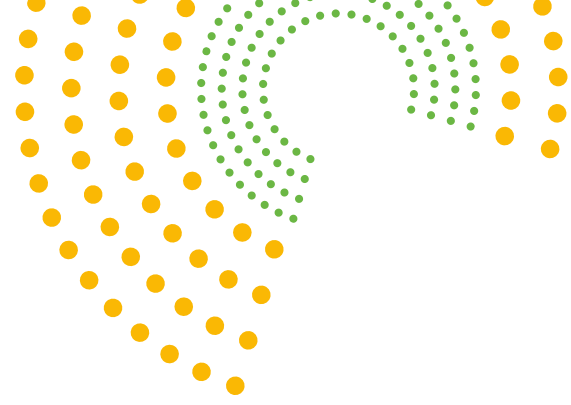




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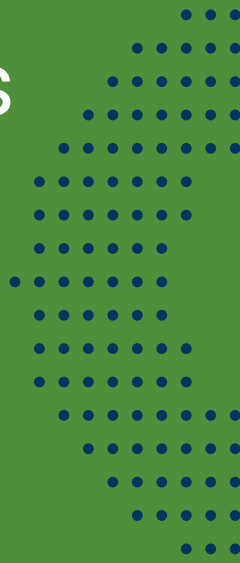
CREATE



e-BOOKS: EVIDENCE AND ANALYSIS OF e-LENDING MARKETS IN EUROPE

Competition Law and Copyright Law Perspectives

Kenny Barr
Magali Eben
Matteo Frigeri
Martin Kretschmer



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CREDITS

Organisation This study was conducted by the CREATE Centre, University of Glasgow, UK.

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Design SPRESSO design studio, The Hague; Square-up Agency, Brussels (cover)

Funding

The publication is issued as part of the Knowledge Rights 21 project, funded by Arcadia – a family charitable foundation. www.knowledgerights21.org www.arcadiahfund.org.uk

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DOI [10.5281/zenodo.17349116](https://doi.org/10.5281/zenodo.17349116)

Recommended citation: Barr, K., Eben, M., Frigeri, M. and Kretschmer, M. (2025). e-BOOKS: EVIDENCE AND ANALYSIS OF e-LENDING MARKETS IN EUROPE FROM COMPETITION LAW AND COPYRIGHT LAW PERSPECTIVES. The Hague: Knowledge Rights 21 (KR21) (*funded by Arcadia*)

ACKNOWLEDGEMENTS

This study was funded by Arcadia – a family charitable foundation, through the Knowledge Rights 21 (KR21) programme of the Stichting IFLA Foundation and CREATE.



Knowledge Rights 21 is focused on bringing about changes in legislation and practice across Europe that will strengthen the right of all to knowledge. It is built on a conviction that access to knowledge is essential for education, innovation and research, and that everyone in society should have the possibility to access and use information in both analogue and digital forms. This, in turn, will help Europe deliver on its economic, social, environmental and democratic potential.



CREATE (www.create.ac.uk) is a research centre of the University of Glasgow recognised by UK Research and Innovation (UKRI) with national centre status (AHRC/EPSRC/ESRC Copyright centre, 2012-2018; consortium member of AHRC Creative Industries Policy and Evidence, 2019-2023; AHRC infrastructure award, 2024-2028).

Our team comprises 14 researchers working at the nexus of law, technology, creative industries, socio-cultural analysis, and market regulation. With a disciplinary anchor in intellectual property law, competition law, and information and technology law, we are engaged in independent research on the impact and regulation of new technologies and services, including AI.

ABOUT THE REPORT

This report consists of three complementary elements. (1) a market study of the e-Lending market, reviewing existing empirical data, as well as analysing a sample of licensing contracts and interviews with library professionals in four European countries (Denmark, Poland, Republic of Ireland and the UK); (2) an analysis of the practices identified in the market study under EU competition law, in particular with respect to the exercise of potentially abusive market power; and (3) an analysis of copyright law, with a focus on potential solutions that could address the market issues identified. In order to make the analysis more accessible to policy makers, an executive summary is available as a separate document. In this full report, the executive policy summary is included at the beginning, offering signposting to the three self-contained studies that follow. Apart from Figure 3 in the summary (= Figure 6 in the full report) there is only minimal repetitive material.

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OVERVIEW

This report examines markets for e-Book lending by academic and public libraries in Europe from competition law and copyright law perspectives. Drawing on a sample of licensing contracts and interviews with library professionals in four European markets (Denmark, Poland, Republic of Ireland and the UK), the markets are analysed in relation to theories of harm under competition law. The evidence indicates significant problems in e-Lending markets with respect to market structure, licensing and pricing. Specifically, seven potential abuses of market power are identified and examined: (1) Refusals to supply: outright and withdrawals; (2) Constructive refusals to supply: restrictive licensing conditions/delayed supply; (3) Bundling; (4) Unfair trading conditions; (5) Excessive pricing; (6) Avoidance of the spirit of other laws, e.g. the copyright exception for text and data mining; (7) Lack of transparency.

The analysis finds that market dominance in the sense of the Article 102 Treaty on the Functioning of the European Union (TFEU) is difficult to establish, but that alternative remedies under (national) provisions on abuse of economic dependence or under the new EU digital market type provisions (platform-to-business P2B regulation; Digital Markets Act) should be considered. While there is potential for intervention in narrowly defined markets (such as academic core textbooks), traditional competition law interventions may not be a natural fit for the governance of 'non-commercial access to knowledge' in Europe.

Finally, copyright law-related solutions are reviewed, to address the incoherence of the judgments of the Court of Justice of the European Union (CJEU) in *VOB* (C-174/15) and *Tom Kabinet* (C-263/18). While *VOB* insisted that lending must be possible in the digital context on the same terms as for physical books, *Tom Kabinet* made access to born-digital books subject to licensing contracts (under the communication to the public right). The public function of libraries as an essential cultural and scientific knowledge facilitator can only be sustained if they are able to build collections for lending. Libraries need to empower access to books that is not dependent on the wealth of the reader or solely governed by the licensing terms of rightsholders.

As the underlying regulatory layer shaping the lending of e-Books, copyright law offers policy opportunities that can draw on this analysis of market practices under competition law. Three groups of interventions are proposed:

(1) Clarification of what constitutes a lawful source

For physical books in a library's possession, *VOB* arguably permits libraries to make a digital copy for e-Lending. But libraries also need to be confident that they can acquire e-Books by donation or in secondary markets (regardless of the licensing framework asserted in *Tom Kabinet*).

(2) Contract regulation

The legislator could intervene in the contracts between libraries, aggregators and publishers, for example by removing the requirement for a licensed copy specifically aimed at a library if there is no licensing scheme available that ensures the public function of libraries.

(3) Limitation to exclusive rights

The legislator could require that a deposit copy of any born-digital book is made available to designated libraries specifically for lending beyond the premises. Alternatively, the legislator could provide an exception in analogy to the preservation copy that cultural heritage institutions are permitted to make under Art. 6 of the Copyright in the Digital Single Market Directive. Such an exception should not be overridable by the terms of licensing contracts or the presence of technological protection measures.

The report is structured as a standalone Executive Summary (suitable for policy makers), followed by the underpinning empirical market study and a detailed competition and copyright law analysis.

EXECUTIVE SUMMARY

Libraries have a public interest function that is often expressed in law. The function is exercised in part by making their collections available for lending. 'Lending' is a copyright concept that, in some respects, limits rightsholders' control over the communication and distribution of books. In the context of physical books, limits to the exclusive rights controlled by authors and publishers with respect to the activities of libraries have been widely accepted. These limitations include interventions such as: (1) requiring deposit copies of published books to be delivered to and held by designated libraries; (2) providing public lending rights; and (3) privileging preservation copies.

In the digital environment, this settlement has been challenged. In the EU specifically, rightsholders can control each independent act of communication to the public, which extends to all forms of access to e-Books: sharing, renting, certain forms of lending, and even 'selling' or re-selling an e-Book (Court of Justice of the European Union (CJEU), *Tom Kabinet*, Case C-263/18). As a result, libraries have no independent control over 'digital copies' of books. The absence of any form of 'digital exhaustion' leaves libraries without substantive ownership of those digital copies.

While there is consensus that libraries should continue pursuing their public function, what this function entails and how it should be secured in respect of digital materials remains contested. The problem is compounded by the unclear division of competence between the EU and its Member States in the regulation of copyright in respect of lending rights. The unstable relationship between intellectual property rights and competition law also affects potential interventions regarding the supply and licensing conditions of e-Books.

This report offers a preliminary market study of e-Lending markets in the context of public and academic libraries, based on evidence from a sample of licensing contracts and interviews with librarians in four European markets (Denmark, Poland, Republic of Ireland and the UK).

KEY TERMS

This report addresses aspects of academic and public libraries' lending of e-Books from a variety of disciplinary and legal perspectives. Certain terminology may have different meanings or interpretations depending on the context of the discussion. This is particularly the case where words have both an everyday usage and a specific legal usage, particularly in respect of the language of competition law. Throughout this report, the authors have sought to reduce ambiguity in how specific terms are being used. The following glossary explains key terms used in the report.

MARKET DEFINITION

In the broad sense, markets are places where goods and services are exchanged. Competition law, however, seeks to define markets more narrowly by focusing on the territorial scope of a market (the geographic market), and the product/s supplied in a market (the product market) in light of the conduct and harm in a particular case. A competition authority is unlikely to define markets for books as narrowly as specific titles but is more likely to define markets based on general categories of books and sometimes, but not always, genres.

DOMINANT MARKET POSITION

The presence of a small number of very large and powerful companies/firms to such an extent that some operators are said to dominate. This is a characteristic of many cultural markets. Holding a 'dominant market position' does not necessarily infringe competition law, but competition authorities will consider whether undertakings are abusing their dominant market position by e.g. excessive pricing, refusal to supply, etc.

MONOPOLY

Copyright is often characterised as a 'monopoly right' in the sense that it confers a set of exclusive economic and non-economic legal rights on the authors and producers of copyright works. Competition law is concerned with the market power of dominant undertakings (which may amount to monopoly) within markets, and abuse of market power by such undertakings. While there may be interplay between these two definitions of 'monopoly', it does not necessarily follow that the monopoly rights conferred by copyright are of concern to competition authorities.

THEORIES OF HARM:

The extent to which particular conduct might contravene competition law can be assessed by applying a 'theories of harm' approach to demonstrate actual or potential harm to competition and customers in a market.

COMPETITION LAW INTERVENTION:

The investigation of conduct under competition law by a competition authority - particularly Article 102 TFEU - and subsequent finding of infringement and an order to terminate the infringement. Interventions are on a case-by-case basis against specific conduct by specific undertakings. Infringement decisions include the possibility to impose fines or behavioural or structural remedies. Structural remedies (divestment or breaking up companies) can only be imposed where no behavioural remedy (conduct requirements) would be equally effective or where the behavioural remedy would be more burdensome. In addition to infringement decisions, some competition authorities (at both national and EU level) may also be able to engage in sector inquiries or market investigations. At EU level, the European Commission cannot currently impose remedies through sector inquiries alone (distinct from the UK's market investigations regime).

Figure 1: Glossary of Key Terms

SCOPE OF THE STUDY

Competition law seeks to define markets by concentrating on the product/s supplied in a market and the scope of competition for the supply of that product. e-Lending markets are populated by a diverse range of actors including libraries, publishers, authors, platforms, and readers, where a mix of overtly commercial and non-commercial models are accommodated.

Libraries' mission is rooted in the non-commercial provision of access to knowledge, and central to this mission is lending books to readers. However, delivering this core function in the digital realm invariably requires libraries to engage with commercial market participants. Academic and trade book publishing markets are populated by a small number of very large rightsholders.¹ The market for English-language trade books is dominated by the 'Big Five' publishers.² Similar oligopolies can be observed throughout most European jurisdictions, albeit with differences in terms of rate of market concentration.³ Similarly, the academic market is home to powerful and highly profitable publishing behemoths such as RELX Group (which includes Elsevier and LexisNexis), Springer Nature and Wiley.

Market concentration resulting in the emergence of potentially dominant operators, and skewed bargaining power dynamics between different market participants are features of many cultural sectors. In this regard book publishing mirrors patterns seen elsewhere. But market dominance and relative bargaining power are dynamic concepts, which only make sense when discussed in relation to specific markets in the value chain. For example, the market for the distribution of e-Books is characterised by a concentration of power in a few intermediaries, with Amazon maintaining a share above 60% and exercising strong bargaining power vis-à-vis publishers in consumer markets. By contrast, in the e-Lending/library market publishers seem to have meaningful agency in the negotiation of terms and conditions with aggregators such as OverDrive.

¹ Publishers' attempts to regain control of pricing at the retail level have been scrutinised, and consequently, chronicled, in the antitrust case *United States v Apple Inc* [2013] 952 F Supp 2d 638, 645-47 (S.D.N.Y. 2013). See more generally: Guy A. Rub, *Amazon and the New World of Publishing: Comments on Chris Sagers, Apple, Antitrust, and Irony* (2017) ISJLP 14 367.

² Penguin Random House, Simon & Schuster, Harper-Collins, Macmillan, and Hachette Book Group. Cf *United States v Bertelsmann Se & Co KGaA et al*, paras 4-7 and 41, <https://www.justice.gov/opa/press-release/file/1445916/download>. See also Thad McIlroy, What the Big 5's Financial Reports Reveal About the State of Traditional Book Publishing (The Future of Publishing, 1 August 2016) <https://thefutureofpublishing.com/2016/08/what-do-the-big-five-financial-reports-tell-us/>

³ See generally the *Handbook of Comparative E-Lending Policies in European Public Libraries* (EBLIDA EGIL, April 2023) 46 and 104. See also Jens Bammel, *From Paper to Platform Publishing, Intellectual Property and the Digital Revolution* (World Intellectual Property Organization, 2021) 29-30.

Figure 2 identifies three relevant modalities of regulation that are central to our analysis, as these potentially shape library provision of e-Lending and, in turn, point towards opportunities for intervention by relevant authorities.

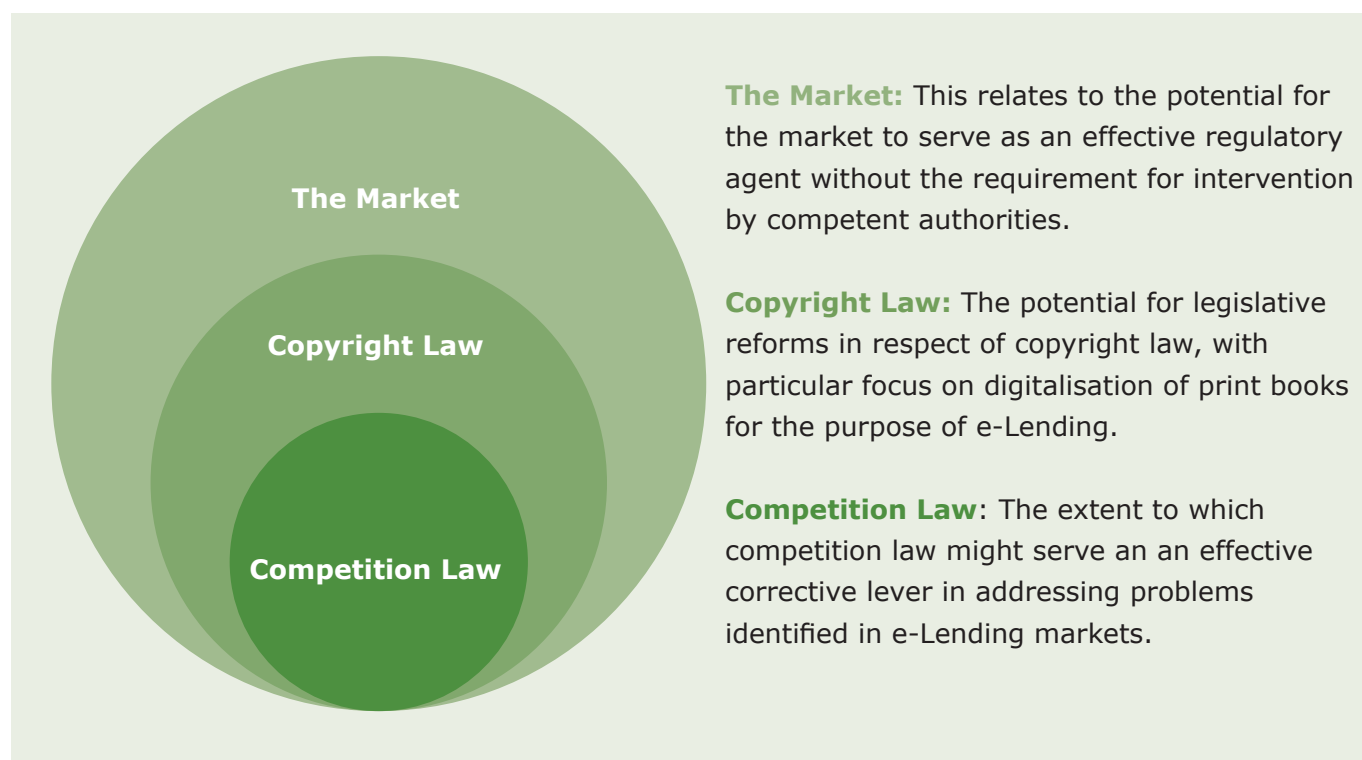


Figure 2: Three regulatory Modalities of e-Lending

The analysis proceeds in three steps:

- (1) A preliminary market study will offer empirical evidence on the workings of e-Lending markets for public libraries and academic libraries in four European markets (Denmark, Poland, Republic of Ireland and the UK);
- (2) The evidence is analysed under theories of harm underpinning competition law;
- (3) Finally, the options for intervention under copyright law are discussed, in light of the decisions by the Court of Justice of the European Union (CJEU) in the cases of VOB (C-174/15), and *Tom Kabinet* (C-263/18).

There is, of course, considerable interplay and overlap between each of these layers. The market for e-Books and e-Lending is established upon an underlying copyright framework that shapes the business models of many market participants. Publishers are, to a large extent, engaged in the acquisition and exploitation of copyright works, and the activities of all market participants are influenced to some degree by copyright law. Indeed, the accumulation of these rights into very large catalogues controlled by a small number of firms has contributed to calls for competition law interventions in this realm.

MARKET STUDY

The first section of the report lays the empirical groundwork for an evaluation of the need for regulatory authorities to intervene in respect of e-Book lending. A sample of licensing agreements between publishers/aggregators and libraries upon which e-Lending markets are constructed was obtained by the researchers. This was complemented by interviews with library professionals working in Denmark, Poland, Republic of Ireland and the UK. These revealed that:

- ▶ In some respects, the markets examined can be said to be functioning markets, in the sense that academic and public libraries in all of the territories are able to provide some form of e-Lending offering to their patrons.⁴
- ▶ Yet these markets are also characterised by a palpable and widespread dissatisfaction of participants in the library sector who are mandated to increase public knowledge, which includes delivering e-Lending services to their patrons.
- ▶ In the digital context, libraries are required to assemble and develop e-Book collections through licensing agreements with publishers and digital platforms that are in many ways at odds with how they can, comparatively unproblematically, build collections for print books.

Figure 3 identifies three main aspects of e-Lending markets that were found to be particularly problematic.

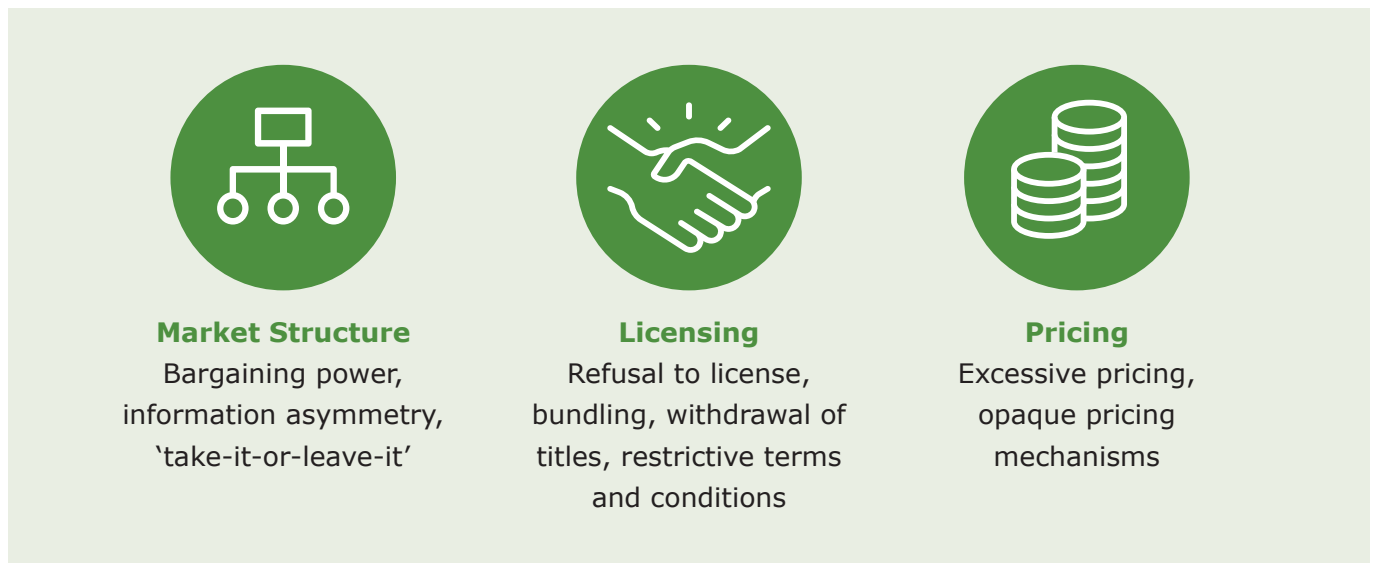


Figure 3: Problematic Issues in e-Lending Markets

MARKET STRUCTURE

This preliminary market study offers evidence of potentially problematic conduct around the activities of powerful suppliers within these markets in respect of how they engage with libraries:

- ▶ There is a widespread perception among library sector professionals and their representative organisations that powerful rightsholders and e-Lending platforms wield excessive power in e-Lending markets.
- ▶ The interview and contract research, coupled with secondary source materials, suggest that these market structure characteristics are manifest in suppliers' capacity to set largely non-negotiable licensing terms and conditions, along with their ability to dictate pricing in these markets for authorised access to e-Book content.

⁴ Although the countries examined in this study all displayed some form of market for the lending of academic and trade books by libraries, this is not necessarily the case for all countries, where there may be no functioning e-Lending market.

Licensing

Tapering the focus from market-level to the lived experience of those engaged in the acquisition of e-Book titles and the delivery of e-Lending services to patrons, the research found several recurrent problems pertaining to the licensing of e-Books for lending:

- ▶ This includes some evidence of practices including refusal to license particular titles for the purposes of e-Lending, 'windowing' strategies – meaning some titles are not made available for e-Lending upon initial publication – and licenses offered on a 'take-it-or-leave-it' basis.
- ▶ Bundling of content is also a feature of e-Lending markets, particularly in the academic library realm where, in some instances, it was found that libraries were required to agree to licences for large bundles of content in order to secure access to key titles that are not available individually.
- ▶ In turn, this can leave libraries dangerously exposed to discontinuity of service when key titles are removed from bundles.

Pricing

Finally, the study considered problematic aspects of pricing in e-Book markets and identified three areas of concern:

- ▶ There are numerous accounts from librarians relating to excessive pricing of specific e-Book titles and bundles when compared to print versions of the same titles.
- ▶ Pricing issues are compounded by opaque data sharing, resulting in libraries having limited access to potentially commercially valuable information on reader usage of e-Book content required to make informed decisions pertaining to e-Book acquisitions and subscriptions.
- ▶ This unavailability of meaningful data results in pronounced and problematic information asymmetry between suppliers/distributors and buyers in these markets.

COMPETITION LAW

The next section of the report considers e-Lending in academic and public libraries from a competition law perspective. The extent to which the activity of e-Lending constitutes a 'market' or set of markets is open to interpretation in different settings. The e-Lending landscape is populated by a diverse range of actors including libraries, publishers, authors, platforms, and readers, where a mix of commercial (e.g. exploitation of exclusive rights, provision of digital services) and non-commercial (e.g. societal goals including promotion of knowledge and a reading culture) objectives are pursued. For the purpose of competition law, what matters is whether the actors whose conduct is assessed are engaged in economic activity (i.e. the offer of goods or services), regardless of their legal status, whether they make a profit (or even have a profit motive), or how they are organised. As it is the conduct of e-Book suppliers which is being considered, it is not vital to ascertain whether libraries are engaged in economic activities to determine whether the provisions apply in the first place. There is a question, nonetheless, about the commercial nature of the downstream markets – that is, the services provided by public libraries and academic libraries. The extent to which various actors (such as libraries, publishers, and platforms) 'compete' with each other is open to question. This, in turn, raises questions in respect of potential harms to competition in such sectors. Abuse can consist of exclusion or exploitation. While exclusion refers to a reduction of competition in the market and corresponding increase or entrenchment of market power (a structural concern reducing effective competitors, or raising barriers to entry or expansion),

exploitation refers to the terms a company can set as the direct result of the existence of limited competition and, thus, market power. Exclusion presupposes competition between libraries, or between libraries and publishers. Where the conduct of e-Book publishers or platforms may cause harm to a downstream market, by reducing libraries' ability to offer services to their customers and effectively compete with other libraries (or even the publishers themselves), the conduct may fit within competition law and the enforcement priorities of competition authorities.

These issues are discussed in detail in the full report. However, it is useful to summarise the key aspects of competition law that are potentially applicable to e-Lending market/s. Seven potential categories of abusive practices were identified under the rules of EU competition law, to which the following general principles apply:

1. Refusals to supply: outright and withdrawals

There could be abuse if publishers or aggregators refuse to license e-Books to libraries or terminate existing licences and withdraw titles. Outright refusals to supply can be abusive under Article 102 TFEU (the provision on abuse of dominance), where a dominant undertaking refuses to provide a product or access to infrastructure to a (potential customer) in a manner which harms competition. This usually requires showing that this product or infrastructure was indispensable for competition in a downstream market. Refusals can also occur where an existing customer is no longer being supplied: the product is withdrawn despite an existing commercial relationship. The threshold to bring such cases is lower, requiring that the dominant undertaking had previously been supplying the product to the customer, and the customer has made relationship-specific investments in order to use the subsequently refused input which is objectively necessary to compete downstream.

2. Constructive refusals to supply: restrictive licensing conditions/delayed supply

There could also be an abuse where the supply is not fully terminated, but licences are offered (again after withdrawal) on more onerous terms or are delayed. Constructive refusals fall short of outright refusals, but instead consist of offering to supply on such onerous terms that, in effect, they amount to the same thing. As the European Commission states in its Guidance on Enforcement Priorities, constructive refusals 'for example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply'.⁵ Constructive refusals do not require a showing that the product is objectively necessary, but there still has to be harm to competition.

3. Bundling

There may be an issue where libraries are being forced to purchase bundles, which include titles the libraries do not want, in order to obtain the titles they do need. The forced acquisition of bundles may be an issue within the remit of Article 102 TFEU, forming a potentially abusive tie ('*tying*'), where a powerful undertaking forces its customers to acquire a product they do not want (to purchase from this undertaking) in order to obtain the product they do want. Dominant undertakings may do this in order to leverage their market power from one market to another, and thus harm competition and entrench or increase their market power.

⁵ Guidance on the Commission's enforcement priorities in applying Article 82 of the *EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C45/7, para 79.

4. Unfair trading conditions

Scholars and advocates have raised concerns about the restrictive licensing conditions for e-Books. These may be abusive where they amount to unfair trading conditions under Article 102 TFEU. Unfair trading conditions may breach Article 102(a) as exploitative conduct. This covers the fact that the dominant company can take advantage of its market power to exploit its customers (or other trading partners such as suppliers). The focus in abuse cases brought by the European Commission has, at least since 2003, been on exclusion, yet unfair terms are problematic when they are exploitative, even in the absence of exclusionary effects. Moreover, there are indications that exploitation is receiving more attention in recent practice. As exploitative abuse, terms are unfair when they are disproportionate⁶ and not absolutely necessary for the dominant company attaining its legitimate objectives.⁷

5. Excessive pricing

Scholars and advocates have also raised concerns about the high prices of e-Books. These may be abusive where they amount to excessive prices under Article 102 TFEU. The EU jurisprudence has struggled to come up with a clear and uniform measure to determine when a price is excessive. Nonetheless, there are some factors which can be considered to assess whether prices are too high and unfair, such as the 'economic value' of the product and the prices of competing products.

6. Avoidance of the spirit of other laws: text and data mining

The inclusion in licensing agreements of a clause prohibiting searching, scraping, extracting and indexing runs contrary to the text and data mining exception in UK and EU copyright law where such activities are undertaken for research purposes by individuals affiliated to research and cultural heritage organisations. There may be scope to argue that it is also an abuse, although this theory is untested under EU competition law. Inspiration can be drawn from German jurisprudence (as well as unconfirmed French decisional practice), and from the preliminary ruling in *Meta Platforms*, which opened the door to considering the violation of other laws as a factor in assessing a violation of competition law.⁸

7. Lack of transparency

There may be an issue where there is a lack of clarity on the factors which determine e-Book prices, particularly if they are being set on the basis of usage data which is being withheld from libraries. Although not a specific category, this lack of transparency is potentially exploitative (a lack of information which flows from an imbalance in power and increases the companies' pricing power) and may also negatively affect competition more broadly. The need for accurate information to make commercial decisions may raise questions not only under competition law, but also under the rationale for adopting regulation such as the platform-to-business (P2B) regulation.

COMPETITION LAW FINDINGS

These seven legal categories are applied to e-Lending in this report, considering whether the actual e-Lending practices identified in the empirical research meet the legal requirements to fall into any of these categories under EU competition law. In order for the practices detailed

⁶ *Duales System Deutschland* [2001] OJ 1166/1, para 111.

⁷ Case C-127/73 *BRT v SABAM*, EU:C:1974:25, paras 9-11.

⁸ Case C-252/21 *Meta Platforms, Inc. and Others v Bundeskartellamt*, ECLI:EU:C:2023:537.

above to be assessed for abusive conduct under EU competition law, relevant markets need to be defined in which suppliers may be considered dominant. It is not possible to arrive at a conclusive delineation of the relevant market(s) in a report such as this, as that would have to be done by a competition authority in the context of an investigation of specific practices and harms. Libraries and, by extension, libraries' patrons could be considered as customers, constituting the demand in these markets. For the purposes of analysis in this report, the demand of and supply to academic libraries and public libraries are considered distinct: there are markets for the supply of academic books to academic libraries, and for the supply of trade books to public libraries.

The report reflects on libraries' preferences, considers the market segmentation based on the types of readers served (in particular fee-paying students), and queries whether core textbooks and bestsellers are 'must-haves' (justifying a narrower relevant market). It also considers whether print books are substitutes for e-Books. In addition, the geographic dimension of the market and the segmentation of markets along national and/or linguistic barriers is discussed.

After a reflection on market definition, the report considers issues of dominance and market power. This is followed by an analysis of the e-Lending practices identified in the empirical research, against the seven categories under EU competition law set out above. The following provides a brief overview of this assessment.

Dominance and Market Power

- ▶ Dominance is required to trigger the application of Article 102 TFEU, the prohibition of abuse of dominance.
- ▶ The evidence is insufficient to establish dominance within any of the markets investigated (either by a single publisher or aggregator or by a group acting collectively), but points to factors which could be considered by a competition authority.
- ▶ However, significant market power is not the only form of economic power. Abuses of superior bargaining positions or dependence may be caught by national provisions within competition law (for example in Germany, France, Belgium, Italy, and other European countries). There are indications of imbalances in bargaining positions between publishers and libraries which may be relevant to such provisions.

Supply of e-Books

- ▶ The report does not find conclusive evidence of *outright refusals* to supply e-Books to either public libraries or academic libraries, although refusals to supply public libraries (e.g. by Hachette) were raised in secondary sources.
- ▶ There is evidence of *terminations of supply* within an existing commercial relationship. Such terminations of supply may be taking place in the various markets, and in particular in a potential market for the supply of core textbooks to academic libraries. Titles are being withdrawn from collections to which the libraries have access. Withdrawal of titles could be framed as refusals to supply existing customers, in a flexible development of the decisional practice under Article 102 TFEU. It may be possible to formulate an exclusionary theory of harm in the context of academic libraries: a lack of access to the titles they need could impact the ability of academic libraries – and thus universities – to provide a service to their students.
- ▶ A withdrawal of titles as a refusal to supply subject to Article 102 TFEU presupposes that the title is no longer being supplied to libraries. However, alongside outright withdrawals,

study respondents indicated that titles may be withdrawn from packages in order to be offered again on different terms. This may make an outright refusal to supply case less fitting but open the door to cases of *constructive refusals*.

- ▶ There have also been separate complaints about *delays in supply* of books to public libraries, particularly for bestsellers. Such delays could be categorised as constructive refusals to deal, as an expansion of theories of harm in current decisional practice. It could be argued that there is an impact on competition – or at least, that it constitutes an attempt to eliminate a competitive threat: publishers have been said to worry that the offer in public libraries cannibalises their sales.
- ▶ Moreover, specific titles may not exist in e-Book format. Although there is, therefore, no refusal of an existing product, this may indicate a market failure even in the absence of specific conduct within the scope of competition law.

Licensing Terms and Conditions

- ▶ The evidence on *tying* is inconclusive. The interviews with academic libraries conducted in this study obtained mixed views on whether title bundling presents a problem in academic libraries. Although some librarians' responses that they can choose whether to obtain a bundle or individual titles might suggest there is no case for abusive tying in competition law, other respondents' reflections indicate that they found bundles undesirable but lacked the option to purchase individual titles instead. This study did not gather sufficient evidence on the desirability of bundles for public libraries.
- ▶ There is evidence of restrictive licensing conditions which may amount to *unfair trading conditions* within the scope of Article 102 TFEU. In the context of academic libraries, the interviews reveal that the current offer does not satisfy libraries' demand for unrestricted, perpetual access to e-Books.
- ▶ The study found that the range of licensing models varies according to the type of content being accessed, with academic textbooks in particular being licensed on more restrictive terms than other types of content, such as monographs, where less restrictive access may be granted in the licence.
- ▶ In the context of public libraries, a particular concern is the steady disappearance of perpetual access licences for trade e-Books. This has brought about sharp spikes in costs incurred for 'replacement copies'. Moreover, delays in supplying e-Books to libraries, mentioned above under constructive refusals to supply, may not obviously generate exclusionary effects, but arguably disadvantages libraries directly and their readers indirectly.
- ▶ This report explores the possibility of framing these terms and conditions as exploitation, particularly in the form of *unfair trading conditions*. Although the European Commission's focus has, until recently, been on exclusionary conduct rather than exploitative conduct, there has been renewed attention on exploitation and there may therefore be scope for a case in respect of unfair trading conditions. Under the older jurisprudence, terms and conditions may be considered abusive where they are disproportionate and not necessary for the dominant company to attain its legitimate objectives.
- ▶ Another, more commonly discussed, form of exploitative conduct is charging excessive prices. While there were concerns over the level of e-Book prices, it is not evident that these high prices constitute *excessive prices* within the scope of Article 102 TFEU. That would require showing that the prices were not just high, but unfairly/unreasonably so. Further analysis is needed to determine whether e-Book prices are representative of their desirability to libraries and readers, and the added value this format brings. Nonetheless, it is clear that there is a concern about the sustainability of libraries' functions given

the rise in costs, with e-Books ten times the cost of their paper equivalent not being uncommon, without corresponding increases in budget.

Access to Data

- ▶ The study gathered evidence that agreements include clauses prohibiting searching, scraping, extracting and indexing, contrary to the text and data mining exception in EU (and UK) copyright law. The *avoidance of another law* as a basis for abuse under Article 102 TFEU is untested, but there may be scope here to push the decisional practice forward.
- ▶ Lastly, there is a *lack of transparency* on the factors that determine prices. The research showed that both academic and public libraries believe the usage data platforms provide them with could be improved. In the interviews with *academic libraries*, not all respondents were satisfied with the information available on usage. Furthermore, whereas a few respondents were satisfied with the usage data they receive, they noted that the supply of data varies across platforms. Overall, every respondent who reflected on the availability of usage data expressed a desire for all e-Books providers to provide such data, as it is important for academic libraries to be able to make informed decisions on their acquisitions.
- ▶ The evidence on public libraries also revealed that only rudimentary data is available to libraries, despite ongoing attempts to improve this situation. Although not a specific category, this lack of transparency is potentially exploitative (a lack of information which flows from an imbalance in power and increases the companies' pricing power) and may also negatively affect competition more broadly. There is possible scope to connect this practice to other areas of law, such as the platform-to-business (P2B) regulation.

New Opportunities under the DMA

- ▶ In considering the scope for regulation of e-Lending, the EU Digital Markets Act (DMA) is a recent competition-related intervention. Platforms may be considered as online intermediation services. If they met the criteria for designation, they could be considered as 'gatekeepers' under the DMA, and a lack of transparency may be of concern within respect to the obligations and prohibitions of the DMA. However, when e-Lending platforms do not fulfil the criteria set out in the DMA, but otherwise wield sufficient power to engage in conduct analogous to that of 'gatekeepers', it raises questions around the need to address this apparent gap in the existing regulatory framework.

In summary, it is difficult within this study to establish (single) dominance in the sense of Art. 102 TFEU, given the limited information on market shares in the relevant markets and the likelihood that, in any case, these shares fall below the thresholds for dominance. Collective dominance – whereby a group of publishers or platforms is considered together – may be another avenue to explore. This report suggests viewing relevant markets from the competition law perspective. Of these markets, academic core textbooks seem most problematic (if the provision of core textbooks as a category can be defined as a separate relevant market). However, it may yet be possible to bring a case under (national) provisions on abuse of economic dependence, or under the new EU digital market-type regulatory provisions (P2B regulation; Digital Markets Act).

COPYRIGHT LAW

Competition law, with its focus on market structure and regulation, may not be a natural fit for the governance of non-commercial access to knowledge in Europe. In the context of print books, a clear decision was made by legislators to create exceptions to copyright and thus market dynamics, enabling libraries to preserve and supply knowledge to society at large. The study analyses why this approach under copyright law has not been applied to e-Books, resulting in an inherent tension between the understandably commercial incentives of publishers and aggregators, and the public service objectives of libraries.

