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## Regulation of Book Markets

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# REGULATION OF BOOK MARKETS

MIRIAM MARCOWITZ-BITTON\* & JACOB NUSSIM\*\*

## ABSTRACT

*Over the years, many European countries have regulated their national book markets. Chief among the regulatory schemes is the resale price maintenance (“RPM”) regime, under which booksellers must offer books for a fixed price for a limited time period. The suggested rationales for this legal regime are mainly: (1) viewing books as cultural goods that deserve special treatment; (2) advancing diversity in the book market; (3) creating a wide distribution of and accessibility to books; and (4) supporting small booksellers. This Article explores the normative rationales for the RPM regime’s adoption and design in book markets. The RPM regime has been discussed and analyzed using a positive economic framework, but its application in reality has been missing a normative theoretical basis. This Article demonstrates that absent such a theoretical basis, policymaking is meaningless. Policymakers as well as courts cannot solely rely on positive economic analysis. Normative analysis is inevitable. This Article explores the missing normative analysis of RPM regimes in the context of book markets. It exposes an important blind spot in regulatory policy and judicial judgment. Lastly, the normative framework introduced in this Article may prove relevant for American RPM arrangements. Since American antitrust scrutiny of RPM schemes recently transformed from a per se rule to a rule of reason analysis, American policymakers and courts are expected to encounter a new wave of resurfacing RPM schemes.*

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## INTRODUCTION

The extent of legal intervention in markets has always been a highly contested and complex social question. A notable example is the “resale price maintenance” (“RPM”) scheme used in many European countries to regulate national book markets. For more than a century, RPM arrangements have faced ambivalent views among legal scholars, economists, policymakers, and the public.<sup>1</sup> These views range from outright rejections of RPM schemes to varying degrees of acceptance to regulatory RPM mandates.

1. See, e.g., Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, 3 ISSUES COMPETITION L. & POL'Y 1841, 1855–56 (2008); Bruno Jullien & Patrick Rey, *Resale Price Maintenance and Collusion*, 38 RAND J. ECON. 983, 983–85 (2007).

These views have affected legal rules in many countries, and have also significantly transformed the legal treatment of RPM arrangements in the United States. In the last hundred years, the legal treatment of RPM schemes went from outright illegal under a *per se* rule,<sup>2</sup> to a more limited applicability of *per se* illegality,<sup>3</sup> and then to four decades of statutory exclusions of RPM arrangements under “fair trade” laws, which encompassed almost all states as well as an exemption on the federal level.<sup>4</sup> However, courts tended to reject or limit these state laws, which were finally eliminated by federal legislation in 1975.<sup>5</sup> Soon after, the tide turned again with the Supreme Court moving, over a period of three decades, from *per se* illegality, to a rule of reason application, to vertical restraints,<sup>6</sup> including RPM arrangements.<sup>7</sup> Yet, states’ authorities now support outright prohibition of RPM.<sup>8</sup>

Overseas, one witnesses less legal variation, but still an ambivalent attitude toward RPM agreements. Although generally disallowed, as RPM remains *per se* illegal under EC Competition Law, RPM agreements are supported in several specific markets—chief among them book markets. Several European countries allow for RPM agreements in book markets, which subject retailers to fixed book prices. While some European countries have rejected RPM arrangements altogether, in other prominent countries these arrangements have been stable for decades or even a century.

Economists have debated RPM schemes for as long as these arrangements have existed.<sup>9</sup> Our main argument is that the positive economic theory of RPM regimes is insufficient. Adoption of regulatory regimes requires normative analysis, which is not found in the economic literature. In this Article, we focus on this neglected part in the economic

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2. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

3. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

4. See L. Louise Luchsinger & Patrick M. Dunne, *Fair Trade Laws – How Fair? What Lessons Can Be Drawn that Would Guide Us in the Future?*, J. MARKETING, Jan. 1978, at 50, 51.

5. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified as amended in scattered sections of 15 U.S.C.); see generally LAURA PHILLIPS SAWYER, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE “NEW COMPETITION,” 1890–1940* (2018).

6. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); see also D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014) (working through the transformation in case law).

7. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); see also Special Issue, *Resale Price Maintenance a Decade After Leegin*, 50 REV. INDUS. ORGS. 129 (2017) (collecting academic commentary on RPM).

8. See Heather M. Cooper, SHEPPARD MULLIN, *Debate on Resale Price Maintenance Heats Up*, ANTITRUST L. BLOG (Nov. 10, 2009), <https://www.antitrustlawblog.com/2009/11/articles/uncategorized/debate-on-resale-price-maintenance-heats-up/> [<https://perma.cc/88CD-MUYT>].

9. William Breit, *Resale Price Maintenance: What Do Economists Know and When Did They Know It?*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 72 (1991).

analysis—the normative theory and application of RPM regimes. A normative theory is crucial for any evaluation of an RPM arrangement, whether wide, limited, or piecemeal. Further, a normative theory has become much needed under the new rule of reason that applies to RPM arrangements in the United States. Any legal analysis of and decision regarding RPM arrangements, whether by policymakers or courts, is meaningless without a founded normative theory.

This Article offers and demonstrates a normative application of RPM regimes and their incidence in European book markets. European book markets function as a well-entrenched case study of RPM regimes. The background and stated goals of proponents of RPM arrangements in book markets are reminiscent of the common arguments found everywhere in support of RPM regimes, and are particularly similar to the stated rationales of past United States fair trade laws and current arguments in defense of a rule of reason application to RPM schemes. Thus, a careful normative study of RPM regimes in European book markets informs us about regulation of RPM arrangements in general.

The analysis focuses on the background for the adoption of RPM regimes in European book markets and explores to what extent RPM regimes can realize their stated goals. We introduce a normative framework for adoption of RPM regimes in book markets that is necessary in order both to make an informed decision regarding such a regime's adoption *ex ante* and to assess its success *ex post*. The normative requirements are not easily met, and our study shows that they were not encountered by policymakers. Accordingly, this Article demonstrates and emphasizes the normative failure of RPM regulation in European book markets. These RPM regimes are arguably baseless. This regulatory anatomy of RPM regimes should find its way into the legal analysis of RPM schemes in the United States. This is not necessarily a call for the elimination of RPM arrangements in the United States or for *per se* illegality. Instead, it is a call for careful regulatory and judicial application of normative theory. It is particularly important once a rule of reason applies.

The Article proceeds as follows. Part I provides a detailed overview regarding regulation of European book markets. First, it considers the structure and details of an RPM regime. Second, it provides the historical background and rationale for the adoption of RPM regimes in these markets. Third, it discusses modern RPM regulations and their objectives, including the rationales for the adoption of book RPM regimes in major European countries. Fourth, the Article progresses to a discussion of major objections to book RPM regulation, mainly touching on anticompetitive concerns that have been raised over the years as well as other objections. Fifth, and lastly, the Article addresses the unclear effects of such regulation,

pointing to the lack of clear evidence for either the success or the failure of such regimes in achieving their stated goals. Part II proceeds to characterize book markets more generally. Part III offers the major contribution of this Article, providing a careful economic analysis of RPM arrangements, suggesting that a positive analysis of RPM regimes is insufficient and that a normative analysis is essential and inevitable, exposing an important blind spot in regulatory policy and judicial judgment.

## I. THE ARRANGEMENT OF BOOK PRICES IN EUROPE AND BEYOND

### A. *Uniform and Fixed Book Prices*

Several European and other countries have adopted a regulatory arrangement known as fixed book prices, which is a type of resale price maintenance (RPM). The RPM arrangement grants—contractually or regulatorily—the producer the legal right to determine consumer market prices down the production chain. Thus, the typical regulatory arrangement in book markets allows a publisher to fix consumer prices across each and every bookstore, thereby forming a uniform price in the book market. The prices are commonly fixed for a certain period of time from the publication date, after which the arrangement dissipates, and market prices may vary according to bookstores' decisions. RPM arrangements include additional variables, such as the type and extent of permitted discounts, necessary agreements between publishers and bookstores, etc.<sup>10</sup>

Book market RPM arrangements do not allow bookstores to compete on book prices during the protected period but do allow competition between publishers or between writers and publishers. Under the RPM regime, the signed contract between the publishers and the bookstores or book chain stores determines profit margins.

Since the retail price is fixed for consumers, the price determined between a publisher and an individual bookstore represents that store's profit margin on each book.

Therefore, even though the established consumer price prevents competition between bookstores, the profit margins of different stores will vary as a result of their bargaining positions with the publisher. On the one side, retailers' profit margins are protected in publishing contracts, and, on the other side, by fixed market prices.

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10. See generally *infra* Part I.B. Historical Background.

### B. Historical Background

Historically, book markets have been regulated for many years, at first mainly in certain European countries such as Germany, Austria, Switzerland, France, the United Kingdom, the Netherlands, and Sweden. Later, regulation expanded to other European countries. In the early days, regulation of book markets was done mainly through contractual arrangements in the book industry.

In Germany, the *Börsenverein*, the German Publishers and Booksellers Association, first introduced price-fixing regulation of books in 1888.<sup>11</sup> The rationale for this regulation was to promote science and research, and to ensure the diversity of books by using profits from best sellers to support risky “literary experiments,” such as new authors and unusual titles, thus protecting books as cultural assets.<sup>12</sup> Bittlingmayer attributed the development of this regime to the constant attempts of local booksellers since the early 1800s to eliminate discounts and promote their own economic interests.<sup>13</sup> The 1888 regulations prohibited discounting from price lists but allowed exemptions based on either regional differences or sales to large buyers.<sup>14</sup> Noncompliance was punished through social and economic sanctions, such as boycotts or exclusion from membership benefits in the associations.<sup>15</sup> The regulation was reestablished in the 1950s following World War II.<sup>16</sup> The agreements were firmly enforced by the courts and the Federal Cartel Office.<sup>17</sup> In 1957, German cartel law explicitly allowed book RPM arrangements, subject to the registration and approval of the Federal Cartel Office.<sup>18</sup> Subsequently, with the Federal Cartel Office’s blessing, the *Börsenverein* initiated the *Sammelrevers*, a system of single contracts, that was used by all players in the industry and

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11. *Past and Present: The History of the German Publishers & Booksellers Association*, BÖRSENVEREIN DES DEUTSCHEN BUCHANDELS [GERMAN PUBLISHERS & BOOKSELLERS ASSOCIATION], <https://www.boersenverein.de/de/394814> [<https://perma.cc/T69E-RTCY>].

12. *Id.*

13. George Bittlingmayer, *Resale Price Maintenance in the Book Trade with an Application to Germany*, 144 J. INSTITUTIONAL & THEORETICAL ECON. 789, 799–801 (1988).

14. *Id.* at 803. It should be noted that some of the exceptions in the 1903 scheme, such as the discount for large buyers or the 5 percent discount for libraries, were adopted in the modern RPM law. *See id.*

15. *Id.*

16. *Id.* at 804.

17. *Id.* at 804–05.

18. *Id.*

administered by an independent trustee.<sup>19</sup> Only in 2002 were these voluntary regulations replaced by legislation.<sup>20</sup>

The history of price regulation of books in both Austria and Switzerland is intertwined with and affected by its German counterpart.<sup>21</sup> The history of price regulation of books in Austria dates back to the eighteenth and nineteenth centuries.<sup>22</sup> At first, the practice of reprinting books and selling them at cheaper prices was widely accepted in Austria and was also perceived as a proper means to promote literacy throughout the country.<sup>23</sup> In 1889, the Austrian Book Association adopted the regulations imposed by the German *Börsenverein* and adapted them to the Austro-Hungarian book trade, setting a fixed price for books.<sup>24</sup> These regulations were recognized by the Austrian courts, and, under the 1951 Competition Act, publisher-retailer agreements concerning books were recognized as an exception to competition rules.<sup>25</sup> It was not until the accession of Austria to the European Union in the 1990s that the *Sammelrevers* were extended to include Austria and Switzerland.<sup>26</sup> The Swiss book industry was part of the *Sammelrevers* system, which served as a form of fixed price regulation on books only with regards to German-speaking Switzerland.<sup>27</sup> The motivation for joining the agreement was the unique cultural environment in Switzerland. As a multilingual country, Switzerland sought to preserve the languages of its minorities and accepted this cultural policy as a justification for joining these agreements despite their anticompetitive effects.<sup>28</sup> However, by 1999, the *Sammelrevers* were rendered illegal by the Swiss Competition

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19. *Id.* at 805.

20. Org. for Econ. Co-operation & Dev. [OECD], Annual Report on Competition Policy Developments in Germany (July 2001–June 2002), ¶ 8, DAFPE/COMP(2002)27/01 (Sept. 26, 2002), [https://one.oecd.org/document/DAFFE/COMP\(2002\)27/01/en/pdf](https://one.oecd.org/document/DAFFE/COMP(2002)27/01/en/pdf) [<https://perma.cc/8U49-XC52>].

21. HANSPETER HANREICH ET AL., BUCHPREISREGELUNGEN IN EUROPA ALS MITTEL DER KULTURPOLITIK: WIRKSAMKEIT UND WOHLFAHRTSÖKONOMISCHE BEDEUTUNG 31 (2009) (Austria), [https://www.ihs.ac.at/publications/eco/recent\\_publications/buchpreisb-eb\\_221009.pdf](https://www.ihs.ac.at/publications/eco/recent_publications/buchpreisb-eb_221009.pdf) [<https://perma.cc/4PFB-XSKZ>] (study commissioned by the Association of the Book and Media Industry, Austrian Federal Economic Chamber).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 31–32.

26. *Id.* at 32.

27. OECD, Policy Roundtables: Resale Price Maintenance, at 147, OCDE/GD(97)229 (1997), <http://www.oecd.org/competition/abuse/1920261.pdf> [<https://perma.cc/GJ3G-C3RA>] [hereinafter OECD Roundtable 1997].

28. HELGE RØNNING ET AL., NOR. MINISTRIES OF CULTURE & EDUC., TIL BOKAS PRIS: UTREDNING AV LITTERATURPOLITISKE VIRKEMIDLER I EUROPA [BOOKS—AT WHAT PRICE?: REPORT ON POLICY INSTRUMENTS IN THE PUBLISHING INDUSTRY IN EUROPE] 38 (Kevin Quirk et al. trans., 2012) (Nor.), [http://www.europeanbooksellers.eu/wp-content/uploads/2015/09/Books-At-What-Price\\_Complete-00000002.pdf](http://www.europeanbooksellers.eu/wp-content/uploads/2015/09/Books-At-What-Price_Complete-00000002.pdf) [<https://perma.cc/A9MV-CQHA>].

Commission due to their negative effects on competition.<sup>29</sup> In Austria, the agreements expired in 1998, and the country adopted modern legislation in 2000, as we discuss below.<sup>30</sup>

Similarly, the single price mechanism in the French book industry has evolved from the voluntary “recommended prices” cartel agreements adopted from the end of the eighteenth century through the beginning of the twentieth century.<sup>31</sup> The stated rationale for the adoption of these arrangements was to redistribute and spread the risks involved in the book market for publishers and booksellers, eventually allowing price coordination.<sup>32</sup> The recommended retail price, printed by publishers on the covers of books, served as a reference point and as a means for coordination, and was generally respected by booksellers.<sup>33</sup> This reality changed in the 1970s due to major changes in the French book market, which triggered the introduction of the 1981 Lang Law.<sup>34</sup>

The practice of RPM was known in the United Kingdom book industry since the nineteenth century. In 1829, the Booksellers Committee in London introduced RPM regulations that were intended to reinforce confidence and coordination between publishers and booksellers in an attempt to increase profits for both market players.<sup>35</sup> In 1852, the arrangement was repealed, and the London Booksellers Committee closed down.<sup>36</sup> This followed the findings of the Campbell Committee, which concluded that the organization was coercive and that their regulations were contrary to principles of free trade.<sup>37</sup> In 1899, the newly established Association of Booksellers of Great Britain and Ireland reintroduced the RPM mechanism in the form of the Net Book Agreement (“NBA”).<sup>38</sup> The support for this new agreement arose mainly because many of the booksellers were concerned by the generous discounts that a minority of large retailers offered to consumers, and its adoption was made possible mainly due to the growing power of organized

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29. OECD, Roundtable on Resale Price Maintenance 2008, at 57, DAF/COMP(2008)37 (Sept. 10, 2009), <https://www.oecd.org/daf/competition/43835526.pdf> [<https://perma.cc/MTH5-VNZB>] [hereinafter OECD Roundtable 2008].

30. HANREICH ET AL., *supra* note 21, at 33.

31. MATHIEU PERONA & JÉRÔME POUYET, CEPREMAP, LE PRIX UNIQUE DU LIVRE À L’HEURE DU NUMÉRIQUE 33 (2010) (Fr.), <http://www.cepremap.fr/depot/opus/OPUS19.pdf> [<https://perma.cc/Z6VM-JVJR>].

32. *Id.* at 34–35.

33. *Id.* at 34.

34. *Id.* The French Act is named after Jack Lang, who was the French Minister of Culture in charge of passing the law.

35. James A. Dearnley, The Decline and Fall of the Net Book Agreement 1962–1997: A Study of Cause and Effect 47–48 (Dec. 1997) (unpublished doctoral thesis, Loughborough University), <https://dspace.lboro.ac.uk/2134/28070> [<https://perma.cc/J926-DAX7>].

36. *Id.* at 48.

37. *Id.*

38. *Id.* at 49.

booksellers.<sup>39</sup> By the 1920s, 70 percent of books were sold in accordance with the NBA.<sup>40</sup> By World War II, the NBA had become the standard in the British book industry.<sup>41</sup> Unlike France and Germany, the United Kingdom never adopted the NBA into legislation, as we discuss below.<sup>42</sup>

In the Netherlands, the history of regulation of book prices begins with the establishment of the Royal Association of Book Trade in 1815 for the promotion of booksellers' interests.<sup>43</sup> Developments within the industry during the nineteenth century included growing division between booksellers and publishers, who subsequently formed their own associations and introduced significant risks and costs to booksellers.<sup>44</sup> As a compromise between the parties' conflicting interests, they drafted a fixed form of trade agreements between 1904 and 1924, marking the beginning of the fixed price regime in the Dutch book trade.<sup>45</sup> The regulations were not strict, and the system resembled a medieval guild rather than a book cartel, as measures were rarely taken against violators.<sup>46</sup> This system was eventually replaced by legislation.<sup>47</sup>

Lastly, the Swedish book market has been heavily regulated since the nineteenth century and was considered one of the most regulated in Europe at the time.<sup>48</sup> The Swedish Book Association was established in 1843 and was responsible for imposing restrictions on the practices of publishing and bookselling, including the regulation of distribution systems and fixed book prices.<sup>49</sup> This system is also well-known as the Commission System. The introduction of the Commission System followed significant social and economic changes in Sweden.<sup>50</sup> The rapid expansion of the Swedish book

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39. *Id.* at 48–49.

40. *Id.* at 50.

41. *Id.* at 50–51.

42. See *infra* notes 125–131 and accompanying text.

43. Joost Cornelis Adriaan Houdijk, *Publieke Belangen in het Mededingingsrecht: Een Onderzoek in Vijf Domeinen* 419, 424 (2009) (doctoral thesis, Radboud University Nijmegen) (Neth.), [https://repository.uibn.ru.nl/bitstream/handle/2066/77600/mmubn000001\\_51815744x.pdf?sequence=1](https://repository.uibn.ru.nl/bitstream/handle/2066/77600/mmubn000001_51815744x.pdf?sequence=1) [<https://perma.cc/SFJ6-46NJ>].

44. F. de Glas, *Spelregels voor het boekenvak: Het Reglement voor het Handelsverkeer als Spiegel van de Ontwikkeling van het Boekenvak 1904–1961*, in 1 JAARBOEK VOOR NEDERLANDSE BOEKGESCHIEDENIS 131, 132–33 (1994) (Neth.), [https://www.dbnl.org/arch/\\_jaa008199501\\_01/pag/\\_jaa008199501\\_01.pdf](https://www.dbnl.org/arch/_jaa008199501_01/pag/_jaa008199501_01.pdf) [<https://perma.cc/QX7A-DKUQ>].

45. *Id.* at 135.

46. *Id.* at 138. For further discussion, see *id.* at 139–41.

47. RÖNNING ET AL., *supra* note 28, at 35.

48. Ann Steiner, *Selling Books and Digital Files: A Comparative Study of the Sales of Books and E-books in Sweden*, 13 N. LIGHTS 11, 13 (2015).

49. *Id.*

50. Such changes include the introduction of freedom of the press (1809) and of compulsory public education in folk schools (1842), as well as general industrialization. See Johan Svedjedal, *Kommissionssystemets Epok – Svensk Bokbransch 1843–1970*, in BOKBRANSCHEN I SVERIGE: UTVECKLINGEN MELLAN 1973 OCH 2003: RAPPORT FRÅN SVENSKA BOKHANDLAREFÖRENINGEN OCH

industry during the 1800s, during which books became widespread and common products in every household, led to the organization of its members.<sup>51</sup> The rationale for adopting the system, which was led by the publishers, was to control the book trade through the imposition of strict restrictions on booksellers.<sup>52</sup> Booksellers were admitted to the system only if found financially reliable by the Association, and they had to offer a wide selection of books, featuring titles of all Association members.<sup>53</sup> Booksellers were not allowed to compete with each other, and titles were sold for the same prices.<sup>54</sup> The rules offered stability and order to all members in the industry, and this system was maintained for nearly 130 years.<sup>55</sup> In an attempt to reach new customer groups, some “free booksellers” existed alongside the “commissioner-approved” bookstores.<sup>56</sup> This continued through 1970.<sup>57</sup>

### *C. The Objectives of Modern RPM Regulation*

Regulation of book markets has continued well into the twentieth and twenty-first centuries. Many European countries introduced price-fixing schemes into legislation, although some countries still regulate the book market through industry agreements. Several reasons and rationales are offered in support of RPM regulation in book markets. The starting point of much of the RPM regulation is that books, being essential cultural assets, should not be regarded as common economic products and therefore must be regulated by different rules.<sup>58</sup>

One of the most commonly introduced objectives of RPM regimes is ensuring diversity, i.e., a wide range of books. For example, the laws in

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SVENSKA FÖRLÄGGAREFÖRENINGEN 8, 8 (2003) (Swed.), [http://www.forlaggare.se/sites/default/files/okbranschen\\_i\\_sverige\\_1973\\_till\\_2003\\_rapport.pdf](http://www.forlaggare.se/sites/default/files/okbranschen_i_sverige_1973_till_2003_rapport.pdf) [<https://perma.cc/Z747-9F6K>] (report of the Swedish Booksellers Association and the Swedish Publishers Association).

