JUDGMENT OF THE COURT
10 January 1985 *

In Case 229/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel [Court of Appeal], Poitiers, for a preliminary ruling in the proceedings pending before that court between

Association des Centres distributeurs Édouard Leclerc, Paris,
SA Thouars distribution et autres, Sainte-Verge,

and

Sàrl 'Au blé vert', Thouars;
Georges Lehec, Auxerre;
SA Pelgrim, Thouars;
Union syndicale des libraires de France, Paris;
Ernest Marchand, Thouars;
Jeanne Demée, née Palluault, Thouars,

on the interpretation of Articles 3 (f) and 5 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and C. Kakouris, Presidents of Chambers, A. O'Keeffe, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: J. A. Pompe, Deputy Registrar

gives the following

* Language of the Case: French.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

1. Facts and procedure

1.1. French Law No 81-766 of 10 August 1981 provides that:

All publishers or importers of books are required to fix a retail selling price for the books that they publish or import;

Retailers must sell at an effective retail selling price of between 95% and 100% of the price fixed by the publisher or the importer; that rule does not apply in respect of associations which facilitate the purchase of school books, or to books purchased by the State, local authorities, educational establishments or vocational training or research institutions, trade unions, works councils or libraries open to the public;

Retailers may sell at prices lower than those fixed in accordance with that rule books published or imported more than two years previously, the last delivery of which took place more than six months previously;

If a book is published with a view to being distributed by sales on a commission basis, subscription or mail order more than nine months after the first edition was put on the market, the price may be fixed by the publisher at his own discretion; otherwise the price must be fixed at a level no lower than that of the first edition;

Where books published in France are re-imported, the retail selling price fixed by the importer is to be no lower than that fixed by the publisher.

Decree No 81-1068 of 3 December 1981 adopted in implementation of the above-mentioned law states that the principal distributor of the imported books, who as such must comply with the requirements of the Law of 21 June 1943, is deemed to be the importer within the meaning of the decree. Under that law all publishers or natural or legal persons who act in their stead (principal distributors of imported works) must deposit a copy with the legal-deposit department of the Ministry of the Interior.

1.2. The 'Centre Leclerc' supermarkets are retail outlets which initially sold groceries but have extended their activities to *inter alia* the sale of books. They have the reputation of selling goods at low prices.

SA Thouars distribution, which is a member of the Association des Centres distributeurs Édouard Leclerc, sold books at selling prices lower than those allowed under the above-mentioned rules. A number of booksellers and the Union syndicale des libraires de France [French booksellers association] brought an action before the President of the Tribunal de grande instance [Regional Court], Bressuire, adjudicating in commercial interlocutory proceedings, against SA Thouars distribution, which issued a third-party notice against the Association des Centres distributeurs Leclerc. The President of that court prohibited the Centre Leclerc in question from selling books at prices which did not conform to the Law of 10 August 1981 and fixed periodic penalty payments for any breaches of that prohibition.

1.3. The Association des Centres distributeurs Édouard Leclerc appealed to the Cour d'Appel, Poitiers, which took the view that it was necessary to consider whether the Law of 10 August 1981 was likely to infringe Community rules on the free operation of competition in the Common Market and whether the considerable restrictions which that law imposes on competition had the effect of distorting competition.

By judgment of 28 September 1983 the Cour d'Appel, Poitiers, therefore set aside the interim orders made by the President of the Tribunal de grande instance, Bressuire. It stayed the proceedings and, pursuant to Article 177 of the EEC Treaty, referred the following question to the Court of Justice for a preliminary ruling:

Must Articles 3 (f) and 5 of the Treaty of 25 March 1957 establishing the European Economic Community be interpreted as prohibiting the setting-up in a Member State, by law or by regulation, in respect of books published in that Member State and books imported into that State, in particular from other Member States, of a system which compels retailers to sell the books at the price fixed by the publisher or the importer without being able to reduce that price by more than 5%.

1.4. The judgment of the Cour d'Appel, Poitiers, was received at the Court Registry on 10 October 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Association des Centres distributeurs Édouard Leclerc, represented by Philippe Jousset of the Laval Bar, by the French Government, represented by Jean-Paul Costes on behalf of the Secretary-General of the Comité interministériel pour les questions de Coopération économique européenne and by the Commission of the European Communities, represented by Daniel Jacob, a member of its legal department, assisted by Nicole Coutrelis.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the parties in the main proceedings, the French Government and the Commission to reply in writing to certain questions.

2. Written observations submitted to the Court

2.1. The *Association des Centres distributeurs Édouard Leclerc* points out that traders wishing to adopt the sales method developed by Édouard Leclerc give a contractual undertaking never to fix a profit margin higher than that recommended by the Association. For the sale of books and similar articles that margin is set at 18%. The Law of 10 August 1981 deprives that clause limiting profit margins of its effect.

That law is incompatible with the EEC Treaty because it leaves retailers only a very narrow margin within which there can be competition as regards prices and because it places considerable restrictions on competition in relation to imported books. Article 3 (f) of the EEC Treaty applies to any measure that restricts effective competition whether by abolishing it, limiting it or modifying it; evidence of this is provided *inter alia* by Article 85. Pursuant to Article 5, Member States too are required to comply with Article 3 (f). A measure severely restricting price competition jeopardizes the attainment of the objectives of the Treaty. In support of its view, the Association des Centres distributeurs Leclerc cites the Commission Decision of 25 November 1981 in the matter of VBBB/VBVB (Official Journal L 54 of 25 February 1982, p. 36) and the judgment of the Court of 25 October 1977 (Case 26/76 *Metro SB-Großmärkte* v *Commission and SABA* [1977] ECR 1875).

