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Digitally binding: examining the feasibility of charging a fixed price for e-books

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Digitally binding



seo economic research

Amsterdam, March 2012
Commissioned by the Ministry of Education, Culture and Science (OC&W)

Digitally binding

Examining the feasibility of charging a fixed price for e-books

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Nico van Eijk & Bart van der Sloot (Institute for Information Law)
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A decorative horizontal line graph with multiple overlapping lines, resembling a signal or data visualization, spans the width of the page above the SEO Economic Research logo.

seo economic research

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Summary

Legal price fixing for printed books in the Dutch and Frisian languages was introduced in the Netherlands in 2005. Publishers today are required to fix retail prices for new books and retailers are required to charge the prices set. Fixed prices are valid for an indefinite period, but publishers are permitted to adjust them after a period of six months and to discard the fixed price altogether after a year. The Resale Price Maintenance (Books) Act (*Wet op de vaste boekenprijs*) seeks to contribute towards a large and varied stock and wide geographic availability of books, as well as towards public participation (purchasing and reading habits).

With the emergence of e-books, the question arises as to whether it would be possible and desirable to introduce legally enforced price fixing for digital books too. This study examines the feasibility and enforceability of resale price maintenance (RPM) for e-books and analyses the functionality in terms of the degree to which it contributes to pluralism and the broad availability of supply, the market structure of the book business and the diversity and availability of print books.

The analyses show clearly that this is a complex matter fraught with uncertainty. The fundamental questions inherent in the legal framework are currently being studied at European level by the EU authorities. With the market in a state of flux, a judicious approach is called for – it would be best to keep close tabs on developments rather than going for rash intervention.

Uncertainty about feasibility and alternatives

The legal analysis presented here shows that European law does not in principle rule out resale price maintenance for e-books. In Germany, existing price maintenance is currently also applied to e-books and in France legislative procedures for the introduction of price maintenance for e-books were concluded earlier this year (2011). And yet it cannot be said with certainty that price fixing for e-books is feasible under European law. The burden of proof required of Member States for the introduction of a measure of this kind is greater than it is for print books: not only because the legislation is new, but also because digital books are considered services rather than goods, and precisely because the interstate effect of resale price maintenance is all the greater in the digital arena. Price fixing will have to fulfil the requirements of necessity, proportionality and subsidiarity. France is taking a pioneering role in Europe and the French legislation is being investigated by the European Commission.

An alternative to legally enforced price maintenance that is gaining ground is the agency model, in which the publisher determines the retail price the bookseller, acting as his agent, should charge and the fee the latter will receive as consideration for his efforts. The agent in this model is considered an intermediary between publishers and consumers. As agency pricing eliminates price competition between booksellers, the model could serve as an alternative to resale price maintenance. An added advantage for publishers is that they can differentiate prices between retailers and adjust prices to changing market conditions. That said, a drawback could be that the agency model will allow retailers who possess considerable market clout to dictate the conditions

at the expense of publishers. The competition law implications of agency pricing are currently being investigated by the European Commission and the British competition authorities. Proceedings are also under way in the United States. Whether agency pricing will be authorised on both sides of the Atlantic, and under what conditions, is hard to predict.

Definition of 'e-book' and scope of a fixed price

The legal analysis also showed that the most readily enforceable basis for e-book price fixing is a version that comes very close to the print book, namely what is known as a facsimile e-book. Defining e-books that are further removed from print through the addition of external links or multimedia enhancement in a legally tenable manner is becoming increasingly difficult with the advent of technological advances and new publishing models. And so with time, it will become impossible to tell enhanced e-books apart from other digital services.

Unlike for print, book rental could serve as a practicable and attractive business model in the digital environment, offering consumers an alternative equivalent to buying, in terms of use. This would give publishers of e-books the option of following two routes to evade the effect of resale price maintenance, if introduced: by enhancing books with external links or multimedia applications, or by applying a business model fashioned after rental or subscription models. Whether or not publishers will actually use these options will be driven by commercial considerations. Note also that rental models and enhancement are innovations that are already being extensively applied in academic and professional publishing. In this light, imposing legal restrictions on this type of service in an effort to enhance the effect of price fixing is not to be recommended as this would unnecessarily frustrate the delivery of such services. This argument was used in France in the drafting of price fixing legislation, which does not impose legal restrictions on rental and subscription services – a decision, incidentally, unrelated to the fact that these models could run into trouble under European law.

E-book market trends to date

To date, the market for e-books in the Netherlands has been quite modest in size, accounting for less than one per cent of sales in 2010. But their market share is growing fast, and bearing in mind the limited supply of e-titles, it is justified to conclude that readers in the Netherlands are favourably disposed to e-books. Yet publishers and authors tend to be wary of going down the e-publishing route for fear of losing revenues: at the end of 2010, less than 1.5 per cent of titles available in print were also available in digital format. That said, evidence from the United States shows that the digitisation of books does not necessarily mean a decline in profits earned by publishers. In fact, the prices of e-books in that country are often higher than those of paperbacks and the share of turnover from e-books already tops 15 per cent of the total book market. For whereas the introduction of e-books requires upfront investments by publishers and booksellers in setting up digital infrastructures, variable costs are set to fall dramatically in the longer term, making such investments worth their while.

A hybrid market would seem the obvious future landscape for the market for e-books and print, at least for the coming years. In the short term, having to actually buy a device to read e-books (an e-reader or tablet) is a hurdle, but one that should feature less prominently over time as owning these devices will become increasingly common. At this point, fiction accounts for the

biggest share of the Dutch market for e-books, as its advantages – portability, storage capacity and direct delivery – are already manifest. *Potentially*, non-fiction offers even greater advantages: in addition to searchability, a feature already available today, this includes such merits as external links, multimedia enhancement, updates and the possibility of selling separate chapters. That said, the development of enhanced e-books is still in its infancy.

Aside from cannibalising printed books, e-books also offer fresh sales opportunities, as digital reading might actually help boost time spent on reading. *Digital rights management* (DRM) is a key factor in the user-friendliness of e-books. Both the industry and users criticise current DRM systems for their user-unfriendliness. There is a danger that DRM will act as a drag on the development of the market for e-books and will actually encourage what it aims to combat: *file sharing*. If readers face restrictions on the use of the e-books they have purchased, this might have the unintended effect of encouraging consumers to turn to copying books obtained from illegal sources that do not restrict their user experience.

Effect of resale price maintenance for e-books

The effect of resale price maintenance for e-books is essentially the same as for print books: price competition between retailers is eliminated, and so fixed prices – or, more precisely, fixed gross margins – might contribute to larger numbers of retailers staying afloat. In the case of print, price fixing could also encourage bookshops to invest in a large and varied range of titles, including titles that do not automatically hold the promise of commercial success. Publishers stand to gain from fixed prices to the extent that a greater multitude of retail outlets will generate higher sales than would be the case under price competition in a more concentrated market. This may be the case for print books as a larger number of sales outlets enhances the proximity of supply and reduces search costs for consumers. Additionally, physical bookshops have advertising value, which boosts demand for book titles. Moreover, a more differentiated retail channel strengthens publishers' negotiating position.

Proximity is of very little consequence in the digital environment: consumers prefer to buy e-books from their computers at home, or through their mobile devices such as e-readers or tablets. Unlike for print, fixed prices for e-books will not affect the breadth and variety of e-books on offer. In an online environment, all market players will try to offer the full catalogue, as this involves relatively low costs. E-book price fixing will not, therefore, promote the broad availability of books in digital format, but it could contribute to the wide geographic availability of print by keeping brick and mortar bookshops in business. Resale price maintenance should improve the ability of traditional bookshops to compete with large online domestic and foreign retailers in the digital domain, causing their market share in the total book market to decrease less rapidly. Resale price maintenance for e-books should, at the same time, slow down price erosion of e-books resulting from competition, which in turn would hold back their emergence. Here, too, physical bookshops stand to benefit.

Functionality of resale price maintenance for e-books

Four scenarios describing future market trends show that more so than any other factor, the strategies pursued by publishers and authors determine the extent to which and pace at which e-books are set to break through. The role of e-book price fixing in shaping market trends is

secondary. Publishing strategies determine such things as the pace at which old and new titles are released in digital format, their user-friendliness and pricing. If publishers continue to take a wait-and-see stance, they could considerably retard the emergence of e-books, raising the likelihood that large foreign online retailers will not for the time being target the Dutch market and keeping the loss of market share by bookshops within bounds.

Under all four scenarios, physical bookshops are set to lose market share in favour of online print and e-booksellers in the coming years. If publishers fully embrace digital platforms, the e-book market will grow rapidly and bookshops will cede market share to large domestic and foreign online retailers. Price fixing should offer bookshops a degree of protection, favourably impacting their position and promoting the broad availability and a varied range of printed books, but will also slow down the pace at which e-books capture market share and keep innovation in check. Not only will the elimination of price competition push up prices, but a fixed price will at the same time limit the ability of publishers and retailers to adjust their prices to changing market conditions.

The limited effect of resale price maintenance on future market trends could be further reduced as publishers see possibilities to sidestep price fixing. Examples are the publication of enhanced e-books and the introduction of subscription or rental models, both of which do not come under the scope of price fixing. By using these instruments, individual publishers jeopardise the collective interest they have in a wide and varied distribution network for physical books, also in the digital age. Yet publishers barely make an individual contribution to extending this network and it will sometimes be in the commercial interest of a single publisher – for example, when marketing a bestseller – to evade price maintenance.

The effect of this strategy on unauthorised file sharing is ambiguous, for whereas a broader range of e-books increases the risk of file sharing, restrictive DRM could open the door to the downloading of DRM-free, hacked versions. Resale price maintenance for e-books is likely to unfavourably affect unauthorised distribution as it will limit the ability of publishers and retailers to quickly respond to changing market conditions.