51. *Id.*

52. *Id.*

53. *Id.* at 8–9.

54. *Id.* at 9.

55. *Id.* at 8, 12.

56. *Id.* at 9.

57. *Id.* at 12.

58. *See, e.g.*, Decreto-Lei n.º 176/96, de 21 de Setembro, Diário da República n.º 220/1996, Série I-A de 1996-09-21, 3309 (Port.), [https://dre.pt/pesquisa/-/search/215895/details/normal?p\\_p\\_auth=f1O AesSR](https://dre.pt/pesquisa/-/search/215895/details/normal?p_p_auth=f1O AesSR) [<https://perma.cc/TS6H-W7K5>] (explaining, in a preamble, the cultural value of books which means that they cannot be regulated in normal economic terms).

Germany,<sup>59</sup> Spain,<sup>60</sup> Greece,<sup>61</sup> the Netherlands,<sup>62</sup> and Portugal<sup>63</sup> state that ensuring diversity of books is a major goal. In Switzerland, a legislative arrangement adopted the RPM regime (which was canceled in a referendum about a year after its enactment)<sup>64</sup> with the stated goal of encouraging the diversity of books.<sup>65</sup>

Another major objective of some countries' RPM regimes is to encourage the printing of high-quality books. This has been, for example, one of the stated objectives of the Norwegian industry agreements,<sup>66</sup> the Spanish Act,<sup>67</sup> and the Greek Act.<sup>68</sup> In France the arrangement in the Lang Law also promotes quality titles, whose inventory turnover is slow, thus

59. OECD Roundtable 2008, *supra* note 29, at 37; RÖNNING ET AL., *supra* note 28, at 38; Buchpreisbindungsgesetz [BuchPrG] [German Resale Price Maintenance Act], Sept. 2, 2002, BUNDESGESETZBLATT, TEIL I [BGBl I] at 3448, § 1, as amended by Gesetz [G], July 31, 2016, BGBl I at 1937 (Ger.), <https://www.gesetze-im-internet.de/buchprg/BJNR344810002.html> [<https://perma.cc/3APG-T3NK>], *unofficial translation at* [http://www.berlinerbuchhandel.de/sixcms/media.php/976/German\\_Resale\\_Price\\_Maintenance\\_Act.pdf](http://www.berlinerbuchhandel.de/sixcms/media.php/976/German_Resale_Price_Maintenance_Act.pdf) [<https://perma.cc/R2FX-2LW8>] (Carol Wanske trans.).

60. *See, e.g.*, Ley 10/2007, de 22 de junio, de la lectura, del libro y de las bibliotecas [Lectures, Books & Libraries Law] (B.O.E. 2007, 12351) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12351> [<https://perma.cc/2QKL-2C7E>]; Real Decreto 484/1990, de 30 de marzo, sobre precio de venta al público de libros [Book Publication Window Decree] (B.O.E. 1990, 9252) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-1990-9252> [<https://perma.cc/8BL8-5M7R>]; Maria Luisa Palma Martos & Luis Palma Martos, *Fixed Book Pricing in Spain: A Debate Between Economic Efficiency and Cultural Diversity*, in CREATIVE CITIES, CULTURAL CLUSTERS AND LOCAL ECONOMIC DEVELOPMENT 137 (Philip Cooke & Luciana Lazzeretti eds., 2008).

61. *See* Dionysios Batikas, Resale Price Maintenance with an Application to Books 25 (Feb. 29, 2016) (unpublished postgraduate dissertation, Athens University of Economics and Business) (Greece), [http://www.pyxida.aueb.gr/getfile.php?object\\_id=iid:5576&ds\\_id=PDF1](http://www.pyxida.aueb.gr/getfile.php?object_id=iid:5576&ds_id=PDF1) [<https://perma.cc/UNQ5-2GDQ>]; Nomos (1997:2557) Thesmoi, Metra kai Drosos Politistikos Anaptyxe [Institutions, Measures and Actions for Cultural Development] EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 1997, A:271 (Greece), <https://nomoi.info/%CE%A6%CE%95%CE%9A-%CE%91-271-1997-%CF%83%CE%B5%CE%BB-1.html>.

62. RÖNNING ET AL., *supra* note 28, at 40; Wet van 9 november 2004, Stb. 2004, 600 (Neth.), <http://wetten.overheid.nl/BWBR0017452/2016-07-01> [<https://perma.cc/9BDA-WZ72>].

63. Decreto-Lei n.º 176/96, de 21 de Setembro (Port.), [https://dre.pt/pesquisa/-/search/215895/details/normal?p\\_auth=fIOAesSR](https://dre.pt/pesquisa/-/search/215895/details/normal?p_auth=fIOAesSR) [<https://perma.cc/TS6H-W7K5>].

64. Moè Nakayama, *For What It's Worth: Fixed Book Price in Foreign Book Markets*, PUB. TRENDS (May 12, 2015), <http://www.publishingtrends.com/2015/05/for-what-its-worth-fixed-book-price-in-foreign-book-markets/> [<https://perma.cc/85Z3-YEM5>]; Bundesgesetz über die Buchpreisbindung [BuPG] [Federal Law on Book Prices], March 29, 2011, Bundesblatt [BBl] Nr. 13 at 2703 (Switz.), <https://www.admin.ch/opc/de/federal-gazette/2011/2703.pdf> [<https://perma.cc/29FV-E6R7>].

65. RÖNNING ET AL., *supra* note 28, at 41.

66. Knut Løyland & Vidar Ringstad, *Fixed or Free Book Prices: Is a Hybrid System Superior?*, INT'L J. CULTURAL POL'Y 238, 239 (2012).

67. *See* Ley 10/2007, de 22 de junio, de la lectura, del libro y de las bibliotecas [Lectures, Books & Libraries Law] (B.O.E. 2007, 12351) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12351> [<https://perma.cc/2QKL-2C7E>]; Real Decreto 484/1990, de 30 de marzo, sobre precio de venta al público de libros [Book Publication Window Decree] (B.O.E. 1990, 9252) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-1990-9252> [<https://perma.cc/8BL8-5M7R>].

68. Batikas, *supra* note 61, at 28.

contributing to the diversity of the literary market and fighting homogeneity in book supply.<sup>69</sup>

Another commonly stated objective of RPM regimes is to offer a large number of sale points to readers. Having standard prices for the same title throughout the country supports the network of traditional booksellers and, in turn, contributes to the accessibility of books to the public.<sup>70</sup> For example, Germany,<sup>71</sup> France,<sup>72</sup> Norway,<sup>73</sup> Spain,<sup>74</sup> and the Netherlands<sup>75</sup> have all emphasized this objective as part of the stated goals of their RPM regime. In Portugal, due to various economic and organizational changes in the book market, bookstores were closing down; the Act aimed to correct this phenomenon and promote the revitalization of the book market, ensuring better conditions for all market players.<sup>76</sup>

Yet another stated objective of such legislation is to support and encourage both the creation and consumption of books. For example, this has been one of the main objectives of the French Lang Law,<sup>77</sup> the Norwegian law,<sup>78</sup> and the modern Spanish 2007 Act of Reading, Books and Libraries.<sup>79</sup>

RPM regimes also aim to prevent the sale of books for extremely low prices, reducing margins for both creators and producers. This has been one of the stated goals of the French Lang Law.<sup>80</sup> In Greece, the 1997 fixed price book regime explicitly aimed to ensure revenue for publishers.<sup>81</sup> It allows them to target small audiences and motivates them to publish unique, unprofitable titles, which, given the competition in a free market, would have otherwise been too risky to publish.<sup>82</sup> Thus, the objective is strongly related to the diversity goal.

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69. OECD Roundtable 1997, *supra* note 27, at 60–61; Loi 81-766 du 10 août 1981 relative au prix du livre [Law 81-766 of August 10, 1981 Relating to Book Price], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Aug. 11, 1981, p. 2198, art. 1. (Fr.), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000517179> [<https://perma.cc/NU7P-89JC>].

70. *Id.*

71. RØNNING ET AL., *supra* note 28, at 38.

72. OECD Roundtable 1997, *supra* note 27, at 59–60.

73. Løyland & Ringstad, *supra* note 66, at 239.

74. Martos & Martos, *supra* note 60, at 142–43.

75. RØNNING ET AL., *supra* note 28, at 40.

76. Decreto-Lei n.º 176/96, de 21 de Setembro, Diário da República 1996, 22 set. (Port.), [https://dre.pt/pesquisa/-/search/215895/details/normal?p\\_p\\_auth=fIOAesSR](https://dre.pt/pesquisa/-/search/215895/details/normal?p_p_auth=fIOAesSR) [<https://perma.cc/TS6H-W7K5>].

77. OECD Roundtable 1997, *supra* note 27, at 59–60.

78. Løyland & Ringstad, *supra* note 66, at 239–40.

79. Ley 10/2007, de 22 de junio, de la lectura, del libro y de las bibliotecas [Lectures, Books & Libraries Law] (B.O.E. 2007, 12351) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12351> [<https://perma.cc/2QKL-2C7E>]; Real Decreto 484/1990, de 30 de marzo, sobre precio de venta al público de libros [Book Publication Window Decree] (B.O.E. 1990, 9252) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-1990-9252> [<https://perma.cc/8BL8-5M7R>].

80. OECD Roundtable 1997, *supra* note 27, at 60.

81. Batikas, *supra* note 61, at 30.

82. *Id.*

Other objectives, however, are raised by very few countries. The French Lang Law states that its objective is also to promote competition over professional services in book supply.<sup>83</sup> Some countries, such as Norway, implement regimes with objectives that emphasize the state's interest in strengthening local language and written culture.<sup>84</sup> Norway also promotes the objective of encouraging competition between titles, book printing, and accessibility.<sup>85</sup> Lastly, at least one country adopted RPM regimes to promote the objective of improving the protection of copyright.<sup>86</sup>

Although not always clearly stated or explicitly explained, RPM arrangements may achieve all—or at least some of—these goals. Many of these goals are indeed reminiscent of the antitrust arguments supporting the legality of voluntary RPM arrangements. The analysis, which is traditionally the economic analysis, is quite similar. Indeed, in its positive economic sense, it is a clear competition law issue.

#### *D. RPM Arrangements in European and Other Countries' Book Markets*

RPM arrangements are generally prohibited under the laws of competition in many countries, since they support price coordination between manufacturers and prevent price competition. In these countries, RPM arrangements are prohibited because they undermine the existence of a competitive market and, as a result, social efficiency and welfare. While there is a certain trend of change towards acceptance in relation to these arrangements, competition laws in many countries still prohibit or limit RPM arrangements.<sup>87</sup> However, several countries have abolished their prohibitions by legislation.<sup>88</sup> In particular, in book markets, RPM arrangements are allowed and sometimes even mandated.<sup>89</sup> The regulatory

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83. OECD Roundtable 1997, *supra* note 27, at 61; Loi 81-766 du 10 août 1981 relative au prix du livre [Law 81-766 of August 10, 1981 Relating to Book Price], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Aug. 11, 1981, p. 2198 (Fr.); Austria followed the French model and its rationale in adopting modern legislation regulating the book market. HANREICH ET AL., *supra* note 21, at 33.

84. Løyland & Ringstad, *supra* note 66, at 239; Bokavtalen à 1.1.2011 [The Book Agreement on January 1, 2011], BOKHANDLER FORENINGEN [BOOKSTORE ASSOCIATION] (Nor.), <http://www.bokhandlereforingen.no/bokavtalen-a-112011> [<https://perma.cc/Q3RP-6YQ9>].

85. *Id.*

86. *Id.*

87. For a detailed discussion of economic analysis of the RPM arrangement, see *infra* Part III.A Positive Analysis.

88. See, e.g., Law 81-766 of August 10, 1981 (Fr.).

89. In the past, RPM regimes were anchored in contracts between publishers and bookstores. Over time, various countries replaced these contractual arrangements with laws that included the RPM arrangement. The main difference between anchoring RPM arrangements by contract or legislation is the resulting regime's application. A contractual agreement applies to those who join it; there is no duty to join the contractual agreement. A legislative resolution, on the other hand, applies to all—all

arrangement of RPM in the book market is widespread throughout the European Union (“E.U.”) countries but very rare outside of the E.U.<sup>90</sup> Out of twenty-eight E.U. countries, most adopted the RPM arrangement for book markets in one way or another. A few non-European countries have also adopted similar regimes.<sup>91</sup>

RPM regulation in book markets is not uniform across all countries.<sup>92</sup> Not all books are necessarily subject to the RPM arrangement; some—such as textbooks, e-books, or reprints—may be exempt and therefore subject to free-market forces. Some regulatory arrangements include rules regarding discounts for certain periods (such as book fairs) or certain institutions (such as schools, libraries, or book clubs) or sales of large quantities. Usually, the arrangement is limited to a given period of time, after which the books will be traded in the free market.

A few central regimes described below are illustrative of RPM arrangements. In Germany, the 2002 German Book Resale Price Maintenance Act (“BuchPrG”) provides price-setting of books by the publishers.<sup>93</sup> A unique feature of the Act is that it covers cartographic products and even music sheets.<sup>94</sup> In setting the price, publishers must consider the professional services offered by smaller booksellers and their contribution to the objective of supplying books on a broad basis.<sup>95</sup> Furthermore, publishers may not discriminate between traditional booksellers and non-traditional booksellers, such as supermarkets.<sup>96</sup> Once the prices are set by the publishers, publishers, importers, and booksellers are bound to comply with them for eighteen months after the edition is released.<sup>97</sup> The Act lists a number of specific exceptions to the rule, including the possibility to offer 5 to 10 percent discounts when selling books to schools and certain libraries, and for group sales.<sup>98</sup> In order to be compatible with European competition law, the Act provides that it applies

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publishers and all bookstores (except for any exceptions in the law). *See, e.g.*, RÖNNING ET AL., *supra* note 28, at 18–19.

90. *See* Marja Appelman, *Fixed Book Price*, in A HANDBOOK OF CULTURAL ECONOMICS 237, 237 (Ruth Towse ed., 2003); STEPHANIE KURSCHUS, EUROPEAN BOOK CULTURES: DIVERSITY AS A CHALLENGE 262–71 (2015); RÖNNING ET AL., *supra* note 28.

91. RÖNNING ET AL., *supra* note 28, at 25–26.

92. For details of RPM resolutions, *see* RÖNNING ET AL., *supra* note 28, at 30–71.

93. Buchpreisbindungsgesetz [BuchPrG] [German Resale Price Maintenance Act], Sept. 2, 2002, BUNDESGESETZBLATT, TEIL I [BGBl I] at 3448, as amended by Gesetz [G], July 31, 2016, BGBl I at 1937 (Ger.), <https://www.gesetze-im-internet.de/buchprg/BJNR344810002.html> [<https://perma.cc/3APG-T3NK>], *unofficial translation at* [http://www.berlinerbuchhandel.de/sixcms/media.php/976/German\\_Resale\\_Price\\_Maintenance\\_Act.pdf](http://www.berlinerbuchhandel.de/sixcms/media.php/976/German_Resale_Price_Maintenance_Act.pdf) [<https://perma.cc/R2FX-2LW8>] (Carol Wanske trans.).

94. *Id.* § 2(1); *see* RÖNNING ET AL., *supra* note 28, at 35.

95. German Resale Price Maintenance Act § 6(1).

96. *Id.* § 6(2); *see also* OECD Roundtable 2008, *supra* note 29, at 55.

97. German Resale Price Maintenance Act §§ 3, 5, 8(1).

98. *Id.* §§ 3, 7.

only in Germany.<sup>99</sup> Moreover, electronic books are within the scope of the RPM.<sup>100</sup>

In France, the Lang Law requires publishers or importers of books to set retail prices. Retailers may charge between 95 and 100 percent of the set price and must provide free shipping for single copies.<sup>101</sup> Importers of books published in France must charge an equal or higher price than the one set by the retailer.<sup>102</sup> The law explicitly prevents the application of some elements of French competition policy regarding price-fixing.<sup>103</sup> Finally, the law prohibits publishers from setting prices lower than the set price of the book's first edition within nine months of the latter's publication date.<sup>104</sup> The law also lists exceptions, providing that discounts of up to 9 percent may be provided when books are sold to state, municipal, and educational institutions, or to public libraries.<sup>105</sup> There is also no price limit on schoolbooks that are sold by an association to its members.<sup>106</sup> Notably, Austria<sup>107</sup> and Greece<sup>108</sup> have followed in the footsteps of the French Lang Law regime.

99. *Id.* § 3.

100. *Id.* § 2(1)3; Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/8043 (Ger.), <http://dipbt.bundestag.de/doc/btd/18/080/1808043.pdf> [<https://perma.cc/LF42-HXWB>].

101. Loi 81-766 du 10 août 1981 relative au prix du livre [Law 81-766 of August 10, 1981 Relating to Book Price], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Aug. 11, 1981, p. 2198, art. 1. (Fr.), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000517179> [<https://perma.cc/NU7P-89JC>].

102. *Id.*

103. *Id.* at art. 9; *see also* Ordonnance 45-1483 du 30 juin 1945 relative aux prix [Ordinance 45-1483 of June 30, 1945 Relating to Price], J.O., July 8, 1945, p. 4150, art. 37 (Fr.), <https://gallica.bnf.fr/ark:/12148/bpt6k9614744c/f1.item> [<https://perma.cc/6PMH-GLYW>].

104. Law 81-766 of August 10, 1981, art. 4 (Fr.).

105. *Id.* at art. 3.

106. *Id.*

107. Austria adopted a new federal law on the price fixing of books in 2000. BUNDESGESETZ ÜBER DIE PREISBINDUNG BEI BÜCHERN [FEDERAL LAW ON PRICE MAINTENANCE FOR BOOKS] BUNDEGESETZBLATT I [BGBL I] No. 45/2000, as amended (Austria), [https://www.ris.bka.gv.at/Geltend\\_eFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20000789](https://www.ris.bka.gv.at/Geltend_eFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20000789) [<https://perma.cc/HN2G-WVJH>]; *see* ULRIKE SEHRSCÖHN & JOHANNES WILLHEIM, DAS NEUE BUNDESGESETZ ÜBER DIE PREISBINDUNG BEI BÜCHERN: DARSTELLUNG DER NEUEN REGELUNG UND GESAMTTEXT DES GESETZES 5 (2000) (Austria). It applies to the publication, importation, or trade of books and music in the German language as well as e-books, excluding textbooks and old books. *Id.* at 6. Importers and publishers must set a fixed minimum retail price for books published in Austria or imported into Germany, and retailers must maintain the set price accordingly. *Id.* at 9. It largely adopts the exceptions listed in the *Sammelrevers* and applies to cross-border online trade. *Id.* at 14; *see also* Martin Rätze, *Buchpreisbindung in Österreich: Neue Regeln für Buch-Händler*, SHOPBETREIBER-BLOG.DE (Nov. 18, 2014) (Ger.), <https://shopbetreiber-blog.de/2014/11/18/buchpreisbindung-ebooks-oesterreich/> [<https://perma.cc/N8KE-VMUL>].

108. Greece adopted a fixed price regime in 1997, which requires publishers to set a fixed price on books for a period of two years and allows booksellers to offer discounts of up to 10 percent of the fixed price. Nomos (1997:2557) Thesmoi, Metra kai Drosos Politistikos Anaptyxe [Institutions, Measures and Actions for Cultural Development] EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 1997, A:271 (Greece); Batikas, *supra* note 61, at 25, 28.

In Spain, the 2007 Act of Reading, Books and Libraries adopted a new model of an RPM regime. This legislation addressed modern liberalization trends in the book RPM regime, introducing a balanced mechanism that supports the mutual interests of the different players in the book market.<sup>109</sup> The regime of free discounts, which allegedly benefited consumers, was replaced with a balanced “free price” regime, which would appease both consumers and retailers.<sup>110</sup> The Act endorses the liberalization introduced in previous decrees, recognizing nearly all of the special categories of books—including textbooks—that qualify for exemptions from price fixing.<sup>111</sup>

In Portugal, the 1996 Fixed Book Price Law imposed a fixed price regime on books offered for sale to the public by publishers, printers, and importers.<sup>112</sup> The fixed price of a copy must be visibly indicated by the retailer.<sup>113</sup> Books may not be offered for sale for less than 90 percent of the fixed price during the first eighteen months from the date of publication or importation.<sup>114</sup> Retailers may charge as low as 80 percent of the fixed price when books are purchased by either public or school libraries or other institutions that promote Portuguese literature.<sup>115</sup> The same applies to special occasions or initiatives in which books are sold to promote this purpose, such as book fairs or exhibitions.<sup>116</sup> The law explicitly exempts certain types of books from the fixed price regime such as school textbooks, limited high-quality editions, used books or books that are out of print, and more.<sup>117</sup> The law went through revisions in 2000 and 2015 aimed at adapting it to modern economic and cultural changes, applying its provisions to electronic books, and improving its enforcement mechanisms in different ways.<sup>118</sup>

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109. See Ley 10/2007, de 22 de junio, de la lectura, del libro y de las bibliotecas [Lectures, Books & Libraries Law] (B.O.E. 2007, 12351) (Spain), <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12351> [<https://perma.cc/2QKL-2C7E>].

110. *Id.*; see also Martos & Martos, *supra* note 60, at 142.

111. Lectures, Books & Libraries Law art. 10–11.

112. See Decreto-Lei n.º 176/96, de 21 de Setembro, art. 2, Diário da República 1996, 22 set. (Port.), [https://dre.pt/pesquisa/-/search/215895/details/normal?p\\_p\\_auth=f1OAesSR](https://dre.pt/pesquisa/-/search/215895/details/normal?p_p_auth=f1OAesSR) [<https://perma.cc/TS6H-W7K5>].

