

ORDER OF THE PRESIDENT OF THE COURT
31 MARCH 1982 ¹

**Vereniging ter Bevordering van het Vlaamsche Boekwezen
(VBVB) and Vereniging ter Bevordering van de Belangen des
Boekhandels (VBBB)
v Commission of the European Communities**

(Agreement concerning the trade in Dutch-language books)

Joined Cases 43 and 63/82 R

In Joined Cases 43 and 63/82 R

VERENIGING TER BEVORDERING VAN HET VLAAMSCH E BOEKWEZEN (VBVB),
Antwerp, represented by A. De Caluwé and J. Billiet, of the Brussels Bar,
with an address for service in Luxembourg at the Chambers of E. Arendt,
Centre Louvigny, Rue Philippe-II,

and

VEREENIGING TER BEVORDERING VAN DE BELANGEN DES BOEKHANDELS (VBBB),
Amsterdam, represented by Th. R. Bremer, of the Amsterdam Bar, with an
address for service in Luxembourg at the Chambers of J.-C. Wolter, 2 Rue
Goethe,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser,
B. van der Esch and by P. J. Kuyper, a Member of its Legal Department,
with an address for service in Luxembourg at the office of O. Montalto, a
Member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

¹ — Language of the Case: Dutch.

and

NV CLUB, NV GB-INNO-BM AND NV SODAL, Brussels, represented by Mr Van Bunnem, of the Brussels Bar, with an address for service in Luxembourg at the office of N. Decker, 16 Avenue Marie-Thérèse,

interveners,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

Facts and Issues

I — The background to the dispute

1. The Vereeniging ter Bevordering van de Belangen des Boekhandels [Association for the Promotion of the Interests of the Book Trade] (hereinafter referred to as "the Netherlands Association") is an association of publishers, book wholesalers, booksellers, importers of books and book-club operators, who are established in the Netherlands. Its object is to protect the common interests of booksellers and publishers and to promote cooperation in the book trade in the widest sense, in particular by laying down and administering binding rules governing the book-trade in the Netherlands, the Reglement Handelsverkeer Nederland [Trade Rules for the Netherlands]. The Vereniging ter Bevordering van het Vlaamsche Boekwezen [Association for the Promotion of Flemish Books], (hereinafter referred to as "the Flemish Association") is an association established in the Dutch-speaking part of Belgium and composed of publishers,

booksellers, sole distributors of domestic and foreign publishing houses and members of allied trades. Its object is to protect the interests of the book trade by administering binding rules governing the trade in Dutch-language books in Belgium, the Reglement Handelsverkeer Vlaanderen [Trade Rules for Flanders].

2. The Netherlands Association and the Flemish Association on 21 January 1949 signed, and on 2 July 1958 amended, an agreement which lays down rules relating to the book trade between the Netherlands and Flanders (hereinafter referred to as "the Agreement"), and of which the Commission was notified by the Netherlands Association on 30 October 1962 and by the Flemish Association on 3 November 1962.

3. Under Article 2 of the Agreement the undertakings bound by it agree not to buy, sell or promote on their national territory books published in the other State by publishers not recognized in

the Netherlands by the Netherlands Association and in Belgium by the Flemish Association. In addition, the books concerned may not be sold or offered for sale in Belgium or the Netherlands at a price below the retail price fixed by the Netherlands or Belgian publishers. Article 5 lays down a system of penalties in the event of the agreement's not being complied with.

4. On 19 December 1977 and 12 January 1978, the Commission sent to the two associations statements of its objections with regard to the Agreement. On 25 November 1981, it took a decision relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB/VBVB), (Official Journal 1982, L 54, p. 36). Under Article 1 of that decision, the agreement between the two associations, making provision for collective exclusive dealing and collective resale price maintenance in trade in books between Belgium and the Netherlands, is stated to infringe Article 85 (1) of the EEC Treaty. Under Article 2, the application for exemption under Article 85 (3) of the Treaty is dismissed. The two associations of undertakings are required to bring the infringement referred to in Article 1 to an end forthwith (Article 3).