The fixing by the national authorities of a minimum price for books is also contrary to Article 30 of the Treaty. Since the Law of 10 August 1981 allows the publisher or the importer to fix the retail selling price, it is easy for a French publisher who also imports books to place the works that he publishes in a privileged position by comparison with those that he imports. The result is a monopoly which restricts trade within the Community. Thus a French bookseller who wishes to order direct from a Belgian publishing house is forced to buy at the price fixed by a French importer, without there being any possibility of competition as regards prices. That state of affairs is particularly flagrant with regard to comic books and practical handbooks (books on cookery, hunting, do-it-yourself etc.) which represent 20% of the books sold by the Centre Leclerc supermarkets and which are often printed in Belgium or Luxembourg. Moreover the Leclerc supermarkets near the frontiers are unable to offer competitive prices to their foreign customers and thereby to respond to competition.

The Association des Centres distributeurs Édouard Leclerc takes the view therefore that the Law of 10 August 1981 is incompatible with Article 3 (f) in particular of the EEC Treaty, and that it distorts competition within the Community; it constitutes a measure having an effect equivalent to quantitative restrictions on imports and its adoption constitutes an infringement of Article 5 of the EEC Treaty.

2.2. The *French Government* points out that the Law of 10 August 1981 merely brings the French system of book prices more closely into line with that which exists in all the countries of the Community and which had been applied in France from the beginning of the 20th century until 1979. The decision of a number of supermarkets in the 1970's to break into the book market with a policy of systematic discounts led in 1979 to the abandonment of the single price system. The result was disruption of the publishing sector as a whole, which was unsatisfactory for the publishers, the retailers, and the public. That disorganization led France to reintroduce the statutory system of a single fixed price for books.

The need for a special mechanism for book prices, whether set up by law or regulation by inter-trade agreements and commercial practices, is recognized in all Member States and in most Western countries. It was reviewed by the Council of Europe which considered, in Recommendation No 930 of 8 October 1981, that a system of fixed prices for books constituted the best means of ensuring the presence on the market of a large number of books and a large number of retail outlets. The Commission itself raised no objections to that situation, which it recorded in its 12th report on competition policy in 1982.

The French Government emphasizes that books are cultural works. They are irreplaceable as the expression and the pre-eminent medium of intellectual reflection and literary and poetic creativity. The continuing existence of publishers of works of reflection and creativity and the intermediaries whose task it is to bring such works to the public's notice by increasing their awareness, by informing them and by giving them advice, must be safeguarded. Giving competitive forces free rein is certainly not the most appropriate and effective policy for the book sector.

Moreover, as a result of the language factor, the linguistic market does not altogether correspond to the Common Market.

Publishers and intermediaries were directly threatened by the freedom of prices which had existed after 1979. That freedom gave supermarkets a position of superiority in the sale of books. Their policy of reduced profit margins requires a rapid turnover of stock and therefore excludes works of reflection

and creativity. By selling huge quantities of a limited number of titles, supermarkets were in a position to impose their choice on publishers and to influence the latter's policy. There was a danger that works of reflection and creativity, which are not available in supermarkets, would disappear, to be replaced by books for light reading. For financial reasons small publishers of cultural works were not able to stand up against the negotiating power of the distributors. Specialized bookshops were incapable of competing with the prices charged by supermarkets and were deprived of sales of works involving no commercial risk. They too were therefore in danger of disappearing. The organization of the trade solely in the terms of the objective of selling books at the lowest prices cannot guarantee the public a real variety of choice such as exists in France, where a range of some 240 000 titles is available and the annual production exceeds 25 000 titles of which 12 000 are new publications.

Since Articles 3 (f) and 5 of the Treaty lay down only general principles, it is not necessary to interpret them in this instance. The French legislation on book prices must be assessed exclusively in the context of Articles 30 *et seq.* of the Treaty. Each Member State retains the freedom to lay down rules governing its internal trade and, therefore, there can be no objection to adopting rules governing the retail sale of books. The Law of 10 August 1981 does not confer any power on the State as regards the actual fixing of prices. Publishing houses remain entirely at liberty to introduce competitive prices if they so wish. The rule that retail discounts may not exceed 5% is not a restriction on competition inasmuch as competition between book retailers must be assessed in the first place in relation to the services provided, such as the number of titles available, the advice given to the public, the possibility of ordering single copies of a title sought — since it is not possible to stock the full range of more than 240 000 titles — and the assistance given in bibliographical research. Having regard to those services, price cannot be regarded as the decisive factor. In permitting discounts of up to 5% for all transactions and larger discounts in favour of the bodies listed and also larger discounts on books published or imported more than two years previously of which there has been no delivery in the preceding six months, the law also allowed a degree of flexibility. Thus the law had the effect of increasing the competition as to the quality of all the services provided and that is in the public's interest.