Academic books

More so than in print, the dynamics of academic books in digital format do not resemble those of general books. That said, it is not possible to establish legal demarcation lines nor to unambiguously define them in terms of content or use. Business models that exist today would not be affected by price fixing for e-books as they bear greater resemblance to rental models (licensing agreements) than to selling. Another factor is that enhanced e-books are already more common in academia than in the general book segment. In light of the scope of resale price maintenance for e-books, if introduced, business models widely used in the academic world are hardly expected to suffer, nor to benefit from price fixing.

1 Introduction and research questions

In his letter to parliament dated 28 January 2010, the then Dutch Minister of Education, Culture and Science concluded, based on the first evaluation of the operation of the Resale Price Maintenance (Books) Act (RPM Books Act) (*Wet op de vaste boekenprijs*), that the law is functioning well.¹ The criteria used for this evaluation were the diversity of supply, wide geographic availability of books and public participation (purchasing and reading habits). A quantitative evaluation of the RPM Books Act between 2005 and 2008 carried out by APE² showed that the total title offering had risen slightly and that the number of physical bookshops had remained more or less the same. And whereas many bookshops in the less urbanised areas of the Netherlands were found to be less well-stocked, a small number of booksellers in the major cities saw their range of books increase. Another finding was that the legal enforcement of resale price maintenance had not influenced public participation.

The letter also stated that the RPM Books Act contributes to the protection of the physical distribution of books, which in turn promotes their wide geographic availability. It went on to say that digitisation – the growing market share of online booksellers and the advent of e-books – was eroding the position of brick and mortar bookshops, thereby undermining the effect of book price fixing. As the pace at which and degree to which e-books will penetrate the market are uncertain factors, scenarios needed to be developed to assess the future functionality of price maintenance.

The emergence of e-books could lead to the introduction of book price fixing in the digital environment as well. With this in mind, the letter announced that a study would be carried out “into the implications of the advent of e-books for the functionality of the RPM Books Act as well as into the desirability and enforceability of fixed prices for e-books. The study should produce a number of scenarios for the future setting out the pace and nature of the development of e-books for each market segment as well as the changing position of market players in the supply chain. Additionally, the study should address the question of whether fixed prices for e-books could serve a purpose in ensuring the broad availability of books and whether price fixing is, in fact, enforceable.”

Further to its letter, the Ministry of Education, Culture and Science commissioned a consortium consisting of SEO Economic Research, the Institute for Information Law (IViR) and Paul Rutten to study the functionality and feasibility of resale price maintenance for e-books. With regard to *functionality*, the research questions are:

¹ *Parliamentary Papers II*, 2009/10, 32.300, no. 1, p. 8.

² Notenboom et al. (2009)

What are the broad implications of fixed prices for e-books, in particular in terms of:

- *the diversity of the e-book offering*
- *the availability of e-book titles through various retail channels*
- *the organisation and market structure of the book trade, both for print and for e-books*
- *the diversity and availability of print books*

Academic books deserve separate attention. The merits and drawbacks of price maintenance for e-books need to be discussed, possible alternative instruments considered and future scenarios developed, specifying the digital share of the overall book market and the share of specialist booksellers in the e-book market. The central question is what role could be played by resale price maintenance for e-books, assuming that fixed prices for print are a given.

The research questions into the *practicability* and *feasibility* of price fixing for e-books are of a legal nature and read as follows:

- *Can e-books be unambiguously defined?*³
- *Can academic e-books that also target the general market segment be clearly and unambiguously distinguished from e-books targeted exclusively at a professional audience?*
- *Is e-book price fixing compatible with European law and can price maintenance be enforced for foreign-based suppliers?*
- *How is piracy expected to develop and how could this relate to book price fixing?*
- *Is resale price maintenance for e-books enforceable?*

This report is structured as follows. Chapter 2 examines the practicability and enforceability of fixed prices for e-books, in particular in relation to European law. Developments in the Dutch book market are dealt with in Chapter 3, with a focus on facts and figures and how they relate to the objectives of book price fixing. Special attention is, of course, given to e-books. While still in its infancy, the development of digital books is burgeoning. Major trends in e-book markets outside the Netherlands are also described.

Chapter 4 analyses the factors and developments that are relevant to the future of the Dutch market for digital books, forming the basis for the scenarios presented in this study. A distinction is made between the demand side and the supply side of the market. The chapter fleshes out details of fixed prices for e-books and describes the expected effects of such regulation. The special position of academic books is also addressed. Chapter 5 then goes on to describe scenarios based on the findings presented in the preceding chapter and analyses the implications of these scenarios for the above research questions.

For the purpose of this study, players in the Dutch market as well as experts knowledgeable of international market trends were interviewed. Similarly, a workshop was organised for a mixed audience to discuss relevant notions and preliminary findings relating to e-books. Lessons learned and insights gained from these discussions stood the contributors to this report in good stead. Four countries – the United States, France, the United Kingdom and Germany – were researched in more detail as part of this study. The focus here was on market trends and policy

³ The sole focus here was on e-books made available electronically, i.e. not through physical formats such as USB sticks or DVDs.

considerations relating to the possible introduction of resale price maintenance for e-books. The insights gleaned from the country analyses are presented in Chapters 2, 3 and 4.

2 Practicability and enforceability

This chapter analyses the main legal aspects of resale price maintenance (RPM) for books.⁴ First of all, it describes the introduction of book price fixing in the Netherlands. The emphasis is on subjects that are of importance within the framework of this study, such as the motives for book price fixing and the definitions of the terms book and e-book. The question whether e-books have also played a role in the regulatory context chosen to date is also considered. Where the chapter deals explicitly with e-books, this is stated. However, this is the case only to a very limited extent.

The chapter then goes on to consider the European law context. European developments are determined mainly by the general principles of European law; industry-specific regulation or case law exists only to a very limited extent. Recent European activity has been prompted by French proposals to introduce RPM for e-books. The positions taken on this subject by the European Commission reflect the different legal issues that arise and are dealt with at length in Section 2.2. Other matters discussed are relevant aspects of the German RPM legislation, in relation to e-books and the current (and also disputed) agency pricing model, particularly in common law countries. Lastly, the main findings about the legal aspects are set out in a section containing a brief analysis and conclusions.

2.1 Dutch context

The Netherlands has a long tradition of resale price maintenance for books. Until 2005 books were the subject of an exemption – granted to the Royal Dutch Book Trade Association (KVB) – from the prohibition on vertical restraint on resale prices under the Economic Competition Act (*WEM*).

As continuation of the exemption in its existing form was no longer considered possible in light of Dutch and European competition legislation, a Resale Price Maintenance (Books) Bill was introduced.⁵ This was a private member's bill closely modelled on the French legislation on fixed book prices, the famous *Loi Lang* of 1981.⁶ In the United Kingdom it was decided not to replace the Net Book Agreement (NBA) with specific legislation. After the Restrictive Practices Court ruled in March 1997 that the Net Book Agreement was illegal, book price fixing was abandoned in the United Kingdom. In Germany, as in the Netherlands (and many other countries that have regulated RPM for books) it was decided to introduce legislation inspired by the French legislation. It should be noted that in the *Gesetz über die Preisbindung für Bücher (Buchpreisbindungsgesetz)* the legislator chose – perhaps unintentionally – a definition of 'book' that is now deemed broad enough to include the e-book (see Section 2.3).

2.1.1 Resale Price Maintenance (Books) Act

⁴ This chapter has been written with the assistance of C. Jasserand, V.E. Breemen and J.M. Breemen.

⁵ *Parliamentary Papers II*, 2002/03, 28 652.

⁶ Named after the then Culture Minister Jacques Lang (*loi n°81-766 du 10 août 1981 relative au prix du livre*).

The Explanatory Memorandum to the Bill stated first of all that the introduction of resale price maintenance for books was intended to serve the objectives of cultural policy. It then went on to define them. Basically, it was about ensuring the availability, in the longer term as well, of a broad and varied range of books in the Dutch and Frisian languages through a network of bookshops with wide geographic coverage and a large and varied stock of books or, to put it another way, safeguarding “the diversity and pluralism of the information contained in the books and accessibility in terms of offering, choice and receipt.”⁷

The Explanatory Memorandum stated that RPM for books, in combination with a reasonable profit margin, would prevent specialist booksellers from being outcompeted by discounters focusing exclusively on best-selling titles. According to the Explanatory Memorandum, the economic certainty of profit from bestsellers meant that *booksellers* could also stock less popular books and thus contribute to the availability of a network of well-stocked bookshops with wide geographic coverage. Such a network was said to be important to *publishers* as well because it ensured that their products could easily reach consumers and that they would also be able to publish high-risk titles.

As the Explanatory Memorandum noted, competition in the book trade would, however, continue to exist in relation to titles, authors, range, expertise and so forth. RPM for books was not intended to obstruct access to the book trade as such or to remove the scope for competition within the book trade.⁸

The contents of the Explanatory Memorandum were examined in more detail in, among other things, the memorandum of reply.⁹ This once again emphasised that the introduction of RPM for books was based on cultural policy objectives, which justified using the instrument of price fixing and thus removing the sale of books and music publications “from the sphere of general competition law and regulating it instead by means of industry-specific legislation.” The reasoning was that without this measure such objectives (i.e. pluralism, geographic coverage and accessibility) would be hard to achieve. RPM for books was regarded as an important means of “protecting books written in Dutch and thus preserving cultural identity”.

On the subject of e-books, the memorandum of reply stated as follows: “Pluralism can be served not only by a fixed price but also by the application of new technologies such as (...) electronic books.”¹⁰ In that respect e-books could therefore help to attain the cultural policy objectives of resale price maintenance. However, the memorandum of reply went on to state that e-books were taking longer than expected to “become a factor of significance” and that, as it would mainly concern the market for professional titles, it would “contribute less than previously thought to pluralism for the general public.”