113. *Id.* at art. 3.

114. *Id.* at art. 4.

115. *Id.* at art. 12.

116. *Id.* at art. 14.

117. *Id.* at art. 15.

118. See Decreto-Lei n.º 196/2015, de 16 de Setembro, Diário da República 2015, 16 set. (Port.), <https://dre.pt/web/guest/pesquisa/-/search/70309897/details/normal?q=196%2F2015> [<https://perma.cc/M6XP-GST2>]; Decreto-Lei n.º 216/2000, de 2 de Setembro, Diário da República 2000, 2 set. (Port.), <https://dre.pt/web/guest/pesquisa/-/search/580794/details/normal?q=216%2F2000> [<https://perma.cc/KCH6-SYZH>].

In the Netherlands, the *Wet op de Vaste Boekenprijs* (Fixed Book Price Law) came into force in 2005.<sup>119</sup> The law provides that when a book written in Dutch or Frisian is published for the first time, the publisher must set a fixed price, which will be the price for all retailers.<sup>120</sup> Exceptions to the fixed price apply to book clubs, bankrupt bookshops, and textbooks or other sales for school use.<sup>121</sup> Publishers or booksellers may cancel the fixed price after one year of its application.<sup>122</sup> Retailers are allowed to offer 5 to 10 percent discounts or even determine their own discounts in cases of selling multiple copies, depending on the number of copies and the identity of the buyer (libraries and educational institutions).<sup>123</sup> They may also set a temporary (up to three months) “special price” for promotional purposes and even offer greater discounts of up to 20 percent for book clubs.<sup>124</sup>

In the United Kingdom the RPM regime in the book industry, which was eventually abolished in 1995, was designed very differently.<sup>125</sup> As we mentioned earlier, the Net Book Agreement (“NBA”) was a mechanism intended to administer individual RPM contracts and was not a collective price-fixing agreement between publishers and booksellers.<sup>126</sup> Rather than imposing a formal RPM regime, it allowed publishers who were signatory members of the NBA to impose fixed prices, as long as they did so in compliance with its terms.<sup>127</sup> The terms applied only to publishers or booksellers who wished to sell net books and were signatory members of the NBA, regardless of their membership in booksellers’ or publishers’ associations.<sup>128</sup> The NBA did not apply to textbooks.<sup>129</sup> The Joint Committee of the booksellers’ and publishers’ associations divided the book industry into sectors, providing each sector with different trade terms.<sup>130</sup>

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119. Wet van 9 november 2004 houdende regels omtrent de vaste boekenprijs (Wet op de vaste boekenprijs) [Law on Fixed Book Price], Stb. 2004, 600 (Neth.), <https://zoek.officielebekendmakingen.nl/stb-2004-600.html> [<https://perma.cc/BMZ8-3JSC>]; see also Houdijk, *supra* note 43, at 427.

120. Law on Fixed Book Price art. 1 (Neth.); Houdijk, *supra* note 43, at 427.

121. Law on Fixed Book Price art. 6(1)(b) (Neth.) (bankrupt bookshops); *id.* at art. 9 (book clubs); *id.* at art. 13 (textbooks); see also Houdijk, *supra* note 43, at 428.

122. Law on Fixed Book Price art. 7 (Neth.).

123. Besluit van 3 mei 2005, arts. 1–3, Stb. 2005, 269 (Neth.), <https://zoek.officielebekendmakingen.nl/stb-2005-269.html> [<https://perma.cc/4U3S-T7N5>].

124. *Id.* at arts. 7–9.

125. See Dearnley, *supra* note 35, at 20–21.

126. *Id.* However, see *infra* note 128.

127. Dearnley, *supra* note 35, at 20–21.

128. *Id.* at 20. It should be noted, however, that some see the NBA as a collective RPM arrangement as opposed to an individual one. See WALTER ALLAN & PETER CURWEN, COMPETITION AND CHOICE IN THE PUBLISHING INDUSTRY 22–24 (1991); OFFICE OF FAIR TRADING, AN EVALUATION OF THE IMPACT UPON PRODUCTIVITY OF ENDING RESALE PRICE MAINTENANCE ON BOOKS, OFT 981, at 20 (U.K.), <https://webarchive.nationalarchives.gov.uk/20110704142022/http://www.offt.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/oft981> [<https://perma.cc/2P2X-BRTS>] (report prepared by the Centre for Competition Policy at University of East Anglia).

129. See OFFICE OF FAIR TRADING, *supra* note 128, at 43.

130. Dearnley, *supra* note 35, at 50–52.

Certain categories of sale were exempt from the NBA, including libraries and book clubs.<sup>131</sup>

The Norwegian book market has also been regulated by industry agreements that were in place between 1998 and 2004.<sup>132</sup> The price of books was determined annually by individual publishers and applied to members of the Norwegian Publishers' Association and the Norwegian Bookshops Association.<sup>133</sup> Under these agreements, the fixed price could be changed one year after the title or the new edition was released, and the period of the fixed price could also be extended.<sup>134</sup> Discounts could be offered to public libraries and schools.<sup>135</sup> These agreements were revised in 2005 and were extended through 2018.<sup>136</sup> The Norwegian Competition Authority, however, opposed these agreements and viewed them as an imprecise tool for achieving their stated goals of promoting the availability, diversity, and quality of books.<sup>137</sup> However, the agreements are still in place.<sup>138</sup>

Table 1 below summarizes the major characteristics of a variety of RPM regimes in different European as well as other non-European countries.

Table 1: RPM Arrangements in Europe and Beyond

Country	Inspection on Book Prices	Legal Basis	Period of Inspection on Price	Maximum Discounts	Application to E-books
Argentina	Yes	Legislation	Eighteen months from publication	10 percent at book fairs; 10 percent for schools and libraries; 50 percent for public organizations	Yes

131. *Id.* at 21.

132. LASSE FRIDSTRØM ET AL., KONKURRANSETILSYNET [NORWEGIAN COMPETITION AUTHORITY], KVEN LYT SETJE PRIS PÅ BOKA?: EI VURDERING AV DEN NORSKE BOKMARKNADEN 10, 12–13 (2004), <https://docplayer.me/17014-Kven-lyt-setje-pris-pa-boka-ei-vurdering-av-den-norske-bokmarknaden.html> [<https://perma.cc/L6YP-7CYH>].

133. *Id.* at 12.

134. *Id.*

135. *Id.* at 16.

136. OECD Roundtable 2008, *supra* note 29, at 57; *see also* OECD, Annual Report on Competition Policy Developments in Norway – 2017, at 11, DAF/COMP/AR(2018)45 (Oct. 31, 2018), [https://one.oecd.org/document/DAF/COMP/AR\(2018\)45/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)45/en/pdf) [<https://perma.cc/72YQ-5LUB>]; OECD, Annual Report on Competition Policy Developments in Norway – 2014, at 5, DAF/COMP/AR(2014)27 (Dec. 9, 2014), [https://one.oecd.org/document/DAF/COMP/AR\(2014\)27/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2014)27/en/pdf) [<https://perma.cc/KSR2-F4MT>] [hereinafter OECD Norway 2014].

137. *See* OECD Norway 2014, *supra* note 136, at 5.

138. *Id.*

Country	Inspection on Book Prices	Legal Basis	Period of Inspection on Price	Maximum Discounts	Application to E-books
Austria	Yes	Legislation	Two years from publication	5 percent relative to all factors, except for libraries, which have a discount of 10 percent	
Bulgaria <sup>139</sup>	Yes	Legislation			
France	Yes	Legislation	Two years from publication, six months after the last delivery of books to book chains	Five percent to consumers and nine percent to libraries	Yes
Germany	Yes	Legislation	At least eighteen months	No discount rules	Yes
Hungary <sup>140</sup>	Yes	Trade Agreement	Six months from publication		
Italy	Yes	Legislation	Twenty months from publication and six months from last delivery to book chains	15 percent; 20 percent for books sold at book fairs or trade fairs	No
Japan	Yes	Price Control Agreements	Dependent on Agreement	Dependent on Agreement	No
Lebanon	Yes	Order of the Ministry of Economy		20 percent for schools, distributors, and book chains	No

139. STEPHANIE KURSCHUS, EUROPEAN BOOK CULTURES: DIVERSITY AS A CHALLENGE 265 (2015).

140. *Id.* at 267.

Country	Inspection on Book Prices	Legal Basis	Period of Inspection on Price	Maximum Discounts	Application to E-books
Luxembourg	Yes <sup>141</sup>	Trade Agreement			
Netherlands	Yes	Legislation	Publishers can charge lower prices every six months	5 to 10 percent only for students	No
Norway	Yes	Agreements between publishers and organizations of book chains	Until April 30 in the year following the publication	12.5 percent for bookstores, 20 percent for libraries	Yes
Portugal	Yes	Legislation	Nineteen months	10 percent; 20 percent for libraries and framework of book fairs	No
Slovenia	Yes	Legislation	Six months	0 percent; 20 percent in the framework of book fairs, subscriptions and book series	Yes
South Korea	Yes	Legislation	Eighteen months	19 percent	Yes
Spain	Yes	Legislation	Two years after publication, six months after bookstore delivery	5 percent; 10 percent on World Book Day and book fairs; 15 percent for public organizations	Yes
Switzerland <sup>142</sup>	Yes	Trade agreement			

141. *Id.* Applicable only to local books; imported books are outside of the resolution.

142. *Id.* at 268. Canceled in 1999; adopted in 2007. OECD Roundtable 2008, *supra* note 29, at 57–58.

Table 2: Countries with No RPM Arrangements in Europe and Beyond

Country	Inspection on Book Prices	Legal Basis	Period of Inspection on Price	Maximum Discounts	Application to E-books	Year Cancelled
Belgium <sup>143</sup>	No					
Cyprus	No					
Czech Republic	No					
Denmark	No	1830 Trade Agreement; Amended in 2001	Twenty-four months from publication	10 percent		2011
United Kingdom	No					1995
Estonia	No					
Finland	No					1971
Ireland	No					1995 <sup>144</sup>
Latvia	No					
Lithuania	No					
Malta	No					
Poland	No					
Romania	No					
Slovakia	No					
Sweden	No					1974

### E. Objections to Regulation

RPM regimes in the book industry have been challenged on many grounds. The most important objection is rooted in competition and antitrust regulation. The relation of RPM regimes in the book industry to antitrust law is usually addressed explicitly by a specific legal exception from antitrust regulation for the book industry, suggesting that books are cultural assets and as such they should be treated differently from other goods. For example, German cartel law explicitly allowed RPM regimes in the book industry, subject to the registration and approval of the Federal Cartel

143. The subject was re-discussed. See Mark Williams, *Half of Belgium Gets Fixed-Price Book Law*, TNPS (Oct. 23, 2017), <https://thenewpublishingstandard.com/half-of-belgium-gets-fixed-price-book-law/> [<https://perma.cc/TLR6-AMZL>].

144. The subject was re-discussed. See Frederick Van Der Ploeg, *Beyond the Dogma of the Fixed Book Price Agreement*, 28 J. CULTURAL. ECON. 1, 16 (2004).

Office.<sup>145</sup> In France, only minimum price regimes are banned by competition law, leaving a loophole for allowing recommended price regimes in the book sector.<sup>146</sup> In the United Kingdom, the NBA was challenged as serving a publishers' cartel, but it was protected by the courts on the grounds that "books are different."<sup>147</sup> In Switzerland, the competition authorities themselves justified the exemption of the book sector's RPM arrangement on cultural policy grounds.<sup>148</sup> The Swedish book industry was exempted from the prohibition on fixing prices based on recognition of its unique cultural value.<sup>149</sup> Between 1998 and 2005, a Dutch booksellers' organization, Koninklijke Boekverkoopersbond (KVB), was granted a dispensation for maintaining its restrictive trade regulations.<sup>150</sup>

However, a number of trends made it more difficult for European countries to maintain their RPM regimes based on cultural justifications alone. These trends include: the growing power of the competition authorities and related developments in national competition laws; the rise of the big production and retailing networks; and the accumulation of data regarding the effects of RPM regimes. Competition authorities, big networks, and scholars criticized the regimes for being incompatible with national competition law and for leading to higher book prices.<sup>151</sup>

In the United Kingdom, following legislation that targeted all forms of RPM regimes and the establishment of the Office of Fair Trade in the 1970s, the NBA was constantly challenged.<sup>152</sup> Dillons, a major bookselling network, criticized the NBA as responsible for the extensive rise in book prices during the 1980s.<sup>153</sup> At the same time, the European Commission ("E.C.") concluded that the NBA disrupted price competition within the

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145. Bittlingmayer, *supra* note 13, at 804–05; *see also* OECD, Annual Report on Competition Policy Developments in Germany July 1993–June 1994, ¶ 9, DAFFE/CLP(94)12/01 (1994), <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Taetigkeitsberichte/OECDAnnualReport1993-1994.pdf?blob=publicationFile&v=10> [<https://perma.cc/R3DS-5L44>].

146. OECD Roundtable 1997, *supra* note 27, at 59–60.

147. *In the Matter of the Net Book Agreement*, 1957 [1962] 3 All ER 751 (RP), *reprinted in* BOOKS ARE DIFFERENT: AN ACCOUNT OF THE DEFENCE OF THE NET BOOK AGREEMENT BEFORE THE RESTRICTIVE PRACTICES COURT IN 1962 3, 4 (R. E. Barker & G. R. Davies eds., 1966); Dearnley, *supra* note 35, at 22–24.

148. RÖNNING ET AL., *supra* note 28, at 38.

149. Kay E. Winkler & Karl-Erik Gustafsson, *Sweden*, in INST. OF EUR. MEDIA LAW, MEDIA MARKET DEFINITIONS - COMPARATIVE LEGAL ANALYSIS FINAL REPORT 10.01 (Alexander Scheuer et al. eds., 2003), <http://ec.europa.eu/competition/sectors/media/documents/sweden.pdf> [<https://perma.cc/F58D-3Z8K>].

150. OECD, Competition Policy in OECD Countries 1996–1997, at 236, DAFFE/CLP(99)23 (1999), [https://one.oecd.org/document/DAFFE/CLP\(99\)23/en/pdf](https://one.oecd.org/document/DAFFE/CLP(99)23/en/pdf) [<https://perma.cc/8637-LBH4>].

151. *See, e.g.*, OECD Roundtable 1997, *supra* note 27.

152. Dearnley, *supra* note 35, at 15–16, 60–61.

153. *Id.* at 118.

book trade, as booksellers who were not included in its lists suffered from competitive disadvantages.<sup>154</sup>

The Spanish competition authorities accused the 1975 Book Law of hampering consumers' welfare, suggesting that the restriction of price competition would inevitably lead to higher prices.<sup>155</sup> The Portuguese RPM system was criticized for imposing tight regulation over discounting and consequently having a negative effect on potential readers.<sup>156</sup>

The Dutch economists at the Competition Authority editorialized in a national newspaper that the Dutch RPM regime inevitably led to higher prices due to the restriction it posed to competition.<sup>157</sup> The Swedish government abolished its RPM arrangement in 1970, finding it to be incompatible with national competition legislation and involve unnecessarily high prices.<sup>158</sup> Greek scholars accused their country's regime of allowing retailers and publishers to maintain high prices and making no adjustments due to the sharp decrease in household income following the Greek recession.<sup>159</sup>

Because most countries that have adopted book RPM regimes belong to the E.U., such regimes also raise anticompetitive concerns under E.U. competition policy because they affect trade between E.U. member states and distort competition. The E.U. also monitors the inner trade within member states, although it has no jurisdiction over national competition policy. Furthermore, it recognizes that the cultural value of books at the E.U. level may sometimes prevail over competition principles. Although the E.U. rarely intervenes in this respect, member states face uncertainty regarding their RPM regimes, and some of them have chosen to adopt or adapt to E.U. competition principles. Many European countries addressed these concerns through securing their RPM arrangement in legislation while adjusting its provisions in order to comply with the E.U.'s policy. For example, the

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154. *Id.* at 85–86.

155. Martos & Martos, *supra* note 60, at 143–44.

156. Carlos Faria, *Revisão da lei do preço fixo do livro, mais um erro em final de mandato*, MENTE LIVRE (Sept. 17, 2015), <https://cefariazores.wordpress.com/2015/09/17/revisao-da-lei-do-preco-fixo-do-livro-mais-um-erro-em-final-de-mandato/> [<https://perma.cc/U996-LRHW>]; Autoridade da Concorrência, Parecer da Autoridade da Concorrência sobre o Projeto de Decreto-Lei n.º 191/2015, que procede à segunda alteração ao Decreto-Lei n.º 176/96, de 21 de setembro, § 2.3, ¶ 17, [http://www.concoerencia.pt/vPT/Estudos\\_e\\_Publicacoes/Recomendacoes\\_e\\_Pareceres/Paginas/Parecer-pre%C3%A7o-do-livro.aspx](http://www.concoerencia.pt/vPT/Estudos_e_Publicacoes/Recomendacoes_e_Pareceres/Paginas/Parecer-pre%C3%A7o-do-livro.aspx).

157. Jarig v. Sinderen et al., *Die Vaste Boekenprijs Laet de Verkoop Dalen* [*Fixed Book Prices Result in Lower Book Sales*], NRC HANDELSBLAD (Amsterdam) (June 11, 2014), <https://www.nrc.nl/nieuws/2014/06/11/die-vaste-boekenprijs-laet-de-verkoop-dalen-1387081-a886393> [<https://perma.cc/SF/W8-4UB4>], translated by Neth. Auth. for Consumers & Mkts., <https://www.acm.nl/en/publications/publication/13189/Fixed-book-prices-result-in-lower-book-sales> [<https://perma.cc/6UXJ-5BD9>].

158. Svedjedal, *supra* note 50, at 12.

159. Batikas, *supra* note 61, at 29.

European Court of Justice (E.C.J.) struck down the German-Austrian collective RPM agreements (*Sammelrevers*), finding them incompatible with its competition policy.<sup>160</sup> In response, the two countries amended their RPM laws to secure their regimes.<sup>161</sup> In compliance with the E.U.'s policy, the German Act exempted cross-border sales from its RPM regime.<sup>162</sup> In an attempt to comply with E.U. policy, the French Lang Law provisions that regulate imported books do not apply to the importations of books originally published by a member state.<sup>163</sup> The British Publishers' Association ended the application of the NBA in Ireland due to concerns regarding the E.C.'s 1988 decision, which found that the NBA was incompatible with E.U. competition law.<sup>164</sup> In this respect, the E.C. could not find the NBA restrictions indispensable for accomplishing public interests, and thus, they did not qualify for an exemption.<sup>165</sup> However, the NBA was not ruled illegal, and in 1995, the E.C.J. accepted the claims of the Publishers' Association, annulling its former decision.<sup>166</sup> The Dutch RPM legislation, which was enacted in response to E.U. bans on vertical restraints, states in its provisions that it does not violate E.U. competition policy since it may be justified under cultural policy.<sup>167</sup>

160. Case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handels-gesellschaft mbH*, 2009 E.C.R. I-03717, ¶ 38, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=73332&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=307248> [<https://perma.cc/8CSU-HECS>]; see also OECD, Annual Report on Competition Law and Policy Developments in Germany – 1st July 1996 – 30 June 1997, ¶ 26, DAFFE/CLP(97)11/01 (1997), [https://one.oecd.org/document/DAFFE/CLP\(97\)11/01/en/pdf](https://one.oecd.org/document/DAFFE/CLP(97)11/01/en/pdf) [<https://perma.cc/W8LG-YBGD>] (hypothesizing that the E.U. might override the German RPM regime).

161. OECD, Annual Report on Competition Policy Developments in Germany July 2001–June 2002, ¶ 8, DAFFE/COMP(2002)27/01 (2002), [https://one.oecd.org/document/DAFFE/COMP\(2002\)27/01/en/pdf](https://one.oecd.org/document/DAFFE/COMP(2002)27/01/en/pdf) [<https://perma.cc/8U49-XC52>]; see also *Buchpreisbindungsgesetz* [*BuchPrG*] [*German Resale Price Maintenance Act*], Sept. 2, 2002, *Bundesgesetzblatt, Teil I* [*BGBI I*] at 3448, as amended by Gesetz [G], July 31, 2016, *BGBI I* at 1937 (Ger.), <https://www.gesetze-im-internet.de/buchprg/BJNR344810002.html> [<https://perma.cc/3APG-T3NK>], *unofficial translation at* [http://www.berlinerbuchhandel.de/sixcms/media.php/976/German\\_Resale\\_Price\\_Maintenance\\_Act.pdf](http://www.berlinerbuchhandel.de/sixcms/media.php/976/German_Resale_Price_Maintenance_Act.pdf) [<https://perma.cc/R2FX-2LW8>] (Carol Wanske trans.).

162. Gesetz [G], July 31, 2016, *BGBI I* at 1937 (Ger.), [http://www.bgbl.de/xaver/bgbl/start.xav?stArtbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl116s1937.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?stArtbk=Bundesanzeiger_BGBI&jumpTo=bgbl116s1937.pdf) [<https://perma.cc/5524-5EJ4>] (repealing article 4).

163. Loi 81-766 du 10 août 1981 relative au prix du livre [Law 81-766 of August 10, 1981 Relating to Book Price], J.O., Aug. 11, 1981, p. 2198, art. 1. (Fr.).

164. Commission Decision 89/44/EEC, Relating to a Proceeding Under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, *Publishers Association - Net Book Agreements*), 1989 O.J. (L 22) 12, <https://publications.europa.eu/s/m8JB>; Dearnley, *supra* note 35, at 83, 86.

165. Dearnley, *supra* note 35, at 87–88.

166. *Id.* at 93–94; Case C-360/92 P, *Publishers Ass'n v. Comm'n of the Eur. Communities*, 1995 E.C.R. I-00023.

