

Who Should Set Book Prices?

Silvi Berger and Morten Hviid
Centre for Competition Policy
University of East Anglia

CCP Working Paper 19-7

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Contact Details:

Morten Hviid

M.Hviid@uea.ac.uk

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This version: October 2019

Abstract

The key question for this paper is by whom and with what restrictions the price of books should be set. In the past, public cultural policy has in some jurisdictions favoured limiting competition at the retail level by mandating a fixed book price system, where prices are the same everywhere. Digitalisation has enabled some competition authorities to challenge this practice. This has left us with a situation where very different rules apply to the book market in different jurisdictions and where the initial question of who sets prices faced with what restrictions is given a very different answer across EU member states. This paper uses recent antitrust cases to highlight the tension over who should have the price setting power in the market for books.

Key words: Retail Price MFN, Across Platform Parity Agreements, price guarantees, agency models

JEL classification: D22; D4; L82

¹ Financial support from the RCUK Centre CREATE is gratefully acknowledged. Some of this work builds on a report by Hviid written for the OECD. The authors thank Michael Harker, Felix Hempel, Sabine Jacques, Sofia Izquierdo Sanchez and Sebastian Peyer for comments, help and discussions. The usual disclaimer applies.

“...the [D]ebate on RPM for books – a debate that seemed “endless” already from the perspective of Tosdal (1915,108) – revives regularly in competition policy cases...” (Beck, 2007, 3).

1. Introduction

The key question for this paper is where and with what restrictions the price of books should be set. The extent to which competition among books as cultural products is desirable for society has long been part of the cultural debate. The tension can be boiled down to a tension between affordability and availability.² Competition tends to drive down prices and is hence generally seen as aiding affordability. However, by reducing the overall surplus available for distribution in the vertical chain from manuscript to retailer, competition can reduce availability to consumers in a number of ways. It may reduce the number of books written, the number of books produced or the number of places at which consumers can access books.³

We will focus on the latter and in particular the effect on retailers. Bookshops along with libraries have traditionally (pre-digital) been seen as the key access-point for consumers of books, see e.g. Varian and Roehl (2001). For bookshops to play this role appropriately to the benefit of society, they will need to exist in sufficient numbers to ensure socially optimal geographical coverage. Conventional wisdom, and more recently economic research (Liu and Shuai, 2015), indicates that prices and profits are lower when they are set at the level where competition is most intense. Leaving price setting in the hands of bookshops may then imply lower overall surplus. One effect of this would be on the number of economically viable bookshops. If it is judged that competition at the retail level leads to socially too few bookshops, moving price setting to the publisher level where competition may be expected to be less intense (Hviid et al., 2019), is a possible policy intervention. Leaving publishers free to set prices may have unintended consequences, in particular in terms of geographical or locational price dispersion. This could arise either because the cost of supplying the book varies geographically with more remote rural areas being more costly to supply, or because of differences in price elasticities making price discrimination profitable. In either case, without a direct cross subsidy between bookshops organised by the publishers, some bookshops are likely to suffer financially. Restricting the freedom of publishers to set prices may go somewhat towards remedying this, in particular a remedy which combines the shifting of price setting with a non-discrimination restriction that the price of books must be the same at all retailers. This is essentially what a Fixed Book Price (FBP) agreement, as implemented in several EU member states as laws, achieves.

While the debate about price setting in the analogue world has been dominated by cultural policy, in the digital world the same question has emerged, but this time the answer was provided by the industry rather than by public policy. In 2010, Apple, together with five of the major publishers agreed a move from a wholesale model, where the internet retailers set the price to an agency model where the publishers set the price and they added to this model a non-discrimination clause, a so-called Retail Price MFN, requiring the price for a specific book to be the same at all on-line book retailers.

² To the extent that cultural policies can fit under Article 106 TFEU, books would become a matter for national competition law. If not, it would only become subject to EU competition scrutiny where more than one member state was affected. In reality, this appears to limit the potential scope to the UK and Ireland because only English language literature is seen as having a significant effect on other member states. For the tension between cultural and competition policy, see also Huijgh (2007).

³ There are other important debates, in particular regarding diversity, which we will not discuss further in this paper.

Formally these vertical agreements are equivalent to FBP agreements, but focused on digital platforms. These vertical agreements between Apple and the publishers were investigated by both the EU Commission and the US Department of Justice and most parties settled.⁴ The settlements generally involved a ban on agency pricing and Retail Price MFN for a period of time. The EU has subsequently looked at the agreements Amazon had entered with publishers and settled this case May 4th, 2017. This is so far the last in a series of competition cases concerning the e-book market. Meanwhile, many of the EU member states, who had an FBP, extended this to cover digital books.

This has left us with a situation where very different rules apply to the book market in different jurisdictions and where the initial question of who sets prices faced with what restrictions is given a very different answer within EU member states. The increase in digital delivery of books has challenged traditional market structures. This paper uses recent antitrust cases to highlight the tension over who should have the price setting power in the market for books and with what restrictions. Understanding the battle over control between the big publishers and the internet retailers is important because it may affect broader policy goals related to the quantity and diversity of cultural products. It may do so directly by affecting the share of publishing revenue going to authors, at least if we believe that authors are motivated mainly by financial gains. It may do so indirectly by appointing particular gatekeeper powers to select which manuscripts get published to particular parts of the vertical chain. It may also do so indirectly through the ways books will be marketed and in particular through the services aimed at reducing the uncertainty faced by the reader trying to assess the value of an experience good, a good whose qualities cannot be fully ascertained until fully consumed.

The paper is organised as follows: Section two focuses on the background to the adoption of FBP both as an instrument of cultural policy and a purely commercial means of increasing surplus in the vertical supply chain. Section three considers the various competition challenges to the FBP, including the initial direct challenge to the RPM and the more recent cases relating to agency pricing combined with a Retail Price MFN. Section four concludes.

2. Background to the pricing policies

This section provides a more in-depth description of where the pricing policies came from and what motivated them. Section 2.1 focuses on cultural policies as the driving factor while section 3.2 focuses on competition as the driving factor once e-books were well established as a medium for retailing books.

2.1. Cultural book policy: a short history of and motivation for FBP

Motivated by cultural policy concerns, book pricing has been the subject of government intervention and regulation in EU member states. There is a long tradition within the majority of EU member states

⁴ In the US, the five publishers settled, see information on the department of justice's case page at: <https://www.justice.gov/atr/case/us-v-apple-inc-et-al>. In the EU, Apple and the five publishers all settled; for more information see the Directorate-General for Competition's case page at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847. The exception was the US case, where the charge regarded conspiracy, and where Apple refused to settle. The US Apple e-book case, came to an end on March 7th 2016 when the US Supreme Court declined to hear Apple's Appeal against the decision that it had conspired with five publishers to raise the price of books in the US, see *Apple Inc. v. United States*, U.S. Supreme Court, No. 15-565. The original decision [*United States of America v. Apple Inc., et al.*, 12 Civ. 2862 (DLC)] was affirmed by the 2nd US Circuit Court of Appeals, *United States v. Apple, Inc.*, No. 13-3741 (2d Cir. 2015).

to have mandated FBP where these have been set by publishers, ostensibly as a means to protect bookstores, traditionally seen as an essential facility in the market for cultural goods. The FBP policies,⁵ which move the pricing decision to the publisher level, in all cases amount to full (vertical and horizontal) RPM on books, sometimes combined with a restriction to what sort of outlet could retail a book (e.g. ban on supermarkets). One of the general observations made about RPM in the book industry, i.e. FBP, is that it tends to come and go. FBP were introduced in the 19th century, with England and Denmark as early adopters. From there it spread to other countries with a focus on Europe and in particular EU Member States.⁶ Many of these have had FBP in place for some time⁷ and many have been enacted/changed more recently.⁸ Interestingly, in most of these EU countries RPM in the book trade is allowed or even mandated, even though it is prohibited in (almost) all other sectors.⁹ Early on FBPs took the form of agreements between publishers and booksellers, later to be replaced by legislation (Poort and van Eijk, 2015). For example the *Sammelrevers*, Germany's RPM scheme, was in effect from 1888 until 2002 (Beck, 2007) and then took effect again, reformulated, shortly thereafter (the current regime has been in place since 2002).¹⁰ Just as there are countries that have recently implemented FBP policies there are also those who have abolished them. Sweden and Finland repealed FBP in the 1970s; Belgium in 1981; the U.K. and Ireland in 1995; Switzerland in 1999; Hungary in 2007; and Denmark in 2011. Norway, who had a fixed-price system since 1962, did not go so far as to completely remove RPM, but introduced a system that is a hybrid of fixed and free book prices in 2005. Abolition is primarily done under the auspices of the promotion of competition (via competition policy). In the case of the UK, the lead up to the demise of the FBP known as the Net Book Agreement [NBA] was partly spurred on by a series of investigations by the European Commission where "language" played a critical role against rather than its traditional role in favour (i.e. language preservation) of RPM for books. As English-language books are desirable in other countries, RPM on titles published in the UK was deemed to affect inter-state trade and thus violate the principles of the EU Common Market (violating Article 101(1) TFEU¹¹). Some countries have attempted to create new FBP laws after having previously dropped them, such as Switzerland who held a referendum in 2012,