Publishers were required to deposit print books with certain privileged libraries even prior to the inception of copyright. As copyright has evolved, so too has the regulation of access and distribution of books – not least through the introduction of lending rights and corresponding public lending schemes at the national level. The introduction of a harmonised lending right was considered justified insofar as the Rental and Lending Directive (Directive 92/100/EEC; codified as 2006/115/EC) simultaneously granted Member States the possibility to allow libraries to lend works to the public upon payment of remuneration for authors. This reflected the need to respect Member States' competence in developing national cultural policies, and to ensure that the right balance is struck between economic and cultural values.

Despite these interventions, e-Lending remained largely beyond the scope of Member States' policy and, as a result, e-Lending services emerged that were established on the basis of licensing the copyright in the books. These commercial solutions for e-Lending have proven problematic for libraries' societal goals and interests. Lack of legislative action prompted the Court of Justice of the European Union (CJEU) in the case of *VOB* (C-174/15) to extend the scope of the lending right to cover a specific form of secure digital lending (SDL), resorting to a 'dynamic or evolving' interpretation of the law. The Court interpreted the lending right as also covering digital book lending as long as such lending complies with a set of specific conditions to ensure there is no multiplication of usable digital copies of the book.⁹ However, the analysis demonstrates that, contrary to the CJEU's intentions, without authorised access to digital copies of books or the right to create them for the purposes of e-Lending, Member States are prevented from effectively implementing a national lending scheme which extends to born-digital books.

Findings:

- ▶ Rightsholders retain the exclusive right to control access to digital copies of works, under the communication to the public right.
- ▶ Under the CJEU's jurisprudence, 'lawful access' to digital copies of a book remains a necessary pre-condition of any e-Lending scheme.
- ▶ Unless libraries are provided with alternative means to obtain or create digital copies of books for the purpose of e-Lending, which do not require entering into licensing agreements with rightsholders (e.g. a right to digitise for the purpose of secure digital lending), it will continue to be impossible for EU Member States to develop e-Lending national schemes operating independently from such private licensing arrangements.

⁹ According to the CJEU in *C-174/15 VOB* a model as falling within the concept of lending for the purposes of the Rental and Lending Directive must comply with the following conditions: (1) a digital copy of a book is placed on the server of a public library and a user is allowed to download a copy on his [sic] own computer; (2) 'only one copy can be downloaded during the lending period'; and (3) 'after that period has expired, the downloaded copy can no longer be used by that user'. See *C-174/15 VOB* paras 52-54.

- Without ensuring independent access to digital copies of books, libraries' ability to carry out e-Lending remains vulnerable to refusal to license, unfavourable licensing terms that disallow core library functions such as preservation and interlibrary loan, opt-outs by contract (contractual override of exceptions/limitations), and technological protection measures (TPMs).

POLICY OPPORTUNITIES: COMPETITION LAW

The European Commission and national competition authorities could consider the practices identified in this report under Article 102 TFEU (and national equivalents): the provision on abuse of dominance. This may require a flexible understanding of exclusion and harm to competition. At EU level, moreover, the European Commission has an opportunity to consider the practices identified within its wider reflection on the substance of and enforcement priorities under Article 102 TFEU, which is ongoing. Exploitative abuses have been little explored in recent years, because the balance between protecting competition and protecting individual market participants for their own sake can be difficult to strike. However, there is a renewed appetite for exploitative abuse cases, given the imbalances in power brought about by the emergence of e-Lending platforms. The practices revealed in the supply of e-Books to libraries could present opportunities to develop the existing decisional practice on unfair trading conditions and reflect on the significance of situations of economic dependence under Article 102 TFEU.

The Commission could also build on its practice of considering platforms' data collection, and the use of such data to reduce pricing transparency for customers. Moreover, as the Commission is working towards adopting guidelines on exclusionary abuses, it may take the opportunity to consider the kind of exclusion needed to find an abuse. There may be scope to clarify to what extent the foreclosure on a downstream market is sufficient, even in the absence of a competitive relationship between the dominant undertaking and its customers. The Commission may also have an opportunity to consider whether the violation of another law can be an abuse under Article 102 TFEU, as it is under some national provisions, thereby addressing a gap left by the Court of Justice in *Meta Platforms*.

The biggest opportunity here, however, is to clarify the extent to which competition intervention can and should be considered where there may be a conflict between commercial incentives and public service objectives. In doing so, it could confirm the relevance of the General Court's statement that, since Article 167(4) TFEU states that the 'Union shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures', the 'Commission is required to take into consideration the objective of respecting and promoting cultural diversity, in particular where the application of that article concerns an activity linked to culture'.¹⁰

¹⁰. Case T-51/08 *Stim v Commission* ECLI:EU:T:2013:189, para 73. Article 179 TFEU also could be taken into account. This gives the Union the objective 'of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties'.

Competition law requires market power. However, as this report shows, there may be issues of economic power that are distinct from market power (which may apply even if competition law market share thresholds are not met), given the imbalances in bargaining power between publishers, aggregators, and libraries. This prompts the question whether regulations such as the P2B regulation may apply (Platform-to-Business Regulation (EU) 2019/1150), or whether the legislator may want to adopt Digital Markets Act (DMA)-like obligations on publishers or aggregators. Nonetheless, competition law-related interventions may not be the most appropriate tool to fill a gap left by law. The commercial nature of access to e-Books in libraries may frustrate their objectives of providing wider access to knowledge, research, scientific advancement and, from a cultural perspective, preservation. Thus, there may be a need for legislative action rather than competition law intervention.

POLICY OPPORTUNITIES: COPYRIGHT LAW

Given the degree of complexity and inconsistency in how e-Lending and access to digital copies have been construed under copyright law, primary legislation should be considered as an opportunity to improve how copyright promotes the distribution of knowledge. A holistic approach to the regulation of e-Lending is needed, that considers the interconnection between acquisition (what it means to obtain digital copies from a lawful source) and e-Lending of books. Analogies with lending of print books are instructive and instrumental in finding policy solutions that promote a balanced system where the interests of publishers and libraries are equally taken into account.

Several solutions – e.g. a right to digitalise or digital exhaustion – are aimed at emulating the acquisition and lending of print books by libraries. Differences in the regulatory framework between print and digital books should be properly justified by considering functional differences in how these books are distributed and consumed. The framework regulating e-Lending appears unbalanced in favour of rightsholders. The VOB case – in which promotion of e-Lending and functional equality between physical and digital lending were major themes in the CJEU judgment – has inadvertently created obstacles in the setting up of national e-Lending schemes operating independently from the market. Particularly challenging from a doctrinal perspective is the introduction of a lawful source requirement where born-digital sources are used. In a regulatory framework where any such act is covered by the exclusive Communication to the Public Right, the Court failed to clarify how such copies can be obtained. Our recommendations address this issue.

As a result, Member States should be allowed to rely on Art. 5(2)(c) of the Information Society (InfoSoc) Directive to enact national legislation permitting libraries to digitise physical books in their catalogue for the purpose of e-Lending in specific instances where: (1) no genuine commercial access to the digital copy of the book exists at the time of digitalisation; or (2) such access is subject to the acceptance of unfair terms and condition. The purpose for which the books are digitised – e-Lending – could further be used to justify the application of the exception as sufficiently specific and circumscribed to comply both with a literal interpretation of Art. 5(2)(c) and with the Berne 3-step tests, as codified in Art. 5(5) InfoSoc Directive.

While rarely discussed in the context of e-Lending, digital exhaustion (permitting the resale of e-Books) could also enable libraries to obtain lawful access to digital copies of books. The approach would be to create a secondary market for e-Books that is sufficiently large to enable libraries to acquire permanent digital collections that could then be used to offer a market-independent e-Lending service. The increased competition resulting from a secondary

market for e-Books might add competitive pressure on publishers. Opening up alternative sources for e-Lending means that publishers will have increased incentives to license the e-Lending of books at reasonable prices – and disincentives for refusals to provide e-Lending licences for libraries.

Less ambitious but equally important measures would ensure that rightsholders cannot opt out from any e-Lending scheme created pursuant to a derogation to the e-Lending right in the Directive on Rental Right and Lending Right (2006/115/EC). It is recommended that any future national legislation implementing Art. 6(1) of the Lending Directive should include a provision explicitly prohibiting rightsholders from introducing any contractual clause – or technical protection measures (TPMs) to the same effect – that would be contrary to the purpose of the e-Lending scheme (e.g. excluding some titles from e-Lending schemes or unduly reducing the modalities under which these books can be made available).

Unless these steps are recognised in law, the effectiveness of the CJEU's decision in VOB (C-174/15) will be seriously undermined, and publishers will retain excessive control – whether via technological protection measures (TPMs) or contractual clauses – in determining the terms and conditions under which knowledge is accessed and distributed. At the same time, it is also important to recognise that the wider implications of the judgment in VOB on libraries' ability to circumvent technological protection measures (TPMs), and the validity of contractual overrides in respect of the Public Lending Right (PLR) remain contested and must be fully assessed.

The above policy options have been largely considered in the EU context, where the recommendations could be similarly implemented across the harmonised EU copyright system. The UK is a special case in so far as already in 2017 (following VOB) it provided for an exception for the lending of e-Books in Section 40A of the Copyright, Designs and Patents Act 1988. The wording reflects the inherent contradictions of the VOB judgment, which in practice fails to make e-Lending independent from market forces. Now it is outside the EU, the UK could, however, consider adjusting the opt-out mechanisms granted to rightsholders, for example by amending Section 40A(1AZ) which makes the exception subject to 'any purchase or licensing terms'. While the subsection may be considered important for protecting the legitimate interests of rightsholders, more balanced solutions can be devised: for example, by allowing libraries to create lawful copies of books for the purposes of e-Lending subject to fair remuneration to authors, at least in those cases when neither a digital version nor a licence at a reasonable price is available on the market.

POLICY CONCLUSION

The competition law analysis is revealing for identifying problematic market practices, but it has shown that competition-related interventions enabling libraries to build sustainable digital collections for non-commercial e-Lending are not straightforward. Equally, within copyright law, there are hurdles to overcome to arrive at secure digital lending schemes at the EU Member State level that would realise the rationale of the VOB decision.

The legislator therefore may have to think afresh about new solutions, taking insights from competition law back into the underpinning layer of copyright. The key policy options identified from the analysis are:

- (1) Clarification of what constitutes a lawful source.** While VOB permits libraries to make a digital copy of physical books in their possession for e-Lending, libraries also need to be able to acquire e-Books by donation or in secondary markets (regardless of the licensing frame asserted in *Tom Kabinet*).
- (2) Regulation of licensing contracts.** More sustainable agreements between libraries, aggregators and publishers could be incentivised by removing the requirement for a licensed copy specifically aimed at a library if there is no licensing scheme available that ensures the public function of libraries.
- (3) Limiting the exercise of exclusive rights.** The legislator could require that a deposit copy of any born-digital book is made available to designated libraries specifically for lending beyond the premises. Alternatively, the legislator could provide an exception (e.g. in analogy to the preservation copy that cultural heritage institutions are permitted to make under Art. 6 of the Copyright in the Digital Single Market Directive) that enables libraries to offer non-commercial e-Lending schemes.

POLICY SUMMARY

Table 1 summarises the policy options in respect of competition law and copyright law.

Policy area	Policy issue	Policy options
Competition law	Abuse of dominant position	<p>Competition authorities (both at EU level – the European Commission – and at national level) could undertake investigations with a focus on seven potential abuses:</p> <ul style="list-style-type: none"> ▶ Refusals to supply: outright and withdrawals ▶ Constructive refusals to supply: restrictive licensing conditions/delayed supply ▶ Bundling ▶ Unfair trading conditions ▶ Excessive pricing ▶ Avoidance of the spirit of other laws, e.g. the copyright exception for text and data mining ▶ Lack of transparency <p>Where relevant harm is found (exclusionary or exploitative), competition authorities may adopt behavioural or structural remedies, including obligations to provide access to e-Books on fair and non-discriminatory terms.</p>
Policy area	Policy issue	Policy options
Competition law	Economic dependence	<ul style="list-style-type: none"> ▶ National authorities could investigate conduct under their national provisions on the abuse of economic dependence ▶ Similarly, EU digital market type regulatory provisions could be explored: <ul style="list-style-type: none"> ◦ Platform-to-business (P2B) regulation ◦ Digital Markets Act
Copyright law	Licensing	<ul style="list-style-type: none"> ▶ Allowing libraries independent access to digital copies, facilitating digitisation or ensuring access to born-digital copies of books ▶ Reviewing the relationship between communication to the public and lending rights and issuing guidance, ensuring that an unduly broad interpretation of the former does not frustrate the application of the derogation to the e-Lending right ▶ Regulating contracts between libraries and publishers directly to promote fairness and redress the differences in bargaining power ▶ Incentivising licensing schemes that enable the building of sustainable digital collections for non-commercial e-Lending, by allowing digitisation if no licence scheme is available on reasonable terms
Copyright law	Limitation	<ul style="list-style-type: none"> ▶ Requiring that a deposit copy of any born-digital book is made available to designated libraries for the purpose of lending beyond the premises ▶ Providing an exception for libraries to make a preservation copy, ensuring a digital backstop copy for a lending scheme regardless of licensing terms ▶ Limiting Technological Protection Measures (TPMs) that can be introduced, enabling libraries to unilaterally circumvent unlawful TPM restrictions without incurring liability

Table 1: e-Lending Policy Options

1: MARKET STUDY

INTRODUCTION: LIBRARIES AND THE 'DIGITAL REVOLUTION'

The context for this study is the considerable volume of recent debate, discord, and activism around the lending of e-Books by public and academic libraries. The restrictions imposed on public interaction during the Covid-19 pandemic meant that the only viable way to lend and borrow books was by electronic means. This simultaneously foregrounded the potential opportunities offered by e-Lending, while exposing shortcomings in the existing technological infrastructure, business models, and legal frameworks that underpin the lending of e-Books. In this process, the disconnect between reader expectations and what libraries were able to deliver in respect of e-Lending were exposed and magnified. As a result, the suitability of existing national and international copyright law, and interpretations thereof, when applied to e-Books for the purposes of lending has increasingly been called into question.

Although the unforeseen global crisis of Covid-19 served as a catalyst for intensifying scrutiny of e-Lending, many of the key issues at stake are long-standing concerns that predate the pandemic. Books have been digitised since the early 1970s.¹¹ Significant advances in hardware and software infrastructure in the second half of the 1990s in the academic setting, and into the 2000s for the consumer market, created viable markets for e-Book content. The emergence of this market for e-Books led to several legal cases and calls for intervention pertaining to pricing and price fixing,¹² interoperability of devices,¹³ and the potential for a resale market for e-Books.¹⁴ As the consumer market for e-Books was developing, e-Lending by libraries also emerged. Similarly, this raised many questions around the practicalities and legalities of offering such services. The digitisation of printed texts, theoretically at least, drastically increases the potential for books to be accessed by readers, unfettered by the physical limitations inherent to printed books held in traditional libraries. The proliferation of hardware and software innovation, along with growing consumer appetite for digital content 'on demand' has seen libraries increasingly engage in a type of hybrid offering that combines lending of print books with provision of access to texts digitally by way of e-Lending. Unlocking the full potential of these developments has many positive implications for libraries' societal goals in terms of education, supporting research, and the promotion of reading culture.

¹¹. Roberta Burk (2001), 'e-Book devices and the marketplace: in search of customers', *Library Hi Tech*, Vol. 19 No. 4, 325.

¹². *United States v Apple Inc* [2013] 952 F Supp 2d 638; CASE COMP/AT.40153 - *E-book MFNs and related matters* (e-Books MFNs) (2017). For a general overview, see Albanese, A (2013) 'Apple Loses: Judge Finds Price-Fixing in e-Book Case', *PublishersWeekly.com*. <https://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/58166-apple-loses-judge-finds-price-fixing-in-e-book-case.html>.

¹³. Interestingly, a demand for interoperability of e-Books across platforms has come from both publishers and libraries, although in different contexts – e-Book sales and e-Lending. See respectively 'The DMA and interoperability: what about e-books?' (European and International Booksellers Federation, 2021) and 'IFLA Principles for Library e-Lending' (International Federation of Library Associations, 2013) 3. in William H Dutton and Paul W Jeffreys (eds), *World Wide Research: Reshaping the Sciences and Humanities in the Century of Information* (MIT Press 2010).

¹⁴. Caterina Sganga, 'Digital Exhaustion After Tom Kabinet: A Nonexhausted Debate' in T. Synodinou et al (eds), *EU Internet Law in the Digital Single Market* (Springer, Cham, 2021).

This transition to a mixed model has, however, not been unproblematic. Debates and disputes around e-Lending have played out in several important copyright cases around e-Lending and directly related aspects of the wider e-Books market. Among the most prominent of these is the Court of Justice judgment in C-174/15 VOB.¹⁵ While the volume of case law pertaining to copyright is considerable, relevant competition cases are less abundant. This is not to say that competition law is not relevant in the e-Book market, though. A number of investigations by UK and European competition regulators have examined aspects of e-Book sales in the consumer space.¹⁶ In the UK, the Office of Fair Trading has also examined the book trade in the digital age.¹⁷ In the educational e-Book sector, a number of recent reports have emerged about publishers imposing significant price increases on licences and withdrawing large catalogues of titles or removing specific titles from bundles of licensed content¹⁸ – an issue which author groups have also expressed concern about.¹⁹ IFLA (International Federation of Library Associations and Institutions), EBLIDA (European Bureau of Library, Information and Documentation Associations) and other prominent voices of library advocacy have campaigned vociferously for interventions that will correct what they see as a profoundly imbalanced relationship between publishers and libraries. This provoked the *#e-BookSOS* campaigns in the UK and Ireland, calling for competition authorities to intervene. In the UK this movement was initiated in the academic sector, whereas in Ireland it incorporated academic and public libraries.²⁰ A group of UK academics called for Elsevier, the UK's largest publisher of scholarly and scientific articles, to be referred to the Competition and Markets Authority on the grounds of: 'abuse of a dominant market position' and 'problems in a market sector' within the context of scholarly and scientific articles.²¹ As is the case in many other areas of the digital cultural industries, such as music streaming, video games and video streaming, competition authority interventions are increasingly being viewed as a potentially effective lever.²² Moreover, at the international level we have seen pan-European and national associations from 23 European countries call for legislative intervention on e-Books.²³

¹⁵ C-174/15 – Vereniging Openbare Bibliotheken (VOB) [2016] (CJEU) ECLI:EU:C:2016:856.

¹⁶ See CASE COMP/M.6789 89 Bertelsmann/Pearson/Penguin Random House (Pearson Merger) (2013); CMA, Merger case: acquisition by Aragorn Parent Corporation (KKR & Co Inc) of OverDrive Holdings (OverDrive Merger) (2020), ME/6880/20; CASE COMP/AT.39847-E-BOOKS (2013); CASE COMP/AT.40153 - E-book MFNs and related matters (e-Books MFNs) (2017).

¹⁷ Office of Fair Trading (2011) Case Reference: CE/9440-11.

¹⁸ Yoyohanna, 'E-BOOKSOS. Wiley withdrawing key e-Book titles from library collections – evidence required please' (Academic Book Investigation, 7 September 2022) <https://academicebookinvestigation.org/2022/09/07/wiley-withdrawing-key-ebook-titles-from-library-collections-evidence-required-please/>.

¹⁹ Authors Alliance, 'Authors Speak Out: An Update on the Wiley e-Book Situation' (Authors Alliance, 14 October 2022) <https://www.authorsalliance.org/2022/10/14/authors-speak-out-an-update-on-the-wiley-ebook-situation/>.

²⁰ Stuart Hamilton, Marian Higgin and Cathal McCauley, 'The #e-Booksos campaign in Ireland' (An Leabharlann21, October 2021) https://mural.maynoothuniversity.ie/14975/1/CMC_An%20Leabharlann21.pdf

²¹ Martin Paul Eve, Jon Tennant and Stuart Lawson, 'Referring Elsevier/RELX to the Competition and Markets Authority' (3 December 2016) <https://eve.gd/2016/12/03/referring-elsevierrelx-to-the-competition-and-markets-authority/>.

²² Kenny Barr, Magali Eben and Martin Kretschmer, 'The re-intermediation of the music industries value chain: market definition, streaming gatekeepers and the control of data' (2022) *European Intellectual Property Review*, 44(6), 317.

²³ 'Library associations across Europe joint call for action on e-Books' (Knowledge Rights 21, 24 April 2023) <https://www.knowledgerights21.org/news-story/library-associations-across-europe-joint-call-for-action-on-e-Books/>

Working Definitions

The specific focus of this report is the library lending of electronic books, as opposed to other types of content. While periodicals, academic journals, news media, trade press, and numerous other types of publication with significant pre-digital legacies are made available by libraries and share close parallels with e-Books, these lie beyond the scope of this study. Two types of books are the focus:

- **Trade books:** fiction and non-fiction books published by commercial publishers aimed at the general public retail market, such as novels, biographies, history, etc.
- **Academic/educational books:** specialist books, often produced by specialist academic publishers, that are principally intended for use in education and research, such as textbooks, academic monographs, edited collections, etc.

Books can exist in print format, audiobook format and e-Book format. For the purposes of this research, the term e-Book is defined as:

／ **e-Book: 'any piece of electronic text regardless of size or composition (a digital object), but excluding journal publications, made available electronically (or optically) for any device (handheld or desk-bound) that includes a screen or screen reader'.²⁴ It should be noted that, in the academic setting, it is also common for e-Book chapters or sections to be sold and accessed individually without purchasing or accessing the complete book.**

A library is defined by IFLA as:

／ **An organisation, or part of an organisation, the main aim of which is to facilitate the use of such information resources, services, and facilities as are required to meet the informational, research, educational, cultural or recreational needs of its users.²⁵**

IFLA also provides a useful definition of the two main types of libraries featured in this study: *Public library:* a general library that is open to the public (even if its services are primarily intended for a particular part of the population to be served, such as children, visually impaired persons, or hospital patients) and that serves the whole population of a local or regional community and is usually financed, in whole or in part, from public funds. Its basic services are free of charge or available for a subsidised fee.²⁶

Public libraries are generally components of public infrastructure that are funded by the national and local government purse and, as such, subject to the vagaries of budgetary constraints placed on public services. Public libraries' e-Lending services mainly relate to 'trade books'.

The academic library serves a narrower constituency of users than the public library and provides access to textbooks, monographs and specialist research materials.²⁷

²⁴. Chris Armstrong and Ray Lonsdale, 'Challenges in managing e-Books collections in UK academic libraries' (2005) *Library Collections, Acquisitions, & Technical Services*, 29/1, 217.

²⁵. IFLA (2024) IFLA Library Map of the World, 'Glossary'. Available at: <https://librarymap.ifla.org/data-glossary/library>.

²⁶. Ibid.

²⁷. Ibid.

Academic library: a library whose primary function is to cover the information needs of learning and research. This includes libraries of institutions of higher education and general research libraries.

Within the academic library landscape there is considerable diversity of funding models and focus. Some institutions will be primarily geared towards teaching, while others may be more research-intensive. Although each institution will make some decisions around e-Lending, in many cases higher education institutions will also be members of library consortia/ government initiatives that, to some extent, centralise functions such as procuring and licensing access to e-Books.

e-Lending Market Participants

The extent to which e-Lending constitutes a 'market' or set of markets is open to interpretation in different settings. In EU legislation, lending is defined as not involving either direct or indirect economic or commercial advantage.²⁸ In essence, the act of lending a book to the public – whether digital or physical – is therefore not an economic transaction, although some authors obtain remuneration for such lending.²⁹ This is at odds with the notion of 'exchange of economic value' which underpins the existence of a market.³⁰ The question of whether these are 'markets' in the specific competition law sense of the term could, therefore, seem misplaced. However, to offer e-Lending to patrons, libraries need not only to obtain licences from publishers on a commercial basis but must also be able to utilise a specific infrastructure – an e-Lending platform. The platform must facilitate a coherent and standardised borrowing and reading experience, while also ensuring that legal access to digital content is managed in a protected environment. Viewed from this perspective, the e-Lending supply chain clearly constitutes a 'market' in the accepted sense of the word. The existence of this market ultimately stems from an author's exclusive right, conferred by copyright, to permit the public lending of their works. In practice, this right is routinely assigned by authors to book publishers.

The EU copyright *acquis* treats the act of supplying an e-Book to the public as falling within authors' economic rights, and an authorisation from the rightsholder is normally necessary in order to carry out such acts unless a specific exemption is deemed to apply.³¹ Upon obtaining a digital copy of a book, the exhaustion of copyright does not occur as it would when a library obtains a print copy. Neither can libraries avail themselves of a public lending exception that applies to print books – firstly, because no Member State has introduced such an exception.³²

²⁸. Council Directive (EC) 2006/115 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 (Rental and Lending Directive) Art. 2(b).

²⁹. See Rental and Lending Directive Art. 6. As specified in the legislation, Member States are free to determine the remuneration, taking into account their cultural promotion objectives, and can exempt certain categories of establishments from the payment of the remuneration.³⁰ Ibid.

³⁰. Konstantina Bania, 'The role of consumer data in the enforcement of EU competition law' (2018) 14 European Competition Journal 38, 45.

³¹. Depending on the circumstances, the supply of an e-Book may be deemed to trigger the reproduction right, communication to the public right and/or lending right. For a full analysis, see Matteo Frigeri, Martin Kretschmer and Peter Mezei, 'Copyright and e-Lending in public libraries: an incomplete revolution?' (2024) 15 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 2, 156-179.

³². Finland recently amended its copyright law to introduce a system of compensation for authors in respect of e-Lending, which is funded from public funds rather than publishers: Knowledge Rights 21, 'The Finnish Bill on e-Book Lending: What's in it for Libraries? Not so much Perhaps' (Knowledge Rights 21, 13 December 2023) <https://www.knowledgerights21.org/news-story/the-finnish-bill-on-eBook-lending/>.

Secondly, because an exception for lending books does not relieve the library from an obligation to obtain access to a lawful copy of the book in the first place, which remains an exclusive right of the author (communication to the public).^{33,34} These divergences in how copyright accounts for e-Books and print books mean that libraries wishing to provide digital lending services must enter these legally-created markets to obtain authorisation from rightsholders to lend e-Books to patrons. These market transactions find a concrete expression in the licences underpinning the lending of e-Books. The book sector is a copyright-intensive industry underpinned by a web of contracts between many constituencies of stakeholders and contributors operating across a dynamic and fluid industrial value chain.³⁵

This overview permits a set of central assumptions to be offered in respect of the products that characterise an e-Lending market and the *consumers* in these markets. The products in e-Lending markets are trade and academic e-Books for the purpose of lending to users. However, in many instances it is more accurate to identify the product on offer as access to trade and academic e-Books via digital platforms. Moreover, this access is typically offered to libraries by publishers on a time-limited or metered-by-usage basis. The suppliers of these products and services are publishers. It follows that public and academic libraries can be identified as constituting the demand in e-Lending markets. The simplified model of the e-Lending ecosystem shown in Figure 4 identifies three main types of participants in the e-Lending value chain.

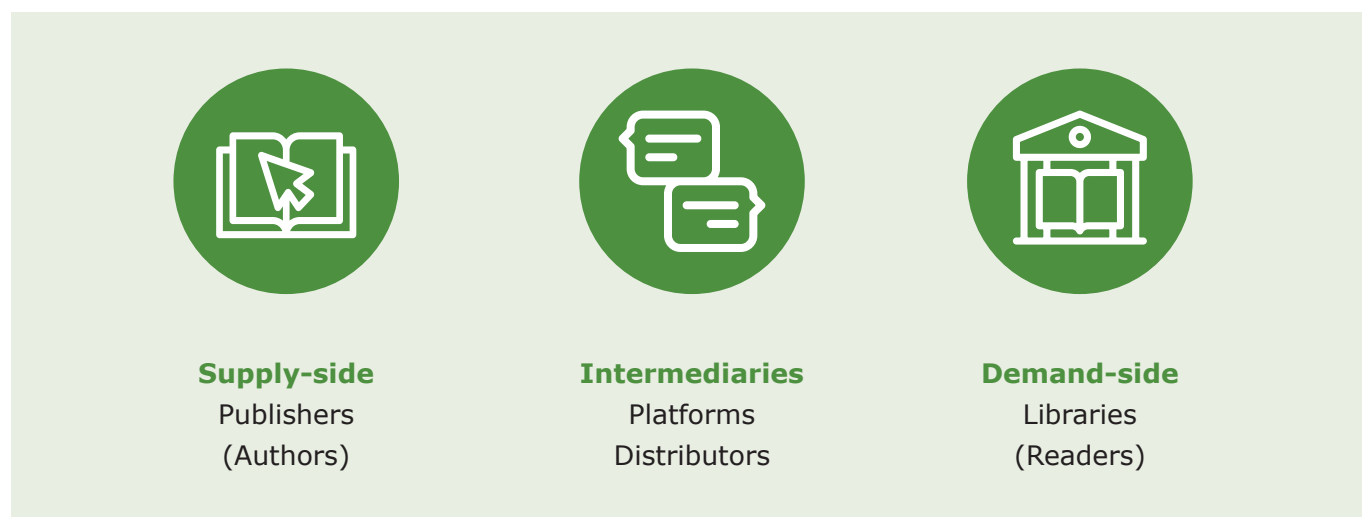


Figure 4: e-Lending Market Participants

At one end of the spectrum are authors and at the other end are readers. The intervening links in the print book chain includes publishers, printers, distributors and booksellers, and libraries. Exploitation contracts between authors and publishers determine which rights are assigned, the commitments made by each party, and how any rewards might be split. In turn, publishers negotiate deals with distributors, retailers, digital platforms, and, in some cases, directly with libraries. Of course, some actors in this chain will occupy more than one role. For example, some publishers will operate e-Lending platforms, and authors are likely to also be readers.

^{33.} It is, of course, incumbent on libraries lending print books to obtain copies lawfully, but this requirement is easily satisfied by purchasing new or used books, or from donations. In the case of licensed digital works, the situation is quite different.

^{34.} See C-174/15 VOB, in particular, paras 66-72.

^{35.} Richard Caves, *Creative Industries: Contracts Between Art and Commerce* Cambridge (Harvard University Press 2002).

SUPPLY-SIDE: PUBLISHERS

On the supply-side are book publishers that enter into agreements with authors to secure control/ownership of copyright in literary works, and in turn produce books for sale and licensing in a variety of markets. The principal revenue-generating activity of the book publishing sector is the production and dissemination of printed texts, both physical and digital.³⁶ As such, the book publishing sector can be described as a 'copyright industry'. It is apparent that many of the forces of digitalisation that have reshaped many other cultural sectors are also significant in the book publishing sector, particularly since the emergence of tech giants Amazon and Google. However, it is important to recognise that the development of the e-Book market does not mirror patterns seen the digitalisation of other cultural sectors. While the digital market for music, television streaming, and many other cultural outputs has grown dramatically, and demand for analogue products in these sectors has diminished greatly, the book publishing sector does not conform to this trajectory. By contrast, the physical print book has proved remarkably resilient to the onslaught of digitalisation, and remains the most valuable contributor to book publishers' revenues by a considerable margin.^{37,38} Within this market, or set of markets, the trade and academic book sectors are significant contributors to overall book publishing industry revenues. Figure 5 reveals important features of the European book publishing sector. Trade books are the largest single contributor to the overall industry, while academic books represent a smaller but significant portion.

European Book Publishing Statistics 2023					
	2023	2022	2021	2020	2019
Publishers' revenue from sales of books (bln)	24.4	23.9	23.6	22.2	22.4
Educational (school)books	18.3%	18.0%	17.4%	18.4%	19.3%
Academic/professional books	16.0%	16.8%	17.1%	16.3%	18.0%
Consumer (trade) books	51.1%	50.5%	50.5%	50.3%	49.4%
Children's books	14.5%	14.7%	15%	14.5%	13.3%
Turnover by area					
Sales in the domestic market	80.5%	79.9%	81.7%	81.7%	79%
Exports	19.5%	20.1%	18.3%	18.3%	21%
Turnover by distribution channels¹					
Sales in bookstores and specialised stores	47%	45.6%	43.6%	44.7%	50.3%
Sales in supermarkets and other stores	11.9%	11.2%	11.5%	11.9%	12.1%
Online sales	24.2%	25.8%	29.1%	28.9%	23.0%
Direct sales (incl. libraries and book clubs)	16.9%	17.4%	15.7%	14.5%	14.6%
Turnover by format²					
Print	83.9%	83.9%	84.8%		
Digital	12.7%	12.9%	12.6%		
Audio	3.5%	3.2%	2.5%		
Sales at market value⁴ (bln)	35.3	34.7	34.75	33.2	32.6
Number of titles published in period					
New titles	585,000	575,000	575,000	595,000	605,000
Number of titles in print (active catalogue) ²	14,000,000	13,800,000	13,400,000	13,100,000	12,250,000

Estimates, all figures rounded

¹ This section has been reviewed and it's data, not comparable to those of previous years, will need time to become more reliable

² This series of data was reintroduced in a corrected form in 2019; figures do not correspond to those in previous issues

³ This series of data was introduced in 2022; 'digital' means e-Books and other text-based digital productions, 'audio' indicates audiobooks in all formats; data should be taken as broad estimates

⁴ This series of data, introduced in 2024 (data 2023) and estimated retrospectively for previous years, indicated the value of sales in European markets at cover price or the equivalent thereof, for books published by European publishers

Figure 5: European Book Publishing Statistics 2023 (FEP 2024)

³⁶. Mosahid Kahn and Kyle Bergquist, *The Global Publishing Industry in 2022* (WIPO, 2023) WIPO Publication No. 1064EN23-2, 10.

³⁷. Rita Matulionyte, 'Lending e-Books in libraries: is a technologically neutral approach the solution?' (2017) 25/4 *International Journal of Law and Information Technology* 259.

³⁸. David Hesmondhalgh, *The Cultural Industries* (4th edn, Sage Publishing 2018).

FEP, the Federation of European Publishers, does not include granular longitudinal data on the contribution of e-Books to overall revenues, but states in its commentary that:

The e-Book market (now around 13% of the total) showed signs of stagnation for the 5 years before Covid (but it could be a matter of capturing the right data), whereas audiobook sales exploded in 2019, giving new impetus to digital sales; they reached 3.5% of the total in 2023 (but the figure is largely underestimated).³⁹

Neither does this dataset reveal detail on revenue generated by trade e-Book licensing to libraries, but this is likely to be modest as an overall proportion, though not necessarily insignificant.⁴⁰ When looking at the circulation of e-Books, reported figures suggest that e-Lending contributes significantly to the total digital readership,⁴¹ despite differences across countries in the EU.⁴² A distinction between the two publishing sectors is that scholarly publishers' business model is principally based on trade with libraries, whereas trade publishers' main focus is the consumer market.

Consistent, longitudinal data relating to the library e-Lending market is very scarce, presenting considerable challenges for research in this area. However, some comparative insights into e-Lending in Europe and North America are available, providing useful avenues of inquiry for this study.⁴³ Just as sector/market-level data is hard to obtain, so too is information about the agreements made between the main actors present in the market/s under study, largely for reasons of commercial confidentiality.

These agreements govern what content, or bundles of content, are included in each deal and what fee the library must pay. The agreement will also stipulate the conditions attached to the ways in which these copies may subsequently be accessed by readers. A central aim of this study is to obtain a better understanding of how these agreements shape the supply of e-Books for the purposes of e-Lending.

Concentration and Consolidation in the Book Publishing Sector

The trade and academic book sectors display a classic cultural industries oligopoly structure.⁴⁴ When considered in terms of market share, both sectors are dominated by a small number of major publishers.⁴⁵

³⁹. European Book Publishing Statistics 2023' (Federation of European Publishers, 13 November 2024) <https://fep-fee.eu/European-Book-Publishing-Statistics-2023>.

⁴⁰. As an indicative comparison using available data, the revenues for e-Book sales in Germany were €237.354 million, while libraries reported spending €14.9 million on e-Books. See Statista's 'Key figures about the e-book market in Germany from 2020 to 2022' and EBLIDA, 'First European Overview on e-Lending in Public Libraries' (Expert Group on Information Law, 2022), 10.

⁴¹. OverDrive reported there were over 16 million e-Lending transactions of e-Books in the UK in 2023, in contrast with the 43.6 million units of e-Books sold in 2022. A similar proportion also exists in other countries, such as Germany, where 30 million e-Lending transactions in 2020 almost matched the units of e-Books sold during the same year – 35.5. For the UK, see OverDrive's press release (UK Libraries Achieve Record-Breaking Circulation of Digital Media in 2023 - OverDrive) and figure reported by The Bookseller. For Germany, the source is Statista and EBLIDA's report (n 42).

⁴². EBLIDA 'First European Overview on e-Lending in Public Libraries' (EBLIDA, June 2022) <http://corist-shs.cnrs.fr/sites/default/files/ressources/first-european-overview-elending-public-libraries.pdf>.

⁴³. Dan Mount, 'Research for cult committee – e-Lending: Challenges and opportunities' (EU Parliament, 2016); Rebecca Giblin et al, 'What can 100,000 books tell us about the international public library e-lending landscape?' (2019) Information Research, 24/3.

⁴⁴. Scott Fitzgerald, 'The Structure of the Cultural Industries' in Kate Oakley and Justin O'Connor (eds), *The Routledge Companion to the Cultural Industries* (Routledge 2015).

⁴⁵. For trade books, the most important in English are Hachette Livre, Harper Collins, Macmillan, Penguin Random House/Simon and Schuster; for academic books irrespective of country the most notable are Elsevier, Routledge, Springer and Wiley.

In addition to this small number of large integrated conglomerates, many smaller and micro-operations populate the book publishing market. While the global market for academic publishing is dominated by the same main players: Elsevier, Taylor & Francis, Springer, Wiley, there is a greater diversity in the trade book publishing market. In Anglophone territories, Hachette Livre, Harper Collins, Macmillan, and Penguin Random House/Simon and Schuster are the major actors. However, this is not the case in some other markets where different publishers enjoy significant market share. In Denmark and Poland the national language trade markets are served by publishers that are not prominent in global markets, including Gyldendal (Denmark) and Wydawnictwo Literackie (Poland). In France, itself a highly concentrated market, Editis and Madrigall are major forces in the trade sector, alongside Hachette Livre.