The legislation in question does not impose any restriction on imports of books since national books and imported books are accorded the same treatment. The prices of imported books are determined by the person deemed to be the importer, that is to say the person who completes the legal-deposit formalities, at his absolute discretion. Thus the Law of 10 August 1981 has a completely neutral impact on trade within the Community and it does not have the effect of promoting the marketing of national products. The Court has held (judgment of 7 June 1983, Case 78/82 *Commission* v *Italy* [1983] ECR 1955 (tobacco); judgment of 16 November 1977, Case 13/77 *GB-Inno-BV* v *ATAB* [1977] ECR 2115) that national measures regulating the fixing of prices which apply without distinction to domestic and to imported products do not in themselves constitute a measure having an equivalent effect to a quantitative restriction if they do not affect the freedom of producers to fix the retail prices of their products. The effect of such measures is usually limited exclusively to the State concerned.

Books published in France and re-imported come within the terms of the fifth paragraph of Article 1 of the Law of 10 August 1981 which is intended to ensure a coherent approach and to avoid any abuse by re-importing books previously exported. That

objective is covered by the tenth recital in the preamble to Commission Directive No 70/50/EEC.

The law has no effect on the exportation of books to other Member States. Publishers are entirely free to fix their export prices as they see fit and the distributors in other countries fix their prices on the basis of the rules which are in force there.

In consequence the French Government takes the view that the provisions of the Treaty, and in particular Articles 30 *et seq.*, must be interpreted as meaning that a national measure applicable without distinction to books published in the Member State and to books imported from other Member States that compels retailers to sell books at the price fixed by the publisher or the importer and prohibits them from offering discounts on that price of more than 5%, does not constitute a measure having an effect equivalent to a quantitative restriction.

2.3. The *Commission* notes that Article 3 (f) of the EEC Treaty refers to the task and the activities of the Community and does not impose any obligations on Member States; it does not in itself constitute a directly applicable rule of law. It is the precursor of the specific provisions of Articles 85 to 94 and is not relevant if those articles are not applicable Since the measure in question is a State measure which does not derive from the action of undertakings, Article 3 (f) is not relevant to the proceedings. Similarly Article 5 does not contain any rule imposing a specific obligation. As regards competition it refers by implication to Article 85 *et seq.* Although in that context a State might conceivably be held at fault for encouraging or facilitating unlawful conduct or for increasing the negative effects of such conduct, in all those cases there is an agreement between undertakings or unlawful conduct. In the absence of such an agreement or conduct, Article 5 may not be relied on. Moreover any measure adopted by a State of an economic nature has the effect of distorting competition. To take the view that Article 5 prohibits such measures is tantamount to asserting that States may no longer legislate on economic matters. Although it is not *a priori* impossible that national measures specifically intended to protect undertakings from the effects of competition may infringe Article 5 in conjunction with the rules on competition even without there having been any agreement or unlawful conduct on the part of the undertakings, in this instance it is not necessary to consider that hypothesis further, since no such exceptional circumstances have been cited.

On the other hand it is necessary to consider the provisions on the free movement of goods. The system of prices established by the Law of 10 August 1981 makes the retail selling price fixed by the publisher or the importer compulsory for all retailers. Taken as a whole it should therefore be regarded as a rule fixing (minimum and maximum) prices which applies without distinction to national and imported products. According to the case-law of the Court (judgment of 24 January 1978, Case 82/77 *van Tiggele* [1978] ECR 25; judgment of 6 November 1979, Joined Cases 16 to 20/79 *Danis* [1979] ECR 3327), it is not in itself a barrier to trade within the Member States.

However two provisions of the Law of 10 August 1981 lead to imported books being treated differently. The first is the fifth paragraph of Article 1 according to which 'where the imported books were published in France, the retail selling price fixed by the importer shall be no less than that fixed by the publisher'. That provision prevents importers of books that were published in

France and are being re-imported from giving consumers the benefit of potentially lower prices prevailing in another Member State. Secondly, pursuant to the fourth paragraph of Article 1 retailers must sell at an effective selling price of between 95% and 100% of the price fixed by the publisher or the importer. The main distributor of the imported books is deemed to be the importer so that the price is fixed by a single importer and any other importer is prevented from selling at lower prices.

It is thus established that there is a measure having equivalent effect. The grounds listed in Article 36 of the Treaty cannot be relied on to justify that measure, as the very wording of the provision shows. Moreover no account may be taken of any imperative requirements within the meaning of the judgment of the Court of 20 February 1979 (Case 120/78 *Rewe-Zentral* [1979] ECR 649) which may exist, in view of the fact that the provisions in question apply with different effect to national products and imported products.

In the alternative the Commission nevertheless considers whether there are any such imperative requirements in this case and it reaches the conclusion that the conditions laid down by the Court for reliance on such requirements, even if it were possible in this case, are in any event not satisfied. The Law of 10 August 1981 is allegedly justified in terms of the desire to protect literary creativity and to ensure the survival of the richness and diversity of culture embodied in books. Measures intended to promote books of cultural value are permissible, but it has in no way been established that the means chosen to attain that objective are appropriate and are the means that cause the least hindrance to trade. It is doubtful whether, in order to promote cultural books, it is appropriate to protect small retail outlets. The retail outlets for books in France include: 19 500 outlets where books are sold as a subsidiary line side by side with other products and which generally have a stock of only 200 to 300 books; 4 000 retail outlets where book sales represent approximately 40% of total turnover; and only 1 000 bookshops, generally in larger towns and cities, where the sale of books is the single main activity. In its report submitted to Parliament in June 1983 on the implementation of the Law of 10 August 1981, the Minister for Cultural Affairs listed a number of other measures intended to provide active support to the book sector. Even if it is desirable to protect small retail outlets, 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.