⁵ "No public debate in Europe on the cultural value of books is complete without a discussion of fixed book price" (Canoy et al, 2006). Thorough analysis of this debate and country-specific legislation for Germany is provided by Tietzel (1995) and Rurup et al (1997); for the UK by Fishwick and Fitzsimons (1998) and Utton (2000); for Denmark by Hjorth-Andersen (2000); for Norway by Løyland and Ringstad (2012); for the Netherlands by Appelman and van den Broek (2002), CPB and SCP (2002) and van der Ploeg (2004); and for Spain by Palma Martos and Palma Martos (2008). Within these debates, there is always a tension between books as instruments of culture and books as products in a profit-making business, as recognised by the Director-General of UNESCO at the World Book and Copyright Day, 23 April 2002.

⁶ According to Table 1 of Poort and van Eijk (2015), as of 1 January, 2015, 11 European countries had RPM for books in place (Austria, France, Germany, Greece, Norway, Slovenia, Spain, Italy, Netherlands, Portugal and Luxembourg).

⁷ Spain since 1975, France 1981, Portugal 1996 and Greece 1997, see Table 9, p. 749 of Canoy et al, for more detail on start/end dates of policy by country (although incomplete).

⁸ Austria 2000, Italy 2001, Germany 2002 and Netherlands 2005, see Rønning et al (2012)

⁹ Historically RPM has been permitted in a few other sectors, in particular pharmaceuticals. At the EU level, RPM is identified as a hard-core restriction on competition and hence a violation of competition law by object. At national level, it is possible under Article 106 TFEU to exempt a limited set of sectors if the effect is purely felt in the national economy.

¹⁰ Details on the history of FBP in Germany are found in Bittlingmayer (1988) and Picot (1991); Guillebraud (1965) gives an account of the introduction of RPM for books in the U.K. at the end of the nineteenth century, which was called the Net Book Agreement. Ballet al. (2008, Ch. 1-3), Dearnley and Feather (2002) and Fleming (1996) nicely summarize the evolution of the Net Book Agreement over the twentieth century; including the lead-up to its demise.

¹¹ Then article 85(1) of the Treaty of Rome.

but for which the population voted “no”. Both Belgium and the Republic of Ireland also attempted an RPM comeback at the beginning of the twenty-first century, but to no avail (Appelman, 2003).

According to Beck (2007) and Canoy et al. (2006) countries’ policies are often based on France’s version, the Loi Lang, and are written specifically into law as such. “Since the 1980s, the FPB in France, Spain, Austria, Greece, Luxembourg, Denmark (before abolishing in 2011), Italy, and Portugal turned from private agreements into law” (Appelman, 2003, p.240). Germany also achieved this in 2002 (Beck, 2007). However, others still take the form of a sectoral contractual agreement that comes up for regular review by competition authorities, as in the Netherlands (such was also the case for the Net Book Agreement in the UK). All in all, FBP laws vary from one country to another “in terms of a range of elements, e.g. the duration of the fixed-price term, the size of the rebate, and whether or not school textbooks are included” (Rønning et al., p.2). The common elements are that FBP policies mandate that publishers set the retail price and set the same price at all retail outlets. The policies also typically include some rules for when and by how much books can be discounted once they have been in print for a period of time and in some cases also restrict retailing to specific outlets. There is typically no requirement or expectation that all books in a category are sold at the same price, although it would appear that several focal points emerge within each market.

The specialized reasons given by individual nation states for supporting RPM for books always fall back on one key word “culture”. The “books are different” argument was first used in support of the NBA in the UK in 1962 (Barker and Davies, 1966). Essentially, what is meant by this argument is that “books are not merely economic products, but also a vehicle of culture” (Appelman, 2003) and that “[b]ooks form an important part of the foundation of a lingual, cultural and national community” (Ringstad, 2004). Or, as, Justice Buckley put it in its original 1962 context, books are not only different in economic terms, but also in terms of their importance to national culture:

“The ‘books are different’ argument may be accepted as true in two respects; for, first, no two literary works are the same or alike in the way in which or the extent to which two oranges or two eggs may be said to be; and, secondly, the production and marketing of books involve problems that are different from those which arise in connexion with most other commodities”.¹²

With digital technology, this “books are different” argument appears less plausible – what is the big difference today with other cultural goods such as film, music, TV or video games? The challenge posed by audio books, which in their nature are potentially closer to radio programmes or podcasts than traditional books, illustrates this nicely.

Broadly speaking the aim of the FBP was to undermine competition to protect the book retailers who were seen as providing important elements of service for cultural good. This aim has subsequently been refined to relate to brick-and-mortar stores with internet retailers, notably amazon.com, seen as a threat. The two key benefits seen as worthy of protection are:

- (i) access locally to all available books in print in the country without having to pay for shipping, and
- (ii) in-store access to expert advice.¹³

¹² Re Net Book Agreement, 1957 - [1962] 3 All ER 751 at 756.

¹³ Van der Ploeg (2003) identified the following views about FBP policies. On the positive side, FBP are viewed as leading to a larger number of (independent and possibly smaller) bookstores, which are spread more widely geographically so that even smaller towns have a bookstore. These bookstores are better stocked. Finally, it is

Some may see it as ironic that internet retailers and in particular the Amazon Bookstore has been viewed as a challenge to obtaining these two benefits, particularly as internet retailers continue to innovate on both delivery and information provision.¹⁴ Internet retailers clearly cover as broad a range of books as brick-and-mortar stores and are able to deliver the books to a greater variety of locations than a bookstore, including the recipients home or work address. This has been countered on the grounds that dominant retailers may act as censors, delisting certain books or publishers.¹⁵ While this may be a justifiable concern, the same argument could obviously be made regarding dominant publishers and more generally about any powerful gatekeeper. Internet retailers now display customer reviews as well as recommendations and there are aggregator sites which provide meta-reviews, ensuring that book buyers are potentially much better informed than in the pre-digital world. While one thus might have thought that the two key arguments for removing competition among booksellers had been undermined, this appears not to have been the case.

“The core policy issue raised by FBP is whether books have special characteristics which justify, or necessitate, a degree of protection from the effects of unfettered market forces on the book market. A secondary question is whether the same characteristics, and the consequent rationale for government intervention, are exhibited by e-books.” OECD (2012, 50).

The advent of e-books and streaming services challenged the arguments for protection further. In the digital world, books can be downloaded to or streamed through a reading device rather than purchased in a physical format. The introduction of Amazon’s e-book reader, the Kindle, kick-started the era of the commercially viable e-book, a mode of publishing which has grown particularly in the US and the UK.¹⁶ Benhamou (2015, 124) reports that 2012 e-book sales in the US represent 22% of the trade market and 12% in the UK. Since then according to the Association of American Publishers, after a peak in 2014, e-book share of the US market has fallen to 17%, a share similar to 2011.¹⁷ At the same time the share of audiobooks has risen steadily from 2.5% in 2011 to 5.6% in 2017. For the UK, Audiobooks now account for 5% of spending.¹⁸ The precision of these data are hard to assess, as one of the unintended effects of developments in the e-book market is less precise data about the exact size of the market. Many self-published books no longer have associated ISBNs, implying that these

argued that more titles are being produced. On the negative side, FBP are viewed as leading to higher prices, less sales and not the expected cross-subsidies from the popular to the less popular. Some of these views may no longer be widely held. The claim that FBP policy leads to more books being produced would appear untenable given the explosion of self-published books available in countries that do not have a FBP.

