by the UK Restrictive Practices Court.

There are two other notifications under Article 85(1) and 85(3) of the Treaty: the "Sammelrevers", i.e. agreements between publishers and booksellers in Germany, Austria and Switzerland by which the publishers set the prices that the retailers have to maintain in their sales to consumers. Only the part concerning Austria and Germany has been notified.

The second agreement notified is the agreement between Dutch publishers, wholesalers, importers and booksellers which establishes a collective vertical price maintenance system combined with an exclusive trading system between the members. Publishers and importers are obliged to set retail prices and retailers are obliged to abide by these prices and the uniform sales conditions laid down by the system. This system also comprises clauses applying to foreign books imported from other Member States and Dutch books reimported from other Member States. The agreements are also the object of a complaint lodged by a Dutch retailer in November 1994.

The Commission has not yet made any decision on these latter notifications and complaints.

Finally, it should be mentioned that the Court of Justice made a ruling on the French legislative RPM for books (Loi Lang of 1982). While the Court accepted the system in general, it did not accept those clauses of the system which concerned the fixing of prices for foreign books imported from other Member States and for French books reimported from other Member States. These clauses were deemed contrary to Article 30 of the Treaty. During the Court procedure, the Commission commented on the application of Articles 30 and 85 in combination with Article 5 and gave an opinion on the advantages and disadvantages of RPM for books.

Arguments advanced for an exemption of book RPM from European competition rules

Retail price maintenance for books, as all other forms of retail price maintenance, excludes price competition between retailers. Therefore it has always been considered by the Commission as a violation of Article 85(1) of the Treaty. Insofar as RPM agreements affect trade between Member States, it is therefore necessary to demonstrate that the conditions for the grant of an exemption under Article 85(3) are fulfilled. It must be demonstrated that such RPM systems improve the production and distribution of goods, that the consumer obtains a fair share of these benefits, that the restrictions are not indispensable for the attainment of the pretended advantages of the system, and that competition is not eliminated in respect of a substantial part of the products in question.

The arguments for an exemption advanced by the notifying parties in all the cases dealt with by the Commission so far are similar. The publishers say that these systems allow subsidisation of less popular books by fast-selling books and thus enable publishers to place a wide range of titles on the market. According to the publishers, the fixed price represents a certain security for the publisher when he decides to publish a book, and makes it possible to publish special interest literature, valuable but less popular literature and books of new authors. In addition, the fixed price is said to allow publishers to refuse too high rebates to big retail chains which would endanger the publishers' possibility to cross-subsidise less popular books.

For the retailers, the fixed price is said to allow retailers to hold a large and varied stock of titles by subsidising the costs of slow-moving titles from the profits of fast-moving ones. It is also said that without the retail price maintenance system the bookseller would be forced to calculate each end-price himself which would increase his costs and cause fewer books with small sales figures to be stocked.

The publishers claim that the abolition of a fixed price system for books would lead to more concentration both in publishing and in the retail sector. Small traditional bookstores with very good service for the customer would have to go out of the market and would be replaced by mail-order booksellers, book-clubs and chain bookstores. These would operate especially in the city, leaving the country-side without any bookstores.

These arguments are also made as cultural arguments. Publishers and booksellers say that a wide network of book shops preserved by retail price maintenance brings books as cultural products closer to the population. The preservation of traditional bookshops with a wide range of books offered is said to benefit the dissemination of culture because such bookshops create an atmosphere in which customers may look at many different books before buying one, and therefore may discover books that they would otherwise not know, and that they would never find in supermarkets which concentrate on best-selling and easily sellable books. It is also said that the abolition of RPM systems would leave parts of the countries without bookstores.

The argument that RPM allows for a wide variety of book titles printed by the publishers is also made under a cultural aspect: RPM is said to ensure the survival of the richness and diversity of culture embodied in books.

The supporters of book RPM say that the consumers benefit from these systems because they have a large offer of different titles and of well assorted bookshops with a good service and they are able to buy a title for the same price everywhere, whether they buy it in a big city or on the countryside.

The position of the Commission towards the arguments for book retail price maintenance

These arguments have, so far, always been refuted by the Commission. In the VBBB decision of 1982, the Commission said that there is no necessary link between the principle of cross-subsidisation as practised by both the publisher and the bookseller, and the system of RPM. The decision says that for the publisher to be able to pursue his chosen policy there is no need for fixed retail prices, but 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 enable them to publish less-commercial titles. This does, according to this decision, not necessarily involve resale price maintenance, especially as in practice the publishers of general-interest books generally do not engage in publishing short-run books such as specialised books or the less popular literary works. The Commission stated that the notifying parties have not proven, as it would have been necessary, that individual decisions to allow commercially unattractive titles to depend on the publication and sale of books that sell well were not possible under a system of free prices.

As far as the arguments relating to booksellers are concerned, the VBBB decision states that despite the existence of RPM in the Netherlands, there had already been a sharp drop in the number of general booksellers in the Netherlands, partly due to the rise of self-service shops which generally offer a fairly limited range of books.

The decision also states that the alleged advantages of RPM for the consumer are not proven, or in any case outweighed by the disadvantages. Apart from the alleged benefits for the consumer due to the pretended wide range of titles which is already discussed above, the decision also discusses the claim 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 RPM. The decision says that, as long as booksellers 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. RPM.

Moreover, the RPM system denied 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. In addition, the fixed price does not allow the consumer to benefit from the advantages of rationalisations that take place in the book-trade. More efficient booksellers with cost savings are not allowed to pass these on to the consumer in the form of cheaper prices.

In the Court procedure in the VBBB case, the Advocate General shared the opinion of the Commission on the usefulness of RPM for books. In particular, he pointed to the indispensability criterion of Article 85(3) and said that there are less restrictive ways of achieving the aim of a wide network of well assorted bookshops. He suggested that, if the publishers really pursue this aim, they should give bigger rebates to the culturally important bookshops with a big assortment of books. This is a better way of achieving the aim than fixed prices which benefit also, and above all, those bookshops that offer only fast-

selling best-sellers without cultural value. RPM does in no way force the booksellers to cross-subsidise cultural books with the revenue from fast-selling books.

Alternatives to RPM were also suggested in the Commission's submission to the Court in the Leclerc case where it is said: "Even if it is desirable to protect small retail outlets (to protect diversity of culture), measures such as the grant of loans to booksellers and improvements in their vocational training are equally capable of contributing towards that protection and they do not hinder trade." It could be added that subsidies to qualified publishers and booksellers or a system of selective rebates from the publisher for these qualified booksellers seem to be more appropriate to further valuable book production and distribution than RPM which benefits all publishers and retailers whatever categories of literature they produce and distribute.

Experiences of countries where RPM for books has been abolished

In a number of European countries, existing book RPM systems have been abolished. This was the case of Sweden, Finland, Belgium, Ireland and the UK. In France, RPM was only abolished for a few years at the end of the Eighties and beginning of the Nineties.

In Sweden, RPM was abolished in 1970. According to explanations from the National Council for Cultural Affairs of June 1995, this was because an investigation by competition authorities into the "cultural argument" advanced by he publishers to justify an exemption from competition rules had shown that sales of culturally valuable, hard-to-sell books written in Swedish accounted for only two percent of total sales.

According to the National Council for Cultural Affairs, the apprehensions that deregulation would cause publishers' lists to become slight and featureless have proved unjustified. The number of book titles published has increased from 6 383 in 1970 to 12 893 in 1993. This is however probably also due to a national subsidy for publishing introduced in 1975.

Book prices have, according to the Swedish Competition Authority, followed a similar price development as other goods. While price rises were slightly lower than the one of the consumer price index until 1978, they were slightly higher in the years afterwards. However, there are considerable differences in prices in general between individual booksellers on all types of books. It is not clear from the Competition Authorities report whether this price development reflects real prices or the development of recommended or list prices (in the latter case, real prices would have been considerably lower).

While in the seventies the number of bookshops covering the full range of books decreased, it has remained stable since then. In districts inhabited by less than 10 000 people, many fully-assorted bookshops turned into so-called service bookstores keeping only a limited range of books. The bookstores which disappeared completely from the market were mostly located in the three biggest cities, while the number of bookstores actually increased in towns between 10 000 and 30 000 inhabitants.

Despite their decrease in number, retail trade is still dominated by bookstores covering the full range of books with a market share of 75 percent, whereas bookstores with a limited range hold five percent, department stores 10 percent and other retailers 10 percent.

In Finland, RPM was abolished in 1971. According to a report of the Finnish competition authority, a system of recommended retail prices was introduced which was greatly respected until the mid-eighties from which period on the sales prices of bookshops were not determined as strictly on the basis of the recommended prices any longer. The number of book titles published in Finland rose from

3 350 in 1970 to 12 400 in 1994 (which in relation to the Finnish population of about five million is a very high number). Also the sales of books seem to have risen to a large extent from 1970 to 1994 (from FIM 86 000 to FIM 1 200 000). In the Nineties sales of books have decreased due to economic recession.

In book distribution, a diversification has taken place with supermarkets, department stores and book-clubs gaining market share (about 20 percent for supermarkets and department stores and 15 percent for book-clubs) and so-called sample book stores loosing market share. The importance of public libraries, which are subsidised by the State, is very important, the share of the total book sale sold to libraries is 16 percent, and there are about one thousand public libraries. 220 mobile libraries are provided to reach the customers in sparsely populated areas. The level of reading is very high with 80 percent of the population having read at least one book in the last six months (according to a survey) and the average number of books borrowed from public libraries being five per head of the population.

In France, after a period in which apparently prices were recommended by publishers and generally followed by retailers, in July 1979 price recommendations were abolished in favour of completely free book pricing. In 1992, RPM was introduced by law (Loi Lang). The period of free prices was probably too short to draw any conclusions from this experience. In addition, studies available are scarce and do not seem to be conclusive. For example, a study of the Culture Ministry of 1987 ("L'évolution des librairies et le prix unique du livre) says that, in 1978, there were 2 000 stockholding bookshops, 3 400 in 1981 and 2 500 in 1983 (therefore after introduction of RPM). It does however not conclude that these developments are due to the abolishment of recommended prices and subsequent introduction of RPM.

It is said in this study that small libraries were suffering from the free price system and losing market share to retail chains and supermarkets. However this development seems to have continued in France despite the introduction of RPM in 1982. According to a report of Euromonitor of 1995, traditional bookshops retained only a market share of 33 percent, with hyper- and supermarkets having 25 percent and the retail chain FNAC 13 percent.

As far as prices and the development of title production are concerned, the study of the Culture Ministry does not tackle these points. However in the Euromonitor study (which covers the beginning of the Nineties), it is said that the prices of books are very high in France in comparison to other countries and that the market is stagnating in terms of sales. Hyper- and supermarkets were the most dynamic sector of the book trade because they started a low price policy in 1992 by publishing their own paperbacks and offering them at cheap prices (thereby circumventing Loi Lang which did not allow them to sell books printed by other publishers at lower prices). This has apparently led to an increase in sales of paperbacks in the Nineties, while the other sectors stagnated.

In Ireland, the Net Book Agreement (NBA) was suspended in September 1992 following the decision of the EU Court of First Instance to upheld the Commission's prohibition decision in relation to the UK-Irish Net Book Agreement. In 1994, RPM was formally abolished. To date, we do not have information on the consequences of these decisions on the Irish book market. Neither do we have information about the development in Belgium.

In the United Kingdom, the NBA was abolished in September 1995, due to the decision of several big publishers to withdraw from this agreement. About a year after the demise of the NBA, the vast majority of booksellers would not like to return to the old system, as the President of the Booksellers' Association said in an article. The abolishing of the NBA did not seem to have a big effect on the number of booksellers, according to an interim report of Francis Fishwick (commissioned by the Publishers' Association). Where withdrawals have occurred from book-selling, this affected mainly outlets selling a

narrow range of popular paperbacks, the segment of the market in which non-traditional outlets such as supermarkets have been engaged in a "price war" with each other and with W H Smith (a book retail chain). The overall sales performance of booksellers rose in the six months between October 1995 and March 1996 by 7.38 percent.

According to the Fishwick report, it is too early to determine the effect on title output. Decisions to publish those titles which appeared in the first half of 1996 would already have been taken before the NBA was abandoned. However the report says that the total number of titles which appeared in the market segments most likely to be affected by the end of RPM (fiction, children's' and general non-fiction) rose sharply in the first half of 1996 compared with the corresponding period in 1995.

The Fishwick report says that the effects of the abolition of RPM on list prices was probably confined to list prices to best-selling hardback fiction, whereas hardback non-fiction and paperback list prices were apparently not affected. List prices of hardback best-sellers rose by five to seven percent over the year 1996. On the other hand, after the demise of the NBA, the big book-selling chains and the bookselling supermarkets offered considerable discounts on the list prices. For example, W. H. Smith offered discounts on 133 titles (especially best-sellers representing a big share of he market), the average discount being 25 percent. Supermarkets offered discounts up to 35 percent. Although this is not said in the study, it must be assumed that these discounts more than made up for the price rise and that they resulted in a net price decrease to the advantage of the consumer.

COMMISSION EUROPEENNE

L’ANALYSE DES PRATIQUES DE PRIX IMPOSÉS

Les réflexions sur les pratiques de prix imposés conduisent à un constat paradoxal. De nombreux économistes vantent les vertus des pratiques de prix imposés et pourtant la plupart des économies développées se sont dotées, de longue date, d'une législation interdisant ces pratiques.

Le paradoxe n'est cependant qu'apparent. En effet si les prix imposés comportent, sur le plan économique de nombreux avantages (I) ceux-ci sont souvent incertains et ne suffisent pas à compenser les inconvénients (II). En outre, à supposer que les pratiques d'imposition de prix puissent améliorer l'efficience économique, cette amélioration pourrait être obtenue par des moyens moins coûteux en termes de concurrence (III).

Avant d'examiner ces différents points, il apparaît utile à titre liminaire de préciser ce qu'il convient d'entendre par "pratiques de prix imposés". Il s'agit des pratiques par lesquelles un fournisseur fixe de façon contraignante les prix de revente de ses distributeurs. En revanche, en principe, il ne sera pas question ci-après des prix réglementés par les autorités publiques.

Notre analyse portera également sur les prix minimum imposés, à l'exclusion des prix maximum. On précisera seulement, pour ne plus y revenir, que la pratique d'imposition d'un prix maximum peut se prévaloir, d'un point de vue de l'efficience économique, d'un bilan positif. En effet, elle permet de lutter contre le phénomène dit de "double marginalisation": lorsque les distributeurs déterminent librement les prix de revente, ils peuvent être amenés à fixer un prix trop élevé, c'est-à-dire supérieur à celui qui maximiserait les bénéfices combinés du producteur et des ses distributeurs.

Les avantages des pratiques de prix imposés

Quatre avantages sont généralement attribués aux pratiques de prix imposés.

Intensification de la concurrence et amélioration de l'efficience économique

Les partisans des prix imposés soutiennent que de telles pratiques ne sont pas forcément néfastes à la concurrence et même lorsque globalement une pratique porte atteinte à la concurrence, elle n'affecterait pas forcément l'efficience économique.

Ils admettent néanmoins que le degré d'atteinte à la concurrence et à l'efficience économique dépend de la configuration du marché et du fait que les autres opérateurs économiques recourent ou non déjà à des pratiques de prix imposés.

Quelques exemples permettent de compléter l'analyse :

- 1ère hypothèse **:** sur un marché concurrentiel, tous les opérateurs économiques recourent à des pratiques de prix imposés. Le caractère anticoncurrentiel et antiéconomique n'est pas contestable. Cette situation est d'autant plus néfaste qu'aucun producteur n'a intérêt à mettre un terme à ses pratiques, sauf à prendre le risque de perdre en partie, voire en totalité, son réseau de distribution. En effet, la plupart des distributeurs qui se voient imposer des prix minimum acceptent bien volontiers cette discipline dans la mesure où elle les met à l'abri de toute concurrence. C'est tellement vrai que très souvent c'est sous la pression des distributeurs que les fournisseurs imposent des prix minimum à l'ensemble de leurs réseaux. Les distributeurs qui perdraient la protection que leur offrent les prix imposés pourraient donc être tentés de changer de fournisseur.

- 2ème hypothèse : sur un marché monopolistique le producteur recourt à une pratique de prix imposé afin de garantir une marge confortable aux distributeurs et, dès lors, de les inciter à se doter du personnel et des installations nécessaires à une bonne commercialisation des produits et de renforcer la satisfaction des consommateurs. Une telle initiative réduira forcément la concurrence puisque par hypothèse il n'y a pas de concurrence intermarque pour compenser l'atteinte à la concurrence entre les distributeurs de l'unique producteur. Mais dit-on l'efficience économique, qui se mesure à la satisfaction globale des consommateurs, sera forcément améliorée. En effet, si le fournisseur n'était pas convaincu que, ce faisant, il élargirait sa clientèle, il ne modifierait pas sa stratégie commerciale.

- 3ème hypothèse : sur un marché concurrentiel, un producteur décide d'imposer des prix, toujours dans le même but d'inciter les distributeurs à offrir des services aux consommateurs. En revanche, les autres producteurs s'abstiennent de recourir à la même pratique. La concurrence intermarque s'en trouve renforcée par les services désormais disponibles sur le marché. Bien plus, l'efficience économique serait elle aussi renforcée : la clientèle s'élargirait aux consommateurs qui n'entendent pas acheter le produit sans service.

Lutte contre les pratiques de prix d'éviction

On soutient parfois que les pratiques de prix imposés permettent de lutter contre les prix anormalement bas pratiqués par des distributeurs qui utilisent une marque ou un produit notoire uniquement pour attirer la clientèle, celle-ci étant dans un deuxième temps orientée vers d'autres produits plus rémunérateurs pour le distributeur. Or de telles pratiques peuvent avoir pour effet d'évincer le produit du marché : les distributeurs traditionnels pourraient être tentés de délaisser le produit puisque leur clientèle est détournée vers les prix anormalement bas et cette désaffection n'est pas compensée par une hausse du chiffre d'affaires réalisé avec l'auteur des prix bas puisque celui-ci ne souhaite pas vraiment vendre le produit.

Dès lors, en renforçant la rentabilité des investissements réalisés par le fournisseur, le prix imposé pourrait favoriser l'entrée sur le marché de nouveaux fournisseurs, même si les investissements sont élevés. Le prix imposé peut donc avoir pour effet, en quelque sorte, d'abaisser certaines barrières à l'entrée d'un marché. L'offre s'en trouverait élargie, ce qui ne pourrait qu'être favorable à la concurrence.

L'utilité du prix imposé est encore plus évidente pendant la période de lancement du produit. De fait, l'échec du lancement de produit a parfois été attribuée à des prix particulièrement bas pratiqués par la grande distribution.

Protection de l'image du produit

Les partisans du prix imposé soutiennent, non sans raison, que lorsque le fournisseur veut donner une image de luxe ou de qualité à son produit, l'imposition d'un prix minimum élevé permet de préserver cette image. Il n'est pas contestable en effet que des prix plus bas pourraient banaliser le produit et anéantir les investissements réalisés par le fournisseur pour donner au produit l'image qu'il souhaite.

Lutte contre les passagers clandestins

Le prix imposé constitue également un moyen efficace pour lutter contre les passagers clandestins : ils s'agit des distributeurs qui choisissent de limiter au maximum les services rendus à la clientèle, et sont donc en mesure de proposer des prix particulièrement bas, mais qui tirent profit des services rendus par ses concurrents : le consommateur s'adresse aux concurrents, par exemple pour obtenir toutes informations sur le produit et se rend ensuite chez le discounter pour acheter le produit. De telles pratiques reviennent à faire subventionner le discounter par ses concurrents, ce qui n'est pas acceptable sur le plan économique.