The Commission therefore proposes that, in answer to the question referred to the Court, it should be stated that Articles 3 (f) and 5 of the Treaty do not prohibit Member States from restricting the right of retailers to depart from the retail prices fixed by the producers; Article 30 must be interpreted as meaning that the obligation imposed on retailers by virtue of the provisions in question to charge a fixed price for the retail sale of books — with a discount allowed of up to 5% — constitutes a measure having an effect equivalent to a quantitative restriction on imports, which is prohibited by Article 30, in so far as, on the one hand, the retail price of books published in France and re-imported into that country must be fixed by the importer at a level which is no lower than that fixed by the publisher and, on the other hand, the importer of a book published in another Member State is required to conform to the retail selling price fixed by the principal distributor of that book.

3. Replies to the questions put by the Court

3.1. At the Court's request, the *French Government* produced the complete text of the Report of the Minister for Cultural Affairs, submitted to the French Parliament in June 1983, concerning the application of the Law of 10 August 1981.

The *Commission* produced an exchange of letters between it and the French Government concerning the compatibility of that law with Articles 30 and 36 of the EEC Treaty.

3.2.1. The *Commission* was asked whether Article 3 (f), viewed in the context of the Treaty and in particular in conjunction with Article 5, may be interpreted as prohibiting Member States from requiring commercial operators by law to act in a way which would be contrary to the rules on competition laid down in Articles 85 and 86 and which would not qualify for exemption under Article 85 (3), if the conduct in question were the subject of agreements between undertakings or derived from the practices of undertakings; if so, what criteria are to be applied in order to assess whether a resale price maintenance system for books which is applied pursuant to binding legislative provisions is compatible with a system ensuring that competition within the Common Market is not distorted. The Commission's answer was as follows:

Article 3 (f) of the Treaty is the precursor of the Chapter which lays down the rules on competition both for undertakings (Articles 85 and 86) and for Member States (Articles 90, 92, 93 and 94).

The obligations imposed on the Member States in order to ensure that competition is not distorted are set out in the rules concerning public undertakings and certain State aids. However, in the Commission's view, Article 3 (f) does not prohibit either the Community or the Member States from intervening in the free operation of the market; it does not prescribe a strict *laissez-faire* policy. The aim of the prohibitions which the Treaty imposes on Member States in order to ensure the free movement of production factors is not to deprive the Member States of all power to regulate such factors but to eliminate restrictions on imports and exports.

In addition to the prohibitions addressed to the Member States, the Treaty contains — in Articles 85 and 86 — prohibitions addressed to undertakings to ensure that they cannot do what Member States are prohibited from doing, namely obstructing the abolition of trade barriers. As the Court stated in its judgment of 5 April 1984 (Joined Cases 177 and 178/82 *van de Haar and Kaveka* [1984] ECR 1797), even though the prohibitions directed at Member States are complementary to those aimed at undertakings and are directed towards the same goal of the unity of the market, the objective, the scope and the conditions of application are different.

A State measure might in principle validly produce effects comparable to those of an agreement prohibited under Article 85. On the other hand, if Member States render ineffective the prohibitions imposed by the Treaty on undertakings, they are failing to fulfil their obligation under Article 5. That is the case:

Where a Member State prescribes, promotes or facilitates the conclusion of restrictive agreements or the abuse of a dominant position;

Where it increases the effects of such agreements or abuses by extending them to undertakings which are not parties thereto;

Or, finally, where exceptionally a State measure restricting competition is adopted with the specific intention of enabling undertakings to circumvent Articles 85 and 86 and where it cannot be claimed that it is in the public interest.

Apart from those three cases, Articles 3 (f) and 5 do not prevent Member States from prescribing conduct that would be contrary to the rules on competition if it was the subject of agreements between undertakings or derived from the practices of undertakings.

As far as those three cases are concerned, the criteria for assessing whether a State measure is compatible with Articles 3 (f) and 5 of the Treaty are the same as those set out in Article 85 (3).

3.2.2. The *Commission* states in addition that it had decided that certain aspects of the French system of book pricing might be incompatible with Article 30 and, therefore, on 17 April 1984 it sent the French Government a formal request for observations in accordance with Article 169 of the Treaty.

The Commission is also in the process of investigating the systems of fixing book prices in the Netherlands and in Belgium, but has not yet reached a final decision on whether to institute proceedings under Article 169. The Commission gave the following details of the practices prevailing in the book sector in other Member States:

In the *Federal Republic of Germany* the national legislation provides for *inter alia* a derogation for the book trade from the general prohibition on resale price maintenance clauses in distribution agreements. The majority of the publishers fix selling prices and the system also includes a clause according to which German books bought abroad must be sold at the prices originally fixed by the publisher; however, no fixed price is imposed on imported books.

In *the United Kingdom* resale price maintenance is regulated by the 'Net Book Agreement' and is authorized under an express derogation for books from the general rules on competition.

The same system of resale price maintenance also operates in *Ireland* for Irish books and applies to the sale of British books in Ireland.

In *Denmark* for the last 140 years, by virtue of a system resulting from a private agreement authorized by provisions derogating from the ordinary civil-law competition rules, the selling price of Danish books is fixed by the publisher and the price of foreign books by the main or exclusive importer.

In *Luxembourg* a system of fixed prices is in fact applied.

In *Greece* there are no exceptions to the general prohibition of resale price maintenance, even for the book sector.