¹⁴ Both France (2011) and Germany (2016) specifically include e-books in their respective FBP, and many contend that they openly did this in order to put a harness on Amazon’s market power (see, for example, <http://publishingperspectives.com/2015/02/bad-news-for-kindle-unlimited-in-france/> and <https://www.mhpbooks.com/france-passes-anti-amazon-law/> regarding France, and <http://publishingperspectives.com/2016/02/fixe-price-for-ebooks-in-germany/> regarding Germany).

¹⁵ “When you have a few dominant retailers, one dangerous consequence is their tendency to delist publishers’ books either for censorship or commercial reasons.” Catherine Blache, 19.1 2016, “Why Fixed Book Price is essential for real competition”, <https://www.internationalpublishers.org/news/blog/entry/why-fixed-book-price-is-essential-for-real-competition>. Blanche is Senior Counsellor, International Policy, of the French Publishers Association (Syndicat national de l’Edition).

¹⁶ While electronic books had been available since the launch of Project Gutenberg in 1971 if not earlier (see Gilbert (2015)), without a dedicated device to read these files, take-up was very modest. The first dedicated e-book readers were launched in 1998, but take-up was very slow, see OECD (2012, 13).

¹⁷ Source: <https://www.statista.com/statistics/639075/book-format-market-share-usa/>. This data is likely to underestimate e-book sales as it may underrepresent self-published books.

¹⁸ See <https://goodereader.com/blog/audiobooks/global-audiobook-industry-report-for-the-first-half-of-2018>.

books do not show up in the official statistics such as those published by Nielsen and Bowker. The lack of readily available data continues to be a problem – see Waldfogel and Reimers (2015) and OECD (2012, 60).

With ebooks and audiobooks that can either be downloaded or streamed, the avenues for authors to reach the reader/consumer have increased. Unlike physical books, which whether available through your favourite brick-and-mortar store or internet retailer, take time to be delivered, these new formats enable immediate consumption. This evidently removed one of the core arguments for distorting competition in the book market. E-books have undermined this aspect of bookstores further because a large and increasing number of books are only available as e-books. Many of these are self-published, i.e. have by-passed the publishers tasked with price setting where there are rules on FBP.

As the digital market matures and self-publishing becomes more of a factor, the arguments in favour of a pricing policy aimed at protecting brick-and-mortar stores will come increasingly under pressure. Some of this pressure may come from current consumers who are expected to foot the bill for analogue delivery. Other pressure may come from groups concerned about these apparently essential cultural good being unnecessarily expensive, thereby pricing some members of society out of the market. The fixed book price is a restraint of trade, which harms consumers. If there are no countervailing benefits, such a restraint would violate both EU and member state competition laws. If digitalisation has changed the cost-benefit analysis of the restraint, EU or national competition law may be prepared to challenge in order to protect consumers.

2.2. FBP through the backdoor: an agency model with a retail price MFN

In 2010, Apple as a future e-book retailer and five of the major book publishers entered an agreement, which shifted the pricing of a book from the retailer to the publisher through a switch from a wholesale model to an agency model. The agreement also included a retail price MFN, which guaranteed that the price on Apple's retail platform was no higher than on other platforms, in particular Amazon. This agreement led to a widespread change in policy to this new format. As discussed by Fletcher and Hviid (2016), there is a close link between an agency agreement and a purely vertical Resale Price Maintenance (RPM) clause. In both cases the upstream firm (here the publisher) sets the final goods price for the consumer. Equally, there is a close link between the combination of agency and Retail Price MFN and the more typical RPM with both vertical (upstream sets the price) and horizontal elements (and the price is the same at all outlets). While the agency aspect implies the vertical element, the Retail Price MFN implies the horizontal element.¹⁹ In other words, for purely commercial reasons, industry participants implemented what was in effect an FBP.

What was the background to this pricing policy? On one side of the agreement was a firm, Apple, wishing to enter the market, on the other side, a group of major publishers facing increasingly powerful retailers. Following the introduction of internet retailing and in particular e-books, the publishers were dealing with a much more concentrated retail sector, which not only yielded buyer power, but was also pursuing other or broader aims. Firstly, three of the main internet retailers entered with their own dedicated e-reader: Amazon had the Kindle, Barnes and Nobel had the Nook, Kobo had Kobo. These devices were not initially compatible, so that there was an incentive for the retailer to lock-in consumers to their e-reader. The entry of the other main e-book retailer, Apple, in 2010 with the iPad on which owners could read books purchased from the iBookstore added another

¹⁹ See Fletcher and Hviid (2016) for a discussion of why the latter horizontal element is the problematic one in terms of competition policy.

device with weak compatibility.²⁰ This gave e-book retailers an incentive to price the books low to build up a loyal consumer base.²¹ Secondly, several of these retailers, such as Amazon and Apple sell other products and hence, may choose to use e-books as a loss leader either to promote the sale of the physical device or to increase the traffic through its internet retail platform. The retail price hence has important external effects on other parts of the retailers' business and the retailers may from that perspective have strong incentives to keep retail prices low.

The growth in both sales of the Kindle and e-books was initially slow. In the US, in May 2010, only 3% of adults owned an e-book reader while 3% owned a tablet²², Waldfoegel and Reimers (2015, 49). Thus at the point at which Apple entered the market, at most 6% and likely closer to 3% of US adults owned a device suitable for reading an e-book.²³ This constrained the sales of e-books and should as a result limit the ability of the above to affect publisher behaviour. This inference appears to be incorrect and it is important to understand why.

Before the entry of Apple with the iBookstore and the iPad, publishers set a wholesale price for e-books and Amazon set a retail price. The US Appeals Case offer some useful insight²⁴ by highlighting a tension between Amazon and the publishers, which existed before Apple proposed to enter the market and before the agency model was first introduced. The retail price for best-sellers was set below the wholesale price²⁵ and the publishers were unhappy with this. At a first glance, this is odd for two reasons and from two perspectives: pricing below a wholesale price means that the retailer (Amazon) is losing money on each sale, so Amazon should be unhappy. It also means that total sales are higher than the publishers could reasonably expect at the wholesale price, so they are gaining profits and should be happy.

This simple analysis is wrong for at least three reasons, both related to complementary goods and associated externalities. Firstly, Amazon was also selling the Kindle for which consumer lock-in would be valuable due to lack of inter-operability across reading devices, so e-book sales were a means to an end. While Amazon was keen to lock-in consumers, this could store up future problems for the publishers if e-books continued to grow in popularity and if Amazon was able to capture a major part of this market since that would lead Amazon to become the key gateway to consumers. This would enhance the bargaining power of Amazon and by implication reduce the bargaining power of the publishers.²⁶ Thus even though at that point in time e-book sales were relatively modest, publishers

²⁰ The increased sophistication of other tablets and mobile phones has expanded the number of devices on which people can read books and with this compatibility has increased over time.

²¹ "The economic models of Amazon and Apple rely on the lock-in of users, in the framework of a proprietary format. For Amazon, books and e-books are a part of more general e-commerce activity. Initially, Amazon's Kindle files could be read on the Kindle only. For Apple, e-books are seen as an additional application within the general economic model of Apple. Apple has restricted its iBook files to the iPad (and iPhone). Even when it is possible to download a file on another device, users stay in the Amazon/Apple ecosystems of software and services." Benhamou (2015, p. 126).

²² The Apple iPad was launched January 2010 while competing Android tablets were launched post May 2010.

²³ By 2015 the percentage of the US population owning an e-reader had risen to 26%, see Statista, <http://www.statista.com/statistics/190283/penetration-rate-of-ereaders-in-the-united-states-since-2009/>. In the UK the percentage is similar, 24%, see <http://www.emarketer.com/Article/UK-Ereaders-Hold-Steady-Within-Tablet-Market/1013639>. Ownership of tablets including iPads, 50%, is considerably higher.

²⁴ United States v. Apple, Inc. 791 F.3d 290, 299-300 (2d Cir. 2015).

²⁵ See e.g. table 2 in Klein (2017).