En uniformisant les pratiques tarifaires au sein de son réseau, le fournisseur ferait perdre au consommateur l'intérêt de s'adresser à deux distributeurs différents pour satisfaire ses besoins.

Les avantages des prix imposés ne sont pas garantis et ne suffisent pas à compenser leurs inconvénients

L'argumentation des partisans des pratiques de prix imposés n'est pas à l'abri des critiques.

Amélioration du service

L'argument de l'amélioration du service n'est pas convaincant.

Les pratiques de prix imposés ne garantissent pas une amélioration du service.

Si le prix imposé peut donner au distributeur les moyens d'améliorer les services, il ne les garantit pas pour autant. Le consommateur pourrait dès lors payer un prix élevé sans obtenir le service auquel il pourrait prétendre.

Plusieurs pays sont dotés d'une réglementation permettant aux éditeurs les prix de vente au détail des livres. L'objectif est notamment de permettre un certain service en faveur du consommateur. L'expérience montre cependant que ces services ne sont pas toujours effectivement rendus. Ainsi, si l'objectif de prix imposés est de remplacer la concurrence par les prix par une concurrence par les services, cet objectif n'est pas toujours atteint.

C'est plus en fixant des exigences qualitatives sur la distribution qu'en déterminant une marge minimum que le producteur peut, lorsque le produit le justifie, rechercher une qualité de service au consommateur.

L'argument de l'amélioration du service s'appuie sur l'idée erronée que tous les consommateurs sont demandeurs de services supplémentaires

Il n'est pas exact, même pour les produits sophistiqués comme le matériel HI-FI ou les ordinateurs, d'affirmer que les consommateurs souhaitent toujours que la vente de produits s'accompagne de services. Par ailleurs, les besoins des consommateurs peuvent varier sensiblement d'une zone de chalandise à l'autre. Dès lors, si l'on admet que des services supplémentaires permettent d'élargir la clientèle, il est sans doute préférable, du point de vue de l'efficience économique, de laisser à chacun de distributeurs l'initiative d'offrir ou non de tels services plutôt que de permettre au fournisseur d'imposer les prix de revente à tous les distributeurs.

L'argument du passager clandestin semble a priori condamner cette analyse. Mais il ne résiste pas à l'examen. En effet l'argument du passager clandestin est surtout valable pour les services avant vente (publicité, conseils, démonstration etc...). Il est en revanche moins pertinent pour le service après vente. Par ailleurs, il concerne surtout les achats dont le renouvellement est espacé (matériel HI-FI etc...) mais beaucoup moins les produits de consommation courante. Enfin, il ne présente aucun intérêt pour les produits de faible valeur ; ceci a été exprimé avec humour : "the consumer who secures from her friendly local hardware store a ten-minute demonstration of a $1.79 potato peeler's merits and then makes a special trip to the discount house to buy one is a candidate for something other than center stage in the economic theory of shopping behavior" [1].

Enfin, à supposer que la pratique de prix imposé constitue le meilleur moyen de garantir la rentabilité de la vente du produit par les distributeurs offrant des services (mais on verra ci-après que cette hypothèse n'est pas fondée), on ne voit pas pourquoi la protection offerte par la pratique de prix imposés doit s'étendre au-delà de la période de lancement du produit, faisant ainsi obstacle à une diffusion plus large.

La réaction du marché

La démonstration du renforcement de l'efficience économique s'appuie parfois sur la conviction que l'entreprise qui recourt à la pratique de prix imposé a une parfaite connaissance des besoins des consommateurs. On l'a vu, par exemple, à propos de l'entreprise qui recourt à des pratiques de prix imposés sur un marché monopolistique. On soutient également que sur un marché concurrentiel où les services sont disponibles dans l'ensemble de la distribution, le distributeur qui refuse d'offrir de tels services finirait par perdre sa clientèle.

Certes, dans les deux cas, le marché ne manquerait pas de sanctionner à terme les erreurs des opérateurs économiques, mais les intérêts de la société auraient, au moins pendant une certaine période, également été affectés.

Les pratiques de prix imposés sont néfastes à plusieurs égards

Les prix imposés sont anormalement élevés

Il s'agit là d'une évidence. Les prix imposés se situent en effet toujours à un niveau supérieur à celui qui résulterait du fonctionnement normal du marché. La pratique porte donc atteinte aux intérêts des consommateurs.

Certes, des garde-fous ne manquent pas. En effet, si le prix imposé est trop élevé, le distributeur se désintéresserait du produit : il pourrait être tenté, pour maximiser son profit global, de vendre à ses clients d'autres produits substituables ; des prix moins élevés pourraient lui garantir, si la demande est suffisamment élastique, un volume de vente plus important. Mais ceci ne peut être envisagé que sur un marché concurrentiel.

Cependant l'hypothèse la plus vraisemblable, on l'a déjà vu, est que le distributeur se plie à la discipline de prix. Dans ce cas, dit-on la sanction viendrait du consommateur.

Dans les deux cas cependant, que la sanction vienne du distributeur ou du consommateur, la réaction pourrait être tardive. Ce point a déjà été examiné à propos de l'insuffisance des services, il n'est pas nécessaire d'y revenir.

Les pratiques de prix imposés empêchent les transferts de parts de marché

En imposant des prix minimum le fournisseur va empêcher les distributeurs de ses produits de proposer des prix plus bas et les priver ainsi d'un avantage concurrentiel important.

L'uniformité du prix imposé va en outre décourager les déplacements de la demande et figer les parts de marché à l'intérieur d'un réseau de distribution, entravant de ce fait le développement vers une distribution plus performante. Enfin, les prix imposés permettent aux entreprises les moins performantes de survivre alors que le fonctionnement normal du marché devrait conduire à leur remplacement par d'autres, plus efficaces.

Les pratiques de prix imposés créent un terrain favorable aux ententes horizontales

Il n'est pas contestable que l'uniformité des prix est de nature à faciliter les ententes horizontales entre fournisseurs sur les prix de production :

- l'absence de concurrence par les prix au stade du détail pour attirer la clientèle pourrait encourager les producteurs à accepter les propositions d'entente qui leur sont faites par leurs concurrents, ou les inciter à se livrer à des ententes tacites ou à des alignements de prix restreignant en fait la concurrence ;

- cette absence de concurrence réduit sensiblement l'utilité pour les producteurs à s'affranchir de l'entente qu'ils ont conclu avec leurs concurrents : les réductions de prix de gros contraires à l'entente ne pourraient être répercutées en aval ;

- des ententes entre producteurs sur les prix au détail peuvent également être encouragées par les distributeurs gênés par la concurrence intermarques.

Les pratiques de prix imposés ont également pour effet de lever les incertitudes qu'un distributeur pourrait avoir sur les prix pratiqués par ses concurrents. Elles rendent donc inutile une entente entre les distributeurs et en constituent l'équivalent. La condamnation de principe du prix imposé devrait donc aller de pair avec celle des ententes horizontales.

Les avantages attribués aux pratiques de prix imposés peuvent être obtenus par des moyens moins coûteux en termes de concurrence

Plus que le prix imposé, la distribution sélective permet de garantir la réalisation des services par chacun des distributeurs.

Dans ce cas, en effet, le fournisseur choisit les distributeurs de ses produits en fonction de critères liés notamment à la qualification du personnel et aux conditions d'installation. Il pourra donc écarter de la distribution de ses produits les distributeurs qui ne répondent pas aux critères de sélection qu'il a lui-même établis. Elle permet ainsi d'éliminer les passagers clandestins.

La distribution sélective permet donc de sauvegarder l'image du produit. Les prix appliqués dans un tel système peuvent également contribuer à la sauvegarde de cette image. Les prix sont en effet relativement élevés : le respect des critères de sélection a un coût que le distributeur doit répercuter dans ses prix de vente. Pour autant, la liberté des distributeurs n'est pas affectée : Certes, le fournisseur conseillera des niveaux de prix de revente permettant de préserver l'image du produit. Mais les distributeurs pourront, sans mettre en danger la pérennité de leur entreprise répercuter dans leurs prix de vente les économies de coût de distribution qu'il pourraient réaliser et cette liberté est une forte incitation à la productivité et donc au progrès économique.

La distribution intégrée, il est vrai ne convient pas nécessairement à tous les fournisseurs. Une stratégie plus ouverte pourrait alors être adoptée, basée sur un système de remises qualitatives: certaines remises ne sont versées qu'aux distributeurs acceptant de rendre des services préalablement définis. Ce système présente des avantages par rapport à la distribution sélective : ainsi, la liberté de choix du consommateur n'est pas nécessairement entamée dès lors que les distributeurs eux-mêmes peuvent ou bien accepter de rendre les services (et percevoir les remises) ou refuser de les rendre. L'avantage par rapport à la distribution sélective n'est cependant réel que si les remises ne sont pas disproportionnées, c'est-à-dire sans rapport avec la valeur réelle des services : un tel comportement pourrait avoir un effet d'éviction, les prix d'achat nets des distributeurs acceptant de rendre des services pouvant être inférieurs à ceux des distributeurs qui n'offrent pas de service mais entendent attirer la clientèle par des prix bas.

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D. ACHACH "les accords de prix minimum imposés", AFEC 24 janv. 1991 ; France.

NOTE

1. F.M. Sherer et D. Ross "Industrial Market Structure and Economic Performance third edition p. 552.

CONTRIBUTION FROM BIAC*

I.

Background

In 1951, Canada became the first country to enact a *per se* prohibition on resale price maintenance.[1] In 1976, the price maintenance provisions were amended to expand their scope to encompass a broader range of persons attempting to influence upward a selling price. Therefore, the person attempting to influence prices and the target do not need to be part of the same distribution channel. These provisions are more encompassing than the corresponding prohibition on vertical price fixing in the US because they include unilateral action by suppliers. Accordingly, companies based in the US and operating in Canada must be careful to ensure that their pricing practices conform to Canadian laws.

The price maintenance provisions apply to any person who is engaged in the business of producing or supplying a product. "Products" include both articles and services. "Article" is defined very broadly to mean real and personal property of every description, including money, energy and other intangible property.

At the time of the enactment of these provisions, it was believed that the suppression of price competition was inherently harmful to consumer welfare, and that price maintenance facilitated collusion among competitors.[2] Some Canadian commentators now argue that price maintenance should not be a criminal offence except where it involves an agreement among competitors.[3] However, such arrangements arguably should be pursued under the conspiracy provisions in section 45 of the *Competition Act* and therefore prohibited only where there is likely to be an undue lessening of competition as a result of the agreement. The rationale for this position is that in the absence of any other anti-competitive purpose, a manufacturer's decision to enforce resale prices may be part of an efficient marketing strategy and may even enhance consumer welfare.[4]

The Price Maintenance Provisions

Attempts to Influence Prices

Under the *Competition Act* (Canada) it is an indictable criminal offence for a person engaged in the business of supplying a product to attempt, by agreement, threat, promise or any like means, to influence upward, or discourage the reduction of, the price at which any other person engaged in business in Canada supplies, offers to supply or advertises a product within Canada (s. 61(1)(a)). It has been held

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that it is not illegal to attempt to maintain prices by discussion, persuasion, complaints, suggestions, requests or advice.[5]

Examples of conduct that has been held to constitute a "threat" include an indication from a supplier that it would limit supply unless a customer advertised at a higher price, the gradual reduction of credit, failure to ship and deliver, failure to pay co-operative advertising allowances, failure to provide regular service and the reduction of a discount provided by the supplier to the customer. The nature of the relationship between the parties may be relevant in determining whether given conduct may constitute a "threat". For example, in one case, comments by a supplier to a dealer that the dealer's low prices was "irresponsible" were considered to be a threat given the lease relationship between the dealer and the supplier and the supplier's leverage in this regard.[6]

These provisions do not apply to affiliates or principal/agent relationships (s. 61(2)). Further, it is not illegal to attempt to influence others to price below a maximum price.

Refusals to Supply because of Low Pricing

The *Competition Act* also provides for a similar offence where a person engaged in the business of supplying a product refuses to supply a product to, or otherwise discriminates against, another person because of the low pricing policy of that other person. It is also an offence to attempt, by threat, promise or any like means, to induce a supplier as a condition of continuing to do business with that supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons. (s.61(6)) These provisions apply even if a person attempts to induce a supplier located outside Canada.

Some courts have held that the offence is committed only if a low pricing policy is the sole reason for the refusal to supply, while other courts have framed the test as whether the low pricing policy was the "real issue" or "the only real, effective cause", of the decision to discriminate or refuse to supply. Two recent cases adopted a strict test, holding that the offence may be committed if the low pricing policy of the "other person" is even one reason for the discrimination or refusal.[7]

The *Competition Act* provides a defence for a supplier who refuses to supply a person who (a) uses the supplier's products as loss leaders (i.e. not for the purpose of making a profit but for the purpose of advertising), (b) uses the supplier's products in "bait and switch" selling, (c) engages in misleading advertising with respect to the supplier's products, or (d) does not provide the level of servicing of the supplier's products that purchasers of the products might reasonably expect.

These defences are available only in the case of an actual termination by a supplier. The defences may not be available where a supplier threatens to terminate a customer, notwithstanding that one or more of these four circumstances may exist, and in such a case, a separate offence may even be committed.

Application to Horizontal Arrangements

The Canadian price maintenance provisions have generally been applied in the context of vertical supply relationships. However, the prohibition in paragraph 61(1)(a) proscribes agreements to achieve the prohibited result, and accordingly, the Canadian Government and a few court decisions take the position that there is scope for applying paragraph 61(1)(a) to conventional horizontal agreements, or even attempted agreements, to increase prices.[8]

There are a few examples where price maintenance provisions have been applied in a horizontal relationship. Most recently, in the *Mr. Gas* case, a gas retailer was convicted on one count of attempting to influence upwards the prices at which other gas retailers sold their gasoline, contrary to paragraph 61(1)(a).[9] The accused acknowledged frequent communication of prices and price increases (occasionally before they were implemented) between the head offices of the accused and other independent gasoline retailers. The accused admitted that it communicated prices to other retailers "with the hope that any competitor lagging behind in restoring its price will raise its price". It also lowered its retail prices in a competitor's home market with a view to disciplining the competitor for lowering retail prices in the accused's home market, thereby, according to the Crown, attempting to influence upwards the competitor's prices in the accused's home market by means of a threat.

The Canadian Government may find it desirable to pursue pricing agreements under the price maintenance provisions where the parties either do not collectively possess significant market power or where such market power may be difficult to prove. Unlike the price-fixing provisions in section 45 of the *Competition Act*, which require the Government to prove that the impugned agreement "unduly" lessened competition, paragraph 61(1)(a) creates a *per se* offence, in the sense that it does not require proof that the defendant possessed market power in the relevant market.

The price maintenance provisions are one of the more frequently enforced provisions of the *Competition Act*. The penalty on conviction for price maintenance is a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both. Fines have ranged from $1 000 to $200 000 per count. The first jail term in Canada for price maintenance was recently imposed against an individual for fixing the price of driving courses in Sherbrooke, Quebec contrary to section 45, section 61 and other criminal provisions of the Act.[10] The Crown had sought a jail term of 14-30 days in an earlier case under the price discrimination provisions, but was unsuccessful. In addition to criminal penalties, there is a private right of action under section 36 of the *Competition Act* for damages suffered as a result of a breach of any of the criminal provisions of the *Competition Act*. Damages are limited to actual damages and costs - treble damages are not available.

There are separate civil refusal to deal provisions in section 75 of the *Competition Act* which provide authority for the Competition Tribunal to issue an order requiring a supplier to supply a person in certain situations.

NOTES

1. An Act to amend the *Combines Investigation Act*, S.C. 1951 [2nd sess.], c. 30, s. 1 amending *Combines Investigation Act*, R.S.C. 1927, c. 26.

2. I. Nielsen-Jones, S.D. Khosla, and R.D. Anderson, Bureau of Competition Policy, *Product Distribution and the Competition Act: The Treatment of Reviewable Matters and Price Maintenance* (Consumer and Corporate Affairs Canada, October 18, 1988) at 42.

3. B. Dunlop, D. McQueen and M. Trebilcock, *Vertical Restrictions*, Canadian Competition Policy (Toronto: Canada Law Book Inc., 1987).

4. F. Mathewson and R. Winter, *Competition Policy and the Nature of Vertical Exchange* (Toronto: University of Toronto Press for the Royal Commission on the Economic Union and Development Prospects for Canada, 1986).

5. R. v. *Les Must de Cartier Can., Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.).

6. R. v. *Shell Canada Products Ltd.* (1989), 24 C.P.R. (3d) 501 (Man. Q.B.).

7. R. v. *41813 Alberta Ltd.*, Alberta Court of Queen's Bench, Judicial District of Calgary, judgement Feb. 4, 1994, unreported; R. v. *Royal LePage Real Estate Services Ltd.*, Alberta Court of Queen's Bench, Judicial District of Calgary, judgement Oct. 24, 1994, unreported.

8. See Background Papers, Stage 1, Competition Policy, Bureau of Competition Policy (Consumer and Corporate Affairs Canada, April (1976) at 55.

9. R. v. *Mr. Gas Limited*, August 11, 1995, Ontario Court of Justice (Provincial Division), Dempsey, J., unreported.

10. R. v. *Jacquet Perreault*, Quebec Superior Court, June 15, 1996, File # 450-27-005489-893.

CONTRIBUTION FROM BIAC*

II.

Outline on Retail Price Maintenance in the Netherlands and Germany

Background

RPM in the Netherlands, as well as in Germany, is generally considered as illegal. In the Netherlands there is an exception for books.

The discussion on RPM in both countries focuses presently on the system of price maintenance within retail chains. The German as well as the Dutch retail market is characterised by a relatively strong share of small retain entrepreneurs who co-operate in voluntary chains. Franchise organisations and Buying Groups are the best known. They represent some 40 percent of the total market volume. The system of the law, which forbids RPM is based on art. 85 of the EC treaty, which means, that as far as RPM is concerned, the focus is primarily on the vertical relation between the manufacturer and the distributor.

The representative organisations in retail trade argue, however, that price maintenance systems within retail chains serve completely different purposes than between manufacturer and distributor.

At the time the EC treaty was signed in 1958, there were hardly any retail chains as we see them today. So art. 85 was not made for this phenomenon and by conclusion, is not fit for the retail scene as we know it today.

Importance of RPM within retail chains

Retail chains can exist in the modern retail environment only by using the same marketing - and operational techniques, as the mega-retailers do. This means, that a central marketing policy for all the participants of the chain is of the utmost importance. Retail marketing is not more or less than communication with the consumer, the only client of a retailer. The consumer wants to know, what the goods offered cost, in order to be able to compare these prices with those of other shops. Therefore, the central marketing activity of a voluntary retail chain will set prices for the goods which are advertised or placed in the shops. All participants of such retail chain are considered or by contract obliged to follow these prices. Otherwise the reliability of the retail chain towards the consumer is at stake. So RPM within a retail chain is essential.

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* This contribution was submitted by M.P.J.A. MUIJSER, Director of the Dutch Member of IVE.

Present situation in Germany and the Netherlands

In Germany, retailers in a voluntary chain may follow the prices which appear in the central marketing instruments of the chain but they are not obliged to do so. Very important in this respect is the so-called "Mittelstandsempfehlung".

In the Netherlands the Minister of Economic Affairs has announced the issue of an exemption from the prohibition on RPM for retail chains for temporary advertising campaigns.

Retail trade considers this exemption as an important helping hand but by far not sufficient. Voluntary chains oppose any discrimination in the market place of their retail system with respect to the big companies with their many outlets all over country, who are allowed to maintain fixed prices for as many goods and as long as they like.

AIDE-MEMOIRE OF THE DISCUSSION

The Chairman (Mr. Jenny) who reminded that the round-table discussion turns on resale price maintenance (RPM) in general, and more specifically on resale price maintenance on copyrighted goods, noted that most of the contributions received addressed RPM issues related to books.