167. RAAD VOOR CULTUUR [COUNCIL OF CULTURE], VASTE BOEKENPRIJS: ADVIES BIJ TWEDE EVALUATIE VAN DE WET [FIXED BOOK PRICE: ADVICE FOR THE SECOND REVIEW OF THE LAW] 5 (2014) (Neth.), [https://www.cultuur.nl/upload/documents/adviezen/vaste\\_boekenprijs-secured.pdf](https://www.cultuur.nl/upload/documents/adviezen/vaste_boekenprijs-secured.pdf) [<https://perma.cc/TWU3-R73T>]; A. W. Hins & G. A. I. Schuijt, *Kroniek van het Nederlandse mediarecht 2006–*

Finally, RPM regimes in book markets are widely criticized for not fulfilling their intended major objectives, namely the increased diversity and availability of books and the increased competition in services offered by retailers. These arguments rely on the experience with the RPM regime and its effects in the country in question as well as the comparative experience with other European countries. Sometimes, positive effects are attributed to different factors than the RPM arrangement, and many times it cannot be determined if the effect in question is linked to the RPM regime or not. The discussion that follows describes these objections in greater detail.

One of the primary arguments in favor of a single price is its ability to maximize certainty for booksellers, who would be willing to take the risk and diversify their selection of books (“cross-subsidization”) instead of selling popular books on discount (best-sellerization or “cream skimming”), since less popular books would be sold for a full price.<sup>168</sup> However, the experience in countries where no RPM regime is imposed shows booksellers flourishing and offering a variety of titles.<sup>169</sup> Frederick Van Der Ploeg showed that this argument in support of a single price is incorrect in the case of the book market, as textbooks and guidebooks feature a substantial price elasticity and cannot be regarded as highly profitable, while the so-called “high-quality” titles tend to have lower price elasticity and thus would incur higher costs.<sup>170</sup> Additionally, the RPM arrangement does not guarantee that booksellers would use the extra profits to enrich their assortment, as they may invest these profits primarily in ordering the more profitable titles.<sup>171</sup>

Furthermore, since the publishers set the price, they may deliberately increase retail profit margins to promote specific titles while lowering margins for other titles, thus incentivizing retailers to step up their promotion of the more profitable titles.<sup>172</sup> Even if the RPM arrangement promotes a larger selection of books, these are generally not bestsellers and may take time to sell. This will lead to difficulties in managing stocks efficiently and possibly increased management costs.<sup>173</sup>

In addition, the idea that the rise of the big chains and supermarkets as a result of unregulated competition would have an adverse effect on diversity

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2011, 3 AUTEURS & MEDIA 287, 295 (2011) (Neth.), <https://dare.uva.nl/search?identificer=14f84496-dfd4-47f3-baa8-b8ac7896f4d1> [<https://perma.cc/7DBN-BX6V>]; Wet van 9 november 2004 houdende regels omtrent de vaste boekenprijs (Wet op de vaste boekenprijs) [Law on Fixed Book Price], Stb. 2004, 600, ch. 2, ¶ 1, art. 3(2) (Neth.), <https://zoek.officielebekendmakingen.nl/stb-2004-600.html> [<https://perma.cc/BMZ8-3JSC>].

168. OECD Roundtable 2008, *supra* note 29, at 55.

169. *Id.* at 55–56.

170. Van Der Ploeg, *supra* note 144, at 11–13; *see also* Martos & Martos, *supra* note 60, at 147.

171. Martos & Martos, *supra* note 60, at 144.

172. *Id.* at 144–45.

173. *Id.*

or quality is implausible, since such entities have no interest in narrowing their selection of titles and leaving the demand for quality books unsatisfied.<sup>174</sup>

Perona and Pouvet criticize the length of the RPM period in the Lang Law (two years), which does not allow retailers to adjust prices in ways that will attract readers and help promote the dissemination of new titles.<sup>175</sup> Moreover, online trade and reading platforms make books available to the public like never before, and questions of geographic accessibility or diversity seem irrelevant and outdated.<sup>176</sup>

Many objections have also been raised with regard to the pricing effects on diversity with regards to RPM arrangements in different countries. Critics of the Portuguese RPM regime argue that the prevention of discounts, considering the already high prices of books in the country, impairs consumers' purchasing power, encouraging them to buy cheaper foreign books instead of promoting Portuguese literature, which eventually shrinks the market and decreases the level of diversity.<sup>177</sup> The Austrian Act was criticized for allowing booksellers, especially the big retailers, to raise prices significantly despite consumers' and small bookstores' interests.<sup>178</sup> An OECD report on the Dutch RPM regime found no rationale in maintaining it, noting that, relying on the experience of free price regimes, there is no evidence suggesting a decline in the number of books, yet there is evidence that book prices are higher under RPM regulation.<sup>179</sup> A 2013 report commissioned by several Dutch Ministries found that the Dutch RPM regime did not lead to an increase in book sales, except in children's books, and, in terms of diversity, the number of genres and titles per genre available for sale were decreasing (in both physical and online outlets).<sup>180</sup> The Swedish Competition Authority, which abolished the country's RPM

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174. Vincenzo Meli, *La Resale Price Maintenance nel Commercio Librario: Limitare la Concorrenza per Promuovere la Cultura?*, 15 MERCATO CONCORRENZA REGOLE 149, 175–76 (2013) (It.).

175. PERONA & POUVET, *supra* note 31, at 79–80.

176. *Id.* at 72.

177. Autoridade da Concorrência, Parecer da Autoridade da Concorrência sobre o Projeto de Decreto-Lei n.º 191/2015, que procede à segunda alteração ao Decreto-Lei n.º 176/96, de 21 de setembro, § 2.3, ¶ 17, [http://www.concorrenca.pt/vPT/Estudos\\_e\\_Publicacoes/Recomendacoes\\_e\\_Pareceres/Paginas/Parecer-pre%C3%A7o-fixo-do-livro.aspx](http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Recomendacoes_e_Pareceres/Paginas/Parecer-pre%C3%A7o-fixo-do-livro.aspx).

178. *Buchhandelskette Thalia erhöht Preise für Bücher – trotz Buchpreisbindung*, VIENNA ONLINE (Sept. 12, 2016, 3:52 PM) (Austria), <http://www.vienna.at/buchhandelskette-thalia-erhoeht-preise-fuer-buecher-trotz-buchpreisbindung/4903258> [https://perma.cc/7N6M-93K3].

179. MICHAEL WISE, OECD, THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM 13 (1999) (Neth.), <http://www.oecd.org/netherlands/2497317.pdf> [https://perma.cc/47UY-TLLR].

180. FRANK BONGERS ET AL., TWEDE EVALUATIE VAN DE WET OP DE VASTE BOEKENPRIJS 103–04 (2014) (Neth.), [https://www.kewj.nl/sites/default/files/research/tweede-evaluatie-van-de-wet-op-de-vaste-boekenprijs\\_2014.pdf](https://www.kewj.nl/sites/default/files/research/tweede-evaluatie-van-de-wet-op-de-vaste-boekenprijs_2014.pdf) [https://perma.cc/FP2A-EZLJ].

arrangement, regarded the regime as preserving an ineffective market structure and as detrimental to the production of books.<sup>181</sup>

Some objections have also been raised with regards to the possible effects on services' competition. A major argument in favor of RPM regimes speaks of encouraging competition in services offered by retailers (expert's advice, home delivery, etc.), yet Appelman notes that the existence of such platforms over the internet or in newspapers renders these services irrelevant.<sup>182</sup> Moreover, the Spanish Competition Authority concludes that services' competition exists regardless of fixed price mechanisms and that in this case, it "does not necessarily lead to an increase in demand for books."<sup>183</sup> The Authority further notes that the RPM arrangement slows down the development of modernized channels of distribution, and thus, it does not promote accessibility.<sup>184</sup>

In summary, many objections have been raised regarding RPM arrangements, chief among them is their anticompetitive effects; their failure to fulfill the goals of diversity and availability of books; and their failure to increase competition in services offered by retailers. The discussion that follows turns to what effects these arrangements actually had under different countries' RPM regimes.

#### *F. Effects of Arrangements*

There is a large body of empirical data pertaining to the effects of RPM arrangement and free market competition in the book sector. Below we survey what is known about these arrangements, specifically touching upon their competitive effects, including their impact on book prices and the number of titles produced, their impact on diversity, their impact on the number of booksellers, including online sellers, and their impact on competition in services.

Generally, the discussion shows unclear and inconclusive effects, especially when one compares different RPM arrangements' effects to free market competition models' effects. We will examine what is known about the effects of RPM regimes primarily in Germany, France, the Netherlands, and Switzerland, while also considering what is known about free competition in the book market, mainly in the United Kingdom and Sweden.

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181. OECD Roundtable 1997, *supra* note 27, at 98.

182. Appelman, *supra* note 90, at 238–39; *see also* Martos & Martos, *supra* note 60, at 144.

183. Martos & Martos, *supra* note 60, at 144.

184. *Id.* at 144–45.

### 1. *Effects on Pricing and Number of Titles*

Exploring the competitive effects of RPM regimes and their impact on prices and the number of titles published uncovers a complex picture. Evidence from Germany suggests that the new RPM regime did not slow down competition in the German book market.<sup>185</sup> In Germany, roughly ninety thousand new titles are published every year, and the average book price in Germany is among the lowest in Europe, excluding Finland and Iceland.<sup>186</sup> Rønning presents similar data in her report on European RPM; while the German book trade is flourishing, showing stable figures in sales and title production between 2001 and 2009 and in more recent years, traditional booksellers are in decline.<sup>187</sup> In 2015, Jessica Sängler, Legal Counsel and Deputy Head of the Legal Department at the German Publishers and Booksellers Association (the *Börsenverein*), suggested that while price competition is eliminated, the German book market incentivizes competition in services such as delivery, quality, and advice, leading to cross-subsidization, thus contributing to a large selection of titles.<sup>188</sup>

The French Lang Law contains an evaluation procedure, which instructs the government to submit to the parliament a report evaluating the law's implementation.<sup>189</sup> Perona and Pouvet point out that this provision effectively was a dead letter, as the evaluation conducted in 1987 and 1988 did not draw concrete conclusions.<sup>190</sup> However, a 1997 analysis of the book market since the Lang Law came into effect in 1981 suggested that the number of published titles had increased overall. In ten years, the number rose from 25,602 in 1981 to 39,342 in 1991.<sup>191</sup> The number of sold copies also increased slightly from 345,923 in 1981 to 476,125 in 1991.<sup>192</sup> The market shares of traditional booksellers have been eroding slowly since the law's adoption but remain above 65 percent.<sup>193</sup>

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185. Michael Naumann, *How Germany Keeps Amazon at Bay and Literary Culture Alive*, NATION (May 29, 2012), <https://www.thenation.com/article/how-germany-keeps-amazon-bay-and-literary-culture-alive/> [<https://perma.cc/9V49-HTJZ>].

186. *Id.*

187. RÖNNING ET AL., *supra* note 28, at 74.

188. Helge Rønning et al., *Seminar Summary—Fixed Book Prices as a Policy Element in a Strategy on Literature and Language*, at 12, INT'L PUBLISHERS ASS'N, <https://www.internationalpublishers.org/images/FBPOslo.pdf> [<https://perma.cc/Y5VK-4E63>] [hereinafter Rønning et al., *Seminar Summary*] (report of Seminar on February 12, 2012 in Oslo submitted to the Norwegian Ministry of Culture and the Norwegian Ministry of Education and Research).

189. Loi 81-766 du 10 août 1981 relative au prix du livre [Law 81-766 of August 10, 1981 Relating to Book Price], J.O., Aug. 11, 1981, p. 2198, art. 11. (Fr.).

190. PERONA & POUVET, *supra* note 31, at 62.

191. OECD Roundtable 1997, *supra* note 27, at 61.

192. *Id.*

193. *Id.*

According to the French Coalition for Cultural Diversity, the effects of the Lang Law are generally positive as of 2008.<sup>194</sup> The figures show a rich selection of books available for customers—450,000 titles in total, while 65,000 new titles are published in the country every year.<sup>195</sup> There was also no evidence that there was an inflation in book prices; in fact, prices were lower than the general consumer price index.<sup>196</sup> In 2013, the French Publishers Association, *Syndicat National de l'Édition* (“SNE”), also showed that the Lang Law allegedly led to the elimination of the “best-sellerization” phenomenon, as the top ten bestsellers in France represent merely 2.5 percent of the market share, while in the United Kingdom they comprise more than 15 percent of total sales.<sup>197</sup>

In the Netherlands, where a new Fixed Book Price Law was enacted in 2005, the Act itself provides for an evaluation scheme, under which submission of an evaluation report is required every four years.<sup>198</sup> These evaluations show that since the Act’s introduction, bookstores offer a variety of titles, especially in the fiction genre, and the availability of overall titles, and fiction titles in particular, has been stable.<sup>199</sup> Rønning notes that while overall sales have increased since the Act, sales of academic and scholarly titles, as well as their availability, have decreased, though due to reasons other than the effects of the price-fixing regime.<sup>200</sup> The 2009 evaluation suggests that the Act has successfully fulfilled the cultural purposes of promoting books’ availability and accessibility.<sup>201</sup> Rønning explains that no significant changes have taken place, mainly because the Act continues the previous trade regulation regime.<sup>202</sup> The 2013 evaluation report concludes that the irreversible digitization of bookselling, which is the most significant trend within the industry, renders the Act less and less

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194. FRENCH COAL. FOR CULTURAL DIVERSITY, CULTURAL POLICIES IN FRANCE 30 (2008), <http://www.coalitionfrancaise.org/wp-content/uploads/2013/11/Cultural-policies-in-France.pdf> [<https://perma.cc/6FF5-2BA7>].

195. *Id.* at 29–30.

196. *Id.*

197. Interview by Syndicat National de l'Édition [French Publishers Association] with Christine De Mazières & Catherine Blache, *Fixed Book Price, Explained*, INT’L PUBLISHERS ASS’N (Dec. 12, 2013), <https://www.internationalpublishers.org/component/content/article?id=150:fixed-book-price-explained> [<https://perma.cc/89VN-8BUF>] [hereinafter Interview with De Mazières & Blache].

198. Wet van 9 november 2004 houdende regels omtrent de vaste boekenprijs (Wet op de vaste boekenprijs) [Law on Fixed Book Price], Stb. 2004, 600, art. 30 (Neth.), <https://zoek.officielebekendmakingen.nl/stb-2004-600.html> [<https://perma.cc/BMZ8-3JSC>].

199. RØNNING ET AL., *supra* note 28, at 40.

200. *Id.*

201. A. NOTENBOOM ET AL., AARTS DE JONG WILMS GOUDRIAAN PUBLIC ECONOMICS [APE], EVALUATIE VAN DE WET OP DE VASTE BOEKENPRIJS: EEN KWANTITATIEVE ANALYSE [EVALUATION OF THE FIXED BOOK PRICE ACT: A QUANTITATIVE ANALYSIS] (2009) (Neth.), <https://zoek.officielebekendmakingen.nl/blg-51671.pdf> [<https://perma.cc/N89F-3GUM>]; see also RØNNING ET AL., *supra* note 28, at 40.

202. RØNNING ET AL., *supra* note 28, at 40.

relevant, as availability is achieved far more by online book sales than by increasing the number of physical bookshops.<sup>203</sup> After the issuance of this last evaluation, government officials made public remarks in favor of the Act, viewing it as an essential protection for vulnerable authors, such as new authors.<sup>204</sup> However, the Dutch Consumers Authority (“ACM”) has criticized the Act as “old-fashioned and ineffective,” since there is no evidence that it promotes diversity by incentivizing retailers to offer unpopular titles.<sup>205</sup> The Council of Culture published a detailed response to the 2013 evaluation, weighing the Act’s benefits and shortcomings, and suggesting that it should not be abolished and that more research on its impact is needed.<sup>206</sup>

In Switzerland, when the *Sammelrevers* were abolished in 2007, the Swiss Parliament launched an initiative to develop a fixed price regime act modeled after the French, German, and Austrian book fixed price laws.<sup>207</sup> To this end, the Parliament assigned a research team to assess the effects that the free price regime had on book prices in the country.<sup>208</sup> The team conducted thorough research, collecting two comparable data sets: one while the *Sammelrevers* were still in place and the other after they were abolished.<sup>209</sup> The team concluded that an informed consumer would be able to save a significant amount of money when buying books after the abolition of the *Sammelrevers*, whereas prior to their abolition, prices for an average title in Switzerland were 15 percent higher compared to its German counterpart.<sup>210</sup> However, one of the factors leading to the enactment of a Swiss book law was the rapid rise in book prices under the free price regime.<sup>211</sup> In fact, the Swiss publishers and booksellers abused their position in the local market, so that French books offered for sale in Switzerland were significantly more expensive than the same books in France (under the French fixed-price regime).<sup>212</sup> In 2008, Swiss titles were on average 6 to 13

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203. BONGERS ET AL., *supra* note 180, at 107.

204. *Fixed Book Price Repeived for Four More Years*, DUTCH NEWS.NL (Feb. 7, 2015), <https://www.dutchnews.nl/news/2015/02/fixed-book-price-repeived-for-four-more-years/> [<https://perma.cc/HWD6-2TR6>].

205. *Id.* The Dutch Competition Authority, the NMa, is now part of the ACM.

206. RAAD VOOR CULTUUR, *supra* note 167; *see generally* BONGERS ET AL., *supra* note 180.

207. OECD Roundtable 2008, *supra* note 29, at 194.

208. *Id.* Structural effects, it was assumed, would become observable only in the long run.

209. *Id.* at 195.

210. *Id.*

211. RØNNING ET AL., *supra* note 28, at 42.

212. *Id.*

percent more expensive than the same titles in Germany.<sup>213</sup> The Swiss book law was rejected by voters in a referendum in 2012.<sup>214</sup>

Exploring the effects in the United Kingdom and Sweden is also important because these two countries transitioned from an RPM regime into a free trade system, allowing a comparison of these transitions' effects on competition.

Studying the effects of the Net Book Agreement in the United Kingdom is important. The NBA was in effect from 1899 until 1997, when it was declared illegal.<sup>215</sup> An analysis conducted by the University of East Anglia in 2008 suggests that the suspension of the NBA in 1995 possibly led to an upward surge in labor productivity.<sup>216</sup> Nevertheless, while such an increase in productivity was recorded between 1994 and 1996 when the NBA was suspended voluntarily, a decline in productivity was reported after its formal abolition in 1997.<sup>217</sup> Between 1999 and 2005, the vast majority of British booksellers, including the big chains, suffered significant productivity losses.<sup>218</sup> The decline may be attributed to the emergence of alternative booksellers, such as supermarkets, books clubs, and online retailers such as Amazon.<sup>219</sup> In an attempt to test the implications of suspending the book RPM mechanism, the report drew comparisons between the United Kingdom and Germany, which maintained and enforced its RPM regime.<sup>220</sup> Figures from 2000 to 2006 show a significant growth in the publishing of British titles compared to all other European countries, including Germany (in which rates were also higher than the average within the E.U.).<sup>221</sup> In terms of prices, figures show a rapid increase in the United Kingdom, while in Germany prices have increased at a slower pace.<sup>222</sup>

Fishwick's analysis, which was also published in 2008, presents similar conclusions regarding the increase in prices.<sup>223</sup> Following the abolition of the NBA and the emergence of both supermarkets and online networks such as Amazon as dominant book retailers, discounts had become more extensive and offered for nearly all titles available for sale.<sup>224</sup> As a result,

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213. *Id.*

214. *Ein Sieg für Konsumenten und Buchhändler*, TAGES-ANZEIGER (Zurich) (Mar. 3, 2012), <http://www.tagesanzeiger.ch/schweiz/standard/Ein-Sieg-fuer-Konsumenten-und-Buchhaendler/story/19307330> [<https://perma.cc/4D4R-2YXL>].

215. Dearnley, *supra* note 35, at 20–21, 49.

216. OFFICE OF FAIR TRADING, *supra* note 128, at 59–60.

217. *Id.*

218. *Id.* at 61.

219. *Id.* at 69–70.

220. *Id.* at 77–86.

221. *Id.* at 78.

222. *Id.* at 85.

223. Francis Fishwick, *Book Prices in the UK Since the End of Resale Price Maintenance*, 15 INT'L J. ECON. BUS. 359, 361 (2008).

224. *Id.* at 337–39.

small booksellers could not compete with the big retailers or the new players.<sup>225</sup> However, since 2004, this trend has been balanced as small bookshops were able to offer personal services and diverse titles, maintaining a status of “niche” bookshops while the supermarkets offered mainly bestsellers.<sup>226</sup> While competition led to extensive discounting, publishers attempted to compensate by raising the recommended resale prices.<sup>227</sup> Fishwick’s findings refute the popular assumption that RPM regimes result in higher prices because after Britain removed the NBA book prices did not fall, but increased.<sup>228</sup> This prompts defenders of RPM arrangements to accept the inefficiency of this mechanism while justifying it merely on cultural values.<sup>229</sup> The analysis of the British book industry following the suspension of the NBA proves otherwise, as prices have been rising since then despite market competition.<sup>230</sup> In an earlier study by Fishwick, he concluded that while predictions of higher prices, fewer new titles, and smaller stocks following the demise of the NBA proved generally accurate, sales in the book industry are fairly high due to aggressive pricing and significant efficiency in distribution by Amazon and the supermarkets.<sup>231</sup> Publishers face a more concentrated market, which involves a leap in buyer’s bargaining power and leads to smaller profits for some.<sup>232</sup> However, the emergence of the alternative retailers in the market led to its expansion, which means that publishers would significantly benefit from bestsellers or books with high demand while some of those who publish niche titles might lose overall.<sup>233</sup> Finally, from the consumers’ perspective, due to the ability to freely discount books, bestsellers are now significantly cheaper than their price under the NBA.<sup>234</sup> On the other hand, readers who enjoy less popular genres or titles would undoubtedly pay more for these than they would under the NBA, since price competition leaves no incentive for booksellers to subsidize less popular books with profits from bestsellers.<sup>235</sup>

Very much like the United Kingdom, Sweden has also transitioned into a free trade system in the book industry. Trade agreements in the book sector

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225. *Id.* at 370.

226. *Id.*

227. *Id.* at 371.

228. *Id.* at 374–75.

229. *Id.* at 375.

230. *Id.* at 375–76.