A feature common of both academic and trade book markets is a high degree of vertical integration, where market participants operate in several upstream and downstream areas of the industry. For example, publishers may be involved in the distribution and provision of content via a database. Similarly, major publishers are in some cases a component of a larger media operation e.g. Elsevier/RELX, Penguin Random House/Bertelsmann, Harper Collins/News Corp, Hachette Livre/Vivendi. While this is a common feature of any cultural sector, in particular circumstances this type of ownership verticality can foreclose competition in the market. These markets also feature a high degree of horizontal integration, with large publishing houses owning multiple brands or 'imprints' operating within the same market. This type of integration can pique the interest of competition authorities concerned about potential lessening of competition. Indeed, the acquisition of Simon and Schuster by Penguin Random House in 2021 attracted the attention of the UK Competition and Markets Authority.⁴⁶ In France, European competition authorities required media conglomerate Vivendi to sell Editis in order to satisfy antitrust concerns relating to its takeover of Lagardere Group, the parent company of the two largest publishers in the French market, Editis and Hachette Livre.⁴⁷

While these patterns of ownership and control are present in both markets, significant distinctions can be identified between the academic and trade publishing market. Larger academic publishers often maintain exclusivity over their content and market it directly by making publications available through their own e-resource offerings, while smaller publishers will work with larger publishers and aggregators to sell into libraries. By contrast, trade book publishers generally use third-party aggregator services to supply e-Book content to libraries. Two of the most significant distinctions to be made are that academic libraries constitute the main source of revenue for academic publishers, and that the market is dominated by international publishers who publish in English. Trade book publishers, who will generally publish in the language of the market they license into, on the other hand, rely far more on sales to individual readers and are said to perceive e-Lending by public libraries as a potential threat to the sales of e-Books, rather than an opportunity for further economic exploitation of rights in trade book titles.⁴⁸

⁴⁶. Acquisition by Penguin Random House of Simon & Schuster, (2020) ME/6916/20.

⁴⁷. Reuters, 'France's Vivendi inks deal to sell Editis to Kretinsky's IMI' (16 June 2023) <https://www.reuters.com/business/media-telecom/frances-vivendi-signs-deal-sell-publishing-unit-editis-2023-06-16>.

⁴⁸. IFLA, 'IFLA 2014 e-Lending Background Paper' (IFLA, 2 August 2014) <http://www.IFLA.org/en/news/ifla-releasesbackground-paper-on-e-lending>.

DEMAND-SIDE: ACADEMIC AND PUBLIC LIBRARIES

On the demand-side of the value chain are libraries. This might be individual libraries negotiating directly with publishers/distributors (academic sector) or consortia of libraries that collectively negotiate licences for e-Books (both sectors). These library consortia have emerged for various reasons, including the reduction of transaction costs, but also as a response to the concentration of the publishing industry. They aim to realise economies of scale in negotiating licences and agreements, and – crucially – increase their bargaining power vis-à-vis publishers.⁴⁹ In this study, academic and public libraries, as opposed to individual readers, are identified as the consumers in the markets under study. IFLA estimates that there are currently around 3.1m libraries around the world, of which c. 560,000 are public libraries, and 87,000 are academic libraries.⁵⁰ While sharing many common characteristics, these types of libraries are also markedly different in respect of the collections they seek to build, their relationships with book suppliers, and their users' expectations and preferences. Consequently, they operate in different ecosystems and, as such, academic libraries and public libraries can be characterised as distinct markets in terms of products and geographical scope.

Academic and Public Libraries across Geographic Markets

There are also significant differences in how these two markets are organised in different territories – as evidenced in a growing body of literature.⁵¹ These differences include: ownership of the e-Lending platform (commercial vs non-commercial), availability of titles, scope of the collection (language, genre etc.), organisational structure of libraries and their licensing and negotiation activities with platforms/publishers, and the players operating in particular markets.⁵² Just as the publishing sector demonstrates concentrated ownership patterns, some very large e-Lending platforms are active across many European markets, raising questions around market concentration and the potentially dominant position of these players. In the trade sector the most prominent example is digital distributor OverDrive, which offers libraries and their readers licensed access to a vast catalogue of e-Books in over 100 countries.⁵³ Conversely, public libraries in some countries have a more limited e-Lending offer, with private companies filling the void, for example Legimi in Poland. In short, conditions for e-Lending by academic and public libraries vary considerably across Europe.

By contrast, while academic markets are undoubtedly hugely complex, dynamic, and diverse in terms of the underlying models employed by operators, there is considerable homogeneity of actors across different countries. This is particularly the case for English language content. This reflects the international nature of the market, with differences also apparent depending on the academic discipline. Engagements with library professionals for this study reveal the availability of financial resources is a significant discriminating factor, with wide differences existing within each country. Digital resources are essential for students and researchers, but gaining access to them depends on the resources available to the institution they are affiliated to.

⁴⁸ IFLA, 'IFLA 2014 e-Lending Background Paper' (IFLA, 2 August 2014) <http://www.IFLA.org/en/news/ifla-releasesbackground-paper-on-e-lending>.

⁴⁹ Barbara McFadden Allen and Arnold Hirshon, 'Hanging Together to Avoid Hanging Separately: Opportunities for Academic Libraries and Consortia', *Information Technology and Libraries*, vol. 17/no. 1, (1998), 36-44.

⁵⁰ IFLA 'Library Map of the World' (IFLA, 2024) <https://librarymap.ifla.org/map>.

⁵¹ EBLIDA, 'First European Overview on E-lending in Public Libraries' (EBLIDA Expert Group on Information Law, 2022); Dan Mount, 'Research for cult committee – e-Lending: Challenges and opportunities' (EU Parliament, 2016).

⁵² These distinctions have also been discussed when defining market in the context of competition law cases. In particular see Pearson Merger, para 154 and paras 164-5.

⁵³ OverDrive, 'Who Is OverDrive and What Do They Do?' (OverDrive, 6 April 2024) <https://company.overdrive.com/company-profile/who-we-are/>.

The accumulation of rights in the hands of a few market players potentially skews bargaining power in favour of large rightsholders and platforms. This, in turn, determines how access to knowledge is offered to the public. These markets are dominated by Elsevier, Springer, Wiley and Taylor & Francis, and the titles they also license from smaller academic presses.

INTERMEDIARIES: E-LENDING PLATFORMS/SERVICES/AGGREGATORS/DISTRIBUTORS

As indicated above, in the e-Lending ecosystem there are also a variety of intermediaries operating between publishers and libraries. These can include operators that serve as aggregators of content controlled by different publishers, as well as book distributors.⁵⁴ In some instances, specialist intermediaries provide the platform by which borrowing takes place. Bolinda, Legimi, OverDrive, and eReolen are examples of trade book platforms used by public libraries. In practice, publishers may deal directly with libraries and/or perform some of the downstream roles of the aforementioned intermediaries, such as providing digital platforms. In the academic space large e-Book digital platform providers/aggregators include EBSCO and ProQuest. In some respects, these intermediaries perform a role akin to that of wholesalers and distributors in the print book value chain. That said, the role of these intermediaries goes beyond simply distributing content from suppliers to consumers. They also provide digital services and platforms that allow users to search for and access digital content. In turn, this provides intermediaries with potentially valuable troves of data relating to user preferences and patterns of demand.

Trade Book Sector Intermediaries

In the trade book e-Lending market, intermediaries (e.g. OverDrive, Bolinda) are significant in the value chain between suppliers (publishers) and consumers of e-Lending services (libraries). As a consequence of the territoriality of rights, each national market can potentially be segmented or sealed off.⁵⁵ This results in a complex picture where transnational actors – for example OverDrive, with a market presence in over 100 countries and boasting a collection of 3 million titles in 9 languages⁵⁶ – are active alongside national players. A notable example of this type of nationally discrete operation is eReolen, serving exclusively⁵⁷ the Danish market with around 5,000 titles. Underpinning this ecosystem is a complex web of commercial licences funded by public libraries' budgets. Readers do not directly bear the economic cost of e-Lending (although library membership fees may be applicable – e.g. in the Netherlands), yet the nature of the transaction remains commercial as publishers and platforms alike pursue their own commercial interests. In Poland, book distributor Legimi provides subscription access to e-Books for both individual subscribers and public libraries. While Legimi is the main provider of these services to Polish public libraries in terms of market share, it exists alongside a number of other Polish distributors offering similar services to libraries on a non-exclusive basis.⁵⁸

⁵⁴. The term 'aggregator' is also widely used in the context of e-Books to describe intermediaries that act as content distributor to allow self-publishing authors to access online retailers such as Amazon, Apple, Sony stores etc.

⁵⁵. However, under competition law such partitioning of the internal market in the national market would need to be proportionate and justified in light of the essential function of copyright and the conditions of the market. See, to this effect, C-262/81 - Coditel v Ciné-Vog Films (CJEU) ECLI:EU:C:1982:334.

⁵⁶. OverDrive, 'Who Is OverDrive and What Do They Do?' (OverDrive, 6 April 2024) <https://company.overdrive.com/company-profile/who-we-are/>.

⁵⁷. A recent development is the expansion of OverDrive in Denmark via the creation of eReolen Global, seemingly the product of a partnership between eReolen and OverDrive. These markets remain segmented according to language of the title, with eReolen remaining the sole provider of Danish-language titles. See eReolen, 'eReolen Global' <https://ereolen.dk/global>.

⁵⁸. See Legimi, 'E-Books, audiobooks and synchrobooks® without limit!' <https://www.legimi.pl/> and Kamila Augustyn, Maciej Liguzinski and Dorota Siwecka, 'Digital Books in Polish Public Libraries: Case Study of Partnership with the Commercial Distributor Legimi' (2024) Public Library Quarterly, 1-33, <https://doi.org/10.1080/01616846.2024.2317073>.

In Germany, Overdrive operates alongside the platform Onleihe, which primarily includes German language titles. Onleihe is the dominant player in the German e-Lending market. In addition, many libraries provide their users with a wider selection of books in other languages through the Libby platform by OverDrive.⁵⁹

Academic Book Sector Intermediaries

This lending ecosystem differs radically from the public library sector in many respects. The centrality of sales and licensing to libraries is a key distinction from the commercial activities of scholarly book publishers. Another area of divergence is the wider variety of established and emergent models coexisting within these markets.⁶⁰ Contributing to this complex picture is a multitude of service providers giving access to e-Books, each potentially constituting discrete subject-specific markets. From the patron's perspective, the academic library will offer access to search infrastructure, often provided by third-party library service providers, which allows readers to identify, sort, and access content held by the library, or to which it has access. This platform does not operate in a market in the strict sense of the word, but its important role in funnelling demand should be acknowledged. In some instances, the academic library platform will allow direct access to e-Book titles. More typically content resides in a vast constellation of databases managed by either publishers (e.g. Wiley Online Library, De Gruyter, Elsevier) or third parties (such as EBSCO, JSTOR or ProQuest).

Whether publisher-owned or otherwise, these services offer varying levels of accessibility, functionality, and user experience that are largely regulated by the terms of the licence between libraries and publishers.⁶¹ For example, readers may only be able to read the content within the application or website of the service. In other instances, downloading some or all of the text for offline use will be possible. But in other settings downloading may be restricted by some form of digital rights management (DRM). Platforms offering non-copyright content on a non-commercial basis have existed for many years and therefore also occupy a space in the e-Lending ecosystem.⁶² Project Gutenberg is the earliest and most notable example that pioneered the concept of the e-Book from its inception in 1971.⁶³

Types of e-Lending Licences

e-Lending licences can take varied forms, depending on how the unit of e-Lending is calculated. The most common licensing models for the trade book sector are as follows⁶⁴:

- ▶ **One copy, one user (OCOU)** – access to the title never expires regardless of how many times it is lent to the public, but only one non-simultaneous access per copy is allowed.
- ▶ **Metered access** – access to the title is determined either by a fixed amount of time (e.g. 2 years) or by the number of checkouts (e.g. access to the title expires after 26 checkouts). As such, there are various permutations of the metered access model – metered access by time, by checkout (one user), by checkout (multiple users), and finally by time and checkout.

⁵⁹. dbv, 'E-Lending in Öffentlichen Bibliotheken: Antworten auf häufige Fragen' (18 October 2021) https://www.bibliothekverband.de/sites/default/files/2021-10/FAQs%20zu%20E-lending%20Bibliotheken_20211018_0.pdf.

⁶⁰. Elena Maceviciute et al, 'The acquisition of e-Books in the libraries of the Swedish higher education institutions' (2014) 19/2 Information Research; Claudio Aspesi et al, 'SPARC Landscape Analysis: The Changing Academic Publishing Industry – Implications for Academic Institutions' (2019).

⁶¹. Aspesi et al, 'SPARC Landscape Analysis'.

⁶². Whether they represent a market is more debatable, as the public domain nature of the titles means that there is no underlying commercial transaction beyond funding of the costs of the platform.

⁶³. Project Gutenberg, 'Project Gutenberg: 50 years of e-Books: 1971-2021' (Gutenberg.org) <https://www.gutenberg.org/about/background/50years.html>.

⁶⁴. The taxonomy above is taken directly from the e-Lending models offered by OverDrive, the main e-Lending platform worldwide for English titles. See OverDrive, 'Library Staff Training – lending models overview' <https://resources.overdrive.com/understanding-lending-models>.

- ▶ **Cost per circulation** – libraries can add various titles to their digital collections and pay directly once a user borrows a book, with simultaneous access to titles by different users.
- ▶ **Simultaneous use** – libraries can get access to a specific title or collection from each publisher and allow unlimited simultaneous access for a fixed period of time.

Whether a library can choose any of these above models depends ultimately on the publishers, with some titles being made available exclusively on metered access or one copy, one user basis.

The licensing models of titles in academic libraries are too complex and varied for any clear taxonomy to emerge. However, additional features include the ability to download a copy of the title or part of it directly on a user's device, reflecting the different purposes (e.g. research) and nature (e.g. more limited in time) of academic library users.

Authors – the Missing Pieces in the Puzzle

The position of authors vis-à-vis e-Lending remains highly diverse and at times ambiguous. Protecting authors' economic welfare is often invoked by those contesting alternative models for e-Lending that do not rely on licences with publishers. For example, in the recent Internet Archive case, publishers portrayed themselves as guarantors and supporters of the 'livelihoods of authors', entrusted with the role of providing 'authors with a reliable stream of royalties'.⁶⁵ These statements were made in the context of Controlled Digital Lending, where authors are considered to have already been remunerated by the first sale of the physical copy of their book. Thus, digitalised, non-market-based e-Lending models – such as the one potentially advanced by Art. 6(1) of the Rental and Lending Directive, as interpreted by VOB – are not in antithesis with authors' remuneration.

Public Lending Rights (PLR) emerged in the second half of the twentieth century in Europe, and have been harmonised in the EU by Council Directive 92/100/EEC, later codified in the Rental and Lending Directive 2006/115/EC. Denmark's PLR system was the world's first, implemented in 1946. By contrast, in Poland the PLR has a relatively short history with authors first receiving payments as recently as 2016. These frameworks are designed to ensure that public library lending of physical books, and in some territories e-Books, is subject to compensation to authors, while at the same time allowing libraries to make these books accessible (see derogation under Art. 6 Rental and Lending Directive). Member States are afforded considerable latitude in how the PLR system is implemented, and the setting up of such a system remains optional. As a result, different forms of PLR systems have developed in different European states, albeit a feature common to many territories is that funding comes from government with payments then being disbursed to authors.⁶⁶ In some states such as the UK and Germany this is on a per-loan basis, while others, including Denmark, distribute payments based on the number of copies of an author's book held by libraries.⁶⁷

⁶⁵ 'Statement of the Association of American Publishers on Oral Arguments in Infringement Suit Against Internet Archive' (Association of American Publishers, 20 March 2023) <https://publishers.org/news/statement-of-the-association-of-american-publishers-on-oral-arguments-in-infringement-suit-against-internet-archive/>.

⁶⁶ Giuseppe Vitiello, 'The Economic Foundation of Library Copyright Strategies in Europe' (2021) 31 LIBER Quarterly, 27.

⁶⁷ Jim Parker, 'The public lending right and what it does' (WIPO Magazine, 14 June 2018) https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html.

The remuneration that authors receive from public lending, individually and in aggregate, also varies considerably from country to country. For example, in Denmark in 2024 a sum of c. €28 million was paid to authors,⁶⁸ while Danish publishers' total turnover was c. €245 million.⁶⁹ The size of remuneration for the Public Lending Right (PLR) can be significant when we consider that trade authors generally only earn a margin of 15% from the sale price of hardcover titles.⁷⁰ In this regard, there seem to be wide differences across Member States. In France, for example, remuneration from PLR amounts only to 0.04% of the value of the publishing market, much less than in Denmark (almost 10%).⁷¹ In the UK and Ireland the government directly funds the PLR, and authors register eligible works for which they will receive a per-loan payment for each use, but this only applies to print books in Ireland while extending to e-Books in the UK. The amount authors can receive per year is capped at £6,600 in the UK and €1,000 in Ireland. In keeping with patterns seen across other areas of the cultural industries, evidence from the UK shows that the majority of registered authors receive no payments from PLR, due to no loans being made, while a small but significant constituency receive a modest but meaningful income, and only a very small number of authors will approach the upper payment limit.⁷²

The divergences observed in the PLR system and the fact it is generally limited to public library lending only indicates that authors' remuneration from e-Lending is, to a large extent, determined by the contracts they enter into with publishers, and the licences subsequently agreed between publishers, intermediaries and libraries. Here trade authors have been found to earn 25% of the fee negotiated between publishers and libraries for the supply of an e-Book, a percentage that mirrors their royalty for the sale of e-Books to retail consumers.⁷³ This figure is based on the individual licensing of a single title in the trade book sector; it remains unclear how the bundling or all-inclusive access offers affect the distribution of remuneration to authors. Academic book publishing contracts typically have a significantly lower headline royalty rate. Despite publishers often citing authors as the victims of e-Lending, authors have a more nuanced relationship with e-Lending, with varying opinions across the sector.⁷⁴ For example, an Open Letter signed in the context of the Internet Archive litigation attracted more than 1,000 signatures from a variety of authors, '...demanding that publishers and trade associations put the digital rights of librarians, readers, and authors ahead of shareholder profits'.⁷⁵

⁶⁸. Slots- og Kulturstyrelsen, 'Public lending right' (Kultur Ministeriet, 6 August 2024) <https://slks.dk/english/work-areas/libraries-and-literature/public-lending-right>.

⁶⁹. Danske Forlag, 'Danske Forlags Årsstatistik 2024' (Danish Publishers 2025) <https://www.danskeforlag.dk/media/2847/danske-forlags-aarsstatistik-2024.pdf>.

⁷⁰. The format of a book (e.g. hardcover, paperback, e-Book) affects the share of royalty to which authors are entitled, as does the agreement between an author and publisher. The agreement may see the author paid a smaller percentage of the title's list price, or perhaps receive a larger proportion of net profits generated by the sale of a book. See The Authors Guild, 'Half of Net Proceeds Is the Fair Royalty Rate for E-Books' (The Authors Guild, 9 July 2015) <https://authorsguild.org/news/half-of-net-proceeds-is-the-fair-royalty-rate-for-e-books/> accessed 29 July 2025 and The Society of Authors, 'How do authors get paid?' (Society of Authors, 2025) <https://societyofauthors.org/where-we-stand/special-sales/how-do-authors-get-paid/>.

⁷¹. Giuseppe Vitiello, 'The Economic Foundation of Library Copyright Strategies in Europe' (2021) 31 LIBER Quarterly, 27.

⁷². British Library, 'Welcome to Public Lending Right' (British Library, 2024) <https://www.bl.uk/plr/#about>.

⁷³. Jane Friedman, 'What Do Authors Earn from Digital Lending at Libraries?' (Jane Friedman, 30 October 2021) <https://www.janefriedman.com/what-do-authors-earn-from-digital-lending-at-libraries/>.

⁷⁴. David Streitfeld, 'What does it Mean to Own a Book?' (The New York Times, 13 August 2023) <https://www.nytimes.com/2023/08/13/business/media/internet-archive-emergency-lending-library.html>.

⁷⁵. Fight for the Future, 'Open Letter – Authors for Libraries' (Fight for the Future, 18 October 2022) <https://www.fightforthefuture.org/Authors-For-Libraries>.

DISCONNECT AND DISCORD IN E-BOOK LENDING MARKETS

Many market participants in the academic and public library sectors are deeply dissatisfied with the ways in which the conditions for e-Book lending have evolved. This has contributed to a significant volume of activism on the part of library advocacy groups across Europe, including working in some instances with authors. Much of this discord stems from divergences in the way libraries are able to lend print books when compared to the conditions for lending e-Books. In turn, these can be attributed to divergences in how print book lending and e-Book lending are accounted for in law and in the marketplace. These concerns range from pragmatic questions around how libraries most effectively allocate budgets for e-Books to maximise access to knowledge, to deeper questions on whether e-Lending should be underpinned by the same or a similar regime as is the case for printed publications. Another key public policy issue is the extent to which libraries can build stable digital collections of e-Books and make them available to the public in ways that are aligned with their founding principles and statutory functions as cultural and educational institutions.⁷⁶ Libraries, of course, do not serve solely archival functions. The important societal goals they fulfil include: the development and curation of collections; the provision of access to information and ideas; the promotion of cultural participation; the preservation and archival of human textual heritage; and the promotion of a 'culture of reading'.⁷⁷ In essence, libraries play an important societal role in preserving and promoting participation in reading culture, as well as supporting the exchange of information and ideas that underpins research and innovation. Moreover, by performing this function of preserving and providing access to e-Books, libraries play a vital role in ensuring these works will remain available and accessible when copyright term expires and the works should enter the public domain (despite potential restrictions via contract and/or technological protection measures).

It should be noted that the objectives and motivations of libraries and traditional proprietary publishers are not aligned. While the activities of all market participants are shaped to some degree by copyright law, in many senses, libraries operate beyond the imperatives of the private book market,⁷⁸ by providing non-commercial access to knowledge to all members of society. However, book publishers are engaged in the exploitation of copyright works on a commercial basis. Similarly, as discussed earlier, the conditions for lending print books and lending e-Books also diverge markedly. Crucially, libraries are able to buy print books at retail price and lend these copies to their patrons.⁷⁹ On the other hand, e-Books are mostly made available to the public by establishing a series of licensing agreements – a form of market transaction.⁸⁰ A statement by 30 European library associations and other organisations calls for legal reform in markets where, '...current modalities of operation, licensing and broader markets for e-Books are subverting the ability of libraries to perform their traditional and essential functions'.⁸¹

⁷⁶ Michael Gorman, 'The Prince's Dream: A Future for Academic Libraries' (2012) 18/2 *The New Review of Academic Librarianship* 114.

⁷⁷ Johan Svedjedal, *The Literary Web: Literature and Publishing in the Age of Digital Production* (Kungliga Biblioteket 2004).

⁷⁸ Lisbeth Worsøe-Schmidt, 'The e-Book war in Denmark' (2019), 51/1 *Journal of Librarianship and Information Science* 95, 97.

⁷⁹ In addition, books could also be donated or bought in the secondary market as a result of the exhaustion of the copyright.

⁸⁰ Rebecca Giblin and Kimberlee Weatherall, 'At the intersection of public service and the market: Libraries and the future of lending' (2015), 26/4 *Australian Intellectual Property Journal* 1, 5.

⁸¹ Knowledge Rights 21, 'Library associations across Europe joint call for action on e-Books', (knowledge rights21.org, 24 April 2023) <https://www.knowledgerights21.org/news-story/library-associations-across-europe-joint-call-for-action-on-e-Books/>.

Moreover, as has been widely reported, the suitability and sustainability of this system has been called into question. Under the existing system, financial pressures associated with delivering a comprehensive e-Lending offer are a significant concern in e-Lending markets, largely due to the fundamental difference in legal conceptions of lending of print books and lending of digital content. Therefore, while libraries remain vital conduits allowing readers to find and access e-Books, commercial actors, whose motivations only partially reflect broader public goals, exercise significant influence over readers' facility to engage with digital content.⁸² This significantly limits libraries' control over their acquisition policy and control of their readers' data and privacy.⁸³

Early expectations that a non-interventionist approach would allow the market to deliver a sustainable e-Lending system for all parties have not been borne out.⁸⁴ Instead, the markets for lending of academic and trade e-Books are the site of significant contention and rancour. As digitalisation increasingly permeates all facets of life, and as global borrowing of e-Books continues to increase, these tensions become more pronounced and problematic.⁸⁵ The level of dissatisfaction with the current trade market for e-Books is evident in a recent survey of the e-Lending system for German libraries.⁸⁶ Library respondents to this survey were unanimous in their assessment of e-Lending agreements as being unfair. Among the areas respondents viewed as most challenging were excessive pricing, and unnecessarily restrictive licensing conditions that significantly restrict digital opportunities which should be available to libraries and readers. The so-called 'windowing' of content, where e-Book licenses are granted later than e-Books are first made available for sale, was viewed by some as being particularly problematic for the public library sector.

Indeed, in the past ten years, while e-Lending models have evolved significantly, there have been some suggestions that this process has tended towards more restrictive terms and conditions, and to the detriment of libraries and their users.⁸⁷ Emblematic of this change was the steady disappearance of perpetual access licences for trade e-Books, a particularly prominent phenomenon in recent years.⁸⁸ It is unclear whether this shift away from permanent licences originated from an intention to reduce costs for libraries – as some publishers claim – or in anticipation of the growth in demand for e-Lending.⁸⁹

⁸². Control refers both to the level of openness (whether a book can be downloaded freely or if it is protected by DRM) and functionalities of the digital content (highlighting, ability to add notes, etc).

⁸³. John Palfrey, *BiblioTech: Why libraries matter more than ever in the age of Google* (Basic Books 2015), 200; Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2017), 114-117.

⁸⁴. For example, see Pamela Samuelson, 'Copyright and digital libraries' (1995) 38/4 *Communications of the ACM* 15, 110: 'Fixed fee subscription systems for access to certain works or classes of works will likely evolve to help institutions, such as schools and libraries, to have predictable budgets while at the same time generating some up-front revenues for authors and publishers'. As will be shown, the unpredictability of existing e-Lending models – in terms of price increases, possibility of withdrawal of titles or expiry of licences, etc – is considered an issue for most libraries.

⁸⁵. 'OverDrive Releases 2022 Digital Book Circulation Data and Highlights' (OverDrive, 6 January 2023) <https://company.overdrive.com/2023/01/06/overdrive-releases-2022-digital-book-circulation-data-and-highlights/>.

⁸⁶. BMJ – Bundesministerium der Justiz, 'Questionnaire on e-Lending: Opinions' (BMJ, 14 May 2024) https://www.bmj.de/DE/themen/wirtschaft_finanzen/rechtschutz_urheberrecht/urheberrecht/stellungnahmen/stellungnahmen_node.html.

⁸⁷. As an example, see HarperCollins' introduction of their 26-circulation cap policy for e-Books in 2011, documented in Josh Marwell, 'Open Letter to Librarians' (HarperCollins, Library Lovefest Blog, 1 March 2011) https://harperlibrary.typepad.com/my_weblog/2011/03/open-letter-to-librarians.html.

⁸⁸. Urban Libraries Council, 'Top e-Content Publishers Are Taking "Dangerous Step Backwards" with New Pricing Models for Libraries' (Urban Libraries Council, 21 June 2019) <https://www.urbanlibraries.org/files/ULC-Statement-on-e-Books.pdf>.

⁸⁹. Andrew Albanese, 'Penguin Random House Changes Library e-Book Lending Terms' (Publishers Weekly, 4 September 2018) <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/77904-penguin-random-house-changes-its-library-e-book-terms.html>.

However, the disappearance of perpetual access has brought about sharp spikes in costs incurred for 'replacement copies' – namely, the cost associated with renewing a licence once it expires.⁹⁰ Besides costs, the lack of perpetual licences also threatens the permanence and stability of library collections.⁹¹ The removal of textbooks from academic library bundles exposed by the #e-BookSOS movement is a particularly pertinent example of the precarious nature of library e-Book collections.⁹²

In Europe⁹³ and beyond⁹⁴, academic and public libraries have highlighted the implications of some the refusal of some publishers to make e-Books available for e-Lending. In instances where publishers are willing to license e-Books for lending, a host of complaints around pricing, licensing terms, bundling of content and lack of transparency have emerged. Many of these issues were raised in responses to the European Commission's Public Consultation as long ago as 2013.⁹⁵ IFLA has argued that the absence of meaningful regulation has given powerful publishers excessive influence in shaping the nascent e-Lending market:

...unlike physical book lending, this has not taken place with any kind of regulation, with the balance between libraries and publishers left to the market. As a result – and in the absence of any widely available data on the subject – publishers have tended to take a (very) cautious approach, much to the frustration of libraries.⁹⁶

Publishers' 'cautious' approach described here has been characterised in more forceful terms elsewhere, as library advocacy groups have become increasingly strident in their criticism of publishers' e-Lending strategies.⁹⁷ These critiques contain numerous accusations of conduct that could attract the attention of competition authorities, including: refusal to license, excessive pricing, unfavourable bundling of content, unfair contractual terms, poor e-Lending models, and removal of content from bundles. For example, in the UK and Irish public library spheres it has been noted that some publishers are unwilling to license some or all of their catalogue for the purposes of e-Lending. Hachette is among the most prominent trade book publishers that severely limits the availability of its e-Books to public libraries.⁹⁸

⁹⁰. Andrew Albanese, 'Frankfurt Spotlight: Library E-books Have Leveled Up' (Publishers Weekly, 14 October 2022) <https://www.publishersweekly.com/pw/by-topic/international/frankfurt-book-fair/article/90592-frankfurt-spotlight-library-e-books-have-leveled-up.html>.

⁹¹. David Streitfeld, 'The Dream Was Universal Access to Knowledge. The Result Was a Fiasco' (The New York Times, 13 August 2023) <https://www.nytimes.com/2023/08/13/business/media/internet-archive-emergency-lending-library.html>.

⁹². Yoyohanna, 'E-BOOKSOS. Wiley Withdrawing Key e-Book Titles from Library Collections – Evidence Required Please' (7 September 2022) <https://academicebookinvestigation.org/2022/09/07/wiley-withdrawing-key-ebook-titles-from-library-collections-evidence-required-please/>; Stuart Hamilton, Marian Higgins & Cathal McCauley, 'The #e-Booksos campaign in Ireland' (2021) https://mural.maynoothuniversity.ie/14975/1/CMC_An%20Leabharlann21.pdf.

⁹³. 'Éléments d'évaluation du dispositif Prêt numérique en bibliothèque (PNB)' (Evaluation of e-Lending in public libraries) (French Ministry of Culture 2019) 11; Mikkel Christoffersen, 'Denmark' in Paul Whitney and Christina de Castell (eds) Trade e-Books in Libraries: The Changing Landscape (De Gruyter 2017); The Library Association of Ireland, 'Irish librarians call for action on the electronic content crisis facing libraries and library users' (LAI, 20 October 2020) <https://www.libraryassociation.ie/irish-librarians-call-for-action-on-the-electronic-content-crisis-facing-libraries-and-library-users/>.

⁹⁴. For an analysis of the situation in the UK (and Ireland), see Yohanna Anderson and Cathal McCauley, 'How the Covid-19 pandemic accelerated an e-Book crisis and the #e-Booksos campaign for reform', 35 Insights 2022.

⁹⁵. EU Commission, 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules' (DG for Internal Market and Services D1, 2014), 46-47.

⁹⁶. 'Long Read: Competition and Libraries' (IFLA, 2 February 2020) <https://blogs.ifla.org/lpa/2020/02/03/long-read-competition-and-libraries/>.

⁹⁷. Yoyohanna, 'E-BOOKSOS. Wiley Withdrawing Key e-Book Titles from Library Collections – Evidence Required Please' (7 September 2022) <https://academicebookinvestigation.org/2022/09/07/wiley-withdrawing-key-ebook-titles-from-library-collections-evidence-required-please/>.

⁹⁸. Rebecca Giblin et al, 'Available, but not accessible? Investigating publishers' e-lending licensing practices' (2019) 24/3 Information Research, 7.

A poor selection of titles can have the effect of driving readers away from the digital format, due to the libraries' inability to offer 'a comprehensive e-Book service'.⁹⁹ This creates obvious challenges for libraries seeking to develop digital collections and meet the demands and preferences of a growing e-Book readership.

In the academic field too, there has been significant disquiet around publishers' practices. Academics' calls for large publishers to be subject to competition authority investigation on the basis of potential abuse of dominant market position¹⁰⁰ were not acted upon by the authorities.¹⁰¹ In 2020 a prominent campaign by academic librarians in the UK called on the Parliamentary Education Select Committee to investigate the 'unfair sales, pricing and licensing practice of academic publishers in their interaction with academic libraries'.¹⁰² As no formal investigation ensued, these concerns remain largely unaddressed in the UK, with a similar sentiment emerging in other countries. Wiley's removal of vast swathes of digital content, including core textbooks, shortly before the start of the 2022/23 academic year was a powerful reminder of the precarious position in which libraries find themselves.¹⁰³ While the impact of Wiley's actions in the UK and Ireland was widely reported, such is the globalised nature of the academic publishing sector that removal of these titles affected libraries across Europe. The vulnerability of libraries to changes in publishers' licensing patterns, highlighted as a significant problem as early as 2005, remains unresolved.^{104,105}

We note, based on a review of the existing empirical evidence, that public librarians consider the availability of e-Books in some national languages, in this example the Swedish academic book sector, to be inadequate, and e-Lending expensive, with library budgets struggling to match growth in the popularity of this service.¹⁰⁶ A study examining e-Lending licences for 100,000 titles across Australia, New Zealand, Canada, the United States and United Kingdom via aggregator Overdrive finds that the cost libraries are charged for e-Lending licences does not depend on the characteristics of the licence – namely, the contractual rights and benefit that libraries obtain from the licence. Instead, the identity of the publisher granting the licence seems to be the most important factor in determining price, suggesting an arbitrary relationship between rights and the cost of acquiring those same rights.¹⁰⁷ Lack of licensing flexibility is also reportedly a key feature of 'e-Lending markets',¹⁰⁸ resulting in libraries being unable to accommodate different types of reader demand.

⁹⁹. Libraries Connected, 'Statement on Tim Coates' survey on reading in libraries' (Libraries Connected, 4 June 2019) <https://www.librariesconnected.org.uk/news/statement-tim-coates-survey-reading-libraries> accessed 29 July 2025.

¹⁰⁰. The complaints referred to the concentration of market power in the field of scholarly journals, as opposed to e-Books.

¹⁰¹. Martin Paul Eve et al, (2016) 'Referring Elsevier/RELX to the Competition and Markets Authority'.

¹⁰². e-BookSOS, 'Original Letter' (Academic Book Investigation, 2020) <https://academice-Bookinvestigation.org/original-open-letter/>.

¹⁰³. The Library Association of Ireland, 'Irish librarians condemn publisher Wiley's removal of hundreds of titles from e-Book collections' (LAI, 20 September 2022) <https://www.libraryassociation.ie/irish-librarians-condemn-publisher-wileys-removal-of-hundreds-of-titles-from-e-Book-collections/>.

¹⁰⁴. Chris Armstrong and Ray Lonsdale, 'Challenges in managing e-books collections in UK academic libraries', (2005) 29/1 Library Collections, Acquisitions, & Technical Services, 33.

¹⁰⁵. Jess Casey, "'Unaffordable, unsustainable and extremely unfair": Libraries battle publishers for equal access to e-Books' (Irish Examiner, 7 June 2022) <https://www.irishexaminer.com/news/spotlight/arid-40888490.html>.

¹⁰⁶. Annika Bergström et al, Books on screens: Players in the Swedish e-Book market (Nordicom 2017); Michael Blackwell, 'A giant leap... backwards' (ReadersFirst, 1 July 2018) <https://www.readersfirst.org/news/2018/7/6/a-giant-leap-backwards>.

¹⁰⁷. Giblin et al, 'What can 100,000 books tell us about the international public library e-lending landscape?' (2019) 24/3 Information Research.

¹⁰⁸. Giblin et al, 'Available, but not accessible? Investigating publishers' e-lending licensing practices' (2019) 24/3 Information Research.

As a result, even in circumstances where there is a high potential availability of e-Books, they remain inaccessible to most libraries.¹⁰⁹ This results in a problematic disconnect between libraries' capacity to offer e-Lending to the public and libraries' user preferences. One study based on US public library data argues that restrictions on e-Lending have a positive effect on library visits, because consumers continue to attach high value to physical books.¹¹⁰ On the other hand, claims that e-Lending negatively impacts digital or print book sales remain largely unsubstantiated,¹¹¹ and access to data is a significant obstacle in verifying demand substitution effects.

¹⁰⁹. Ibid 15. This seems to be a common feature in many EU countries: for example, while OverDrive hosts a catalogue of more than 3 million titles, libraries' actual catalogues often only include less than 0.01% of the total offer (source: Glasgow libraries' OverDrive account features less than 20000 e-Books). In France, statistics show that libraries in Paris offer access to 16,000 titles out of a catalogue of more than 195,000 (less than 10% – data from 2019), see 'Présentation de la Bibliothèque Numérique' (Bibliothèques de Paris, 6 February 2023). It is therefore important to distinguish between two parameters: availability and accessibility.

¹¹⁰. Reimers and Waldfogel use US data on over 8,000 library systems from 2013-2019 to measure the impacts of physical and electronic holdings on the respective formats' circulation: Imke C. Reimers and Joel Waldfogel, 'The First Sale Doctrine and the Digital Challenge to Public Libraries' (National Bureau of Economic Research, NBER, August 2022) <http://www.nber.org/papers/w30392>.

¹¹¹. See Rita Matulionyte, 'Lending e-Books in Libraries: Is a Technologically Neutral Approach the Solution?', *International Journal of Law and Information Technology* (2017) vol. 25/no. 4, 259, 275.

Evidence from Licensing Contracts and Interviews with Librarians in Four European Countries

Four e-Lending markets in European countries were identified for detailed empirical investigation, three within the EU (Denmark, Poland and Republic of Ireland), and the United Kingdom. These countries were selected to incorporate: a large predominantly non-Anglophone market (Poland: population c. 41m); a large Anglophone market (UK: population c. 68m); a smaller non-Anglophone market (Denmark: population c. 6m); and a smaller predominantly Anglophone market (Republic of Ireland: population c. 5m).