He added that these contributions tend to acknowledge that the issue concerning the effects of RPM on competition is certainly a complicated and a hotly debated one among economists; no clear guidance emerges from economic analysis on the question of what should be the proper treatment of RPM under competition law, except perhaps that RPM can have both pro- and anti-competitive effects. It appears also that in most jurisdiction RPM is treated as a *per se* prohibition, which is usually mitigated by the possibility to get exemptions either on an individual or on a sectoral basis.

I. General discussion on Resale Price Maintenance

Upon the Chairman's request, Mr. Arhel (Commission) presented the European Commission contributions and explained that he will try to show that while the practice of resale price maintenance presents advantages, these advantages are often uncertain and do not suffice to offset the disadvantages. He will also demonstrate that if one supposes that RPM can improve economic efficiency, this economic efficiency could be achieved by less costly terms in terms of competition.

Pro- and anti-competitive effects of Resale Price Maintenance

Resale price maintenance represents some advantages:

- First assumption: in competitive markets RPM can improve efficiency and competition; as an example, the proponents of RPM argue that if, on a market where there is competition, some producers, not all, impose minimum prices in order to guarantee a comfortable margin for the distributors, they can in this way incite distributors to set up the necessary installations and hire the necessary personnel to properly distribute the goods and satisfy customers. The inter-brand competition would thereby be enhanced and economic efficiency would also be enhanced to the extent that the clientele would include customers who would not be willing to buy the goods without the services offered.

- Second assumption: resale price maintenance helps fight eviction prices; these are practices of distributors which praise the low prices of a good to attract customers but without any intention to sell the goods at the price. So, this is simply to attract customers who will buy other things in that store; in this context, the practice of RPM would help to avoid such practices.

- Third assumption: resale price maintenance also helps maintain the image of a product of a brand; if a supplier wishes to give the image of a luxury good to his goods then the imposition of a high floor-price would help in maintaining this prestige image.

- Fourth assumption: the resale price maintenance helps avoid the free-rider problem. Indeed, the RPM make the customer lose interest in going to two different distributors to satisfy his needs.

However, according to Mr. Arhel, the service argument is not a convincing argument. Because the practice of resale price maintenance does not in fact guarantee that there will be an improvement in the service. It is true that RPM can give the distributor the means to improve the services, but there is no guarantee of this happening. The customer could then be forced to pay a high price without in exchange obtaining the service which he might claim.

One could, indeed, respond that on a competitive market a distributor who applies resale price maintenance without offering the corresponding services would run the risk of losing his customers. However, this reaction on the part of consumers would not be certain. Furthermore, putting forward the improvement of service relies on an erroneous assumption, which is that all consumers wish to have extra services. This is not the case even regarding sophisticated goods such as stereos and electronics.

RPM have negative effects in different aspects:

- First, the resale prices are unduly high; it would not be necessary to impose these prices, indeed, if the supplier did not have the intention of setting a high price.

- Second, RPM prevents the shift of market shares; by setting minimum prices, the supplier will prevent the distributor of his goods from setting lower prices and thereby deprives the distributor of competitive advantage.

- Third, RPM may lead to horizontal agreements.

Mr Arhel continued, stating that if one supposes that RPM can improve economic efficiency, this economic efficiency could be achieved by less costly means in terms of competition such as exclusive distribution, selective distribution and some discounts.

For instance, the system of exclusive distribution allows for an effective fight against free-riding just as the system of resale price maintenance; but contrary to the resale price maintenance system, it allows also the savings of the price to be passed on to customers.

Ms Valentine (United States) presented the US contribution which discusses the theoretical economic issues on the relationship between RPM and competition and offers an extensive survey of the legal treatment of RPM in the US (which is prohibited *per se*). She also explained that there is still a lively controversy in the academic community concerning the anticompetitive or procompetitive effects of RPM.

Main arguments put forward by the defenders of the anticompetitive effects are :

- RPM facilitates dealer cartels, either at the retail or wholesale level, by providing a cartel enforcement mechanism where dealers cannot police the agreement themselves;

- RPM may facilitate supplier collusion;

- RPM , while inducing the provision of pre-sale services, forces customers to pay higher prices if an unbundled package is not available.

Main arguments put forward by the defenders of the procompetitive effects are :

- RPM by restricting intrabrand price competition can reduce or eliminate free riding and maintain adequate incentives for dealers to provide costly pre and after sale services;

- RPM enables manufacturers to induce dealers to carry large inventories or to attract new dealers when demand is highly uncertain for the manufacturer's product;

- RPM deters price reductions which could in the case of an "image item" such as perfume, reduce sales volume.

Ms. Valentine concluded that the rule of *per se* illegality, though circumscribed in its application by the courts, continues to be the legal standard in the United States. She noted that the anti-trust agencies had filed a brief with the Supreme Court arguing that a rule of reason standard should replace the *per se* standard in instances involving maximum resale price maintenance.[1]

Mr. Rob Anderson (Canada) referring to the Canadian written submission, explained that in Canada, too, there was a debate on the economic effects of RPM and the desirability to prohibit such a practice. The main arguments were, on one side that RPM is not harmful to consumers in an intrabrand competition context, and on the other side that RPM can be harmful when it is used to facilitate cartels or encourage foreclosure. Despite a try in the mid-80's to reconsider and possibly overturn the RPM prohibition, this was not followed. The practice of resale price maintenance remains in Canada subject to a strict criminal prohibition under the relevant provisions of the competition Act, without any redeeming value.

However, he added, if we look at the law on one hand and the economics on the other hand most of us would have to acknowledge that there is a kind of intellectual tension here.

In Canada, there are some very limited statutory defences in the law, and in very narrow circumstances they accommodate the dealer service rationale for price maintenance although the availability of those defences is quite circumscribed. Canadian authorities are really trying to grapple with this in terms of enforcement priorities. The public statements regarding enforcement priorities in the area of the criminal law stress that the most egregious cases in this area are the ones that have horizontal overtones, where it appears that firms are lessening competition not just within a single brand, but across brands.

How should price fixing be treated?

The Chairman, then, turned to the Norwegian contribution to this debate and put emphasis on two points. One of them is a discussion in this contribution of what is meant by RPM and in particular how should maximum resale price or recommended prices be treated. Should the general ban on minimum resale price maintenance also extend to those other forms or are they even less conducive to competition problems? (A committee was set up to examine this question and recommended that there should not be a *per se* prohibition of maximum sale price or recommended prices. This recommendation was not followed by the Ministry). The second point concerns the idea put forward in the written submission that maybe RPM may be allowed for firms which do not have market power, such as franchisees in a system of franchise.

Mr Hope (Norway) explained that, under the Norwegian competition Act, RPM is generally prohibited and that no distinction is made between concerted RPM and unilaterally stipulated RPM. Both are prohibited. On the other hand, non-price vertical restraints are generally allowed. And in particular it is permitted for a supplier to organise a vertical market sharing between its distributors.

However, he added, although RPM is generally prohibited, RPM may be exempted is some cases and although vertical market sharing, or generally non-price vertical restraints are generally allowed, Norwegian Authorities may upon individual scrutiny intervene and forbid the restraint in question if it's anti-competitive. But intervention against vertical market sharing remains few because it is generally felt that it involves an efficient co-operation between a supplier and his distributors; for instance in connection with a sole importership which tends to promote entry into Norwegian markets or in connection with franchising which tends to promote entry by small retailers.

On the other hand, RPM is a much more flexible instrument, and it may occur other market circumstances where there is no closed relationship or co-operation between a supplier and his distributors notably in circumstances where distributor is free to choose between different sources of supply. If there is an effective downstream competition, it will induce the distributors to look for more profitable sources of supply, and therefore the downstream competition may promote upstream competition. This may be of particular importance if the upstream market is concentrated, which may often be the case in markets in Norway because of the limited size of the Norwegian economy.

Mr. Hope explained that the Committee which proposed a new Norwegian competition Act also considered whether there should be a general exception for RPM in conjunction with vertical market sharing. According to him, this would make a lot of sense because if one has vertical market sharing then it would restrict inter-brand competition in the first hand and it would not be RPM which is responsible for restricted inter-ban competition. Therefore, to fix the situation, one should do something about the vertical market sharing before addressing the RPM problem. Finally, no exemption for such vertical market sharing, for instance in connection with the franchise systems, was proposed, mainly because of the difficulties with defining such vertical market sharing.

Possible exemptions

The Chairman referred to the Finnish contribution which states that RPM is treated under a *per se* rule in Finland with the possibility of exemptions and discusses a lot of cases where exemptions have been given or have been withheld.

Ms. Hiltunen (Finland) explained that in assessing RPM, due consideration is given in Finland to the promotion of efficiency either in production or distribution, or to the technical or economic improvements. At the same time, a major part of this benefit must go to the consumers or customers.

In case law, the Office of Free Competition has assessed whether the arrangement possibly promotes effective competition, and in its decisions has paid attention to the incentives given by the arrangement. Are these incentives pro-competitive and efficiency increasing or are they anti-competitive, for example could they be used as a mean for horizontal co-operation? Attention has also been paid to intra-brand competition.

In the case of ESSO and its "Right Price" system, the dealers were able to decide independently whether they wanted to apply a wholesale price reduction to meet the prices of their competitors. The arrangement guaranteed a minimum margin for these retailers. Discount given by the wholesaler was at most half the difference between the local retail price and the dealers full-cost retail price. And in this system it was the retailers who themselves set the price and did it independently.

The OFC found out that this system increased the dealer's ability to meet competition while part of this price risk was transferred to the wholesaler.

On the other hand, in a gas case, an association of oil companies wanted to use a contract with their dealers which would have allowed the wholesalers to set the maximum prices of the dealers to beat prices of dealers from other chains. This cost would have been split between the wholesaler and the dealer. As the contract and meeting competition system was planned to be used by competing wholesalers, the Office concluded that it would not really give incentives to price competition, but instead it would lead to a uniform price level, a retail price maintenance system.

Furthermore, as the whole gas-selling industry would have used the same competition system OFC felt that such system would have decreased incentive to compete with prices as every actor in the market knew how the others would respond. It would also have given strong incentives for the companies to engage in horizontal price-fixing and market-sharing as the wholesalers would have been able to control the pricing behaviour of their retailers.

The big difference between the two cases is, then, the following: in the ESSO "Right Price" system, the element of horizontal restraint was missing, and the system was really pro-competitive; in the latter one, the vertical arrangement was to be seen as an instrument for horizontal co-operation.

Ms. Hiltunen, also, referred to a pharmaceutical case **(**AO case). The manufacturer gave price recommendations (he did not fix the price),which were printed on the products, and were clearly lower than those of other similar products. The retailers didn't have to use those prices but could use either lower or higher prices (whereas, in Finland there is very limited price competition in the pharmaceutical sector). So the OFC felt that these resale price recommendations actually introduced price competition into this branch which had so far avoided price competition.

Mr. Jimenez Murcia (Spain) mentioned the case of cosmetics being sold in drugstores. In that case wholesalers fixed the retail price, and the court decided that this was a restrictive practice, regulated by Article 1.1.a) of the Spanish competition law. Wholesalers had to be fined.

In the two cases brought to court by a consumer's union and a national association of small and medium-sized companies, there was a network controlled by a group of drugstore owners acting as distributors. The official association of pharmacists had signed agreement with producers of cosmetics. It

was decided that recent agreements signed between companies constituted an infringement to the law: they were in fact vertical agreements.

The interested companies claimed that they were not aware of this retail price maintenance prohibition, that the cosmetics market was not as important as the market of drugs and pharmaceuticals, and that an indicator price is not a retail sale policy but an indication to drugstore owners. These claims were rejected. The court stated that drugs in Spain are, indeed, subject to special scheme. Intra-brand competition does not exist in the pharmaceutical system, being a closed circuit, organised in *numerus clausus* and where competition among pharmacies is non existent. The association of pharmacists claim this to be an indispensable condition in order to protect the health of all citizens. But such a scheme does not apply to other goods sold in drugstores. So, according to the court, recommended prices for cosmetics are in fact, fixed or imposed.

Ms Gollan (Germany) explained that since 1957, there has been a general prohibition for resale price maintenance. Branded goods and books were exempted, though. There has also been a general ban on price recommendations, which covers specific prices, costs and methods and price ranges. Violations of both prohibitions for resale price maintenance and of the ban on price recommendations may be fined up to one million German marks or up to three times the additional gains obtained as a result of the infringement.

However, these prohibitions do not apply when they can generate efficiencies and advantages, that also may come along with resale price maintenance. In 1973, the prohibition of resale price maintenance has been extended to branded goods and since then, the manufacturer, and only the manufacturer, of a branded good is allowed to set a non-binding resale price. This system is subject to abuse-control exercised by the Federal Anti-trust Authority.

As a result, binding and non-binding price recommendations for unbranded products are prohibited under German law and may be sanctioned. The reasons are that any agreement between companies at different stages of the economic process under which one contracting party compels the other to observe certain prices for the resale of goods restricts individuals' freedom of action and price competition. Resale price maintenance operates like a price cartel of retailers and, thereby, impedes not only a reduction in consumer prices but also prevents the development of efficient forms of distribution systems. And for these reasons resale price maintenance is prohibited in Germany.

However, the legislator has recognised that consumers might wish to have an approximative idea of the product's value. In this respect, the price is at least a psychological indicator for a product's value. Balancing this consumer's interest as well as the manufacturer's legitimate interest in guaranteeing constant prices in the long-run and stabilising entrepreneurial planning against restriction of price competition, the legislator has allowed non-binding price recommendations for branded goods, and only in case where these products face competition by similar goods of other manufacturers.

Dr. Ferenc Vissi (Hungary) explained that in the late '80s, three sets of factors had been taken into consideration to determine the structure of the present law: *i)* the market structure in the early '90s; *ii)* economic policy considerations, namely, what kind of messages need to be sent to the market players in this transition phase; *iii*) lessons drawn from OECD countries' experience.

Concerning the market structure, the former vertical relations were broken in the early '90s, the distribution system had partially been atomised and the so-called "across-the-board privatisation" begun but it is developing progressively with unavoidable gaps.

Against such a background, the government addressed the following message :barriers to entry are to be removed and prohibited; vertical relations, based on market initiatives and private-based principle are to be encouraged; small and medium-sized companies are to be developed.

To fulfil such objectives, the Hungarian competition law provides that under ten per cent market share, there is no prohibition whether there is an horizontal or vertical restraint, including a resale price maintenance. Ban on abuse of dominance is to be enforced over thirty per cent market share regardless of possible restrictions on the market. In situations where there are two market sharing areas, namely the ten per cent market share and the thirty per cent, a case-by-case approach was adopted.

Mr. Vissi explained that all the RPM cases which have been reviewed, involved restrictions of competition. However, they were analysed for their own merit and it was felt that some had more advantages than disadvantages; therefore, exemption was granted.

In 1996, the beer distribution industry was reviewed, and it was found that the five local wholesaler and two hundred and nineteen retailers agreed on resale price maintenance, namely almost the whole sector of brewery industry and distribution. Such RPM was viewed as horizontal price fixing and as such, banned by the Office.

In Hungary, Mr. Vissi continued, there is also a ban on maximum prices. In the three cases which were investigated, it was, however, stated that no dominance existed because the market was open, and there was no inter-brand competition restrictions.

Given above considerations, the new Hungarian competition law which came into force on 1st January 1997, keeps the principle of a general ban regardless of whether it's concerted or unilateral, whether it's minimum or maximum price, but, exemption is possible, across the board, based on the merits of the case.

The Chairman, then, turned to the Australian delegation. He emphasised that in Australia , like in some other countries, RPM has long been a *per se* offence (except for recommended prices). Since 1995, however, authorisations (or exemptions) can be granted by the Australian Competition and Consumer Commission. He asked whether non price vertical restraints are under the Australian law also treated as *per se* offences and, if it is not the case, why, given the proclaimed advantages of the *per se* approach.

He also wanted to know, how the Australian Competition Commission grants exemptions and why in the case of a company which cannot be seen as a small player in a very competitive field, the Commission would, following to the changes introduced in 1995, grant exemption.

Professor Allan Fels (Australia) recalled that once in Australia there was no law against resale price maintenance; then, the trade unions went on strike about this behaviour by some industrialists, and the law was quickly passed. It provided that if RPM was against the public interest, then it should be prohibited following enquiry. In 1974 the law was changed to a *per se* automatic ban irrespective of the impact on competition. Then, in 1995, the law was slightly changed: if any one applies in advance for approval of practising resale price maintenance, if that person can overcome the onus that is against it, and if he can satisfy the Commission that there is a overriding public benefit, then the practice is allowed.

Mr. Fels explained that non-price vertical restraints are indeed, in general, only a breach of the law if they substantially lessen competition, if that can be shown. With the exception of third-line forcing,

which is somewhere in between those two categories, it's sort of *per se*, but there is a chance of showing that that is in the public interest.

Now, of course, there is a very big difference in practice, because if one has to conduct a full-scale case in court demonstrating that a practice substantially lessens competition, one has a much more substantial case to conduct. And the basic rationale, for any *per se* prohibition in competition law, flows from a kind of cost benefit calculus. If a practice is so likely to be anti-competitive, and against the public interest, then it should be generally banned without need for a full enquiry, even if that means that in some exceptional cases that where a practice is not harmful, and may even be beneficial, then you should have a *per se* prohibition. The judgement has been made in Australia that the evils of RPM are so great that there should be a prohibition

According to Mr. Fels, most of the Australian cases have arisen out of horizontal agreement possibilities that have been associated with RPM. The oil industry, for example, has always been very keen on RPM practices at horizontal level, though they have not been allowed to have them. It has been pretty clear in those cases that they have really wanted to stop retail price competition because if they could do that, it would stabilise the amount of competition at wholesale between the oil companies.

Now the practice however is authorisable. This means that if someone can advance a good case for RPM in terms of the sorts of factors already discussed, if they can satisfy the Commission in advance, then they get their opportunity. The question about this *per se* approach in general applies in Australia to price-fixing agreements. There is a *per se* ban to collective boycotts. There is a *per se* ban to resale price maintenance. Otherwise breaches of the law have to be demonstrated by the enforcement agency or the private parties taking action to substantially lessen competition. That is the balance of judgement which has been made in Australia.

On the ICI case specifically mentioned by the Chairman, Mr. Fels stated that the situation now is that if they had applied in advance, the onus would have been on them to demonstrate the validity of the case.

The Chairman concluded the first part of the discussion stating that there is a kind of a general agreement that RPM should be prohibited *per se* for whatever reason, convenience or for economic reasons, with a system of exemptions.

Resale Price Maintenance on Copyrighted goods

Concerning books, he noted that there is also an agreement amongst delegates, according to their written submission. Very few competition authorities feel appropriate to exempt the book business from the general prohibition on RPM. However, this general opinion is widely disregarded by policy officials, and books are in fact exempted from the general prohibition on RPM in many countries. Nevertheless, one must acknowledge that there is very little empirical evidence showing either the benefits of RPM in book distribution, or showing the benefits of prohibiting RPM in book distribution.

Referring to the Swedish and the French contributions, he stressed that in one case the ban was lifted and that it was felt that everything improved afterwards, and in the other case the ban was imposed and that it was felt that everything was fine afterwards. This reflects the debate which has been going on for a great many years, notably in France. He, then invited the EC Representative to take the floor to, focus on the arguments that are exchanged for or against RPM in books.

Resale Price Maintenance on books

Mr. Kaufmann (Commission) explained that book retail price maintenance systems have been dealt with by the Commission under Article 85, and so far this has been applied to systems which concern a homogeneous language areas between member states. That is because Article 85 requires that trade between member states is affected and books as a cultural good, are especially traded between member states of the same language. Therefore there were cases especially in these homogeneous language areas in Europe. The first case where the Commission has made a formal statement was a Dutch / Flemish case. The Commission has made a decision in 1981. Then, there was a UK / Irish case book agreement in 1987. And two other cases are still pending: a German/Austrian case and a case concerning the Dutch agreement, but which includes also restrictions for imports of books from other member states.