231. Francis Fishwick, *Book Retailing in the UK Since the Abandonment of Fixed Prices 9* (May 2, 2008) (unpublished manuscript), [https://ilsr.org/wp-content/uploads/2011/06/Buchvielfalt\\_Redde\\_Fishwick.pdf](https://ilsr.org/wp-content/uploads/2011/06/Buchvielfalt_Redde_Fishwick.pdf) [<https://perma.cc/Z3NP-8DZQ>].

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 7(a).

expired in the early 1990s.<sup>236</sup> Following the abandonment of the central trade agreements, the book industry turned to signing ad-hoc agreements in different constellations.<sup>237</sup> This liberalization of the book market entailed a differentiation between publishers.<sup>238</sup> Whereas the larger and more powerful publishers could enjoy higher rates of exposure, the smaller publishers struggled to find sales opportunities to the point where placing large orders became a prerequisite for publishing.<sup>239</sup> Furthermore, consumers gained more control over the titles offered for sale in bookstores, and as a result, titles bearing an unclear commercial potential were less likely to be offered at all.<sup>240</sup> Nevertheless, bookstores have survived these changes.<sup>241</sup> Books have been made available in a variety of different places and through many more channels than before, such as book clubs, supermarkets, petrol stations, and more.<sup>242</sup> Additionally, book clubs and online sales platforms became more dominant compared to traditional bookstores.<sup>243</sup> Nevertheless, the report of the Swedish Booksellers Association and the Swedish Publishers Association also finds some positive outcomes following the transition.<sup>244</sup> For example, the number of titles published in Sweden rose steadily since the 1990s.<sup>245</sup> However, this trend stagnated in the mid-2000s, and, since 2008, the number of titles has been in decline.<sup>246</sup> Another positive aspect of price competition is that the free price system did not lead to higher prices in all genres, and the average price of books did not reach the inflation rate of the 1970s.<sup>247</sup> While the prices of textbooks, educational literature, and non-fiction books increased during this period, the price of children's books actually decreased.<sup>248</sup> In fact, since the 1990s, the average book price has dropped and is considered one of the lowest among European countries.<sup>249</sup> Price competition over the internet also contributes to the wide range of prices for the same title.<sup>250</sup> Rønning et al., for instance, conclude in their analysis that drastic changes in the book markets, especially recent

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236. P. Jonas Sjögren, *Från Branschavtal till fri marknad*, in *BOKBRANSCHEN I SVERIGE: UTVECKLINGEN MELLAN 1973 OCH 2003*, at 14, 18 (2003) (Swed.), [http://www.forlaggare.se/sites/default/files/bokbranschen\\_i\\_sverige\\_1973\\_till\\_2003\\_rapport.pdf](http://www.forlaggare.se/sites/default/files/bokbranschen_i_sverige_1973_till_2003_rapport.pdf) [<https://perma.cc/Z747-9F6K>] (report of the Swedish Booksellers Association and the Swedish Publishers Association).

237. *Id.* at 20.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. RÖNNING ET AL., *supra* note 28, at 54.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 56.

250. *Id.*

technological developments such as online sales and the introduction of electronic books, will pave the way for a new business culture in the book market, regardless of a fixed price or a free price system.<sup>251</sup>

The 1997 OECD Competition Committee Roundtable evaluated the Swedish book market.<sup>252</sup> The report concludes that “it would seem that the pessimistic predictions of publishers and retailers about the detrimental effects of allowing price competition have not been realised.”<sup>253</sup> The report also found that a number of bookstores did close down as a result of the transition to the free price system and noted some changes in the market structure, mostly in terms of types of book distribution.<sup>254</sup> These changes in market structure involved the growing market shares of mail-order companies, primarily book clubs and department stores.<sup>255</sup> The report found that the number of specialized bookstores had increased significantly.<sup>256</sup> Thus, for Sweden, it seems that the transition away from the RPM regime proved successful in terms of accessibility.<sup>257</sup>

In Spain, no studies were conducted on the Spanish book sector, except for the textbook sector.<sup>258</sup> In a 2001 study, it was found that the liberalization in the textbook sector, which was excluded from the price fixing regime, did not yield any positive results, apparently since small bookshops were in an inferior position compared with the big chains.<sup>259</sup>

Studying other European markets, it is hard to tell if book RPM systems or their absence necessarily lead to higher prices.<sup>260</sup> Because prices increased both in countries that adopted RPM regimes and in countries lacking such a regime, it is argued that book RPM regimes do not have a significant impact on prices, and the evolution of the market in this respect is attributed to the sensitivity of consumers towards prices.<sup>261</sup> There is no sufficient data on the elasticity of book prices and their effects on demand.<sup>262</sup> Perona and Pouvet conclude that RPM arrangements’ effects on the book market are ambiguous and difficult to ascertain.<sup>263</sup> Other studies show that in 1999 the number of titles per 10,000 residents was higher on average in countries where book RPM regimes were not implemented,

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251. *Id.*

252. OECD Roundtable 1997, *supra* note 27.

253. *Id.* at 9.

254. *Id.* at 98.

255. *Id.* at 98–99.

256. *Id.* at 99.

257. *Id.*

258. Martos & Martos, *supra* note 60, at 146–47.

259. *Id.* at 147.

260. PERONA & POUVET, *supra* note 31, at 48–50.

261. *Id.* at 49–50.

262. *Id.* at 51. For example, if book prices increase, consumers might choose to instead purchase alternative cultural goods, such as films, music, or computer-related products. *See id.* at 52–54.

263. *See id.* at 57.

compared to countries where they were, with significant variations between different countries.<sup>264</sup> This suggests that the RPM regime in itself is not necessarily a decisive factor in this respect.<sup>265</sup>

## 2. *Effects on Diversity*

Studying the effects on diversity also uncovers different results. In 2013, the French Publisher's Association, SNE, noted that the Lang Law has been adopted as a model in at least fifteen countries and is being debated around the world following the decline in the number of bookshops.<sup>266</sup> Addressing the implications of the law, SNE argued that it fulfilled both cultural diversity and the stabilization of the book market, playing a significant role in enhancing accessibility to readers and booksellers.<sup>267</sup> Perona and Pouvet also note that while the Lang Law apparently allows the survival of independent booksellers, it hampers the deployment of large networks that would have offered large selections, thus negatively affecting the achievement of diversity and accessibility.<sup>268</sup>

In the Netherlands, the 2009 evaluation report on the question of diversity suggested that the number of titles of different genres sold between 2005 and 2008 had slightly increased, and authors of the report concluded that the Act has therefore contributed to this trend.<sup>269</sup> However, the 2013 evaluation of the Dutch Act provided a different picture.<sup>270</sup> There, the number of genres and the number of titles per genre available for sale—both in physical and online outlets—were decreasing, negatively affecting diversity.<sup>271</sup> Overall, diversity has slightly improved since the introduction of the Act, as the share of bookshops offering a wide selection of books between 2006 and 2012 remained stable.<sup>272</sup> However, since 2008, the number of genres and “unique” titles offered for sale is decreasing.<sup>273</sup>

In Sweden, the data paints a grim picture regarding the diversity of titles offered in bookstores.<sup>274</sup> Under the free price system, booksellers ceased to accommodate a wide selection of books and instead featured the more commercially profitable titles on their shelves.<sup>275</sup>

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264. *Id.* at 58.

265. *Id.*

266. Interview with De Mazières & Blache, *supra* note 197.

267. *Id.*

268. PERONA & POUVET, *supra* note 31, at 57.

269. NOTENBOOM ET AL., *supra* note 201, at 31.

270. BONGERS ET AL., *supra* note 180, at 103.

271. *Id.* at 104.

272. *Id.* at 106.

273. *Id.* at 106–07. The authors attribute this trend to the growing digitization of the market, the introduction of new online players, and the 2008 economic crisis.

274. RØNNING ET AL., *supra* note 28, at 49.

275. *Id.*

### 3. *Effects on the Number of Booksellers and Online Stores*

RPM regimes have had different impacts on the number of booksellers and the flourishing of online trade in books. In Germany, as of 2010, the online book market for used books was growing.<sup>276</sup> Traditional booksellers were in decline and held only 50 percent of the market share. At the same time, internet sales were rapidly rising: direct online sales were 18 percent of total book sales, and another nearly 14 percent of sales were made through online bookshops in 2010.<sup>277</sup> The Legal Counsel to the *Börsenverein* suggested in 2015 that while the market share of e-books was growing, it stood at less than 5 percent. She further explained that small booksellers offering printed books held 50 percent of the market and were still “stabl[e].”<sup>278</sup>

In France, the number of publishing houses remained stable between 1981 and 1990, and it is argued that the legislation contributed to the maintenance of a large number of publishers.<sup>279</sup> The French Coalition for Cultural Diversity has argued that the Lang Law’s purpose of preserving the network of small booksellers has been fulfilled because 3,000 professional bookshops comprise 40 percent of the distribution of books in certain sectors in the country.<sup>280</sup> The SNE also notes that the figures point to a remarkable number of 2,500 independent booksellers that represent nearly 50 percent of the market, suggesting that the law has successfully prevented booksellers from closing down.<sup>281</sup> As a comparison, in the United Kingdom, where book RPM was abolished, a third of independent bookshops closed down in the past decade, and they represent only 4 percent of the British book industry.<sup>282</sup>

In the Netherlands, in terms of promoting availability, the 2009 evaluation report found that the number of physical outlets had been maintained, though most sales were performed online.<sup>283</sup> However, the supply offered by those bookshops had been decreasing since 2000, and it was difficult to say if this effect stemmed from the Act or not.<sup>284</sup> The 2013 report suggested that the number of online retailers was growing while the number of physical outlets remained stable.<sup>285</sup> However, the share of physical outlets offering a large number of “unique” titles remained stable,

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276. Naumann, *supra* note 185.

277. *Id.*

278. Rønning et al., *Seminar Summary*, *supra* note 188, at 3–4.

279. OECD Roundtable 1997, *supra* note 27, at 61 (finding 383 French publishers).

280. FRENCH COAL. FOR CULTURAL DIVERSITY, *supra* note 194, at 29–30.

281. Interview with De Mazières & Blache, *supra* note 197.

282. *Id.*

283. NOTENBOOM ET AL., *supra* note 201, at 46.

284. *Id.*

285. BONGERS ET AL., *supra* note 180, at 103.

unlike in the previous evaluation, which suggested a decline in this respect.<sup>286</sup>

In Switzerland, E.C. reports showed a decline in points of sale following the adoption of the free price regime in Switzerland.<sup>287</sup>

In the United Kingdom, another trend pointed to a rapid decline in small bookshops in the United Kingdom following the transition away from the NBA agreements and to a free trade system in the book market.<sup>288</sup> When compared to Germany, which developed online book markets at nearly the same time in 1998, growth in market share of online book retailers in the United Kingdom is far more substantial and rapidly growing.<sup>289</sup>

In Sweden, statistics introduced by Rønning in a 2012 report to the Norwegian government showed a clear decline in the number of sales outlets among Swedish booksellers who were members of the Bookstores Association following the introduction of the free price system.<sup>290</sup> This data possibly suggested a negative trend in terms of accessibility.<sup>291</sup> The 1997 OECD Competition Committee Roundtable evaluated the Swedish book market after the transition to the free price system and found that some bookstores had closed and noted some changes in the market structure.<sup>292</sup> These changes in market structure involved the growing market shares of mail-order companies, primarily book clubs and department stores.<sup>293</sup> The report found that the number of specialized bookstores had increased significantly.<sup>294</sup> Thus, for Sweden, it seems that the transition away from the RPM regime proved successful in terms of accessibility.<sup>295</sup>

#### 4. *Effects on Services' Competition*

Unlike other effects of RPM regimes, there is very little empirical data on the effects of RPM arrangements on competition regarding services. In Germany, in 2015, the Legal Counsel for the *Börsenverein* suggested that while price competition was eliminated, the German book market incentivized competition in services such as delivery, quality, and advice.<sup>296</sup>

In summary, the transitions in the book industry are hard to predict. The experience gathered from different European countries about the

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286. *Id.*

287. RØNNING ET AL., *supra* note 28, at 42.

288. OFFICE OF FAIR TRADING, *supra* note 128, at 80.

289. *Id.* at 81.

290. RØNNING ET AL., *supra* note 28, at 49.

291. *Id.*

292. OECD Roundtable 1997, *supra* note 27, at 98.

293. *Id.* at 98–99.

294. *Id.*

295. *Id.*

296. Rønning et al., *Seminar Summary*, *supra* note 188, at 3.

effectiveness of fixed price regimes is contradictory. Thus, it is difficult to assess the effects of such regimes on diversity and availability, as well as on the other goals RPM regimes try to accomplish. Adding the technological changes that have occurred and the flourishing of online trade generally and online trade in books specifically, the assessment of these regimes' effectiveness becomes even more complex.

## II. CHARACTERISTICS OF BOOK MARKETS

Book markets consist of several layers.<sup>297</sup> The first layer is content, in which writers work. The second layer is publishing, which includes the production of the books (such as translation, editing, illustration, and design) and usually their marketing and distribution. The third layer is retail, which includes bookstores and other stores—whether physical or online—that also sell books.

Economically, there are no conspicuous failures in typical book markets. Basically, a book is a private good. A book is also an experience good, the quality of which is learned through consumption. Today, however, there is copious information for book consumers about the quality of books, so the cost of experience is not high.

Anyone can write a book if she wishes, and there are no special barriers to entry for producers along the chain of production of books—from writers to publishers to bookstores. There is, however, considerable uncertainty about the success of the products—new books.<sup>298</sup> Content production of books entails several risks: the risk that the book will not get printed; the risk that it will not be marketed by the publisher; the risk of it not being successful even after marketing; and, the risk of a low profit even if it is successful. However, uncertainty in itself is not usually a failure that needs to be addressed in a regulatory manner. Rather, there are market measures (such as contracts) to address uncertainty. For example, publishers try to reduce uncertainty by diversifying which books they publish.<sup>299</sup>

However, the typical production process of books bears high fixed costs (independent of the number of readers) and very low variable costs (depending on the number of copies sold) that will continue to decrease with

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297. For a detailed description of the European book industry, see JEAN PAUL SIMON & GIUDITTA DE PRATO, EUROPEAN COMMISSION JRC TECHNICAL REPORT, EUR 25277 EN/6, STATISTICAL, ECOSYSTEMS AND COMPETITIVENESS ANALYSIS OF THE MEDIA AND CONTENT INDUSTRIES: THE BOOK PUBLISHING INDUSTRY (2012), <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC76642/book%20report%20with%20covers.pdf> [<https://perma.cc/C99F-4GKL>].

298. RICHARD E. CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 147–48 (2000).

299. The basic rationale for publishers' attempt to reduce uncertainty through diversification is similar to the underlying logic of Markowitz's Modern Portfolio Theory. See Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77, 77–78 (1952).

the development of technology in the production and marketing of books.<sup>300</sup> There is a possibility for specialization, expressed in different genres of books (for instance, children's books, cookbooks, science fiction, poetry books, and history books). However, there is competition between books, at least in the same genre.<sup>301</sup> If different books—even those of the same genre—are not sufficiently interchangeable, the appropriate analytical framework would be of a monopolistic competition.<sup>302</sup>

In addition, the profitable life of a new mass-marketed book is relatively short.<sup>303</sup> One of the unique characteristics of books is that a large part of the cost of a book is expressed in the time spent reading it. The more time it takes reading a book, and the larger the value of time, the lower book consumption sensitivity is to its market price (i.e., the elasticity of demand for books is low).

Although a book is basically a private good, it might have additional properties of a public good.<sup>304</sup> These characteristics are also expressed in the claim that books, unlike other goods, are cultural goods. The existence of books may offer an option value for their future consumption; a value may also stem from the mere knowledge of their existence, apart from their actual consumption. Books can create cultural values like national identity, national pride, solidarity, heritage, and more.<sup>305</sup>

Generally, book markets in many countries do not suffer from lack of competition. Book prices *per se* do not necessarily indicate anything, and they have also changed over time without a clear trend, although in recent years, there has been a decline in book prices.<sup>306</sup> Household expenditures on books is on the rise in nominal as well as in real terms.<sup>307</sup>

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300. In economic language, the production process is non-convex. GILES CLARK & ANGUS PHILLIPS, *INSIDE BOOK PUBLISHING* 3–4 (5th ed. 2014).

301. In other words, there is a great deal of interchangeability between books, at least in every genre.

302. *See generally* B. Curtis Eaton & Richard G. Lipsey, *Product Differentiation*, in 1 *HANDBOOK OF INDUSTRIAL ORGANIZATION* 725, 752–56 (1989); JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 287–88 (1988).

303. CAVES, *supra* note 298, at 144.

304. For the characteristics and significance of public goods, see HARVEY S. ROSEN, *PUBLIC FINANCE* 56–58 (7th ed. 2005); JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 128–36 (3d ed. 2000). Public goods represent market failure that may justify state intervention. Manufacturers of products with characteristics of a public good are not able to receive the full exchange for the social value that they create from their products. Therefore, they produce an amount that is smaller and of lower quality than that which is appropriate from the perspective of the company. In economic terms, we expect that the amount of public goods produced in the free market and such goods' quality will not divert social welfare. Thus, the state may help rectify market failure by encouraging manufacturers to produce public goods both in larger quantities and of a better quality.

305. *See infra* Part III.B.1 Normative Analysis: Culture, Art, and Literature.

306. RØNNING ET AL., *supra* note 28, at 2, 62.

307. *Id.* at 75–76.

## III. RPM ARRANGEMENTS: ECONOMIC ANALYSIS

Before we turn to the analysis of the special regulatory RPM arrangement for the book market, we will discuss the significance and expected results of RPM arrangements in general. The economic analysis of RPM arrangements is mainly done within the framework of “industrial organization.”<sup>308</sup> The basic economic analysis indicates that RPM arrangements prevent price competition between stores at the retail level and support coordination among manufacturers (cartelization) that reduces competitive pressures.<sup>309</sup> These two effects adversely affect efficiency and therefore affect social welfare.

The basic approach to RPM arrangements among economists and regulatory authorities (e.g., the Federal Trade Commission) is one of negativity or at least suspicion.<sup>310</sup> Accordingly, competition laws in many countries prohibit or limit RPM arrangements. Most of these countries include sweeping prohibitions (*per se* illegality) explicitly or impliedly. Nevertheless, legal frameworks change, and there is a trend away from sweeping prohibitions towards more decisional flexibility and case-by-case analysis—e.g., a rule of reason.<sup>311</sup> While outside the United States flexibility in evaluating RPM arrangements is grounded in a default presumption of illegality, in the United States the tide has turned. Over three decades, starting with *GTE Sylvania* and culminating with *Leegin*,<sup>312</sup> the United States Supreme Court has gradually moved from applying a *per se* illegality rule in vertical restraints cases to a rule of reason.<sup>313</sup>

Still, the general approach of economists and jurists in the field of competition law in relation to RPM arrangements is not a positive one. Antitrust authorities in many countries, including the United States, oppose these arrangements in the markets, including in book markets.<sup>314</sup>

The reason for the apparent legal change is a growing recognition among economists that RPM arrangements may have some efficiency-based advantages.<sup>315</sup> A prominent example is the lack of incentives for stores selling the same product to invest in sale-related services, such as consumer

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308. See TIROLE, *supra* note 302.

309. For examples, see *id.*; Elzinga & Mills, *supra* note 1, at 1843–46; Jullien & Rey, *supra* note 1, at 984–85.

310. See *supra* Part I.F Effects of Arrangements.

311. See Elzinga & Mills, *supra* note 1, at 1851; see also OECD Roundtable 2008, *supra* note 29.

312. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

313. See *supra* notes 2–7 and accompanying text.

314. See, e.g., Cooper, *supra* note 8.

315. For a summary, see Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. INDUS. ORG. 57 (1998); see also generally Hao Wang, *Resale Price Maintenance in an Oligopoly with Uncertain Demand*, 22 INT'L J. INDUS. ORG. 389, 390–91 (2004).

guidance, experienced staff, or well-stocked inventory.<sup>316</sup> Investment in sales efforts hurts retailer profits if it cannot be accompanied by a price raise. A rise in price would hurt sales and, therefore, profits, since it would then be possible to purchase the product for a lower price at another store that did not provide these services. In other words, it is a free-riding problem, whereby no retailer engages in non-price competition that is beneficial to consumers in general (that is, consumers are willing to pay for their value).<sup>317</sup> The RPM arrangement can address free riding incentives by eliminating intrabrand price competition and thus making competition over other components, such as services, possible.

Academic literature challenges this explanation.<sup>318</sup> First, even in a competitive market, there is an incentive for manufacturers or retailers to compete over limited demand by providing services.<sup>319</sup> Second, even if sales effort incentives in a competitive market are insufficient, and an RPM arrangement may provide such incentives, it is impossible to know whether resulting incentives are excessive or lacking.<sup>320</sup> In particular, RPM arrangements may over-incentivize provision of ancillary services in the sense that the manufacturers' or retailers' supply costs are greater than the benefit they provide to consumers.

The following discussion focuses on RPM arrangements in book markets. Their positive effects in book markets are first presented, followed by their normative analysis, which is the core issue of this study.

### A. Positive Analysis

RPM arrangements in various European countries' book markets emphasize two main goals: (1) increasing public access to books;<sup>321</sup> and (2) increasing the diversity of books offered in the market.<sup>322</sup> The economic

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316. For an example, see Raymond Deneckere et al., *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q.J. ECON. 885, 906–10 (1996).

317. See Lester G. Telser, *Why Should Manufacturers Want Fair Trade II?*, 33 J.L. & ECON. 409, 409–10 (1990); Ralph A. Winter, *Vertical Control and Price Versus Nonprice Competition*, 108 Q.J. ECON. 61, 69–70 (1993). But see William S. Comanor & David Salant, *Resale Price Maintenance Post Leegin: A Model of RPM Incentives*, 50 REV. INDUS. ORG. 169, 178 (2017) (showing that consumers are not necessarily willing to pay for sales services).

318. See, e.g., Van Der Ploeg, *supra* note 170. In addition, in the book market the importance of this potential advantage is questionable. See Martos & Martos, *supra* note 60, at 144.