Article 4 of the decision further provides that:

"The associations of undertakings referred to in Article 5 shall inform their members and affiliates and other parties recognized by or registered with them, in writing, of this decision and of the fact that the restrictions on competition laid down in the agreement referred to in Article 1 have been brought to an end,

stating the practical effects that this will have on the terms under which trade in books is carried on between Belgium and the Netherlands. They shall submit a proposal for a notice to this effect to the Commission within four months of receipt of this decision."

The Netherlands Association was notified of that decision on 14 December 1981 and the Flemish Association on 11 December 1981.

5. The Agreement to which that decision relates was the subject of an order made by the President of the Arrondissementsrechtbank [District Court] Amsterdam, on 26 May 1977 in a dispute between the Netherlands Association and a number of publishers, on the one hand, and Maxis BV, on the other. Under that order books published in the Netherlands which may be shown to have been bought abroad may be sold in the Netherlands at a retail price below that set by the publisher. In a judgment of 18 May 1979, the Hoge Raad [Supreme Court] confirmed that order in this regard (Nederlandse Jurisprudentie 1979, No 480).

6. In an order made on 18 June 1979 by the President of the Tribunal de Commerce [Commercial Court], Brussels, in proceedings relating to the adoption of interim measures in a dispute between the department store chain GB-INNO-BM, plaintiff, and the Flemish Association and a number of publishers, defendants, that association was ordered to cease making the sale of Dutch-language books conditional upon the obligation on the plaintiff to conform to the retail price fixed by the supplier. The President stated that the Trade Rules for

Flanders infringed Article 85 (1) of the EEC Treaty and that it had not been shown that there was any great probability that the Commission would make use of its powers under Article 85 (3).

II — Written procedure

7. By an application lodged at the Court Registry on 5 February 1982, the Flemish Association brought an application for a declaration that the Commission's decision of 25 November 1981 was void. On the same day, it applied for a suspension of the operation of the decision in pursuance of Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure of the Court of Justice as an interim measure until the main proceedings were determined (Case 43/82 R).

8. By an application lodged at the Court Registry on 15 February 1982, the Netherlands Association also brought an application for a declaration that the decision of 25 November 1981 was void. On the same day, it lodged an application for an order suspending the operation of the decision of 25 November 1981, and, in the alternative, suspending the operation of Article 4 thereof until the Court had delivered judgment on the application for a declaration that the said decision was void (Case 63/82 R).

9. By order of the President of the Court of 17 February 1982, Cases 43/82-R and 63/82-R were joined for the purposes of the procedure and the interlocutory order.

10. In its observations on the application for the adoption of interim measures, the Commission contends that the Court should:

Dismiss the applications of both associations for the suspension of the operation of the Commission's decision of 25 November 1981 in Case IV/428 (VBBB-VBVB); and,

In the alternative, in the event of the application's being accepted:

Declare that the Agreement is not thereby rendered provisionally valid once again; and

Prohibit the imposition of any penalties which may arise from Article 5 of the Agreement between the two associations.

11. By order of the President of the Court of 10 March 1982, NV Club, NV GB-INNO-BM and NV Sodal were allowed to intervene in support of the Commission's submissions.

III — Submissions and arguments of the parties

A — The irreparable nature of the damage

According to the *applicants*, the Agreement constitutes the keystone of the two systems of vertical collective resale price maintenance on the national level. If that factor were to disappear, the national systems would quickly be threatened with collapse. As a result, the implementation of the decision and particularly of Article 4 thereof would irrevocably lead to the disintegration of the national systems intended to ensure that fixed prices are maintained in bookshops. The abandonment of the resale price maintenance system for books would result in irreparable damage to such a relatively small market as that in the Dutch-language cultural area.

The *Commission*, on the other hand, contends that, as a result of the decisions taken by the Hoge Raad and the President of the Tribunal de Commerce, Brussels, the national systems have already been affected. Indeed, in Belgium, fixed prices for books published in Belgium can no longer be maintained with respect to two important purchasers, GB-INNO-BM and Club, and in so far as those purchasers also sell in the Netherlands, such prices can no longer be maintained there either. In the Netherlands, fixed prices of books published in the Netherlands can no longer be maintained so far as books re-imported into that country are concerned. According to the Commission, its decision of 25 November 1981 makes it impossible to maintain in Belgium a fixed price for books published in the Netherlands and imported directly into Belgium from the Netherlands by traders independent of Netherlands publishers. It also prevents fixed prices from being maintained in the Netherlands for all books published in Belgium and imported directly from Belgium by traders independent of Belgian publishers, and not only for books brought into the Netherlands by Club and GB-INNO-BM.