In the two decisions that were taken, the arguments of the supporters of RPM for books have always been rejected, especially in the Dutch/Flemish decision of 1981, whereas the UK decision did not go into very much detail. Perhaps many of the arguments in favour and against RPM have already been mentioned. But to talk about this specific cultural aspect, it has been advanced that RPM gives the publishers the possibility to cross-subsidise valuable, but less popular, books with the profits from popular books. And it has been said that RPM allows for a wide range of retail outlets, which are also culturally important because they allow a broad range of the population to have access to books as a cultural good.

But we can see, Mr. Kaufmann added, that these cultural arguments in a way are a second face of the economic arguments that have been brought forward, because you can look at this also from an economic point of view. You can say that retail price maintenance might increase the title production, which is also a diversity of titles and therefore cultural diversity; and other advantages for the distribution as far as a broad range of outlets may be created.

But the Commission has said, especially in the Dutch/Flemish decision for a broad title production, we don't need retail price maintenance because as long as a publisher can have enough profits from his production of books he can subsidise less popular books if he wants. In any case he is not forced to do that by retail price maintenance. And in fact, we have many publishers who do not produce culturally important books and concentrate on popular and easy-selling books. And the same applies to the retailer who is also not forced to offer culturally important books or to have a big range of books, and who can nevertheless have the advantages of retail price maintenance which is of course a guaranteed margin that he does not have to pass on to the consumer by offering lower prices.

Turning to the Japanese Delegate, the Chairman noted that Japan initially indicated that it was very interested in the CLP in having such a round-table because the issue is very much alive in Japan, not only for books, but for copyrighted goods. A commission has been created which has reviewed the exemption on copyrighted goods.

Mr. Kobayashi (Japan) explained that in Japan the Anti-monopoly Act allows resale price maintenance with regard to *a)* certain types of cosmetics, *b)* certain types of non-prescription medicine, and *c)* copyrighted works. The JFTC has taken measures to abolish exemptions on the first two categories: medicines and cosmetics. And this will take effect as of the of 1st April 1997. Then, only exemptions on copyrighted works such as books, magazines, newspapers, and music CDs will remain. There has been active discussions as to whether or not such exemptions on resale price maintenance should be continued or not.

The JFTC has been studying the question ever since early 1992. It has organised a study group on this issue. It has also held public hearings on this issue. The Commission intends to come to some conclusion by the end of March 1998. But the Commission cannot decide itself, because this is something provided for in the Anti-monopoly Act itself, so it's up to the Parliament to decide.

Newspapers

Regarding the newspapers, supporters of exemptions argue that *i)* without these exemptions, small distributors would be driven out of the business, and that distribution system would become even more oligopolistic; *ii)* without the exemption, home-delivery services will be seized where they are found unprofitable, and smooth delivery system will be disrupted ("home-delivery" argument); *iii)* without the exemption, newspapers will tend to carry articles mainly those which cater for readers' enjoyment, leading to lower quality of newspapers ("lower quality" argument); *iv)* the number of newspaper publishers will decrease because of competition, which leads to the reducing of the variety of newspapers("less variety" argument).

But with regard to home-delivery argument, since the home-delivery services are needed by both retailers and distributors, the distributors will not be able to abolish it unilaterally. And with regard to the "lower quality" argument, it is doubtful if readers would continue to read a newspaper whose quality has been lowered. And if newspaper quality is lowered, the volume of circulation would decrease. Such a prospect would be a big deterrent for the publishers to lower the quality. Also, the resale price maintenance on newspapers has brought about inflexible pricing practices, such as the absence of discount for long-time readers, and increase in the use of incentives for subscribers who are most likely to switch newspapers.

Books and magazines

Regarding books and magazines, the supporters of continuation of resale price maintenance argue that *i*) if it is abolished, the transaction of books will be mainly done on a sale basis, rather than on the consignment basis as is it done at the moment (the booksellers will try to avoid the risk by selling only those books that sell well; the variety of books displayed will be diminished--"book variety" argument); *ii)* if transaction of books will be done on a sale basis, the number of copies printed will decrease (this will push up the prices of books --this is a "copy number" argument).

Those who are for the abolition of resale price maintenance on books and magazines argue that booksellers can carry out transactions of books on the sale basis with the option of returning books. This will invalidate both the "book variety" argument and the "copy number" argument. A lowering of book prices due to competition can also be expected.

Trade agreement on books in Norway

The Chairman referred to the contribution by Norway, which discusses the trade agreement on books in Norway, which is a collective type agreement where professional organisations of distributors and a large number of publishers established an agreement that involved not only RPM in books but also some other provisions. This agreement has been examined twice by the competition authorities, and denied an exemption twice by the competition authorities. However, it was exempted by the Ministry.

Mr. Hope (Norway) explained that the book agreement stipulates the commercial sales conditions for books, including RPM. Other restraints concern discounts, return conditions for unsold copies, and an obligation for booksellers to store and supply books to the consumers. Bookstores must be approved by the booksellers' association in order to be part of the agreement. Furthermore, the agreement establishes a monopoly for bookstores to sell school books. The objectives are to contribute to publishing of a variety of literature, secure the existence of bookstores in sparsely populated areas, and promote literacy in the Norwegian language.

The debate has, notably, focused on the need to protect small bookstores in sparsely populated areas. The monopoly for school books has been particularly important in this respect. It prohibits schools from ordering school books directly from the publishers. In addition, inefficient bookstores are protected by the RPM since it precludes price competition from other bookstores.

When considering an exemption from the prohibitions of the Competition Act, the Norwegian Competition Authority decided to draw up an exemption on the following conditions:

- regulations for school books should no longer be a part of the agreement;
- that the price of discount restrictions in relation to book clubs had to be removed, and publishers;
- they should not be allowed to label the price on books before distribution.

This means that it was largely the general literature that would have been exempted from the prohibition. This was the "cultural" objectives of the agreement. The Norwegian Competition Authority argued, however, that the cultural objectives and the maintenance of bookstores in sparsely populated areas could be achieved by other means than RPM, for example by direct budget transfers by the government.

The decision of the authority was appealed to the government, which prompted a blessing for the whole agreement, but without stating all of the reasons why they then made the decision. Concerning the lessons to be drawn from experience, it seems that the agreement has contributed to preserving an inefficient structure of bookstores. The question whether a satisfactory supply of books in sparsely populated areas could have been achieved by other means, is also an important question. It must be expected that the prices are higher, due to the inefficient structure of the industry. Whether there has been a larger variety of books due to the agreement, remains an open question.

Mr. Hope concluded that the agreement is now being eroded from within, and it may fall apart by itself from competition. There is now a tendency to have independent publishers entering the market for instance, an independent chain of bookstores with a new distribution concept has entered; books are being sold in some of the grocery chain stores, etc. So it will be interesting to see how long the agreement will last in its present form. It might be done away with by competition from new entries into the market.

Is there no alternative to Resale Price Maintenance?

The Chairman remarked that there is still an unsolved question which is to what extent the same goals can be achieved in different ways, why is it that politicians are so favourable to this particular approach?

Alberto Heimler (Italy) stated that in Italy there is no general prohibition on RPM, or any exemptions for books or any other products. He reported on a case in the book distribution market, where

RPM was enforced through an horizontal agreement by publishers and an horizontal agreement by book shops. This was an agreement among four major publishers in the Italian market that accounted for around sixty per cent of the market, and the Association of Italian Booksellers. According to the agreement, the publishers agreed not to make discounts to larger retail stores; from the publishers' perspective, it was necessary for enforcing a cartel by the publishers not to make different discounts. From the booksellers' perspective, the merit of the agreement was the cost the publishers had to pay in order to enforce that agreement. Because otherwise publishers did not have any possibility of knowing whether a single publisher would provide discounts to retailers, and the only way they could do that is by collectively contracting such an agreement with booksellers.

This case was referred to the Competition Authority, following a denunciation of the association of large-scale retail trade firms that had sold books in their shops for already three years, and that sale was very successful (in fact the amount of books sold through that channel was quite extensive, and the total amount of books sold in Italy was also increased quite a lot). The discounts that were provided to large retail trade firms and the lower price that consumers received were, indeed, instrumental for increasing the price of the sale books and did not apparently, reduce the amount of books sold by little book shops and specialised book shops.

The publishers did not really make arguments in favour of this agreement. This was the book shops associations which did it putting forward usual argument such as : discounts would not have allowed little book shops to be alive; the amount of titles that they would carry would be reduced etc. However, it was apparent by the available statistical evidence that in fact the sale from large retail trade stores was not substituting directly sales made by book shops; the people that went and bought books at these shops were marginal consumers that probably would not have bought books anyway. So it was really an increase in demand that this new channel would provide. And it would certainly increase competition, but at the same time would constitute a very important increase in demand.

The authority felt that by allowing discounts to large retail trade stores, there would not be any welfare loss on the part of consumers, and that specialised book shops would still have the ability of maintaining their quality and services that were prided by them.

The authority ruled that this particular agreement was in violation of the law and the parties terminated that agreement and also eliminated the exclusive distribution because the agreement was also made in such a way that everyone had to go to a common company which was constituted of the four major publishers in order to purchase those goods. And also that agreement was eliminated so that everyone could contract directly with each publisher, eliminating the possibility, or reducing very much the possibility, of concerted practice in this respect.

Mr. Massey (Ireland) stated that the Irish Competition Authority has in recent years looked at a couple of different agreements relating to books. The main one being the UK NET Book Agreement. Essentially, given the common language and the respect of size of the two economies, UK-published books account for a very large proportion of books sold in Ireland. About eighty per cent of all books other than school books, or if school books are included, UK-published books are about sixty seven per cent of the total market. And most UK-published books were NET books. The Authority took the view that the arrangement prevented competition between retailers, both in respect of individual books titles, but also in respect of different titles which might be considered as substitutes for one another.

The Authority also took a view that it had some effect at the publisher level as well and there were elements of a horizontal agreement between the publishers involved also. In particular, once one publisher published a particular book and set a NET price for it, rival publishers could then set their prices

accordingly, given the procedures of the agreement. In fact, it was conceded by the publishers' association that the arrangements were anti-competitive and were contrary to the prohibition in our legislation, and their arguments really were that they should be exempted.

The sort of criteria that were advanced for exemption are the ones which have already been referred to by a number of the other speakers. The Authority rejected the arguments, in particular, that purchases of high-selling books which are the majority of consumers should be cross-subsidising those who bought minority-interest books. The Authority didn't feel it would cause book shops to stop stocking a wide range of books. It, also, felt unlikely that there would be any widespread closure of book shops.

It recognised that some shops might close, but new competitors would enter. It also rejected the argument that it would lead to less books being published, because major technological changes are going on in the publishing industry that are greatly reducing the prices of the cost of publishing books. The evidence of that was the entry of a large number of new publishers who are publishing books which previously mainstream publishers, in spite of the NET Book Agreement wouldn't have touched.

So the Competition Authority took that decision in mid-1994. Since then, the representatives of the industry denounced the Authority members. There has been some pressure for a legislative change, but it has not really got very far. Initially there was major discounting with shops on opposite sides of the street engaging in a campaign, with one saying "ten per cent off all books", the competitor matched it and so on. That settled down. What happens now is some discounting on more popular titles and some evidence of better service. There is, however, no extensive evidence of what's gone on underground. At the same time, there is certainly no major evidence of widespread closure of traditional book shops.

The Chairman turned to Spain where a Royal decree of March 1990 does set resale price maintenance as the rule, although it seems that the Spanish Competition Authority and the Ministry has some intellectual reservation as to the relevance of its wording.

The Spanish Delegate described the context for approbation of this Royal decree. At the time, the Spanish government felt that books were particularly important on cultural grounds; this is why it has condoned resale price maintenance to try to foster a larger supply of published books. At the same time, the Spanish government did want to protect those publishers that publish literary books with large circulation. It was also an attempt to protect smaller businesses against large business that could have managed to compete successfully via prices.

However, it is clear now that the competition authorities in Spain do not in fact support this type of legislation. It is the court which rules on competition, which has several times ruled on the matter because it feels that there is a very large amount of restrictive practices in the publishing industry among book sellers and that, therefore, the consumer can not enjoy lower prices for books; consumers are forced to buy a particular combined offer of price and service and are deprived of any choice in the matter.

Concerning possible discretion which the Spanish competition authority has to try to avert such a royal decree being prevented and followed in practice, the authority has lodged complaints against large department stores on grounds that they are in fact carrying out unfair practices. They argued that these department stores did not comply with the Royal decree since they have offered higher discounts than those that are allowed in the royal decree. They were therefore challenged on grounds of unfair competition, and also to safeguard competition according to Article 7 of the Spanish Act on competition.

A number of terms have to be met. There should be no unfair competition, no agreement, and the market should not be distorted in a major way. It was found that there was no major market disruption

because some book shops did not sell less books. And that the least efficient competitors could not be in fact encouraged. It was said that the public interest was at stake, but the Court in fact did turn down this argument because book sales have increased.

The Chairman, then, referred to the Swedish experience. Sweden is an active case in this discussion because not only was the resale price maintenance for books abolished in 1970, but it was abolished with the support of the Swedish Competition Authority. It is, therefore, a case where the competition authority successfully advocated a change. Mr. Jenny added that the Swedish contribution offers a rather extensive comment on what happened since the resale price maintenance for books has been lifted in Sweden, twenty years ago

Ms Widegren (Sweden) stressed that she was reporting on developments occurred during the last twenty years, in fact, since 1970. So these are the findings on the Swedish book market during a very long period of time and that long perspective could be a valid contribution to some countries who are contemplating this. Also, they are the findings of several government commissions over the years, and of associations of publishers.

The general view is that Swedish consumers have experienced a decrease in prices and they have better access to books than they have ever had before. The reasons for this is that the market structure has also changed considerably.

On the other hand, a number of book stores have closed down and there are complaints that in small cities and municipalities, they have only specialised book stores; one has to go to the supermarket or the store for daily consumer goods to find general literature and the best-sellers.

However, on average there has not been a decline in the number of book sellers as a whole. Indeed, it has followed the general decline in the number of retail outlets. So there has been no significant increase deviating from the general decrease in the number of retail outlets.

New distribution channels of books have emerged;. mostly, mail order companies, so called book clubs, have developed because Sweden has many scarcely populated areas where of course the access is improved if one has the possibility to buy books through book clubs.

The sales of general literature, except school books, has also increased very much, by fifty per cent, between 1970 to 1990. So it would be difficult to claim that Swedish people read fewer books now a days due to the abolishment of the RPM system, at least.

The stocking of the book sellers has not decreased, perhaps, due to the State aid in this area. The sales area, book stores, has on an average increased also very much by thirty five per cent. So Sweden has bigger and more sales areas for books, now. And the market concentration in Sweden hasn't changed over the year while the general level of prices decreased slightly; but there is certainly fiercer competition of prices on books all the more so that there are now retail chains of bookstores that have a significant low price profile.

The Chairman , then, gave the floor to the French delegation to describe a situation where in 1981, was unanimously approved the Lang Act in favour of resale price maintenance.

Mr. François Souty (France) introduced his presentation by mentioning that it exists a comparative study of the book market and the record market which shows contrast. As to the book, the Lang Act of Parliament, dating back to 1981, sets mandatory resale price maintenance. Competition law applies in a symmetrical fashion to what was described by Canadian Delegate earlier in the discussion. If

one compares the book market and the disc market, there are three features which separate out these two markets:

- First, the book did not benefit from the same technological revolution as records, with compact discs at the end of the ‘80s;

- Second, printed book will obviously be competed ever more against via Internet, multimedia, and also customised data-processing systems via Cds. (In terms of pattern or structure, the second feature, the book market seems indeed static and the disc seems to be dynamic. Disc has become the main cultural asset in France, ahead of books, stimulated by technological advance);

- Third, the cultural dimension seems to lead to diverging trends: concerning household cultural consumption between 1959 and 1994, records or discs are obviously shooting up tremendous growth, whereas books have in fact evolved in a positive fashion between 1959 and the end of the 1980s, and then the market levelled off as soon as “multimedia” emerged.

Concerning the book market, as to the cultural objection, the Lang Act of Parliament wanted to stimulate diversity of supply upstream and downstream, to give preference to neighbourhood service, close quarters and as to the effect of resale price maintenance on the book market, over fifteen years, French data show that the change in the market did mirror what the legislator wanted to achieve:

- First as to supply upstream, publishers, there is a fair amount of concentration. Four per cent of publishing houses in 1991 own fifty five per cent market share in 1991, then, a large amount of publishers was kept: three hundred eighty, almost four hundred publishers in 1991, ten years after resale price maintenance was introduced.

- The second feature is pluralistic publishing and supply, which was one of the aims of the legislature. There’s been an increase in the number of titles published between 1971 or 1981 and 1991. Twenty five thousand six hundred, thirty nine thousand four hundred and ninety two titles published in 1991 but there’s a price drift upwards. On the market shares now, it’s fairly stable. But the disc market is a dynamic market: relative prices are declining, and there is a very strong upward trend of records and disc consumption. So, in the case of discs and records, there is a highly concentrated and efficient economic market (World-wide there are five globalised markets which have eighty per cent of market share; none of them is French). As to the top hits, they account for eighty per cent of the turnover.

- The third feature is that the consumer isn’t better served than the case books apart from the price side of it, since seventy per cent of the purchases of consumers apply to what we call the basic fund of books and twenty per cent of the turnover. Downstream, fifty per cent of the market stems from large stores with only ten thousand titles, whereas the large department stores, supermarkets and chains have a hundred thousand different titles.

- Last feature, there is no longer a small record store. There is now a streamlined, concentrated market with a price decline over a long trend; however, prices are thirty per cent higher than those in the British market. A highly profitable market, the net mark-up for music publishers is eight per cent, which is much higher than the average French industry, which is one per cent.

Mr. David Parker (Australia) explained that Australia has not had resale price maintenance for books and CDs and other cultural property for some very considerable time. Prices in the Australian market remain high by world standards. After extensive analysis, it was decided that one cannot ascribe those price differences to differences in taxation or scale economies or the like. Basically, the bottom line is that the abolition of resale price maintenance has not been sufficient to bring about world competitive prices in Australia, that it is a necessary but not sufficient condition.

It is felt that the high prices in Australia can be ascribed to an intellectual property issue. It stems from the fact that Australian law like many others provides for parallel import protection, a distribution right which provides for monopoly importation rights for copyrighted goods; that monopoly right basically segments the Australian and other markets legally from the world market and provides the basis for price discrimination, and the extraction of the monopoly profit.

Australia, at the moment, is considering this issue and, notably, a possible amendment to the Australian law in this area.

In addition, Mr. Parker emphasised that the Treasury is strongly in favour of intellectual property right protection. The issue is that there is a parallel import restriction which provides for monopoly importation. Now the used Treasury framework in advocacy is one of market failure; Treasury asks what is the market failure which requires a monopoly right for importation, for distribution. Treasury accepts that it is appropriate to have a monopoly right in intellectual property for production, for creation. But distribution is a down-stream market. There are no obvious market failures directly in the market for distribution of any particular good, so why do we have a monopoly right for distribution of copyrighted material?

Within that framework, the argument must be that the two markets are so inherently intertwined that one could justify a restriction on competition and distribution because of a market failure at the production level, and that market failure is argued as piracy, that one needs a restriction on importation to prevent piracy.

Mr. Parker added that it is certainly true that importation restriction makes it easier to detect piracy, but the question is, "well, is it the best way?". It certainly doesn't guarantee detection of piracy. Is there a way other than providing a monopoly right, which would have fewer spin-off effects in terms of segmenting the market and providing for extraction of monopoly profits?. Australian view is that another argument has to be added: are there other ways? can we implement other detection mechanisms, notification schemes, and the like?