In *Italy* there are no legal provisions concerning resale price maintenance which is therefore permitted; it is applied to books by virtue of a collective agreement between the Italian Publishers' Association and the Booksellers' Association.

In *Belgium* there is no general prohibition of resale price maintenance. A price agreement concluded by the Cercle Belge de la Librairie, a private association, for the French-speaking region is not in fact applied. A system established for the Dutch-speaking region by the Vereeniging ter Bevordering van het Vlaamsche Boekwesen was declared contrary to Article 85 by the

Tribunal de Commerce [Commercial Court], Brussels, and replaced by a collective system in the form of uniform general conditions of sale.

In *the Netherlands* the national competition rules allow for resale price maintenance on an individual basis and make the application of collective resale price maintenance subject to special derogations; one such special derogation has been accorded for the book trade. The Hoge Raad [Supreme Court] has declared the system unlawful on the basis of Article 85 in so far as it extends to re-importations from Belgium and in addition the Arrondissementsrechtbank of Harlem has stated that the collective system must not lead to a prohibition of parallel imports including re-importations.

As regards the agreement between the Vereniging ter Bevordering van het Vlaamse Boekwezen (Belgium) and the Vereeniging ter Bevordering van de Belangen des Boekhandels (Netherlands) which was the subject of the judgment of the Court of 17 January 1984 (Joined Cases 43 and 63/82 *VBVB* and *VBBB* v *Commission* [1984] ECR 19) the Commission is at present considering proposals made by the two associations with a view to complying with the Commission Decision of 25 November 1981.

3.3. In reply to the Court's questions, the Association des Centres distributeurs Édouard Leclerc and the French Government made the following observations on the view put forward by the Commission in its written observations that Article 30 of the Treaty prohibits measures stipulating that the retail selling price of reimported books must be fixed by the importer at a level no lower than that fixed by the publisher and that importers of books published in another Member State must conform to the retail selling price fixed by the principal distributor of those books.

3.3.1. The *Association des Centres distributeurs Édouard Leclerc* points out that the underlying idea of the economic interpenetration sought by the Treaty is that commercial operators in the various Member States must be able to compete with each other freely, without hindrance from State measures. Under the system established by the Law of 10 August 1981, the prices of foreign books are fixed by the importers who are operators already established on the French market but at a different stage in the marketing process to that of the publishers who are the direct competitors of French publishers. 'Inter-brand' competition does in fact exist in part of the book sector, namely in the case of practical handbooks (books on cookery and do-it-yourself, travel guide-books and so on) in respect of which the price is a major factor in determining the reader's choice. The fixing of the price of foreign books by importers and not by the publishers is likely to make it more difficult for books from the Common Market to penetrate the French market in significant quantities. In 1982 practical handbooks accounted for 9.5% of French imports of books from other Member States. Such books represent a significant proportion of the books sold in shops like the Centre Leclerc supermarkets.

The view expressed by the Commission in its written observations is nevertheless incomplete and inaccurate inasmuch as it is based on the hypothesis that, taken as a whole, the Law of 10 August 1981 must be regarded as a rule fixing prices applying without distinction to national products and imported products. The decisions of the Court concerning the fixing of minimum or maximum prices (the *Tasca, Danis* and *van Tiggele* cases) cannot be applied to that law since it contains no provision regarding the level of prices.

Contrary to what its title might suggest, the Law of 10 August 1981 is a law concerning competition in the French book trade. Competition is controlled by setting a derisory 5% limit on the margin of price competition, which is the most important

element in a system of free competition. The question referred to the Court of Justice by the Cour d'Appel, Poitiers, is in fact concerned with the interpretation of the rules on competition and not that of Article 30, to which the Commission's proposed reply is confined.

In the light of the rules on competition, specifically Article 85, the system set up in France is a collective system of resale price maintenance with international and national implications; the national implications themselves are, however, also liable to affect trade between the Member States inasmuch as the national market is divided up by a number of vertical distribution agreements covering the whole of the French market. Such a system is contrary to Article 85 (1) and does not qualify for exemption under Article 85 (3). The national law imposing such a prohibited system therefore constitutes an infringement of Article 5 in conjunction with Article 3 (f) of the Treaty.

3.3.2. The *French Government* points out that the provisions of the Law of 10 August 1981 which the Commission considers incompatible with Article 30 of the Treaty are absolutely necessary to ensure the effectiveness of that law and cannot be contrary to Article 30. The provision concerning re-importations is an auxiliary clause which cannot be separated from the text as a whole, and without which the system of fixed prices for books published and marketed in France would lose its effectiveness. Without that safeguard clause a French retailer, in particular in border areas, could obtain supplies from foreign wholesalers and sell re-imported books at less than the price prevailing in France. The intra-Community trade involved in such a transaction would be merely illusory and in reality it would pursue only the purely internal objective of evading the effects of the French price-fixing rules. It is difficult to see by what other means it would be possible to ensure the coherence of the rules, which are not contested in principle. Even if the detailed rules on fixing the prices of books published in another Member State are considered to apply differently to imported works and to those published and marketed in France, that difference of treatment is not such as to hinder intra-Community trade. In making the persons charged with effecting the legal deposit of an imported book responsible for fixing the price, the legislature merely sought a reasonable and appropriate equivalent to the system applied within French territory, since it would be difficult to impose obligations outside French territory on foreign publishers. In practice, publishers who regularly export books to France rely on a principal importer, which may be a distributor, a representative office or a French subsidiary and which they authorize to carry out their marketing policy.