According to the Commission, the damage feared by the applicants is in fact that integrity of the national systems will be irreparably affected by the contested decision. The Commission considers that that damage is not irreparable, because, even if it were demonstrated, it does not appreciably increase that already suffered as a result of the decisions of the national courts.

With regard to the implementation of Article 4 of the decision, the Commission

notes that the disintegration of the national systems began as early as summer 1979. The Court of Justice cannot reverse that process by deciding now to suspend the operation of the Commission's decision. Replying to the applicants' objection that the operation of the decision would give rise to a mistaken interpretation on the part of traders who belong to the applicant associations, the Commission states that this type of misunderstanding may be avoided if the two associations speedily provide their members with correct information.

According to the *interveners*, there is a contradiction between the applicants' pleadings and their statements to the press. In the proceedings they contend that the operation of the contested decision will lead to irreparable damage, whereas to the press they claim that the Commission's decision in no way changes the present actual position. In order to convince third parties that they will not be penalized if they supply non-members of the Flemish association with books, it is necessary for the Commission's decision to be made known to members of the association by the Netherlands association, as Article 4 of the decision provides.

B — The urgency

According to the *applicants*, the matter is urgent because since the publication of the contested decision, traders who reduce prices consider that that decision also entitles them to use books for cut-price sales and loss leaders. It is clear

from a report written in March 1980 by Mr Bertina for the applicants, that since the price of books in the Netherlands was freed, publishers have been compelled to give up publication of 40% (or 20 000 of the current titles) of the books constituting the common stock.

The *Commission* replies that the alleged damage resulting from the fact that, following the contested decision, books published in Belgium may be sold in the Netherlands below the fixed price, is negligible, since this involves a pattern of trade which represents at most only 7% of the Netherlands market in Dutch-language books. The Bertina report is therefore irrelevant in this regard. With regard to the damage caused by the sale below the fixed price in Belgium of books published in the Netherlands, the Commission considers that the Flemish Association has not provided a scintilla of evidence.

The *interveners* take the view, on the basis of orders refused by the publishers belonging to the Netherlands association, that the Agreement is still in force with the result that, even after notification of the decision, parallel imports are virtually impossible.

C — *The grounds establishing a prima facie case for the suspension of operation*

The *applicants* take the view that the operation of the contested decision would make it impossible to apply the Treaty between Belgium and the Netherlands concerning the Dutch Language Union of 9 September 1980

and the protection of the Dutch language and culture by cooperation between the Netherlands and Flanders. To erect such a partition between small cultural communities would be contrary to the integration envisaged in Articles 2 and 3 of the EEC Treaty. They summarize the submissions on which they rely in the main application and consider that those submissions show that their application is clearly well-founded.

The *Commission* denies that the Agreement does not fall within the provisions of Article 85 (1) of the EEC Treaty. So far as the refusal to grant the Agreement an exemption as provided for in Article 85 (3) is concerned, it considers that the applicants' submissions are either irrelevant or unfounded and that, in any event, they have not shown that its refusal was *prima facie* illegal.

In case the Court should nevertheless decide in favour of suspension of operation, the Commission refers to the conditions in which that was done in Cases 71/74 R and RR, (*Fruit- en Groentenimporthandel v Commission* [1974] ECR 1031), and in Joined Cases 209 to 215 and 218/78 R (*van Landewyck and Others v Commission* [1978] ECR 2111). It is clear from those decisions that the Court does not consider that it is within its jurisdiction, in the framework of proceedings instituted on the basis of the second sentence of Article 185, to substitute its own appraisal for that of the Commission and declare an agreement provisionally valid or re-establish the provisional validity of the agreement. Indeed, the suspension of operation of a decision refusing to grant an exemption under Article 85 (3), as in the present case, should not be confused with the grant of authorization applied for, as was the position in Case 50/69 (*Federal Republic of Germany v Commission*,

[1969] ECR 449). At the same time it appears that, during the suspension of operation of a decision, the Court generally prohibits the application of the penalties provided for in the agreement invalidated by the Commission.