²⁶ United States v. Apple Inc., 952 F. Supp. 2d 638, 652-653 (S.D.N.Y. 2013) ("publishing houses worry that eventually, Amazon and other e-book retailers will pressure publishers to take a smaller cut on e-books").

had cause to be concerned about the future.²⁷ Secondly, publishers were also selling printed books and in particular hardback copies with a significant mark-up. A low e-book price relative to the standard hardback price might accelerate the diffusion of e-book readers and so put competitive pressure directly on hardback sales. According to the Appeal Court, “the Publisher Defendants’ primary objective in expressly colluding to shift the entire e-book industry to an agency model (with Apple’s help) was to eliminate Amazon’s \$9.99 pricing for new releases and bestsellers, which the publishers believed threatened their short term ability to sell hardcovers at higher prices and the long-term consumer perception of the price of a new book.”²⁸ Attempts to combat this through holding back releases of e-book formats, the so-called windowing, had not been successful.²⁹ While Kindle ownership was still modest and hence the direct effect potentially similarly modest, a more behavioural view of consumers offers two alternative reasons for publishers to dislike low retail prices on e-books, both of which have the potential to lower demand for hard-cover books. Consumers could potentially be upset if the gap in price between print and e-book was too large and secondly, the lower price may alter the anchor price consumers had in mind. This is expressed very clearly in the Appeals case in the US. “As Hachette’s Young put it, the idea of the ‘wretched \$9.99 price point becoming a de facto standard’ for e-books ‘sickened’ him.”³⁰ Thirdly, the publishers were concerned that Amazon would enter the digital publishing business, a fear, which according to the District Court decision, was justified.³¹ With the majority of internet searching and purchasing going through Amazon’s website, Amazon would be well placed to offer authors a set of attractive services. The emergence of a significant competitor might reduce the value of what Amazon could offer.

To complicate the post-2010 picture further, the degree of interoperability and hence of the competition for a complementary device (the e-book reader) shifted significantly while the number of devices on which consumers could read e-books increased markedly to include smart phones.³² Moreover, many of these devices, including the iPad and smart phones, were not primarily e-book readers. For these devices, other products, including Apps, might offer better means of attracting buyers than cheap e-books. The fears about lock-in are hence much reduced.

3. The challenge from competition authorities

Because FBP is a form of RPM, a vertical restraint which has been treated at least with suspicion and often direct hostility by antitrust law and enforcers, it is unsurprising that competition authorities have sought to challenge FBP policies. Given the status of RPM requirements in EU competition law, where they are generally a blacklisted restraint and hence a violation by object, the decisions of the European Commission in earlier competition cases are interesting.

²⁷ There are two further avenues for lock-in, one arising from the e-book formats, see OECD (2012, 14) and the other arising from the Digital Rights Management (DRM) restrictions OECD (2012, 15).

²⁸ *United States v. Apple, Inc.* 791 F.3d 290, 327 (2d Cir. 2015).

²⁹ Nor had the obvious strategy of raising the wholesale price, see *United States v. Apple, Inc.* 791 F.3d 290, 303 (2d Cir. 2015).

³⁰ *United States v. Apple, Inc.* 791 F.3d 290, 300 (2d Cir. 2015).

³¹ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 649 (S.D.N.Y. 2013) (“might begin to compete directly with publishers by negotiating directly with authors and literary agents for rights—a process referred to as disintermediation.”).

³² There seems to be some argument over this, since there is no single standard for DRM for e-book formats. The conclusion drawn by OECD (2012, 15) is that “The DRM regime as it exists today ties the consumer investment in a particular e-reader device to the particular range of e-book titles provided by the related e-book”, still remains true.

3.1. Early EU cases challenging the cultural inspired FBP policies³³

There had been a number of early challenges to the NBA in the UK, notably in 1962 when the Restrictive Practices Court found the agreements were not contrary to the public interest and in 1968 when the same court, in light of the new Resale Prices Act 1964, ordered that the relevant kinds of books and maps should be exempt from the general prohibition on resale price maintenance under the Act based on a “books are different” argument.³⁴ The European Commission challenged the NBA of the Publishers Association in its decision of 12 December 1988³⁵ finding first that the NBA infringed article 101(1) TFEU and second that the NBA was not exempted under Article 101(3) TFEU because the NBA was not indispensable for the purpose of the agreement.³⁶ Hence the Publishers association was ordered to bring the infringement to an end. In the decision, the European Commission makes clear that it can bring the case under Article 101 TFEU because the NBA covered the UK and Ireland and hence affected trade between those two member states. The Publishers Association unsuccessfully appealed the decision to the GC who rejected the appeal 9 July 1992.³⁷ The Publishers Association then appealed the GC decision to the CJEU. In its judgement of 17 January 1995,³⁸ the CJEU set aside the judgment of the CFI. The appeal before the CJEU did not relate to the finding that Article 101(1) TFEU was violated by the NBA but to the analysis of whether the agreement could be exempted under Article 101(3) TFEU. The CJEU found that the Commission had not provided sufficient reason to reject an exemption and in particular had not engaged sufficiently with the 1968 decision by the Restrictive Practices Court.

The European Commission also challenged an agreement to fix book prices in Germany and Austria on similar grounds to the challenge to the NBA above, a challenge that led to a revision of the agreement, notified in March 2000, to ensure that it only related to Germany.³⁹ By so doing, the agreement no longer involved trade between member states and hence was moved beyond the reach of the Commission and EU competition law. The EU Competition Commissioner, Mario Monti, concluded that,

“[O]n the basis of EU competition law the Commission has no problem with national book price fixing systems which do not appreciably affect trade between member states. By clearing the German price fixing system the Commission, in a perspective of subsidiarity, also takes account of the national interest in maintaining these systems which are aimed at preserving cultural and linguistic diversity in Europe”.⁴⁰

³³ In the text, apart from direct quotes we use the current EU numbering and abbreviation. Hence Article 85, 85(1) and 85(3) are referred to as Article 101, 101(1) and 101(3) TFEU. The Court of First Instance (CFI) is referred to as the General Court (GC) and the European Court of Justice (ECJ) is referred to as The Court of Justice of the European Union (CJEU).

³⁴ *Re Net Book Agreement*, 1957 - [1962] 3 All ER 751 at 756.

³⁵ 89/44/EEC: Commission Decision of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association - Net Book Agreements).

³⁶ See 89/44/EEC at paragraph 75: “The Commission continues to recognize the important cultural role which books play among other cultural media. However, it is convinced that the parties could use less restrictive means to improve the publication and distribution of books.”

³⁷ Case T-66/89.

³⁸ Case C-360/92 P.

³⁹ O.J. No. C 162 of 10 June 2000, p. 25.

⁴⁰ IP/02/461 of 22 March 2002, ‘Commission accepts undertaking in competition proceeding regarding German book price fixing’.

Essentially, so long as trade across member states is not affected, EU member states are entitled to treat books as an exception and allow what essentially amounts to a minimum RPM with full horizontal effects. Following complaints from internet retailers, the Commission issued a Statement of Objections in July 2001 and settled the case in March 2002 following undertakings.⁴¹ These guaranteed the freedom of direct cross-border selling of German books to final consumers in Germany, in particular, via the Internet.

3.2. The Apple e-book cases

The approach by Apple to the major publishers with an offer of new contracts which would enable Apple to enter the market at a significant scale was hence welcomed by most of these, with five of the then six major publishers entering an agreement with Apple.⁴² This agreement included two important elements.⁴³ Firstly, there was an adoption of an agency model rather than the wholesale model which was in place between the publishers and the other internet retailers such as Amazon and Barnes and Noble. This shifted price setting on books from the retailer to publishers. Secondly, it included a term which guaranteed Apple that the price set by the publisher for an e-book offered in the iBookstore would be no higher than the price set through any other internet retailer (a Retail Price MFN). Note that the combined effect of a Retail Price MFN and an agency model is formally identical to RPM where the publishers set the same price for a book at all retail outlets. There may have been no nervousness about introducing something which is in effect an RPM in the US, where RPM since *Leegin*⁴⁴ was no longer a *per se* violation of Section I of the Sherman Act. The same is unlikely to have been the case in the EU, where RPM was still a black-listed vertical restraint, violating Article 101 TFEU by object,⁴⁵ unless an argument could be made that trade between EU member states was not affected. In the latter case the book market would be subject only to national competition law scrutiny. Another cause for nervousness among publishers would likely have been how the agency model plus Retail Price MFN in one vertical channel would interact with a more standard wholesale model on the other vertical channels. How could the publishers ensure that the Retail Price MFN was not violated? Setting up a system to monitor prices on all internet retailers, while technically feasible, would clearly be costly. A simpler answer would be to renegotiate the contracts with the other vertical channels to implement similar terms across these. Once the Retail Price MFN was in place with one retailer, the publishers had added incentives to force through a move to agency pricing.⁴⁶ Not only would they gain control over the retail price which they could then raise to avoid the possible negative feedback effects on the sales of printed books, they also avoided the costs of setting up an expensive monitoring system. Adding in the Retail Price MFN was essentially a sweetener for the retail platforms. It may also have

⁴¹ IP/02/461.