319. See Winter, *supra* note 317.

320. Norbert Schulz, *Does the Service Argument Justify Resale Price Maintenance?*, 163 J. INSTITUTIONAL & THEORETICAL ECON. 236, 238–40 (2007).

321. See *supra* notes 59–65 and accompanying text.

322. See *supra* notes 66–69 and accompanying text.

literature on RPM arrangements also emphasizes these two goals as central components of public policy in the field of books.<sup>323</sup>

Starting with access, several important variables influence the accessibility of books. The first is book prices. Lower book prices increase book consumption. A second variable is the degree of bookstores' proximity to consumers. Dispersed selling points of books affect the costs involved in reaching bookstores and thus consuming books overall. Hence, public policy in the field of books also focuses on the proliferation of bookstores and their spatial distribution. A third variable may be related book retail services, such as training or consulting, or maintaining inventories, which may improve accessibility for consumers.

The diversity component, which is explicitly stated in the goals of many European countries' laws, is more difficult to characterize and define than the accessibility component. Generally, there is value in providing a thorough response to the various needs and preferences of individuals in society. Although the number of titles advertised indirectly indicates diversity, it is certainly not a good measure of diversity. The degree of book markets' diversity should be assessed by the extent to which the diverse needs and preferences of individuals are met. An indirect measure may be the degree of differentiation among published books. However, the definition of such an index, and especially its measurement in practice, is quite complicated.<sup>324</sup> We should add that the variety of books held in bookstores' inventories is another variable—a mixed one—that affects both accessibility and diversity. It is insufficient to disperse bookstores if their stock does not meet the variety of consumer needs.

The regulatory arrangement of RPM limits competition in book markets. The ability to set a uniform price for consumers in all bookstores enables collaboration between publishers and bookstores or chain stores in setting the consumer price to maximize their profits. Needless to say, the lack of intrabrand competition under a uniform price arrangement gives monopolistic power to publishers and distributors, as well as to bookstores. A monopoly power allows book prices to rise above competitive market prices (and the consumed quantity to fall), and accordingly, increase publishers' and bookstores' profits.<sup>325</sup> Monopolistic power is limited by demand elasticity and by interbrand competition. The larger demand elasticity is for books (i.e., increased consumer sensitivity to book prices), the harder it is to raise prices. The elasticity of demand for books depends,

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323. See, e.g., Appelman, *supra* note 90; Marcel Canoy et al., *The Economics of Books*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 721, 742–43 (Victor A. Ginsburgh & David Throsby eds., 2006).

324. See further discussion *infra* Part III.B.2 Normative Analysis: Diversity.

325. See, e.g., Canoy et al., *supra* note 323; Van Der Ploeg, *supra* note 170.

among other things, on the existence of “close” substitutes for books, such as films, games, performances, and other books.<sup>326</sup> It is also affected by the cost of consuming books, which is the time required to read books. Higher value of (book-reading) time lowers the sensitivity of consumers to books’ market prices, and therefore lowers the demand elasticity in book markets. We should, therefore, expect a non-trivial price increase for books that are protected by RPM regimes.

The monopolistic gains made possible by RPM arrangements also hurt incentives to increase the profitability of existing books, as well as incentives to create innovation and improve profitability in the selection of new books for publication.<sup>327</sup> Moreover, the potential for monopoly power under RPM arrangements encourages investment in political activities to acquire such power—i.e., rent-seeking.<sup>328</sup> The very existence of a manufacturers’ lobby in various countries’ book markets to support these laws raises a suspicion that public policy is dictated by the industry preferences rather than the public interest. These are non-profit organizations or associations that serve for-profit entities. Thus, for example, arguments rooted in a culture-based ideology must be questioned.<sup>329</sup>

However, it is important to emphasize the benefits of RPM arrangements. First, a larger variety of books is expected, in comparison to unconstrained competitive conditions.<sup>330</sup> As mentioned above, the typical production process of books is subject to large fixed costs (independent of the number of readers) and low variable costs (which depend on the number of printed books), with the latter further decreasing with technological development in the production and marketing of books. When fixed production costs are high, unconstrained competition does not necessarily result in an optimal outcome. Publishers and distributors must sell a sufficient quantity of books to cover their fixed costs. Thus, books that are not expected to be sold in sufficiently large quantities will not be produced

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326. Indeed, extensive interbrand competition slashes monopoly power.

327. See Appelman, *supra* note 90, at 238–39.

328. See Robert D. Tollison, *Rent Seeking: A Survey*, 35 KYKLOS 575 (1982); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 224–32 (1967).

329. For cultural-based reasoning, see generally BRUNO S. FREY & WERNER W. POMMEREHNE, *MUSES AND MARKETS: EXPLORATIONS IN THE ECONOMICS OF THE ARTS* 59–60 (1989); William D. Gramp, *Rent-Seeking in Arts Policy*, 60 PUB. CHOICE 113 (1989); Susanne Krebs & Werner W. Pommerehne, *Politico-Economic Interactions of German Public Performing Arts Institutions*, 19 J. CULTURAL ECON. 17 (1995); Günther G. Schulze & Anselm Rose, *Public Orchestra Funding in Germany—An Empirical Investigation*, 22 J. CULTURAL ECON. 227 (1998).

330. It is important to note that books are not a homogeneous product. Books are different in many ways. Models of monopolistic competition may be more suited to analyzing the free book market than are models of perfect competition. However, arguably, at least within one genre or another (such as children’s books, cookbooks, science fiction, poetry, or history) there is great substitutability between different books, so one can assume perfect competition in the retail market.

in a competitive market. On the other hand, when publishers or distributors gain monopolistic power—e.g., due to RPM arrangements—they can set a higher price for books, which may allow them to cover their fixed costs for a smaller quantity of sold books. Therefore, the expected result is that a larger variety of books is anticipated under RPM arrangements, although their price will be higher than in an unconstrained competitive market. Hence, theoretically, RPM arrangements encourage book variety and higher market prices.<sup>331</sup>

A second theoretical benefit of the RPM arrangement is a wider dispersion of bookstores, including small bookstores.<sup>332</sup> The reason for this is the lack of price competition in the retail market. Competition over book prices in a free market provides an advantage for book chains or other large entities due to economies of scale, and hence small shops find it difficult to compete on book prices.<sup>333</sup> A uniform price arrangement eliminates the competitive benefit of large retailers and allows larger profit margins for bookstores.<sup>334</sup> These two effects enable the existence of more bookstores, a correspondingly better dispersion of bookstores, and in turn improved access to readers. Furthermore, the lack of price competition among bookstores does not eliminate competition altogether, but instead directs competition to non-price components, such as sale services—consulting, training, and so forth. These components are also considered valuable and necessary in the book market to facilitate better access.<sup>335</sup>

It should be emphasized that a better geographic dispersion of bookstores, which is expected under an RPM arrangement, does not necessarily indicate that a narrower spread of bookstores represents a market failure. There are social costs to a wider distribution of points of sale of any kind, and consumer savings due to store proximity do not necessarily outweigh the costs involved in creating such improved access. Indeed, conventional economic analysis does not treat dispersion of retailers under an RPM arrangement as an advantage of this regime.<sup>336</sup> However, arguably,

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331. See *supra* Part I.C The Objectives of Modern RPM Regulation.

332. See generally THOMAS R. OVERSTREET, JR., FED. TRADE COMM'N, BUREAU OF ECON., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 161–62 (1983); Mathewson & Winter, *supra* note 315, at 81–82; see also Aday Hernández & Juan Luis Jiménez, *Do Supermarkets Reduce the Number of Traditional Bookshops? An Empirical Application to the Textbook Market in Spain* 4–5 (Ass'n for Cultural Econ. Int'l, Working Paper No. AWP-02-2011, 2011), <http://www.culturaleconomics.org/awp/AWP-02-2011.pdf> [<https://perma.cc/4T6N-LZZX>].

333. See also CAVES, *supra* note 298, at 155–57.

334. If the number of publishers is not large, the advantage of large margins for small shops is eliminated.

335. Although higher profit margins for bookstores allow them to invest both in the establishment of stores and in giving related services, these investments are substitutes in the sense that both utilize a store's extra profit due to RPM arrangement. Thus, as more stores are opened (representing an investment in accessibility and storage), we should expect a smaller scope of related services.

336. Although, in theory, one may include spatial dispersion of retailers in sales services.

unlike other products, bookstores enjoy an additional social value—cultural value. Since books are cultural products, their accessibility may possess an additional unique social value, which exceeds the sum of the individual benefit from book consumption.

Even if the geographic dispersion of bookstores allows for greater accessibility, one should note the shortcomings of the RPM arrangement in achieving this accessibility. First, ensuring high profit margins to retailers harms innovation in the distribution and marketing of books. Distribution tools that are more efficient and cheaper than traditional systems of bookstores may allow cost savings to be delivered to consumers by reducing the price of books, which, importantly, is also an element of accessibility.<sup>337</sup> Such innovation is avoided when book prices are fixed. Second, lower costs of book delivery and more extensive use of electronic versions of books diminish the importance of geographical proximity to the bookstore and the variety of books held in stock. Online bookstores offer a very wide range of books, a great deal of information about them, and accompanying services comparable—or even superior—to those offered by physical bookstores.<sup>338</sup> Lastly, “accessibility” to books is not only a function of commuting costs to bookstores that hold a sufficient variety of books, but also, as noted, of the price of books. If the regulatory instrument that brings about dispersion of points of sale inevitably also leads to an increase in the prices of books, accessibility may actually be harmed.

Some argue that although an RPM arrangement allows for higher prices and thus monopolistic profits, publishers and bookstores will use these excess profits from successful books (such as best sellers) to cross-subsidize books whose demand has turned out to be limited.<sup>339</sup> Cross-subsidization by monopolistic profits will allow for better variety of books in the market. Such cross-subsidies may be particularly supportive of “high-quality” books.<sup>340</sup> However, the cross-subsidy justification for the RPM arrangement is questionable. The incentive to create cross-subsidization between expected successes and failures facing uncertainty exists in any case. Even in a competitive market, manufacturers will seek to expand their production variety facing uncertainty of product success.<sup>341</sup> The interesting question is if we should expect an additional incentive by manufacturers to use their

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337. See Martos & Martos, *supra* note 60, at 144.

338. See, e.g., OECD Roundtable 2008, *supra* note 29, at 56.

339. See, e.g., Appelman, *supra* note 90; Michael A. Utton, *Books Are Not Different After All: Observations on the Formal Ending of the Net Book Agreement in the UK*, 7 INT'L J. ECON. BUS. 115 (2000); see also Martos & Martos, *supra* note 60, at 143–45; Van Der Ploeg, *supra* note 170.

340. Note that the very intention of supporting “high-quality” books involves difficult problems. See *infra* note 355.

341. See *supra* note 299 and accompanying text.

excess monopolistic profit for extra cross-subsidization. This is not a necessary result.<sup>342</sup>

In conclusion, the main goals of the RPM arrangements in the book markets of various European countries are to increase the variety of books and improve access to books. These goals probably serve the broader purpose of supporting and promoting a country's culture. The economic-theoretical analysis indicates that RPM arrangements may indeed increase the variety of books published in the market.<sup>343</sup> The theoretical effect on consumer accessibility to books is not unequivocal and may turn out to be negative due to various opposing effects, in particular due to an expected increase in book prices and a reduction in the amount of books consumed, which also represent a harm to social welfare due to RPM arrangements. The positive analysis is only the first step toward social decision-making. The next necessary step, which builds on positive analysis, is normative.

### *B. Normative Analysis*

So far, we have seen that a regulatory arrangement of RPM may, though not necessarily will, achieve social objectives that are ostensibly desirable in the book market—increasing literary diversity and possibly improving the public's access to books and, as a result, promoting a country's culture. Yet this regulatory arrangement incurs social costs, which were also discussed above. In order to formulate social policy or make public decisions, such as that of regulation in the book market, normative valuation is unavoidable. We must evaluate the expected social benefits of an RPM arrangement in the book market against its expected social costs. We should place social values on the positive effects of regulation. Generally, we would like to find a certain balance—the proper balance—between achieving socially desirable goals and the costs of realizing them. Economists denote this balance a cost-benefit analysis.<sup>344</sup> To this end, we

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342. See Canoy et al., *supra* note 323, at 747–48; see also *supra* notes 168–171 and accompanying text.

343. The economic implication of the diversity objective in book markets is a market structure of monopolistic competition. See *supra* note 302 and accompanying text. If the appropriate analytical framework for the book market is one of monopolistic competition, then we should be less concerned about the problems of variety in the market. See KELVIN LANCASTER, VARIETY, EQUITY AND EFFICIENCY: PRODUCT VARIETY IN AN INDUSTRIAL SOCIETY 179–223 (1979); Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297 (1977); Kelvin Lancaster, *The Economics of Product Variety: A Survey*, 9 MARKETING SCI. 189 (1990) [hereinafter Lancaster, *Survey*]. If so, the social value of the regulatory arrangement of RPM decreases.

344. Cost-benefit analysis is considered the proper method for social evaluation of regulatory rules. See, e.g., CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 6–10 (2002).

must evaluate the social variables—goals and costs—pertinent to an RPM regulatory regime.<sup>345</sup>

The objectives of RPM regulation in European book markets include promoting literature and preserving cultural diversity. These are quite general goals; they are not well-defined and can be understood in countless ways. Additionally, without assigning value to the laws' objectives, it is impossible to assess the laws' desirability or the optimal design of these regulatory measures (e.g., duration of the desired protection, the proper extent of protection over different types of books, or the appropriate types of exceptions).

Assigning social values to laws' objectives is necessary both for assessing their expected desirability *ex ante*, and for judging their success or failure *ex post*. For example, should we examine the change in the quantity of books after a period of implementation of the laws? Does it matter what kinds of books have been published (such as original or translated; “high-brow” or popular)? Should we examine the change in the variety of books? How should we assess any change in the prices of books? Should we examine other cultural variables, such as *ethos* or heritage? How would we weigh these variables? For example, if due to RPM arrangements in the book market, book prices are higher and consumption of books decreases, but the variety of books improves, more “quality” books are written and read, and the public becomes immersed in culture, is that law successful?

Surprisingly, in European countries, where regulatory and tax arrangements have been used for many years to intervene in and support the book market, no normative point of view is found. One finds only positive data on European book markets and attempts to compare the data across countries and legal arrangements. Comparisons across countries are not sufficiently informative, since countries differ in many respects, apart from their applicable legal arrangements.<sup>346</sup> For example, once a uniform price arrangement for books was canceled in the United Kingdom, the number of bookstores decreased, as expected under the economic model.<sup>347</sup> Yet, when a similar arrangement was canceled in France for a certain time period, the number of bookstores increased.<sup>348</sup> A simple comparison of data, without controlling for other relevant variables, can be erroneous. Examining only certain variables—such as the number of retailers—and not others provides

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345. We implicitly adopt a consequentialist normative approach. Other normative approaches may be alternatively considered, but in general, the following normative discussion cannot be avoided.

346. See Løyland & Ringstad, *supra* note 66, at 240–42 (giving examples).

347. See *supra* notes 332–338 and accompanying text.

348. See Van Der Ploeg, *supra* note 170; see also Hernández & Jiménez, *supra* note 332 (providing results); cf. *supra* notes 284–288 and accompanying text.

only a partial picture of the legal effect. And looking at the whole picture requires weighing variables—i.e., it requires assignment of social values.

Although RPM arrangements in book markets are customary in some European countries, their normative basis is unclear. Outside of Europe, few countries adopt such regulatory arrangements in book markets.<sup>349</sup> Even among European countries, where these arrangements began to emerge in the nineteenth century, it is not possible to identify a clear legal trend. Although there are countries that have enacted RPM regimes in recent years, at the same time, other countries have cancelled long-standing RPM arrangements or refused to adopt new ones.<sup>350</sup>

The main problem, in our opinion, is the complete absence of a normative discussion of the RPM arrangements adopted in European book markets. It is the kind of discussion that may be expected in examining RPM arrangements under the rule of reason standard in the United States. We therefore wish to present below the basis for the necessary normative discussion and to begin paving the way for a normative analysis of RPM arrangements in the case of book markets. The following normative discussion is divided between the general goals of promoting culture and literature and that of increasing diversity.

### *1. Culture, Art, and Literature*

The objectives of European states' laws prescribing RPM arrangements are to regulate the book and literature markets specifically and the fields of art and culture more generally.<sup>351</sup> The general justification for protective regulation of art—including literature—is based on the social value attributed to culture and cultural goods, or goods that preserve or create culture. Thus, the common argument, in its application to books, is that books are unique and not similar to other market goods.<sup>352</sup> Books are cultural goods, and as a cultural good, they require special public treatment, and therefore should not be subject to market forces and competitive pressures.<sup>353</sup> Free markets with profit-motivated suppliers are likely to only incentivize publishing best sellers and best-selling authors that provide greater profits at the expense of printing books that may not have an obvious audience, despite their potentially fine literary or cultural value. A book market based on market forces gives no value to culture, identity, heritage, and more. It is arguable that the purpose of European laws is, *inter alia*, to

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349. See *supra* Part I.D. RPM Arrangements in European and Other Countries' Book Markets.

350. For a review, see OECD Roundtable 2008, *supra* note 29; KURSCHUS, *supra* note 90.

351. See *supra* Part I.C. The Objectives of Modern RPM Regulation.

352. See Appelman, *supra* note 90; Dearnley, *supra* note 35, at 22–24.

353. See generally TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE (1998).

incentivize the production of books that carry these values—books that are of high cultural or literary value—although they do not enjoy sufficient demand among readers. These are apparently books that are consumed by high-quality or special-taste readers—i.e., high-brow consumption.

This analysis of competitive markets is similarly applicable to the variety goal of RPM regulation. Free markets may reduce literary diversity and settle for literature of low cultural value and bestsellers. There is a concern that free markets encourage the production of books with a broader common denominator, which is expressed in a low cultural rank and in books that represent entertainment consumption<sup>354</sup>—that is, literature of a low culture character at the expense of literature that represents a high culture one.<sup>355</sup> Works of literary value face the risk of lack of publicity or reduction of their cultural value—i.e., dumbing down—for marketing purposes.<sup>356</sup> Accordingly, state intervention may prove useful—whether through monetary compensation for culture or through regulatory means—in order to avoid these free market results. We will explicitly discuss the normative basis for such claims. In particular, we wish to show that not only do European laws lack the normative basis required for both their enactment and evaluation over time, but the conceivable normative basis itself is subject to dispute.

#### *a. Definition and Meaning*

The term “culture” is difficult to define and delineate, and it has no clear and unique meaning. There are different meanings and various definitions and descriptions of “culture,” and they vary across scholarly research and even among scholars within certain fields.<sup>357</sup> It seems that there is more disagreement than agreement on this issue. David Throsby organizes the ways the term “culture” is used by dividing it into two parts.<sup>358</sup> He contrasts culture “in an anthropological sense, meaning shared values, customs, ways of life, etc” with its “functional sense, meaning activities such as the practice

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354. For an analysis of the potential factors for creating cultural goods that appeal to a broad common denominator, see TYLER COWEN, *CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD'S CULTURES* ch. 5 (2002).

355. It should be explicitly noted that the ability to identify, classify, or describe cultural goods with high vs. low social value is greatly doubtful. Its application in reality is doubtful as well as the societal gain.

356. See, e.g., ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 189–209 (1995) (discussing these effects).

357. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (rev. ed. 1983) (“Culture is one of the two or three most complicated words in the English language.”); see also A. L. KROEBER & CLYDE KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* 77–141 (1963) (surveying interdisciplinary definitions of culture).

358. DAVID THROSBY, *THE ECONOMICS OF CULTURAL POLICY* 16 (2010).

of the arts.”<sup>359</sup> Arjo Klamer offers a similar distinction between “culture as identity” and “culture as expression,” where the latter describes the arts.<sup>360</sup> We are interested in culture in its expression as art. The definition and identification of art, a topic, which is largely discussed in the philosophical study of aesthetics, is far from simple. Identifying actions or goods that are part of a group of things that constitute art is neither straightforward nor uncontroversial.

For our purposes, we can leave aside the questions of definition and identification of art—and derivatively of literature—and assume that they are answered in some way or another. Assuming “art” is identified, our focus is on legal intervention: should the state intervene with art, and what are the nature and boundaries of such intervention? This question has been discussed extensively in scholarly literature, especially with regard to public finance of art and its creation. Many countries support art through various means, such as subsidies, prizes, or tax breaks. Indeed, scholars offer justifications for public support of art and guidelines for the appropriate degree of such support.

*b. Public Economics*

The discussion of art by economists largely began in the 1960s.<sup>361</sup> The accepted normative analysis in neo-classical economics is known as “welfare economics.” The main justifications for state intervention in the market are market failures and wealth redistribution.<sup>362</sup> Public goods represent a market failure that may justify state intervention, for example, by financing their production. In short, a public good is a product with two characteristics: (1) many individuals can consume and enjoy the product at the same time without harming the consumption or enjoyment of any of them; and (2) it is very difficult to exclude individuals from consuming the product.<sup>363</sup>

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359. *Id.*

360. Arjo Klamer, *Cultural Goods Are Good for More than Their Economic Value*, in *CULTURE AND PUBLIC ACTION* 138, 139–40 (Vijayendra Rao & Michael Walton eds., 2004).

361. See WILLIAM J. BAUMOL & WILLIAM G. BOWEN, *PERFORMING ARTS—THE ECONOMIC DILEMMA: A STUDY OF PROBLEMS COMMON TO THEATER, OPERA, MUSIC AND DANCE* (1966); W. J. Baumol & W. G. Bowen, *On the Performing Arts: The Anatomy of Their Economic Problems*, 55 *AM. ECON. REV.* 495, 495–502 (1965).