Concerning international obligations, the position is that the TRIPS Agreement doesn't apply to distribution rights. And the agreement negotiated in December, the World Intellectual Property Organisation Copyright Treaty, specifically does not provide for a right of distribution. It was proposed, but not agreed by all countries. So this is an issue which is being run in Australia.

The BIAC Representative presented a document from the International Association of Buying and Marketing Groups. The conclusion of that association is that retail trade is very much in favour of certain exemptions in European legislation, especially when it deals with advertising, etc. This Association also claims that there should be no discrimination in the marketplace of their small independent retailers' co-operation scheme.

In general, he stated, we are very much pleased by the economic analysis given in the recent European paper on vertical restraints, and especially with the conclusion that individual clauses or

different types of vertical restraints can not be considered *per se* as having a negative or a positive effect on competition or integration. And it is interesting to see that in that economic analysis there is no real difference being made between price restraints and non-price restraints. Furthermore, we are pleased to see that in that economic analysis, reference is given to new developments stemming from developments in information technology, etc.

We hope that this economic analysis would be brought forward into the present system in Europe, which is a straight-jacket system. In those new block exemption regulations, should also be allowed possibility for double-terraced maximum price maintenance .

The US Delegate referred to recent case involving American Cyanamid where American Cyanamid had two rebate programs. These involved written agreements and they offered to pay dealers substantial rebates if they sold AC's crop protection chemicals at or above specified minimum prices. The way the FTC ended up looking at this was that the dealers were making nothing, no profit, if they sold below minimum prices and in fact could see no difference between this case and a very recent case by Judge Posner in the Seven Circuit where he found that dealers who got no profit if they sold above a suggested maximum retail price clearly were part of an illegal price maintenance scheme and he had to find so whether he liked the law or not. So it seems that the one virtue of RPM law, not the *only* virtue, but *a* virtue, is that it is clear and it is important to draw clear lines and send clear signals to Counsellors, because counselling in this area of restrictive constraints generally can get very difficult. And so in effect what we are trying to do is draw clear lines. So this will make your counselling easier in the future.

The UK Delegate explained that the UK law prohibits restrictive RPM but there are currently two legal exemptions from this prohibition. One covers books and the other covers over-the-counter medicines or non-prescription medicines.

In terms of books, the exemption has been in existence since 1962 but we hope, he added, that that exemption will very shortly be ended. Early January 1997, in the Restrictive Practices Court there was the final hearing on ending the exemption. That hearing lasted for two weeks. It received quite a bit of press coverage, not least because there were some colourful authors who gave evidence in court. We await the judgement.

In practice on the book side, although we are, in UK, very keen to end the statutory exemption, the actual operation of the net book agreement practically ceased in September 1995 when the Publishers Association advised that they were no longer able to enforce the terms of the agreement. So for over a year it has not been practically in effect.

On over-the-counter medicines, that exemption from the prohibition on RPM was brought in 1970 and in the case of over-the-counter medicines we also would like to end that exemption, but the first step is for the Office of Fair Trading, to persuade the Restrictive Practices Court that there have been what is called 'material changes in circumstances' that are sufficient for the court to reconsider the exemption. There will be a hearing in the court later this year on whether there have been material changes in circumstances.

Earlier in the discussion there were comments to the effect that some of the exemptions against RPM have been introduced following ministerial pressure. Of course, in the UK in considering the current exemptions on both books and over-the-counter medicines, it is a question that goes to the court and is not a question for Ministers.

The UK Delegate then turned to the questions that are in the Secretariat paper:

- If RPM has been allowed for books and other cultural goods, what have been the decisive arguments for allowing it? He said that the current exemptions for books dates from 1962 and the court in the UK in 1962 based its judgement on its finding that without the Net Book agreement there would be firstly fewer and less well equipped stock holding bookshops. Secondly they considered there would be more expensive books and thirdly, fewer published titles. The arguments of those who currently defend the Net Book Agreement are that they consider it provides stability, that it reduces the risk of all involved in the trade. And they also consider that it keeps the prices lower than they would otherwise be, and hence is in the interest of the reading public. For the avoidance of doubt , he added that that UK competition authority does not accept those arguments in favour of the Net Book Agreement.

- If books had not been granted exemption what had been the arguments against granting it? The Director General of Fair Trading gave the following arguments to the Court: firstly there had been a change in the printing and publishing process whereby the cost of producing books was significantly less; there had been a growth in the chain of major bookshops, of two particular chains, which increased the number of well-stocked bookshops; the growth of book wholesalers offered a fast delivery and ordering service tailored to the needs of small bookshops; there was also a growth in the terms of supply which allowed bookshops to return unsold copies to publishers; and the final factor which he cited was the decision by then of the Publishers Association not to enforce the agreement.

- What led to the collapse of the Net Book Agreement in the UK and what have been the effects? It was generally accepted that the collapse of the Net Book Agreement was brought about largely by the attempts of large booksellers to breach it and subsequently by the decision of a number of major publishers to give up their support for it. Unfortunately because it is only recently that the Agreement has collapsed (over a year ago), it is rather early to give any definitive assessment of what has been the effect. But there are some pointers as to what the position is and the larger booksellers have gone in for discounting and other promotional measures on best sellers and new titles although the number of titles involved is quite limited. The effect on the price of less popular titles is more difficult to assess. Studies that have been undertaken suggest that these titles have risen by more than retail prices generally but they had been rising more than retail prices before the Net Book Agreement and no causal link has been established. So far there is little of no evidence of reduction of the number of titles published, although again it is too early because most of the work in progress had been planned before the end of the Net Book Agreement. Then, finally, in terms of the number of bookshops, that appears to be almost unchanged, although there may have been a change in their distribution with the chains, the larger bookshops, growing and the smaller ones decreasing in number.

- Is there a conflict of views between the competition authorities and the cultural authorities in relation to RPM for books? The answer is there was no such conflict. It wasn't an issue that arose. we have been trying

- Is there any consideration being given within government to revising the current provisions of competition law in relation to RPM? Many will be familiar with the fact that in the UK for many years we have been working to reform our law against restrictive agreements and we have now a draft bill which proposes introducing a prohibition broadly along the lines of

Article 85. No government has yet found parliamentary time for that legislation although there is the draft bill. The current draft has a prohibition for RPM. It does though propose excluding certain vertical agreements. They would be excluded from the scope of the prohibition. Whatever form of vertical agreement is excluded the new prohibition will have a *per se* prohibition against RPM. So whatever the form of the new legislation we will prohibit price fixing agreements and resale price maintenance.

The Swiss Delegate recalled that there is a new law on cartel and restrictive practices in Switzerland. When the bill was debated in Parliament a proposal was made to enshrine in the law, the principal whereby cultural field has to enjoy a number of different treatments. The proposal was rejected by a vast majority in the upper and lower chamber. In other words it is not possible *per se* to recognise to the cultural exemption the value of an exemption clause. The position here was extremely clear.

When it comes to German speaking Switzerland, the Swiss people are subject to the scheme of the so-called zummer reverse which covers the production and distribution of books in German language. And this agreement extends to Germany, Austria. There, we still need to know if it will be possible for Swiss people to obtain a change in the attitude of German publishers, because of course Switzerland is not a very important market for them. We discussed the issue with German publishers and they granted change in the prices. We are quite interested to know the outcome of what they are doing in Brussels and the whole issue between Germany and Austria because our position will depend on the outcome of this issue.

When it comes to French-speaking Switzerland, the situation is completely different. There is no retail price maintenance and the prices vary from big chains to small shops. A proposal has been made by the leftist MPs to the Parliament but it has received no reply. The Parliament has not implemented this proposal. It is quite an interesting situation because it shows that next to a country where it is claimed that the Lang law has produced very positive effect, we should be in a disastrous situation, and yet this is not the case.

Mr. Souty (France) emphasised that in the analysis of the link to be made between the pro-competitive impact of vertical restraint agreements on price and the structure of the market there are a number of aspects to take into account. Four were mentioned: the cultural aspect and the technological aspect, production processes, the services supplied to consumers. But there is a fifth which is linked to the nature of vertical relations at the two ends of the market of the disc and records (i.e. dowstream and upstream).

NOTE

1. The Supreme Court rencently held that the *per se* standard no longer applies to maximum resale price maintenance.

AIDE-MEMOIRE DE LA DISCUSSION

Le Président (M. Jenny), après avoir rappelé que le débat de la table ronde portait sur les prix imposés en général et les prix imposés des produits faisant l'objet de droits d'auteur en particulier, note que la plupart des contributions reçues traitaient des problèmes de prix imposés concernant les livres.

Il ajoute que ces contributions tendent à accréditer l'idée que la question des effets des prix imposés sur la concurrence constitue un problème complexe faisant l'objet d'âpres débats entre économistes ; l'analyse économique ne donne cependant pas d'indication claire quant au traitement qu'il convient d'appliquer aux prix imposés dans le cadre du droit de la concurrence, si ce n'est peut-être que les prix imposés peuvent produire des effets aussi bien positifs que négatifs sur la concurrence. Il semble aussi que dans la plupart des juridictions, les prix imposés sont traités par une interdiction *per se*, qui est généralement atténuée par la possibilité d'accorder des exemptions soit individuelles, soit sectorielles.

Débat général sur les prix imposés

A la demande du Président, M. Arhel (Commission) présente les contributions de la Commission européenne et explique qu'il va s'efforcer de montrer que même si la pratique des prix imposés présente des avantages, ces avantages sont souvent incertains et ne suffisent pas à en compenser les inconvénients. Il entend en outre démontrer que si l'on part du principe que les prix imposés peuvent améliorer l'efficience économique, cette dernière peut être réalisée par des moyens moins coûteux en termes de concurrence.

Effets pro- et anticoncurrentiels des prix imposés

Les prix imposés présentent certains avantages

- Première hypothèse : sur des marchés concurrentiels, les prix imposés peuvent améliorer l'efficience et la concurrence ; à titre d'exemple, les partisans des prix imposés affirment que si, sur un marché où s'exerce la concurrence, certains producteurs, mais pas tous, imposent des prix minima pour assurer une marge confortable aux distributeurs, ils peuvent ainsi inciter ces distributeurs à mettre en place les installations et embaucher le personnel nécessaires pour assurer la distribution convenable des produits et satisfaire les clients. La concurrence entre marques s'en trouve stimulée dans la mesure où la clientèle pourrait comporter des clients qui ne seraient pas disposés à acheter les biens sans les services proposés.
- Deuxième hypothèse : les prix imposés contribuent à lutter contre les prix d'éviction ; il s'agit de pratiques de producteurs qui vantent la faiblesse du prix d'un bien pour attirer les clients sans avoir l'intention de leur vendre les produits à ce prix. Il s'agit simplement d'attirer les clients qui achètent ensuite autre chose dans le magasin ; dans ce contexte, le recours aux prix imposés devrait contribuer à éviter de telles pratiques.

- Troisième hypothèse : les prix imposés contribuent aussi à maintenir l'image d'un produit d'une marque ; si un fournisseur souhaite donner une image de luxe à ses produits, l'imposition d'un prix plancher élevé l'aide à préserver cette image prestigieuse.
- Quatrième hypothèse : les prix imposés contribuent à éviter les problèmes de parasitisme. En effet, le fournisseur peut faire en sorte que le client n'ait plus intérêt à se rendre chez deux distributeurs différents pour satisfaire ses besoins. En conséquence, un client ne va pas parasiter un producteur particulier.

Toutefois, selon M. Arhel, l'argument du service n'est pas convaincant, car la pratique du prix imposé ne garantit pas en fait qu'il y aura amélioration du service. Il est certes vrai que les prix imposés peuvent donner au distributeur les moyens d'améliorer ses services, mais rien ne garantit qu'il le fera. Le client risque dès lors d'être contraint de payer un prix élevé sans obtenir en échange le service auquel il pourrait prétendre.

1. On peut néanmoins répondre que sur un marché concurrentiel, un distributeur qui applique des prix imposés sans offrir les services correspondants risque de perdre ses clients. Toutefois, cette réaction de la part des clients n'est pas certaine. De plus, mettre en avant l'amélioration des services repose sur une hypothèse erronée, qui consiste à penser que tous les consommateurs veulent avoir plus de services. Ce n'est pas le cas même pour des produits élaborés comme les appareils stéréophoniques et les produits électroniques.

Les prix imposés ont des effets négatifs à plusieurs égards

- Premièrement, les prix imposés sont inutilement élevés ; en fait, il ne devrait pas être nécessaire d'imposer de tels prix si le fournisseur n'avait pas l'intention de fixer un prix élevé.
- Deuxièmement, les prix imposés empêchent l'évolution des parts de marché ; en fixant des prix minima, le fournisseur empêche le distributeur de ses biens de fixer des prix inférieurs et prive donc le distributeur d'avantages concurrentiels.
- Troisièmement, les prix imposés peuvent aboutir à des ententes horizontales.

M. Arhel poursuit en déclarant que si l'on part du principe que les prix imposés peuvent améliorer l'efficience économique, cette dernière peut être réalisée par des moyens moins coûteux en termes de concurrence, comme la distribution exclusive, la distribution sélective et certaines remises.

Par exemple, le système de la distribution exclusive permet de combattre aussi efficacement le parasitisme que le système des prix imposés ; mais contrairement aux prix imposés, il permet aussi de faire bénéficier les clients de l'économie réalisée sur le prix.

Mme Valentine (Etats-Unis) présente la contribution des Etats-Unis qui traite des aspects économiques théoriques de la relation entre prix imposés et concurrence et passe en revue le traitement juridique des prix imposés aux Etats-Unis (où ils sont interdits *per se*). Elle explique aussi qu'une vive controverse se poursuit parmi les chercheurs sur les effets anti- et pro-concurrentiels des prix imposés.

Les principaux arguments en faveur de la thèse des effets anticoncurrentiels sont les suivants :

- les prix imposés facilitent les ententes entre revendeurs, au détail ou en gros, en offrant un mécanisme d'application de cette entente lorsque les revendeurs ne peuvent pas eux-mêmes la faire respecter ;
- les prix imposés peuvent faciliter la collusion des fournisseurs ;
- les prix imposés, tout en incitant à la prestation de services préalables à la vente, contraignent les clients à payer plus cher s'il n'est pas possible de séparer les éléments d'une offre de biens et services.

Les principaux arguments en faveur de la thèse des effets pro-concurrentiels sont les suivants :

- les prix imposés en limitant la concurrence intra-marque sur les prix peut réduire ou éliminer le parasitisme et inciter judicieusement les revendeurs à fournir des services avant et après vente coûteux ;
- les prix imposés permettent aux fabricants d'inciter les revendeurs à conserver des stocks importants ou d'attirer de nouveaux distributeurs lorsque la demande à l'adresse du produit du fabricant est très incertaine ;
- les prix imposés dissuadent les réductions de prix qui, dans le cas d'un produit assorti d'une "certaine image" comme les parfums, pourraient peser sur le volume des ventes.

Mme Valentine conclut en indiquant que la règle de l'illégalité *per se*, bien que circonscrite dans son application par les tribunaux, continue d'être la norme juridique aux Etats-Unis. Elle a indiqué que les agences antitrust avaient porté l'affaire devant la Cour Suprême faisant valoir que la règle de raison devait se substituer à la règle *per se* dans les cas de fixation de prix maximum[1].

M. Rob Anderson (Canada), se référant à la contribution écrite du Canada, explique que dans ce pays également, on débat des effets économiques des prix imposés et de l'utilité d'interdire cette pratique. Les principaux arguments en présence sont les suivants : d'un côté, les prix imposés ne sont pas préjudiciables aux consommateurs dans le cadre d'une concurrence intra-marque, et de l'autre, les prix imposés peuvent nuire à la concurrence lorsqu'ils servent à faciliter les ententes ou à encourager les exclusions. Une tentative, vers 1985, de réexaminer l'interdiction des prix imposés, voire de revenir sur cette mesure n'a pas été suivie d'effets. La pratique des prix imposés reste soumise au Canada à une interdiction pénale rigoureuse aux termes des dispositions correspondantes de la Loi sur la concurrence, sans aucune circonstance atténuante.

Toutefois, ajoute-t-il, si nous examinons le droit d'un côté et l'économie de l'autre, la plupart d'entre nous doivent admettre qu'il y a là matière à tensions intellectuelles.

Au Canada, la loi prévoit un nombre très restreint d'exceptions, et dans des cas très définis, elle admet la justification des prix imposés par le service apporté par le revendeur. Les autorités canadiennes s'efforcent réellement de s'attaquer au problème auquel elles attribuent un caractère prioritaire sur le plan opérationnel. Les déclarations publiques concernant ces priorités dans le cadre du Code criminel soulignent que les affaires les plus exemplaires dans ce domaine sont celles qui ont des connotations d'ententes horizontales dans lesquelles il apparaît que des entreprises portent préjudice à la concurrence non seulement en ce qui concerne une même marque, mais aussi entre marques.

Comment faut-il traiter les prix imposés ?

Le Président passe ensuite à la contribution norvégienne à ce débat et met l'accent sur deux points. Le premier porte sur une étude figurant dans cette contribution sur ce que l'on entend par prix imposés et plus précisément sur le traitement qu'il convient d'appliquer aux prix plafonds ou aux prix recommandés. L'interdiction générale des prix planchers doit-elle aussi être étendue à ces autres formes de prix imposés ou sont-elles encore moins de nature à poser des problèmes de concurrence ? (Une commission a été mise en place pour étudier cette question et a recommandé de ne pas imposer une interdiction *per se* des prix plafonds ou des prix recommandés. Cette recommandation n'a pas été suivie par le ministère). Le second point concerne l'idée figurant dans la contribution écrite que les prix imposés pourraient éventuellement être autorisés pour les entreprises qui n'exercent pas de puissance sur le marché, comme les franchisés dans un système de franchises.

M. Hope (Norvège) explique que, aux termes de la loi norvégienne sur la concurrence, les prix imposés sont interdits de façon générale et qu'aucune distinction n'est faite entre les prix imposés de façon concertée et les prix imposés unilatéralement. Les deux sont interdits. En revanche, les restrictions verticales ne portant pas sur les prix sont autorisées de façon générale. Plus précisément, il est notamment permis à un fournisseur d'organiser un partage vertical du marché entre ses distributeurs.

Toutefois, malgré l'interdiction générale des prix imposés, il peut y avoir des exemptions dans certains cas et bien que les répartitions verticales du marché, ou de façon générale les ententes verticales, ne portant pas sur les prix soient normalement autorisées, les pouvoirs publics norvégiens peuvent intervenir au cas par cas et interdire la restriction concernée si elle est anticoncurrentielle. Toutefois, ces interventions à l'encontre de répartitions verticales du marché restent rares, parce qu'on estime généralement qu'elles vont de pair avec une coopération efficiente entre un fournisseur et ses distributeurs ; par exemple, dans le cadre d'un canal unique d'importation et de promotion de l'entrée sur le marché norvégien ou d'un régime de franchise qui tend à favoriser l'entrée de petits détaillants.

Cela étant, les prix imposés constituent un instrument beaucoup plus souple et d'autres situations peuvent se présenter sur le marché où il n'y a pas de relation, ni de coopération étroite entre un fournisseur et ses distributeurs, notamment lorsque le distributeur peut librement choisir ses sources d'approvisionnement. S'il existe une véritable concurrence en aval, les prix imposés peuvent inciter les distributeurs à rechercher des sources plus rentables d'approvisionnement et ainsi la concurrence en aval peut stimuler la concurrence en amont. Cela peut être particulièrement important si le marché en amont est concentré, ce qui est sans doute fréquent en Norvège en raison de la faible taille de l'économie nationale.