⁴² Bertelsmann (Penguin Random House/Transworld); Hachette Livre UK (Headline/Hodder/Little Brown/Orion); News Corporation (HarperCollins); Holtzbrinck (Pan Macmillan); and Simon & Schuster.

⁴³ The move from wholesale to agency was accompanied by a move from the producer getting a per unit (wholesale) price to the producer keeping a share of revenue. This can make a difference to final consumer prices and should be part of the evaluation of the adverse effect of any change.

⁴⁴ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁴⁵ This is essentially the EU equivalent of *per se*.

⁴⁶ See *United States v. Apple, Inc.* 791 F.3d 290, 317 (2d Cir. 2015) (“As a sophisticated negotiator, Apple was fully aware that its proposed Contracts would entice a critical mass of publishers only if these publishers perceived an opportunity collectively to shift Amazon to agency. In fact, this was the very purpose of the MFN, which Apple’s Saul devised as an elegant alternative to a provision that would have explicitly *required* the publishers to adopt an agency model with other retailers. As Cue put it, the MFN ‘force[d] the model’ from wholesale to agency.”).

functioned as a device to insure a near-universal shift to the agency model, see Foros et al. (2017). The combination of the agency model and the Retail Price MFN was challenged by competition authorities and private litigants in a number of jurisdictions, including the EU and the US.

3.2.1. The US case⁴⁷

The US Department of Justice (DoJ) opened the case on October 16, 2012 and together with 33 states and territories filed suit in the US District Court for the Southern District of New York.⁴⁸ Each of the publishers settled and signed consent decrees, which prohibited them, for a period of at least two years, from restricting the e-book retailers' ability to set prices. Apple chose to litigate. The District Court⁴⁹ found Apple to have violated Section 1 of the Sherman Act and issued an injunctive order that, among other things, prevents Apple from entering into agreements with publishers that restrict their ability to set, alter, or reduce the price of e-books, a decision which mirrors the earlier settlements both in the US and EU. The temporary injunction would remain effective until the end of 2014. Apple appealed the decision and on June 30, 2015 US Court of Appeals for the Second Circuit upheld the finding of the District Court.⁵⁰ On March 7, 2016, the US Supreme Court declined to hear Apple's appeal putting into effect the \$450 million settlement agreed by Apple if the case was lost, of which e-book buyers will receive \$400 million.

While there are a number of interesting issues, such as the use of *per se*, see Klein (2107), this paper focuses on what the judgement and the settlements tell us about fixed book prices. The settlements of the DoJ with each of the publishers all involve a prohibition on the publishers, for a period of time, from entering an agreement between them and any e-retailer which includes a Retail Price MFN. The length of the prohibitions differ across the publishers as follows: Hachett, Harper Collins and Simon & Schuster not to enter a Retail Price MFN until after September 6, 2014; Macmillan not to enter a Retail Price MFN until after December 18, 2014; Penguin not to enter a Retail Price MFN until after May 17, 2015. The Judgement in *United States v. Apple Inc.* prohibits Apple from enforcing any Retail Price MFN in any agreement with an E-book Publisher relating to the sale of E-books and from entering into any agreement with an E-book Publisher relating to the sale of E-books that contains a Retail Price MFN. The judgement provides expiry dates for these prohibitions relative to the effective date of the judgement i.e. September 5, 2013. These vary according to which publisher Apple would be entering an agreement with in the following way: Hachette, 24 months after the effective date of the judgement; Harper Collins, 30 months after; Simon & Schuster, 36 months after; Penguin, 42 months after; Macmillan, 48 months after. The judge motivated the staggered periods of prohibition as follows:

“By delaying Apple's ability to renegotiate similar restrictions and arranging for the restrictions to expire at different times for each Publisher Defendant, the injunctive order ensured that Apple and the Publisher Defendants would not be able to use that same strategy as part of a new conspiracy.”⁵¹

The overall result is that the Publishers could all enter agreements including a Retail Price MFN with anyone but Apple well before any one of them could enter a similar agreement with Apple.

⁴⁷ DoJ case web site: <https://www.justice.gov/atr/case/us-v-apple-inc-et-al>

⁴⁸ Formally the charge was that they had conspired to fix prices through the contractual arrangements.

⁴⁹ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013).

⁵⁰ *United States v. Apple, Inc.* 791 F.3d 290 (2d Cir. 2015).

⁵¹ *United States v. Apple, Inc.* 791 F.3d 290, 339 (2d Cir. 2015).

The situation with the difference in dates created some confusion. On December 18, 2014, the day that the restriction imposed in the consent decree lapsed and they had agreed an agency model with Amazon, Macmillan's CEO, John Sargent, wrote, that:

"Late last week Macmillan reached an agreement with Amazon on a multiyear deal for print books as well as a multiyear deal on the agency model for e-books, starting on January 5, 2015. All our other retailers will also be on the agency model, leaving Apple as the only retailer who is allowed unlimited discounting. Irony prospers in the digital age."⁵²

Two other publishers had also returned to some version of the agency deal as soon as they could, Simon & Schuster on October 21, 2014,⁵³ and Hachette on November 13, 2014.⁵⁴ Harper Collins reached a similar agreement April 13, 2015.⁵⁵ Penguin Random House were the last to reach such an agreement, in June 2015.⁵⁶

Finally, one of the defences offered by Apple is worth highlighting because it appears closely related to some of the arguments in favour of FBP, that a little competition law violation may be needed to ensure competition. The decision in the Court of Appeals was not unanimous and the Dissenting Judge "contends that Apple was entitled to do so because the conspiracy helped it become an ebook retailer".⁵⁷ The argument boils down to higher prices being necessary for Apple to enter the market and provide future competitive restraint on the dominant retailer, Amazon.⁵⁸ While the dissenting judge in the Appeals Court was willing to accept this argument, the majority was very clearly not.

"And it is particularly ironic that the 'terms' that Apple was able to insist upon by organizing a cartel of Publisher Defendants to move against Amazon — namely, the elimination of retail price competition — accomplished the precise opposite of what new entrants to concentrated markets are ordinarily supposed to provide. In short, Apple and the dissent erred first in equating a symptom (a single-retailer market) with a disease (a lack of competition), and then erred again by prescribing the disease itself as the cure."⁵⁹

3.2.2. The European cases

In January 2011 UK's Office of Fair Trading (OFT) launched an investigation into whether these new business models (Agency plus Retail Price MFN) might breach UK competition law.⁶⁰ The investigation was closed in December 2011 when the OFT stated that "following discussions with the European

⁵² Blog post visited 08/08/18, available at: <https://www.tor.com/2014/12/18/a-message-from-john-sargent-4/>.

⁵³ <https://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/64461-s-s-amazon-agree-on-version-of-agency-pricing.html> ("the deal gives S&S, "with some limited exceptions," control over the price of its books").

⁵⁴ http://www.infodocket.com/wp-content/uploads/2014/11/HBG-and-Amazon-joint-release_11-13-14-1.pdf (The new ebook terms will take effect early in 2015. Hachette will have responsibility for setting consumer prices of its ebooks, and will also benefit from better terms when it delivers lower prices for readers.").

⁵⁵ <https://www.nytimes.com/2015/04/14/business/media/harpercollins-and-amazon-in-multiyear-publishing-deal.html>

⁵⁶ <https://www.authorsguild.org/industry-advocacy/for-the-big-five-agency-now-holds-sway-across-the-board>.

⁵⁷ *United States v. Apple Inc.*, 791 F.3d 290, 297 (2d Cir. 2015).

⁵⁸ One can think of the argument, relying on *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, as the US antitrust equivalent of using Article 101(3) TFEU in a European competition case establishing the violation of Article 101(1) TFEU by object.

⁵⁹ *United States v. Apple, Inc.* 791 F.3d 290, 332 (2d Cir. 2015).

⁶⁰ Case reference: CE/9440-11.