The study employed a mixed-method approach combining semi-structured interviews with library practitioners, alongside contract analysis of various e-Book licensing agreements, complemented by secondary source materials. The research design was reviewed and approved by the University of Glasgow’s College of Social Sciences Ethics Committee.

Stakeholder Interviews

The interviews were designed to gain qualitative insights into the contemporary market for academic libraries’ lending of e-Books. The primary selection criterion was that respondents had direct knowledge and experience of e-Book acquisitions and/or provision of e-Books to library patrons.

Interviewee	Country	Institution type
A1	Denmark	Academic Library
A2	Denmark	Academic Library
B1	Poland	Academic Library
B2	Poland	Academic Library
C1	Republic of Ireland	Academic Library
C2	Republic of Ireland	Academic Library
D1	UK	Academic Library
D2	UK	Academic Library
D3	UK	Academic Library

Table 2: Library Sector Respondents

The interviews posed questions around a number of central themes relevant to competition law identified in the initial scoping of the project. The semi-structured nature of the interviews ensured sufficient opportunity for respondents to articulate attitudes and relevant experiences of the contemporary e-Book lending landscape that were not anticipated by the authors. These engagements yielded a considerable volume of rich insights into e-Lending in each of the territories under study.

The interviews were conducted by the authors online using video conferencing platforms, and subsequently transcribed for the purposes of analysis. Given the potentially sensitive nature of the subject matter, all respondents were pseudonymised and any contextual information that could potentially identify respondents or their institutions was redacted. In addition to the semi-structured interviews conducted with academic librarians, largely by way of the Freedom of Information process used to access e-Lending agreements, formal and informal engagements took place with stakeholders who are active in the public library setting. This resulted in two further interviews with an executive from a globally-prominent trade book aggregator (DP1) and a representative of a large UK public library consortium (DP2).

Contract Analysis

The researchers also gained access to a number of e-Lending agreements between libraries and publishers and aggregators. Accessing such agreements proved to be exceptionally challenging, chiefly due to their commercially sensitive nature. The contracts were gathered by issuing a 'call for contracts' to library professionals using various channels including via library trade organisation networks and at library advocacy events.

Additionally, Freedom of Information requests were made to a number of UK public and academic libraries which yielded a number of useful contracts, along with supplementary written descriptions of significant elements found in contracts between libraries and providers of e-Books and platform services.

RESPONDENT ATTITUDES TO THE CURRENT E-BOOK LENDING SYSTEM

Interview respondents were asked to reflect on their current capacity to provide e-Book lending to patrons in the contemporary market and how this might relate to their conception of the 'ideal' e-Lending offering. There was broad agreement among respondents in each country that academic libraries were able to provide a reasonably comprehensive e-Book lending service to patrons. However, there was also a consensus that the current e-Lending offering fell some way short of matching the conditions for lending print books. As such, there was a general sense that the opportunities presented by digital technologies remain unrealised. A librarian at a large UK university noted that, although able to provide a relatively satisfactory e-Lending service, a significant degree of 'expectation management' was required in respect of readers' and tutors' preferences. Respondent D3 noted that the current system:

／ **...doesn't necessarily represent the ideal of what we'd like to do perhaps, that is us cutting our cloth accordingly. We're trying to, like, set our budget. We're trying to spend our resources as fairly as possible. So we're able to serve a need, but that's kind of heavily done by managing an expectation of what we can and can't do.** (Respondent D3, interview with authors, August 2023)

This need to balance borrower expectations with limitations of the contemporary market was echoed by another UK-based librarian:

／ **I think there's a lot of misconceptions outside of anyone other than librarians really about the challenges of e-provision. I think most people assume that everything's available as an e-Book, so they don't always understand why e-Books are not available, why we can't just make an e-Book available of anything that's on a reading list.** (Respondent D1, interview with authors, June 2023)

D1 also suggested that, in the UK setting, where most students are required to pay considerable fees to attend university, there is an expectation that core texts should be available as e-Books:

／ **I think it's a challenge because students these days, with the fees that they're paying, assume that everything should be included in that... so when the library doesn't make everything available as an e-Book, they're asking those questions of why, or why should I have to buy anything, why isn't all this available?** (Respondent D1, interview with authors, June 2023)

The main reasons cited for non-availability of digital content was high pricing, coupled with publishers' unwillingness to licence certain content, issues that shall be further addressed in due course. These attitudes expressed by UK librarians were also shared by counterparts in the other countries. Respondent C2, a librarian based in the Republic of Ireland, suggested that library demand for e-Books and reader uptake of e-Books was growing significantly, but this was being stymied by budgetary and licensing obstacles:

／ **Our acquisitions policy is very robust, and we seek to order an e-version of everything that is available, but obviously there's licence limits, cost limits, so we've come up to quite a few barriers as well. But we have certainly had significant e-Book growth across the range, I think, and uptake.** (Respondent C2, interview with authors, June 2023)

In this respect, the market for e-Book lending does not currently appear to satisfy the preferences of librarians, students or academic staff at a time where there is an increasingly pervasive expectation that all kinds of digital content, including books, should be available on demand.

These initial responses revealed that libraries are faced with a host of difficult choices in respect of acquisitions and collection development of e-Book content. These decisions are driven by trade-offs around user demand, licensing terms, and budgets. A Polish respondent outlined the key factors governing their acquisition policy:

／ **The numbers are the most important. We take into consideration two factors, the usage statistics. We have, for example, many titles that we continue (to subscribe to), year and year again. The second numbers that matter are the finances, the budget that we have.** (Respondent B1, interview with authors, May 2023)

As will be discussed in due course, it is not always possible for libraries to access meaningful, granular usage statistics to inform this type of decision-making, which has led to calls for publishers and platforms to improve transparency on reader demand, usage and pricing.

Aside from demand and cost, the licensing terms imposed by suppliers were also found to be an area where publishers' current offering was out of step with the preferences of libraries and their members. Models such as 'one copy, one user' where digital books can only be accessed by one user at a time, or campus access models where users must be logged in via the institution's network in order to access content that cannot be downloaded to personal devices are examples of how e-Book usage and functionality can vary considerably, depending on the suppliers' terms and conditions.

Preferred e-Book Licensing Model

To evaluate how these variations in licensing terms and conditions were viewed, respondents were asked to provide detail about their preferred e-Book licensing models and how this informs their acquisition policy.

In the academic realm, an 'e-first' policy, where libraries prioritise e-Book acquisition ahead of print books, was a common approach reported. In some regards this is a response to the aforementioned changing preferences of students and staff, who increasingly expect all content to be available digitally:

...In my institution, there's been a shift in the focus also among both employees and students towards e-Books, whereas earlier on they preferred print editions of the same books, but that's not the question anymore. Today, I would say most of them expect that, if it's in their curriculum, then they're expecting it to be in a digitalised version. (Respondent A2, interview with authors, October 23)

But that is not to say that the print book is not still a desirable option for some readers. Indeed, in some markets, non-availability of books in electronic format requires students to borrow or buy print copies, particularly for content in languages other than English:

We have a policy where, whenever we buy a book, we try to buy it in an e-Book format. But the Danish publishers don't deliver e-Books in the same formats, so that means that we are seldom able to buy e-Books in Danish. And for some studies their textbooks are almost all in Danish. So for them it's not an option, they have to buy or otherwise acquire the books in print. (Respondent A2, interview with authors, October 2023)

The respondent attributed this to the risks involved for Danish publishers to move to a digital model in what is a relatively niche market. On the other hand, this respondent noted that international publishers of English-language textbooks are able to supply both print and e-Book versions of most texts for e-Lending. The extent to which publishers are willing to make both formats available to libraries, and their motivations for doing so or not, is discussed later in the report. Publishers are increasingly shifting towards an 'inclusive access' model, where students are given time-limited access to a catalogue of textbooks against the payment of a monthly fee paid by the student, as opposed to the library.¹¹² While it appears prima facie to be a legitimate business model, especially when considering the pressure on academic textbook publishers to improve revenues,¹¹³ more problematic is the fact that shifts towards this type of personal subscription model may make access to content prohibitively expensive for some of the student population.

Where there was a choice between electronic and print formats, we observed a general preference for e-Books, but it was also apparent that there are a vast range of licensing models offered by publishers and platforms. This includes: the 'one copy, one user' model, metered access, unlimited downloads, and a multitude of other variations. Respondents were asked to identify their preferred licensing model among those offered for e-Books. Again, there was a degree of consensus on this issue, with perpetual, unlimited access to e-Books viewed as the preferred licensing model.

¹¹² SPARC, 'Landscape Analysis – The Changing Academic Publishing Industry – Implications for Academic Institutions' (SPARC, 2019), 39.

¹¹³ Ibid 34-38.

Respondent D3, a UK digital acquisitions specialist, encapsulates this:

An affordable, essentially unlimited user licence, that as much as possible or ideally doesn't have any kind of DRM on it at all. That would be the gold standard. That's what we'd like to buy every book in that format. Because every single thing beneath that adds a level of complexity and a level of friction to the user accessing the content essentially. (Respondent D3, interview with authors, August 2023)

This respondent identifies the complexities and frictions placed on e-Lending that are not a feature of print book lending. These frictions are often a response from publishers to what they consider the need to protect the cannibalisation of their retail sales.¹¹⁴ Echoing D3, respondents in Ireland were of a similar mind that unlimited, perpetual access would be the preferred model:

...we want to be able to buy something outright and that we have perpetual access to, it could be unlimited access, which would be ideal, but we would accept kind of a tiered model as well. So, you might start with three licences and then if there's sufficient demand, we would up the licence to more. (Respondent C1, interview with authors, June 2023)

In practice, the agreement being described here allows for a maximum of three readers to use the same e-Book concurrently rather than allowing an unlimited number of readers to have simultaneous access. As articulated by Respondent C2, the preferred perpetual access model is available in some instances, but it is far from being the standard. Instead, an array of different models is operated by publishers and aggregators:

And we prefer to own the e-Book where possible, so we have perpetual access. It's a once off cost, we can control the cost. Some of the models are more now subscriptions, or you buy a package, or you subscribe to a package, and you only want certain titles. So there's a lot of different aspects to it. (Respondent C2, interview with authors, June 2023)

Crucially, it does not appear that publishers readily offer libraries the opportunity to choose their preferred licensing terms for specified titles or bundles of content. Rather, it seems more accurate to characterise it as a 'take-it-or-leave it' offer. Once more it is clear that libraries must build their e-Book collections in a piecemeal way, often with significant inconsistencies both in the texts that are available, and in how users are subsequently able to engage with that content. This is a radically different situation from development of print book collections. The following section of the report turns to potential competition issues observed in the markets under study.

POTENTIAL COMPETITION ISSUES IN E-LENDING MARKETS

The preliminary desk research conducted for this report pointed to a number of potential competition issues in e-Lending markets. Key issues identified as characteristics of e-Lending markets with potential competition law implications are listed in Figure 6.

¹¹⁴ See John Sargent, 'Letter from John Sargent to Authors, Illustrators, and Agents' (Publishers Weekly, 25 July 2019) https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4222-1.pdf.

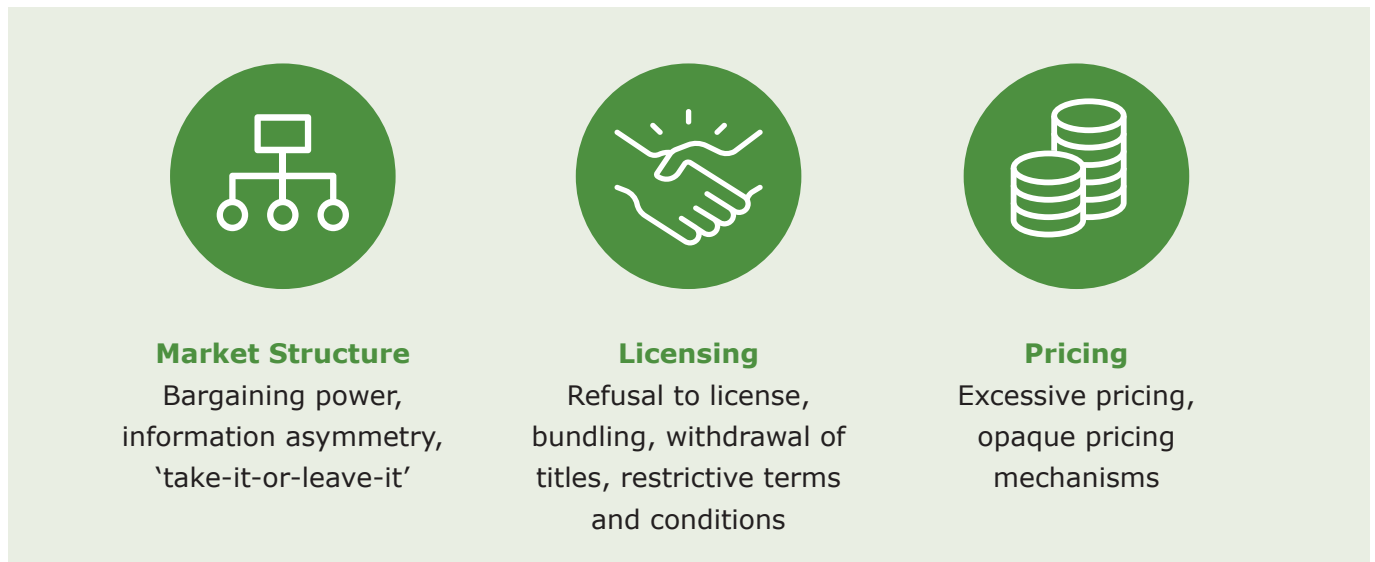


Figure 6: Potential Issues in e-Lending Markets

These can be distilled into three main themes. The first is the overarching issue of market structure and how the relationships between market actors are defined by the relative bargaining power of different constituents in the e-Lending value chain. The other themes are issues relating to pricing, and licensing which are, in many instances, said to reflect the structure of the market. These themes formed part of the protocol guiding the semi-structured interviews with library professionals, the results of which are detailed here. The analysis of these issues within competition law follows below.

Market Structure

The notion that powerful rightsholders and digital platforms wield excessive power in e-Lending markets is a prominent feature of debates surrounding many, if not most, cultural sectors including book publishing, recorded music, TV, video games and myriad other sectors. Oligopoly markets dominated by corporate rightsholders owning or controlling vast catalogues of copyright works, coupled with the emergence of large new-entrant digital platforms operating on a transnational basis, is a familiar characterisation of many of these sectors. In many ways, markets for e-Lending also conform to this pattern. Much of the discussion and debate around e-Lending markets posits that this market structure operates against the interests of libraries, readers, and libraries' long-established public mission, resulting in negative outcomes.

It follows that these structural imbalances are likely to be manifest in how these powerful actors engage with libraries. This can be as fundamental as dictating what content is made available for the purposes of e-Lending and what content is not available to libraries. Libraries currently have few remedies at their disposal in the event of publishers refusing to license e-Book content, beyond seeking other titles that might appeal to their patrons. This, in turn, poses questions about the extent to which books can be considered substitutable. Where content is licensed for e-Lending, asymmetries of bargaining power and access to market information abound in both the academic and public library sectors. These issues permeate much of the debate around e-Lending and are largely attributed to the influence of these powerful market actors. Two areas where these problems are said to play out in market transactions are in relation to licensing terms and conditions, and pricing for e-Books.

LICENSING ISSUES

Literature and Secondary Evidence

It is known that not all e-Book titles are made available to libraries. As already mentioned, Hachette is a notable example of a publisher that generally refuses to license e-Books to public libraries.¹¹⁵ A growing practice is also 'windowing' or adding an 'embargo' period before titles are released to libraries and made available via e-Lending.¹¹⁶ Windowing, in various guises, is a well-established strategy across many media sectors, including the film, television, and video game industries.¹¹⁷ Central to these strategies is the 'sequential distribution' of content to different markets at different times to maximise produce revenues.¹¹⁸

Some book publishers in both the trade and academic book sectors employ variations of the windowing model when licensing e-Book content to libraries. As an example, in 2019 Macmillan imposed a limit of eight weeks before libraries could license access to more than one copy of an e-Book.¹¹⁹ Meanwhile, in Germany it has become the norm for trade publishers to only permit lending 12 months after publication.¹²⁰ While directed more generally to copyright contracts in the context of educational libraries rather than e-Lending, several reports have remarked how these contracts tend to contain restrictive clauses, overriding for example established copyright exceptions and limitations.¹²¹ This claim has been corroborated by evidence provided by the British Library, which analysed 100 such contracts it had been offered.¹²²

Effects of e-Lending on Book Sales – Emerging Evidence

Publishers' reluctance, and in some cases refusal, to license e-Books to libraries also reflects the tension generated by the perceived threat that lending e-Books may have on sales of either digital or physical copies of books. Claims of the effect of lending on sales, both negative and positive, are often raised in policy discussions, and evidence pointing in either direction would be crucial in assessing the legitimacy of the restrictions imposed by publishers on e-Lending. It is therefore important first to appreciate the available evidence. Notwithstanding the effect that publishers' reluctance or refusal to license books has on libraries' role in supporting research, education and the promotion of reading, such discussions are often tightly framed in economic discussions around the effect of library lending on the sale of books.¹²³ In economic terms, this question relates to the degree of substitutability of sales of books in various formats and e-Lending. The level of substitutability of a product indicates whether a consumer perceives the goods as satisfying the same need.¹²⁴

¹¹⁵ Giblin et al, 'Available, but not accessible? Investigating publishers' e-lending licensing practices' (2019) 24/3 Information Research.

¹¹⁶ American Library Association, 'Competition in digital markets' (2019), 2.

¹¹⁷ Gillian Doyle, 'Digitization and Changing Windowing Strategies in the Television Industry: Negotiating New Windows on the World' *Television & New Media*, 17(7), 629-645.

¹¹⁸ Thorsten Hennig-Thurau, Victor Henning, Henrik Sattler, Felix Eggers and Mark B Houston (2007). 'The Last Picture Show? Timing and Order of Movie Distribution Channels' *Journal of Marketing*, 71(4), 63-83.

¹¹⁹ John Sargent, 'A letter from John Sargent' (Macmillan Publishers, October 2019) <https://d1x9nywezkh0w2.cloudfront.net/wp-content/uploads/2019/10/29160131/A-Letter-from-John-Sargent-.pdf> accessed 29 July 2025.

¹²⁰ See Deutscher Bibliotheks Verband, 'Libraries in Germany 2023' (Bibliothekerverband.de, 2023) https://www.bibliothekerverband.de/sites/default/files/2023-10/Bibliotheken%202023_englische%20Version_WEB.pdf accessed 29 July 2025.

¹²¹ For an overview, see Orit Fischman Afori, 'The Battle Over Public e-Libraries – Taking Stock and Moving Ahead', 44 ICC 392.

¹²² British Library, 'Analysis of 100 Contracts offered to the British Library' (IFLA) <https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/100contracts.pdf> accessed 29 July 2025. See further Ben White, 'Guaranteeing Access to Knowledge: The Role of Libraries' (WIPO Magazine 4/2, August 2012).

¹²³ Public librarians in France have recently called for a consultation to find solutions that are not solely governed by the logic of "platformisation of culture": Associations of Librarians of France, 'Open Letter: For an Adapted and Quality Digital Offer in Public Libraries' (ABF, 1 October 2024) <https://www.abf.asso.fr/1/22/1100/ABF/-lettre-ouverte-pour-une-offre-numerique-adaptee-et-de-qualite-en-bibliotheque-publique>.

¹²⁴ Walter Nicholson and Christopher Snyder, 'Microeconomic Theory: Basic Principles and Extensions' (South-Western, 2008), 185.

Rather than being a binary question, substitutability is better understood in terms of degrees. Purchasing a physical copy of a book is unlikely to be considered substantially the same as obtaining temporary access to read that same title. However, the difference in price between purchase and lending may draw a share of the purchasing population to move to libraries. The purpose – ‘why I read a book’ – also affects the degree of substitutability considered. For example, a researcher exclusively interested in the information inside a book may consider e-Book and print books as equally suitable, in some cases even preferring the former.

Nonetheless, a simplified account of substitutability may be as follows: if there is a low level of substitutability, e-Lending does not displace sales of books, rather, it operates in the ‘area of dead-weight losses’, by targeting readers who would not have otherwise purchased or read the book due to its price exceeding their willingness to pay.¹²⁵

In this respect, libraries therefore provide books to those who cannot afford access to books (affordability), or make readers less risk-averse to reading an unknown title or author by reducing the cost of access (discoverability). This last function is in principle capable of increasing sales of books, rather than decreasing them, as some libraries have pointed out,¹²⁶ with studies supporting this claim.¹²⁷ On a similar note, a recent analysis of the life cycle of e-Books sales suggests that digital and physical lending may complement the sales of e-Books by prolonging the life cycle of e-Books. In other words, once sales drop, lending provides a long tail of consumption for these cultural goods. A recent study examining the Australian trade book/public library sectors employed the methodologically innovative research design of digitising 161 out-of-print (in copyright) books, followed by printing and licensing these for retail sale and e-Lending as e-Books, to test the effect of e-Lending on e-Book sales. The study found ‘no evidence that library e-lending cannibalises book sales, even where they are licensed for simultaneous access’.¹²⁸ This instructive study suggests that e-Lending may even have a positive effect on the sale of some titles, indicating that further nuances to the question of substitutability are possible. The categories of book buyers and book lenders do not necessarily overlap,¹²⁹ so whether one good substitutes the other may depend on which population the proposition is tested on. A study of the relationship between trade book buying and book borrowing in France found that library users tend also to buy books (73%), while a minority of book buyers surveyed also borrowed books (37%).¹³⁰ This suggests that substitutability may be lower for book purchasers. Book borrowers seem to be more flexible, with one study suggesting that they regard physical and e-Books as substitutes for the purpose of lending.¹³¹

¹²⁵ Giuseppe Vitiello, ‘The Economic Foundation of Library Copyright Strategies in Europe’ (2021) 31 *LIBER Quarterly*, 27.

¹²⁶ Andrew Albanese, ‘Frankfurt Spotlight: Library E-books Have Levelled Up’ (Publishers Weekly, 14 October 2022).

¹²⁷ See Dan Mount, ‘Research for Cult Committee – e-Lending: Challenges and opportunities’ (EU Parliament, 2016), 99. The author cites four studies (two in the United States, one in Finland, and one in Denmark) indicating that a considerable number of e-Lending users utilise this service to better inform future purchases.

¹²⁸ Paul Crosby, Tessa Barrington, Airlie Lawson and Rebecca Giblin, *Untapped Potential: Results from the Australian Literary Heritage Project* (Melbourne Law School, 25 September 2024) https://law.unimelb.edu.au/_data/assets/pdf_file/0007/5096446/Untapped-Research-Report_v4.pdf.

¹²⁹ Alison Flood, ‘Print and digital readers like different books, library data suggests’ (The Guardian, 20 May 2020).

¹³⁰ François Rouet, ‘De la concurrence entre les pratiques d’emprunt et d’achat des livres: l’impossible simplicité’ in Bernadette Seibel (ed), *Lire, faire lire. Des usages de l’écrit aux politiques de lecture* (Le Monde editions 1996).

¹³¹ Imke Reimers and Joel Waldfogel, ‘The First Sale Doctrine and the Digital Challenge to Public Libraries’, NBER Working Paper Series (2022), 13-15

More generally, and acknowledging the difficulty of studying this phenomenon, it is reasonable to conclude that, even if a degree of substitution is in principle possible, it is likely to be negligible.¹³² Indirect evidence (e.g. statistical comparison of most sold and most loaned books)¹³³ further support this conclusion.¹³⁴ Between 2019 and 2022 revenues from book sales grew or remained stable for almost all countries for which data is available,¹³⁵ despite the parallel surge in e-Lending. An additional factor in the displacement of sales discussion is the growing population of readers that e-Lending is likely to foster. Finally, it should be acknowledged that data on e-Lending and its sale revenues are increasingly exclusively being controlled by publishers, thus placing them in a better position to rebut what should be considered a null hypothesis: that e-Lending does not substantially cannibalise sales of books.

RESTRICTIVE LICENSING CONDITIONS AND REFUSAL TO LICENSE

It was established that academic librarians prefer electronic content that is available on a perpetual access basis and free of DRM. However, it is also clear that such licensing terms are not available on all proprietorially-published content. Outright refusal to license or imposing such restrictive terms on e-Lending as to render licensing undesirable, appears to be a problem for particular types of content. This applies in the case of academic course textbooks and also in the public library setting where the major publisher Hachette does not currently make e-Books available to public libraries in certain territories. It was suggested by some respondents that the academic publishers' strategy here is designed to discourage libraries from seeking to gain access to textbooks, thus requiring students to purchase titles rather than borrow them. In Poland, Respondent B2 noted that:

For the last few years, it was hard to buy electronic versions of some monographs, some textbooks because first, publishers put out on the market their printed versions and after that, it was electronic version only available for private clients. For example, for Kindle versions or something. Then, after that, comes an institutional version which we can buy. It was like waiting for us to... First, they wanted to sell the printed version, an electronic version for private people, and after that they put an institutional version on their platforms, and after that they gave those electronic versions to institutions on an aggregator's platform. It was mostly in every publisher that I saw. (Respondent B2, interview with authors, September 2023)

However, this respondent was of the opinion that such strategies were now less common than previously, particularly as Polish publishers are developing their own platforms:

¹³² Analysing the displacement of sales of new books caused by the sale of second-hand books on Amazon, the authors estimate that only 16% of used-book sales at Amazon cannibalise sales. See Anindya Ghose and Michael D Smith, 'Internet Exchanges for Used Books: An Empirical Analysis of Product Cannibalization and Welfare Impact' (2006) 17/1 Information Systems Research.

¹³³ Alison Flood, 'Library audio and e-Book loans in 2021 reveal unexpected stars' (The Guardian, 8 December 2021) <https://www.theguardian.com/books/2021/dec/08/library-audio-and-e-Book-loans-2021-ellery-adams-brenda-chapman>.

¹³⁴ Frank Huysmans, 'E-Book Lending in The Netherlands in European Perspective' (WareKennis, 27 October 2016) <https://warekennis.nl/e-book-lending-in-the-netherlands-in-european-perspective/>.

¹³⁵ World Intellectual Property Organization, The Global Publishing Industry in 2022 (WIPO Publications, 2023), 20.

What else has changed? There are more Polish platforms on the market. We can see it nowadays. A few years ago, it was only one or two, and now almost every publisher has its own little platform with their e-Books... It's not that I don't see negative things in this market. I also do, but I think that it's going in the right direction, where you don't have to think that much and research for books in many different platforms. (Respondent B2, interview with authors, September 2023)

This cautious optimism that the market was in some ways self-correcting was not shared by all of our respondents and is certainly at odds with the narratives that characterise much of the secondary literature consulted by the researchers.

The issue of negotiability of the licensing terms was another area where respondent attitudes were nuanced. D3 was sceptical that there was scope for libraries to negotiate on specific licensing terms they viewed as excessively restrictive, particularly where a third-party aggregator was the supplier, rather than a publisher:

There's very little scope for negotiation I would say because often you're dealing at arm's length, right? So most of the standard e-books I'm talking about we would buy through a vendor, so someone like ProQuest or whoever. And basically, they have a pre-negotiated agreement with the publisher, so you just go on a vendor platform and it tells you this book is available in the following formats, right? (Respondent D3, interview with authors, August 2023)

Here we see how the 'take-it-or-leave-it' nature of some e-Book transactions plays out in practice. However, some publishers and aggregators do appear willing to slightly relax or waive licensing conditions to cater to requests from individual institutions:

I think unlimited access, unlimited online access is very important, particularly for teaching, because of open book exams. So, we're in a situation where (INSTITUTION REDACTED) has decided to go down the route of open book exams in some cases. If we have an unlimited textbook, or we know it's an open book exam and we can speak to the publisher and/or aggregator and say we need unlimited access for twenty-four hours, that'll happen. (Respondent D2, interview with authors, July 2023)

Respondent D2, representing a large, well-funded UK university, was able to negotiate improved terms with the supplier to suit their institution's changing needs, albeit on a time-restricted basis. The divergent attitudes of these two UK-based respondents illustrates how experiences can differ considerably within the same e-Book market. As will be discussed, the buyer power of larger institutions and consortia is viewed as a significant factor in libraries' capacity to negotiate with suppliers, particularly publishers.

BUNDLING OF CONTENT: REFUSAL TO LICENSE INDIVIDUAL TITLES FOR THE PURPOSES OF E-LENDING

Bundling of content is another contentious licensing issue, both in the secondary literature consulted, and in engagements with library practitioners. Bundling is where publishers and aggregators offer libraries access to bundles of content, rather than individual titles. While this may intuitively seem like an attractive proposition for libraries seeking to assemble broad collections of titles, in practice it is viewed by some as a strategy designed to force libraries

to pay higher fees for bundles of content in order to gain access to important individual titles within the bundle.

This was articulated by one respondent who suggested refusal to license individual titles that were included in bundles was common for specific disciplines and fields of study:

／ **I think particularly in one of the areas that I focus on, which is Law, I often find that new editions of textbooks are often not available for individual purchase, they're often only available as part of bundles. And then once the fifth edition is available, sometimes then the fourth edition might be available as a standalone purchase. I've over the years had lots of difficulty particularly with law books because they are often bundled up.** (Respondent D1, interview with authors, June 2023)

By and large, the issue of bundling content did not appear to be a particularly emotive topic for most of the respondents.

While it was apparent that licensing individual titles was preferred by library practitioners, objections to bundling of content as a licensing model were relatively muted.

DISCONTINUITY OF SERVICE

While bundling of content was viewed by some respondents with a certain degree of indifference in terms of principle, an issue considered to be a genuine threat to libraries' ability to build stable and sustainable e-Book collections ('collection development') was the common practice of publishers unilaterally removing titles from bundles. The most notorious example of this was where academic publisher Wiley removed c.1300 titles from its bundles at the start of the 2022/23 academic year. As a Danish respondent exemplified, this type of discontinuity of service presents significant problems for librarians, tutors and students alike:

／ **...the majority of the e-books that we actually provide are, I think, for a large part, part of bundles. There's been some complaints over the years about that, but that's more when the content of a bundle changes in the middle of a semester. So a teacher might find an e-Book and say to the students, well, you have to read part of this book, and then halfway through the semester the content of the bundle changes and the book is gone.** (Respondent A2, interview with authors, October 2023)

In the case of Wiley, the titles were quickly reinstated to the bundles as a direct response to pressure from library advocacy groups, the Authors Alliance¹³⁶ and academic institutions, but it served as an example of the extent to which academic libraries and authors are beholden to the publishers in respect of e-Book content.¹³⁷ In Ireland, a respondent identified one way that publishers stop short of removing content from bundles and outright refusal to license, but are able to significantly shape the market in their favour by placing limitations on the number of licenses available:

¹³⁶. See Authors Alliance, 'Authors speak out on an update on the Wiley e-Book situation' (Authors Alliance, 14 October 2022) <https://www.authorsalliance.org/2022/10/14/authors-speak-out-an-update-on-the-wiley-e-Book-situation/>.

¹³⁷. Matt Leavy, 'Statement on Wiley e-Books Featured in ProQuest Academic Complete Library' (wiley.com, 15 May 2022) <https://newsroom.wiley.com/press-releases/press-release-details/2022/Statement-on-Wiley-eBooks-Featured-in-ProQuest-Academic-Complete-Library/default.aspx>.

I think one thing... this is just a sort of slightly different version of that, whereby we would have some textbook and we would have only a handful of licences for it and we're no longer able to buy new licences for it. So, in other words, they don't remove it, but they've shut it down and it's available and it's so oversubscribed it practically stops working. (Respondent C1, interview with authors, June 2023)

The extent to which these types of publisher actions might be of concern to competition authorities remains unclear, but what is certain is that publishers, as suppliers, wield considerable influence in shaping these markets.

PRICING ISSUES

The second main theme in the competition issues we identified relates to pricing. Of particular significance in much of the e-Lending discourse are issues relating to excessive pricing, and pricing mechanisms that are opaque to libraries.

Literature and Secondary Evidence

It is clear from existing studies and secondary evidence found across a variety of media outlets that many librarians feel the prices paid for e-Lending are excessive when compared to lending of the printed version. In practice, this means comparing the retail price of a printed title or digital title with the cost of the licence – accounting, when possible, for differences such as the time-limited nature of many licences or other frictions that are introduced in the licence. Even when looking at the cost of licensing an e-Book for 2 years – a standard timeframe for e-Lending licences¹³⁸, which arguably is significantly less than the shelf lifespan of printed books lent out in libraries – prices for the digital version are often said to be 4 to more than 10 times more expensive than the retail version,¹³⁹ a figure that can be corroborated across studies.¹⁴⁰

Another factor contributing to the perceived excessiveness of the price is the steady increase of the cost of licences in the past years. This increase seems to affect both printed and digital formats, although not to the same extent. For example, it has been noted that prices for textbooks have grown by 184% in the past 20 years.¹⁴¹

For many librarians, the excessiveness of the price also stems from the time-limited nature of licences for the lending of books. In some cases, what would otherwise be considered an acceptable price – e.g. 27 USD – is rendered excessive by the fact that the licence has to be renewed annually, thus significantly increasing the cost of licensing access when compared to ownership of books/e-Books.¹⁴²

¹³⁸ The presumed lending lifetime of a printed book is a crucial factor in comparing the cost of lending printed and digital books. The longer the lifetime, the more expensive the digital version will be, as licences need to be renewed over more years.

¹³⁹ American Library Association, 'Competition in digital markets' (ALA, 15 October 2019) <https://www.ala.org/sites/default/files/news/content/mediapresscenter/CompetitionDigitalMarkets.pdf> accessed 29 July 2025.

¹⁴⁰ Reimers and Waldfogel, 'The First Sale Doctrine and the Digital Challenge to Public Libraries', NBER Working Paper Series 2022.

¹⁴¹ Mark J. Perry, 'Chart of the day.... or century?' (American Enterprise Institute, 11 January 2019) <http://www.aei.org/publication/chart-of-the-day-or-century/>.

¹⁴² Maria Bustillos, 'Billion-Dollar Book Companies Are Ripping Off Public Schools' (The New Republic, 22 December 2020) <https://newrepublic.com/article/160649/book-companies-follett-overcharge-public-schools>.

Excessive Pricing: Interviews

Respondents were in agreement that prices for e-Book content were high and appear to be trending in an upwards direction. Danish Respondent A2 noted that, at present, their institution was able to absorb price rises, but on the current trajectory of increases this would not be sustainable:

／ **We lose a lot of our budget buying these materials in a digitalised version. So, in that respect, if we look ten years out into the future, we won't be able to buy the same things. It's simply going to be too expensive. That means that we'll get to a point where we can say, 'well, we are obliged to buy the materials that the university is using, but we haven't got the money to do it, it's simply too expensive'. (Respondent A2, interview with authors, October 2023)**

This respondent saw significant challenges on the horizon but was of the opinion that this challenge was not limited to e-Books, but extended to other electronic content, particularly journals. On the potential effects of excessive pricing, Respondent D1 opined that publishers' pricing strategies will ultimately compromise universities' capacity to deliver learning experiences to students:

／ **I think the challenge is, and my perspective on it is that it will force libraries to have to pay more and more and more money for core texts and the core textbooks. And that means sacrificing the breadth and the depth of our collections, and I think it will have a damaging pedagogic effect really. (Respondent D1, interview with authors, June 2023)**

Here there is concern that publishers are exploiting libraries' dependence on textbooks in ways that are unsustainable. However, libraries have been proactive in seeking solutions to these pricing problems. One strategy employed by academic libraries in all of the countries we studied to improve their bargaining power in negotiations with publishers and aggregators is consortia-led acquisitions:

／ **Here in Poland, we also have the national licensing by the Ministry of Higher Education. They participate in the cost of buying the biggest publishers' licences. For example, like ProQuest, Elsevier, Wiley, Springer and other names like that. (Respondent B1, interview with authors, May 2023)**

Respondent D3 echoed other respondents in the belief that larger institutions and consortia were able to negotiate more favourable prices:

／ **Just generally, if you are a bigger customer with any publisher, you can leverage greater discounts. So as much as possible, we try and do things through structured agreements because they're fairer. But I mean regularly publishers, at least just not on the book side but, you know, they'll offer you stuff that you could get a better deal if you went directly to them. So yeah, the more buying power you've got, the better deal you can generally get. (Respondent D3, interview with authors, August 2023)**

As discussed previously, some aspects of e-Book licences were viewed as being largely non-negotiable, but pricing appeared to be an area where there is scope for negotiation.

When asked if it was possible to negotiate with suppliers, Polish Respondent B2 stated:

Yes, yes, all the time. When we are discussing terms of agreement, we always bargain with our publishers, with aggregators and sometimes, it's 'okay, make it cheaper, we will take more collections'... They have to be elastic for us because we are perfect clients. We will always pay, and we will always be in need of this. So, yes, they have to cooperate with us. So, there is a lot of space for some discussions. (Respondent B2, interview with authors, September 2023)

This account illustrates that, in the academic market at least, libraries are the primary customers of publishers and aggregators, so negotiating affordable and sustainable agreements can have mutual benefits.

Discussing the Danish market, Respondent A2 reported rising prices for e-Books but conceded that the functionality of certain types of licences, namely campus licences permitting all students to access a title, represented better value than would be possible for print books:

...the prices are definitely higher than if we, say, bought a single copy of a book. I mean, that's what we usually did at the library when we only had printed books, we didn't buy 20 copies of the same book whenever somebody needed it. We would buy one or two copies and have them at the library. But now we are actually buying campus licences, so that means that a lot of students can have access to the same book. And in that respect, the price might be quite reasonable. (Respondent A2, interview with authors, October 2023)

Overall, in the academic sector there was a sense that prices were high, and in some cases prohibitively so, but it was felt that libraries had some effective strategies at their disposal that made it possible to improve their bargaining position in order to negotiate on price.