In addition the French Government produces statistics of imports of books from EEC countries in 1982 showing that imports of books published in other Member States represent 4.88% of the total turnover of French publishers; that proportion becomes even smaller if allowance is made for the fact that the figure for imports includes in part the cost of marketing and distribution in the countries of origin which is not the case for the turnover of French publishers.

4. Oral procedure

At the hearing on 27 June 1984 the following persons presented oral argument and replied to questions put by the Court: Mr Jousset, for the Association des Centres distributeurs Édouard Leclerc; Mr Guillaume, for the French Government; and Mrs Coutrelis and Mr Jacob, for the Commission of the European Communities.

The Advocate General delivered his opinion on 3 October 1984.

Decision

1 By a judgment of 28 September 1983, which was received at the Court on 10 October 1983, the Cour d'Appel [Court of Appeal], Poitiers, referred a question to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of various rules of Community law, in particular the provisions relating to free competition in the Common Market and Articles 3 (f) and 5 of the EEC Treaty, so as to enable it to assess the compatibility with Community law of national legislation requiring all retailers to abide by the selling prices for books fixed by the publisher or importer.

2 The question was raised in proceedings between Association des Centres distributeurs Édouard Leclerc (hereinafter referred to as 'Leclerc') and Thouars distribution, part of the Leclerc Group, on the one hand, and various booksellers in Thouars and Union syndicale des libraires de France [French booksellers' association], on the other. The dispute concerns the need to comply with the retail prices for books fixed under Law No 81-766 of 10 August 1981 on book prices (Journal Officiel de la République Française of 11 August 1981).

3 Leclerc has retail outlets throughout France which initially sold groceries but have extended their business to cover other products including books. The outlets have the reputation of charging low prices. It appears that Thouars distribution, like other distributors in the Leclerc group, has sold books at prices undercutting the prices fixed under the aforementioned legislation.

4 Under the Law of 10 August 1981 all publishers or importers of books are required to fix retail prices for the books which they publish or import. Retailers must charge an effective price for sales to the public of between 95% and 100% of that price. The law exempts certain private and public entities, such as libraries and educational establishments, from having to pay that price and it authorizes clearance sales, subject to certain conditions. If the provisions of the law are contravened competitors and various types of association may seek an injunction or claim damages; criminal proceedings may also be brought.

5 As far as imported books are concerned, the last paragraph of Article 1 of the law provides that 'where imported books were published in France the retail price fixed by the importer shall be no less than that fixed by the publisher'. Decree No 81-1068 of 3 December 1981 (Journal Officiel de la République Française of 4 December 1981), issued pursuant to the Law of 10 August 1981, further provides that the principal distributor of imported books who must comply with the requirement laid down in Article 8 of the Law of 21 June 1943 — namely the requirement that a complete copy must be deposited with the Ministry of the Interior — is deemed to be the importer.

6 In proceedings commenced by several booksellers, the President of the Tribunal de grande instance [Regional Court], Bressuire, ordered Thouars distribution to make its retail prices for books comply with the Law of 10 August 1981 or incur penalty payments and declared this order also to apply to Leclerc, against which a third-party notice had been issued.

7 On appeal, the Cour d'Appel, Poitiers, took the view that in order to resolve the dispute it was necessary to ascertain whether the Law of 10 August 1981 was such as to infringe the Community rules on free competition in the Common Market since it considerably restricted competition as regards both books published in France and imported books, and since booksellers in other Member States were not subject to such restrictions. Accordingly, the Cour d'Appel referred the following question to the Court of Justice for a preliminary ruling:

'Must Articles 3 (f) and 5 of the EEC Treaty be interpreted as prohibiting the setting-up in a Member State, by law or by regulation, in respect of books published in that Member State and books imported into that State, in particular from other Member States, of a system which compels retailers to sell the books at the price fixed by the publisher or the importer without being able to reduce that price by more than 5%?'

8 Article 3 (f) of the EEC Treaty sets out one of the general principles of the Common Market, which are applied in conjunction with the relevant chapters of the Treaty devoted to their implementation. It envisages 'the institution of a system ensuring that competition in the common market is not distorted', a general objective which is enlarged on by, *inter alia*, the rules on competition set forth in

Chapter 1 of Title I of Part Three of the Treaty. The second paragraph of Article 5 of the Treaty requires Member States to 'abstain from any measure which could jeopardize the attainment of the objectives' of the Treaty. Thus the question referred by the national court, concerning the compatibility of legislation of the type described above with Articles 3 (f) and 5, seeks to establish whether that legislation accords with the principles and objectives of the Treaty and with those provisions of the Treaty concerned with their detailed implementation.

9 Articles 2 and 3 of the Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not distorted. That objective is secured *inter alia* by Article 30 *et seq.* prohibiting restrictions on intra-Community trade, to which reference was made during the proceedings before the Court, and by Article 85 *et seq.* on the rules on competition, which it is appropriate to consider first.