Most of the matters raised during the passage of the Bill through the Dutch Senate had already been dealt with in the House of Representatives.¹¹ As the objective was to achieve “pluralism, quality and a wide offering of books and music publications”, and books were not simply

⁷ *Parliamentary Papers II* 2002/03, 28 652, no. 3.

⁸ *Parliamentary Papers II*, 2002/03, 28 652, no. 3, p. 5.

⁹ *Parliamentary Papers II*, 2003/04, 28 652, no. 11.

¹⁰ *Parliamentary Papers II*, 2003/04, 28 652, no. 11, p. 9.

¹¹ *Parliamentary Papers I*, 2004/05, 28 652, no. E, pp. 1, 5 and 6.

merchandise but also merited protection as cultural objects, resale price maintenance for books would, in the opinion of the Senate, help to maintain a large degree of diversity in the book trade.¹² The Senate went on to note that RPM would also make it practicable to continue identifying, guiding and coaching talent, thereby contributing in turn to pluralism and ensuring that “qualitatively worthwhile books of the many as yet unknown authors can continue to be published (...)”.

Another argument in favour of RPM advanced in the memorandum of reply was that “threats to the freedom of information, resulting from monopolistic trends characteristic of a market economy, perhaps require an active information policy on the part of government through maintenance and promotion of the diversity, availability and accessibility of information” and that “the necessity of such action is being strengthened by the advent of information technology.”¹³

2.1.2 Evaluation of the Resale Price Maintenance (Books) Act

As noted, the Minister has concluded in the first evaluation of the operation of the Resale Price Maintenance (Books) Act – Wvbp for short in Dutch – and on the basis of the lodged studies and commentaries that the law is functioning well.¹⁴ According to the Minister, the introduction of the Act has not resulted in any significant changes to the supply of books in the Netherlands. The developments that have been identified are attributable to autonomous factors which are independent of the Act or the fixed price as such and are to some extent a continuation of trends that were already perceptible before 2005.

The Minister also refers to a survey carried out by the Royal Dutch Book Trade Association (KVB) showing that all sectors of the book trade support the Resale Price Maintenance (Books) Act and do not feel that great changes are necessary. However, views differ on the question of fixed prices for digital products. The Royal Netherlands Booksellers Association (KBb) is in favour. The Minister acknowledges that the Act is not a solution to all problems. For example, it cannot prevent the range of books stocked by the average bookshop from becoming increasingly narrow. A new factor here is the competition from online booksellers.

The ongoing digitisation of the market (increasing market share for online retailers and further market penetration by e-books) may adversely affect the position of physical bookshops and, as a corollary, impair the effectiveness of fixed prices. Digitisation plays a role in the field of academic books as well. Owing to its increase and the advent of online booksellers, fewer academic books are now bought from physical bookshops. The Minister has announced a study to gauge the impact of e-books and assess the possibility of introducing RPM for e-books.

¹² *Parliamentary Papers I*, 2004/05, 28 652, no. E, p. 5.

¹³ *Parliamentary Papers I*, 2004/05, 28 652, no. E, p. 7.

¹⁴ *Parliamentary Papers II*, 2009/10, 32 300, no. 1.

2.1.3 Compatibility with European law

This section sets out what has been said about the European law aspects in the context of the Resale Price Maintenance (Books) Act. Section 2.2 deals more systematically with the relevance of European law to RPM for e-books.

The Explanatory Memorandum to the original Bill indicated that the European Commission considered national price maintenance for books to be acceptable in principle. This was conditional upon there being no incompatibility with Community law. If price maintenance arrangements only had territorial effect, they would not, in principle, constitute barriers to interstate trade.¹⁵ The Minister sought the advice of the European Commission on an initial version of the RPM Books Bill. The Commission's criticisms were taken to heart and acted upon when introducing the Bill.¹⁶ In the amended text the importer would fix a price for imported books. In the case of books that had been exported and then reimported the price fixed by the importer could not be less than the book price fixed by the Dutch publisher. However, section 3, subsection 3 of the Bill provided that the latter obligation was not applicable to Member States of the European Union and Member States of the European Economic Area (EU/EEA countries), except where there was an intent to evade the law. This was intended to meet the Commission's objections. The final version of the Bill was also submitted to the European Commission, which described the modified text (including the EU/EEA limitation) as 'less vulnerable'. The Minister endorsed the view of those introducing the Bill that this had largely removed the risk of incompatibility with European law.¹⁷

The recent Bill to amend the RPM Books Act¹⁸ contains a proposal to add a fourth subsection to section 6 of the Act. The proposed addition would oblige sellers of imported books who are established abroad to charge the fixed price to the end customer. However, by analogy with section 3, an exception is included here too for EU/EEA countries, unless there is an intent to evade the law.¹⁹

Whether a transaction involving import or sale from EU/EEA countries constitutes circumvention of the law must be determined on the basis of objective circumstances. The burden of proof will be on the Dutch Media Authority, which supervises enforcement of RPM for books. The Explanatory Memorandum to the Bill indicates that basically a restrictive approach will be adopted to the interpretation of this provision. An intent to circumvent the law will therefore be deemed to exist only if the seller's sole intention in selling from abroad was to circumvent the Act.²⁰ The proposed provision is thought to be in accordance with the settled case law of the Court of Justice of the European Union.²¹ The Explanatory Memorandum to the

¹⁵ *Parliamentary Papers II*, 2002/03, 28 652, no. 3, p. 6.

¹⁶ *Parliamentary Papers II*, 2003/04, 28652, nos. 21 and 22.

¹⁷ *Parliamentary Papers II*, 2003/04, 28652, nos. 28 and 29.

¹⁸ *Parliamentary Papers II*, 2010/11, 32641.

¹⁹ *Parliamentary Papers II* 2010/11, 32641, no. 3. Compare in this respect the case of the Royal Dutch Book Trade Association et al. v. Edumedia bv/Boekenconcurrent (Amsterdam District Court dated 3/12/2009, LJN: BK6182) and the order imposed by the Dutch Media Authority together with a penalty in the event of non-compliance (decision dated 22/12/2009, reference 20183/2009019029).

²⁰ *Parliamentary Papers II* 2010/11, 32 641, no. 3, p. 7.

²¹ Cf. in this connection: *Parliamentary Papers I* 2004/05, 28 652, no. E, p. 2.

amending Bill states that this is why the European Commission did not consider a formal request for an opinion to be necessary.

The proposed amendment relates back to the evaluation of RPM, in which it was noted that the legislation would be applicable only to publishers, importers and sellers established in the Netherlands and that online booksellers established abroad would fall outside its scope. In the view of the people introducing the original Bill, online retailers of this kind formed a potential but not yet direct threat to the closed system. However, the Dutch Media Authority, which supervises compliance with RPM, now considers this has become a real threat in view of existing and expected initiatives on the part of foreign online retailers. A judgment of the Amsterdam District Court concerning an online retailer that has its corporate seat in the Netherlands Antilles has now shown that having a seat abroad is not sufficient for designation as a foreign seller. Where the actual sale and delivery take place in the Netherlands, the foreign seller must apply the fixed price.²²

2.2 European law framework

This section examines first of all whether a resale price maintenance for e-books infringes the right to freedom of establishment and the freedom to provide services and the competition rules as laid down in the Treaty on the Functioning of the European Union.²³ It then goes on to consider whether a fixed price for e-books is in keeping with the E-Commerce Directive²⁴ and the EU Services Directive.²⁵ Finally, there is a brief assessment of the relevance of Article 10 of the European Convention on Human Rights.²⁶

2.2.1 French law on resale price maintenance for books

A Bill was recently passed in France regulating a fixed price for e-books.²⁷ This was the subject of discussion with the European Commission, which sent two notifications to the French government.²⁸ Although the French government's answer has not yet been officially released, it was available for the purposes of this study. These documents were taken into account in analysing the EU context.

²² *Parliamentary Papers II* 2009/10, 32 300, no. 1, p. 7 and Amsterdam District Court (President) 3 December 2009, no. 443481 / KG ZA 09-2503 SR/TF, paragraphs 5.5-5.9 (Edumedia).

²³ Treaty on European Union (TEU) – consolidated version 2009.

²⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

²⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

²⁶ European Convention on the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14 with additional Protocols, Nos. 1, 4, 6, 7, 12 and 13.

²⁷ *Loi no 2011-590 du 26 mai 2011 relative au prix du livre numérique* (J.O. dated 28 May 2011).

²⁸ The text of the notifications (2010/616/F and 2010/710/F) by the European Commission can be found in: Sénat, *Rapport au nom de la commission de la culture, de l'éducation et de la communication sur la proposition de loi, modifiée par l'Assemblée nationale, relative au prix du livre numérique*, no. 339, dated 9 March 2011. The response of the French authorities in 'Proposition de loi relative au prix du livre numérique Réponse des autorités françaises aux avis circonstanciés de la Commission européenne faisant suite aux notifications 2010/616/F et 2010/710/F' (not yet published).