Commission, that the European Commission is currently well placed to arrive at a comprehensive resolution of this matter and will do so as a matter of priority”.⁶¹

As indicated in the OFT press release, the EU Commission opened an investigation in December 2011. The Commission expressed similar concern to the US case that the publishers were engaging in direct communication with each other to combat what they viewed as too low retail prices for e-books.⁶² “Between March and December 2010, each of the Four Publishers⁶³ entered into negotiations with Apple concerning the signature of agency agreements in the United Kingdom, France and/or Germany.”⁶⁴ The Commission settled the case with four of the five publishers and with Apple on December 13, 2012⁶⁵ and with the remaining publisher, Penguin, on July 25, 2013.⁶⁶

These agreements were similar to the agreements made in the US, that is, they included a move to an agency model with Apple, a Retail Price MFN and a series of price caps.⁶⁷ For the UK, with a more developed e-book market and a history of banning RPM, the analysis was similar to that carried out in the US. For France, Amazon did not have a targeted presence at the time of entry by Apple but did enter in October 2011. The agency model appears to have been a standard model.⁶⁸ This is consistent with a history in France of embracing RPM for books.⁶⁹ Germany was similar to France except that where France had one dominant e-book retailer before the entry of Apple, Germany had five. Amazon did not have a targeted presence before the entry of Apple, but entered in April 2011. From the decision, it is not clear whether the agency model was typical before the entry of Apple, but there is reason to think so as Germany also has a history of RPM on books.⁷⁰

⁶¹ “Investigation into arrangements between certain publishers and retailers for the sale of e-books”, United Kingdom Office of Fair Trading, CE/9440-11, at: <https://www.gov.uk/cma-cases/e-books-investigation-into-anti-competitive-arrangements-between-some-publishers-and-retailers>.

⁶² Case COMP/39.847/E-BOOKS. Available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847.

⁶³ These are Simon & Schuster, Harper Collins, Hachette, Holtzbrinck. The quote reflects that these four publishers settled together and before Penguin.

⁶⁴ Case COMP/39.847/E-BOOKS, recital 40. The rather cryptic “and/or” reflects that of the four, only one was active in the French market and only one (a different firm) was active in the German market. These two entered agreements with Apple for those titles.

⁶⁵ Press release: Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books.

⁶⁶ Press release: Commission accepts legally binding commitments from Penguin in e-books market

⁶⁷ Case COMP/39.847/E-BOOKS, recital 46.

⁶⁸ Case COMP/39.847/E-BOOKS, recitals 54-57.

⁶⁹ In 1981, France introduced the *Loi Lang*, a Fixed Book Price law named after Culture Minister Jack Lang. It has since served as the model for many other countries’ FBP schemes. The *Loi Lang* was extended to e-books (livre numérique) in 2012, see LOI n° 2011-590 du 26 mai 2011 relative au prix du livre numérique. <https://www.sne.fr/prix-unique-du-livre/prix-du-livre-numerique/>. Importantly, while Article 2 of that law requires that a fixed price is set for any type of offer, the price can differ between the offers (Ce prix peut différer en fonction du contenu de l'offre et de ses modalités d'accès ou d'usage).

⁷⁰ As discussed in section 2, FBP, essentially RPM, have a been mandatory for books in Germany since 2nd September 2002 (Buchpreisbindungsgesetz - BuchPrG). That this law (Buchpreisbindung) also covered e-books was clarified by an extension to this law, which came into force on September 1st 2016. The law imposes fixed book prices also on books sold into Germany by international platforms. Interestingly, it appears from § 2 para. 1 no. 3 that self-published books sold on a specialist platform are not covered, though the exact circumstances under which this is true is not settled. As in France, while a particular format of a book has to have the same price no matter the retail channel, again different versions can have different prices.

In the settlement, the parties agreed to terminate the agency agreement and in addition not to enter a Retail Price MFN for a five year period – this commitment is binding from December 12, 2012. The publishers also agreed for a period of two years “not to restrict, limit or impede an e-book retailer’s ability to set, alter or reduce retail prices of e-books and/or to restrict, limit or impede an e-book retailer’s ability to offer price discounts or any other forms of promotions.”⁷¹ The latter was questioned by some respondents, who were concerned by the potential clash with domestic RPM rules. The Commission appears unperturbed by this, pointing out that any problems which the settlement remedies propose for domestic retailers bound by national RPM laws were caused by those laws not by the remedies. One might wonder whether this is essentially the EU Commission using the only lever they have against a practice, which they disagree with but which, since it is national, they cannot reach through conventional means. The ban on a Retail Price MFN on e-books expired on December 12, 2017. That the expiration has had no effect is likely explained by the more recent case against Amazon.

The European Commission initiated an investigation of practices involving Amazon and book retailing on June 11, 2015, reaching a settlement, which was accepted by the Commission on May 4 2017.⁷² The concern raised in the initial press release related to “certain clauses included in Amazon’s contracts with publishers. These clauses require publishers to inform Amazon about more favourable or alternative terms offered to Amazon’s competitors and/or offer Amazon similar terms and conditions than to its competitors, or through other means ensure that Amazon is offered terms at least as good as those for its competitors.”⁷³ These are referred to as parity clauses in the Decision⁷⁴ and can be interpreted as “Retail Price MFN plus ...” in that they go beyond just requiring that prices should be the same. The settlement in effect prevents Amazon from enforcing existing parity clauses or entering agreements, which include such clauses for a period of 5 years after the decision.

One notable comment in the Decision is that:

“The Commission’s preliminary analysis focused on the Retail Price Parity Provisions pertaining to English language e-books. Concerning the e-book retail distribution markets for German language e-books, countries where German is the main language (that is to say, Germany or Austria) are mainly relevant. However, both in Germany and Austria, there are RPM laws in place which are applied to e-books. Given that the vast majority of German language e-books are sold in those two countries, also the likely anti-competitive effects of Retail Price Parity Provisions in the markets for the retail distribution of German language e-books covering those countries were considered largely determined by the effects of those clauses in Germany and Austria. The Commission considered that in light of applicable RPM laws in Germany and Austria, the anti-competitive effects of Amazon’s Retail Price Parity Clauses in those countries are likely to be more limited than the potential effects in the relevant English language e-book markets.”⁷⁵

⁷¹ Case COMP/39.847/E-BOOKS, recital 99.

⁷² Case COMP/40153/E-Books MFNs and related matters (May 4, 2017). Decision and case details available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40153.

⁷³ http://europa.eu/rapid/press-release_IP-15-5166_en.htm.

⁷⁴ CASE AT.40153 E-book MFNs and related matters (Amazon), available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf

⁷⁵ CASE AT.40153 E-book MFNs and related matters (Amazon), recital 119.

In other words, Amazon's parity agreements did not add significantly to the distortions to competition already created by existing FBP agreements, given that these two agreements impose very similar constraints on retail pricing.

More recently, a special report⁷⁶ from the German Monopolkommission questions whether the existing law regarding book prices, Buchpreisbindungsgesetzes (BuchPrG), is delivering on the aim to protect the book as a cultural object.⁷⁷ The Monopolkommission offer a number of justifications for intervening in the market, including:

- The asymmetry of information on behalf of consumers/readers arising from a book being an experience good. Because of this feature of the product, the provision of reliable information through reviews and recommendations is valuable.
- The high fixed cost of production. If competition is intense, publishers may not be able to recoup these costs, affecting the incentive to produce.
- The uncertainty of demand. It is difficult for publishers and bookshops to pick winners so an element of cross subsidy between successful and unsuccessful books is desirable and competition may undermine cross-subsidies.
- The book is a merit good so the choice of publications should not solely be determined by market economic forces.

Their conclusion is that fixed book prices is an intervention with ambiguous effects trying to deal with a cultural goal which itself is not clearly defined.⁷⁸ Because of this, the Monopolkommission comes out in favour of abolishing the fixed book price law. The report was prompted by the EU finding that the German use of RPM on drugs was illegal under EU law.⁷⁹

In the EU, the ban on Retail Price MFN remains effective. The EU Commission view about Retail Price MFN [or Parity Agreements as they refer to them] is clear from the Commission Staff Working Document which is accompanying the E-commerce Sector Inquiry Report from the Commission to the Council and the European Parliament, adopted on 10 May 2017.⁸⁰ Interestingly, the efficiencies arising from Retail Price MFN, which they list in their summary (page 180) relate to the protection of investment by the (digital) market place. While the EU Commission may be against pricing policies which lead to or protect FBP, they still appear unable or unwilling to tackle this. The argument seems to be that book markets, except for English language books, are national and hence national culture policies trump competition concern. While Apple could not get away with an excuse that distorting the market was the only way to ensure that there was enough competitors in the digital market place, bookshops and publishers in some EU member states are successfully arguing that distorting pricing is a price worth paying to ensure that enough brick-and-mortar retailers survive the competition with the e-retailers.