Lack of Transparency: Opaque Pricing Mechanisms and Reader Usage Data

The researchers also sought to evaluate suggestions of problematic information asymmetry in respect of factors influencing e-Book pricing. One significant disconnect between libraries and suppliers can be observed in the absence of agreed definitions of key terms, most notably an agreed definition of the 'textbook'. One librarian, responsible for digital acquisitions, noted:

We have engagement days before we write the tender documents and we posed the same question to all interested parties, 'define a textbook'. And what came back was quite interesting. Nobody had a proper definition of it. (Respondent D2, interview with authors, July 2023)

In practice, it seems that textbooks are defined by publishers and platforms according to the intended use by an institution. In effect, texts that are central to teaching and feature on course reading lists are likely to be considered textbooks. That libraries, academic and public, seek to respond to anticipated reader demand arguably exacerbates their lack of bargaining power in negotiations with suppliers, who are often endowed with valuable information on library and reader preferences.¹⁴³

¹⁴³ In a recent survey, 38% of libraries stated that 'they would purchase high-demand titles regardless of unattractive pricing'. See Jenny Kennedy, Rebecca Giblin, Kimberlee Weatherall and Julian Thomas, *Driven by Demand: Public Library Perspectives on the e-Lending Market* (RMIT 2020).

Reportedly this can have a significant effect on the price, availability and licensing terms attached to these e-Books. Conversely, materials that may be relevant to particular courses and programmes, but not integral prescribed teaching materials, are less likely to be deemed textbooks and, as such, are often available on more favourable terms. It was reported that one publisher had systematised their definitions of academic textbooks:

Wiley have now categorised all of their books. So, they've categorised them as: A, core e-textbook; Band B, which is still a textbook but not quite as core. So, they're doing that and there's certain types of material they're not including in run of the mill academic subscriptions. (Respondent D2, interview with authors, July 2023)

These apparently subtle distinctions can have significant impact on the price and availability of e-Books, but the mechanisms used by publishers to determine which e-Books are classed as 'textbooks' remain largely opaque to libraries.

Textbooks are likely to be high-demand titles in a collection, but measuring the demand and use of library books is far from straightforward, both in the physical and digital world of book lending. This is another area where opacity limits libraries' capacity to make informed decisions around acquisitions. In the print book setting, libraries can gauge demand for titles using measures including the number of times a title is requested and borrowed, and the number of holds placed on a book that is on loan to another reader. But beyond this, little is known about how readers engage with the book they have borrowed. In the case of e-Books, it is possible not only to track demand, but also to gather data on how readers are engaging with the text in terms of chapters and pages that are accessed, sections that are downloaded, and many other reader metrics.

Crucially, in many cases it is the platform provider, as opposed to the library, that will have access to this valuable data. The extent to which publishers and aggregators are willing to share such data with libraries appears to be variable. Respondent D1 expressed the opinion that information asymmetry in respect of reader behaviour is used by publishers to gain an advantage when negotiating licenses:

We are very aware that our students' use of these things that we pay for is, to a certain extent, being used against us because the publishers will be monitoring and knowing obviously which are the most high use sources. And that has value for them from a commercial perspective. But it also has value in that they know which ones that we can afford to lose the least and which ones we might potentially pay for the most if it was available in a different format or a different user licence. (Respondent D1, interview with authors, June 2023)

In essence, publishers and aggregators have access to much more comprehensive and granular datasets on demand for specific content and how that content is subsequently used than is available to libraries. Access to data also provides numerous advantages to publishers when justifying their conduct in the market, as well as in shaping policy debates more broadly. For example, the introduction of an embargo for public library e-Lending of books by Macmillan Publishers was deemed commercially necessary to offset cannibalisation of sales. According to the company, up to 45% of its e-Book sales were being substituted

by e-Lending from libraries. Although e-Lending, as we have seen, is a commercial activity and thus produces revenues for publishers, in the same letter John Sargent (former CEO of Macmillan Publishers) maintains that those revenues are very low on average.¹⁴⁴ Access to data, as is evident, provides considerable bargaining power. For this reason, it is problematic that libraries are increasingly less able to access data on readers' statistics due to their reliance on third-party infrastructure for the provision of e-Lending.

Where publishers do supply data, a Danish library professional stated that:

／ **...some publishers actually supply statistics of use. That means that you can use that and say, 'well, is this really what we want?' I think whenever the person who buys the book or decides whether or not we should buy the book, that's something that they consider each time, is this too expensive in regards to how many users are actually going to use it? I think sometimes they might say well, this is simply too expensive, we can't justify buying this book at that cost.** (Respondent A2, interview with authors, October 2023)

It is apparent that not all publishers seek to withhold user data from libraries. Again, there is evidence of divergence among suppliers in respect of how they serve the e-Lending market. While some withhold user data, others are said to share these statistics with libraries. The extent to which publishers and platforms should be compelled to share data with libraries is an issue that has implications for transparency in pricing mechanisms.

¹⁴⁴ The letter states that the average revenue per circulation to a library reader was under two US dollars, thus, necessitating, in Sargent's view, a change in e-Book terms offered to libraries. See John Sargent, 'Letter from John Sargent to Authors, Illustrators, and Agents' (Macmillan Publishers, 25 July 2019). https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4222-1.pdf.

E-Lending Contracts

The researchers gained access to a variety of e-Lending licensing agreements for academic e-Books and trade e-Books. This included contracts between libraries/ local authorities (buyers) and publishers/aggregators (suppliers) for access to content, databases and e-Lending platforms. Some of these suppliers were major transnational publishers and platforms, while other agreements involved independent suppliers operating in discrete territorial markets and those supplying content in languages other than English. Two agreements between book publishers and e-Book platforms were also obtained. Accessing this range of agreements was invaluable for this study, as they set out the terms and conditions that govern the lending of e-Books, and the commitments and obligations of each contracting party. Moreover, where the interview material and other sources provided insights into the relative bargaining power of libraries and suppliers, accessing and analysing these documents permits more comprehensive understandings of how these dynamics play out in e-Lending licences.

Accessing Contracts

As mentioned above, the contracts discussed in this section were gathered by issuing a 'call for contracts' to library professionals using various channels including via library trade organisation networks and at library advocacy events. Gaining access to e-Lending contracts proved to be exceptionally challenging, chiefly due to the commercially sensitive nature of these agreements. Indeed, some of this opacity is built into the contracts in confidentiality clauses. Freedom of Information (FOI) requests were made to selected UK local authorities and academic institutions requesting relevant documents that constitute the contract/s for provision of e-Lending services by e-Book suppliers, including the main terms and conditions of the digital lending licences (e.g. price, lending model – metered by time, etc). This approach yielded several useful contracts, along with additional explanatory information from respondents about e-Book licensing terms and conditions. Some FOI responses declined to supply information on the basis of commercial confidentiality and argued that supplying such data could operate against public interest by jeopardising relationships between libraries and e-Book suppliers. Therefore, some elements of e-Book lending agreements remain opaque.

ACADEMIC E-BOOK AGREEMENTS

Academic e-Book Agreements				
Ref	Country	Year	Duration	Description of contract
POA1	Poland	2021	Unknown	Contract between academic library and platform/e-Book supplier
POA2	Poland	2021	12 months	Contract between academic library and major publisher
POA3	Poland	2015	12 months	Contract between academic library and online database provider
POA4	Poland	Unknown	Unknown	Contract between academic library and online database provider
POA5	Poland	Unknown	12 months	Contract between academic library and platform/e-Book supplier
POA6	Poland	2021	12 months	Contract between academic library and major publisher
POA7	Poland	2022	12 months	Contract between academic library and platform/e-Book supplier
ROIA1	ROI	2018	12 months	Contract between academic library and online database provider
ROIA2	ROI	2019	36 months	Contract between academic library and major publisher
ROIA3	ROI	Unknown	Unknown	Contract between academic library and platform/e-Book supplier
UKA1	UK	Post-2018	Unknown	Contract between academic library and supplier of academic books
UKA2	UK	2022	Indefinite	Contract between library purchasing consortium and supplier of academic books
UKA3	UK	2022	Unknown	Contract between academic library and platform/e-Book supplier
UKA4	UK	2022	Rolling	Contract between academic library and supplier of academic books. Individual e-Books or e-Book packages purchased on a perpetual access basis
UKA5	UK	2020	3 x 1 year	Contract between academic library and platform/e-Book supplier

Table 3 details the academic contracts gathered from Poland, Republic of Ireland and the UK. No academic contracts for Denmark were obtained.

TRADE E-BOOK AGREEMENTS

Trade e-Book Agreements				
Ref	Country	Year	Duration	Description of contract
DKT1	Denmark	2023	1 year	Contract between library platform and book publisher
DKT2	Denmark	2023	1 year	Contract between library platform and book publisher
ROIT1	ROI	2019	1 year	Single Supplier Tender Framework Contract
UKT1	UK	2021	1 year	Contract between university library and trade book platform
UKT2	UK	2021	3 years	Contract between university library and trade book platform
UKT3	UK	2021	3 years	Contract between local authority and trade book platform
UKT4	UK	2017	3 years	Contract between local authority and trade book platform
UKT5	UK	2023	Unknown	Standard terms offered by trade book platform to academic library updated Jan 2023
UKT6	UK	2020	3 years	Contract between university library and trade book platform
UKT7	UK	2022	3 years	Contract between local authority and trade book platform
UKT8	UK	2022	3 years	Contract between local authority and trade book platform
UKT9	UK	2019	3 years	Contract between local authority and trade book platform
UKT10	UK	2022	2 Years	Contract between university library and trade book platform

Table 4: Trade e-Book Agreements

Table 4 details the trade book e-Lending agreements gathered. These principally comprise agreements between public libraries and e-Lending platform providers. ROIT1 is a call for tenders to supply e-Lending services for public libraries. DKT1 and DKT2 are licensing agreements between a library e-Lending platform and a book publisher.

EMERGENT THEMES

The contract analysis sought to identify elements relevant to competition law issues identified in Figure 6, namely those relating to market structure, licensing and pricing issues. Some elements in the contracts closely align with attitudes and experiences articulated in the interviews. In other respects, there are areas where the contracts provide perspectives not readily available from interviews and secondary sources.

In the public library setting, local authorities will issue a call for tenders to providers of specified e-Lending services, e.g. ROIT1. In the case of UKT7 and UKT8, agreements between a local authority and major e-Lending platform, the local authority, rather than the platform, is the initiator of the contract and sets out its service requirements in the agreement. The supplier's responses to these requirements are redacted from these documents so it is not known how much meaningful negotiation took place regarding the terms of the agreement. What is more certain is that most of the suppliers' contracts examined in both sectors were characterised by identical or closely analogous clauses and elements offered by suppliers to different buyers. This indicates that many agreements can be deemed to be standardised 'boilerplate' contracts, as opposed to contracts drawn up and negotiated on a case-by-case basis. Moreover, this applies across territories. For example, terms offered by a major publisher in the academic sector in Poland contained identical clauses to those offered by the same publisher to libraries in the Republic of Ireland.

Similarly, in the public library sector much of the contracts were standardised, with little variance in terms offered by suppliers to different buyers. While much of the agreements are standardised, platform fees paid by libraries are an area where variance between different agreements. Another area where there was some divergence across the sample is in the duration of the agreements, which typically range from 1 year to 3 years, often on a 'rolling' basis, where the agreement will automatically renew unless the licensee wishes to give notice of termination at the end of the term.

LICENSING ISSUES

In essence, the contracts are licensing agreements for works protected by copyright and, as such, the terms of each contract determines how e-Book content can be loaned to readers. In some instances, the contracts will stipulate specific aspects of the licensing terms, such as identifying those that may access the content, e.g. registered library patrons, employees, students, inter-library loans, etc. The contracts may also dictate where the content can be accessed, e.g. on terminals located within the library, remotely via networked devices, etc. In some cases, these agreements determine how content can be accessed, e.g. via permanent download, metered access, etc. But in other contracts there is very little reference to specific licensing models. None of the contracts examined make any reference to individual e-Book titles.

Platform Access

In broad terms, the contracts between university libraries/local authorities and suppliers we analysed are for the provision of a range of complementary services required to provide an e-Lending offering to library patrons, including: access to an e-Lending platform and reader interface, access to e-Book content under a variety of licensing terms, and access to support services such as IT support, library staff training, and marketing materials.

In the academic sector, the agreements typically offer licensed access to individual titles and content packages, or 'bundles' as they are commonly known. UKA5, an agreement between an e-Lending platform and a UK academic library, outlines the main elements of the contract: The Supplier operates a digital platform to offer subscribers access to packages of digital academic course materials. They are offered under this Licence in the following ways: i) under the Broadening access model; ii) on a title-by-title subscription-only basis (TBT textbooks); iii) on a title-by-title perpetual access basis (TBT monographs); iv) as an evidence-based model (EBA monographs); and v) as a user-activated acquisition model (UAA) for textbooks (subscription-only) and monographs (perpetual access). (UKA5)

This illustrates that the range of licensing models varies according to the type of content being accessed. The analysis supports the interview finding that academic textbooks are often licensed on more restrictive terms than other types of content, such as monographs, where perpetual access is granted in the licence. This issue will be discussed further in due course. POA4, a contract between a Polish academic library and a major e-Book content provider, details how authorised users may utilise licensed content:

Persons using computer terminals in libraries at locations to which the Subscriber grants access to the Subscription Products for the purpose of conducting their own research, education and other non-commercial use... Each Authorised User may: print, download and retain a reasonable portion of the items in the Subscription solely for such authorized user's own purposes. (POA4)

In the trade book setting, there is similar standardisation of the suppliers' specific terms and overall offering to the buyer. In these agreements the library/local authority will often pay an advance lump sum to the platform, against which content may be selected. For example, UKT1 includes an annual fee totalling £20,000, of which £19k is allocated to 'selection of digital content' (UKT1). The contract states that it is incumbent on the library at the outset of the agreement to indicate the titles it wishes to make available. These titles can be supplemented at a later date, subject to additional charges. UKT2 contains identical terms and conditions, but with an annual fee of £12,000, of which £10k is allocated to digital content. Again, the proportion of the overall fee allocated to platform services is relatively modest when compared to the proportion allocated to selection of digital content.

BUNDLING OF CONTENT

In the trade book setting, public libraries assemble e-Book collections by selecting titles from the aggregator's extensive catalogue in a marketplace area of the platform. These titles are then made available to readers on the customer-facing side of the platform. In the academic setting, some titles are licensed on a title-by-title basis, but most of the contracts examined also include some form of bundled content, although the term 'bundle' is not a feature of the contracts. More typically the contracts refer to packages which could be discipline-specific, such as medical titles, as is the case in POA2, or access to science texts, as offered in ROIA2. The interviews and other engagements with library stakeholders indicated that bundling of content is a feature of e-Lending markets, and this was not generally viewed as especially problematic. In the academic sector, bundling is more often highlighted as a problem in the licensing of journals, where increases in the quantity of articles published is often used to justify the steady increase in prices.¹⁴⁵ The quality of those additional publications is often questionable, and evidence on the readership demonstrates that only a minority of popular journals capture most of the readership.¹⁴⁶ In some respects, public libraries appear to be subject to similar strategies, where bundling is used by publishers to require libraries to subscribe to packages containing a 'long tail' of titles that otherwise have little commercial value for publishers.¹⁴⁷

¹⁴⁵ SPARC, 'Landscape Analysis – The Changing Academic Publishing Industry – Implications for Academic Institutions' (SPARC, 2019), 11-13.

¹⁴⁶ Ibid.

¹⁴⁷ See response by Hammelburg City Library (Stadtbibliothek Hammelburg) to the German Federal Ministry of Justice's questionnaire on e-Lending (question 2.1): https://www.bmjv.de/SharedDocs/Downloads/DE/Gesetzgebung/Stellungnahmen/2023/0623_Stellungnahme_eLending_Stadtbibliothek_Hammelburg.pdf?blob=publicationFile&v=2.

DISCONTINUITY OF SERVICE: REMOVAL OF TITLES FROM BUNDLES

Of greater concern to interview respondents was the threat of content being removed from bundles, as happened in the widely reported 'Wiley case' mentioned above, where large swathes of content were suddenly removed from bundles without consultation with libraries. This is an area where the contracts offer perspectives not found in the interview material. Many of the agreements contain provisions for the removal of licensed titles from a package. A standard recurring expression of this in academic agreements is:

／ **The Supplier reserves the right at any time to withdraw from the Licensed Material any item or part of an item: for which the Supplier no longer retains the right to make available on its application; or which the Supplier has reasonable grounds to believe infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable. (UKA5)**

While this clause doesn't necessarily preclude suppliers' unilateral removal of content from packages as happened in the Wiley case, it does imply that there should be reasonable grounds for doing so. In some instances, the contracts detail the bases for financial compensation to be paid to libraries in the event that content is withdrawn. Withdrawal of content also permits the buyer to terminate all or part of the agreement:

／ **The Supplier shall promptly give written notice of such withdrawal to the Institution. If, in the Institution's reasonable opinion, such withdrawal results in the Licensed Material being no longer useful to the Institution or the Authorised Users, the Institution may on receipt of such notice, on written notice to the Supplier, terminate the application of this Agreement to such Licensed Material with immediate effect. (UKA1)**

However, given the limited substitutability of e-Book titles, it is questionable if libraries are likely to seek to terminate agreements, given their reliance on providing access to other titles licensed by the same supplier.

TEXT AND DATA MINING CLAUSES

The study's contract analysis also revealed a potentially significant issue that did not emerge as a concern articulated by the interview respondents. Some of the suppliers' contracts include a clause that prohibits subscribers and authorised users from using:

／ **...any robots, spiders, crawlers or other automated downloading programs, algorithms or devices to continuously and automatically search, scrape, extract, deep link, index or disrupt the working of the Subscribed Products. (POA2)**

This clause runs contrary to the text and data mining exception in EU and UK copyright law, which allows text and data analysis by research organisations for non-commercial research purposes to those persons who have lawful access to the copyright work (in this case, e-Books and the licensed content more generally).¹⁴⁸

¹⁴⁸ See Art. 29A Copyright, Designs and Patents Act 1988 and, for EU law, see Art. 3 and 4 Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market ('CDSM Directive') (2019) OJ L130/92.

The legislation also provides that this exception shall not be overridden by contracts, namely any clause purporting to prevent or restrict such a use would be unenforceable.¹⁴⁹ Irrespective of the enforceability of the clause, its inclusion carries the risk of a chilling effect on risk-averse libraries that may desist from benefitting from rights granted to them by the legislation. Prohibition of text and data mining is commonly witnessed in the academic sector, mostly as a result of the desires of publishers and repository owners to exploit the licensing of data mining to third parties – as illustrated by the launching of Elsevier’s Entellect platform.¹⁵⁰

PRICING

Information on pricing in the contracts is sparse for several reasons. Transactions for individual titles appear to take place within the aggregator/publisher platform where pricing and licensing terms are listed in a ‘marketplace’ area of the platform that is not accessible to readers. It is here that librarians can license titles for e-Lending, rather than in the written contract. Commercial confidentiality is another impediment to penetrating opacity on pricing information. For example, UKT7 defines commercially sensitive information as: ‘All information regarding pricing and incentive’ (UKT7). As such, this information is subject to confidentiality clauses and is also generally exempt from FOI disclosure. In some cases there is a contractual obligation that the library/local authority will act reasonably and proportionately, to ‘protect the Supplier’s legitimate commercial interests and trade secrets’ (UKT7).

A particularly rich example of secondary sources of information on contracts, including databases detailing pricing and licensing terms for e-Book titles, is the #e-BookSOS Campaign e-Book price database.¹⁵¹ This database supports the findings from the interviews and also the analysis of some contracts that academic textbooks are often licensed differently to other types of e-Book content, both in respect of the terms and conditions of the licence and in respect of the pricing of titles deemed to be textbooks. In this market, it is reported that it is common for listed e-Book prices to be 10 or even 20 times the price of the print title. This study’s researchers were permitted access to trade book pricing information for individual titles in one of the markets under study. These were accessed on the condition of non-disclosure of any granular detail of the agreements, but this material provided an instructive sense of pricing differentials between print copies of books and the same titles in e-Book format. Here, the discounted price offered for e-Books was on average around 2.25 times more expensive than the discounted price offered for the print version of the same title. This suggests that the pricing dynamics in the trade e-Book market are very different from those seen in the academic sector.

TRANSPARENCY OF USAGE DATA

Another recurring theme in the study interviews suggested that access to reader usage data was often difficult to obtain. This presents obvious difficulties to libraries in respect of evaluating whether prices levied on e-Books represented value for money and whether collections were meeting the readers’ needs. Indeed, some respondents suggested that publishers and platforms were able to utilise usage data when setting prices for content. This extended beyond pricing, and it was suggested that suppliers employed such data when deciding which content should be included in bundles, which content should be available for purchase on a title-by-title basis,

¹⁴⁹. Ibid Art. 29A(5).

¹⁵⁰. SPARC, ‘Landscape Analysis – The Changing Academic Publishing Industry – Implications for Academic Institutions’ (SPARC, 2019).

¹⁵¹. #e-BookSOS, ‘Resources’, (academicbookinvestigation.org, 2022) <https://academicbookinvestigation.org/resources/>.

and which content should not be made available for the purposes of e-Lending at all. This recurring complaint that transactions between libraries and suppliers are opaque from the library perspective was viewed by respondents as problematic information asymmetry.

In this respect there is an area of disconnect between library professionals' accounts and the terms of many of the contracts gathered for this research. While some agreements contain no mention, or only an obliquely-implied obligation to provide usage data to libraries, major trade book platform agreements include clauses on supplying usage data to libraries, e.g.: (PUBLISHER REDACTED) will make usage data reports on the Subscriber's usage activity available as described at (WEBSITE REDACTED). (POA6)

Indeed, there is evidence of formalised efforts by suppliers to improve the availability of meaningful usage metrics to libraries in Poland, Republic of Ireland and the UK. For example, academic contract UKA1 states that the supplier will provide usage data in accordance with an established code of practice:

／ **...at least monthly (and otherwise promptly on request by the Institution), provide the Institution with usage statistics fully compliant with the current version of the (COUNTER) Code of Practice. (UKA1).**¹⁵²

Codes of practice are increasingly being employed as a corrective lever in other copyright-intensive industries, such as music and television production. In the library sector efforts have been made to initiate market-led solutions that 'promote constructive relationships and the upholding of mutual interests between libraries and publishers in the e-Book space, as well as to uphold the interest authors have in reaching new readers'.¹⁵³ The efficacy of such initiatives in improving transparency and correcting information asymmetry that is a reported feature of e-Lending markets remains open to question.

SUMMARY OF EMPIRICAL FINDINGS

This component of the study set out to interrogate key aspects of how e-Lending markets function, by engaging with library practitioners in four European markets (Denmark, Poland, Republic of Ireland and the UK), and by examining the licensing agreements upon which these markets are constructed.

e-Lending has existed in some form in academic and public libraries for over 20 years, and the Covid-19 crisis had a catalytic effect in accelerating library demand for e-Book content. The picture of markets for e-Books that emerged at the time of the empirical research in 2023/24 is complex and inconsistent. In some respects, these can be said to be functioning markets, in the sense that academic and public libraries in all of the territories are able to provide some form of e-Lending offering to their patrons. But these markets are also characterised by a palpable and widespread dissatisfaction of participants in the library sector who are mandated to increase public knowledge, which includes delivering e-Lending services to their patrons. In the digital context, libraries are required to assemble and develop e-Book collections through licensing agreements with publishers and digital platforms. The experiences of library professionals reported here are in many ways at odds with how they can, comparatively unproblematically, build collections for print books.

¹⁵² See COUNTER, 'COUNTER Code of Practice 5.1.0.1' (CounterMetrics, 14 January 2025) <https://cop5.countermetrics.org/en/5.1.0.1/00-foreword.html>.

¹⁵³ e-Book Pledge (2024) 'About' <https://www.eBookpledge.org/about/>.

The research identified three related recurring elements to this discontent among library stakeholders and their representative bodies. An overarching issue relates to that of market structure and the perception that powerful rightsholders and digital platforms wield excessive power in e-Lending markets. The reasons for this are manifold, but a central factor often cited are the disparities between how the law accounts for the lending of print books and e-Books respectively. In practice, this creates markets for e-Book lending where rightsholders and platforms enjoy considerable power in setting licensing terms, including whether to make e-Books available for lending at all, and also in dictating prices for authorised access to e-Book content.

In this context, this section of the report offers evidence of potentially problematic conduct around the activities of powerful suppliers within these markets in respect of how they engage with libraries. The interview and contract research, coupled with other secondary sources, revealed problematic issues pertaining to suppliers' capacity to influence licensing terms and conditions, along with their ability to dictate pricing. This includes some evidence of practices such as refusal to license particular titles for the purposes of e-Lending, and licenses offered on a 'take-it-or-leave-it' basis. Bundling of content is also a feature of e-Lending markets, particularly in the academic library realm, which leaves libraries dangerously exposed to discontinuity of service when key titles are removed from bundles. Suggestions of excessive pricing for specific e-Book titles and bundles, compounded by opaque data sharing, have been said to result in a pronounced information asymmetry between suppliers and buyers. However, it is crucial to note that the study's interviews and contracts analysis also gained insights into markets that are somewhat more harmonious and equitable than some voices would have it. For example, there is evidence of contractual obligations on the part of publishers and platforms to provide libraries with meaningful usage data in accordance with industry codes of practice. Similarly, some interview respondents articulated the sentiment that e-Lending markets are incrementally evolving in more positive ways as markets for e-Books mature, and as e-Lending becomes a more established component of these markets. Overall, publishers' and platforms' practices in respect of e-Lending remain challenging for libraries. The following section offers an analysis of seven potentially harmful practices identified by the empirical research under competition law: refusals to supply e-Books to libraries; withdrawals of e-Books from existing catalogues; bundling of titles; unfair terms (restrictive licensing conditions); excessive prices; limitations on text and data mining; and lack of transparency in usage data.

2: COMPETITION LAW ANALYSIS

This section applies a competition law lens to the evidence from the semi-structured interviews and contracts scrutinised. The gap left in copyright law with regards to e-Lending has enabled a continuous commercialisation of access to e-Books in libraries, creating a tension between publishers and aggregators' commercial incentives and libraries' public service objectives. Advocates and scholars have pointed to market failures as well as certain practices by publishers and aggregators which endanger the sustainability of libraries' collections, at times suggesting there may be scope for competition law intervention.¹⁵⁴ This section considers whether the practices by publishers and aggregators can be addressed through the application of competition law. It reviews the evidence gathered from the semi-structured interviews and contract analysis, to provide indications about relevant market definition, economic power, and possible anti-competitive practices.

Economic Activity

EU competition law applies to 'undertakings', rather than to companies or firms. This was a conscious decision by the drafters of the provisions, to broaden the scope of the law beyond those entities recognised as 'companies' in corporate law, to catch organisations which may influence market activity and distort competition regardless of their legal or institutional status. Competition law, and particularly Article 102 TFEU (the abuse of dominance provision) applies to distortions of competition caused by *undertakings*. Thus, it is vital to determine what is an undertaking (and what is not). Undertakings are those entities engaging in economic activity – regardless of the way they are organised, their legal status,¹⁵⁵ or even whether they make a profit or have a profit motive as such.¹⁵⁶ Economic activity consists of offering goods or services.¹⁵⁷ Since this could catch a broad range of activities and actors, there are two exceptions. First, where the activities are connected with the exercise of prerogatives of a public authority, they will not be considered to have an economic character.¹⁵⁸ These activities are 'task[s] in the public interest which form part of the essential functions of the State' and are connected 'with the exercise of powers... which are typically those of a public authority'.¹⁵⁹ Second, where social activities are provided on the basis of solidarity, they will be considered inherently uncommercial. Solidarity is the 'involuntary subsidisation of one social group by another'¹⁶⁰ (such as contributions proportionate to income resulting in identical benefits).¹⁶¹

¹⁵⁴ E.g. Martin Paul Eve, Jon Tennant and Stuart Lawson (2016) Referring Elsevier/RELX to the Competition and Markets Authority; IFLA, 'Long Read: Competition and Libraries' (IFLA, 3 February 2020) <https://blogs.ifla.org/lpa/2020/02/03/long-read-competition-and-libraries/>; IFLA, 'Libraries as Consumers: Potential for Protection?' (IFLA, 8 December 2020) <https://blogs.ifla.org/lpa/2020/12/08/libraries-as-consumers-potential-for-protection/>; IFLA, 'Is the Library e-Book Market Working? Identifying Areas for Further Investigation' (IFLA, 26 May 2020) <https://blogs.ifla.org/lpa/2020/02/03/long-read-competition-and-libraries/>.

¹⁵⁵ C-41/90 Höfner and Elser v Macrotron GmbH (1991) EU:C:1991:161, para 2; Joined Cases C-180/98 to C-184/98 Pavlov and Others (2000) ECLI:EU:C:2000:428, para 7.

¹⁵⁶ For example, nonprofit-making medical aid organisations such as the Red Cross, which provided ambulance services for remuneration, were found to be undertakings in C-475/99 Ambulanz Glöckner v Landkreis Südwestpfalz (2001) EU:C:2001:577, paras 91-21.

¹⁵⁷ Case C-128/21 Lietuvos notarų rūmai v Lietuvos Respublikos konkurencijos taryba (2024) EU:C:2024:49, para 56.

¹⁵⁸ Ibid, para 61.

¹⁵⁹ Case C-343/95 Calì e Figli (1997) EU:C:1997:160, para 23.

¹⁶⁰ AG Opinion in Case C-70/95 Sodemare v Regione Lombardia (1997) EU:C:1997:301, para 29.

¹⁶¹ E.g. Cases C-159/91 and 160/91 Poucet v Assurances Générales de France (1993) EU:C:1993:63.

It is important to note that the same entity may be considered an undertaking when exercising some of its activities, but not when engaging in others. The undertaking is a functional concept: according to the Court of Justice, 'The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity'.¹⁶²

The actors covered in this report are very likely to meet the definition of an undertaking. e-Book suppliers not only operate at a profit but engage more broadly in the economic activity definition which brings them within the scope of competition law. As it is e-Book suppliers whose conduct is being considered, it is not vital to determine whether libraries are engaged in economic activities to determine whether the provisions apply in the first place. There is a question, nonetheless, about their commercial nature in the downstream markets – that is, the services provided by public libraries and academic libraries.¹⁶³ This is not a question about the applicability of the provisions to the suppliers, but rather raises the issue of the impact of their actions on competition itself and on the extent to which it is necessary to balance the public service obligations of libraries with their own provision of services which may be considered economic in its own right.¹⁶⁴ Competition authorities can intervene even in public markets, where there may be a degree of public money invested or public policy objectives.¹⁶⁵

Article 106 TFEU stipulates that undertakings entrusted with the operation of 'services of general economic interest' shall be subject to competition law, 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.¹⁶⁶ These are services which the public authorities believe need to be provided for all, even where private economic actors (the 'market') may not have incentives to do so.¹⁶⁷ Competition law does apply to them, but its application may be limited where it detracts from their essential function.

It is important to note at the outset, however, that, although the provision of e-Books to libraries is a clear commercial activity with competitive dynamics, the commercial nature of the downstream markets (provision by libraries of services to readers) is more complicated. This question does not have to be answered conclusively to reflect on the abusive nature of the conduct of publishers and platforms (particularly where the conduct is considered exploitative), but it could be relevant to establish the harm some conduct may be causing to competition on downstream markets (particularly when considering exclusionary conduct).

¹⁶² Case C-49/07 MOTOE (2008) EU:C:2008:376, para 25.

¹⁶³ On the question of whether universities are 'undertakings' for the purpose of competition law, the answer will likely vary depending on the circumstances. In the context of the freedom to provide services, the Court of Justice made a distinction between higher education institutions financed out of public funds, and those seeking to make an economic profit and which are financed out of private funds, particularly payments made by students or their parents (Case C-109/92 Wirth v Landeshauptstadt Hannover (1993) ECLI:EU:C:1993:916). The Court determined that the organisation of remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment (Case C-153/02 Neri v European School of Economics (2003) ECLI:EU:C:2003:614 para 39). These are not competition law cases, and therefore their interpretation is useful but should be considered with caution in the competition law context.

¹⁶⁴ In *Ambulanz Glöckner*, the Court of Justice noted that 'Public service obligations may, of course, render the services provided by a given medical aid organisation less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities.' (para 21).

¹⁶⁵ OFT1214, Choice and Competition in Public Services (March 2010) https://webarchive.nationalarchives.gov.uk/ukgwa/20140402142426/http://www.offt.gov.uk/shared_offt/business_leaflets/general/oft1214.pdf.

¹⁶⁶ Article 106(2) TFEU.

¹⁶⁷ European Commission Communication from the Commission, Services of general interest in Europe, (19 January 2001) OJ 2001 C17/4, para 14.

Where the conduct of e-Book publishers or platforms may cause harm to a downstream market, by reducing the ability of libraries to offer services to their customers and effectively compete with other libraries (or even the publishers themselves), the conduct may fit more neatly within competition law and the enforcement priorities of competition authorities.

Academic Libraries

In universities, especially those charging tuition fees, there does seem to be a commercial activity in the provision of services to students, but it is difficult to say to what extent there is competition between academic libraries or between libraries and others (such as the publishers themselves). When it comes to the research activities libraries enable, the picture is muddled as well.

Whether university activities are commercial is not an easy question to answer.¹⁶⁸ Universities throughout the European Union and the United Kingdom take on different forms. While many countries have chosen to finance universities entirely from the public purse, others have adopted mixed systems. The jurisprudence on this is sparse. In a state aid case, the Commission considered that activities of public universities (and research organisations) in Germany (which do not charge tuition fees) are not economic, as they are intrinsically connected with the exercise of public tasks.¹⁶⁹ However, where tuition fees are charged, universities may be considered to engage in competition law-relevant economic activities.¹⁷⁰ In the UK, where universities do charge tuition fees, the Competition and Markets Authority (CMA) noted in a 2015 policy paper that universities in the UK were actively competing with each other in delivering services to their consumers – the students.¹⁷¹ Further, in the Netherlands, once universities had been given the opportunity by the legislator to charge tuition fees for second degrees, the competition authority was in a position to launch investigations into possible collusion between universities on these fees.¹⁷² When universities engage in research activities, they are generally not considered to be engaging in economic activity, although here the further commodification of higher education institutions may muddy this picture.¹⁷³

¹⁶⁸. See an early piece on the topic: Andrea Gideon, 'Higher Education Institutions and EU Competition Law' (2012) 8(2) The Competition Law Review 169.

¹⁶⁹. EU Commission Decision 2020/391 of 20 September 2019 on the measure SA.34402 – 2015/C (ex 2015/ NN) implemented by Germany for Hochschul-Informations-System GmbH (notified under document C(2019)6836), paras 110-112.

¹⁷⁰. In the Netherlands, universities had been allowed to set their own prices by law since the Wet Versterking Besturing (Strengthening Administration Act) entered into force in 2010. Not long after, complaints of price-fixing were brought against some universities and the Dutch competition authority started investigations (later closed). See <https://dub.uu.nl/nl/nieuws/nma-staakt-onderzoek-naar-amsterdamse-universiteiten>.

¹⁷¹. CMA, 'An effective regulatory framework for higher education: A policy paper' (CMA, March 2015) https://assets.publishing.service.gov.uk/media/550bf3c740f0b61404000001/Policy_paper_on_higher_education.pdf. In the United States, the Department of Justice signed a consent decree with eight Ivy League colleges in 1991: https://www.justice.gov/archive/atr/public/press_releases/1991/325032.pdf. Salop and White discussed why the antitrust laws could apply to them, despite the fact that they are nonprofit institutions involved in education rather than commodities. US antitrust law operates differently from EU competition law (for example in its system of exemptions by Congress for certain services), and universities also have distinct differences, but it is still an interesting discussion. See Steven C. Salop and Lawrence J. White, 'Policy Watch: Antitrust Goes to College' (1991) 5(3) Journal of Economic Perspectives 195. See also the recent class action against colleges (Hansen v. Northwestern University, U.S. District Court for the Northern District of Illinois, No. 1:24-cv-09667).

¹⁷². In 2012, the Dutch Competition Authority (at the time, the NMa) ended its investigation into VU University Amsterdam (VU) and the University of Amsterdam (UvA) after the universities stated they would not coordinate tuition fees for a second college degree with one another nor with other Dutch universities.

¹⁷³. Gideon, 'Higher Education Institutions and EU Competition Law'.

Universities may compete with each other for students, based inter alia on the library services they can provide to them. As such, the conduct of a dominant publisher may in theory affect competition between universities in this downstream market. In addition, exploitative conduct could harm academic libraries in their capacity as the publishers' customers. The conduct of some publishers indicates that, at least when it comes to the supply of textbooks, they consider that academic libraries restrain their ability to sell textbooks directly to students.¹⁷⁴ Although academic libraries are publishers' main customers, it can also be asked whether publishers consider them a competitive threat to their business models.

Public Libraries

We assume, for the purposes of this report, that there are at least potential downstream markets for library services for readers in which competition between libraries might be negatively affected by the exclusionary conduct of a publisher. Even if no such market could be said to exist, however, it may be that the conduct of a publisher is exploitative and harms public libraries as its customers.

Exploitation may be the crux of the problem since, even in the absence of a downstream market in which libraries can be said to compete, the conduct of publishers or e-Lending platforms may restrict the freedom of libraries to manage their collection and determine their offer to readers. If conduct restricts the ability of libraries to provide access to books to their readers, it undermines the libraries' ability to fulfil their non-economic mission.

MARKET DEFINITION

Competition authorities will usually define relevant markets within which to assess the alleged conduct, to act as frames of reference to establish market power and evaluate the feasibility and harm of the alleged conduct.¹⁷⁵ Given the case-specific nature of relevant markets, as well as the limitations of the evidence analysed within this study, it is not possible to arrive at conclusively defined relevant markets. The aim of this study is therefore to point to interesting features and evidence which could indicate lines of enquiry for market definition in this context.

A delineation of relevant markets requires the identification of the focal product: the product offered by the undertaking under investigation which is relevant to that investigation. Antitrust markets will be defined by reference to a particular undertaking which forms the subject of the investigation. More specifically, the market will be defined by reference to a *particular product* offered by that undertaking, which is the product with regard to which the conduct has occurred. Substitutes to this focal product will be included in the market, in order to arrive at the final 'relevant market'. Identifying products and their substitutes is not always straightforward. This is particularly so in the context of cultural goods containing copyrighted material. In the context of books and other publications, the European Commission has previously recognised that substitution between books is inherently imperfect, given differences in the coverage, comprehensiveness and content of publications.¹⁷⁶

¹⁷⁴ See Respondent D1: 'Anecdotally publishers feel like library sales in general cannibalise on print sales, so I think there is this feeling that they would rather be selling directly to students'; Respondent D3: 'And I think equally there's an attempt to kind of move a little bit more to the American model where students are responsible for their own textbooks. So selling directly there. Because libraries obviously are a collective [bargainer] essentially on behalf of an institution. If you can sell to individual departments or better, individual students and academics, I'm sure it's an easier ride'.