When the Bill was under consideration by the French parliament the debate focused on sales to end consumers. Every publisher of e-books (*livres numériques*) which has its corporate seat in France is bound to apply the fixed price (section 2). Section 3 attributes extraterritorial effect to the fixed price by providing that anyone offering e-books to buyers in France must apply the fixed price: “*Le prix de vente, fixé dans les conditions déterminé à l'article 2, s'impose aux personnes proposant des offres de livres numériques aux acheteurs situés en France.*” This means that providers abroad are also bound to charge the fixed price to buyers resident in France. It should be noted, incidentally, that the extraterritorial effect was not part of previous versions of the draft legislation,²⁹ but was introduced during its passage through parliament. In these previous versions the operation of the legislation was limited to sellers having their corporate seat in France. The original draft legislation also contained a restriction on the rental and subscription service for e-books: *Les offres groupées de livres numérique, en location ou par abonnement, peuvent être autorisées par l'éditeur, tel que défini à l'article 2, au terme d'un délai suivant la première mise en vente sous forme numérique. Ce délai est fixe par décret.* This rule, which gave the publisher the power to establish a window for rental or subscription, was dropped at an early stage because it provided insufficient scope for flexibility (i.e. distinguishing between individual books or categories of books).³⁰ This was also in keeping with the advice of the French competition authority, which regards e-book subscription services as a form of new/innovative business model.³¹

2.2.2 Freedom of establishment and freedom to provide services

The Treaty on the Functioning of the European Union (TFEU) is the successor to the Treaty establishing the European Community (EC). Together with the Treaty on European Union it constitutes the basic text of the European Union. For the purposes of this report the fundamental principles of the internal market are of particular relevance.

Restrictions on the freedom of establishment and freedom to provide services as regulated in the Treaty are prohibited, save for exceptions regulated in the Treaty (Articles 49 and 56 TFEU). This prohibition applies not only to natural persons but also to legal persons.

Both the freedom of establishment and the freedom to provide services can be relevant to the conduct of a business activity in relation to e-books. This can be the case, for example, if a fixed price for books in digital form prevents foreign operators from competing fully with companies established in the Netherlands.

To assess whether this is the case, it will be necessary to take into account, for example, that the market for both print books and e-books is often nationally oriented on account of the language factor (irrespective of whether the language criterion has been included in the regulation). In such a situation it can be important for economic operators that do not have their corporate seat in the country concerned to compete on price in order to get a proper foothold in the market. By charging a lower price they can make up for any advantages possessed by the national market players, such as an existing customer base and local presence. Moreover, as it is relatively simple

²⁹ *Proposition de loi relative au prix du livre numérique présentée par Mme Catherine Dumas et M. Jacques Legendre, Sénateurs*, no. 695, 2009/2010, dated 8 September 2010.

³⁰ *Rapport fait au nom de la commission de la culture, de l'éducation et de la communications sur la proposition de loi relative au prix du livre numérique.*

³¹ *Autorité de la concurrence, Avis no 09-A-56 du 18 décembre 2009 relatif à une demande d'avis du ministre de la culture et de la communication portant sur le livre numérique*, p. 24.

for customers to make price comparisons online, price can become a more important competitive factor. E-books in particular make it possible for foreign economic operators to access a national market that was previously largely closed. RPM for books restricts this scope for price competition.

Government price regulation can be regarded as a restriction on the freedom of establishment and the freedom to provide services, even if discrimination on grounds of nationality is not an objective.³² This is because such regulation prevents a market participant established in another Member State from offering lower rates than those imposed as a result of resale price maintenance for e-books and from thereby competing more effectively with market participants that are already permanently established in that Member State and therefore have more opportunities to attract customers than firms established abroad.³³ A lower price is the main way in which a foreign supplier can distinguish itself from national suppliers which may, for example, have already established a customer base and/or have a local presence.

In their reasoned response to the questions of the European Commission, the French authorities played down the importance of pricing as the sole or main means of competing in the e-book market. For instance, they argued – using the commercial operations of Amazon as an example – that it is in fact the tax system that is the main determinant of whether a company sets up branches and operations in a foreign book market (Amazon’s European operations are legally established in Luxembourg). The French authorities also pointed out that the German publisher Bertelsmann controls about 16% of the book trade in France. Nor are its activities confined to the market for print books as it also sells digital books, for example through Chapitre.com. The argument is therefore that RPM for print books in France has not resulted in unfair competition, and it is unlikely that this would be different for the e-book market. The French authorities also submitted that the e-book market is in any case determined along national lines due to the language factor. As regards the restriction on the freedom to provide services, the French authorities stated that RPM for print books would also not constitute an obstacle. For example, Amazon has acquired a large share of the French book market without being established in France and despite resale price maintenance. The same is said to apply, for example, to Apple’s online music sales.³⁴

In its response to the questions of the European Commission, the French authorities argued that the draft legislation was not discriminatory. It had not discouraged foreign operators from entering the French market. The French authorities also pointed out that fixed resale prices for books also existed in other Member States of the European Union, namely Austria, Spain, Greece, Italy, the Netherlands and Portugal, and that intersectoral agreements existed in Bulgaria, Hungary and Slovenia (as well as in Norway, which is a member of the European Economic Area).

³² CoJ EC, 5 October 2004, case C-442/02 and CoJ EC 5 December 2006, joined cases C-94/04 and C-2002/04.

³³ CoJ EC, 18 July 2007, case C-134/05

³⁴ *Proposition de loi relative au prix du livre numérique Réponse des autorités françaises aux avis circonstanciés de la Commission européenne faisant suite aux notifications 2010/616/F et 2010/0710/F*, p. 7/9.

Grounds of justification

Exceptions to the freedom of establishment and the freedom to provide services may be made by Member States, namely where provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals are justified on the grounds of public policy, public security or public health.³⁵ These exceptions apply to both discriminatory and non-discriminatory restrictions, although in the case of non-discriminatory measures restrictions may also be justified by imperative requirements in the general interest and if they are proportionate to the objective to be attained.³⁶

As regards the specific objectives to be attained by RPM for e-books, the grounds of justification may be based on those put forward in respect of the fixed price for print books. The main purpose of introducing RPM for print books in the Netherlands was to ensure the broad availability of books, diversity and pluralism of the information contained in books and accessibility in terms of offering, choice and receipt.³⁷ These arguments do not differ substantially from those applied in other countries as grounds of justification. Although arguments of this nature in support of RPM for books do not generally discriminate directly on the grounds of nationality they may in certain circumstances be described as indirectly discriminatory, namely where the nature of the measure affects foreign companies more than domestic companies,³⁸ which – as noted above – could be the case here. Besides meeting the interests of individuals, however, a fixed resale price should also fulfil a general and public interest, namely by promoting the varied supply and wide availability of books throughout the country in order to promote knowledge and culture.³⁹

None of the interests referred to above corresponds with the interests specified in the articles, namely public policy, public security and public health. As this list of exceptions is intended to be exhaustive, the article cannot be extended to cover objectives not expressly enumerated in it. As the safeguarding of consumers' interests and the protection of creativity and cultural diversity in the realm of publishing do not come within the grounds mentioned in the treaty, they cannot be invoked.⁴⁰ Nonetheless, in certain circumstances cultural diversity can be taken into account in ruling on the lawfulness of restrictions on the freedoms referred to in the treaty. In such a case, there must be non-discriminatory application and justification on the grounds of imperative requirements in the general interest. The measures must also be suitable for securing the attainment of the objective that they pursue, and they must not go beyond what is necessary in order to attain it.⁴¹

Article 167 of the Treaty, under the heading Culture, provides that the Union must contribute to the “flowering” of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Action by the

³⁵ Articles 52 and 62 TFEU. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the above-mentioned provisions laid down by law, regulation or administrative action.

³⁶ CoJ EC, 30 November 1995, case C-55/94.

³⁷ *Parliamentary Papers II*, 2002/03, 28 652, no. 3 p. 4.

³⁸ CoJ EC, 18 July 2007, case C-212/05.

³⁹ House of Representatives, vol. 2002–2003, 28 652, no. 3 p. 5.

⁴⁰ CoJ EC, 10 January 1985, case C-229/83 (Leclerc).

⁴¹ CoJ EC, 30 November 1995, case C-55/94 and CoJ EC, 18 March 2004, case C 8/02.

Union must be aimed at encouraging cooperation between the Member States and, if necessary, supporting and supplementing their action in the improvement of the knowledge and dissemination of the culture and history of the European peoples, conservation and safeguarding of cultural heritage of European significance, non-commercial cultural exchanges, and artistic and literary creation, also in the audiovisual sector. Both the Union and the Member States should foster cooperation with third countries and the competent international organisations in the sphere of culture,⁴² but the Union must take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. According to the Court of Justice, the protection of books as cultural objects may be considered an overriding requirement in the public interest capable, in certain circumstances, of justifying the restriction of freedoms.⁴³ Clearly, this will not apply if the aim of the measure is to serve economic interests or maintain the status quo in the market.⁴⁴

According to the French authorities, the purpose of the French legislation is to protect cultural diversity, for example by reference to Article 22 of the Charter of Fundamental Rights of the European Union (“The Union shall respect cultural, religious and linguistic diversity”), Article 167 TFEU already mentioned above, and Article 5 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which has also been signed by the European Union.⁴⁵ Other arguments are derived from Article 6.1 of the E-Commerce Directive (see Section 3.2.4) and the above-mentioned judgment of the Court of Justice in case C531/07 (*Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*), from which the French authorities conclude that promoting and protecting cultural diversity is a legitimate ground for restricting the freedom of establishment and the freedom to provide services.

Necessity

A fixed price for e-books may possibly restrict both the freedom of establishment and freedom to provide services. Such a measure can be justified in order to protect cultural diversity in the public interest, but should then be non-discriminatory. If this is the case, the measure must fulfil the requirements of necessity, proportionality and subsidiarity. The authorities must demonstrate that the legislation meets these requirements. To do so, a Member State must show, for example, that there is a direct connection between a fixed price for e-books and cultural diversity, that the

⁴² Particularly with the Council of Europe.