⁷⁶ Monopolkommission (2018).

⁷⁷ According to § 1 of BuchPrG "Das Gesetz dient dem Schutz des Kulturgutes Buch. Die Festsetzung verbindlicher Preise beim Verkauf an Letztabnehmer sichert den Erhalt eines breiten Buchangebots. Das Gesetz gewährleistet zugleich, dass dieses Angebot für eine breite Öffentlichkeit zugänglich ist, indem es die Existenz einer großen Zahl von Verkaufsstellen fördert."

⁷⁸ Monopolkommission, 2018, "Die Buchpreisbindung in einem sich ändernden Marktumfeld", Sondergutachten 80, e.g. paragraph K9.

⁷⁹ Case C-148/15 Judgment of the Court (First Chamber) of 19 October 2016, Deutsche Parkinson Vereinigung eV v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (concerning the setting, in German law, of fixed prices for the sale by pharmacies of prescription-only medicinal products for human use)

⁸⁰ See http://ec.europa.eu/competition/antitrust/sector_inquiry_sw_d_en.pdf, especially pages 177-180.

3.3. The effect on prices

The US and EU decisions may have been beneficial to consumers. Some work looking at the aftermath of the US Apple e-book case attempt to get at the effect of both the move to and from an agency model and the adoption of an MFN. De Los Santos and Wildenbeest (2017) use the publisher variation in the timing of the return to the wholesale model to estimate its effect on retail prices. They find that e-book prices for titles that were previously sold using the agency model decreased by 18 percent at Amazon. De Los Santos et al. (2018) analyse the switch from wholesale to agency after the expiration of a two-year ban on agency pricing following the US DoJ settlements with the major publishers. They show that prices went up substantially at Amazon following the shift (back) to an agency model. Using simulations they also show reinstalling the banned MFN would lead to price increases of close to nine percent for non-fiction books.

The tensions remain between the desire of the Big-Five publishers to have high e-book prices and the push by Amazon to discount. The latter makes clear its views on its website: “A key objective is lower e-book prices. Many e-books are being released at \$14.99 and even \$19.99. That is unjustifiably high for an e-book. With an e-book, there's no printing, no over-printing, no need to forecast, no returns, no lost sales due to out-of-stock, no warehousing costs, no transportation costs, and there is no secondary market -- e-books cannot be resold as used books. E-books can be and should be less expensive.”⁸¹ The contrasts with a claim from one German bookseller that the cost difference is relatively modest and only relate to printing costs.⁸²

Interestingly, for both France and Germany, countries with fixed book price laws, prices for e-books have also fallen. The laws in both countries mandate that for a particular product the price must be the same. However, it is perfectly legal for publishers to charge different prices for an printed book and an e-book and indeed this is generally the case. From the tables associated with the annual “Buch und Buchhandel in Zahlen” report⁸³ for Germany, the average hardcover price for fiction (Belletristik) in 2017 was 14.77 Euro while the average paper back price was 11.81 Euro. This compares with an average ebook price of 6.38 Euro. It is interesting that the average price of ebooks in Germany appears to have fallen quite significantly over time. From the same report, the price for 2016 was 6.72 Euro and for 2010 even higher at 10.71 Euro. It may have been the case in 2010 that paperback and ebooks had fairly similar prices but that appears no longer to be the case.

A similar drop in prices is found in France where data from the Ministère de la Culture report a significant drop in the price of e-books since data was reported in 2016. Prices fell by 13,2% in 2016, 2.0% in 2017 and 4.9% in 2018.⁸⁴ By contrast, prices on printed books increased slightly over the period. The stock of e-books rose steadily and by greater absolute numbers than printed books. Finally the share of books revenue accounted for by e-books has risen steadily since 2009, reaching 7.6% in

⁸¹ Kindle Forum: Update re: Amazon/Hachette Business Interruption. http://www.amazon.com/forum/kindle/ref=cm_cd_tfp_ef_tft_tp?encoding=UTF8&cdForum=Fx1D7SY3BVSE_SG&cdThread=Tx3J0JKSSUIRCMT.

⁸² “Die Preisdifferenz ist nicht größer, weil der Aufwand für die Herstellung eines eBooks nicht wesentlich geringer ist, als der für die Produktion eines Printbuches. Lediglich die reinen Druckkosten fallen weg.” From the FAQ pages of the German book chain, Lehmann available at <https://www.lehmans.de/page/ebookfaq>

⁸³ See http://www.boersenverein.de/sixcms/media.php/1117/WIPK19_Tabellenkompodium.pdf, table 9.

⁸⁴ Source: Chiffres clés du secteur du livre from 2009-10 to 2016-17. See various years of “Chiffres clés du secteur du livre” at <http://www.culture.gouv.fr/Thematiques/Livre-et-Lecture/Documentation/Chiffres-et-statistiques>

2017. Another interesting observation regarding France is the share of revenue from sales in non-book stores (particularly supermarkets) which has been roughly a fifth for the last number of years.

Without better price data, we cannot rule out that consumers get at least some of the benefits from the lower delivery costs of e-books, even in the countries with an FBP.

3.4. The effect on retail outlets

An interesting point made by the Monopolkommission is that while fixed book prices may slow down the developments in book retailing in Germany away from the traditional bookstore and towards other, in particular internet based, forms of retail and delivery, it cannot halt this development.⁸⁵ One of the aims of the FBP laws is to protect bookstores. In that regard, it is interesting to look at the revenue share of the major retail channels in to two main FBP economies, France and Germany. For neither country does the change over a 10 year period look dramatic.

As illustrated in the tables in the appendix, both France and Germany display a remarkable stability of revenue shares for bookstores. For France, over a 10 year period, 2009-2018, the market share of specialist bookstores fluctuate between 44% and 47.5% and the share of non-specialist retail channels, such as supermarkets, fluctuate between 19% and 20.7%.⁸⁶ The odd one out is internet retail (of print and e-books), which has grown steadily and significantly from 10% to 21% over the same period. Most of this market share gain appears have come from book clubs and other outlets shipping directly to the reader. This suggests very stable with respect to delivery, whether at the bookstore, the supermarket or in the home.

Germany break down market shares somewhat differently, with a significant share of revenue, on average over 2009-2019 of 20%, accounted for by direct sale from publishers to business users.⁸⁷ If we combine the sales in specialist brick-and-mortar bookstores with the sales from bookstores within department stores, which are likely to have the same level of specialist staff, their share fall steadily from 54.7% to 48.1%. Most of this decline has been accounted for by an increase in internet sales from 15.5% to 19.5%. Sales at supermarket type outlets has remained relatively constant as just below the 10% mark.

Data for the UK is less complete but suggests a rather different picture with a larger and growing share of the internet as a distribution channel.⁸⁸ The larger share of internet retailers may simply reflect the greater popularity and supply of e-books, though the availability of e-books in both France and Germany is non-trivial and growing.⁸⁹ One indication that the shares have become relatively stable is the number of bookstores, which fell significantly in 2008 (from 1315 to 972) but have subsequently stabilised around 1050.⁹⁰

The discussion above have focused on revenue shares. This may hide shifts in the number of books purchased from the different channels. In particular, as e-books appear to have fallen in price in some

⁸⁵ Monopolkommission, 2018, "Die Buchpreisbindung in einem sich ändernden Marktumfeld", Sondergutachten 80, paragraph 6.

⁸⁶ See Table A-1 in the appendix.

⁸⁷ See Table A-2 in the appendix.

⁸⁸ See Table A-3 in the appendix.

⁸⁹ For France the fraction of the stock of books accounted for by e-books rose from about 20% in 2015 to over 26% in 2018, see various editions of "Economie du Livre, Chiffres clés du secteur du livre"

⁹⁰ See Statista at <https://www.statista.com/statistics/295868/book-selling-books-in-specialised-stores-in-the-uk/>.

countries, there may have been a greater shift to the internet when it comes to volume of books sold. The growing popularity of streaming, possibly supported by the growth in digitally delivered audiobooks, may lead to further distortions in this market.⁹¹ Whether streaming eats into the market shares of printed books or e-books is difficult to judge. It is also not clear whether streaming, which like e-books and audiobooks can be consumers on the move, is mainly an alternative to print books or an alternative to the other leisure activities, which are competing in a crowded space for our time and attention.