¹⁷⁵ Magali Eben, 'The antitrust market does not exist: pursuit of objectivity in a purposive process' (2021) 17(3) *Journal of Competition Law and Economics* 586.

¹⁷⁶ COMP/M.3197 *Candover/Cinven/Bertelsmann Springer*, Commission decision of 29 July 2003, para 13.

This is inherent in most cultural goods containing copyrighted material. The originality of individual creative works, such as book titles, might imply that different titles have low levels of substitution from the perspective of consumers.¹⁷⁷ The Commission does not, however, define consumer markets for books as narrowly as specific titles, but is more likely to define markets based on general categories of books and sometimes, but not always, genres.¹⁷⁸ Moreover, when considering the intermediate customers, such as libraries, rather than final consumers, it is important to consider the acquisition of books as an input to the service they in turn provide to final consumers. The European Commission has previously noted, for example, that the significant demand for academic publications comes from academic libraries rather than individual readers, so that, although individual readers may not switch between different publications, academic libraries will buy a fuller range of publications across different disciplines.¹⁷⁹ The Commission made this reflection within the context of substitution between different disciplinary subjects, but it is of wider significance. The question of substitution becomes important when analysing the evidence in this study below, where the focus is on the perspective of libraries as customers rather than readers as end consumers.

The markets could be defined in various ways, depending particularly on the conduct alleged. The evidence raises some interesting indications for relevant markets.

An important note is that market definition here is undertaken from the perspective of libraries as the customers. Libraries purchase e-Books – or rather access to e-Books through licences – from publishers and aggregators, and bear the cost: they do not usually pass these on to the readers, although library fees may exist in public libraries, and part of the cost of academic libraries may be recouped where universities charge tuition fees. However, libraries also serve others, their patrons – readers of trade books supplied by public libraries, or students, teaching and research staff reading academic books supplied by academic libraries. Their patrons' needs form the main driver for the requirements libraries have when acquiring books. Thus, the wants of patrons influences the wants of libraries in their relationships with publishers and aggregators. For the purpose of this study, it is assumed that libraries' demand is for the supply of books which they can offer to readers. These books can be e-Books or print books, a distinction to which this report returns below in the analysis of substitution.

First, the supply of (e)books should be divided based on academic or public libraries: the supply of academic books to academic libraries is distinct from the supply of trade books to public libraries. The European Commission has previously segmented academic publishing from other types of publishing, particularly considering the differences in content of the publications as well as the considerations of academic libraries as the main customers of academic publications. Furthermore, in its (non-referral) decision on the acquisition by Aragon of OverDrive,¹⁸⁰ the CMA considered that the markets should be segmented based on the type of libraries, as they serve different types of customers and have different specialisms and objectives. There are therefore markets for the supply of academic books to academic libraries, and for the supply of trade books to public libraries. Leaving aside for now whether print books can be substitutes for e-Books, libraries want access to books in digital format in all these markets, although there may be differences in their preferences.

¹⁷⁷. Josef Drexler, 'Copyright, Competition and Development' (Report for WIPO 2013), 7.

¹⁷⁸. E.g. COMP/M.6789 Bertelsmann/Pearson/Penguin Random House, Commission decision of 5 April 2013, para 155.

¹⁷⁹. Candover/Cinven/Bertelsmann Springer, paras 17-18.

¹⁸⁰. ME/6880/20 Completed acquisition by Aragon Parent Corporation (KKR) of OverDrive Holdings, CMA decision of 16 June 2020, paras 62-67.

The respondents in the interviews indicate that the ideal for academic libraries is a form of perpetual and unlimited access, if not outright ownership of the books. For public libraries, the ideal is likely perpetual access. This ideal is not met for either.

Second, a potential further segmentation of markets may be made based on the type of readers served by libraries. This is particularly the case for academic libraries, where there may be a further segmentation based on whether the libraries are part of universities offering free or low-cost tuition, or others (such as in the UK) that are part of universities with higher tuition fees. Some respondents reflected on the increased commercialisation of university studies, which means that students have higher expectations of the level of service and facilities offered, including in the library. The evidence on this is unclear.

Third, although there seem to be broad markets for the supply of books for both academic libraries and public libraries, there may be an additional, more narrow, relevant market for specific categories of books. In the context of academic libraries in particular, core textbooks may form a relevant market in themselves, since substitution for other types of content seems limited. This was a key finding from the interviews: core textbooks are deemed 'must haves', for which teaching staff are unlikely to consider alternatives and students will not have alternatives where teaching staff have included these in their course reading lists. The review of the agreements obtained for this study supports the interview finding that academic textbooks are often licensed on more restrictive terms. A couple of the contracts reviewed set out different types of licenses, depending on the type of content. Moreover, what is categorised as a 'core textbook' is subject to change, and it appears that publishers and aggregators adapt this categorisation (and thus the terms under which titles are offered) based on their intended use by the academic institution. The 'must have' nature of core textbooks may indicate that they form a narrow market, distinct from other academic books.

It is not clear whether a similar conclusion can be reached for bestsellers supplied to public libraries. There are indications that publishers treat bestsellers differently, subjecting them to windowing practices (delaying their offer to libraries or not offering them to libraries at all). The literature has also suggested that there may be a long tail effect in book sales to consumers, with bestsellers taking the largest share of sales early in their supply cycle, although that effect appears less stark for digital formats than for print books. However, this study did not gather evidence on whether bestsellers are considered to satisfy distinct needs from the perspective of public libraries. In its *Bertelsmann/Pearson/Penguin Random House* decision, the European Commission considered that bestsellers were not a distinct market for the purpose of that decision but had to be considered as a specific sub-segment of the sale of English language books.¹⁸¹ Fourth, the evidence is mixed on substitution between e-Books and print books. Although the demand by libraries is for access to books in digital format, it has to be considered whether the purchase of print books may be a sufficiently attractive alternative that it acts as a competitive constraint on the licensing of e-Books.

The European Commission has previously found that, in retail to consumers, substitution from e-Books to print books is limited. Moreover, the distribution of print books and e-Books entails different investments in infrastructure and production, so there was considered to be little scope for supply substitution.¹⁸²

¹⁸¹. COMP/M.6789 Bertelsmann/Pearson/Penguin Random House, Commission decision of 5 April 2013, para 169.

¹⁸². AT.40153 E-book MFNs and related matters (Amazon), Commission decision of 4 May 2017, para 43; see also Bertelsmann/Pearson/Penguin Random House, footnote 12, paras 142-143.

The weight given to the conclusions in that case should not be overstated, given the particular context of this case – in terms of both the alleged conduct at the time and the fact that the customers were not libraries but consumers, whose preferences may not align with those of libraries.

The CMA has more specifically considered demand substitution from the perspective of libraries. In its *Aragorn/OverDrive* decision, the CMA distinguished print and digital editions of books, believing that there is limited substitutability between them. According to its survey of libraries (the ‘Parties’ customers’) print and digital editions satisfy different categories of readers and have different characteristics. It also noted that libraries would be unlikely to transfer their budget allocation from digital to physical content unless patron demand changed significantly, or the quality of digital content degraded significantly.¹⁸³

This seems to be borne out by this study, although the evidence on substitution is mixed. The interviews with academic library respondents reveal that demand for print books serves different needs and continues in most academic libraries, even as demand for digital copies has increased. The responses could be interpreted as showing that the relationship between digital and print is more one of complements than substitutes, although this seems to fluctuate.

There may be a more nuanced conclusion in the narrow relevant market for core textbooks. The emphasis on e-Books seems to be most significant for core textbooks, to which many students need simultaneous access.

A last question on market definition concerns the geographic dimension and the segmentation of markets along national and/or linguistic barriers. In the context of supplying academic books to *academic libraries*, this may be less pronounced than in the context of supplying trade books to *public libraries*. For disciplines where the main writing language is English, linguistic barriers may be less pertinent, although this is not the case for all disciplines. The answer may be different in the context of supply of trade books to *public libraries*. Although within the context of retail distribution rather than supply to libraries, the Commission has previously considered that linguistic barriers may point to national markets, and that customer preferences are not homogenous across countries, including differences in language and cultural preferences. It also noted that, from the point of view of supply-side substitution, certain e-Book distribution agreements are limited to a single territory. A competition authority could assess whether the same is true in the context of supply to public libraries. Indeed, the picture of supply to libraries is complex: as mentioned above, transnational actors like OverDrive, with a market presence in over 100 countries and 3 million titles in 9 languages, are active alongside national players such as eReolen, serving exclusively the Danish market with around 5,000 titles. This study included an interview with a representative of a major e-Book aggregator, who provided anecdotal evidence that aggregators consider the markets for supply of books to public libraries have evolved differently across different countries.

The relevant markets will have to be determined on a case-by-case basis, in light of the alleged conduct and the evidence available to the competition authorities or courts. The questions raised above are, therefore, limited to suggestions which could be considered in an investigation. Table 5 summarises the possible relevant markets in the academic book/library setting.

¹⁸³. *Aragorn/OverDrive*, paras 50-54.

Defining relevant markets: academic e-Books/libraries	
<p>A relevant market for: e-Books or all books (print and digital)?</p> <p><i>The key issue here is the question of the extent to which the relationship between print books and e-Books is one of substitution, or one of complementarity</i></p>	<p>Interviews indicate some libraries consider that print and digital books satisfy different needs. In other instances, students use them simultaneously, thus prompting academic libraries to purchase both print and e-Books.</p> <p>Competition authorities will need to analyse this further, in light of the specificities of a case, not only from the perspective of demand substitution, but also from the perspective of supply substitution.</p> <p>Nonetheless, the evidence gathered tentatively supports that there may be a distinction between print books and e-Books, particularly when considering the conduct of platforms or publishers which applies exclusively to e-Books.</p>
<p>A relevant market for: distribution to specific customers (type of library)?</p> <p><i>The key issue here is whether different types of libraries might constitute discrete relevant markets</i></p>	<p>Customer segmentation by type of academic library requires further analysis, to assess whether segmentation is possible between different academic libraries based on whether students at these institutions pay (higher) tuition fees. Can/do publishers/platforms discriminate between libraries on this basis?</p>
<p>A relevant market for: a specific category of books: core textbooks?</p> <p><i>The key issue here is the extent to which particular types of books can be considered markets in their own right</i></p>	<p>The evidence indicates that there may be certain categories of books which are subject to particular demand (and also, as shown later in this analysis, treated differently by suppliers).</p> <p>For academic libraries in particular the core textbooks used for teaching may be product markets in their own right, for which other categories of books cannot be substitutes.</p> <p>Thus, there could be a narrow relevant market for core textbooks.</p>

Table 5: Defining Relevant Markets: Academic e-Books/libraries

In the case of trade books/public libraries the findings are more tentative in respect of possible relevant markets as shown in Table 6.

Defining relevant markets: trade e-Books/public libraries	
<p>A relevant market for: e-Books or all books (print and digital)?</p> <p><i>The key issue here is the question of the extent to which the relationship between print books and e-Books is one of substitution, or one of complementarity</i></p>	<p>There may be limited substitution, but this would need further analysis. No conclusion is possible.</p>
<p>A relevant market for: a specific category of books: bestsellers?</p> <p><i>The key issue here is the extent to which particular types of books can be considered markets in their own right</i></p>	<p>A narrow market for bestsellers may be possible, but is less likely. This conclusion is based on secondary literature rather than evidence gathered for this study.</p>

Table 6: Defining Relevant Markets: Trade e-Books/Public Libraries

COMPETITORS AND ECONOMIC POWER

Both publishers and aggregators are competing for demand from both academic and public libraries, although the importance of aggregators may be more significant for public libraries. Publishers and aggregators compete through differentiated offers, though there may be some indications of increasing homogeneity. There is, however, an added complexity in that publishers both compete with and supply to aggregators. In a narrower relevant market for core textbooks, it is likely that fewer players compete, though this would have to be confirmed based on further research into data on the supply of core textbooks.

Establishing Dominance

For competition law to apply to an actor's conduct, and particularly to apply the provision on abuse of dominance (Article 102 TFEU and national equivalents), it is crucial to establish that this actor is in a dominant position. Only the conduct of a 'dominant undertaking' can be abusive. Market power is an essential element in the enforcement of competition law, since it provides its *raison d'être*. Market power exercised collectively or unilaterally can generate social costs, in the form of higher prices, lower output, reduced quality, less variety, and/or slower rates of innovation. This is why competition law addresses harms caused by the (mis) use of market. Competition law principally tackles the use of market power through anti-competitive conduct or its creation or enhancement through mergers, but not its existence as such. Having market power is not illegal – using it incorrectly is.

To apply Article 102 TFEU, it is therefore essential to determine dominance. Dominance means a substantial level of market power. Merely having exclusive supply of a specific product does not amount to market power: having a 'monopoly' in a natural language sense, such as that granted by copyright over a single title, is insufficient.

Instead, there must be sufficient power in a relevant market, which is often larger than a single title. Situations of dominance clearly arise where a firm can act independently from its competitors, not facing appreciable competitive constraints. Such independence is often equated with the economic concept of substantial market power, that is, the ability profitably to raise prices above the competitive level for a significant period of time (although it is important to note that the parameters which can be influenced by a dominant undertaking are broader than merely price).¹⁸⁴

Most Article 102 TFEU cases are brought against a single undertaking which is dominant – ‘single dominance’. Dominance is defined in the EU jurisprudence as the ‘power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers’ on the relevant market.¹⁸⁵ Dominance is established through a variety of factors, but the starting point is usually the analysis of the market position of the undertaking under investigation (and of its competitors), whereby market shares provide *prima facie* evidence of dominance. According to the case law, market shares of 50% and above indicate that there is dominance, which can nonetheless be rebutted through evidence of competitive constraints such as the short-term nature of the high level of market share and the countervailing buyer power of customers.¹⁸⁶ Market shares between 40% and 50% could still amount to dominance, if other factors indicate it, such as barriers to entry or expansion and the low shares of other companies on the market.¹⁸⁷ Market shares can be assessed by looking at the undertaking’s proportion of volume or value of sales in the relevant market.

Although the Market Report in section 2 above indicates the significant size and revenue of companies in the book industry, this study cannot conclusively determine whether aggregators¹⁸⁸ or publishers of trade books or academic books are dominant for the purpose of competition law. Industry statistics available to the authors of this study were limited and inconclusive. Even where industry statistics are available, these do not provide an accurate picture of shares of a specific relevant market as a competition authority would define it. In terms of single dominance thresholds, the shares of the market are essential. These are not necessarily the shares of sales volume or revenue across the whole industry, but may be the shares in a more narrow segment of sales, depending on how the relevant markets in a case are defined. For example, in the case of academic books, where the market is defined more narrowly as being for core textbooks, the number of companies participating in the supply of core textbooks to academic libraries may be smaller than for the supply of all academic books to academic libraries. Thus, industry statistics representing *all* academic books may not be sufficient to establish dominance.

¹⁸⁴. Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, paras 10–11. Despite the guidance’s wording, substantial market power is not only limited to power over prices. It also includes the power to limit output or innovation, to decrease the quality of production, or limit the choice of goods or services. See Communication from the Commission, ‘Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings’ (currently subject to public consultation), para 1 https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en; for example, Google Search (Shopping) (AT.39740) Commission Decision C(2017) 4444 final [2017] OJ C9/17 593 2, paras 168, 321–4; Case T-691/14 *Servier and Others v*

¹⁸⁵. Case 27/76, *United Brands and United Brands Continental v Commission*, EU:C:1978:22, para 65.

¹⁸⁶. C-62/86, *Akzo v Commission*, EU:C:1991:286, para 60.

¹⁸⁷. Guidance on Enforcement Priorities paras 13–18; Draft Guidelines paras 25–32 ; T-219/99, *British Airways v Commission*, EU:T:2003:343, para 211.

¹⁸⁸. In the retail distribution of English language and German language e-Books in the EEA, the Commission found Amazon to be dominant, with a 70–100% and 40–60% market share respectively (E-book MFNs and related matters (Amazon), paras 56–61)

There are several ways in which market shares could be assessed in the different relevant markets identified: in addition to percentages of overall sales turnover,¹⁸⁹ an authority could consider the percentage of the new titles published in a territory,¹⁹⁰ or the percentage of the most cited titles or titles with highest impact factor.¹⁹¹ The proportion of sales of 'must have' titles or bestsellers can also be relevant,¹⁹² either because it is a separate market (as suggested above) or within a more broadly defined market.

The 'big five' publishers of trade books are at times described as the 'dominant publishers in Anglo-American trade publishing'.¹⁹³ Similarly, in academic publishing, this report refers to 4 big players who are often said to 'dominate' the industry: Elsevier, Taylor & Francis, Springer, Wiley. This common language use of dominance does not automatically equate to dominance in the competition law sense, for which market shares above 50% is needed in the relevant markets.

None of the sources found by the authors of this study indicate individual market shares equalling or above 50% of the supply of books. However, most of the sources either combine all formats (physical and e-Books) in their statistics or do not disaggregate based on the type of books (e.g. textbooks or bestsellers) (with some exceptions¹⁹⁴). Given the possibility of narrow relevant markets (such as e-Books as a separate market, or a relevant market for textbooks, or distribution to libraries rather than consumers), the share of sales of all books may not be representative (and may even be too low). Statistics used in past competition cases are, moreover, likely out-of-date given the digital revolution which transformed the industry and introduced e-Books, after these decisions were taken.

In trade publishing, the CMA found in 2021 that Penguin Random House was the largest supplier in the UK, with 20-30% market share.¹⁹⁵ Hachette's shares of supply by value in 2019 were estimated at 10-20%, HarperCollins and Pan Macmillan both at 5-10%, whereas Bloomsbury, Bonnier and Simon & Schuster each had 0-5%. Similar shares seemed to apply for e-Book as for print books.¹⁹⁶ The CMA also indicate shares between 0-5% for OUP, Scholastic and Amazon Publishing.¹⁹⁷

In academic publishing, Elsevier is routinely described as the largest publisher of scholarly and scientific *articles*¹⁹⁸ or academic publishing in general.

¹⁸⁹. COMP/M.2978 Lagardere/Natexis/VUP, Commission decision of 7 January 2004, para 33.

¹⁹⁰. IV/27393 and IV/27394, Publishers Association—Net Book Agreements, Commission decision of 12 December 1988, para 40.

¹⁹¹. Candover/Cinven/Bertelsmann Springer, paras 40-41; Vincent Larivière, Stefanie Haustein and Philippe Mongeon, 'The Oligopoly of Academic Publishers in the Digital Era' (2015) POLS ONE; see also this complaint against journal publishers in the US, which considers the share of peer-reviewed journals and number of citations per journal: Lucina Uddin vs Elsevier, Wolters Kluwer, John Wiley, Sage Publications, Taylor & Francis, Springer Nature, International Association of Scientific, Technical and Medical Publishers, and John Does 1 Through 50 (class action complaint) (12 September 2024) Case No. 1:24-cv-6409, paras 987-98.

¹⁹². Candover/Cinven/Bertelsmann Springer; ME/6916/20 Anticipated acquisition by Penguin Random House LLC of Simon & Schuster, Commission decision of 12 May 2021, paras 30-34.

¹⁹³. John Thompson, 'Trade Publishing' in Angus Philips and Michael Bhaskar (eds) *The Oxford Handbook of Publishing* (Oxford University Press 2019) 249.

¹⁹⁴. See a US study: Albert N. Greco, *The College Textbook Publishing Industry in the U.S. 2000-2022: The Search for Competitive Marketing Strategies* (Springer 2023).

¹⁹⁵. Anticipated acquisition by Penguin Random House LLC of Simon & Schuster, para 2.

¹⁹⁶. Ibid, paras 26-27 – based on Nielsen BookScan and Books and Consumers Data, as well as Parties' responses to requests for information.

¹⁹⁷. Ibid, para 26 – based on Nielsen BookScan and Books and Consumers Data.

¹⁹⁸. Eve, Tennant and Lawson, 'Referring Elsevier/RELX to the Competition and Markets Authority'.

A 2003 decision by the European Commission had confirmed Elsevier as the market leader, though still with market shares of around 25-30% and others with market shares below 5%. Moreover, in addition to being over 25 years old, the decision left the exact market definition open, since a conclusive definition had not been necessary to clear the merger in this case.¹⁹⁹ The UK's competition authority found that together the top six publishers accounted for 44% of journal articles and that 'a merged Elsevier Harcourt would [and now does] account for around a third of UK sales by value'.²⁰⁰ Although single dominance (that of a single undertaking) makes up the bulk of Article 102 cases, there can also be grounds for enforcement where the abuse is undertaken by two or more undertakings who have 'collective dominance'.²⁰¹ Given the many references to oligopolistic tendencies and combined power of the publishers, a case might be made for collective dominance. Although there are variations across countries, studies and industry reports tend to refer to a handful of large publishers in book sales who together account for a large proportion of sales volume, both in trade and academic books.²⁰² Consolidation has been a feature of trade book publishing.

A finding of collective dominance is possible where the undertakings 'present themselves or act together on a particular market as a collective entity' from an economic point of view.²⁰³ This requires examining the economic links or factors which give rise to a connection between them, such as agreements, structural or personal links which make them act as a single entity,²⁰⁴ or the (tacit) adoption of a common policy.²⁰⁵ The Commission suggests this may be the case if there are cross-shareholdings, interlocking directorships or joint ventures.²⁰⁶ It must then be decided whether that collective entity holds a dominant position, following the same factors (including market shares) as for single dominance. It may be more likely that publishers will meet the market share thresholds collectively than on their own, but first it would have to be determined that they act as a collective entity.

The focus on publishers moreover overlooks the presence of intermediaries: in the supply of e-Books, aggregators play an important role, particular in the provision of e-Book access to public libraries. If an aggregator is the main distributor of e-Books, meeting the market share threshold of 50% or more, they could be dominant. Moreover, it is possible to find collective dominance between a producer and a distributor where there are clear relationships and shared interests.²⁰⁷ If such relationships exist between publisher(s) and e-Lending platform, it may be possible to consider that they act as a collective entity.

¹⁹⁹. Candover/Cinven/Bertelsmann Springer, para 38 and para 43.

²⁰⁰. Jim Vickery, 'The Market for Scientific, Technical and Medical Journals: a Statement by the Office of Fair Trading (OFT 369) Interlending & Document Supply, Vol. 31 No. 1, 61-64 <https://doi.org/10.1108/02641610310460745>.

²⁰¹. The European Commission's 'Draft Guidelines on Article 102 TFEU' refer to collective dominance, perhaps indicating a higher willingness to pursue these cases.

²⁰². John Thompson, 'Trade Publishing' in Angus Philips and Michael Bhaskar (eds) *The Oxford Handbook of Publishing* (Oxford University Press 2019) 249; Albert N Greco, *The College Textbook Publishing Industry in the U.S. 2000-2022* (Palgrave Macmillan 2023) viii, xi; Raf Guns, 'Concentration of academic book publishers', *Proceedings of the 23rd International Conference on Science and Technology Indicators* (Centre for Science and Technology Studies, 11 September 2018); Laura Carollo, Statista, 'Publishing houses in France – statistics & facts' (27 June 2024) <https://www.statista.com/topics/6212/publishing-houses-in-france/#topicOverview>; Amy Watson, Statista, 'Book market in Europe – statistics & facts' (29 February 2024) <https://www.statista.com/topics/4062/book-market-in-europe/#topicOverview>; see also the class action complaint brought against journal publishers in the US by Lucina Uddin. Case No. 1:24-cv-6409, para 33 (which suggests that the Publishers against which the complaint is lodged 'own approximately 53 percent of all academic journals').

²⁰³. Cases C-395 and 396/96 P, *Compagnie Maritime Belge* EU:C:2000:132 para 36.

²⁰⁴. *Compagnie Maritime Belge*, paras 44 and 45.

²⁰⁵. *Draft Guidelines on Article 102 TFEU*, 36-37.

²⁰⁶. *Draft Guidelines on Article 102 TFEU*, para 35.

²⁰⁷. Case T-228/97, *Irish Sugar* EU:T:1999:246, para 28.

Moreover, it may be easier to establish dominance for e-Lending platforms in a narrow relevant market of supply of e-Books to public libraries, than to establish single dominance for publishers. On e-Lending platforms, when considering in 2020 whether to refer the Aragon/OverDrive merger for review, the UK's CMA provided estimates of shares of supply of e-Books to public libraries in the UK, noting that pre-merger OverDrive would have 40-50% (to increase to 50-60% post-merger) and Bolinda 30-40% with shares of between 0-10% for other companies.

In assessing the potential power of publishers and aggregators, it is also important to consider barriers to entry. Publishers hold the copyright over many publications. Anyone wishing to set up a platform would need to obtain licences from publishers. This explains why, as one interview respondent noted, aggregator platforms are more likely to have Digital Rights Management (DRM) than publishers' own platforms. In academic libraries, the open access movement may go some way to addressing this, but it is not clear how much effect this has on academic publishing, particularly given the importance of reputation and quality assurances (e.g. institutionalised peer review) in academic publishing.²⁰⁸ Setting up platforms also requires significant investment, which small national publishers may not be able to make. The 'narrow' character of their national academic market was raised by one of the interviewees. However, another respondent noted that there was an increase in national platforms in their country, with almost every national publisher setting up their own platform. A competition authority would have to assess how much of a barrier the set-up of a platform represents. This may differ for wider English language academic publishing versus national academic publishing, as well as when it comes to setting up a platform for public libraries.

Other Types of Economic Power

Dominance (as substantial market power) is not the only form of economic power possible.²⁰⁹ Indeed, some EU Member States have national laws which limit the abuse of relative power.²¹⁰ Whereas market power refers to an undertaking's ability to influence the market (and parameters of competition) as a whole, relative power refers to the power or advantage one undertaking has over another individual (undertaking), such as its customers or suppliers. These are generally situations of economic dependence or superior bargaining positions. In principle such situations are not covered by Article 102 TFEU, despite some early unsuccessful attempts by the European Commission to incorporate them.²¹¹

²⁰⁸. Aileen Fyfe et al, 'Untangling Academic Publishing: A history of the relationship between commercial interests, academic prestige and the circulation of research' (2017) Working Paper 12 <https://doi.org/10.5281/zenodo.546100>.

²⁰⁹. Or Brook and Magali Eben, 'Abuse without dominance and monopolization without monopoly' in Pinar Akman, Or Brook and Konstantinos Stylianou (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar 2023) 259; Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18(4) *Journal of Competition Law and Economics* 795.

²¹⁰. E.g. Germany (§20(1) Gesetz gegen Wettbewerbsbeschränkungen), France (Article L420-2 Code de Commerce), Italy (Article 9 of Law no. 192 of 18 June 1998). The UK does not have such provisions in its competition law, but – in addition to the reference to imbalances of power in contract law and tort law – it can consider structural issues (including issues of economic dependence) within its market studies and market investigations. See this discussion in Chapter 6.06. of Lúcio Tomé Feteira, *The Interplay between European and National Competition Law after Regulation 1/2003: 'United (Should) We Stand?'* (Wolters Kluwer 2016).

²¹¹. ABG/Oil companies operating in the Netherlands (IV/28.841) Commission Decision [1977] OJ L117/1, 9. The CoJ has overturned this Commission decision based on the conduct and remedy analysis rather than on the assessment of dominance: Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and Others v Commission* [1978] ECR 1513; see also Case 75/84 *Metro SB-Großmärkte GmbH & Co KG v Commission* ECLI:EU:C:1986:399, para 86.

However, they may be covered by provisions found in national competition laws or other laws on unfair trading conditions, consumer protection, or torts.²¹²

EU law has expressly made an exception to the harmonisation of EU competition rules for national provisions on unilateral conduct: Regulation 1/2003 explicitly permits stricter national rules on unilateral conduct, meaning that conduct which is not prohibited under Article 102 could, under certain conditions, still be prohibited under national competition rules on unilateral conduct.

This exception is sometimes described as the 'German Clause',²¹³ to express the idea that exception is allowed for such provisions in Germany,²¹⁴ though we now also find provisions in France,²¹⁵ Italy,²¹⁶ and Belgium,²¹⁷ amongst others. Some of these national provisions are enforced by national competition authorities, in a similar manner as traditional investigations under abuse of dominance, whereas others are enforced through the courts or other authorities. The use of economic dependence within national competition laws of different countries presents idiosyncrasies (both with Article 102 TFEU and between Member States) which cannot be fully covered by this report.²¹⁸ Nonetheless, their existence is worth noting since the threshold for power may be different from that required to establish market power, while similar conduct may be covered as under abuse of dominance, such as refusals to supply or terminations of existing supply, tying and bundling, or unreasonable terms. In Germany, for example, the Competition Act²¹⁹ prohibits abuse of dominance in Section 19, as well as abuse of 'relative or superior' power in Section 20. The Act explicitly aligns abusive conduct across the provisions, noting that Section 19 shall also apply to undertakings on which other others (such as suppliers or buyers) depend. This dependence exists where a supplier or buyer does not have sufficient and reasonable possibilities to switch to third parties and there is a significant imbalance in power. There may therefore be an argument to consider e-Lending under national provisions aimed at abuses of economic dependence. A crucial question concerns the harm, however, since several national provisions require that the abuse of dependence has a harm to the functioning or structure of competition on the market. Such harm would need to be clearly articulated in the context of libraries. This need arises in both cases of abuse of economic dependence and abuses of dominance – this study's analysis of abusive practices returns to this question at various stages when discussing abuse of dominance. How broadly or narrowly such harm is construed under national provisions of abuse of economic dependence would, however, likely differ across jurisdictions.

²¹² For an overview, see College of Europe, 'Study on the Impact of National Rules on Unilateral Conduct that Diverge from Article 102 of the Treaty on the Functioning of the European Union' (College of Europe, 21 November 2012) <https://www.scribd.com/document/475401738/National-rules-on-unilateral-conduct-Final-Report>.

²¹³ Or Brook and Magali Eben, 'Article 3 of Regulation 1/2003: a historical and empirical account of an unworkable compromise' (2024) 12(1) Journal of Antitrust Enforcement 54.

²¹⁴ Section 20 of the Gesetz gegen Wettbewerbsbeschränkungen (GWB), 'Statute on Restrictions of Competition' (author's own translation).

²¹⁵ Article L. 420-2, para 2, of the French Commercial Code prohibits abuse of a situation of a customer²¹⁵ or supplier's (involuntary) economic dependence, on the condition that the conduct is likely to affect the functioning or structure of competition. The conduct can include tying, refusals to supply or discriminatory practices described in Articles L. 442-1 to L. 442-3 of the French Commercial Code.

²¹⁶ Article 9 of the Italian Law n.192 of 18 June 1998.

²¹⁷ Article IV.2/1 of the Wetboek van Economisch Recht, 'Code of Economic Law' (author's own translation) prohibits abuse of a situation of economic dependence, where it can affect competition on the market. Abuses can consist of refusals to supply, unreasonable terms, or tying.

²¹⁸ Or Brook and Magali Eben, 'Article 3 of Regulation 1/2003: a historical and empirical account of an unworkable compromise' (2024) 12(1) Journal of Antitrust Enforcement 45.

²¹⁹ Gesetz gegen Wettbewerbsbeschränkungen (GWB), 'Statute on Restrictions of Competition' (author's own translation).

Another expression of economic power which incorporates imbalances in power between actors is that of intermediary or ‘gatekeeper’ power, which has found its way into the Digital Markets Act, and is premised on access to markets rather than a dominant position in a specific market.

This report has referred several times to possible imbalances in power between publishers and libraries, and between e-Lending platforms and libraries, particularly when it comes to the distribution of e-Books to public libraries.

Public libraries seem most likely to be in a weak bargaining position vis-à-vis publishers. One interview with a public librarian conducted for this study indicates that aggregators are more likely to be open to discussion with public libraries about new models of e-Lending, but that there is no real scope for negotiation with publishers, for whom libraries represent only a small proportion of sales. As the prices are mostly set by publishers, according to the respondent, this means that there is no real scope for negotiation on prices. The evidence from interviews indicates that there may also be some concerns around academic libraries’ bargaining position. This is an important finding regardless of how narrowly the market for academic e-Books is defined, and it is of particular pertinence when considering specific categories such as core textbooks. As discussed above, academic libraries are unlikely to find many substitutes for these e-Books. Similarly, they may have less ability to switch away from platforms which offer research sources of essential importance to their staff. One respondent noted the importance of certain publishers – such as Elsevier – for academic libraries, noting that their organisation’s researchers would not allow the library to opt out of Elsevier’s platform. Several respondents reflected on their inability or weak position to negotiate (including C1/C2 and D1), but this was not the experience of all respondents, given that a few did feel there was scope to negotiate with publishers at least, if not with aggregators. These varying accounts might be explained by differences in resources and in the importance of those libraries to publishers as their customers.

Academic libraries and public authorities have tried to address their bargaining asymmetries with publishers and aggregators through consortia-led acquisitions and negotiations of terms and formats (in purchases for academic libraries) and through framework agreements (in purchases of trade books for public libraries). Indeed, in the supply of trade books to public libraries, aggregators may have to negotiate with public authorities rather than individual libraries.²²⁰ Collective bargaining also plays a role for academic libraries. Most respondents referred to consortia and/or national negotiations (with government involvement) which enabled the negotiation of more favourable terms for academic libraries or reduction of transaction costs, but this is an area where more research would be needed.

Although situations of power imbalances are not in themselves sufficient to trigger the application of Article 102 TFEU, they may raise concerns under the national provisions on economic dependence or intermediary power.

²²⁰. As recognised for the UK by the CMA in *Aragorn/OverDrive*, footnote 9, para 36.

Conclusion on Power

Further information is needed to arrive at a conclusion regarding the market power of publishers or aggregators in the supply to libraries. However, at this stage, there may be indications of an existence of situations of dependence or superior bargaining positions. This may not be sufficient to trigger EU competition law, but may open the door for cases under other areas of law or national competition law. Moreover, there is room in the EU jurisprudence to push for more consideration of situations of economic dependence.

ABUSIVE PRACTICES

Having considered possible relevant markets and reflected on the need to establish market power, it is possible to review the evidence for potentially anti-competitive practices. As the evidence has not provided any indications of collusion between publishers or aggregators, or anti-competitive cooperation more broadly, the focus of this section will be on Article 102 TFEU, which prohibits abuse of dominance in EU competition law. Abuse can consist of exclusion or exploitation. Exclusion refers to the foreclosure by a company in a dominant position of other companies from a relevant market, whereas exploitation refers to the direct use of power in a way which disadvantages customers or suppliers. In other words, while exclusion refers to a reduction of competition in the market and corresponding increase or entrenchment of market power (a structural concern, reducing effective competitors, or raising barriers to entry or expansion), exploitation refers to the terms a company can set as the direct result of the existence of limited competition and thus market power. The evidence indicates that there may be practices which raise issues of exploitation and, in the case of academic libraries, exclusion on downstream markets.

Exclusion implies a weakening of competition in a particular market because of the conduct of the dominant undertaking, and thus requires the existence of (at least potential) markets in which competitors are being excluded. A dominant undertaking may affect the ability of its own competitors to remain in the market on which the dominant undertaking operates, but its conduct could also affect the ability of companies to compete in downstream markets in which the dominant undertaking itself does not compete. As explained above, there can be some debate about the existence of such downstream markets for the services provided by libraries. There is also a possible discussion about the extent to which publishers consider that libraries themselves are a commercial threat. For the purpose of this assessment, this report assumes that such competition may exist but returns to the question when discussing the specific abusive practices in the next section.

Even if no competition is affected, the conduct of dominant undertakings can still be harmful, if it consists of conduct whereby the dominant undertaking takes advantage of its market power to exploit its trading partners. Such exploitative abuses harm customers or suppliers. The European Commission has, for the most part, prioritised enforcement against exclusionary conduct, but, as referred to later in this report, there has recently been renewed attention to exploitation.

The next sections will reflect on the practices revealed by the study's empirical findings and scholarship, to consider whether they could fit into the case law on abusive conduct. The report considers seven practices: refusals to supply e-Books to libraries; withdrawals of e-Books from existing catalogues; bundling of titles; unfair terms (restrictive licensing conditions); excessive prices; limitations on text and data mining; and lack of transparency in usage data.

REFUSALS TO SUPPLY: OUTRIGHT AND WITHDRAWALS

There are claims by scholars and advocacy groups that publishers and aggregators limit library access to e-Books, not only through imposing onerous conditions and prices as discussed below, but also by actually denying licences to libraries. A denial to license e-Books altogether could conceivably amount to an outright refusal to supply, if it is proven that the various legal conditions are met, including dominance in the upstream market for the supply of e-Books/licenses to libraries, the indispensability of the licences, and harm within the scope of competition law. Indispensability, in particular, is a high threshold to meet.

Although this report did not gather evidence of these practices, outright refusals to license e-Books to public libraries have been reported in other studies.²²¹ Moreover, reports suggest that not all titles are available for e-Lending, which may be because of publishers' refusals to supply e-Books to libraries or e-Lending platforms.²²² Such outright refusals could be considered under Article 102 TFEU. The analysis of such an exclusionary conduct (and subsequent forcing publishers to supply libraries) would be subject to particularly stringent conditions. In particular, it would have to be shown that such access is indispensable, i.e. that there are no alternatives and no duplication is possible, and that access is necessary for the libraries to remain viably on the market and exert effective competitive constraints. Moreover, in the case of intellectual property rights, it is likely that the refusal impedes the development of a new service. Conceivably, public libraries provide a service which – through their non-economic mission in particular – are distinct from the distribution of e-Books to consumers for profit. It may not fall neatly within the harm to competition, however. Thus, exploitation of customers through unfair conditions may be a more natural fit, to which this study returns below. When it comes to academic libraries, the interviews undertaken in this study provided little evidence of outright publisher refusals to supply e-Books to academic libraries. Nonetheless, some respondents' answers may cautiously indicate a reluctance by publishers to provide certain categories of books or packages of content to academic libraries where they believe it would be more lucrative to sell directly to students or staff, or specific departments or schools, or to sell them as part of packages (an issue this analysis returns to below). This, however, does not appear to meet the thresholds to establish an abusive outright refusal to deal under Article 102 TFEU.

Although outright refusals (where a licence is never granted) were not raised as a concern by academic libraries, there may be more evidence of *terminations of supply*, where there was previous supply. Terminations of supply are a variation on refusals to supply, but they are not subject to the stringent indispensability test to establish abuse. Terminations of supply may be taking place in the various markets of supply to academic libraries.