⁴³ CoJ EC, 30 April 2009, case C-531/07 (*Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*): “(...) The protection of cultural diversity in general cannot be considered to come within the ‘protection of national treasures possessing artistic, historic or archaeological value’ within the meaning of Article 30 EC. Furthermore, Article 151 EC, which provides a framework for the activity of the European Community in the field of culture, cannot be invoked as a provision inserting into Community law a justification for any national measure in the field liable to hinder intra-Community trade. However, the protection of books as cultural objects can be considered an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective set and do not go beyond what is necessary to achieve it. In that regard, the objective of the protection of books as cultural objects can be achieved by measures less restrictive for the importer, for example by allowing the latter or the foreign publisher to fix a retail price for the import market which takes the conditions of that market into account. (...)”

⁴⁴ CoJ EC, 5 June 1997, case C398/95; CoJ EC, 24 January 2002, case C164/99.

⁴⁵ Article 5 (1): “(...) reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions.” The Netherlands is also party to this Convention; see: *Parliamentary Papers* 2008/09, 31971, no. A/1, Senate/House of Representatives.

possible consequences in relation to the restriction of the freedom of establishment and the freedom to provide services are proportionate to the achieved cultural diversity, and that the same objectives could not be attained by other, less far-reaching measures.⁴⁶

To demonstrate compliance with these requirements the French authorities argue in their response that the physical and electronic book markets are not strictly segregated. The fixed book price for print books has had many benefits for consumers, and the French authorities are convinced that the same arguments apply to resale price maintenance for e-books. They point to the danger that cheap e-books may undermine the infrastructure for the distribution of print books, and that a sizeable proportion of the population, particularly older people, are dependent on physical sales outlets for their book purchases. Moreover, books purchased online tend to be books with which the buyers are already acquainted. It is a passive book trade, and there is no encouragement to purchase new, unknown or different titles. It is also desirable to have a wide range of bookshops: the more there are, the more specific and original their choices – and hence the books they sell – will be. Physical bookshops also do more than electronic retailers to promote the sale of unknown titles; online booksellers focus mainly on promoting bestsellers. Physical booksellers therefore have an important role to play in the discovery of new and unknown talent.

The French authorities consider that the proposed legislation fulfils the requirement of proportionality: protecting cultural diversity is an acute problem and the fixed price for e-books relates to only part of the market for books in digital format. Only e-books that can be converted into print books and vice versa are covered by the legislation, whereas e-books with a more intrinsically digital content and facilities fall outside its scope (e.g. interactive e-books). The French authorities argue that other forms of regulation such as contractual solutions and agency pricing would not be effective or expedient. Agency pricing is discussed in the following section.

Conclusion

Resale price maintenance for e-books may restrict both freedom of establishment and freedom to provide services. Pricing barriers may constitute a restriction in relation to e-books in particular, since online retailing is more transparent, international and hybrid than the market for print books. It is therefore necessary to determine whether the measure is indirectly discriminatory or non-discriminatory. If a measure is classified as indirectly discriminatory, for example because it affects foreign operators more than their national counterparts, it must be legitimated on the grounds of public policy, public security or public health. If the measure qualifies as non-discriminatory it may also be legitimated by an argument based on the public interest, of which cultural diversity can form part. In any event, the measure must fulfil the requirements of necessity, proportionality and subsidiarity. The central issues in determining whether the requirements are met are the connection between the fixed book price and cultural diversity, the relationship between the advantages and disadvantages of the measure, and the possibility of other less far-reaching measures.

⁴⁶ CoJ EC, 18 March 2004, case C 8/02.

2.2.3 Competition

Another question is whether a fixed price for e-books might not infringe the rules on competition. Under the TFEU (Article 101) decisions by associations of undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited as being incompatible with the internal market. Examples are directly or indirectly fixing purchasing or selling prices or any other trading conditions, limiting or controlling production, markets, technical development or investment, sharing markets or sources of supply, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Although these obligations relate to market participants, the Member States are obliged to take account of them and to refrain from taking measures that could undermine the rules on competition. As mentioned above, resale price maintenance for e-books could mean that foreign companies experience greater obstacles with regard to their economic operating models than national operators. If this proves to be the case, such a measure could be an obstacle to fair competition.

Price agreements often come under the Guidelines on Vertical Restraints⁴⁷ and constitute a restriction on trade. Vertical price fixing, in other words agreements or concerted practices that are directly or indirectly intended to impose a fixed or minimum resale price or a fixed or minimum price level on the customer are treated as a hardcore restriction. When such a measure is identified, it is presumed to be incompatible with the TFEU.⁴⁸

In their response to the notification, the French authorities observe that a fixed price for books in digital format will not have a substantial effect on interstate trade. They refer to the arguments they previously employed in relation to the freedom of establishment and the freedom to provide services and point out, among other things, that even when there is a fixed price foreign players are still quite capable of entering the French market. In previous versions of the legislation an extension to cover foreign suppliers was not considered necessary because agreements were already being prepared with large suppliers such as Apple, Amazon and Google. Since then, however, it has become clear that small and medium-sized publishers are in a very unequal position in relation to these large operators. The French authorities also refer to their previous submissions in relation to the importance of a fixed price to end users (varied stock and diversity of distribution).

Agency pricing

Although this issue falls outside the scope of this report, some indication can be given of the scope for agency pricing under European law. In the international discussions on the subject of e-books the agency pricing model plays an important role. It is common in the United States and

⁴⁷ Commission. Commission Notice. Guidelines on Vertical Restraints (2000/C 291/01).

⁴⁸ Guidelines on Vertical Restraints, section 223.

the United Kingdom, but is also well-known in continental Europe. Under an agency agreement, which is concluded between a supplier and an agent, the agent (in this case a seller of e-books) has the power to conclude contracts with third parties on behalf of the supplier (in this case a publisher or author).⁴⁹ The seller remains an intermediary (agent), the contract is concluded between the publisher and the consumer, and the publisher therefore determines the retail price. As consideration for his efforts the seller receives an agreed fee (per book). When the French legislation for e-books was being drafted, the question of whether the agency pricing model could possibly serve as an alternative to resale price maintenance was considered. The opinion given by the French competition authority goes into this question in more detail.⁵⁰ In particular, the competition authority notes that the agency pricing model implies that the freedom of the agent is or can be limited (for example, with regard to the range of books, marketing strategy and terms of sale). This restricts the autonomy of retailers (i.e. bookshops), but this autonomy is regarded by the French authorities as essential. In summary, the competition authority concludes that there are no adequate contractual solutions with respect to the position of publishers and booksellers that are comparable to the existing situation under the rules governing resale price maintenance. The French authorities have adopted the arguments of the competition authority and observe in response to the notification that, in their view, agency agreements do not constitute a fully-fledged alternative to a fixed book price. As noted, reference is also made to the fact that in negotiating with large suppliers, small and medium-sized publishers are at a distinct disadvantage compared with large publishing firms.

Agency agreements can result in an unauthorised restriction of competition. This could be the case, for example, where there is a most-favoured-nation clause under which operators are always charged the same price as their competitors. Small agents are thus prevented from competing on price or other terms with larger agents. The lower price or more favourable terms would then also have to be offered to the larger market players, which would put the publisher at an even greater disadvantage. At present, there is an investigation into possible unauthorised agreements relating to e-books in the United States⁵¹ and the United Kingdom⁵² as well as at European level.⁵³

Grounds of justification

Under Article 101 (3) TFEU rules can be declared inapplicable pursuant to paragraphs 1 and 2. However, this is possible only – in brief – in the case of an agreement or concerted practice that contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.⁵⁴

⁴⁹ Or, as formulated in section 12 of the Guidelines on Vertical Restraints: ‘Agency agreements cover the situation in which a legal or physical person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the purchase of goods or services by the principal, or for the sale of goods or services supplied by the principal.’ See also: Veen, Christiaan van (2011).

⁵⁰ Autorité de la concurrence, *Avis no 09-A-56 du 18 décembre 2009 relatif à une demande d’avis du ministre de la culture et de la communication portant sur le livre numérique*

⁵¹ <http://www.ct.gov/ag/cwp/view.asp?Q=463892&A=3869>

⁵² <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/e-books/>.

⁵³ <http://www.guardian.co.uk/books/2011/mar/04/ebooks-publishing/print>.

⁵⁴ Article 101 (3) TFEU.

It is debatable whether a fixed price for e-books could be brought within the ambit of these exceptions. During the passage of the Resale Price Maintenance (Books) Act through parliament it was noted that there was only a small chance of this and that a statutory scheme was the only feasible alternative.⁵⁵

Necessity

Once again it will be necessary to assess how such a measure relates to the principles of necessity, proportionality and subsidiarity. The central issues in determining whether the requirements are met are the connection between the fixed book price and efficiency improvements, the relationship between the advantages and disadvantages of the measure, and the possibility of other less far-reaching measures.

Conclusion

The Treaty on the Functioning of the European Union contains various competition rules, which are implemented in practice through the Guidelines on Vertical Restraints. These guidelines are intended primarily for market participants, but Member States too should take account of them in legislation and regulations. A fixed price for e-books might quite conceivably affect the business operations of foreign companies to a greater extent than those of their national counterparts, thereby hindering them in their access to the market. Such a measure would then have to be treated as a restriction on competition. This could possibly be legitimated by efficiency considerations, but adequate evidence would have to be adduced in support of this contention. Finally, account should be taken of the principles of necessity, proportionality and subsidiarity.

2.2.4 E-Commerce Directive

The E-Commerce Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States. The directive complements Community law applicable to information society services.⁵⁶

The definition of information society services covers any service of information society that is typically provided for remuneration, by electronic means, at a distance, and at the individual request of a recipient of a service. A service is provided at a distance when the parties involved are not simultaneously physically present. By electronic means is defined as meaning that the service is sent and received by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, radio, optical means or by other electromagnetic means. A service is provided at the individual request of a recipient of services when the service is provided through the transmission of data on individual request.⁵⁷

⁵⁵ *Parliamentary Papers II*, 2003/04, 28.652, no. 7, pp. 17-19 and no. 9, pp. 11-13.