The application of Articles 3 (f), 5 and 85 of the EEC Treaty

10 Leclerc maintains that the French Law on book prices does not introduce State price controls but rules restricting price competition, since the prices are freely fixed by publishers and importers. Hence the law should be considered first from the point of view of the rules on competition laid down in the Treaty. In that regard, Leclerc submits that the law establishes a collective system of price maintenance which undertakings are precluded from establishing by Article 85 (1) of the Treaty and which is contrary to the system of undistorted competition in the Common Market which Article 3 (f) designates as one of the aims of the Community. The second paragraph of Article 5 of the Treaty therefore imposes on Member States an obligation to refrain from adopting such measures, since they are likely to render Article 85 ineffective by enabling private undertakings to circumvent the constraints embodied therein and are thus likely to jeopardize the attainment of one of the aims of the Treaty.

11 The French Government considers that Articles 3 (f) and 5 of the Treaty merely lay down general principles and do not in themselves give rise to obligations. Article 85, on the other hand, applies, in its view, only to certain practices on the part of undertakings and cannot be construed, even in conjunction with Articles 3 (f) and 5, as prohibiting Member States from adopting measures which might have

an effect on free competition. The limitation of price competition at retailer level — price competition at publisher level being moreover free — should be examined in the light of Article 30 *et seq.*, the only potentially relevant Treaty provisions in this case.

12 The Commission considers that Articles 3 (f) and 5 cannot be interpreted in such a manner as to deprive Member States of all power in the economic sphere by prohibiting them from interfering with free competition. Since Article 85 concerns only practices on the part of undertakings and not State measures, it would only be the exceptional case — where a Member State required or facilitated the conclusion of prohibited agreements, heightened their impact by extending them to third parties or pursued the specific aim of enabling undertakings to circumvent the Community competition rules — that the adoption of such State measures could constitute a failure to fulfil the obligations arising under the second paragraph of Article 5 of the Treaty. The Commission therefore considers that the compatibility with the Treaty of legislation of the type in question is to be considered solely in the light of Article 30 *et seq.*

13 In accordance with the aim laid down in Article 3 (f) of the Treaty, the following are incompatible with the Common Market and prohibited by virtue of Article 85 (1) of the Treaty: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions. Thus, Article 85 (1) covers agreements, decisions and concerted practices in restraint of competition between undertakings, subject to exemptions granted by the Commission under Article 85 (3) of the Treaty.

14 Whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (cf. judgment of 13 February 1969 in Case 14/68, *Wilhelm* v *Bundeskartellamt*, [1969] ECR 1, and judgment of 16 November 1977 in Case 13/77, *Inno* v *ATAB*, [1977] ECR 2115).

15 However, legislation of the type at issue does not require agreements to be concluded between publishers and retailers or other behaviour of the sort contemplated by Article 85 (1) of the Treaty; it imposes on publishers and importers a statutory obligation to fix retail prices unilaterally. Accordingly, the question arises as to whether national legislation which renders corporate behaviour of the type prohibited by Article 85 (1) superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of Article 85 and is therefore contrary to the second paragraph of Article 5 of the Treaty.

16 The French Government, while maintaining that Article 85 of the Treaty is not applicable to legislative measures, seeks to justify the legislation at issue on the ground that its aim is to protect books as cultural media from the adverse impact that untrammelled competition in retail prices would have on the diversity and cultural level of publishing. The French Government further maintains that such legislation is necessary both in order to conserve specialist booksellers in the face of competition from other distribution channels which rely on a policy of reduced margins and a limited range of titles and in order to prevent a small number of large distributors from being able to impose their will on publishers to the detriment of poetic, scientific and creative works. It is therefore indispensable in order to preserve books as an instrument of culture and has counterparts in most of the Member States.

17 The Commission, which also considers that Article 85, even in conjunction with Article 5, does not apply to a case such as this, does not share the French Government's assessment of the state of competition in the book trade. It contests the utility and desirability of special national rules for the book trade. Nevertheless, it recognizes that publishers and booksellers have retail price maintenance agreements or practices in most Member States, even though the various national systems exhibit considerable differences, from one Member State to another, as regards their application and detailed rules.

18 It may be observed that the Commission, which has publicly stated its intention to investigate all those systems and practices, has not yet succeeded in bringing that investigation to a conclusion or in determining what approach to adopt with regard to the exercise in this sphere of the powers conferred on it by the Treaty and by Regulation No 17 of 30 October 1962. Moreover, it has so far failed to

submit any proposal for action to the Council. Nor has it initiated any proceedings under Article 85 of the Treaty with a view to prohibiting national systems and practices for fixing book prices.

19 The only Commission decision relating to the fixing of book prices concerned a transnational agreement between trade associations in two Member States which the Court held to be incompatible with Article 85 (1) of the Treaty in its judgment of 17 January 1984 in Joined Cases 43 and 63/82 (*VBVB and VBBB* v *Commission*, [1984] ECR 19). In that judgment the Court observed that national legislative or judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty. However, neither the Commission's decision nor the Court's judgment took a stand on the compatibility with Article 85 of the Treaty of purely national price-fixing agreements.

20 It is thus apparent that the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply by virtue of their duty to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. It follows that, as Community law stands, Member States' obligations under Article 5 of the EEC Treaty, in conjunction with Articles 3 (f) and 85, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books, provided that such legislation is consonant with the other specific Treaty provisions, in particular those concerning the free movement of goods. It is therefore necessary to consider those provisions.