²²¹ A study focused on Australia found that, for 'the bulk of the years captured, Hachette has refused to license e-books to libraries in the British Commonwealth (though does license them to North American libraries)'. See Millicent Weber, Rebecca Giblin, Yanfang Ding and François Petitjean-Hèche, 'Exploring the circulation of digital audiobooks: Australian library lending 2006–2017' (2021) 26/2 Information Research.

²²² Moreover, reports have suggested that only around 10% of academic titles are actually available as e-Books or that less than half of bestsellers are available as e-Books: Jane Secker, Elizabeth Gadd and Chris Morrison, 'Understanding the value of the CLA Licence to UK Higher Education' (RLUK, July 2019) <https://www.rluk.ac.uk/wp-content/uploads/2019/10/CNAC-Research-Project-Report.pdf>; Statement of the German Library Association (dbv): <https://www.bibliothekverband.de/sites/default/files/2020-12/Report%20on%20the%20State%20of%20Libraries%20in%20Germany%202019.pdf>. Titles may exist in e-Book format but are not made available for e-Lending, which could amount to a refusal to supply a specific category of customers: libraries. A different scenario is that where the title does not exist in e-Book format at all. Publishers may not have been given the rights by authors to create e-Books, or be unwilling to provide such a format.

This occurs in particular in a potential market for the supply of core textbooks: in the form of withdrawal of titles, whereby publishers or aggregators do license the book but then later withdraw the title from the collection to which the libraries have access. This happened in the widely reported 'Wiley case', where large swathes of content were suddenly removed from bundles without consultation with libraries.

The evidence from interviews provides a mixed picture on the withdrawal of titles. Some respondents indicated that the withdrawal of titles is a real challenge for their continued provision of library services to researchers and students. The threat of withdrawals may be particularly critical for core textbooks, on which staff and students rely for the provision of and engagement with teaching, and which they cannot easily forego if they are suddenly withdrawn. Rather than abrupt terminations of service which end the supply entirely, however, it appears that sometimes the withdrawals may be followed by a new offer of the titles under different terms. Two respondents indicated that publishers may withdraw high-use titles in order to offer them in different formats or at more onerous terms later on.

On the other hand, other respondents indicated that the withdrawal of content was either a less prominent issue for e-Books than for journals or that the issue was less prevalent in recent years. It was also noted that the issue is less pertinent for academic libraries within bigger institutions, which, because of their importance as customers and their resources, have more bargaining power. One respondent commented in particular on the Wiley case, noting that the public outcry at their withdrawals had prompted them to reinstate the content. Although this seems to imply that publishers cannot act independently from their academic library customers, caution is advisable here: first, this may not apply to all publishers; and second, it may be that publishers react to the pushback from larger, well-resourced libraries, but that smaller institutions have less bargaining power, as noted above. Public outcry about withdrawals of a large collection of titles, such as in the Wiley case, may lead to reinstatements of titles for all libraries. While this particular respondent indicated that their reaction had caused Wiley to change tack, another interviewee emphasised a more generally weak bargaining position in the face of withdrawals or ad hoc changes to collections by publishers.

Withdrawal of titles could conceivably be framed as refusals to supply existing customers, which would in theory be subject to less stringent requirements than the outright refusal to supply a new customer (which requires showing that access is 'indispensable'). The Court of Justice has held that a dominant supplier 'cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary'. Thus, an abuse may occur where a dominant undertaking refuses supplies to an established existing customer who abides by regular commercial practice, without objective justification, at least where the refusal to supply is disproportionate and operates to the detriment of consumers.²²³

This is particularly the case where the customer has made relationship-specific investments. In the case of e-Book withdrawals, there may be an argument that libraries have invested in the use of a specific platform (including training staff to use the platform and familiarise readers), or that they have made different investments in establishing the contractual relationship with publishers.

²²³ Case 27/76, *United Brands v Commission* EU:C:1978:22, para 182; Cases C-468–478/06, *Sot. Lélos kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton* EU:C:2008:504 para 49.

In the specific context of core textbooks, certain titles may be used across several courses, with reading lists and teaching materials being built around the availability of these titles.

However, to make a case of abusive termination, the harm needs to be framed within the scope of EU competition law, as an exploitative or exclusionary conduct with a link to competition. Moreover, a case of refusal to supply an existing customer is, within the existing jurisprudence, more likely to succeed where there is exclusion rather than merely exploitation.²²⁴ Although the Commission Guidance on Enforcement Priorities states it is required to show that access to the product is objectively necessary for the customers to 'compete effectively on the market', this is easier to satisfy if the dominant undertaking has previously been supplying the product to the customer, and the customer has made relationship-specific investments in order to use the subsequently refused input.²²⁵ In its Draft Guidelines, the Commission appears to emphasise the need for a competitive relationship, by stating that 'dominant undertakings cannot cease supplying existing customers who are competing with them in a downstream market'.²²⁶

It is possible to formulate an exclusionary theory of harm in the context of academic libraries, as a lack of access to the titles they need could impact the ability of academic libraries – and thus universities – to provide a service to their students. If this can be characterised as a 'market' in which they compete with other academic libraries/universities, there may be an exclusionary effect in a market in which the publishers themselves are not present. An argument could be made that academic libraries require the titles for their own commercial activities related to teaching and research. Especially in a relevant market for the supply of core textbooks, the evidence assessed seems to indicate that academic libraries are expected by students and teaching staff to supply these core textbooks as part of the service the university provides. As was explained above, there are few, if any, substitutes for core textbooks: although staff and students may be able to obtain their own individual copies, libraries are reliant on their relationships with publishers to obtain the specific titles they need as e-Books. This lack of alternatives may be a factor in considering the objective necessity of the supply to academic libraries. One agreement scrutinised for this study provides that, in the case of a withdrawal of a title, the customer (the academic library) may substitute the 'withdrawn subscribed titles' with one or more titles of comparable value (ROIA2, schedule 1). This may or may not be feasible for journal titles but, as indicated, is ineffectual for core textbooks if there are no or few alternatives.

In an early case concerning the withdrawal of supply, the European Commission considered that the withholding of supplies by a dominant company operating upstream was problematic, given 'the substantial likelihood of [customer] going out of business as a result of the withholding of supplies', given the dependence of the customer on the supplier.²²⁷ Crucially, however, this withholding of supplies was intended to remove a competitive threat to the dominant company, and so there was a clear link with harm to competition.

²²⁴. Cf cases where the court considered that there was no abuse, in absence of a competitive relationship between the dominant undertaking and customer: Case T-504/93 *Tiercé Ladbroke v Commission* ECLI:EU:T:1997:84, para 130; Case T-155/04 *SELEX Sistemi Integrati v Commission* ECLI:EU:T:2006:387, para 108.

²²⁵. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, paras 83-84.

²²⁶. Draft Guidelines on Article 102 TFEU, para 166(a).

²²⁷. IV/32.279 *BBI/Boosey & Hawkes: Interim measures* Commission decision of 29 July 1987, OJ L 286, 9.10.1987, paras 18-19, 36-43.

Although the harm to competition on a downstream market of university services appears convincing, it may require a broadening of current decisional practices.

The prevalent understanding of a competition problem is one where the dominant undertaking is also present on the downstream market,²²⁸ which is not the case for publishers or aggregators in the provision of university services. Nonetheless, there is a risk to competition between academic libraries, even in the absence of a competitive relationship with publishers. A problem may also arise, as noted above, where the dominant undertaking at least intends to eliminate a competitive threat to itself. This issue of a competitive threat does not seem to apply to academic libraries and publishers in the context of teaching materials. It is left open whether academic publishers may be threatened by follow-on academic research activities. Characterising the harm to libraries solely as exclusion from a market, however, misses the larger harm this conduct generates. Libraries – both academic and public – provide a public service in addition to or instead of a commercial service.

It also has to be considered whether there is an objective justification for the withdrawal. Various agreements obtained for this study contain clauses on the ability to withdraw content. However, the right to remove these titles according to these contracts is not unconditional, but the documents set out 'reasonable grounds' to do so. Moreover, some contracts indicate that buyers may terminate the agreement if the withdrawal means that access to the material is no longer useful (e.g. UKA1). However, the utility of this clause may be limited where libraries cannot turn to alternative suppliers. This seems a particular issue in the case of core textbooks, where, as noted above, substitution may be more limited, so libraries may have no choice but to accept a withdrawal with a subsequent offer on more onerous terms.

Where it is difficult to bring a case under Article 102 TFEU – for lack of market power or harmful conduct within the scope of the Article – it may yet be possible to bring a case under (national) provisions on abuse of economic dependence.²²⁹

Constructive Refusals to Supply: Restrictive Licensing Conditions/Delayed Supply

A withdrawal of titles could be conceived as a refusal to supply subject to Article 102 TFEU, in a flexible development of the decisional practice under this provision. However, this presupposes that the title is no longer supplied to libraries, which does not seem to be the case: respondents indicated that titles may be withdrawn from packages in order to be offered again on different terms as discussed above or, in the case of academic libraries, be offered to students directly. Other studies have also indicated that publishers may be delaying supply to libraries, placing embargoes on e-Lending of new titles.²³⁰ This may make an outright refusal to supply case less fitting, but could open the door to cases of constructive refusals.

We distinguish two such situations, broadly speaking.

²²⁸ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 76, unchanged by the Amending Communication of 2023.

²²⁹ For example under national provisions in Germany, France, Italy and Belgium.

²³⁰ Jenny Kennedy, Rebecca Giblin, Kimberlee Weatherall and Julian Thomas, J. (2020) 'Driven by demand: public library perspectives on the e-Lending market' <http://elendingproject.org/report.pdf>.

First, where the cost for academic libraries increases because the title is offered at a higher price than before. Indeed, one of the respondents emphasised the negative effect on their budget (and thus a raising of their costs) in a situation where a bundle had been purchased with the aim of obtaining a specific title, but a publisher withdrew that title from a bundle, only to offer it later as an individual title with a separate price. This bears the hallmarks of a margin squeeze. However, establishing an abusive margin squeeze requires that the dominant company is vertically integrated, operating both upstream and downstream. This would require a showing of competition between academic libraries and publishers.²³¹

Second, there have been separate complaints about delays in supply of books to *public libraries*, particularly for bestsellers. Such delays could be categorised as constructive refusals to deal, as an expansion of theories of harm in current decisional practice. Although this would be an expansion of current decisional practice, there could be an argument that there is an impact on competition – or, at least – that it constitutes an attempt to eliminate a competitive threat.²³²

Industry groups have raised concerns over windowing practices, and particularly the delaying of the availability of individual titles in libraries. According to the German Library Association (dbv), this practice is particularly felt in the supply of e-Books, which may be delayed for up to 12 months, with some never being made available to libraries.²³³

Practices intended to delay competition have been found to be abusive under Article 102 TFEU, although in different circumstances (e.g. pay-for-delay). Delaying the sale to one set of customers (public libraries) but not another (retailers selling to consumers) may in theory be a discriminatory practice, but the thresholds to bring such a case are high. Bringing this as a constructive refusal to deal would require a rethink of the current decisional practice, but a theory of harm may be constructed to do so. Crucially, it seems that, in its future approaches, the European Commission will clearly distinguish constructive refusals from outright refusals,²³⁴ so that no indispensability needs to be shown.²³⁵ The Draft Guidelines may also be more flexible in the harm which needs to be shown, given the references to delays or degradations of existing supply through unfair access conditions.²³⁶

There are some indications that these delays are intended to remove a competitive threat, at least in a broad sense. With regard to academic e-Books, a publisher may withdraw a textbook which is considered essential for teaching, in order to supply it directly to students. With regard to trade books, as has been reported, publishers claim that the availability of e-Books in public libraries will negatively impact sales of books to consumers since they can access the books for free in libraries. As discussed earlier in this report, there is no conclusive evidence of this cannibalisation of sales.²³⁷

²³¹. See discussion on economic activity: academic libraries.

²³². Cf in BBI/Boosey & Hawkes (n 160), where theory of harm was deemed as intention to remove a competitive threat to the dominant undertaking.

²³³. dbv, 'Report on the State of Libraries in Germany 2019' (German Library Association, 2020) <https://www.bibliothekerverband.de/sites/default/files/2020-12/Report%20on%20the%20State%20of%20Libraries%20in%20Germany%202019.pdf>.

²³⁴. And restrictions on access more broadly, see Draft Guidelines on Article 102 TFEU, para 163.

²³⁵. Draft Guidelines on Article 102 TFEU, paras 163-166.

²³⁶. Draft Guidelines on Article 102 TFEU, para 166.

²³⁷. A recent study found that, in fact, they may increase sales in certain circumstances. See Paul Crosby, Tessa Barrington, Airlie Lawson, and Rebecca Giblin, *Untapped Potential: Results from the Australian Literary Heritage Project* (October 2024) <https://law.unimelb.edu.au/news/ipria/untapped-potential-results-from-the-australian-literary-heritage-project>.

However, if accurate, this threatens the main source of revenue for publishers (which, it is important to reiterate, differs from the situation of academic books, where libraries are a key source of revenue). By delaying the provision of books to public libraries, publishers may intend to protect their most lucrative sales. Regardless of the actual evidence on cannibalisation, the delays may aim to eliminate a perceived competitive constraint.

BUNDLES

Advocacy and industry groups have raised concerns about the lack of control libraries have over the content of bundles, which may include titles the library does not want. There seems to be a relationship with the issue of windowing raised above.

The forced acquisition of bundles may be an issue within the remit of EU competition law, forming a potentially abusive tie, where a powerful undertaking forces its customers to acquire a product they do not want (to purchase from this undertaking) in order to obtain the product they do want. Companies may do this in order to leverage their market power from one market to another. Under that logic, there may be a relevant problem if publishers or aggregators are tying titles academic libraries do not want to the essential titles they do desire to purchase.

Here too, the interviews with academic libraries conducted in this study generated mixed evidence on whether bundling is a problem academic libraries face.

Although some librarians' assertions that they have a choice might lead one to believe there is no case for tying, other respondents' reflections indicate they do face this challenge. Some respondents commented on their inability to purchase specific titles as standalone products rather than in a bundle, expressing dissatisfaction at having to buy a package when they only want certain titles. One participant expressed a strong opinion that bundles are the least desirable option, pushing libraries to pay for titles they do not need in order to get access to those they do need. Interestingly, this respondent seemed to note this as a particular issue with new editions of textbooks, and that this is an issue particularly on aggregator platforms. The respondent also opined that publishers may adopt this strategy to ensure that students or law schools pay for the textbooks first (as individual consumers) before they become available for free in the university library. This is a rationale which sounds similar to that claimed for trade book publishers' delay of sales to public libraries.

In the trade book setting, bundles are a common feature, as it appears that public libraries assemble e-Book collections by selecting titles from an aggregator's extensive catalogue in a marketplace area of their platform. This study did not gather sufficient evidence to reflect on the desirability of bundles for public libraries.

UNFAIR TRADING CONDITIONS

The study found that the range of licensing models varies according to the type of content being accessed, with academic textbooks in particular being licensed on more restrictive terms than other types of content, such as research monographs.

Unfair trading practices may breach Article 102 TFEU, and particularly 102(a). They can be exploitative, but they can also generate foreclosure effects and thus amount to exclusionary conduct. The focus in abuse cases has been on exclusion, at least since 2003, yet unfair terms are also problematic when they are exploitative, even in the absence of exclusionary

effects. What is covered is the fact that the dominant company can take advantage of its market power to exploit its customers (or other trading partners such as suppliers). This is addressed for the harm to customers for their own sake, not for the foreclosure effect it may generate. Although the conduct is the same – unfair terms imposed on customers – whether the harm is exclusionary or exploitative matters greatly, as they are treated differently as a matter of legal tests. As exclusionary abuses, there are different legal tests (under margin squeeze or refusal to supply) and foreclosure. As exploitative abuse, terms are unfair when they are disproportionate²³⁸ and not absolutely necessary for the attainment of the dominant company's legitimate objectives.²³⁹ In an exploitation case, there is no need to show a potential for foreclosure. That being said, it is possible for a competition authority to refer in a decision both to the exploitative and exclusionary character of the terms set by a dominant company.

There has recently been renewed attention to exploitation and unfair trading conditions in particular. In the recent *Apple music streaming*²⁴⁰ decision, the Commission expressly referred to Article 102(a), bringing a case of abuse based on unfair trading conditions. The Commission was very clear: the jurisprudence gives it the ability to go after conduct which is abusive because it 'cause[s] harm directly to other undertakings, irrespectively of whether these undertakings compete with the dominant undertaking or not'.²⁴¹ This decision contained both exclusionary and exploitative characterisations of the conduct, but in its final decision the exploitation theory of harm increased in importance. The Court of Justice also recently delivered a preliminary ruling in the *German Face-Book ('Meta Platforms')* case, which concerned the imposition of unfair data collection terms and conditions on social network users.²⁴² Advocates have raised concerns that the offers on which e-Lending to libraries takes place have become increasingly restrictive.

In the context of public libraries, a particular concern has been the steady disappearance of perpetual access licenses for trade e-Books.²⁴³ It is unclear whether this shift away from permanent licenses originated from an intention to reduce costs for libraries – as some publishers claim.²⁴⁴

However, the disappearance of perpetual access has brought about sharp spikes in costs incurred for 'replacement copies' – namely, the cost associated with renewing a licence once it expires – and has made it challenging for libraries to build stable collections.²⁴⁵

Moreover, the delays in supply of e-Books to libraries, mentioned above under constructive refusals to supply, may not obviously generate exclusionary effects, but arguably disadvantages libraries directly and their readers indirectly. In the context of academic libraries, the interviews reveal that the current offer does not satisfy the demand of libraries. The ideal of unlimited, unrestricted, perpetual access to e-Books is not being satisfied.

In its recent *Apple music streaming decision*, the Commission set out the conditions, inferred from the case law, for determining that unfair trading conditions are an exploitative abuse under Article 102(a). They stated that the trading conditions must be:²⁴⁶

²³⁸. *Duales System Deutschland* [2001] OJ 1166/1, para 11.

²³⁹. *Case C-127/73 BRT v SABAM* EU:C:1974:25, paras 9-11.

²⁴⁰. *Case AT.40437 – Apple – App Store Practices (music streaming)*, Commission decision of 4 March 2024.

²⁴¹. *Ibid*, para 524.n

²⁴². *Case C-252/21 Meta Platforms, Inc. and Others v Bundeskartellamt*, ECLI:EU:C:2023:537.

²⁴³. Urban Libraries Council, 'Top e-Content Publishers Are Taking "Dangerous Step Backwards" with New Pricing

²⁴⁴. Andrew R Albanese, 'Penguin Random House Changes Library e-Book Lending Terms' (Publishers Weekly, 4 September 2018).

²⁴⁵. Andrew R Albanese, 'Frankfurt Spotlight: Library E-books Have Leveled Up' (Publishers Weekly, 14 October 2022).

²⁴⁶. *Case AT.40437 – Apple – App Store Practices (music streaming)*, Commission decision of 4 March 2024, para 529.

1. imposed by a dominant undertaking on its trading partners,
2. unfavourable or detrimental to the interests of that undertaking's trading partners or of third parties, including consumers, that are affected by the trading conditions imposed by the dominant undertaking, and
3. not necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose, in that they go beyond what is strictly necessary to achieve it.

In this decision, the Commission also affirmed that it is not necessary 'to consider whether the object or effect of the dominant undertaking's activities was to restrict competition between undertakings within the internal market. Rather, it is sufficient that the trading conditions in question affect parameters of competition such as price, choice, quality or innovation to the detriment of the interests of (or, in other words, harm), the dominant undertaking's trading partners or third parties, including in particular consumers'.²⁴⁷

It would be up to a competition authority to assess whether these conditions are satisfied in the context of public libraries and academic libraries, but there are preliminary indications of potential issues when reviewing the evidence provided by industry groups supplemented by the evidence gathered in this study.

Considering condition 2, the terms imposed by publishers are evidently unfavourable to libraries, as they fall short of the ideal of perpetual access which is required for a sustainable collection. In the context of academic libraries, this has an additional impact on their ability not only to support further research activities (which provided the input to the books in the first place), but also to supply the teaching materials needed for the service universities provide to students.

The consideration of condition 3 is challenging within this study, as it requires an evaluation of the reasons given by publishers for their restrictive terms, an assessment of whether it is a legitimate objective, as well as a judgment on the proportionality of the terms in achieving that objective. The delay in supplying e-Books to public libraries has ostensibly been justified by the negative impact e-Lending may have on publishers' sales – an argument which has been questioned in the literature, but which is difficult to verify in this study.²⁴⁸

A competition authority would be in a better position to gather the data needed to confirm or deny this 'substitution' effect. In any case, this argument would not hold in the context of academic libraries, as they are themselves an important driver of demand for academic works.

This study also included an interview with an aggregator. Although the single number makes it difficult to draw clear conclusions that are representative of the industry, it provides anecdotal evidence that publishers have become more restrictive, at least in the terms they allow aggregators to offer, because of a fear that the traditional business models will be disrupted.

EXCESSIVE PRICING

Excessive prices may also breach Article 102 TFEU, particularly 102(a). The reluctance to pursue exploitative conduct also applies to excessive pricing, although national competition authorities have continued bringing excessive pricing cases even after 2003.

²⁴⁷. Ibid, para 530.

²⁴⁸. See above section 2; also see Matulionyte, 'Lending e-Books in Libraries' 275.

Moreover, at EU level the reluctance to pursue excessive pricing cases has translated into a lack of findings of infringement, but has not stopped the European Commission from using commitment decisions and other less formal means to address high prices.²⁴⁹ The agreements consulted as part of this study provide little insight into the pricing of e-Books for either public libraries or academic libraries, as discussed in the section on pricing above. However, some data was made available relating to platform access fees and/or particular content packages, i.e. bundles of content, as well as lump sums lodged by libraries with suppliers to be allocated to libraries' usage of digital content. Moreover, secondary sources exist on contracts, including databases detailing pricing terms for e-Book titles. Although these results would have to be verified by a competition authority, the #e-BookSOS Campaign e-Book price database reveals that the prices at which the e-Book versions of textbooks are offered are reportedly 10 to 20 times the price of the print title. These disparities on price seem less pronounced in the context of trade e-Books supplied to public libraries, at least as far as can be deduced from the evidence analysed for this study, although there is anecdotal evidence of concerns raised by public libraries about prices too.²⁵⁰

Moreover, while the concerns outlined above focus primarily on the price of e-Book formats compared to print format, the prices of academic textbooks in e-Book format are higher than those for other types of e-Book content. This concern about the prices of academic e-Books was affirmed by the interviews we conducted with academic libraries.

The interviews revealed an overarching concern about the sustainability of the access to knowledge objective to which academic libraries contribute, given the rise in prices of e-Books but, even more importantly, of journals. Respondents were in agreement that prices for e-Book content were high and appear to be trending in an upwards direction. As many respondents noted, prices of e-Book content are going up, at a time when budgets are declining for many. However, some respondents referred to their ability to negotiate prices with academic publishers individually, indicating that publishers were willing to adapt to libraries' needs or pricing concerns, although this experience is not uniform across all libraries. Moreover, consortia may provide a counterweight to publishers' pricing power, as mentioned above.

Concern about e-Book prices seems particularly crucial for core textbooks, where academic libraries have less ability to switch. As one respondent put it, when texts are considered essential for teaching by staff and students, 'It's very hard just to offer people alternative titles, and publishers have always known this, which allows them to set their costs. I think broadly, academic publishing, the cost is set at the point that the market can bear, not at what would be some objectively fair cost for content'. Academic libraries which form part of bigger, better-resourced universities, may pay even when prices are very high, and absorb the costs elsewhere.

²⁴⁹. E.g. COMP/39.592 Standard & Poors, Commission decision of 15 November 2011; COMP/38.636, Rambus, Commission decision of 9 December 2009; AT39816, Upstream gas supplies in Central and Eastern Europe (Gazprom) Commission decision of 24 May 2018; AT.4039 Aspen, Commission decision of 10 February 2021.

²⁵⁰. For the US, see Susan Haigh, 'Libraries battle publishers over e-book prices' (Star Advertiser, 12 March 2024) <https://www.staradvertiser.com/2024/03/12/breaking-news/libraries-battle-publishers-over-e-book-prices/>.

The EU jurisprudence on excessive pricing has struggled to come up with a clear and uniform measure to determine when a price is excessive. Moreover, it is not sufficient to prove high mark-ups for a price to be declared abusive. If the price is indeed 'suspiciously high' – which can be the case if the profit margin is high – it still has to be determined that the price is unfair. This unfairness is meant to ascertain whether there are legitimate reasons for the high margins. This may be done by comparison to competing products and by considering the value of the product to its customers.

A concept which appears repeatedly in the limited decisions and judgments is that a high price may be justified if it reflects the 'economic value of the product'. Despite the debatable economic grounding of this concept, it would be remiss not to consider whether a digital format presents any features which distinguish it from print formats and may make it a more valuable product to customers.

It is worth assessing whether a digital format provides benefits which justify its price tag to customers (in this study, libraries). This cannot be done conclusively in this study. However, based on the interviews conducted, the following observations can be made. Most respondents noted that e-Book prices are going up, and there seems to be a general concern about these increases. It was raised that purchasing e-Books may nonetheless bring cost benefits in other forms, since libraries save on physical costs. This may raise the question whether the e-Book price is justified by the added value this format brings, in terms of cost savings or the durability of a digital copy compared to a physical copy. Indeed, it is frequently argued in secondary literature that publishers create restrictions on the offer of e-Books in order to replicate the 'physicality' of print books, including the wear and tear and degradation of print books which digital versions do not experience. However, it is important to critically consider to what extent these factors explain the prices charged for library access to e-Books. First, it can be questioned whether this artificial replication of 'wear and tear' also applies to academic texts, particularly to core textbooks which are frequently updated. Moreover, stocking e-Books brings costs that are not present when managing print books only, such as the costs of managing e-resources and the technical expertise required by library staff. Moreover, e-Book licences may have to be renewed regularly, increasing these costs.

However, although most respondents felt that prices were high, not all of them were sure they were necessarily unreasonable. One respondent noted that their institution purchased e-Books on campus licences, allowing multiple students to use the title at any time, remarking that, if many students use the e-Book, the price may be justified. It is not clear at this point how well related usage is to price. This highlights the importance of clarity on usage, to which we return below.

Moreover, in the context of textbooks, there may be a question whether demand is reasonably related to the price. Arguably, the demand for core textbooks is higher than for other teaching and research texts. However, there is no agreed definition of a textbook: publishers seem to price textbooks based on usage, even offering texts first as monographs at a particular price or under particular conditions but later re-categorising them as textbooks in light of high usage.

As noted, it is possible to incorporate in the analysis a comparison of the price of the investigated product with comparators, which would allow an estimate of what the price would be at a competitive level. These comparators can be competing products offered by non-dominant competitors or in other geographic markets, or even other products offered by the

dominant undertaking. However, this requires sufficient homogeneity to make a comparison. It can be queried, therefore, whether anything can be learned from a comparison of the price of a print version and e-Book version of the same title. The evidence gathered by the #e-BookSOS Campaign indicated that the price of an e-Book may be 10 to 20 times higher than that of the print version. It is important to be mindful, however, that the competitive relationship between print and digital is not straightforward (as discussed in the market definition section above). They may be addressing different and, at times, complementary needs. Furthermore, it is difficult to discuss e-Book pricing in general since the provision of access can vary: the duration may vary (it is conceivable to have a perpetual licence, one for a short period of time, or anything in between), and the number of people who may use it one time may also vary. Thus, to make a comparison with print books feasible, one would have to look at the price of a licence for the use of an e-Book under comparable conditions as a print book (i.e. non-simultaneous access, or one copy, one user, commonly referred to as a single seat licence).

AVOIDANCE OF THE SPIRIT OF OTHER LAWS: TEXT AND DATA MINING

The authors' analysis of the agreements gathered for this study revealed a potential issue which had not been raised by interview respondents, as discussed in the section above on text and data mining clauses. Some of the suppliers' contracts included a clause prohibiting subscribers and authorised users from using any text or data mining tools, contrary to the text and data mining exception in UK and EU copyright law (in this case under Art. 29A, UK Copyright, Designs and Patents Act 1988).

As noted, prohibition of text and data mining is commonly witnessed in the academic sector.²⁵¹ There may be a competitive impact of such a clause, where it can be argued as above that academic libraries or researchers within their institution are competing with academic publishers for derivative commercial works.

Despite the non-enforceability of these clauses, academic libraries feel they have no choice but to comply, given the lack of alternatives for the supply of core textbooks to them. However, it may be possible to argue that a violation of one law by a company with market power may form an abuse. In this situation, it could be put forward that the inclusion of this clause in their agreements which libraries feel they have to abide by because of a lack of competition in the market is a violation of the text and data mining exception. This would be akin to the logic in the German jurisprudence²⁵² and in recent French decisional practice,²⁵³ where the ability of a company with market power to breach a law other than competition law may under certain conditions raise a competition concern. Two caveats ought to be made, however: first, the French decisions did not conclude on substance and, second, the German jurisprudence under national abuse of dominance cannot automatically be transferred to EU competition law.

²⁵¹ Knowledge Rights 21, 'Why are legacy publishers trying to prevent universities from undertaking AI?' (Knowledge Rights 21, 3 September 2025) <https://www.knowledgerights21.org/news-story/undermining-scientific-research/>; Erickson and Stobo report from their survey that research institutions did not feel able to request refunds or switch between different providers in the market if they were unhappy with licence conditions or TPMs imposed by a provider: Kristofer Erickson and Victoria Stobo, 'Survey on Technological Protection Measures: Impacts for Researchers, Libraries and Archives' (2024), Project Report, Knowledge Rights 21 DOI: [10.5281/zenodo.14168676](https://doi.org/10.5281/zenodo.14168676).

²⁵² See German cases: VBL Gegenwert (KZR 58/11, Bundesgerichtshof, Judgment of 6 November 2013, KZR 47/14 Bundesgerichtshof, Judgment of 24 January 2017; Pechstein (KZR 6/15, Bundesgerichtshof, Judgment of 7 June 2016); Face-Book/Meta v Bundeskartellamt (Kart 2/19 (V), Oberlandesgericht Düsseldorf, Face-Book v Bundeskartellamt, 24 March 2021).

²⁵³ See Autorité de la Concurrence, Google Syndicat des éditeurs de la presse magazine Decision 21-D-17 of July 12 and Decision 20-MC-01.

The Court of Justice indicated in its preliminary ruling in a German case against Face-Book that non-compliance with the GDPR can be one factor among others in assessing a violation of competition law.²⁵⁴ This does not confirm that the infringement of another law can be an abuse under Article 102 TFEU as a matter of course, but does open the door to such a theory of harm.

LACK OF TRANSPARENCY

A recurring theme in the interviews was a lack of clarity on the factors that determine the prices of e-Books as supplied to academic libraries. Respondents presumed that both the categorisation by publishers of titles as textbooks and the subsequent pricing is based on the volume of usage of these e-Books. They also assumed that such data was used to decide which content should be offered in bundles rather than as individual titles. However, some interviewees indicated that they did not have the same information on usage by students and staff as the publishers or aggregators. The evidence on whether the usage data is indeed being withheld from academic libraries is mixed.

The majority of contracts with academic libraries collected for this study include clauses obliging the supplier to provide usage information, in various formats with varying degrees of granularity: including usage statistics (e.g. ROIA3), aggregate statistical analysis or data reports (e.g. POA1, POA2, POA4, POA5, POA6, POA7, ROIA2), data analytics dashboards (e.g. UKA1, UKA5). Some agreements also refer to industry standards on usage statistics, to which the suppliers will adhere (e.g. UKA1, UKA5, ROIA3, POA7). Some also include the right for a library to change its chosen access model if a certain level of usage of the materials has not been achieved (e.g. UKA5).

Despite the express provisions in the contracts, our interviews evidenced that not all respondents were satisfied with the information available on usage. A few were satisfied with the usage data they receive, but they noted that the supply of data varies across platforms. Overall, every respondent who reflected on the availability of usage data expressed a desire for *all* e-Book providers to provide such data, as it is important for academic libraries to be able to make informed decisions on acquisitions.

The interview with the public librarian indicated a similar concern with the need to obtain data. Public libraries are setting up a pilot scheme, as part of which they want to understand user preferences and behaviour. As the respondent noted, currently the available data is rudimentary.

Although not a specific category, this lack of transparency is potentially exploitative (a lack of information which flows from an imbalance in power and increases the companies' pricing power), and may also negatively affect competition more broadly.²⁵⁵

²⁵⁴. Case C-252/21 Meta Platforms, Inc. and Others v Bundeskartellamt, ECLI:EU:C:2023:537, para 47.

²⁵⁵. The importance of data has been recognised in European Commission decisions under EU competition law as well, such as in the Amazon Marketplace commitments decision (AT.40426). Though the focus in these decisions has been on the necessity of data to compete with the dominant undertaking downstream, they point to a larger concern with platforms' ability to make price and output decisions based on usage data collected, which remains a black box to those using the platforms.

Clarity on the factors which determine prices can reduce customer search costs, intensifying competition. Where a failure to provide usage data is indeed established, an obligation to share usage data would not only remedy an imbalance in power but also improve libraries' ability to understand the prices of platforms, to compare them with the terms offered by other publishers or aggregators. Competition authorities and regulators have, in the past, required companies to make costs or pricing policies more transparent to customers.²⁵⁶

The need for accurate information to make commercial decisions may raise questions under competition law, but also under the rationale for the adoption of regulation such as the platform-to-business (P2B) regulation. The P2B regulation includes data transparency requirements, although merely requiring 'a description of the technical and contractual access, or absence thereof, of business users' data.²⁵⁷ The P2B regulation has a particular scope – it applies to online intermediation services – which requires the platform to provide an intermediation service between business users and end users. Aggregators and particularly publishers may not fall within this scope, but the P2B regulation's data transparency requirement points to a recognition of the importance of data for business customers.

COMPETITION LAW SUMMARY

The findings above require further investigation by competition authorities or regulators. There are indications of potential imbalances in power and exploitative conduct across the provision of e-Books to both academic libraries and public libraries. For the purposes of competition law intervention, this study points to one particularly important market: that for academic core textbooks. In that market, given the higher likelihood of harm relevant to competition law, it would be worthwhile to consider the following practices more carefully: the charging of high prices, the bundling and later withdrawing of titles, restrictive licensing conditions, and the lack of transparency on usage data.

In addition to exploitative conduct, in the context of academic libraries there could be an opportunity for competition authorities to consider expansive exclusionary theories of harm, given the impact of these practices on academic libraries' – and thus universities' – ability to provide services and compete in downstream markets for higher education as well as fulfil their wider (non-commercial) missions. Before any of these conducts can be considered, however, it would need to be shown that the publishers or platforms have market power. This study was not in a position to provide a conclusive answer on dominance. In the context of public libraries, there may also be indications of exploitative conduct, but only limited scope for exclusionary theories of harm. Practices are exclusionary if the conduct of a dominant undertaking weakens competition, either in their own market or in a downstream market.

²⁵⁶. In the UK, the OFT (now CMA)'s 2008 study on Personal Current Accounts (PCAs) revealed that consumers lacked awareness of the significant costs linked to their accounts. In 2009 the OFT agreed a voluntary programme with banks to address these low levels of transparency. In 2013 in Germany, the Bundeskartellamt concluded that the German market is characterised by an oligopoly of five vertically integrated oil companies, leading to higher prices. To increase price competition, it mandated an online price disclosure portal for gasoline prices called the Market Transparency Unit for Fuels (MTU). A Market Transparency Unit for Wholesale Electricity and Gas Markets was also set up by law in 2012. See the OFT'S 2011 progress update: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402132426/http://www.offt.gov.uk/shared_offt/reports/financial_products/PCA_update_March_2011.pdf. For a reflection on its efficacy in increasing price competition, see Marco Horvath, 'Germany's market transparency unit for fuels: Fostering collusion or competition?', (2019) Ruhr Economic Papers, No. 836, ISBN 978-3-86788-969-8, RWI – Leibniz Institut für Wirtschaftsforschung.

²⁵⁷. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, 57-79, Article 9.

This requires the existence of (at least potential) markets in which libraries are competing with each other or with publishers, and their ability to compete is being hampered. This is not straightforward, although this report does provide reflections on possible competitive relationships between libraries and the (perceived) competitive threats publishers face from libraries. Exploitation may be a more likely theory if harm can be shown. Even if no competition is affected, dominant undertakings' conduct can still be harmful, whereby the dominant undertaking takes advantage of its market power to exploit its customers. In all the conducts discussed in this report, libraries are the customers of publishers and aggregators. Exploitative conduct is less frequently the subject of enforcement action, however, although there may be a renewed willingness to bring such cases. There is scope to go beyond the narrow provisions of competition law, however, and explore the broader regulatory framework to address superior bargaining positions and unfair trading practices. These relate to all relevant markets which could be defined in the supply to academic libraries and public libraries.

The European Commission has also recently indicated an increased openness to cases based on exploitative conduct and unfair trading conditions in particular. Given the European Commission's current review of its enforcement priorities under Article 102 TFEU and consideration of guidelines, it is also an opportune time to reflect on more expansive exclusionary theories of harm.

In assessing the potential power of publishers and aggregators, it is important to consider barriers to entry, such as the existence of exclusive rights created by copyright, and the resources needed to set up e-Book platforms. Where issues in an industry are structural rather than conduct-based, it may be difficult to intervene under the provisions of competition law which require an actual behaviour by a specific entity. Some issues in the industry may be the result of structural issues, regulatory market failures or imbalances in power, even in the absence of any specific conduct within the scope of competition law. It may be an advisable approach in the EU, therefore, as a first step to undertake sector inquiries to identify those structural issues in the market(s). In the UK, the CMA could launch a market investigation to explore market failures and take remedial action, where necessary, under a market investigation reference.