⁵⁶ Article 1 E-Commerce Directive.

⁵⁷ Article 2 E-Commerce Directive. Directive 98/34/EC of the European Parliament and of the Council dated 22 June 1998 on a procedure for the provision of information in the field of technical standards and regulations. Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC on a procedure for the provision of information in the field of technical standards and regulations.

It may be assumed that this definition applies to the delivery of e-books as the information is provided at a distance, by electronic means and at the request of a given user. The provisions of the E-Commerce Directive therefore also apply to price fixing for e-books. The directive requires that each Member State ensures that the information society services rendered by a service provider established in its territory comply with the national provisions applicable in the Member State in question that fall within the coordinated field. The freedom to provide information society services may not be restricted for reasons falling under the scope of the directive.⁵⁸ Resale price maintenance for e-books could be considered a restriction of the freedom to provide information society services.

However, Article 1.6 of the Directive provides that it “should not affect measures taken at Community or national level, with due observance of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism”. This is addressed in more detail in recital 63 of the preamble: “The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.” In their response, the French authorities drew special attention to these preconditions.

Grounds of justification

Under the Directive, Member States may take measures restricting the freedom to provide information society services, provided the measure is necessary on the grounds of public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons. Additionally, any such measure should be necessary for the protection of public health and for public security, including the safeguarding of national security and defence of the protection of consumers, including investors. This refers to measures taken against a given information society service that prejudices one of the four objectives referred to above or presents a serious risk of prejudice to those objectives.⁵⁹

Note that a possible ground of justification for resale price maintenance for e-books will probably not be based on the promotion or protection of public policy, public health or public security. It is far from certain whether the measures will be deemed to qualify as being necessary for the protection of consumers. The Explanatory Memorandum to the Resale Price Maintenance (Books) Act states that consumers benefit from a fixed book price system as it promotes a varied range of books. However, seeing as building up a wide range of titles in the digital environment does not, in itself, incur high costs, it is open to question whether this would

⁵⁸ Article 3 E-Commerce Directive.

⁵⁹ Article 3 E-Commerce Directive.

apply equally to digital books, thereby providing an independent ground of justification. That said, this does not prejudice what was said earlier in relation to Article 1.6 of the Directive.

Necessity

Once again, the measures will have to be necessary to achieving the objectives to be attained and proportionate to these objectives.⁶⁰ Another factor to be borne in mind is whether the desired effect could be achieved with other, less far-reaching measures. It will be up to individual Member States, in this case the Netherlands, to show that this is in fact the case.

Conclusion

Digital books may qualify as an electronic service based on the fact that the information is provided at a distance, by electronic means and at the request of a given user. The provisions of the E-Commerce Directive therefore also apply to e-book price fixing. Resale price maintenance for e-books may be considered a restriction of the freedom to provide information society services; the measure is not likely to be legitimated by an argument based on the promotion or protection of public policy, public health or public security. It is far from certain whether RPM will be deemed to qualify as being necessary for the protection of consumers. In this respect it is not clear what weight should be attached to the provision in Article 1.6, namely that the Directive does not affect measures taken at Community or national level with due observance of Community law in order to promote cultural and linguistic diversity and to ensure the defence of pluralism. Incidentally, this does not alter the fact that any measures must fulfil the requirements of necessity, proportionality and subsidiarity.

2.2.5 Services Directive

The Services Directive, commonly referred to as the Bolkestein Directive after the then European Commissioner for the Internal Market, establishes general provisions aimed at facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while ensuring a high quality of the services provided.⁶¹ Although the Directive provides that electronic communications services and networks are excluded from its scope, including associated facilities and services, matters that come under the scope of the E-Commerce Directive are not excluded⁶² to the extent that they are subject to the applicable regulatory framework⁶³. The fact that the E-Commerce Directive applies to e-book price fixing does therefore not exclude the Services Directive from applying as well.

It was mentioned earlier in relation to the freedom of establishment that Member States need to examine whether their legal system makes access to, or the exercise of a service activity conditional on compliance with the non-discriminatory requirement. Here, the directive refers specifically to fixed minimum and/or maximum fees with which the provider must comply. Member States need to examine whether this requirement is directly or indirectly discriminatory

⁶⁰ Article 3 E-Commerce Directive.

⁶¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Publ. L 376/36 dated 27/12/2006 (Services Directive).

⁶² Article 2 (2) under c.

⁶³ As laid down in the Directives 2002/21/EC (Framework Directive), 2002/19/EC (Access Directive), 2002/20/EC (Authorisation Directive), 2002/22/EC (Universal Services Directive) and 2002/58/EC (Directive on privacy and electronic communications).

on grounds of nationality or, in the case of legal persons, on grounds of the place at which they are established.⁶⁴ Member States are not permitted to make access to, or the exercise of a service activity within their territory conditional on compliance with discriminatory requirements that relate directly or indirectly to nationality or, in the case of legal persons, to the place at which they are established, such as nationality requirements for the provider, his staff, shareholders or members of the provider's management or supervisory bodies, and the requirement that the provider, his staff, shareholders or members of the provider's management or supervisory bodies be resident within the territory.⁶⁵ It is unlikely that e-book price fixing will be regarded as a directly discriminatory measure as it makes no distinction on grounds of nationality, nor does it have such goal. Having said that, it is not inconceivable, as noted above, that measures that in fact differentiate between national and international companies may be regarded as being indirectly discriminatory.

However, as is the case in the E-Commerce Directive, Article 1, paragraph 4 of the Services Directive states that the Directive does not affect measures taken at Community or national level, in accordance with Community law, to protect or promote cultural or linguistic diversity or media pluralism.⁶⁶

Regarding the free movement of services, the Directive also stipulates that Member States should respect the right of service providers to deliver services in a Member State other than the one in which they are established, and that Member States in which the service is provided should ensure free access to, and free exercise of a service activity within its territory. Once again, the Member State concerned is not permitted to make access to, or the exercise of a service activity within its territory conditional on compliance with requirements that relate directly or indirectly to nationality or, in the case of legal persons, to the Member State at which they are established.⁶⁷

Grounds of justification

The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service where these requirements are justified for reasons of public policy, public security, public health or protection of the environment. Cultural diversity is not, however, mentioned explicitly as a legitimate exception to the free movement of services. Nor do the provisions of this Directive preclude the application by a Member State of its rules on employment conditions, in accordance with Community law, including those set down in collective labour agreements.⁶⁸

Necessity

Resale price maintenance for e-books must fulfil the requirements of necessity, proportionality and subsidiarity. The Services Directive provides that the measures taken by Member States should be necessary and proportionate; in other words, the requirements must be justified by imperative requirements in the general interest and must be suitable for securing the attainment

⁶⁴ Article 15.

⁶⁵ Article 14, see also Article 20.

⁶⁶ Article 1 paragraph 4.

⁶⁷ Article 16.

⁶⁸ Article 16 in conjunction with 18.

of the objective they pursue; they must not go beyond what is necessary for it to be attained. Additionally, it needs to be examined whether the same objective could be attained with less restrictive measures.⁶⁹

Conclusion

As e-books may be qualified as a service within the meaning of the Services Directive, the provisions of this Directive also apply to resale price maintenance for e-books. A fixed price for digital books can be regarded as a restriction of the free movement of services. Note that such price fixing will most likely not qualify as an exception as defined in the Services Directive. The Services Directive, like E-Commerce Directive, has special provisions in respect of measures relating to cultural diversity and pluralism.

2.2.6 Article 10 ECHR

Lastly, the European Convention on Human Rights (ECHR), which provides for a number of fundamental rights such as the right to freedom of expression, will be dealt with briefly. This right, guaranteed by Article 10 ECHR, includes the freedom to hold opinions and the freedom to receive or impart information and ideas without interference by a public authority and regardless of frontiers. This article does not, however, prevent States from requiring the licensing of radio, broadcasting, cinema or television enterprises.

As digital books disseminate opinions, information and beliefs, they come under the scope of this article. Government interference in this area could relate both to information content and to the means through which the information is publicised or transmitted.⁷⁰ Freedom of expression in this respect applies both to the content of information and to the means of dissemination and receipt as any restriction on the means of communication could limit the possibility to receive and impart information.⁷¹ Restrictions on radio and television broadcasting, for example, could also limit the freedom of expression, even where there is no question of a distinction based on content.⁷² This could, by analogy, also apply to resale price maintenance for e-books.

In addition to direct restrictions on dissemination, there may also be indirect restrictions on the freedom of expression, including financial restrictions.⁷³

It is by no means inconceivable that e-book price fixing could be qualified as a direct restriction on either the dissemination or the receipt of information. A measure of this kind could, alternatively, be regarded as an indirect restriction on the freedom of expression or the freedom to receive information, which is also protected under the European Convention on Human Rights.

⁶⁹ Article 15 in conjunction with 16.

⁷⁰ Voorhoof, p. 929.

⁷¹ European Court of Human Rights (ECHR), 22 May 1990 (Autronic).

⁷² European Court of Human Rights (ECHR), 28 March 1990 (Groppera).

⁷³ Voorhoof, p. 929.

Grounds of justification

Restricting the freedom of expression is permitted in certain cases. Pursuant to Article 10, paragraph 2 ECHR, the exercise of this right may be subject to certain formalities, conditions, restrictions or sanctions, as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence or to maintain the authority and impartiality of the judiciary.