362. See ROSEN, *supra* note 304, at 33–48; STIGLITZ, *supra* note 304, at 128–31.

363. For an explanation of public goods, see ROSEN, *supra* note 304, 55–77; STIGLITZ, *supra* note 304, at 128–36.

Many economists hold the view that art generally represents a group of products and services with characteristics of a public good.<sup>364</sup> An example is a museum or a musical work. If individuals in society enjoy the existence of a museum or a musical work, even if they do not visit the museum or listen to a musical work, these products have the characteristics of a public good. The existence of a museum or a musical work in this case creates value for many individuals at the same time without impairing the value (of consumption) for any of them. Anyone's enjoyment of a museum's existence is not impaired by a simultaneous enjoyment of other people of that museum. This kind of individual utility is called a "non-use value." Economists describe individual enjoyment of art even if no one consumes it directly (non-use values) in three ways.<sup>365</sup> The first is the pleasure derived from the existence of the product or service. The very existence of a museum or a classical work gives pleasure to individuals in society. For example, individuals in French society may attribute importance to the existence of the *Louvre* or the *Arc de Triomphe*, even if they do not intend to visit them; they may perceive them as important beyond the enjoyment they derive from visiting them. The second source of non-use value is the pleasure resulting from the option value of a product or service. The existence of an option to consume and enjoy a museum or a classical work in the future gives pleasure to individuals who do not rule out such potential consumption in the future. The third is the enjoyment that stems from the value of endowing valuable goods to future generations. Individuals may take pleasure in knowing that different kinds of arts will be available for future generations, which will be able to enjoy them.

Another way to describe the market failure that characterizes art is externalities. Externalities represent changes in individuals' utility that are not priced in markets in the way private goods are.<sup>366</sup> Externalities are inefficient—i.e., a market failure—and hence may justify state intervention. Art may include products and services that create positive externalities. That is, art may provide utility to individuals in society beyond the consumption value of any such product or its price; in this sense, art provides an

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364. See, e.g., BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* 111–14 (2d ed. 2003); Hans Abbing, *On the Rationale of Public Support to the Arts*, in *ECONOMIC POLICY FOR THE ARTS* 34, 39–40 (William S. Hendon et al. eds., 1980); Alan Peacock, *Economics, Cultural Values and Cultural Policies*, *J. CULTURAL ECON.*, Dec. 1991, at 1, 9 [hereinafter Peacock, *Cultural Values*]; Alan Peacock, *Welfare Economics and Public Subsidies to the Arts*, 37 *MANCHESTER SCH. ECON. & SOC. STUD.* 323, 323–24 (1969), reprinted in 18 *J. CULTURAL ECON.* 151, 151–52 (1994) [hereinafter Peacock, *Welfare Economics*].

365. See THROSBY, *supra* note 358, at 110–11; see also FREY, *supra* note 364, at 117–19 (indicating additional potential positive externalities).

366. For an explanation of externalities, see, e.g., ROSEN, *supra* note 304, at 81–99; STIGLITZ, *supra* note 304, at 214–33. It should be noted that public goods are, in fact, a case of positive externalities.

additional non-market value. There is no market for trading these extra values—hence, positive externalities. Thus, scholars argue that art, such as a concert, is socially valuable not only through its consumption—enjoyment of attendance at the concert—but also through the pleasure individuals sense although they are not present at the concert.<sup>367</sup> This kind of pleasure is not priced in markets and is not traded in any market. It represents a positive externality of art. The value of art is manifested in the three forms listed above: existence value, option value, and bequest value.

These social values, which are reflected in individuals' utility, can be measured, and economists have developed empirical methodologies for measuring such values. One of the accepted measures for estimating externalities is the willingness-to-pay.<sup>368</sup> It is possible to evaluate the willingness-to-pay for a public good to ensure that the social investment in its production—through public funding—is worthwhile under cost-benefit analysis. Several empirical tools were developed to measure willingness-to-pay, of which the best known is the contingent value method.<sup>369</sup> Another evaluation method is impact studies, which examine the various positive effects of cultural goods.<sup>370</sup>

Thus, by means of economic theory and empirical measurement, it is possible to justify state intervention in the field of literature and to define the boundaries of such intervention. The justification for intervention is the existence of market failure. The extent and design of intervention depends on the measurement of the social value resulting from the production of

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367. See *supra* note 366 and accompanying text.

368. See, e.g., Trine Bille Hansen, *The Willingness-to-Pay for the Royal Theatre in Copenhagen as a Public Good*, 21 J. CULTURAL ECON. 1 (1997); C. D. Throsby, *The Measurement of Willingness-to-Pay for Mixed Goods*, 46 OXFORD BULL. ECON. & STAT. 279 (1984); cf. Richard T. Carson & W. Michael Hanemann, *Contingent Valuation*, in 2 HANDBOOK OF ENVIRONMENTAL ECONOMICS 821 (K.-G. Mäler & J.R. Vincent eds., 2005). Shortly, “willingness-to-pay” describes the maximum amount one is willing to pay for a benefit. See a basic explanation in N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 136–40 (6th ed. 2011) and a more advanced discussion in HAL R. VARIAN, *MICROECONOMIC ANALYSIS* ch.10 (3d ed. 1992).

369. See generally KENNETH ARROW ET AL., *REPORT OF THE NOAA PANEL ON CONTINGENT VALUATION* 3 (Jan. 11, 1993), reprinted in *Natural Resource Damage Assessments Under the Oil Pollution Act of 1990*, 58 Fed. Reg. 4601, 4602 app. 1 (proposed Jan. 15, 1993) (to be codified at 15 C.F.R. ch. IX). For a review of empirical studies in culture and art based on contingent valuation, see JEANETTE D. SNOWBALL, *MEASURING THE VALUE OF CULTURE: METHODS AND EXAMPLES IN CULTURAL ECONOMICS* 77–120, 177–210 (2008) [hereinafter SNOWBALL, *MEASURING*]; Douglas S. Noonan, *Contingent Valuation and Cultural Resources: A Meta-Analytic Review of the Literature*, 27 J. CULTURAL ECON. 159, 159–60 (2003); see also Special Issue: *Contingent Valuation in Cultural Economics*, 27 J. CULTURAL ECON. 155 (2003). Another methodology is choice experiments. See J.D. Snowball & A.C.M. Webb, *Breaking into the Conversation: Cultural Value and the Role of the South African National Arts Festival from Apartheid to Democracy*, 14 INT’L J. CULTURAL POL’Y 149, 150–54 (2008).

370. For a review of many studies, see generally KEVIN F. MCCARTHY ET AL., *RAND CORP., GIFTS OF THE MUSE: REFRAMING THE DEBATE ABOUT THE BENEFITS OF THE ARTS* (2004); see also Amartya Sen, *How Does Culture Matter?*, in *CULTURE AND PUBLIC ACTION*, *supra* note 360, at 37; SNOWBALL, *MEASURING*, *supra* note 369, at 33–76.

literature. Such a measurement would enable the use of cost-benefit analysis to assess the extent and form of the state's support for literature. Arguably, literature exhibits a social value that is not priced in the market—non-use value. Individuals may enjoy the existence of books of various kinds, even if they do not intend to read them. They may enjoy the knowledge that they can read them when they wish; they may also benefit from the knowledge that the existing literature will be inherited by future generations. Measurement of these enjoyments, although certainly not accurate, is possible. Based on this kind of assessment of the social value of literature, it is possible to examine a state's proper intervention in the book market,<sup>371</sup> and accordingly to try assessing the desirability of an RPM arrangement or the optimal design of such a regime.<sup>372</sup>

*c. Aesthetics*

There are economists who tend to adopt perceptions of culture and art as articulated in the philosophy of aesthetics. They claim that there exists a certain detachment of cultural economics from the common analysis of welfare economics, and perhaps even from the foundations of neo-classical economics.<sup>373</sup> In their view, art is expressed in products called “cultural goods,” which are distinguished from “ordinary” consumer goods in a manner different from that described above.<sup>374</sup> Klamer defines a “cultural good” in the following way: “the good has cultural value in that it is a source of inspiration or symbol of distinction.”<sup>375</sup> Throsby defines a cultural good in a similar way as a product that provides “cultural value,” such as spirituality, aesthetics, or cultural identity, above and beyond the product's commercial value in the market.<sup>376</sup> He also presents several examples of cultural goods—works of art, musical performances, literature, films and television programs, and video games.

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371. Obviously, a cost assessment of the RPM arrangement is also needed. The types of costs are specified in the theoretical economic analysis above.

372. There is another related normative course to study RPM arrangements. The economic research of culture and art has developed into a field of “cultural economics.” Many economists regard this discipline as a sub-field of welfare economics, where a few nuances that are unique to the field of culture can be identified and so require special attention and treatment to some extent. One of the important examples of the position is the discussion of “cost disease.” See, e.g., William J. Baumol, *The Arts in the “New Economy,”* in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE, *supra* note 323, at 339, 346–47.

373. Klamer, *supra* note 360, at 139.

374. See *supra* Part III.B Section 1.b.

375. Klamer, *supra* note 360, at 138.

376. THROSBY, *supra* note 358, at 16; see also a definition of cultural goods in Roger McCain, *Defining Cultural and Artistic Goods,* in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE, *supra* note 323, at 147, 150–55.

Throsby discerns three common criteria of cultural goods: their production requires human creativity; they are devices for transmitting symbolic messages to those who consume them and therefore are also used to connect individuals; and they potentially represent intellectual property rights that are granted to a person or group of individuals.<sup>377</sup> Throsby also identifies four sources of cultural values: “arts production and consumption; cultural identity and symbolism; cultural diversity; and cultural preservation and continuity.”<sup>378</sup>

Although the guiding principle of cultural values (and accordingly identifying cultural goods that represent art) is shared by economists who adopt the aesthetics approach, there is no clear definition of cultural values, and there is no consensus among scholars regarding their meaning. Klamer denotes the additional values beyond an individual’s consumption value as “social values.”<sup>379</sup> These include “belonging, being a member of a group, identity, social distinction, freedom, solidarity, trust, tolerance, responsibility, love, friendship, and so on.”<sup>380</sup> He also relates the term “social capital” to these social components.<sup>381</sup> Klamer goes on to argue that apart from economic values and social values, there are also cultural values that are unique to cultural goods.<sup>382</sup> Cultural values include “aesthetic, spiritual, social, historical, symbolic, and authenticity values.”<sup>383</sup> Throsby presents a similar, albeit not identical, concept of cultural goods. In general, he combines Klamer’s social values and cultural values into one group, which he also calls “cultural values.”<sup>384</sup> John Holden, who holds similar positions, defines cultural values more broadly and includes all the values relevant to culture—the economic, social, and cultural values of Klamer and

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377. THROSBY, *supra* note 358, at 16.

378. *Id.* at 42–45.

379. Klamer, *supra* note 360, at 149.

380. *Id.* (internal citation omitted).

381. *Id.* at 149–50.

382. *Id.* at 150.

383. *Id.* (citing DAVID THROSBY, *ECONOMICS AND CULTURE* 28 (2001)); see also Michael Hutter & Richard Shusterman, *Value and the Valuation of Art in Economic and Aesthetic Theory*, in 1 *HANDBOOK OF THE ECONOMICS OF ART AND CULTURE*, *supra* note 323, at 169.

384. THROSBY, *supra* note 358, at 14–22, 111–13; David Throsby, *The Production and Consumption of the Arts: A View of Cultural Economics*, 32 *J. ECON. LITERATURE* 1, 4 (1994) [hereinafter Throsby, *Production and Consumption*]. Snowball holds a similar position and notes the cultural values of national identity, national pride, public education, the creation of personal development, and the creation of brotherhood and solidarity in society. Jen D. Snowball, *Cultural Value*, in *A HANDBOOK OF CULTURAL ECONOMICS* 172, 174 (Ruth Towse ed., 2d ed. 2011). Throsby also ties the idea of cultural values to “cultural capital,” which is an asset that contains cultural values or provides such values. THROSBY, *supra* note 358, at 169–72; see also Arjo Klamer, *Accounting for Social and Cultural Values*, 150 *DE ECONOMIST* 453, 453 (2002).

Throsby.<sup>385</sup> Roger McCain goes further and distinguishes between cultural values and artistic values.<sup>386</sup>

These distinctions between economic values and social or cultural values are also related to the accepted distinction in the study of the arts between extrinsic values and intrinsic values.<sup>387</sup> Extrinsic values, also called instrumental values, describe influences of art on individuals and groups in society. Intrinsic values are derived from spiritual, emotional, and intellectual experience. Contact with and the experience of art give value to human life; art possesses intrinsic values in that it can provide people with meaning, and create distinct emotional pleasure and stimulation.<sup>388</sup> Intrinsic values are perceived in the scholarly literature as a value in their own right and not due to their consequences or influence in reality. Those who study the philosophy of aesthetics generally hold that culture has an intrinsic value that is not only detached from and independent of preferences or satisfaction of individuals in society, but it is also primary and fundamental to them.

Separately from aesthetics, scholars argue that cultural goods have intrinsic value by characterizing art or cultural goods as “merit goods.”<sup>389</sup> This term is used in public economics literature, yet its economic rationale is unclear. Apparently, merit goods are products that are socially valuable to supply, independently of the actual demand for the goods by individuals in society.<sup>390</sup> The claim that cultural goods are merit goods means that they possess an intrinsic value, which is not necessarily conditioned on an individuals’ utility, and thus establishes the social need for public support of their production. However, note that the term merit goods largely assumes the desired, normative outcome of public policy, and therefore is not useful.<sup>391</sup>

These approaches to culture and art face a twofold problem—theoretical and empirical. First, a theoretical model should be adopted to facilitate normative judgment. If art is expressed in cultural goods, which are unique because of their cultural (or other) or intrinsic values, beyond the economic values of products, what is their normative meaning or content? How should

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385. JOHN HOLDEN, CAPTURING CULTURAL VALUE: HOW CULTURE HAS BECOME A TOOL OF GOVERNMENT POLICY 36 (2004).

386. McCain, *supra* note 376, at 155–56.

387. See MCCARTHY ET AL., *supra* note 370, at xv–xvi. *But see* McCain, *supra* note 376, at 152–54.

388. MCCARTHY ET AL., *supra* note 370, at xv.

389. See David Cwi, *Public Support of the Arts: Three Arguments Examined*, J. CULTURAL ECON., Dec. 1980, at 39, 39; Throsby, *Production and Consumption*, *supra* note 384, at 23.

390. See Richard A. Musgrave, *A Multiple Theory of Budget Determination*, 17 FINANZARCHIV/PUB. FIN. ANALYSIS 333, 341 (1957).

391. See William J. Baumol & Hilda Baumol, *Book Review*, 89 J. POL. ECON. 425, 426–27 (1981); Don Fullerton, *On Justifications for Public Support of the Arts*, J. CULTURAL ECON., Dec. 1991, at 67, 73.

one weigh various cultural values in public decision-making—such as public funding of arts—and how should she allocate scarce public funds between different types of art? In order to answer these questions, a normative model—or theory—is required that enables value judgments. According to the accepted economic approach, which is based on welfare economics, one should weigh the effect of certain values on individuals' utility.<sup>392</sup> Only values expressed in benefit or satisfaction of individuals in society are of normative significance.<sup>393</sup> Indeed, cultural values may well affect the utility of individuals in society. For example, values of national identity, heritage, or spirituality may cause happiness or satisfaction for at least some individuals in society. If so, only the empirical problem of measurement, which can be overcome, will remain.

However, the basic concept of these approaches does not conform with the normative methodology of welfare economics. Under the aesthetics view of culture and art, a measure of cultural values will be expressed separately from and independent of an individual's utility. The social values of identity, heritage, aesthetics, spirituality, and others represent a shared, collective utility that is separated and detached from the utility of each individual member in the group.<sup>394</sup> Thus, it is doubtful whether a common denominator between cultural values and economic values is feasible, and hence overall assessment and public choice may prove impossible.<sup>395</sup> When the value of a cultural good is endowed to society as a group of individuals rather than to each of its many individual members, such value cannot be attributed to individuals, i.e., no individual in society prefers this good and chooses to consume it. Therefore, this value has no significance under neo-classical economics, which, as explained above, gives normative meaning only to individual utility and preferences.<sup>396</sup>

In response, some economists suggest deviating from the neo-classical framework when evaluating cultural goods and propose including group cultural value as a separate and independent normative consideration.<sup>397</sup> This position is actually more general. It implicitly argues for a different system of social decision-making. Perhaps even a different model of social choice may function better in this type of decision-making system. In other

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392. ROBIN W. BOADWAY & NEIL BRUCE, *WELFARE ECONOMICS* (1984); Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463 (1979).

393. BOADWAY & BRUCE, *supra* note 392; Sen, *supra* note 392.

394. See, e.g., THROSBY, *supra* note 358, at 20–22.

395. See, e.g., Arjo Klamer, *A Pragmatic View on Values in Economics*, 10 J. ECON. METHODOLOGY 191, 207–08 (2003).

396. See *supra* notes 364–365, 392–393 and accompanying text.

397. See THROSBY, *supra* note 358, at 20; see also THROSBY, *supra* note 383. *But cf.* Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001).

words, in the field of culture and art, cost-benefit methods are not appropriate for public decision-making and for designing guidelines for public policy.<sup>398</sup> Thus, a new normative theory is required. It should (1) define the pertinent cultural values and how they are identified in any particular cultural good; (2) create an index for estimating these cultural values; and (3) propose a way to assign social value to cultural values, and accordingly weigh different cultural values among themselves, and between them and other non-cultural values (mainly, individual utility). Otherwise, it is unclear how to decide questions of public policy, such as public support for art.

It seems that the tasks of defining and identifying cultural values and of creating positive proxies for them are not impossible, and there is some progress in these areas. Many variables that are related to culture, arts, literature, or public goods can be measured in reality.<sup>399</sup> Clearly, we must develop methodologies for identifying and measuring the variables in a reality that are of normative interest, namely, cultural values.<sup>400</sup> This is possible and even realized in a certain, partial manner.<sup>401</sup>

Notwithstanding this progress, there is still no agreement among scholars and across research fields on how to measure the “cultural value.” The measurement is probably complex and of many dimensions (aesthetics, symbolism, spirituality, and historical value) that have no apparent common denominator. It is unstable, not constant over time, and comprised of components that are too complex to describe quantitatively or even

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398. The historian Arthur Schlesinger said:

I do not believe . . . that the defense of public support need rest on the spillover effects of the arts boom . . . [b]ut the case must be made on the intrinsic value of the arts to society as a whole. If the arts are worth pursuing at all, they are worth pursuing for their own sake.

Arthur Schlesinger, Jr., *America, the Arts, and the Future: The First Nancy Hanks Lecture on the Arts and Public Policy*, in *THE FUTURE OF THE ARTS: PUBLIC POLICY AND ARTS RESEARCH* 3, 5 (David B. Pankratz & Valerie B. Morris eds., 1990).

399. See, e.g., THROSBY, *supra* note 358, at 54–55, 214–30; John C. Gordon & Helen Beilby-Orrin, *International Measurement of the Economic and Social Importance of Culture* (OECD Working Paper, 2006), <https://www.oecd.org/std/na/37257281.pdf> [<https://perma.cc/D3A5-DPH5>].

400. HOLDEN, *supra* note 385; BRIAN MCMASTER, DEP’T FOR CULTURE, MEDIA AND SPORT, *SUPPORTING EXCELLENCE IN THE ARTS: FROM MEASUREMENT TO JUDGMENT* 4 (2008), <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/supportingexcellenceinthearts.pdf> [<https://perma.cc/37Z3-E72K>]. There are proposals for the measurement and evaluation of “cultural values.” But these are usually subjective measurement methodologies. See, e.g., THROSBY, *supra* note 358. Not only is subjective measurement scientifically challenging, but it can also give off a strong odor of paternalism. See Peacock, *Cultural Values*, *supra* note 364; Peacock, *Welfare Economics*, *supra* note 364.

401. See generally articles in 23 *CULTURAL TRENDS* 79 (2014); see also ARTS & HUMANITIES RESEARCH COUNCIL, *Cultural Value Project*, <https://ahrc.ukri.org/research/fundedthemesandprogrammes/culturalvalueproject/> [<https://perma.cc/7LEB-JHWH>].

qualitatively.<sup>402</sup> For this reason, there are those who argue, like the aestheticians, that a “cultural value” is not necessarily measurable; cultural goods are perhaps unique and exceptional cases that should not be subject to market assessments and pricing.<sup>403</sup> As a recent report on the value of the arts explained:

Intrinsic benefits of the arts are intangible and difficult to define. They lie beyond the traditional quantitative tools of the social sciences, and often beyond the language of common experience. Although many advocates of the arts believe intrinsic benefits are of primary importance, they are reluctant to introduce them into the policy discussion because they do not believe such ideas will resonate with most legislators and policymakers. . . . [T]he arts community is expected to focus on tangible results that have broad political backing, such as improved educational performance and economic development.<sup>404</sup>

But even if cultural values can be measured—and some believe that this task is possible—measurement is not a sufficient condition. Another necessary task, and this is our focus, is to assign values to the measured results. This is a necessary condition for normative judgment of culture, arts, literature, or public goods, and even more so where state intervention is at issue. We must assign the variables a value in reality that can be compared on the basis of some common denominator with other values that are of socially normative interest. These values must be commensurable, otherwise it is not clear how to make judgments and public policy.<sup>405</sup>

According to the aesthetics approach, it is arguably impossible to find a common denominator that allows for any comparison between things in reality, such as works of art; those things are incommensurable.<sup>406</sup> Indeed, economists who hold these positions and argue that cultural or intrinsic values cannot be measured, or that they do not have anything in common with economic or instrumental values, have difficulty dealing with questions of public policy. They either avoid the public decision-making

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402. THROSBY, *supra* note 358, at 214–15; David Throsby, *Determining the Value of Cultural Goods: How Much (or How Little) Does Contingent Valuation Tell Us?*, 27 J. CULTURAL ECON. 275 (2003).

403. THROSBY, *supra* note 358, at 16; *see also* Klamer, *supra* note 360; Snowball, *supra* note 384.

404. MCCARTHY ET AL., *supra* note 370, at 37–38.

405. In principle, measurement does not have to be quantitative. It is possible, under certain conditions, to suffice with qualitative measurement. For suggestions for such a measurement of cultural values, *see* THROSBY, *supra* note 358, at 29–30; *see also* Snowball & Webb, *supra* note 369.