M. Hope explique que la commission qui a proposé une nouvelle loi sur la concurrence s'est également demandée s'il devait y avoir une exception générale pour les prix imposés en lien avec les répartitions verticales du marché. Selon lui, cela serait logique, parce que si l'on est en présence d'une répartition verticale du marché, ce serait cette entente et non pas les prix imposés qui limiterait avant tout la concurrence inter-marques. En conséquence, pour remédier à cette situation, il conviendrait d'intervenir sur la répartition verticale du marché avant de traiter le problème des prix imposés. Enfin, aucune exemption n'a été proposée pour de telles répartitions verticales du marché en lien avec les systèmes de franchise, principalement en raison des difficultés pour définir ces répartitions verticales du marché.

Les possibilités d'exemptions

Le Président se réfère à la contribution finlandaise qui indique que les prix imposés sont traités dans le cadre d'une règle *per se* en Finlande, avec la possibilité d'exemptions et qui traite de multiples cas où des exemptions ont été accordées ou retirées.

Mme Hiltunen (Finlande) explique que lorsque l'on étudie les prix imposés, on accorde en Finlande toute l'attention qu'il convient à la promotion de l'efficience de la production ou de la distribution, ou encore aux améliorations techniques ou économiques. Parallèlement, la majeure partie des avantages doivent revenir aux consommateurs ou clients.

D'après ce qu'indique la jurisprudence, l'Office de la libre concurrence a cherché à voir si chaque dispositif favorise éventuellement une concurrence efficace et, dans ses arrêts, il a accordé une attention particulière aux incitations données par le dispositif. Les dispositifs renforcent-ils la concurrence et l'efficience ou sont-ils au contraire anticoncurrentiels ; par exemple, peuvent-ils servir à une coopération horizontale ? L'Office s'est également attaché à la concurrence intra-marque.

Dans le cas d'ESSO et de son système de "juste prix", les distributeurs pouvaient décider en toute indépendance s'ils voulaient appliquer une réduction du prix de gros pour s'aligner sur les prix de leurs concurrents. Le dispositif garantissait une marge minimale pour ces vendeurs au détail. La remise accordée par le grossiste correspondait à la moitié de la différence entre le prix de détail local et le prix de détail complet des revendeurs. De plus, dans ce système, c'étaient les détaillants qui fixaient eux-mêmes le prix en toute indépendance.

L'Office de la libre concurrence a estimé que ce dispositif accroissait la capacité du revendeur de faire face à la concurrence tandis qu'une part du risque de prix était reportée sur le grossiste.

Cela étant, dans une affaire de distribution d'essence, une association de compagnies pétrolières voulait recourir à un contrat conclu avec leurs revendeurs qui aurait permis aux grossistes de fixer le prix plafond des revendeurs afin de proposer des meilleurs prix que ceux des revendeurs concurrents. Ce coût aurait été réparti entre le grossiste et le revendeur. Comme le contrat et le dispositif mis en place face à la concurrence devait être utilisé par des grossistes concurrents, l'Office a conclu que ce mécanisme ne favoriserait pas vraiment la concurrence sur les prix, mais uniformiserait au contraire le niveau des prix, à travers un système de prix imposés.

De plus, comme l'ensemble du secteur de la vente d'essence aurait eu recours au même mécanisme de concurrence, l'Office de la libre concurrence a estimé que ce mécanisme aurait découragé les intervenants à proposer des prix plus concurrentiels, dans la mesure où tous les intervenants du marché savent comment les autres vont réagir. Ce mécanisme constituerait en outre une puissante incitation pour les compagnies pétrolières de conclure un accord horizontal de fixation des prix ou de répartition du marché, puisque les grossistes auraient été à même de contrôler le comportement de leurs détaillants en matière de prix.

La grande différence entre les deux cas est dès lors la suivante : dans le mécanisme du "juste prix" mis en place par ESSO, il n'y a pas d'élément de restriction horizontale et le système favorise réellement la concurrence ; dans le second cas, le mécanisme vertical apparaissait nécessairement comme un instrument de coopération horizontale.

Mme Hiltunen évoque par ailleurs une affaire dans le secteur de la pharmacie (affaire AO). Le fabricant a formulé des recommandations de prix (il n'a pas fixé les prix) qui sont imprimées sur les

produits, ces prix étant manifestement inférieurs à ceux d'autres médicaments similaires. Les détaillants n'étaient pas obligés de pratiquer ces prix et pouvaient en appliquer de plus faibles ou de plus élevés (alors qu'en Finlande, la concurrence sur les prix est très limitée dans le secteur de la pharmacie). En conséquence, l'Office de la libre concurrence a estimé que ces recommandations de prix de revente introduisaient une concurrence sur les prix dans un secteur qui avait jusqu'ici cherché à échapper à cette concurrence.

M. Jimenez Murcia (Espagne) évoque le cas des cosmétiques vendus en pharmacie. Dans cet affaire, les grossistes fixaient le prix de détail et le Tribunal de défense de la concurrence a décidé qu'il s'agissait d'une pratique restrictive, tombant sous le coup de l'article 1.1.a) de la loi espagnole sur la concurrence. Il fallait donc imposer une amende aux grossistes.

Dans deux affaires portées devant le Tribunal par une union de consommateurs et par une association nationale de petites et moyennes entreprises, il y avait un réseau contrôlé par un groupe de propriétaires de pharmacies intervenant comme distributeurs. L'association officielle des pharmaciens avait signé un accord avec les producteurs de cosmétiques. Il a été décidé que les récents accords signés entre les sociétés constituaient une infraction à la loi, puisqu'il s'agissait de fait d'ententes verticales.

Les sociétés concernées ont affirmé qu'elles n'avaient pas connaissance de cette interdiction des prix imposés, que le marché des cosmétiques n'était pas aussi important que celui des produits pharmaceutiques et qu'une indication de prix n'est pas assimilable à une politique de vente au détail, mais est une simple indication à l'intention des propriétaires de pharmacie. Ces arguments ont été rejetés. Le Tribunal a décidé que les produits pharmaceutiques sont effectivement régis par un système spécial. La concurrence intramarques n'existe pas dans le secteur pharmaceutique qui est un circuit fermé, organisé selon la règle de *numerus clausus* et où la concurrence entre pharmacies est inexistante. L'association des pharmaciens a fait valoir que c'était là, la condition indispensable à la protection de la santé des citoyens. Toutefois, ce dispositif ne s'étend pas aux autres produits vendus en pharmacie. En conséquence, selon l'arrêt du Tribunal, les prix recommandés pour les cosmétiques constituent de fait des prix fixés ou imposés.

Mme Gollan (Allemagne) explique que depuis 1957, les prix imposés font l'objet d'une interdiction de caractère général. Les produits de marque et les livres ont cependant été exemptés de cette disposition générale. Il y a aussi une interdiction générale des recommandations de prix, qui couvre les prix spécifiques, les coûts et méthodes et les fourchettes de prix. Les infractions à ces deux interdictions des prix imposés et des prix recommandés sont passibles d'une amende pouvant aller jusqu'à un million de deutsche mark, ou jusqu'à trois fois les bénéfices supplémentaires générés par l'infraction.

Toutefois, ces interdictions ne s'appliquent pas lorsqu'elles génèrent les gains d'efficience et les avantages qui peuvent aller de pair avec les prix imposés. En 1973, l'interdiction des prix imposés a été étendue aux produits de marque et depuis lors, le fabricant, et le fabricant uniquement, d'un produit de marque est autorisé à définir un prix de vente non contraignant. Ce système est soumis à un mécanisme de contrôle des abus exercé par le Bundeskartellamt.

En conséquence, les recommandations contraignantes et non contraignantes de prix ne concernant pas les produits de marque sont interdites aux termes de la loi allemande et sont passibles de sanctions. Cette disposition s'explique par le fait que tout accord entre sociétés intervenant à différentes étapes du processus économique dans lequel une partie contractante oblige l'autre à observer certains prix pour la revente des produits, restreint la liberté d'action des individus et la concurrence par les prix. Les prix imposés sont assimilables à une entente sur les prix de détaillants et non seulement entravent ainsi une

réduction des prix à la consommation, mais encore empêchent le développement de formes efficients de distribution. C'est pour ces raisons que les prix imposés sont interdits en Allemagne.

Toutefois, le législateur a admis que les consommateurs peuvent souhaiter avoir une idée approximative de la valeur du produit. A cet égard, le prix constitue à tout le moins une indicateur psychologique. Soucieux de l'équilibre entre ces intérêts des consommateurs et l'intérêt légitime du fabricant de garantir des prix constants à long terme et de stabiliser la planification de l'entreprise d'une part et le risque de limiter la concurrence par les prix d'autre part, le législateur a autorisé les recommandations de prix non contraignantes pour les produits de marque, mais uniquement lorsque ces produits affrontent la concurrence de produits analogues d'autres fabricants.

Le Dr. Ferenc Vissi (Hongrie) explique qu'à la fin des années 1980, trois séries de facteurs ont été pris en compte pour déterminer la structure de la loi en vigueur aujourd'hui : *i)* la structure du marché au début des années 1990 ; *ii)* les considérations de politique économique, à savoir quel type de messages il convient de transmettre aux intervenants du marché dans cette phase de transition ; *iii*) les leçons tirées de l'expérience des pays de l'OCDE.

En ce qui concerne la structure du marché, les anciennes relations verticales ont été rompues au début des années 1990, le système de distribution a été partiellement atomisé et la vague générale de privatisation a commencé, bien qu'elle se développe progressivement avec d'inévitables décalages.

Dans ce contexte, le gouvernement a adressé le message suivant : les obstacles à l'entrée doivent être levés et interdits ; les relations verticales, fondées sur des initiatives du marché et entre intervenants privés, doivent être encouragées ; il faut favoriser le développement des petites et moyennes entreprises.

Pour satisfaire ces objectifs, la loi hongroise de la concurrence prévoit qu'en-deçà de 10 pour cent de part de marché, il n'y a pas d'interdiction, qu'il s'agisse de restrictions horizontales ou verticales, y compris de prix imposés. L'interdiction à l'encontre de l'abus de position dominante est applicable au-delà de 30 pour cent de part de marché, quelles qu'en soient les conséquences sur le marché. Dans les secteurs où il y a une double répartition du marché, l'une relevant de la part des dix pour cent et l'autre de celle des trente pour cent, on applique une démarche au cas par cas.

M. Vissi explique que toutes les affaires de prix imposés qui ont été examinées, allaient de pair avec des restrictions de la concurrence. Toutefois, elles ont été analysées en fonction de leur spécificité et les autorités ont estimé que certaines présentaient plus d'avantages que d'inconvénients ; dans de tels cas, une exemption a donc été accordée.

En 1996, le secteur de la distribution de bière a été examiné et on a constaté que les 5 grossistes locaux et 290 détaillants s'étaient entendus sur des prix imposés, ce qui porte sur presque la totalité du secteur de la brasserie et de la distribution de bière. Ces prix imposés ont été considérés comme un accord horizontal de fixation des prix, interdit par l'Office de la concurrence.

En Hongrie, poursuit M. Vissi, il y a aussi une interdiction des prix plafonds. Dans les trois affaires ayant fait l'objet d'enquêtes, on a cependant conclu qu'il n'y avait pas domination du marché puisque ce dernier était libre, et qu'il n'y avait pas de restriction de la concurrence entre marques.

Compte tenu des considérations précédentes, la nouvelle loi hongroise de la concurrence, qui est entrée en vigueur le 1er janvier 1997, maintient le principe de l'interdiction générale, qu'il s'agisse d'une initiative concertée ou unilatérale, de prix plancher ou de prix plafond, mais il est normalement possible d'obtenir une exemption en fonction des avantages et inconvénients du dispositif.

Le Président, se tourne ensuite vers la délégation de l'Australie. Il souligne qu'en Australie, comme dans quelques autres pays, les prix imposés ont longtemps constitué une infraction *per se* (sauf pour les prix recommandés). Depuis 1995, cependant, des autorisations (ou exemptions) peuvent être octroyées par l'Australian Competition and Consumer Commission. Il demande si les restrictions verticales ne portant pas sur les prix sont également traitées par la législation australienne comme des infractions *per se* et si ce n'est pas le cas, pourquoi, compte tenu des avantages proclamés de l'approche *per se*.

Il souhaite également savoir comment l'Australian Competition Commission accorde les exemptions et pourquoi, dans le cas d'une société qui ne peut pas être considérée comme un petit intervenant dans un domaine très concurrentiel, la Commission devrait accorder, conformément aux changements introduits en 1995, une exemption.

Le professeur Allan Fels (Australie) rappelle qu'autrefois, l'Australie n'avait pas de loi s'opposant aux prix imposés ; puis, les syndicats ont fait grève pour protester contre ce comportement chez certains industriels et la loi a été rapidement adoptée. Elle prévoyait que si les prix imposés allaient à l'encontre de l'intérêt public, ils devaient alors être interdits après enquête. En 1974 la loi a été changée au profit d'une interdiction automatique *per se* indépendamment de l'impact sur la concurrence. Par la suite, en 1995, la loi a été légèrement modifiée : si une personne demande à l'avance le feu vert pour pratiquer les prix imposés, si cette personne peut surmonter les préventions à l'encontre de cette pratique et si la personne peut donner à la Commission l'assurance que son dispositif présente un avantage déterminant pour le public, la pratique est alors autorisée.

M. Fels explique que les restrictions verticales ne portant pas sur les prix constituent, de façon générale, une infraction à la législation uniquement si elles atténuent sensiblement la concurrence et à condition de pouvoir le démontrer. En dehors d'une attitude qui se situe quelque part entre ces deux catégories, on se trouve en présence d'une sorte d'approche *per se*, avec cependant la possibilité de démontrer qu'il y va de l'intérêt public.

Certes, dans la pratique, les choses sont très différentes, parce que si l'on doit traiter tout un dossier devant les tribunaux en démontrant qu'une pratique limite sensiblement la concurrence, l'affaire prend des dimensions beaucoup plus considérables. Or, la justification essentielle de toute interdiction *per se* dans le droit de la concurrence, résulte d'une sorte de calcul des coûts et avantages. Si une pratique risque d'être anticoncurrentielle et contre l'intérêt public, il y a dès lors lieu de l'interdire de façon générale sans avoir à mener une enquête complète, même si cela signifie qu'il y a certains cas exceptionnels où une pratique n'est pas préjudiciable et peut même être bénéfique, il doit y avoir une interdiction *per se*. On a estimé en Australie que le mal causé par les prix imposés est tel qu'ils doivent être interdits.

Selon M. Fels, la plupart des affaires australiennes sont résultées des possibilités d'entente horizontales associées aux prix imposés. Le secteur pétrolier, par exemple, a toujours été friand des prix imposés au niveau horizontal, bien qu'il n'ait pas été autorisé à les pratiquer. Il est ressorti assez clairement de ces affaires que les sociétés avaient vraiment voulu mettre un terme à la concurrence par les prix au niveau de détail. Il est clairement apparu que dans certaines affaires qu'il y avait une volonté réelle de supprimer la concurrence par les prix de détail, parce que procéder ainsi permettait de stabiliser l'ampleur de la concurrence au stade de gros entre les compagnies pétrolières.

Aujourd'hui, cette pratique est cependant admise. En d'autres termes, si quelqu'un peut avancer une bonne argumentation en faveur des prix imposés pour ce qui est des facteurs déjà évoqués, s'il peut en convaincre d'avance la Commission, il peut alors avoir sa chance. La question que pose cette approche *per*

se en général s'applique en Australie aux accords de fixation des prix. Il existe aussi une interdiction *per se* des boycotts organisés, ainsi qu'une interdiction *per se* des prix imposés. Sinon, il appartient aux organismes opérationnels ou encore aux parties privées ayant pris une initiative restreignant de démontrer les infractions à la loi. La démarche adoptée en Australie consiste à peser le pour et le contre.

A propos de l'affaire ICI spécifiquement mentionnée par le Président, M. Fels déclare que dans la situation actuelle, si la demande avait été formulée à l'avance, il leur appartiendrait de démontrer la validité de leur démarche.

Le Président conclut le premier volet de la discussion en affirmant qu'un accord général semble se dégager en faveur d'une interdiction *per se* des prix imposés, quelle qu'en soit la raison, commodité ou motifs économiques, avec cependant un système d'exemptions.

Prix imposés et produits faisant l'objet de droits d'auteurs

En ce qui concerne les livres, il note qu'il y a aussi un accord entre les délégués, d'après leurs contributions écrites. Très peu d'autorités de la concurrence jugent convenable d'exempter le commerce des livres de l'interdiction générale des prix imposés. Toutefois, cet avis général est largement négligé par les responsables de la politique et les livres sont de fait exemptés de l'interdiction générale des prix imposés dans de nombreux pays. Cela étant, il faut admettre qu'il n'y a guère d'éléments faisant apparaître les avantages des prix imposés sur la distribution de livres ou ceux d'une interdiction des prix imposés dans ce domaine.

Se référant aux contributions suédoise et française, il souligne que dans un cas l'interdiction a été levée et on estime que tout s'est amélioré par la suite, alors que dans l'autre, l'interdiction a été imposée et on estime que tout s'est bien passé par la suite. Cela traduit le débat qui se déroule depuis de nombreux années, notamment en France. Le président invite ensuite le représentant de la CE à prendre la parole et à s'exprimer sur les arguments échangés à propos des prix imposés dans le cas du livre.

Les prix imposés des livres

M. Arhel (Commission) explique que les systèmes de prix du livre imposé ont été traités par la Commission par application de l'article 85, et que cet article a jusqu'ici été appliqué aux systèmes concernant des zones linguistiques homogènes entre Etats membres. Cette caractéristique est due au fait que l'article 85 stipule que les échanges entre Etats membres sont affectés par le système et que les livres, en tant que bien culturel, font plus spécialement l'objet d'échanges entre Etats membres de même langue. Les cas observés concernent donc plus particulièrement les zones linguistiques homogènes d'Europe. La première affaire dans laquelle la Commission a fait une déclaration formelle a été l'affaire néerlando-flamande. La Commission a arrêté sa décision en 1981. Puis, il y a eu une affaire anglo-irlandaise d'accord sur les livres en 1987. Enfin, deux autres cas sont en cours d'examen : une affaire germano-autrichienne et une affaire concernant l'accord néerlandais, mais qui comporte aussi des restrictions à l'encontre des importations de livres d'autres Etats membres.

Dans les deux décisions qui ont été prises, les arguments des partisans des prix imposés pour le livre ont toujours été rejetés, en particulier dans la décision néerlando-flamande de 1981, alors que la décision concernant le Royaume-Uni n'est pas véritablement entrée dans le détail. Sans doute de nombreux arguments favorables ou opposés aux prix imposés ont déjà été évoqués. Mais pour parler de cet aspect culturel spécifique, on a avancé que les prix imposés donnent aux éditeurs la possibilité d'appliquer des subventions croisées à des ouvrages intéressants, mais moins populaires, grâce aux bénéfices de la

vente des gros tirages. En outre, on a affirmé que les prix imposés permettent l'existence d'un nombre important de points de vente au détail, ce qui est aussi culturellement important, parce que ces points de vente permettent à une partie importante de la population d'avoir accès aux livres en tant que biens culturels.

Cela étant, comme le précise M. Arhel, ces arguments culturels peuvent en un sens être perçus comme la face cachée des arguments économiques qui ont été avancés, parce qu'on peut aussi traiter la question sous un angle économique. On peut en effet dire que les prix imposés peuvent susciter une augmentation de la production de titres, ce qui induit aussi une diversité de titres et donc une diversité culturelle ; de plus, les prix imposés peuvent présenter d'autres avantages pour la distribution, dès lors que l'on peut ouvrir un grand nombre de points de vente.