Whereas it seems likely that resale price maintenance for e-books will be enforced by law, it remains to be seen whether such a measure would qualify as an exception, as specified in the Convention. Note, though, that the Court is generally found to freely interpret this exhaustive list of exceptions. “Although the grounds for legitimacy have been exhaustively listed, and although they should be restrictively interpreted and should, moreover, be applied strictly within the objective set, the Court has been rather lenient when grounds need to be found to legitimate government interference.”⁷⁴ It is by no means unlikely that cultural diversity will be accepted as a ground of justification by the Court for the introduction of e-book price fixing.

Necessity

Should such a measure be found to be justified, it would at least have to be necessary in a democratic society, in which case it would have to constitute a ‘pressing social need’ according to the Court’s case law.⁷⁵ It would also have to fulfil the requirements of necessity, proportionality and subsidiarity and it would be up to government to prove that the law meets these requirements. Note that Member States are usually afforded a ‘margin of appreciation’, giving them a degree of discretionary power in determining whether a certain measure meets these requirements.

Conclusion

The distribution and receipt of e-books fall under the protection of the freedom of expression as provided under the European Convention on Human Rights. If restrictions are imposed on the distribution of e-books, as would possibly be the case if resale price maintenance were to be introduced, this could be construed as a restriction of the freedom of expression. Given that the grounds of justification for a restriction of this kind tend to be freely interpreted, the argument that it would promote cultural diversity is likely to be accepted. As mentioned various times in this report, the right to freedom of expression requires that a measure of this kind would have to fulfil the requirements of necessity, proportionality and subsidiarity. Note here that under the ECHR, discretionary power has been explicitly conferred on Member States to determine the extent to which these requirements have been met.

⁷⁴ Voorhoof, p. 979.

⁷⁵ Voorhoof, p. 982.

2.3 Definitions

To delineate the scope of this study, e-books will need to be clearly defined, both to distinguish them from traditional printed books and to prevent overlap with other types of electronic services. In competition terms, too, it is essential to define precisely what constitutes the product market.

Article 1b of the current RPM Books Acts describes books as a “body of text virtually exclusively produced in the Dutch or Frisian languages, complete with a title and consisting of paper pages, including or excluding specific physical formats, and printed and published in multiple copies intended for sale to end users”. The current proposal to adjust the text of the article somewhat⁷⁶ only focuses on the phrase ‘virtually exclusively’ and is technical in nature. Being made of paper apparently constitutes the key defining element of what makes a book. Other countries investigated in this study also cite the printed form (whether or not linked to terms such as ‘originality’) as key criterion. But it is precisely this element that is lacking in e-books. The Explanatory Memorandum to the proposed retail price maintenance bill identifies the issue and describes e-books as follows: “Adding ‘paper’ excludes so-called e-books, whose text can be downloaded digitally from a central database and onto non-physical format, and can be made visible or audible by electronic means (...).”⁷⁷ Elsewhere, there have been other attempts at producing a definition. The addendum to the model contract for the publication of original literary work in the Dutch language – agreed by the Dutch Writers Guild and the General Publishers Group – defines an e-book as ‘a book in digital form’.⁷⁸

The proposed French regulation – which, like French retail price maintenance for printed books, does not include any mention of language – defines e-books as a body of text that is simultaneously exploited in digital and in printed form or that is suited to this dual purpose because of its content and composition, any specifically digital added elements notwithstanding.⁷⁹ The French definition, in other words, is more technology-neutral and focuses on the specific features that make a book, examples of added elements being indexation or search options. The definition leaves room for further specification of these elements.⁸⁰ As the French regulation demonstrates, it is no easy task to arrive at a comprehensive definition of e-books. This much is clear, however: e-books are not necessarily printed books released digitally in completely unchanged form. Their form is so fluid precisely because it allows for adding elements. At the same time, one limitation is that e-books should be printable, re-establishing their link to paper-based books.

⁷⁶ *Parliamentary Papers II*, 2010/11, 32.641, no. 2.

⁷⁷ *Parliamentary Papers II*, 2002/03, no.3, p. 16, resp. no. 9, p. 28.

⁷⁸ http://www.vvl.nu/php/download.php?txt_id=402&suffix=1

⁷⁹ Section 1 (1): ‘La présente loi s’applique au livre numérique lorsqu’il est une œuvre de l’esprit créé par un ou plusieurs auteurs et qu’il est à la fois commercialisé sous sa forme numérique et publié sous forme imprimée ou qu’il est, par son contenu et sa composition, susceptible d’être imprimé, à l’exception des éléments accessoires propres à l’édition numérique’. For the purposes of the notification procedure this has been translated as: ‘This law applies to the digital book as a product of the mind, created by a single or multiple authors, marketed in digital form and previously published in printed form or that qualifies as such because of its content and composition - with the exception of minor elements specific to the digital edition.’ (<http://ec.europa.eu/enterprise/tris/pisa/cfcontent.cfm?vFile=120100616NL.DOC>).

⁸⁰ Section 1 (2): ‘Un décret précise les caractéristiques des livres entrant dans le champ d’application de la présente loi.’

What elements may be added and still be part of a book that might be printed, and when is that line crossed? What if an e-book provides a link to background information or moving images? And what about e-books that are constantly updated? Theoretically, of course, every update could be printed but it is hardly common for updated print versions to be released daily. That said, France's decision to preserve a direct link between printed books and e-books (which it also calls *livre homothétique*) provides an interesting angle, particularly as this suggests that the effect on the market for e-books will be limited: all types of innovative/interactive usage are excluded. This mitigating factor is emphatically cited in the advice of the French competition authority and the French government's response as part of the notification procedure.

Germany's law on book prices, *Gesetz über die Preisbindung für Bücher (Buchpreisbindungsgesetz)*, dates from 2002 and does not specifically define book as a separate term. However, for the purposes of this review, the law does indicate that books also include products that reproduce or substitute books and that can be broadly considered typical of publishing and the book trade.⁸¹ The notes to the draft legislation do not specifically mention e-books. A 2008 statement from the German book trade organisation *Börsenverein des Deutschen Buchhandels* is key to the position of e-books in Germany. It said that e-books should be taken to be included under the definition of comparable products, and it also expressed the expectation that this would be confirmed in case law.⁸² Germany does not seem to have had similar debates to recent discussions in France, the broader definition would rather seem to be the product of older case law dating back to 1997, which concerned CD-ROM publishing.⁸³ It was this ruling that the statement referred to.

Dutch law as it stands today does not distinguish between general books, school books or academic books, although it does reserve a special position for school books not governed by retail price maintenance. School books are books specifically intended for educational purposes and used in specific educational settings⁸⁴ – a functional criterion. With e-books, the key will be to establish whether or not their use is duly licensed. Such licensed use is particularly prevalent in the professional sector but is also gathering momentum as operating model for regular end users (comparable to licensed use of music via Spotify). The proposed French regulation starts off with a broad definition of e-books but goes on to exclude licences and 'content of another nature or with other functionalities'. In this – similarly functional – approach, professional, research and educational use falls outside of the scope of e-books.⁸⁵

⁸¹ Section 2 (1): 'Bücher im Sinne dieses Gesetzes sind auch (...) 3. Produkte, die Bücher, (...) reproduzieren oder substituieren und bei Würdigung der Gesamtumstände als überwiegend verlags- oder buchhandelstypisch anzusehen sind (...)'

⁸² Literature reviewed did not contain any references to relevant case law.

⁸³ Bundesgerichtshof no. 14/1997 dated 11/3/1997, KVR 39/95.

⁸⁴ Section 1 (d): 'School books are texts whose form and content specifically focus on the transfer of information in education-type settings in primary education, education for children with special needs, secondary education and vocational training, as well as adult education, and whose use has been prescribed by the educational facility as part of its curriculum.'

⁸⁵ Section 2, third paragraph: 'Le premier alinéa ne s'applique pas aux livres numériques, tels que définies à l'article 1er, lorsque, ceux-ci sont intégrés dans des offres proposées sous la forme de licences d'utilisation et associant à ces livres numériques des contenus d'une autre nature et de fonctionnalités. Ces licences bénéficiant de l'exception définie au présent alinéa doivent être destinées à un usage collectif et proposées dans un but professionnel, de recherche ou d'enseignement supérieur, dans le strict cadre des institutions publiques ou privées qui en font l'acquisition pour leurs besoins propres, excluant la revente.'

The explanation suggests the proposals are looking to take account of specific market dynamics.⁸⁶ German law, by contrast, does not make any general exceptions for school or academic books, which is highly suggestive of the specific aspects of e-books not being in the minds of the lawmakers at the time.

2.4 File sharing

Dutch law makes no distinction between downloading or uploading (file sharing) e-books and downloading or uploading music and films,⁸⁷ and studies find only a tenuous relationship between downloading prohibitions and the act of downloading. In the legal context, this implies that, if motives for lawful or unlawful downloading are taken out of the equation, there will be incentives for end users to obtain products by other means – i.e. by paying for them. As the European Commission noted when commenting on the French proposals, retail price maintenance for e-books comes with the inherent danger that the response to this more dynamic market is too slow and that prices might turn out too high from the perspective of consumers' willingness to pay. Both factors might encourage downloading and provide more of a stimulus to than a hindrance for piracy in the French context – where downloading is illegal. It can be observed that increased downloading of films is indeed one of the reasons putting pressure on regulating windowing: the lengthy gap between films screening at cinemas and their availability through online services or on DVD is agreed to be a key factor behind downloading. In its response, the French government notes that publishers and authors are well aware of the problem of file sharing and that they will take the issue into account when fixing prices for e-books. German literature studied on the subject did not contain any relevant exposés on the relationship between e-books and file sharing.