406. This approach is also prominent in the field of law. *See, e.g.*, Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PENN L. REV. 1371 (1998); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

question, answer it with *pathos* and without foundation,<sup>407</sup> or honestly admit that they do not know how to draw conclusions regarding public policy.<sup>408</sup>

We do not hold this position. We do not understand how one can think of public policy that requires normative judgment and choice among different possibilities without any measurement or assessment of these possibilities.<sup>409</sup> Moreover, even in the arts, it seems that the dominant position is that not only is there a need for evaluation and measurement, but it is also possible to do so.<sup>410</sup> Various entities that deal with art in reality on a daily basis—such as museums, orchestras, or theaters—choose, in some way, what works or artists to finance or promote (privately or publicly). Various systems of assessment and critique of artworks were developed and function in reality. They produce assessments and measurements of quality or artistic values.

In conclusion, if a law aims to support culture and promote literature, as European countries' laws prescribing RPM regulation of book markets do, it is impossible to avoid a normative analysis of these goals. Such analysis requires the identification and definition of the social values supported by the law, a normative framework (theory) for their assessment, and measuring tools. We discussed possible ways of realizing such assessment and a corresponding normative decision regarding the promotion of culture and literature through RPM arrangements. We do not seek a decisive policy decision on this matter, but rather bring to the forefront the absence of a relevant normative discussion in the hearts of the laws.

## 2. Diversity

Similar to the normative analysis of culture, it is impossible to avoid a normative analysis of diversity, which is one of the main motivations for RPM arrangements in book markets.<sup>411</sup> The social and political discussion of cultural and literary diversity is not unique to E.U. countries.<sup>412</sup> For example, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) has been involved in cultural diversity since the 1950s. In 2001, the organization adopted the Universal Declaration on Cultural Diversity,<sup>413</sup> and, in 2005, members of the organization opened for

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407. See, e.g., MCCARTHY ET AL., *supra* note 370, at 71–74.

408. See THROSBY, *supra* note 358, at 53–56.

409. See, e.g., Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PA. L. REV. 1419 (1998).

410. See, e.g., MCMASTER, *supra* note 400 (recommending a measure of “cultural excellence,” innovation, and risk-taking).

411. See *supra* Part I.C. The Objectives of Modern RPM Regulation.

412. See generally *supra* Part I. The Arrangement of Book Prices in Europe and Beyond.

413. U.N. Educ., Sci. & Cultural Org. (UNESCO), Universal Declaration on Cultural Diversity, UNESCO Doc. CLT-2002/WS/9 (Nov. 2, 2001), <https://unesdoc.unesco.org/ark:/48223/pf0000127160>.

signature the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which entered into force in 2007.<sup>414</sup> The aim of cultural and literary diversity is prominent in the goals of many countries, which also emphasize the importance of diversity. As with the above discussion pertaining to the promotion of literature, the question of diversity also raises questions of normative approach and empirical means, which first require the identification and definition of diversity.

*a. Definition and Meaning*

The first inquiry is of the identification and definition of diversity, whether it is cultural variety, literary variety, or a variety of books. The definition of cultural or literary diversity, and accordingly the identification of such diversity, is not simple.<sup>415</sup> Richard Caves emphasizes the “infinite variety” that exists in the book market.<sup>416</sup> In his opinion, the number of titles published is a measure of diversity.<sup>417</sup> Tyler Cowen also thinks of diversity in terms of the quantity of cultural goods supplied in the market.<sup>418</sup> It seems that other economists also adopt, whether explicitly or implicitly, the number of titles as a measure of diversity.<sup>419</sup> Cultural diversity has been studied and measured empirically in other art fields, such as television broadcasts,<sup>420</sup> movies,<sup>421</sup> and music.<sup>422</sup> These studies use the quantity of products or the quantity of new or additional products to measure diversity.

However, this is not the only available measure. Various studies of culture have proposed several different measures for estimating cultural

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414. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *opened for signature* Oct. 20, 2005, 2440 U.N.T.S. 311 (entered into force Mar. 18, 2007), <https://en.unesco.org/creativity/sites/creativity/files/passeport-convention2005-web2.pdf> [<https://perma.cc/EGA3-VJWE>] [hereinafter Convention on Cultural Diversity].

415. For example, the Convention on Cultural Diversity defines cultural diversity in an intuitive, but neither general nor operative way:

“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. . . . Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

*Id.* at art. 4(1).

416. CAVES, *supra* note 298, at 146–47.

417. *Id.* at 155–56.

418. COWEN, *supra* note 353, at 53–55.

419. See Canoy et al., *supra* note 323; Van Der Ploeg, *supra* note 170.

420. See Joëlle Farchy & Heritiana Ranaivoson, *Do Public Television Channels Provide More Diversity than Private Ones?*, 1 ENCATEC J. CULTURAL MGMT. & POL’Y 50 (2011).

421. See François Moreau & Stéphanie Peltier, *Cultural Diversity in the Movie Industry: A Cross-National Study*, 17 J. MEDIA ECON. 123 (2004).

422. See Heritiana Ranaivoson, *The Determinants of the Diversity of Cultural Expressions: An International Quantitative Analysis of Diversity of Production in the Recording Industry*, 4 OBSERVATORIO (OBS\*) 215, 216 (2010).

diversity. It appears that there is significant similarity between the diversity indices proposed in cultural studies and the various indices that were proposed and measured in other areas of research, such as economics (variety of products), biology (biodiversity), finance (risk diversification), psychology (psychological diversity), and communication (media sources and formats).<sup>423</sup> Having used similar measures in different fields of study may assist in learning from one use or application to another. Ranaivoson reviews the development of diversity indices in various research fields and various studies and demonstrates the general similarity in measuring diversity.<sup>424</sup> She shows that Andrew Stirling's proposal for measuring diversity generalizes the various proposals for such measure.<sup>425</sup>

Stirling suggests measuring diversity through three variables: variety, balance, and disparity.<sup>426</sup> First, we should divide the evaluated system into different types or categories (by use, content, location, etc.). *Variety* represents the number of different types or categories.<sup>427</sup> As the number of categories in a given system increases, diversity grows. Thus, the quantity of products (or the quantity of new products)—the index that was previously offered for diversity in the book market—serves as an indirect proxy for variety. A larger number of products implies greater likelihood of multiple categories. Additional measures of variety may be directly based on the number of categories or groups, according to different divisions of the system and following different characteristics for division into categories. Examples from the field of books may be the number of published genres or the number of languages translated into the local language.

The variable *balance* describes how each of the categories is represented.<sup>428</sup> The more uniform the representation of different categories (e.g., distribution of products over more uniform categories) or the smaller the gap in the representation of the different categories, the greater the

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423. See Andrew Stirling, *On the Economics and Analysis of Diversity* 37 (Univ. of Sussex Sci. Policy Research Unit, Electronic Working Papers Series No. 28, 1998), <https://pdfs.semanticscholar.org/08e8/fb40fdbfd91fec63fc632d91b7dbc5779ea1.pdf> [<https://perma.cc/2DJP-UV64>] (collecting academic studies of diversity in a range of fields); Richard Van der Wurff, *Competition, Concentration and Diversity in European Television Markets*, 29 J. CULTURAL ECON. 249 (2005); Daniel G. McDonald & John Dimmick, *The Conceptualization and Measurement of Diversity*, 30 COMM. RES. 60 (2003).

424. Heritiana Ranaivoson, *Measuring Cultural Diversity: A Review of Existing Definitions* (Sept. 2007) (unpublished research paper), <http://uis.unesco.org/sites/default/files/documents/measuring-cultural-diversity-a-review-of-existing-definitions-2007-en.pdf> [<https://perma.cc/BQ2X-2TGB>].

425. *Id.* at 20–21. For other proposals of diversity measurement, see CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1949); Kenneth Junge, *Diversity of Ideas About Diversity Measurement*, 35 SCANDINAVIAN J. PSYCHOL. 16 (1994); E. H. Simpson, *Measurement of Diversity*, 163 NATURE 688 (1949); Martin L. Weitzman, *On Diversity*, 107 Q.J. ECON. 363 (1992).

426. See Andy Stirling, *A General Framework for Analysing Diversity in Science, Technology and Society*, 4 J. ROYAL SOC'Y INTERFACE 707, 710 (2007); Stirling, *supra* note 423, at 39.

427. Stirling, *supra* note 423, at 39.

428. *Id.*

diversity. Typical balance indices measure the proportion of each category or type. For example, with books, it would use the quantity of books sold of any kind in proportion to the total sales of books.<sup>429</sup>

The third component, *disparity*, indicates the difference or discrepancy between different categories.<sup>430</sup> Lesser resemblance between different categories implies more diversity; the farther away the various categories are from each other, in terms of Harold Hotelling,<sup>431</sup> the more diverse is the system. It should be noted that it is difficult to develop disparity measures that are quantitative, reliable, and objective.<sup>432</sup> Empirical studies on diversity have begun using these variables, and a few empirical studies on cultural diversity have actually used the diversity index as a function of these three variables.<sup>433</sup>

Estimating these variables empirically is only the first positive step. Each of them in itself testifies to a certain degree or aspect of diversity; however, only their totality yields, apparently, a good estimation of diversity. The three variables (sometimes each of which is composed of several components that require weighting themselves) must therefore be weighted into a unified measure of diversity. It is possible to think of different approaches to creating weighted metrics.<sup>434</sup>

For example, Stirling chooses an axiomatic approach. In his view, weighting must retain several attributes, which we believe and are convinced are important for such an index.<sup>435</sup> It should be noted that an axiomatic approach, adopting a few essential attributes, does not necessarily

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429. The well-known index of Herfindahl-Hirschman is a weighting of the two variables—balance and variety. See Stephen A. Rhoades, *The Herfindahl-Hirschman Index*, 79 FED. RES. BULL. 188 (1993).

430. Stirling, *supra* note 423, at 40.

431. See Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929).

432. Stirling, *supra* note 423, at 87–88.

433. See Françoise Benhamou & Stéphanie Peltier, *How Should Cultural Diversity Be Measured? An Application Using the French Publishing Industry*, 31 J. CULTURAL. ECON. 85 (2007) [hereinafter Benhamou & Peltier, *French Publishing*]; Farchy & Ranaivoson, *supra* note 420; Ranaivoson, *supra* note 422; Françoise Benhamou & Stéphanie Peltier, *Application of the Stirling Model in Assessing Diversity Using UIS Cinema Data*, in MEASURING THE DIVERSITY OF CULTURAL EXPRESSIONS: APPLYING THE STIRLING MODEL OF DIVERSITY IN CULTURE: TWO CASE STUDIES 9 (UNESCO Inst. for Statistics, Technical Paper No. 6, 2011), <http://uis.unesco.org/sites/default/files/documents/measuring-the-diversity-of-cultural-expressions-applying-the-stirling-model-of-diversity-in-culture-2011-en.pdf> [https://perma.cc/85NF-APUD].

434. Additionally, the measured object should be identified. First, the diversity of products traded in markets may differ between the supply and demand. For example, the range of printed and distributed books may differ from the diversity of books purchased and read. It is a choice of measuring optional vs. actual diversity. See COWEN, *supra* note 353, at 53–55; Benhamou & Peltier, *French Publishing*, *supra* note 433; Ranaivoson, *supra* note 424, at 6–7. Second, product diversity is correlated with diversity in the production chain. For example, the variety of manufacturers, wholesalers, retailers, etc., may be of interest. Hence, diversity in book production may be directed at writers, publishers, marketers, and bookstores. See Ranaivoson, *supra* note 424, at 7.

435. See, e.g., Stirling, *supra* note 423, at 90–98.

result in a unique weighted index. There may be some measures that will sustain these traits. Thus, the weighted index suggested by Stirling is not the only one. In addition, we must first agree on the essential characteristics of a weighted index of diversity. Lack of consensus results in a large set of potential indicators of diversity.<sup>436</sup> Finally, the characteristics necessary for a weighted index of diversity and the weighting of the variables may vary over different phenomena in reality. For example, important attributes of diversity in culture may differ from those that are important for measuring diversity in technology.

*b. Normative Analysis*

Once all those obstacles are overcome—choosing a method of defining and measuring the relevant variables, selecting how to weigh them into a measure of diversity, and identifying the phenomena in reality that we seek to estimate—we end up with a positive, measurable index of diversity. An empirical measure of diversity is not sufficient for the purpose of normative analysis. Similarly, to the discussion of culture and art, a value should be assigned to diversity. An assessment of the social importance or the public need for diversity is required in order to make judgments that are necessary for public policy, such as the design of regulatory arrangements in the book market. How much diversity is appropriate?

An important source for the social value of diversity is individual preferences. A common assumption in economic studies is that consumers prefer, and hence value, diversity. Economists identify two sources of the value of diversity.<sup>437</sup> One is the variety of preferences of individuals in society. If different individuals in society exhibit different tastes, a wider range of products will better conform to individual preferences. For example, if different consumers prefer to consume non-identical products, producing and delivering more diverse products will better suit each individual's preferences. The second source is the preference of each individual in society for diversity. Individuals benefit from the existence of a variety, independent of their actual use of all varied items. A possible explanation for this preference is that individuals expect that various potential situations in reality would require various items from a variety. For example, an individual would normally prefer to drive her private car, but in harsh weather conditions, she might prefer to ride the train.<sup>438</sup> The individual will therefore have a preference for diverse means of transportation. Accordingly, it is possible to develop methodologies for

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436. See, e.g., Ranaivoson, *supra* note 424.

437. KELVIN LANCASTER, *MODERN CONSUMER THEORY* (1991); Dixit & Stiglitz, *supra* note 343.

438. Wing Suen, *The Value of Product Diversity*, 43 OXFORD ECON. PAPERS 217, 217 (1991).

estimating the value of diversity based on its impact on individual's utility.

It can also be argued, similarly to the discussion above on culture and art, that diversity itself provides pleasure and satisfaction to individuals in society. The very existence of a variety of cultures and cultural expressions *per se*, regardless of their use or consumption by individuals, creates enjoyment.<sup>439</sup> Being aware of the reality of diversity may be sufficient. This is a description of the existence value, which gives cultural diversity the characteristics of a public good (or of a positive externality).<sup>440</sup> Perhaps the option value of literary or cultural diversity generates utility to individuals in society. And maybe diversity also yields a bequest value—the social value of imparting diversity to future generations. These values can be measured.

Throsby further argues that cultural diversity has a value derived from the interconnectedness of the cultural world.<sup>441</sup> No culture lives in isolation. If phenomena and expressions of culture are isolated, culture will stagnate and disappear; therefore, such a network of cultural diversity is valuable.<sup>442</sup> He goes so far as to argue that cultural diversity exhibits social value because certain cultural expressions may have future value that is not yet recognized.<sup>443</sup> Therefore, we should be wary of a loss of cultural phenomena and keep more cultural options for the future.<sup>444</sup> Yet, these claimed social values are unclear and hence not easily measurable, if at all.

The ways we choose to define diversity and assign social value to it affect the normative assessment of diversity. If diversity is valued through individual preferences only, no market failure necessarily exists. We may find that free book markets, lacking state intervention, provide an adequate variety of books (or writers, publishers, or bookstores). Yet, adequate or optimal diversity is contingent on other variables such as market structure or market size.<sup>445</sup> It also depends on supply-side economies: available economies of scale reduce variety, whereas economies of scope in

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439. THROSBY, *supra* note 358, at 171–73.

440. *Id.* at 172.

441. *Id.*

442. *Id.*

443. *Id.* at 172–73.

444. For further suggestions for the source of a variety of sociological and psychological literature, see Heritiana Ranaivoson, *Does the Consumer Value Diversity? How the Economists' Standard Hypothesis Is Being Challenged*, in *THE CONSUMPTION OF CULTURE, THE CULTURE OF CONSUMPTION: A COLLECTION OF CONTRIBUTIONS ON CULTURAL CONSUMPTION AND CULTURAL MARKETS* (Marilena Vecco ed., 2012).

445. See LANCASTER, *supra* note 437; Lancaster, *Survey*, *supra* note 343; Dixit & Stiglitz, *supra* note 343.

production foster variety.<sup>446</sup> Generally, economies of scale allow cost reduction for lower variety, while economies of scope enable reduction in production costs with more variety. Thus, for sufficiently large economies of scope, market variety can be optimal.<sup>447</sup>

The application to book markets obviously requires empirical estimation, and it depends on the specific book market examined. But generally, it seems that, on the one hand, book production incurs relatively high fixed costs and low marginal costs, which signify economies of scale; on the other hand, much of the capital invested in the publication of a book of one type can also be used for publishing a book of a different type.<sup>448</sup>

If diversity exhibits public good characteristics, or it generates positive externalities, its public support may be granted. These market failures imply that expected diversity in a free market will be inadequate.

Therefore, assuming diversity is sub-optimal in free book markets, the possibility of expanding it through corrective intervention should be examined. In order to evaluate the extent to which diversity should be widened, a normative assessment of diversity, as presented above, is essential. The social (or other) value of expanded diversity should be traded off with its costs.

For this purpose, an estimation of the value of widening diversity is required. If the value of diversity stems from consumers' preferences or from its public good nature, then the value of diversity can be estimated by methods such as those discussed above regarding culture and art. If, on the other hand, the value of diversity stems from a network of connections between different cultural expressions or from a possible future that is unknown and cannot be assessed, in the absence of an objective scientific methodology for estimating such values, we will face a normative stalemate.

In conclusion, we do not doubt that cultural diversity, literary diversity, and a variety of books have social value. Our argument is that the discussion presented here cannot be avoided when we face social decisions involving diversity, such as those in European laws regulating book markets. While RPM regulation of the book market is expected to expand the range of books, this regulatory arrangement incurs costs; in particular, it leads to higher prices and reduced consumption of books. To the extent that the social benefit of RPM arrangements is expressed in a wider range of books, one need not only show that increased diversity of books is socially

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446. LANCASTER, *supra* note 437. For an explanation of "economies of scale," see MANKIW, *supra* note 368, at 272–73, and of "economies of scope," see John C. Panzar & Robert D. Willig, *Economies of Scale in Multi-Output Production*, 91 Q.J. ECON. 481 (1977); John C. Panzar & Robert D. Willig, *Economies of Scope*, 71 AM. ECON. REV. 268 (1981).

447. See Stirling, *supra* note 423.

448. Indeed, the more specialization is important in book production, the less we should expect for economies of scope.

beneficial, but also assess the social value of increasing diversity. This cannot be done without identifying and defining books' diversity and without the ability to estimate it.<sup>449</sup> Indeed, pointing to the right answer is complex, but our goal, as stated, is to present the type of discussion and normative analysis required concerning diversity.

### CONCLUSIONS

RPM arrangements are tricky. They have encountered all kinds of legal treatments: they have been forbidden; they have been allowed (with or without restrictions); and in some European book markets they are mandated. This Article demonstrated the discussion and analysis needed for examining RPM arrangements with a particular focus on the regulatory arrangements in European book markets. The Article went from the widely discussed positive economic analysis of RPM regulation and stepped forward toward a normative analysis of such a regime's goals and expected results. Surprisingly enough, this kind of normative analysis is almost completely missing from the literature on these European laws.

The analysis we present here consists of many parts, each of which is in itself non-trivial, and therefore, the normative framework becomes quite complex. However, we do not argue that a thorough and complete analysis must be conducted in order to arrive at a precise and certain conclusion beyond any regulatory or judicial doubt. Our argument is that this discussion and analysis do not take place at all in the context of the European laws. To avoid arbitrary public decisions and unfounded regulatory legislation, we must face the normative challenge. If we seek meaning and purpose in RPM regimes, we should carefully consider their goals; if we are wary of the methods and extent of state intervention in individuals' lives, we should not be indifferent to the regulatory arrangements adopted in these laws. This Article, using the context of Europe's well-entrenched regulation of book markets, demonstrated what is required to address the normative challenge of RPM regimes.

This kind of analysis cannot be avoided and is necessary for such legal decisions by regulators or judges. That is, intuitions are insufficient. Slogans such as fair trade, culture, or heritage cannot suffice. They obviously cannot serve as a satisfactory rationale for the adoption of RPM arrangements. Yet, similar claims seem to be the reasons for the adoption of book RPM regimes in European countries. These reasons also played a vital role in past

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449. Another step, which we do not discuss here, is necessary. Assuming wider diversity is needed, we should turn to the choice of a public instrument. An RPM arrangement is one such public policy. There are other public options, such as subsidization. That is, the RPM arrangement may not be the best public instrument to accomplish further diversity.

adoption of “fair trade” laws allowing RPM arrangements in most American states.

This normative exercise is relevant and necessary for any RPM regime. Moreover, it has gained much importance in the United States following the *Leegin* decision, which now subjects RPM arrangements to a rule of reason scrutiny, rather than barring them as outright illegal.<sup>450</sup> The rule of reason analysis requires exactly this kind of normative analysis by both antitrust regulators and judges. Lacking a normative theoretical basis for RPM arrangements, one cannot examine and assess regulatory regimes (such as fair-trade laws or regulation of European book markets) either *ex ante* or *ex post*—e.g., contesting them in court. Additionally, a normative account of RPM arrangements facilitates public debate and empirical examination. Notwithstanding these concerns, it should be emphasized that this Article does not necessarily advocate the elimination of RPM regulation in book markets or its rejection under American antitrust laws, but rather introduces an example of a workable theoretical framework for its analysis.

Lastly, the normative discussion here is admittedly incomplete. The focus is only on RPM arrangements as a social instrument. Yet, the same social goals may be accomplished through other means. That is, even if RPM arrangements are socially beneficial in certain circumstances, other social mechanisms may prove superior. It is an instrument choice question. It is a necessary additional step in social decision-making which is ignored in this Article. For example, in the case of book markets, other legal tools can potentially affect culture and literature. Culture and art can be supported through grants and subsidies. Grants can be given to authors based on a variety of criteria that represent social values or quality. Another acceptable way to accomplish such goals is through granting subsidies to books and other cultural products through a value-added tax (VAT) exemption for their consumption. Some European countries have adopted these instruments in addition to their RPM regimes (rather than as a substitute).

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450. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).