The application of Articles 30 and 36 of the EEC Treaty

21 The Commission considers that the legislation in question constitutes a measure equivalent in effect to a quantitative restriction on imports, contrary to Article 30 of the Treaty. It observes that two provisions of the Law of 10 August 1981 are peculiar to imported books, namely: first, the price of imported books is to be fixed by the importer, the principal distributor being deemed for this purpose to be the importer; and, secondly, where books published in France are imported, the retail price is to be no lower than that fixed by the publisher. In the Commission's view, those two provisions impede imports by making it impossible for importers to

charge lower prices and preventing them from penetrating the French market by means of price competition. Leclerc expresses substantially the same view.

22 The French Government argues that legislation of the type at issue is not contrary to Article 30. In its contention, each Member State remains free to regulate its domestic trade. The restriction on retail price competition does not in any way restrict imports. Imported and domestic books are treated identically in that respect. The principal distributor is responsible for fixing the price of foreign books because he performs an equivalent commercial role in the domestic market to that performed by the publisher in distributing French books. The French Government contends that the provision relating to books published in France and re-imported is vital in order to make the legislation as a whole coherent and to prevent the re-importation of books from being used as a device for circumventing the law.

23 Article 30 of the EEC Treaty prohibits quantitative restrictions on imports and all measures having equivalent effect in trade between Member States. The Court has consistently held that under that article any national measure which is capable of hindering intra-Community trade, directly or indirectly, actually or potentially, is to be considered a measure having an effect equivalent to a quantitative restriction. That would be the case, for instance, where national legislation treated domestic products differently from imported products or disadvantaged, in any manner whatsoever, the marketing of imported products *vis-à-vis* domestic products.

24 In that regard two different situations to which the national legislation in question applies must be considered: first, that of books published in another Member State and imported into the Member State concerned, and, secondly, that of books published in the Member State concerned and re-imported, following exportation to another Member State.

25 As regards books published in another Member State and imported into the Member State concerned, a provision whereby the retail price is to be fixed by the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, transfers the responsibility for fixing the retail price to a trader at a different stage in the commercial process than the publisher and makes it impossible for any other importer of the same book to charge the retail price in the

importing State that he considers adequate in the light of the cost price in the State in which it was published. Contrary to the French Government's contention, such a provision does not merely assimilate the rules applying to imported books to those applying to domestic books but creates separate rules for imported books which are liable to impede trade between Member States. Such a provision must therefore be viewed as a measure equivalent in effect to a quantitative restriction on imports, contrary to Article 30 of the EEC Treaty.

26 On the other hand, in so far as the legislation applies to books published in the Member State concerned and re-imported following exportation to another Member State, a provision requiring such books to be sold at the retail price fixed by the publisher does not make a distinction between domestic and imported books. Nevertheless, such a provision discourages the marketing of re-imported books by preventing the importer from passing on in the retail price an advantage resulting from a lower price obtained in the exporting Member State. Accordingly, it constitutes a measure equivalent in effect to a quantitative restriction on imports, contrary to Article 30.

27 However, the above finding is not applicable where it is established that the books in question were exported for the sole purpose of re-importation in order to circumvent legislation of the type at issue.

28 The French Government again invokes, as justification for the two provisions at issue, the imperative requirements of consumer protection, referring to its view, which is mentioned above, that books as cultural media need to be protected.

29 As far as that point is concerned, it must be noted that national legislation which requires traders to abide by specific retail prices and discourages the marketing of imported products can be justified solely on the grounds set out in Article 36 of the Treaty.

30 Since it derogates from a fundamental rule of the Treaty, Article 36 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Neither the safeguarding of consumers' interests nor the protection of creativity and cultural diversity in the realm of publishing is mentioned in Article 36. It follows that the justification put forward by the French Government cannot be accepted.

31 The question referred by the Cour d'Appel, Poitiers, must therefore be answered as follows:

1. As Community law stands, the second paragraph of Article 5 of the EEC Treaty, in conjunction with Articles 3 (f) and 85, does not prohibit Member States from enacting legislation whereby the retail price of books must be fixed by the publisher or by the importer and is binding on all retailers, provided that such legislation is consonant with the other specific provisions of the Treaty, in particular those relating to the free movement of goods.

2. In the context of such national legislation, the following constitute measures equivalent in effect to quantitative restrictions on imports, contrary to Article 30 of the EEC Treaty:

   (a) provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail price;

   (b) provisions requiring the retail price fixed by the publisher to be applied to books published in the Member State concerned and re-imported following exportation to another Member State, unless it is established that those books were exported for the sole purpose of re-importation in order to circumvent the legislation in question.

Costs

32 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Cour d'Appel, Poitiers, by judgment of 28 September 1983, hereby rules:

1. As Community law stands, the second paragraph of Article 5 of the EEC Treaty, in conjunction with Articles 3 (f) and 85, does not prohibit Member States from enacting legislation whereby the retail price of books must be fixed by the

publisher or by the importer and is binding on all retailers, provided that such legislation is consonant with the other specific provisions of the Treaty, in particular those relating to the free movement of goods;

2. In the context of such national legislation, the following constitute measures equivalent in effect to quantitative restrictions on imports, contrary to Article 30 of the EEC Treaty:

   (a) provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail price;

   (b) provisions requiring the retail price fixed by the publisher to be applied to books published in the Member State concerned and re-imported following exportation to another Member State, unless it is established that those books were exported for the sole purpose of re-importation in order to circumvent the legislation in question.

Mackenzie Stuart Bosco Kakouris

O'Keeffe Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 10 January 1985.

P. Heim
Registrar

A.J. Mackenzie Stuart
President