Competition law, and other areas of market regulation, may not be a natural fit in an area where the market has filled a gap left by law (copyright law in particular) and regulation. As discussed in the copyright section of this report, the gap left in the regulation of e-Lending leaves an inherent tension between the commercial incentives of publishers and aggregators and the public service objectives of libraries, which may not be solved by competition law. In the context of print books, a clear decision was made by legislators to create exceptions to copyright and thus market dynamics, enabling libraries to preserve and supply knowledge to society at large. This has not been extended to e-Books. The commercialisation of access to e-Books in libraries may frustrate the objectives of wider access to knowledge and preservation. The European Commission has recognised books as a cultural medium, and emphasised the importance of publishing books of cultural value even when ultimately focusing its analysis on issues of competition and commercial activity.²⁵⁸

²⁵⁸ IV/428 – VBBB/VBVB, Commission decision of 25 November 1981, para 59; IV/27393 and IV/27J94, Publishers Association—Net Book Agreements, Commission decision of 12 December 1988, para 75.

This tension is most pronounced in the context of public libraries, where, even absent any competition law-relevant conduct, companies' profit drive is likely to crowd out supply to public libraries which do not themselves make a profit from the service they provide to readers. The picture is more complex regarding supply to academic libraries, which may be providing their service to students and staff in the context of activities for which their universities charge fees, and which are a major source of sales revenue for publishers. Even in this context, however, there are public interest objectives to consider beyond profit-making and consumer welfare in a strict sense. Universities (and libraries within them) contribute to the development and spread of knowledge that is necessary to achieve societal benefits and policy objectives, from social mobility to sustainable development.²⁵⁹ The achievements of these objectives may go beyond the traditional outcomes of the market. The scope for intervention by an authority under competition law may therefore be more limited in public services, given the need for economic activity, market power and competitive harm. However, where conduct does fall within the scope of competition law, intervention by authorities may bring wider benefits to society. Thus, competition authorities may want to consider bringing cases, given the impact on competition and the wider public interest. If competition law cannot apply, this likely indicates a failure which must be addressed through other policies.

²⁵⁹ See, for example, Department for Innovation and Business Skills (UK), 'Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice' (Gov.UK, 16 May 2016) <https://www.gov.uk/government/consultations/higher-education-teaching-excellence-social-mobility-and-student-choice> accessed 30 July 2025; Council of the European Union, 'Council conclusions on the European Universities initiative - Bridging higher education, research, innovation and society: Paving the way for a new dimension in European higher education' (Council of the European Union, 17 May 2021) <https://www.gov.uk/government/consultations/higher-education-teaching-excellence-social-mobility-and-student-choice> accessed 30 July 2025.

²⁶⁰ John Gilchrist, 'Copyright Deposit, Legal Deposit or Library Deposit? The Government's Role as Preserver of Copyright Material' [2005] 5(2) QUT Law Review 177-194.

3: COPYRIGHT LAW ANALYSIS

The underlying regulatory layer shaping the lending of e-Books identified in this study is copyright law. Publishers have been required to deposit print books with privileged (university or national) libraries since the inception of copyright. As copyright has evolved, so too has the regulation of access and distribution of books – not least through the introduction of lending rights and corresponding national lending schemes – but in the digital realm the situation is far from straightforward.²⁶⁰ The introduction of a harmonised lending right was considered justified insofar as the Rental and Lending Directive²⁶¹ simultaneously granted Member States the possibility to allow libraries to lend works to the public upon payment of remuneration for authors.

This reflected the need to respect the competence of Member States in developing their national cultural policies,²⁶² and to ensure that the right balance is struck between economic and cultural values.²⁶³ Reviewing the policy documents of the time when e-Lending was in its infancy, it is clear that a different approach was adopted for the digital context, i.e. e-Lending. According to the Commission, e-Lending services were better regulated in 1997 on a 'contractual basis, whether individual or collective agreements'.²⁶⁴ At the same time, it was also recognised that 'public libraries should not be subject to *undue financial or other restrictions*'.²⁶⁵ While attempts have been made to review the state of the e-Lending market,²⁶⁶ concrete policy action to regulate e-Lending has been anticipated by the seminal case CJEU – C-174/15 VOB. This judgment was hailed as a victory for libraries, yet so far it has failed to translate into practice and, more generally, has not affected the provision of e-Lending services, which are still largely regulated by licensing. In the next section, we briefly review this judgment and discuss its main criticalities. Copyright law in many respects is the most natural starting point to regulate e-Lending; however, by reason of the system's in-built rigidities (e.g. narrow interpretation of exceptions) and general imbalance in favour of rightsholders, especially in digital environments, concrete steps need to be undertaken to support libraries in the digital transition.

EVOLUTION OF THE E-LENDING RIGHT

While in some respects lending and e-Lending may be considered functionally equivalent²⁶⁷, they are not legally equivalent. Regulation of the material exploitation of copyright enjoys a conceptual and analytical coherence that finds little correspondence in its digital counterpart. In other words, the distribution and use of physical and digital copies are treated very differently by the law, as the distinction between the right of distribution and communication to the public right (CP) well exemplifies. The exclusive rights afforded by copyright are particularly far-reaching in the digital world.

²⁶¹ Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2006) L 376/28 ('Rental and Lending Directive').

²⁶² Silke von Lewinski, 'Rental and lending rights directive' in Silke von Lewinski et al (eds) *European Copyright Law: A Commentary* (Oxford University Press 2010), para 6.1.6.

²⁶³ See Rental and Lending Directive recital 3.

²⁶⁴ Commission, 'Travaux préparatoires for the Proposal for a Directive on the harmonization of certain aspects of copyright and related rights in the Information Society' ('Travaux préparatoires Info Soc') (1997) COM (97) 628 final, 31.

²⁶⁵ *Ibid*, 32.

²⁶⁶ Dan Mount, 'Research for cult committee – e-Lending: Challenges and opportunities' (EU Parliament, 2016).

²⁶⁷ The section draws on Matteo Frigeri, Martin Kretschmer and Péter Mezei, 'Copyright and e-Lending in public libraries: an incomplete revolution?' (2024) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 15(2), 156-179.

While historically the use of a work (e.g. reading) and specific acts of distribution (e.g. private lending) were considered as prerogatives of users and direct expressions of their ownership over these works, the digital transition significantly alters the legal analysis and results in a more extensive control by rightsholders of a user's relationships with the literary works they consume.²⁶⁸ This control is exacerbated by the use of private law instruments such as contracts to further erode users' liberties and their conception of digital ownership.²⁶⁹

In the context of physical copies, copyright distinctly regulates different uses of a work. Rightsholders have the right to control the (first) sale of a book under the public distribution right,²⁷⁰ as long as it takes place within the EU. Ignoring for present purposes the CJEU's expansive interpretation of the concept of distribution, the kernel of this right could be considered to be the transfer of ownership of the physical copy.²⁷¹ Regardless of exhaustion, a book owner does not need the rightsholder's permission to lend copies of the book. In fact, it should be noted that the lending right discussed in this report only refers to the making available through '*establishments accessible to the public*'.²⁷² The exhaustion of the distribution right and the liberty to lend books have positive effects on the dissemination of books, with attached benefits in terms of the advancement of knowledge and science.

By contrast, the rental of the same book would require the author's permission, even in those circumstances when the distribution right has been exhausted by a first transfer of ownership of the physical copy of the book.²⁷³ There is, in other words, no exhaustion for the right to rent a book.

Both rental and lending exclusively refer to a temporary use of the work – namely, access to the copy is provided for only 'a limited period of time'.²⁷⁴ This limited temporal dimension constitutes an important distinction from the distribution right, thus ensuring there is no possible overlap between distinct rights and legal regimes. The two regimes coexist without interfering with each other, as summarised in Table 7²⁷⁵:

How Different Acts are Construed by InfoSoc and Lending Right Directive		
	Making available for use for limited period physical copies of a book (via public establishment)	Transfer of ownership in physical copies of a book
Non-commercial	Lending	Private use/ distribution (e.g. donation)
Commercial	Rental	Distribution

Table 7: How Different Acts are Construed by InfoSoc and Lending Right Directive

²⁶⁸ Graham Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press 2018) 280. See also Jessica Litman, 'The Exclusive Right to Read' (1994) 13 *Cardozo Arts & Ent LJ* 29; and Martin Kretschmer, 'Digital Copyright: The End of an Era' (2003) 25/8 *EIPR* 333, 340.

²⁶⁹ Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2017).

²⁷⁰ Art. 4(2) InfoSoc.

²⁷¹ C-456/06 *Peek & Cloppenburg* (CJEU) ECLI:EU:C:2008:232 paras 34- 36; although see the wide interpretation of 'transfer of ownership' in C-5/11 *Donner* (CJEU) ECLI:EU:C:2012:370 para 26, as well as in C-516/13 – *Dimensione Direct Sales and Labianca* (CJEU) ECLI:EU:C:2015:315 para 33, and C-572/17 *Syed* (CJEU) ECLI:EU:C:2018:1033 paras 25-33.

²⁷² Lending Right Directive Art. 2(1)(b).

²⁷³ Lending Right Directive Art. 1(2).

²⁷⁴ Lending Right Directive Art. 2(1)(b).

²⁷⁵ The right of distribution is triggered by a 'transfer of ownership' (based on a literal interpretation of Art. 4(1) InfoSoc). Once the rights in the copy are exhausted, further transfer of ownership (e.g. donations) will not require the permission of the author – these acts are here described as 'private use', to be distinguished from the private use exception in Art. 5(2)(b) InfoSoc, which applies only to acts of reproduction. See Mezei (n. 3) p 11.

As mentioned, the legal treatment of ‘functional equivalent’ uses of physical and digital copies of a book differs significantly.²⁷⁶ A first question that arises is whether a digital copy of a book can be sold or whether ownership can be transferred. This point was adjudicated by the CJEU in C-263/18 *Tom Kabinet*.²⁷⁷

In this, the Court qualified the term ‘sale of an e-Book’ as ‘the supply to the public by downloading, for permanent use, of an e-book’, and came to the conclusion that such acts are covered by the communication to the public (CP) right, more specifically the ‘making available to the public right’.²⁷⁹

Before the decision in C-174/15 VOB, it was possible to argue that e-Lending was also covered by the CP right, regardless of whether such lending was carried out through publicly accessible establishments or private parties. Similarly, renting a digital copy of a book can be considered to be covered by the CP right, not the rental right.²⁸⁰ In other words, the InfoSoc Directive was the sole instrument regulating immaterial forms of exploitation.²⁸¹ Prior to C-174/15 VOB, the situation could be summarised as follows in Table 8:

How Different Acts were Construed by InfoSoc and Lending Right Directive before C-174/15 VOB		
	Supply to the public by downloading a copy of a book for temporary use (acts carried out by a ‘public establishment’)	Supply to the public by downloading a copy of a book for permanent use (‘public establishment’)
Non-commercial	CP right	CP right
Commercial	CP right	CP right

Table 8: How Different Acts were Construed by InfoSoc and Lending Right Directive before C-174/15 VOB

The conceptual clarity of this *summa divisio* was altered by the extension of the public lending (PL) right to e-Lending. In this discussion, it should be made clear that by e-Lending we exclusively mean ‘the “making available for a limited time without any commercial/economic advantage by public establishment” of a digital copy of a book’.²⁸²

²⁷⁶ While recognising the legal uncertainty that surrounded the legal interpretation of the sale of e-Books, as well as the developing jurisprudence of the CJEU expansively interpreting the right of communication to the public, in the following analysis we will take into account the CJEU’s clarification of the rights conferred by the InfoSoc

²⁷⁷ C-263/18 *Tom Kabinet* (n. 23).

²⁷⁸ *Ibid* para 72.

²⁷⁹ *Ibid*.

²⁸⁰ Rental right cannot be extended to immaterial forms of exploitation due to how such a right is interpreted in international law – see WIPO Copyright treaty Art. 7, which refer ‘exclusively to fixed copies that can be put into circulation as tangible [physical] objects’, stated in C-174/15 VOB para 31-35. This interpretation has been criticised in Linklater-Sahm (n. 85) p 1564.

²⁸¹ See InfoSoc Recital 20: ‘This Directive is based on principles and rules already laid down in the Directives currently in force in this area ... and it develops those principles and rules and places them in the context of the information society’. For further development of this argument in the context of C-174/15 VOB, see Catherine White, ‘Backlash over CJEU’s “dangerous” e-Lending decision’, (2017) Intellectual Property Magazine 14.

²⁸² This definition is largely based on Art. 2(b) Lending Directive.

Accepting this premise, it should already be clear that C-174/15 VOB did not establish an e-Lending right; more correctly, it only recognised the extension of the PL right to e-Lending when the functional equivalence of the lending of digital and printed books is preserved.

According to the Court, this functional equivalence is present when four conditions are met:

- ▶ a digital copy is placed on the server of a public library,
- ▶ the digital copy is then downloaded to a new computer,
- ▶ only one copy can be downloaded during the lending period (one copy, one user model),
- ▶ the copy is no longer accessible to the user after the period expires.

The Court held that 'it cannot therefore be ruled out that

... [the lending right] may apply where the operation carried out by a publicly accessible library... has essentially similar characteristics to the lending of printed works'.²⁸³

The characteristics to which the Court is referring here are: (1) the constant ratio between acquired copies and lent copies – whether physical or digital; and (2) the ability to ensure that access to the copy remains limited in time.

Despite the Court treating these two conditions as distinct, they arguably refer to one property that is shared by the lending of both physical and digital copies: the non-multiplication of usable copies. When lending print books, there is no reproduction and no multiplication of the book itself. With the ePL right, on the other hand, there is a reproduction – e.g. the digital copy is downloaded from a server – but there is no multiplication of usable copies.²⁸⁴ Therefore, it is submitted that, as long as there is no simultaneous 'multiplication of usable copies', the lending right should cover all forms of e-Lending.

How Different Acts are Construed by InfoSoc and Lending Right Directive since C-174/15 VOB				
Functional equivalent of...	Making available for a limited time		Making available for an unlimited time	
	Physical	Digital copy	Physical	Digital copy
Non-commercial	Lending	ePL right or/and CP right	Private use/distribution	CP right
Commercial	Rental	CP right	Distribution	CP right

Table 9: How Different Acts are Construed by InfoSoc and Lending Right Directive since C-174/15 VOB²⁸⁵

²⁸³. C-174/15 VOB para 51.

²⁸⁴. While there is no multiplication of usable copies, there is a reproduction of copies in so far as two copies exist: one on the library's server and one on the reader's server.

²⁸⁵. It is here assumed that the conditions under Art. 2 Lending Directive are satisfied (e.g. lending is made through establishments accessible to the public).

RELATIONSHIP BETWEEN THE RIGHT OF COMMUNICATION TO THE PUBLIC AND THE PUBLIC LENDING RIGHT

The interface between the communication to the public right (CP) and the public lending right (PL) was addressed by AG Szpunar in C-174/15 VOB, arguing that contractual terms should not be used to narrow the scope of the derogation from the PLR.²⁸⁶ But the judgment in VOB left the conceptual boundaries of these rights undefined – and therefore it missed an opportunity to clarify whether characterising an act as ‘e-Lending’ would automatically disapply the need to ask permission for any act that would otherwise constitute a communication to the public (CP). While this may seem an obvious point – after all, a different interpretation would render any derogation from the e-Lending right meaningless, given that there is no convergence in terms of exceptions and limitations between CP and lending – the Court’s use of the terms ‘making available... of a digital copy’ and ‘unlawful source’²⁸⁷ suggests that any act of e-Lending also presupposes a CP, at least to the extent that it assumes the library will need to be granted access to a digital copy (e.g. if a book exists only in electronic form, i.e. cannot be digitised from a physical copy). This point in particular should be referred to the CJEU in the future, as soon as the occasion arises.

While the drafting of the derogation of the lending right in the Rental and Lending Directive has always been intended to leave discretion to Member States, there is a risk that conditions imposed by rightsholders on e-Lending may dilute the objectives behind such a derogation. For example, it is not clear how including a requirement for consent from rightsholders could be balanced with the independent cultural objectives served by the Lending Directive – in a case of conflict, which one would prevail? Member States’ effective implementation of Article 6(1) Lending Directive would have to rely on strong in-built safeguards against contractual overrides by publishers in order to provide libraries with the possibility to effectively pursue their knowledge dissemination goals.

The second point is even more problematic, as it points to the limits of any genuine attempt to implement a balanced e-Lending system. Several issues can be identified. There is an overlap between the e-Lending right and the CP right: while the CJEU has now clarified that the lending right should extend to making available of digital copies of books, it does not resolve the conflict with the CP right, which covers ‘the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them’.²⁸⁸ Whether the application of the e-Lending right would automatically rule out the applicability of the CP right, as put forth by AG Szpunar in C-174/15 VOB,²⁸⁹ is a point that still needs clarification by the CJEU, possibly on the basis of a *lex specialis* argumentation – as developed in other similar cases (e.g. *UsedSoft*).²⁹⁰

Even if the overlap between CP and the e-Lending right can be resolved, there is still a considerable risk that imposing a condition of lawful source will preserve the relevance of the CP right in regulating e-Lending. In fact, it is difficult to avoid interpreting a condition of lawful access or lawful source to a copy as – in essence – an obligation to enter into a licensing agreement with rightsholders (which in most cases, would be publishers rather than authors).

²⁸⁶ According the AG Szpunar (at 88), Member States may require “that electronic books which are lent under that derogation should first have been made available to the public by the rightsholder or with his consent” but this limitation must not be “formulated in such a way as to restrict the scope of the derogation”.

²⁸⁷ C-174/15 VOB paras 66-72.

²⁸⁸ Art. 3(1) InfoSoc Directive.

²⁸⁹ ECLI:EU:C:2016:459. VOB para 55.

Libraries may in fact not have independent means of accessing digital copies of books, making licensing – on the basis of CP right for the first making available – an unavoidable and necessary step to provide e-Lending services (e.g. adding e-Books to the catalogue of e-Books offered for e-Lending). This licensing relationship creates dependencies and increases the risk of the widespread application of contractual override or technological protection measures (TMPs). This reduces the functionalities of digital copies and undermines the cultural and knowledge goals of e-Lending. These risks could be tempered by alternative forms of access to digital copies of books that do not depend on consent by (i.e. licensing) from rightsholders. It is therefore important to ask the question: which lawful sources of access are available to libraries when carrying out e-Lending?

Within the scope of this report, we offer here a provisional list of potential forms of access:

- ▶ Digitisation of print copies in libraries' collections by relying on Art. 5(2)(c) InfoSoc Directive. Similar to Controlled Digital Lending in the United States, libraries could digitise print books, thus allowing them to obtain digital copies for e-Lending under the same terms and conditions as they obtain copies of print books – a practice in Europe called Secure Digital Lending.²⁹¹ The main obstacle in relying on this exception is that the acts of reproduction need to be sufficiently specific, a requirement that the CJEU held to mean that libraries cannot digitalise their entire collection.²⁹² It is submitted that, in the context of e-Lending, the specific character of the reproduction is conferred by the limited purpose for which the item is being digitised.
- ▶ Expansive interpretation of the research and teaching limitations in Art. 5(3)(a) InfoSoc Directive. The transfer of digital copies, an act that would normally be considered a communication to the public, could be made between libraries – for example in the context of interlibrary loans – for the purpose of providing e-Lending. Several conditions would need to be met, raising doubts on whether this is a feasible solution to support more general e-Lending schemes beyond academia. Reliance on the exception implies the existence of a lawfully obtained copy of a book – whether born-digital or as a result of digitalisation.²⁹³
- ▶ Creating a secondary market for digital copies of e-Books through digital exhaustion, permitting resale. As a result of international and European harmonisation, Member States have limited scope to introduce legislation on digital exhaustion. Digital exhaustion could, however, play an important role in promoting wide lawful access to digital copies of books, and support libraries in building permanent digital collections.
- ▶ Addressing issues in the licensing of e-Books to libraries. The most common way to obtain lawful access to a digital copy of an e-Book is to enter into a licensing agreement directly with the rightsholders. As outlined in the Market Study (chapter 1 above), challenges that libraries may face include:
 - o Opt-outs or contractual overrides. Licences could be used to reduce libraries' rights to even below the minimum set by the legislation.

^{290.} C-128/11 *UsedSoft* (2012) (CJEU) ECLI:EU:C:2012:407 para 51.

^{291.} See Konrad Gliściński, *e-Books and Secure Digital Lending in European Libraries: Comparative Analysis under National and International Law* (2025), Project Report, Knowledge Rights, DOI: [10.5281/zenodo.10960186](https://doi.org/10.5281/zenodo.10960186). The specific e-Lending model which the CJEU recognised in C-174/15 *VOB* as falling within the concept of lending for the purposes of the Rental and Lending Directive relies on the following conditions: 1) a digital copy of a book is placed on the server of a public library and a user is allowed to download a copy on his own computer; 2) 'only one copy can be downloaded during the lending period'; and 3) 'after that period has expired, the downloaded copy can no longer be used by that user'.

^{292.} C-117/13 *Eugen Ulmer* (CJEU) ECLI:EU:C:2014:2196 para 45.

^{293.} Emily Hudson, 'Updated Copyright Guidance for Using Films, Audiovisual Works and Images in Online Teaching: Beyond the Covid Pandemic' (2022) SSRN.

- o Unfair terms and conditions (e.g. pricing). Authors are entitled to receive a 'remuneration' for the act of lending under the derogation in the Lending Directive, which, after VOB, would also apply to e-Lending. However, this remuneration does not reflect the full market value of a licence – namely the licence fee a rightsholder would be able to extract if the exception was not operating. The ensuing overlap following VOB between CP right and lending right – whereby libraries need to enter into a licensing agreement to obtain the digital copy from a lawful source, to then rely on an exception to lend the digital copy to the public – would raise the question of the quantum of remuneration that rightsholders are entitled to claim. In other words, what is considered a fair price for a licence for e-Lending? If the licence is considered an instrumental step for libraries to benefit from the e-Lending derogation, then it would also follow that any price attached to granting access to the lawful copy would need to be adjusted downwards to reflect the cultural objectives of such lending, as allowing rightsholders to extract the full-market value from the first – and necessary – licence would patently frustrate the objectives pursued by e-Lending.
- o Technological Protection Measures (TPMs). Limitations imposed by TPMs rather than licences may also negatively affect e-Lending. Limitations could be imposed on which TPMs can be introduced, with the aim of ensuring that they are proportionate to the interests they are meant to serve. This would enable libraries to circumvent unlawful TPMs restrictions without incurring liability – a solution that would, however, need to rely on a clarification of the liability for circumventing such restrictions, to minimise the risks to libraries relying on this option.²⁹⁴
- o Refusal to license. Without a positive obligation to license access to digital copies, it is unlikely that rightsholders will enter into a licensing relationship with a library unless the price provides a sufficient incentive to make the work available. A positive incentive to make a title available to libraries would also need to outprice the potential profits rightsholders may extract by licensing e-Books directly to students, which is a widespread model, especially in the US. If e-Lending schemes are to be supported, lending rights (including e-Lending) should work as a remuneration right rather than as a right to prevent access. Options to ensure that licences are available on sustainable terms should be considered.

Interventions in this area could directly intervene at the contractual level:

- An obligation could be introduced for publishers to ensure that, whenever licensing access to digital copies for the purpose of e-Lending, all of the license terms are reasonable and fair, taking due account of the cultural objectives pursued by ePL right schemes in Art. 6(1). This suggestion follows a similar example of US State legislation (e.g. Maryland).²⁹⁵ It would maintain the publishers' role as the exclusive lawful source of digital copies of books while also ensuring that the conditions demanded for such access does not frustrate the purpose of the PL right exception in Art. 6(1) – e.g. a remuneration grossly exceeding the cost of digitalisation of the books.

²⁹⁴. See Anthony Rosborough, *Technological Protection Measures & the Law: Impacts on Research, Education & Preservation* (2024), Project Report, Knowledge Rights 21.

²⁹⁵. A Albanese and J Milliot, 'With New Model Language, Library E-book Bills Are Back' (Publishers Weekly, 23rd February 2023) <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/91581-with-new-model-language-library-e-book-bills-are-back.html>.

- ▶ An alternative would be to incentivise licensing by removing the requirement for a licensed copy specific for libraries if there is no licensing scheme available that ensures the public function of libraries.
- ▶ Publishers have been required to deposit print books with certain privileged libraries even prior to the inception of copyright, as discussed in the Copyright Law section above. As copyright has evolved, so too has the regulation of access and distribution of books – not least through the introduction of lending rights and corresponding public lending schemes at the national level. In the digital realm the situation is far from straightforward.²⁹⁶ The introduction of a harmonised lending right was considered justified insofar as the Rental and Lending Directive²⁹⁷ simultaneously granted the possibility to Member States to allow libraries to lend works to the public upon payment of remuneration for authors. This reflected the need to respect the competence of Member States in developing national cultural policies,²⁹⁸ and to ensure that the right balance is struck between economic and cultural values.^{299,300} The analysis demonstrated that, contrary to the CJEU's intentions, without authorised access to digital copies of books or the right to create them for the purposes of e-Lending, Member States face difficulties in effectively implementing a national lending scheme extending to born-digital books without the possibility of rightsholder opt-outs.³⁰¹

ABUSE OF MARKET DOMINANCE IN IP MARKETS

Competition law enforcement in relation to copyright so far seems confined to specific cases and atypical subject matter, rather than more generally regulating the 'proportionality' of the effects of copyright. This raises questions around the extent to which this approach within competition law can serve as a mechanism to address issues in the wider market, as well as the extent to which competition law's possible deference to intellectual property rights may influence the scope for intervention.

The objectives pursued by competition law and copyright law could be considered as being aligned: they share 'the same basic objective of promoting consumer welfare and an efficient allocation of resources'.³⁰² This is referred to as 'the theory of complementarity'.³⁰³ The aim of competition law is to protect 'competition on the market with a view to promoting consumer welfare and an efficient allocation of resources'.³⁰⁴ While IP rights create static costs – for example by granting the exclusive right to market a product, which ultimately results in a higher price for the consumer – the theory of complementarity lays emphasis on the dynamic benefits of exclusivity: IP rights force other competitors to innovate and compete on the basis of merits rather than imitation.

²⁹⁶ John Gilchrist, 'Copyright Deposit, Legal Deposit or Library Deposit? The Government's Role as Preserver of Copyright Material' (2005) 5(2) QUT Law Review 177-194.

²⁹⁷ Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2006) L 376/28 ('Rental and Lending Directive').

²⁹⁸ Silke von Lewinski, 'Rental and lending rights directive' in von Lewinski et al (eds) European Copyright Law: A Commentary, (Oxford University Press 2010), para 6.1.6.

²⁹⁹ See Rental and Lending Directive recital 3.

³⁰⁰ Notwithstanding the welcoming developments made in supporting libraries missions in other areas, such as promoting the making available of out-of-commerce works (Directive 2012/28/EU - Orphan works Directive) and the digitalisation of works in their collection for preservation purposes (Art. 6 Directive 2019/790 - Digital Single Market Directive).

³⁰¹ In fact, while the UK Parliament introduced an exception to copyright also covering the lending of an e-book to the public, reliance on this exception was premised on the lawful acquisition of the e-Book or on compliance of the lending 'with any purchase or licensing terms to which the book is subject' – thus providing in practice a veto to rightsholders on whether public lending is permitted. See Copyright, Designs and Patents Act 1988, Section 40A, as amended by Digital Economy Act 2017 Section 31.

³⁰² See Olav Kolstad, 'Competition law and intellectual property rights – outline of an economics-based approach', in Josef Drexel (ed.) Research Handbook on Intellectual property and Competition law (2008, Edward Elgar), p 9.

³⁰³ TTAs Guidelines para 5.

³⁰⁴ William Landes & Richard Posner, The Economic Structure of Intellectual Property Law (Harvard UP 2003), p 13.

From this angle, IP rights are a precondition for creative work and innovation, as they create incentives to justify *ex-ante* investments in production that would otherwise be impossible to recoup if everyone were to free-ride on the intellectual efforts of original authors,³⁰⁵ avoiding the risk of underproduction.³⁰⁶ Thus, competition law will not usually be employed to intervene in the exploitation of IP rights.

However, there are occasions when the rationales of the laws conflict. It is undeniable that IP rights have the effect of restricting competition, by creating exclusive rights not only in existing markets but also in potential and yet unexploited markets.³⁰⁷ The jurisprudence has attempted to balance the need to address the potential anti-competitive effects of IP rights with the need to respect the granting of exclusive rights under copyright law to achieve specific policy goals (e.g. promotion of creativity) or interests (e.g. recognition of authorship) underpinning their existence. This priority finds expression in the laws of some EU Member States,³⁰⁹ as well as in Art. 345 of the TFEU. EU law has developed tools to demarcate between anti-competitive practices justified by the essence or the essential function of IP rights, and the negative effects resulting from their exercise.

There is an important relationship between competition law and copyright in terms of developments and limitations of the theory of 'abuse of an IP right'. Such abuse occurs when the right is exercised in ways and circumstances that are manifestly contrary to the objectives of Art. 102 TFEU.³¹⁰ Most interestingly, abuse occurs when the right is no longer exercised in a manner corresponding to its essential function – namely, 'to protect the moral rights in the work and ensure a reward for the creative effort'.³¹¹ A facet of this theory is how copyright and competition law may interact to define 'appropriate remuneration',³¹² that is, a remuneration that retains its character as an incentive for the creation of new works.³¹³

More limited, however, is the scope to impose an obligation to license copyrighted material.³¹⁴ Case law here has concentrated on atypical subject matter (e.g. listings of TV programmes), as well as innovation (e.g. where refusal to license prevents the emergence of a new product), rather than consumption narrowly defined.³¹⁵ It is therefore uncertain to what extent this may be applicable to the licensing of access to e-Books, and whether the educational, scientific, and cultural goals promoted by such access can be incorporated into competition law analysis.

³⁰⁵ Kenneth Arrow, 'Economic Welfare and the Allocation of Resources for Invention', in Nelson (ed), *The Rate and Direction of Inventive Activity* (Princeton UP 1962) p 619.

³⁰⁶ As provided by the various versions of the so-called 'three-step test' regulating limitations and exceptions to copyright (see for example Art. 10 WIPO Copyright Treaty 1996), such limitations cannot conflict with the 'normal exploitation of the work', a notion that is likely to be dynamically interpreted to include emerging markets arising from development in technologies. See Paulien Wymeersch, 'EU Copyright Exceptions and Limitations and the Three-Step Test: One Step Forward, Two Steps Back' (2023) 27/7 GRUR International 631, p 634.

³⁰⁷ See Poland, Art. 2(1) Competition and Consumer Act (2007) as discussed in Drexel et al, 'Copyright, Competition and Development' (2013, MPI) p 45. However, even in this case the exemption is rather weak, as competition law applies to licensing contracts and other exercises of such rights.

³⁰⁸ Treaty on the Functioning of the European Union (TFEU) 2008/C 115/01.

³⁰⁹ Treaty on the Functioning of the European Union (2007) 2008/C 115/01.

³¹⁰ C-241/91 RTE and ITP v Commission (Magill) ECLI:EU:C: 1995:98, para 28.

³¹¹ Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* [2011] ECLI:EU:C:2011:631. The case specifies that copyright 'does not guarantee the opportunity to demand the highest possible remuneration' but only a 'reasonable remuneration', reflecting the economic value concerned and the actual or potential number of persons enjoying the service. See para 108-109.

³¹² C-200/96 *Metronome Musik v Music Point Hokamp* [1998] ECLI:EU:C:1998:172 para 28.

³¹³ Magill (n 36); C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* (2004) ECLI:EU:C:2004:257; Case T-201/04 *Microsoft* (2007).

³¹⁴ Magill (n 36); C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* (2004) ECLI:EU:C:2004:257; Case T-201/04 *Microsoft* (2007).

³¹⁵ However, there is scope for the application of this theory to academic markets insofar as the access to scientific publication (raw material) can be considered essential for production of new works (new product). This would be a significant step from the case law, and the success of this argument is difficult to predict.

Competition law has an intrinsic ability to evolve and, to some extent, interface with the exercise of IP rights. While the limitations in the case law on copyright-protected subject matter are evident, we do see a more interventionist approach to the anti-competitive effects of patent rights (rather than copyright) on innovation and technological transfers.³¹⁶ A potential role therefore remains for competition law in similarly limiting the scope of copyright to favour access to information, innovation and research, notwithstanding the fact that this role is still largely untested.

Competition law's deference to copyright does not mean that competition law intervention is not possible in copyright-intensive industries. Competition law may apply – not only where there is an 'abuse of IP right', but also in the (upstream or downstream) commercial activities which result from the exploitation of IP rights. However, competition law intervention presumes a commercial activity and a need which can adequately be served by the market. There is, at present, limited scope within competition law to take into account the non-economic values and interests which should be embedded in a balanced copyright system. As such, competition law may not succeed in addressing a balancing failure within copyright law.

Policy Opportunities outside Competition and Copyright Law

It appears that the market, as a notionally self-correcting regime, does not deliver a satisfactory e-Lending offering. That said, some market-driven remedies have, partially at least, altered some of the imbalances seen in e-Lending. For public libraries, an initial review of competitive conditions in different EU countries (e.g. Denmark, Netherlands) suggests that libraries can increase their bargaining power by setting up their own e-Lending platforms and licensing titles directly with publishers at a national level. However, publishers' withdrawals from such agreements on a number of occasions in Denmark, coupled with the considerable resources required to establish such platforms, illustrates that this type of non-regulatory solution does not necessarily guarantee a stable or sustainable e-Lending offering. Cooperation between platforms to integrate e-Book collections may also be possible. As an example, in Denmark eReolen recently included books from OverDrive. A blended collection management model of this type may ensure a greater degree of independence and flexibility than would otherwise be achievable.

From our engagements with library practitioners, we recognise that there are considerable challenges for national library organisations considering setting up their own e-Lending infrastructure, including the high levels of investment required and risks of failure. Funding for an e-Lending platform in the countries under study should be considered to increase libraries' bargaining positions and reduce operating costs through scale efficiency gains.³¹⁷

³¹⁶ Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* (Hart Publishing 2012), pp 205-49.

³¹⁷ See for example Associations of Librarians of France, Open Letter from French public libraries for an adapted and quality digital offer in public libraries (1 October 2024) <https://www.abf.asso.fr/1/22/1100/ABF/-lettre-ouverte-pour-une-offre-numerique-adaptee-et-de-qualite-en-bibliotheque-publique>

³¹⁸ Notwithstanding the developments in supporting libraries missions in other areas, such as promoting the

4: CONCLUSION

This report framed the underlying policy issue for e-Lending as: the regulation of 'non-commercial digital access to knowledge'. Drawing on our analysis of available market data, e-Book licensing contracts and interviews with library professionals in four European markets (Denmark, Poland, Republic of Ireland and the UK), the evidence indicates significant problems in e-Lending markets with respect of market structure, licensing and pricing.

Specifically, seven potential abuses of market power were identified and examined from a competition law perspective: (1) refusals to supply: outright and withdrawals; (2) constructive refusals to supply: restrictive licensing conditions/delayed supply; (3) bundles; (4) unfair trading conditions; (5) excessive pricing; (6) avoidance of the spirit of other laws: text and data mining; (7) lack of transparency.

Our analysis found that market dominance in the sense of Article 102 Treaty on the Functioning of the European Union (TFEU) was difficult to establish, but that alternative remedies under (national) provisions on abuse of economic dependence or under the new EU digital market-type provisions (platform-to-business P2B regulation, Digital Markets Act) may be available. Copyright policy has left space that enabled the commercial provision of e-Book access to libraries. This has created a conflict between publishers' and aggregators' incentives, and libraries' public service objectives. Publishers and aggregators engage in several practices which jeopardise the sustainability of library collections and their pursuit of public goals. While this report analysed these practices through a competition law lens, it found that competition law may not be able to solve the dilemma left by copyright law. In order to address the issues fully, careful consideration of non-economic goals in e-Lending and of libraries' public service character is required. This is not a natural fit for competition law enforcement.

Legislative progress on the regulation of e-Lending at EU level has been slow.³¹⁸ The lack of action has prompted the CJEU to extend the scope of the lending right to cover a specific form of secure digital lending,³¹⁹ resorting to a 'dynamic or evolving' interpretation of the law.³²⁰ In the *VOB* case, the Court interpreted the lending right as also covering digital lending of books, as long as such lending complies with a set of specific conditions ensuring that there is no multiplication of usable digital copies of the book.³²¹

making available of out-of-commerce works (Directive 2012/28/EU - Orphan works Directive) and the digitalisation of works in their collection for preservation purposes (Art. 6 Directive 2019/790 - Digital Single Market Directive).

³¹⁹ This characterisation is supported by the Advocate-General in his opinion in *C-174/15 Vereniging Openbare Bibliotheken (VOB)* (2017) ECLI:EU:C:2016:459. AG Szpunar remarks how e-Lending is 'entirely subject to the laws of the market, by contrast with the lending of traditional books, which benefits from rules which are favourable to libraries'. He continues by saying that 'an adjusted interpretation ... is therefore necessary ... to enable libraries to benefit from those same favourable conditions in the contemporary digital environment' (AG Opinion in *VOB* para 79).

³²⁰ AG Opinion in *VOB* para 28.

³²¹ *C-174/15 VOB* para 52-54.

The judgment appears to have had little effect in promoting new e-Lending models. Contrary to the CJEU's intentions, we argue that, without explicitly having authorised access to digital copies of books for the purposes of lending, Member States face difficulties in effectively implementing a national lending scheme that is capable of extending to forms of digital lending, even though Art. 6 of the Rental and Lending Right Directive seems to explicitly provide for such a possibility.

This diagnosis derives from the perceived primacy of licensing contracts which, in the rightsholders' view, follows from the exclusive right to control access to digital copies of works, under the communication to the public right. Under one interpretation of the Court's jurisprudence a condition of lawful access or lawful source to a copy constitutes an obligation to enter into a licensing agreement with rightsholders. It is therefore imperative to explore interventions that enable libraries to build sustainable collections that enable them to fulfil their public function, regardless of the problematic licensing practices we identified using competition law concepts.

We have offered several possible directions under copyright law that would allow libraries independent access to digital copies (e.g. digitisation of physical books, interlibrary loans, digital exhaustion). We also reviewed measures to regulate contracts directly, including incentivising licensing schemes that enable the building of sustainable digital collections for non-commercial e-Lending, by allowing digitisation and lending if no licence scheme is available on reasonable terms. A more foundational solution would require the delivery of digital deposit copies to privileged libraries, or an exception that would enable libraries to create a preservation copy, regardless of the terms of licensing contracts or the presence of technological protection measures.

Libraries' public function as essential cultural and scientific knowledge facilitators can only be sustained if they are able to build independent digital collections and make these accessible for non-commercial lending. Libraries need to empower access to books that is not dependent on the wealth of the reader or solely on the licensing terms of rightsholders.

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