IV — Oral procedure

The parties were duly summoned and presented oral argument at the hearing of the application for the adoption of interim measures on 25 March 1982.

Decision

- 1 On 5 and 15 February 1982 the applicants in the main proceedings brought actions for a declaration of the nullity of the Commission's decision of 25 November 1981, declaring incompatible with Article 85 of the EEC Treaty and prohibiting an agreement between them concerning the Dutch-language book market in the Netherlands and in Belgium which contains, on the one hand, a collective exclusive dealing agreement and, on the other, a collective resale price maintenance agreement.
- 2 At the same time, they each lodged an application for the adoption of interim measures seeking, so far as the Flemish association's application is concerned, the suspension of operation of the Commission's decision of 25 November 1981 and, so far as the Netherlands association is concerned, the suspension of operation of that decision or, in any event or alternatively, of Article 4 thereof.
- 3 Under Article 185 of the EEC Treaty, actions brought before the Court of Justice do not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of contested measures should be suspended. It may also, under Article 186 of the EEC Treaty, prescribe any necessary interim measures.
- 4 It appears both from the file and from the explanations given in the course of the interlocutory proceedings, that in the Dutch-language book market in the Netherlands and in Belgium, relations between publishers, distributors and retailers, so far as they are members of the applicant associations, are governed on the one hand by the agreement in dispute and, on the other, by two systems of rules governing the national book markets, applicable one in the Netherlands and the other in Belgium and including *inter alia* sale price maintenance agreements.

5 In the contested decision, the Commission expressly stated that its decision did not concern those two national systems.

6 Although, at the present stage of the proceedings, it is not possible to gain a precise conception of the reactions between the two national systems and the agreement in dispute, it none the less appears and is admitted by the parties to the main proceedings that such reactions exist, inasmuch as it is the agreement in dispute which, even when the restrictions which result or might result from the national judicial decisions referred to by the contested decision have been taken into account, ensures the integrity of the combination of the national systems. The contested decision is therefore liable to influence the operation of those systems, although the Commission deliberately refrained from calling them in question by that decision.

7 In addition, the applicants have drawn attention to the obligations imposed upon them by Article 4 of the contested decision, which provides:

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

8 The applicants contend that the immediate operation of those obligations would make it impossible to reconstruct the relationships between the different parties to the agreement in dispute, in the event of their applications for a declaration that the decision is void being successful.

9 Those two facts justify the need for the suspension, at least, in part, of the operation of the contested decision, in order to avoid immediate and, to all appearances, irreversible damage to the applicants.

- 10 The protection of the applicants' interests does not, however, require the suspension of the operation of the contested decision in so far as it declares incompatible with Article 85 (1) of the Treaty the system of collective exclusive sales and purchases instituted by the agreement in dispute, a system which, according to the applicants, has in any case not been applied for a long time.
- 11 In addition, the suspension of operation is granted only subject to the express reservation that, until judgment has been given on the applications for a declaration that the decision is void, the possible penalties and exclusions provided for in the agreement in dispute are not to be applied against those of the members of the two associations who do not comply with the obligations resulting from the part of the agreement provisionally maintained.
- 12 Finally, this order leaves intact the provisions of the two sets of national rules, as they must be applied following the decisions given by the national courts, referred to in the contested decision, but without prejudice to the question of the compatibility of those rules with the Treaty.

On those grounds,

THE PRESIDENT OF THE COURT

by way of interim decision,

hereby orders as follows:

1. The operation of Articles 1, 2 and 3 of the Commission's decision of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428-VBBB-VBVB) is suspended, in so far as those provisions concern the system of collective resale price maintenance in the trade in Dutch-language books resulting from the agreement between the two associations concerned.

2. The operation of Article 4 of the said decision is suspended.
3. Neither the applicants nor the associations of which they are composed shall apply the penalties or exclusions provided for by the agreement, in particular in Article 5 thereof, against those of their actual members or other parties recognized or registered with them who do not voluntarily comply with the rules contained in that part of the agreement which remains in force.
4. The costs are reserved.

Luxembourg, 31 March 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President