4. Conclusion

When Apple introduced the combination of the agency model and the Retail Price MFN, it was not introducing anything which did not already exist in some of the EU member states, notably two of the larger economies, France and Germany. The Agency model combined with a Retail Price MFN amounts to having FBP. Yet the EU commission decided to challenge Apple and subsequently Amazon when it came to e-books and did so successfully. As in previous attempts by the EU Commission to tackle FBP, even in the most recent case, it acknowledges that it cannot reach the national FBP laws and agreements. In the Amazon case, the Commission noted that the effect of the Amazon agreement on the German and Austrian market would be almost non-existent because of their existing FBP. Matters are different when it comes to e-books and book streaming because the market is no longer national and EU competition law can be applied.

The legal cases of the past decade have highlighted the harm to competition, which FBP laws and agreements give rise to. The broader analysis of Retail Price MFN which acknowledges that the distortion may be necessary in order to reap the benefit of the investments in services made by retailers point to where the discussion ought to be. Do the traditional retailers offer a service which free-riding by internet retail platforms would erode? Given the information available on-line combined with delivery to the door or to pick-up points nearby it is reasonable to challenge the orthodoxy. While at the moment, the battle between cultural policy and competition policy seems to have resulted in a stalemate, this state of affairs may not remain in the future, particularly if streaming takes off as a significant means of book consumption.

It may simply be that the battleground has shifted back to book prices and away from reading devices. While initially Amazon and others were happy to use book prices as a loss leader to sell more Kindles, the benefits of locking in consumers to reading devices are less obvious at a time where we read e-books on such a variety of these. If Amazon and other on-line retailers are no longer focused on lock-in, then a wholesale model in a market where there is significant levels of concentration both at the publisher and retailer level may lead to a double marginalisation problem where both levels add an oligopolistic mark-up to their costs. We know from the literature on RPM that it is one of several ways to solve this problem.⁹² This does not mean that we get competitive book prices, but at least the agency model may give us lower prices than the wholesale model. Whether that transpires depends

⁹¹ This is an area with rapid changes where good data seems hard to obtain. German streaming services in the spring of 2019 include: Skoobe, KindleUnlimited and 24symbols which are traditional monthly fee streaming services, Tolinoselect which is more like a bookclub where the subscriber selects a maximum of 4 books from 40 per month and Readfy which is ad funded with free access to ebooks. In addition there are some free streaming services based on access to the classics. This variation may be a result of experimentation during a period of disequilibrium, rather than the new reality.

⁹² With RPM there is only one price setter in the vertical chain and hence double marginalisation is ruled out by design. See e.g. Motta (2004) section 6.2.1 page 307.

on how purchasing habits develop over time. Where publishers still make a lot of their profit from selling printed hardback books, they may yet be concerned about the spill-over from e-book prices to hardback prices and this may keep prices artificially high.

The delivery of e-books is under transition. While the sale of e-books looks a lot like traditional book retailing, the buyer of an e-book does not own the book in the same sense as if they purchased a print copy and there are a lot of things which it is hard or impossible to do with an e-book, including lending the book to others.⁹³ There are good reasons for why ownership cannot be fashioned in the same way, but this has implications for how e-books should and likely will be perceived in the future. A new way of delivering content, subscription services, offers a future challenge to the fixed book price policies. Subscription services offer readers access to an entire library of books to read online in return for a monthly fee.⁹⁴ The current two main providers are Kindle Unlimited (KU), which is part of Amazon, and Scribd.⁹⁵ While with electronic delivery of books, a FBP could be designed to align prices between physical copied and electronic copies, it is harder to see how this can be achieved in the case of streaming. Maybe books were different because a FBP regime could be implemented. The challenge posed by streaming is hard to assess, in no small part because the relative market shares or the share of reading accounted for by streaming are not currently available. More generally, research in this area is hampered by the paucity of credible and readily available information.

Added to this is an issue highlighted in Monopolkommission (2018) and Appelman (2003) that the FBP is a very blunt instrument. There is no guarantee that the increased surplus finds its way to the retailers and the authors in such a quantity that we get the socially optimal number of books and book retailers. Moreover, it is likely a blunt instrument to achieve another policy goal which we have not discussed in this paper, but which is seen as important in the cultural policy debates, namely that of diversity.

The danger when demanding that we protect the existing regulatory regime in the face of disruptive innovations in delivery of goods and services is that we allow the incumbent producers and retailers to fossilise rather than to raise to the challenge. Recent research in the US, Raffaelli (2017), suggests that the number of independent brick-and-mortar bookstores there is on the rise again. But these are focused on their place in the local community for example through their curation of their collection of books and on hosting events and book clubs.

⁹³ A big factor here is the Digital Rights Management (DRM) system used.

⁹⁴ Varian and Roehl (2001) draw parallels with the video rental markets and early circulating libraries and Varian (2000) looked more generally at the differences between buying, sharing and renting information goods such as books. While the examples used in these papers, including video rentals, are interesting, arguable the parallels are even more apt when it comes to comparing the early circulating libraries with the book streaming services. The parallel gets even tighter when one considers the following quote: "The rise of a new class of readers on the introduction of the novel in in the eighteenth century opened a way to the profitable lending of books. From about 1740 private individuals began to lay in stocks of literature and to charge annual subscriptions of a guinea or thereabouts for the use of it. By 1761 it was thought worthy of mention in *The Annual Register* that 'the reading female hires her novels from some country Circulating Library, which consists of about a hundred volumes'." Plant (1939, 264).

⁹⁵ There are other ebook subscription services, Bookmate, 24symbols, Playster and Kobo Plus as well as potential future entry by Walmart, Apple and Google.

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6. Appendix: Tables

Table A-1: Market shares of different retail channels; France 2007-2018

year	Specialist retailers ⁹⁶	Non-specialist retailers ⁹⁷	Internet
2007	45.6%	21.4%	7.9%
2008	46.1%	19.9%	9.6%
2009	46.8%	20.7%	10.0%
2010	45.7%	19.1%	13.1%
2011	N/A	N/A	N/A
2012	46.0%	19.0%	17.0%
2013	44.0%	19.5%	18.0%
2014	44.0%	19.5%	18.5%
2015	46.0%	19.0%	19.5%
2016	46.5%	19.0%	19.5%
2017	47.5%	19.0%	20.0%
2018	47.5%	19.0%	21.0%

Source: Chiffres clés du secteur du livre from 2009-10 to 2016-17. Available at: <http://www.culture.gouv.fr/Thematiques/Livre-et-Lecture/Documentation/Chiffres-et-statistiques>

Table A-2: Market shares of different retail channels; Germany 2008-2018

Year	Brick and mortar bookshops	Internet sales	Book retail in department stores	Non-specialist retail	Direct from publisher BtB
2008	52.6%	14.0%	3.0%	9.2%	18.2%
2009	52.3%	15.5%	2.4%	9.3%	18.3%
2010	50.6%	17.1%	2.1%	9.4%	18.5%
2011	49.7%	17.8%	1.9%	9.5%	19.1%
2012	48.3%	19.1%	1.7%	9.7%	19.4%
2013	48.6%	18.6%	1.5%	9.9%	19.7%
2014	49.2%	17.9%	1.3%	9.9%	20.4%
2015	48.2%	17.4%	1.2%	10.1%	20.9%
2016	47.3%	18.2%	1.4%	10.1%	20.9%
2017	47.1%	18.8%	1.4%	9.8%	21.3%
2018	46.8%	19.5%	1.3%	9.8%	21.0%

Source: Börsenverein des Deutschen Buchhandels, various years.

⁹⁶ Brick-and-mortar bookstores: “Librairies” and “grandes surfaces culturelles spécialisées”.

⁹⁷ This refers to non specialist book store outlets, most of which are supermarkets: “grandes surfaces non spécialisées (dont hyper)”.

Table A-3: Market shares of different retail channels; UK 2008, 2012-2013

Year	Brick and mortar bookshops	Internet sales	Non-specialist retail
2008	54	20	17
2012	39	41	16
2013	38	44	15
2014	38	46	14

Sources: Nensel (2017) and Booksellers Association:
<https://www.booksellers.org.uk/BookSellers/BizFormFiles/3432732c-4ae9-4173-bf21-38a48d1e32b8.pdf>