Toutefois, la Commission a déclaré, en particulier dans la décision sur l'affaire néerlando-flamande, que les prix imposés n'étaient pas nécessaires parce que rien n'empêche un éditeur de subventionner des ouvrages moins populaires s'il le souhaite, dès lors qu'il dégage suffisamment de bénéfices de sa production de livres. En tout état de cause, il n'est pas tenu d'en passer par les prix imposés pour y parvenir. Or, en fait, il y a beaucoup d'éditeurs qui ne produisent pas de livres culturellement importants et qui s'attachent aux ouvrages populaires et faciles à vendre. De plus, il en va de même du détaillant qui n'est pas non plus contraint de proposer des livres culturellement importants et qui peut néanmoins tirer parti des prix imposés qui offrent bien entendu une marge garantie qu'il n'a pas besoin de répercuter sur le consommateur en lui offrant des prix inférieurs.

S'adressant à la délégation japonaise, le Président note que le Japon s'était à l'origine déclaré très intéressé par l'organisation d'une table ronde dans le cadre du CLP, parce qu'il s'agit d'une question de grande actualité au Japon, non seulement pour les livres, mais encore pour tous les biens faisant l'objet d'un droit d'auteur. Une commission a été créée pour revoir les exemptions concernant les biens donnant lieu à droit d'auteur.

M. Kobayashi (Japon) explique qu'au Japon la loi anti-monopole autorise les prix imposés dans le cas de *a)* certains types de cosmétiques, *b)* certains types de médicaments vendus hors prescription, enfin *c)* pour les œuvres faisant l'objet de droits d'auteurs. La JFTC a pris des mesures pour supprimer les exemptions relatives aux deux premières catégories : médicaments et cosmétiques. Ses décisions entreront en vigueur le 1er avril 1997. Par la suite, il ne restera plus que des exemptions pour les œuvres faisant l'objet de droits d'auteurs, comme les livres, les magazines, les journaux et les enregistrements musicaux sur disques compacts. La question de savoir si ces exemptions concernant des prix imposés devaient être maintenues ou non a suscité des débats animés.

La JFTC étudie en permanence la question depuis le début de 1992. Elle a organisé un groupe de travail à cet effet. Elle a aussi procédé à des auditions publiques à ce propos. La Commission entend parvenir à une conclusion à la fin du mois de mars 1998. Mais la Commission ne peut pas décider seule, parce que la Loi anti-monopole elle-même stipule qu'il appartient au parlement de trancher la question.

Journaux

En ce qui concerne les journaux, les partisans de l'exemption affirment que *i)* sans cette exemption, les petits distributeurs se trouveraient exclus du marché et le système de distribution deviendrait alors encore plus oligopolistique ; *ii)* en l'absence d'exemption, les services de livraison à domicile seraient supprimés là où l'on constate qu'ils ne sont pas rentables et la souplesse du système de livraison serait remise en cause (argument de la "livraison à domicile") ; *iii)* sans l'exemption, les journaux auront tendance à présenter surtout des articles faisant plaisir aux lecteurs, ce qui abaisserait la qualité de

la presse (argument de la “baisse de qualité” argument); *iv)* le nombre d’éditeurs de journaux diminuera en raison de la concurrence, ce qui amènera une réduction de la diversité des journaux (argument de la “moindre diversité”).

Toutefois, en ce qui concerne l’argument de la livraison à domicile, ces services sont nécessaires aussi bien pour les détaillants que pour les distributeurs, de sorte que ces derniers ne pourront pas les supprimer unilatéralement. En outre, pour ce qui est de l’argument de la baisse de qualité, on peut penser que les lecteurs ne continueront pas à lire un journal dont la qualité a baissé. Or, si la qualité d’un journal baisse, sa diffusion baisse aussi. Une telle perspective constitue un puissant élément de dissuasion pour les éditeurs tentés par la baisse de qualité. En outre, les prix imposés des journaux ont amené des pratiques de tarification rigides, comme l’absence de remise pour les lecteurs fidèles, et le recours plus fréquent à des incitations destinées aux abonnés qui sont le plus susceptibles de changer de journal.

Livres et magazines

En ce qui concerne les livres et les magazines, les partisans du maintien des prix imposés affirment que *i*) si les prix imposés sont supprimés, le négoce des livres se fera sur des bases purement commerciales et non plus selon le principe du dépôt en librairie, comme c’est actuellement le cas (les libraires essayeront d’éviter le risque en ne vendant que les livres qui se vendent bien ; la diversité des livres présentés va diminuer – argument de la “diversité des livres”) ; *ii)* si le négoce des livres se fait dans des conditions purement commerciales, les tirages vont être réduits (cela entraînera une hausse des prix – argument du “tirage”).

Ceux qui sont favorables à l’abolition des prix imposés sur les livres et les magazines affirment que les libraires peuvent négocier des ouvrages selon des conditions commerciales avec l’option de renvoyer les livres à l’éditeur. Cela remet en cause l’argument de la diversité et celui du tirage. On peut aussi s’attendre à une baisse du prix du livre, sous l’effet de la concurrence.

La convention commerciale sur les livres en Norvège

Le Président évoque la contribution de la Norvège, qui analyse la convention commerciale sur les livres dans ce pays. Il s’agit d’une convention de type collectif par laquelle des organisations professionnelles de distributeurs et un grand nombre d’éditeurs se sont entendus sur diverses dispositions, dont les prix imposés, mais pas uniquement. Cette convention a fait l’objet de deux examens par les autorités de la concurrence qui ont refusé à deux reprises l’octroi d’une exemption dans ce domaine. Toutefois, cette convention s’est vue accorder une exemption par le ministère.

M. Hope (Norvège) explique que cette convention sur le livre stipule les conditions commerciales de vente des livres, notamment les prix imposés. Parmi les autres restrictions, on retiendra les remises, les conditions de renvoi des invendus et l’obligation faite aux libraires de stocker et de fournir des livres aux consommateurs. Les librairies doivent être agréées par l’association des libraires pour pouvoir bénéficier du dispositif. De plus, la convention institue un monopole des librairies pour la vente de livres scolaires. Il s’agit ainsi de contribuer à la publication d’une littérature variée, de garantir l’existence de librairies dans les zones peu peuplées et de favoriser l’acquisition de compétences essentielles en langue norvégienne.

Le débat a notamment été centré sur la nécessité de protéger les petites librairies dans les zones peu peuplées. Le monopole des livres scolaires joue un rôle particulièrement important à cet égard. Il

interdit aux écoles de commander directement les livres aux éditeurs. En outre, les librairies inefficientes sont protégées par les prix imposés puisque ces prix empêchent la concurrence d'autres librairies.

Envisageant une exemption vis-à-vis de l'interdiction prévue par la Loi sur la concurrence, l'Autorité norvégienne de la concurrence a décidé d'instaurer une exemption dans les conditions suivantes :

- les règles relatives aux livres scolaires doivent être retirées de la convention ;
- les restrictions concernant les remises de prix pour les clubs de livre doivent être supprimées ; enfin,
- les éditeurs ne sont pas autorisés à faire mention du prix sur les livres avant leur distribution.

Cela signifie que c'était dans une grande mesure la littérature générale qu'il s'agissait d'exempter des dispositions d'interdiction des prix imposés. Tels étaient les objectifs culturels de la convention. L'Autorité norvégienne de la concurrence a cependant fait valoir que les objectifs culturels et le maintien des librairies dans les zones peu peuplées pouvaient être satisfaits par d'autres moyens que les prix imposés, par exemple sous forme de transferts budgétaires directs par le gouvernement.

Cette décision de l'autorité de la concurrence a donné lieu à un appel auprès du gouvernement qui a émis un avis favorable sur l'ensemble de la convention, mais sans le motiver. En ce qui concerne les leçons à tirer de cette expérience, il semble que la convention a contribué au maintien de la structure inefficiente des librairies. La question de savoir si l'on aurait pu obtenir par d'autres moyens une offre satisfaisante de livres dans des zones peu peuplées est aussi importante. On peut s'attendre à voir les prix augmenter en raison de cette structure inefficiente du secteur. Quant à savoir si l'éventail des livres proposés s'est élargi sous l'effet de la convention, on ne le sait pas encore.

M. Hope conclut en indiquant que la convention est désormais minée de l'intérieur et qu'elle pourrait s'effondrer sous l'effet de la concurrence. On observe actuellement une tendance à l'entrée sur le marché d'éditeurs indépendants, par exemple une chaîne indépendante de librairies avec un nouveau concept de distribution ; des livres sont vendus dans certaines chaînes de supermarchés, etc. Il sera donc intéressant de voir combien de temps la convention va s'appliquer sous sa forme actuelle. Elle pourrait être balayée par la concurrence suscitée par l'arrivée de nouveaux intervenants sur le marché.

Existe-t-il une solution de rechange aux prix imposés ?

Le Président note que la question de savoir dans quelle mesure on peut parvenir aux mêmes résultats par des voies différentes reste en suspens. Pourquoi les pouvoirs publics privilégient-ils tant cette approche ?

Alberto Heimler (Italie) indique qu'il n'y a pas d'interdiction générale en Italie à l'encontre des prix imposés, ni d'exemption pour les livres ou tout autre produit. Il évoque une affaire sur le marché de la distribution de livres dans laquelle les prix imposés ont été appliqués par une entente horizontale entre éditeurs et une entente horizontale des librairies. Il s'agissait d'un accord entre les quatre grands éditeurs sur le marché italien qui représentaient environ 60 pour cent du marché, et l'Association des libraires italiens. Aux termes de cette convention, les éditeurs convenaient de ne pas faire de remises aux gros détaillants ; du point de vue des éditeurs, il fallait en passer par une entente entre éditeurs de façon à ce qu'ils ne pratiquent pas des remises différentes. Du point de vue des libraires, l'avantage de la convention résidait dans le coût que les éditeurs devaient prendre en charge pour appliquer la convention. Sinon les éditeurs n'auraient en effet pas eu la possibilité de savoir si un éditeur isolé accorderait des remises à des

détaillants et la seule façon de le savoir consistait à conclure collectivement une telle convention avec les libraires.

L'affaire a été portée devant l'Autorité de la concurrence, à la suite d'une plainte déposée par l'association des grandes entreprises de détail qui vendaient des livres dans leurs points de vente depuis déjà trois ans et dont les ventes marchaient très bien (de fait le nombre d'ouvrages vendus par ce biais était considérable et le volume des livres vendus en Italie avait ainsi progressé dans des proportions importantes). Les remises accordées à ces entreprises et la baisse des prix qui en résultait pour les consommateurs était effectivement indispensables pour relever le prix du livre. Cette situation n'a apparemment pas réduit le volume des ventes des petites librairies ou des librairies spécialisées.

Les éditeurs n'ont pas réellement défendu cet convention. C'est l'association des libraires qui a mis en avant des arguments classiques comme : les remises n'auraient pas permis aux petites librairies de survivre ; le nombre de titres qu'elles proposeraient diminuerait, etc. Toutefois, les statistiques disponibles démontrent qu'en fait les ventes des grands magasins de détail ne se substituent pas directement aux ventes des librairies ; les gens qui viennent acheter des livres dans ces magasins sont des consommateurs marginaux qui n'auraient de toute façon pas acheté de livres par ailleurs. En fait, ce mode de distribution a permis une augmentation de la demande. Or, cela devrait contribuer à accroître la concurrence, tout en apportant une très forte augmentation de la demande.

L'Autorité de la concurrence a estimé que permettre des remises aux grands magasins de vente de détail n'entraînerait pas de perte de bien-être pour les consommateurs et que les librairies spécialisées continueraient de pouvoir préserver la qualité et les services dont elles vantent les mérites.

L'Autorité a estimé que cette convention constituait une infraction à la loi et que les parties devaient mettre un terme à cette convention, mais aussi éliminer les clauses de distribution exclusive, parce que la convention était formulée de telle façon que tout le monde devait en passer par une société commune constituée des quatre grands éditeurs pour pouvoir acheter ces biens. La convention étant éliminée, chacun contracterait directement avec les éditeurs, ce qui éliminerait la possibilité de pratiques concertées à cet égard ou réduirait très sensiblement ce risque.

M. Massey (Irlande) indique que l'Autorité irlandaise de la concurrence a étudié ces dernières années quelques accords ayant trait aux livres, le principal d'entre eux étant le Net Book Agreement britannique. Pour l'essentiel, compte tenu de la langue commune et de la taille des deux économies, les livres publiés au Royaume-Uni représentent une très forte part des livres vendus en Irlande. Quelque 80 pour cent de l'ensemble des livres (non scolaires) ou, si l'on prend en compte les livres scolaires, 67 pour cent vendus en Irlande sont des livres britanniques. Or, la plupart des livres publiés au Royaume-Uni entrent dans le cadre du NET Book Agreement. L'Autorité a estimé que ce mécanisme entravait la concurrence entre détaillants, aussi bien en ce qui concerne les différents titres que les titres différents pouvant être considérés comme les substituts d'un autre titre.

L'Autorité a par ailleurs estimé que ce mécanisme avait certains effets au niveau des éditeurs et qu'il y avait des éléments d'entente horizontale entre les éditeurs concernés. Plus précisément, une fois qu'un éditeur a publié un ouvrage donné et lui a attribué un prix Net, les éditeurs concurrents sont alors à même d'ajuster leurs prix en conséquence, compte tenu des procédures de fonctionnement de l'accord. En fait, l'association des éditeurs a admis que les mécanismes étaient anticoncurrentiels et contraires à l'interdiction prévue par la loi et que leur argumentation visait en fait à obtenir une exemption.

Le type de critères avancés pour obtenir l'exemption sont ceux qui ont déjà été évoqués par un certain nombre d'autres intervenants. L'Autorité a rejeté ces arguments, notamment l'idée que les achats

de livres à gros tirage qui représentent la majeure partie de la consommation devait subventionner ceux qui intéressent une minorité de lecteurs. L'Autorité n'a pas estimé que cela amènerait les librairies à ne plus avoir en stock un large éventail de titres. Elle a en outre estimé peu probable que l'on assiste à un vaste mouvement de fermeture de librairies.

L'Autorité a certes admis que certaines librairies risquent de fermer, mais de nouveaux concurrents vont arriver. Elle a par ailleurs rejeté l'argument selon lequel l'interdiction freinerait la publication de livres, dans la mesure où les grands changements technologiques se répercutent sur l'édition et permettent effectivement de réduire le coût d'édition des livres. L'Autorité en veut pour preuve l'arrivée sur le marché d'un grand nombre de nouveaux éditeurs qui publient des livres que les grands éditeurs, malgré l'Accord Net Book, n'auraient pas publiés.

En conséquence, l'Autorité de la concurrence a pris cette décision à la mi 1994. Depuis lors, les représentants du secteur ont stigmatisé les membres de l'Autorité. Certaines pressions se sont exercées en faveur d'un changement de législation, mais les choses ne sont pas allées très loin. Dans un premier temps, on a assisté à de fortes remises, des librairies voisines se lançant dans une campagne dans laquelle l'une proclame une remise de "10 pour cent sur tous les livres", l'autre libraire faisant alors de même etc. Cette campagne s'est apaisée. Ce que l'on constate aujourd'hui ce sont quelques remises sur les titres les plus prisés et des signes d'amélioration des services. Toutefois, on ne dispose pas d'éléments significatifs sur ce qui se passe en coulisse. Parallèlement, il n'y a de toute évidence aucun signe de mouvement de fermeture de librairies traditionnelles.

Le président s'adresse à la délégation de l'Espagne où un décret royal de mars 1990 stipule que les prix imposés sont la règle dans le domaine du livre, bien qu'il semble que l'Autorité espagnole de la concurrence et le ministère aient certaines réserves intellectuelles quant à la pertinence de la formulation du décret.

Le délégué de l'Espagne décrit le contexte de l'approbation de ce décret royal. A l'époque, le gouvernement estimait que les livres étaient particulièrement importants pour des motifs culturels ; c'est la raison pour laquelle il a institutionnalisé les prix imposés afin de tenter de stimuler l'offre d'ouvrages publiés. Parallèlement, le gouvernement espagnol entendait protéger les éditeurs publiant des ouvrages littéraires à grande diffusion. Il s'agissait aussi d'une tentative de protéger les petites entreprises contre les plus grosses qui auraient pu exercer une concurrence efficace par les prix.

Toutefois, il est désormais manifeste que l'Autorité de la concurrence en Espagne n'est en fait pas favorable à ce type de législation. C'est au Tribunal de défense de la concurrence qu'il appartient d'édicter les règles de concurrence et il est souvent intervenu dans ce domaine parce qu'il estime qu'il y a un grand nombre de pratiques restrictives dans le secteur de l'édition et chez les libraires et que les consommateurs ne peuvent donc pas bénéficier d'une baisse des prix du livre ; les consommateurs sont contraints d'acheter une offre combinée de prix et de service et sont privés de tout choix en la matière.

En ce qui concerne l'éventuel pouvoir discrétionnaire dont elle dispose pour contourner un tel décret, l'Autorité espagnole de la concurrence a porté plainte à l'encontre de grands magasins au motif qu'ils se livraient effectivement à des pratiques anticoncurrentielles. L'autorité affirmait que ces grands magasins ne respectaient pas le décret royal, puisque les remises étaient supérieures à ce qui était prévu dans le décret royal. Ces magasins ont donc été attaqués pour des raisons de pratiques anticoncurrentielles et en vue de préserver la concurrence aux termes de l'article 7 de la loi espagnole sur la concurrence.

Un certain nombre de conditions doivent être respectées. Le dispositif ne doit pas amener de pratiques anticoncurrentielles, il ne doit pas y avoir d'entente, il ne doit pas y avoir de distorsion du

marché, quelle qu'en soient les modalités. On n'a constaté aucune perturbation majeure du marché dans la mesure où certaines librairies ne vendaient pas moins de livres. De plus, rien ne pouvait encourager les concurrents les moins efficients. On a dit que l'intérêt général était en jeu, mais le Tribunal a en fait rejeté cet argument, parce que les ventes de livres ont augmenté.

Le Président évoque ensuite l'expérience suédoise. La Suède est au cœur des débats parce qu'elle a non seulement aboli les prix imposés pour les livres en 1970, mais encore parce que cette décision a été soutenue par l'Autorité suédoise de la concurrence. On se trouve donc en présence d'un cas où l'Autorité de la concurrence a plaidé avec succès pour un changement. M. Jenny ajoute que la contribution suédoise présente une analyse assez large de ce qui s'est passé depuis la suppression des prix imposés du livre il y a vingt ans.

Mme Widegren (Suède) souligne qu'elle rend compte d'évolutions intervenues au cours des vingt dernières années, en fait depuis 1970. Il s'agit donc d'observations sur le marché suédois du livre durant une très longue période et cette longue rétrospective pourrait constituer un apport précieux pour les pays qui envisagent de prendre une telle décision. On trouvera également dans cette contribution les conclusions d'un certain nombre de commissions mises en place au fil des années par le gouvernement, ainsi que les observation d'associations d'éditeurs.

De façon générale, cette expérience a montré que les consommateurs avaient bénéficié d'une baisse des prix et d'un meilleur accès aux livres que cela n'avait jamais été le cas dans le passé. Ce phénomène s'explique par le fait que la structure du marché a aussi changé considérablement.

Cela étant, un certain nombre de librairies ont fermé et on se plaint dans les petites villes et communes de n'avoir que des librairies spécialisées ; il faut aller au supermarché ou dans des magasins qui vendent des biens de consommation courante pour trouver la littérature générale et les livres à succès.

Toutefois, en moyenne, on n'a pas assisté à un recul du nombre total de libraires. En fait, le secteur a suivi le recul général du nombre de commerces de détail. Il n'y a donc pas eu d'évolution divergente du secteur du livre par rapport à l'évolution générale de baisse du nombre de commerces de détail.

De nouveaux modes de distribution des livres sont apparus. Il s'agit principalement de sociétés de commande par correspondance, les clubs du livre, parce que la Suède comporte des zones très peu peuplées dans lesquelles la possibilité d'acheter des livres par des clubs constitue une amélioration de l'accès au marché.

Les ventes de littérature générale, à l'exclusion des livres scolaires, ont aussi considérablement augmenté, de 50 pour cent, de 1970 à 1990. Il est donc à tout le moins difficile d'affirmer que les Suédois lisent désormais moins de livres en raison de la suppression du système de prix imposés.

Les fonds des librairies n'ont pas diminué, sans doute grâce à l'aide de l'Etat dans ce domaine. La surface de vente des librairies a elle aussi augmenté en moyenne de façon considérable, à savoir de près de 35 pour cent. En conséquence, la Suède est dotée de surfaces de vente plus grandes et plus nombreuses. De plus, la concentration du marché en Suède n'a pas changé sur un an, tandis que le niveau général des prix a légèrement baissé ; toutefois, la concurrence sur le prix du livre est certainement plus intense d'autant qu'il y a désormais des chaînes de librairies réputées pratiquer des faibles prix.

Le Président donne ensuite la parole à la délégation française pour décrire la situation de 1981 où la Loi Lang préconisant les prix imposés du livre a été unanimement approuvée.

M. François Souty (France) introduit son exposé en rappelant qu'il existe une étude comparative du marché du livre et du marché du disque, qui fait apparaître les contrastes entre ces deux marchés. En ce qui concerne le livre, la loi Lang de 1981 prescrit l'application de prix imposés. Le droit de la concurrence s'applique de façon symétrique au mécanisme décrit précédemment par la délégation du Canada. Si l'on compare les marchés du livre et du disque, on constate trois caractéristiques propres qui distinguent ces marchés :

- premièrement, le livre n'a pas bénéficié de la même révolution technologique que le disque, avec l'apparition des disques compacts à la fin des années 1980.
- deuxièmement, les ouvrages imprimés subiront de plus en plus les effets de la concurrence par l'intermédiaire de l'Internet, du multimédia, ainsi que de systèmes informatiques personnalisés faisant appel aux disques compacts. (En termes de structure, pour la deuxième caractéristique, le marché du livre semble en fait statique alors que celui du disque semble dynamique. Stimulé par les progrès technologiques, le disque est devenu le principal actif culturel en France, devant les livres);
- troisièmement, la dimension culturelle semble aboutir à des tendances divergentes : en ce qui concerne la consommation culturelle des ménages de 1959 à 1994, les disques ont à l'évidence connu une expansion phénoménale, alors que les livres ont enregistré une évolution positive de 1959 à la fin des années 1980, avant que le marché ne se stabilise avec l'arrivée du "multimédia".

En ce qui concerne le marché du livre et l'objection culturelle, la Loi Lang entendait stimuler la diversité de l'offre en amont et en aval, donner la préférence au service de proximité et pour ce qui est de l'effet des prix imposés sur quinze ans, les statistiques françaises montrent que l'évolution du marché a correspondu aux attentes du législateur :

- pour ce qui est de l'offre en amont, à savoir les éditeurs, on a assisté à un mouvement assez important de concentration. Quatre pour cent des maisons d'édition détenaient en 1991 quelque 55 pour cent du marché ; de plus le grand nombre d'éditeurs n'a pas diminué (380 éditeurs en 1991, dix ans après l'introduction des prix imposés).
- Le deuxième trait caractéristique réside dans la pluralité de l'édition et de l'offre de livres qui constituait l'un des objectifs de la loi. On a assisté à une augmentation du nombre de titres publiés entre 1981 (25 602) et 1991 (39 492), mais on a observé une dérive à la hausse des prix. Pour ce qui est des parts de marché, la situation est assez stable. En revanche, le marché du disque est dynamique : les prix relatifs y baissent et la consommation d'enregistrements et de disques suit une pente fortement ascendante. En conséquence, dans le cas des disques et enregistrements, on se trouve en présence d'un marché très concentré et économiquement efficient (à l'échelle mondiale, on compte cinq producteurs de dimensions mondiales qui s'adjugent 80 pour cent du marché ; aucun n'est français). Quant aux disques de référence, ils représentent 80 pour cent du chiffre d'affaires.
- La troisième caractéristique est que le consommateur n'est pas mieux servi que dans le cas du livre, en dehors de la question du prix, puisque 70 pour cent des achats des consommateurs portent sur ce que l'on qualifie de fond de catalogue et qui représente 20 pour cent du chiffre d'affaires. En aval, 50 pour cent du marché provient des ventes des grandes surfaces, avec dix mille titres seulement, alors que les grands magasins multispécialistes et les chaînes de disquaires proposent une centaine de milliers de titres différents.

- Dernière caractéristique, il n'y a plus de petits disquaires. On se trouve désormais en présence d'un marché rationalisé, concentré, sur lequel les prix suivent une tendance durable à la baisse ; cela étant, les prix sont plus élevés de 30 pour cent que ceux du marché britannique. Le marché français du disque est très rentable, la marge nette des éditeurs d'enregistrements musicaux s'établissant à huit pour cent, ce qui est nettement supérieur à la moyenne des entreprises française qui est de un pour cent.

M. David Parker (Australie) explique que l'Australie n'a plus depuis longtemps de prix imposés pour les livres, les disques compacts et autres biens culturels. Les prix restent élevés sur le marché australien par rapport aux prix mondiaux. Après une analyse approfondie, on a conclu que l'on ne pouvait pas attribuer ces différences de prix à des différences d'imposition ou à des économies d'échelle, etc.. Pour l'essentiel, le bilan fait apparaître que la suppression des prix imposés n'a pas suffi à introduire les prix mondiaux en Australie et donc qu'il s'agit d'une condition nécessaire, mais pas suffisante.

On estime que la cherté des prix australien est imputable à un problème de droits de propriété intellectuelle. Ce problème réside dans le fait que la loi australienne, comme celle de nombreux pays, institue une protection contre les importations parallèles, à travers un régime de distribution qui prévoit des droits de monopole à l'importation de biens faisant l'objet de droits d'auteurs ; ces droits de monopole isole juridiquement pour l'essentiel le marché australien vis-à-vis du marché mondial, ce qui permet des discriminations par les prix et génère un bénéfice de monopole.

Actuellement, l'Australie étudie la question et s'interroge sur l'introduction éventuelle d'un amendement de la loi australienne dans ce domaine.

En outre, M. Parker souligne que le Trésor est très favorable à la protection des droits de propriété intellectuelle. Le problème tient à l'existence d'une limitation des importations parallèles qui va de pair avec un monopole des importations. L'idée force du plaidoyer du Trésor réside dans la notion de défaillance du marché ; le Trésor se demande où réside la défaillance qui impose un droit de monopole pour l'importation et pour la distribution. Le Trésor convient qu'il est normal d'avoir un monopole en matière de propriété intellectuelle pour la production ou la création. Cela étant, la distribution est un marché en aval. Or, on ne constate pas de défaillance manifeste du marché de la distribution d'un bien quelconque. Pourquoi dès lors avoir un droit de monopole sur la distribution de matériel soumis aux droits d'auteurs.

Dans ce cadre, l'argument doit être que les deux marchés sont si étroitement liés que l'on peut justifier une limitation de la concurrence et de la distribution en raison d'une défaillance du marché au stade de la production et que cette défaillance provient du piratage, d'où la nécessité d'une limitation des importations pour empêcher ce phénomène.

M. Parker ajoute qu'il est certainement vrai que la limitation des importations facilite la détection des piratages, mais la question est de savoir si c'est la meilleure voie. Cette limitation ne garantit certainement pas la détection du piratage. Existe-t-il un meilleur moyen que l'instauration d'un monopole qui aurait moins d'effets en termes de segmentation du marché et de profits de monopole. L'Australie estime qu'il faut introduire un autre argument dans le débat : a-t-on d'autres solutions ? Peut-on mettre en œuvre d'autres mécanismes de détection, des mécanismes de notification, etc. ?

En ce qui concerne les engagements internationaux, la position consiste à considérer que l'Accord sur les ADPIC ne s'applique pas aux droits de distribution. De plus l'accord négocié en décembre, à savoir le Traité sur le droit d'auteur de l'Organisation mondiale de la propriété intellectuelle,

ne prévoit pas spécifiquement de droit de distribution. Ce droit a été proposé, mais tous les pays n'y ont pas souscrit. C'est un problème à l'étude en Australie.

Le représentant du BIAC présente un document de l'International Association of Buying and Marketing Groups. Cette association conclut que le commerce de détail est très favorable à certaines exemptions dans le cadre de la législation européenne, notamment lorsqu'elle traite de la publicité, etc. Cette association demande en outre qu'il n'y ait pas de discrimination sur le marché à l'égard des mécanismes de coopération des petits détaillants indépendants.

De façon générale, le BIAC est très satisfait de l'analyse économique figurant dans le récent document européen sur les restrictions verticales et notamment de la conclusion qu'on ne peut pas considérer que les clauses individuelles ou les différents types de restrictions verticales ont en soi un effet négatif ou positif sur la concurrence ou l'intégration. De plus, il est intéressant de constater que cette analyse économique n'établit pas de véritable différence entre les restrictions portant ou ne portant pas sur les prix. Enfin, le BIAC se réjouit d'observer que dans cette analyse économique, on fait référence aux nouveaux développements provenant des progrès des technologies de l'information.

Le BIAC espère que cette analyse économique va se pencher plus attentivement sur le régime actuel en Europe, qui constitue un carcan. Dans ces nouveaux règlements sur les exemptions en bloc, il convient de permettre l'imposition d'un prix maximum à deux niveaux.

Le délégué des Etats-Unis évoque l'affaire récente concernant American Cyanamid dans laquelle cette société avait deux programmes de remises. Ces programmes faisaient appel à des accords écrits proposant aux distributeurs des rabais substantiels s'ils vendaient des produits chimiques de protection des récoltes fabriqués par American Cyanamid au moins à un prix minimum spécifié. La FTC a conclu que les distributeurs ne faisaient aucun bénéfice s'ils vendaient en-dessous des prix minimum et que ce cas ne présentait en fait aucune différence avec celui très récent des Seven Circuit traité par le juge Posner. Dans cette dernière affaire, le juge avait conclu que les distributeurs qui ne réalisaient aucun bénéfice s'ils vendaient au-dessus d'un prix maximum conseillé entraient dans le cadre d'un système illégal de prix imposés et il a été amené à s'interroger sur le bien fondé de la loi. Il semble donc que l'une des vertus de la loi sur les prix imposés, non pas la *seule* vertu, mais *une* vertu réside dans le fait qu'il faut tracer des lignes de démarcation claires et envoyer des indicateurs clairs aux conseillers, parce que le conseil dans ce domaine des restrictions est généralement très délicat. Et c'est ce que la FTC s'efforce de faire. Cela facilitera le travail de conseil dans l'avenir.

Le délégué du Royaume-Uni explique que la loi britannique interdit les prix imposés à caractère restrictif, mais qu'il y a actuellement deux exemptions juridiques vis-à-vis de cette interdiction. La première couvre les livres et l'autre les médicaments délivrés sans ordonnance.

En ce qui concerne les livres, l'exemption existe depuis 1962 mais on peut s'attendre à sa suppression prochaine. Au début de janvier 1997, s'est tenue à la Restrictive Practices Court, les dernières auditions sur la suppression de l'exemption. Cette audition a duré deux semaines. Elle a bénéficié d'un peu de couverture de presse, notamment parce qu'il y avait quelques auteurs en vue appelés à déposer devant la cour. On attend encore sa décision.

Dans la pratique, sur le front du livre, bien que le Royaume-Uni soit très soucieux de mettre un terme aux exemptions réglementaires, le fonctionnement effectif du Net Book agreement a pratiquement cessé en septembre 1995 lorsque la Publishers Association a indiqué qu'elle ne pouvait plus en respecter les conditions. En conséquence, cet accord n'a pas d'effet pratique depuis plus d'un an.

Pour ce qui est des médicaments délivrés sans ordonnance, l'exemption vis-à-vis de l'interdiction des prix imposés a été introduite en 1970 et là encore les autorités de la concurrence aimeraient y mettre un terme, mais il s'agit d'abord pour l'Office of Fair Trading de persuader la Restrictive Practices Court qu'il y a eu ce que nous appelons une "modification concrète de la situation" suffisante pour que le tribunal remette en cause cette exemption. Une autre audition interviendra plus tard dans l'année pour vérifier s'il y a bien eu modification concrète de la situation.

Au début de la discussion, des commentaires ont été formulés quant au fait que certaines des exemptions vis-à-vis des prix imposés ont été introduites à la suite de pressions ministérielles. Bien entendu, au Royaume-Uni, lorsque l'on se penche sur les exemptions actuelles à la fois sur les livres et sur les médicaments sans ordonnance, c'est dans le cadre de la Restrictive Practices Court, et non pas dans les ministères.

Le délégué du Royaume-Uni en vient ensuite aux questions soulevées dans le document du Secrétariat :

- Si les prix imposés ont été autorisés pour les livres et autres biens culturels, quels ont été les arguments décisifs pour prendre une telle décision ? Selon le délégué britannique, les exemptions actuelles sur les livres datent de 1962 et la Cour faisait reposer en 1962 ses arrêts sur la conclusion que sans le Net Book agreement il y aurait premièrement eu moins de librairies conservant des stocks et elles auraient été moins bien équipées. Deuxièmement, on a considéré qu'il y aurait des livres plus chers et troisièmement moins de titres publiés. Les arguments des défenseurs actuels du Net Book Agreement consistent à dire que ce dispositif assure la stabilité, réduit les risques de tous les intervenants. En outre, ils estiment que cela maintient les prix à un niveau inférieur au prix normalement facturé, et sert donc l'intérêt général du lectorat. Pour éviter toute ambiguïté, le délégué du Royaume-Uni ajoute que l'Autorité britannique de la concurrence n'accepte pas ces arguments en faveur du Net Book Agreement.
- Si les livres ne s'étaient pas vu octroyer une exemption, quels auraient été les arguments contre cet octroi ? Le Directeur général de l'Office of Fair Trading a présenté les arguments suivants à la cour : premièrement, il y a eu une modification du processus d'impression et de publication qui s'est traduite par une baisse sensible du coût de production des livres ; on a assisté à une croissance des chaînes de grandes librairies, et de deux d'entre elles en particulier, qui a accru le nombre de librairies ayant un fond important ; la croissance enregistrée par les grossistes en livres a permis d'offrir une livraison rapide et des services de commandes adaptés aux besoins des petites librairies ; il y a eu en outre une évolution des conditions de l'offre dans lesquelles les libraires pouvaient renvoyer leurs invendus aux éditeurs ; enfin, dernier facteur évoqué, la décision de la Publishers Association à l'époque de ne pas appliquer cet accord.
- Quels facteurs ont abouti à l'effondrement du Net Book Agreement au Royaume-Uni et quels en ont été les répercussions ? On admet généralement que cet effondrement est venu dans une large mesure des tentatives des grandes librairies de le violer, puis par la décision d'un certain nombre de grands éditeurs de ne plus le soutenir. Malheureusement, du fait de l'effondrement trop récent de l'accord (il y a un peu plus d'un an), il est encore trop tôt pour faire une analyse définitive de ses effets. Toutefois, on dispose de certains indices quant à la situation et les grandes librairies se sont lancées dans des opérations de remise ou de promotion sur les best-sellers et les nouveaux titres bien que le nombre de titres concernés soit assez limité. L'effet produit sur le prix des ouvrages de moins grande diffusion est plus difficile à cerner. Les études entreprises sur ce sujet indiquent que le prix de ces titres a en général progressé plus

vite que la hausse des prix de détail en général , mais aussi qu'il a progressé plus vite que les prix de détail avant le Net Book Agreement sans que l'on puisse établir une relation de cause à effet. Jusqu'ici, on ne dispose guère de preuves d'une réduction du nombre de titres publiés, même si là encore, il est trop tôt pour ce prononcer parce que la plupart des publications en cours de préparation ont été planifiées avant la fin du Net Book Agreement. Enfin, en ce qui concerne le nombre de librairies, il semble pratiquement inchangé, même s'il y a pu avoir une modification de leur répartition, les chaînes de librairies, les grandes librairies connaissant une expansion, alors que le nombre de petites librairies diminue.

- Peut-on parler de conflit entre les autorités de la concurrence et les autorités culturelles en ce qui concerne les prix imposés des livres ? Il n'y a pas eu de conflit dans ce domaine. Le problème ne s'est pas posé. L'Autorité de la concurrence s'y est efforcée.

- Envisage-t-on au sein du gouvernement de réviser les dispositions actuelles du droit de la concurrence en ce qui concerne les prix imposés ? Nombreux sont ceux qui savent qu'au Royaume-Uni, on a travaillé depuis de nombreuses années sur la réforme des textes consacrés aux accords restrictifs et que l'on dispose désormais d'un projet de loi visant à introduire une interdiction correspondant en gros aux principes de l'article 85. Aucun gouvernement n'a encore trouvé où faire figurer ce texte dans les travaux du parlement, bien qu'il y ait un projet de loi. Ce projet actuel prévoit l'interdiction des prix imposés. Il propose cependant d'en exempter certaines ententes verticales. Quelle que soit la forme d'entente verticale qui pourrait être exclue, on se trouvera en présence avec les nouvelles dispositions d'une interdiction *per se* des accords de fixation des prix et des prix imposés.

Le délégué de la Suisse rappelle que son pays s'est doté d'une nouvelle loi sur les ententes et les pratiques restrictives. Lors du débat au parlement sur le projet de loi, une proposition a été faite qui visait à inscrire dans la loi le principe selon lequel le champ de la culture devait bénéficier d'un certain nombre de traitements spécifiques. Cette proposition a été rejetée par la grande majorité de la chambre haute et de la chambre basse. En d'autres termes, il n'est pas possible *per se* d'attribuer à l'exemption culturelle le statut de clause d'exemption. Dans ce domaine, la position était extrêmement claire.

S'agissant de la Suisse alémanique, la population est soumise à un dispositif qui couvre la production et la distribution de livres en langue allemande. Or, cet accord s'étend à l'Allemagne et l'Autriche. A cet égard, on ne sait pas encore si l'on obtiendra un changement d'attitude des éditeurs allemands, car bien entendu la Suisse n'est pas un marché très important pour eux. Des discussions ont été engagées avec les éditeurs allemands qui ont consenti à une modification des prix. Il sera très intéressant de connaître les résultats de ce qui se fait actuellement à Bruxelles ainsi que la solution du problème entre l'Allemagne et la Suisse, dans la mesure où la situation de la Suisse va dépendre de ces résultats.

S'agissant de la Suisse romande, la situation est complètement différente. Il n'y a pas de prix de détail imposés et les prix varient entre les grandes chaînes de librairies et les petites librairies. Une proposition a été formulée au parlement par un député de gauche, mais elle n'a pas suscité de réponse. Le parlement n'a pas repris cette proposition. C'est une situation intéressante parce qu'elle montre que chez les voisins d'un pays qui affirme que la loi Lang a produit des effets très positifs, la Suisse romande devrait être dans une situation désastreuse, ce qui n'est pourtant pas le cas.

M. Souty (France) souligne qu'un certain nombre d'aspects doivent être pris en compte dans l'analyse du lien qu'il convient d'établir entre l'impact positif pour la concurrence des accords de restriction verticale portant sur les prix et la structure du marché. Quatre aspects ont ainsi été évoqués : l'aspect culturel et l'aspect technologique, processus de production, ainsi que les services fournis aux

consommateurs. Il faut y ajouter un cinquième aspect lié à la nature des relations verticales des deux composantes du marché des disques et des enregistrements sonores (en amont et en aval).

NOTE

1. La Cour Suprême a récemment décidé que la règle *per se* ne s'appliquerait plus à la fixation de prix maximum.