2.5 Analysis and conclusions

2.5.1 Arguments justifying a fixed book price

The national analysis shows that there are three main arguments justifying the introduction of a fixed book price. These arguments are a) availability of a broad and varied *supply of books*, b) the presence of a *network of bookshops* with wide geographic coverage, and c) a *large and varied stock* in the bookshops. The French draft legislation for resale price maintenance for e-books uses similar arguments. E-book price fixing would: a) strengthen the position of the rightful owners, b) enhance the diversity in retail channels and geographic coverage, c) prevent excessive concentration at retail level, d) support the diversity of supply, and e) keep piracy to a minimum thanks to the development of a legal and attractive offering. In the European context (see below), Member States will have to evidence that there is a direct relationship between fixed book prices

⁸⁶ '(...) tend à exclure de ce dispositif certains types d'offres afin notamment de ne pas interférer avec le modèle économique des éditeurs scientifiques et techniques proposant de longue date des produits spécifiques à un public professionnel, notamment à des bibliothèques universitaires et détaillants et les prix qu'ils fixent font en fait l'objet de larges négociations commerciales', Rapport Sénat 2010/11, no. 50, dated 20 October 2010, p.34.

⁸⁷ For further details of the legal aspects, see: TNO/SEO/IViR, *Ups and downs. Economic and cultural effects of file sharing on music, films and games, A study carried out by a consortium of TNO Informatie- en Communicatietechnologie*, January 2009.

and cultural diversity, that the enhanced cultural diversity will make good any consequences restricting the freedom of establishment and the freedom to provide services, and that there are no other, less far-reaching ways to reach the same goals.⁸⁸

2.5.2 European context

As with paper books, European law does not in principle rule out the application of fixed prices for e-books. That said, price fixing would be subject to stricter review in the case of e-books, in part owing to their nature (e-books are a service, where paper books are a good). Introducing price maintenance is set to present even more of a challenge when the free movement of services is at stake. Whereas there is room for the imposition of restrictions on the trading of *goods* in the domestic market, even if supplied from abroad (see the traditional fixed book price regulation, which also relates to imports), a similar restriction on *services* would give rise to significantly greater problems. This issue is, incidentally, the main focus of the debate in France. In the most recent – adopted – version of the French Act, suppliers who have their corporate seat in France are required to charge a fixed price for books. And so anyone offering books for sale to buyers in France must apply the fixed price. This means that suppliers established outside of France (i.e. Amazon and others) are also bound to charge fixed prices.⁸⁹ It is this extraterritorial criterion – no exception being made for EU/EEA countries – that makes the proposal vulnerable. That said, it would appear to make fairly good sense not to make an exception for EU/EEA countries given the difference between print and digital books. Such an exception would, after all, render price fixing for e-books less than effective as – contrary to print – logistical restrictions in the digital environment are close to none. It has been suggested, incidentally, that the proposed regulation was prompted in part by a European investigation into agency pricing practices in the French market, seeing as the outcome of this inquiry could be that the agency model is not permitted. The fact that retailers such as Amazon have agreed to comply with the rules⁹⁰ is of no consequence here.

The question therefore remains as to whether a far-reaching restriction like resale price maintenance for e-books is compatible with European law. For whereas standard case law offers the possibility to counteract classic evasion of the law (selling from abroad with the sole purpose of sidestepping national regulations), generic supply, which includes supplying domestic markets, should remain possible. Similar restrictions on the provision of services have proven to be untenable. Stricter national rules would put such international suppliers at a competitive advantage compared with market players that focus exclusively on the Dutch market. Should these suppliers face a situation where publishers refuse to supply them with Dutch-language books (in an effort to indirectly enforce domestic price fixing, if applicable), this would quickly meet with objections arising from national and/or European competition law, based in part on the requirement of proportionality. It cannot be said just yet what the outcome will be, but it would be advisable to keep close tabs on developments in France. In two of its opinions – the

⁸⁸ CoJ EC, 18 March 2004, case C 8/02.

⁸⁹ Section 2: ‘Toute personne établie en France qui édite un livre numérique dans le but de sa diffusion commerciale en France est tenue de fixer un prix de vente au public pour tout type à l’unité ou groupée. Ce prix est porté à la connaissance du public (...); Section 3: ‘Le prix de vente, fixé dans le conditions déterminées à l’article 2, s’impose aux personnes proposant des offres de livres numériques aux acheteurs situés en France’.

⁹⁰ www.thebookseller.com/news/france-faces-battle-over-e-book-pricing-law.html.

arguments for which were incorporated in the legal analysis – the European Commission said it would carefully follow how legislation regarding the French proposal unfolds.

To the extent that agency pricing *could* offer a possible alternative in the digital arena, it is noted that this model may not operate outside the limits of competition law. Developments in the United States, the United Kingdom and in Europe should be followed closely. Another question that deserves attention is how agency pricing affects the autonomy of the market players involved.

2.5.3 Definition of e-book

Defining e-books is much less straightforward than defining traditional printed books, with ‘paper’ being a useful element for the latter. By contrast, e-books lack this simple physical format, making it difficult to arrive at an unambiguous definition. At a time of transition, some link to physical books might provide an anchor point and e-books could be agreed to be the unchanged digital counterpart to printed books. However, interpretation problems arise when additional functionalities are mixed in, and a clear demarcation between e-books and other electronic services becomes tricky or even impossible as soon as such functionalities become more sophisticated. In view of the special features of the academic/professional markets, exclusion of this particular segment should be considered, much as it is in the French regulation.

2.5.4 File sharing

In legal – and in technical – terms there is no difference between the sharing of e-books and music or film, except that music and film are not subject to price regulation. Fixed book prices that do not match demand or that cannot be quickly adjusted to demand could result in e-books being sold less and downloaded more. However, a flexible fixed book price is a contradiction in terms.

3 Market trends

This study seeks to determine the feasibility and functionality of a fixed price for e-books. To do so, it is essential to have a clear picture of market trends in the Netherlands and elsewhere. Using relevant indicators obtained from public sources, this chapter describes how the market in the Netherlands and in several other countries has developed. It will address the situation in the Netherlands, the United States, the United Kingdom, Germany and France.

In addition to presenting data about the various segments of the book market, this chapter provides insights about developments in areas in which book price fixing seeks to have impact, such as reading habits, diversity of supply and the position of bookshops.

3.1 Developments in the Netherlands

Market segments

The book market in the Netherlands can be divided into three main market segments: *general books*, *academic books* and *school books*. These three segments form the basis for compiling turnover statistics and each type of book has its own set of publishers, distribution channels and methods, and retail channels. That said, the boundaries between the three segments are not clear cut. There are publishers who release both general and academic publications and shops that sell all three types of books. The digitisation of books has had varying consequences for these market segments, as explained in the previous chapter (see Section 2.3). Classifying books into categories (general, academic or school books) also has direct consequences for the commercial side of the business. The *Centraal Boekhuis*, the leading logistic services provider in the Dutch book trade, applies different retail margins for the various categories of books, in accordance with the terms agreed in the industry. Margins are highest for general books and lowest for school books.

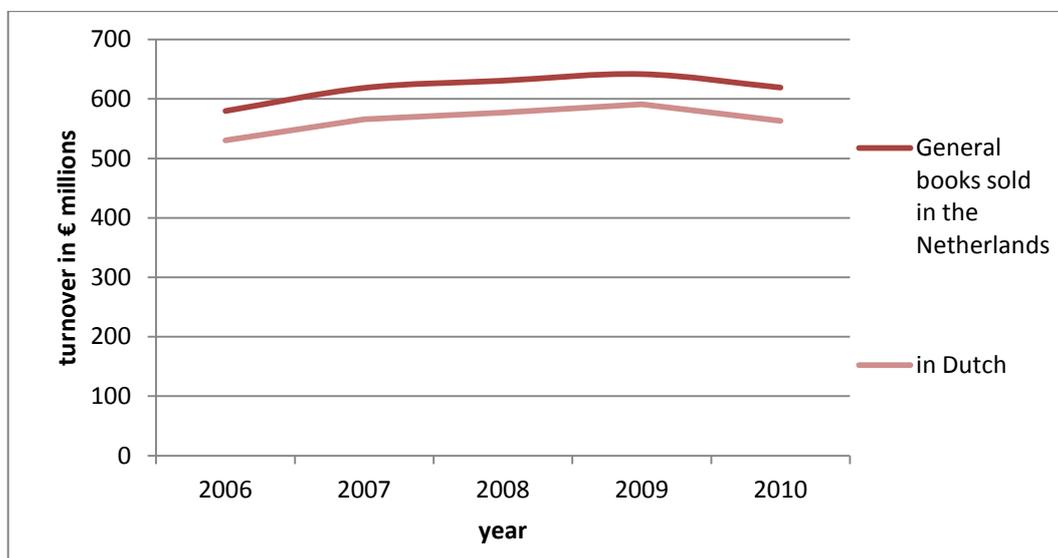
The Resale Price Maintenance (Books) Act also uses these three categories, but in some respects does not stick to the practical definitions applied in the book trade, which at times makes it difficult to gauge the effect of the law for academic and school books. Books that could be classified as school books in terms of their content do not necessarily meet the legal definition of school books. Within the meaning of the RPM Books Act, school textbooks are books that have been produced specifically for, and are prescribed in certain types of education, namely primary education, education for children with special needs, secondary education and vocational training (excluding higher vocational training, HBO), as well as adult education. The fact that use of these books is prescribed – which is a functional distinction – is the main reason why the law excepts them from resale price maintenance. In fact, under competition law, publishers of such books are not permitted to fix prices. They *are* permitted to fix prices for any other school books prescribed for types of education that do not appear in the limitative list as well as for school books that have not been prescribed for any particular type of education. In other words, a book considered to be a school book need not necessarily qualify as such within the meaning of the law.

Academic books are subject to price fixing. Whereas in principle the difference between a general book and an academic book lies in their content, here too the boundaries are often fluid and are sometimes drawn for pragmatic reasons. Publishers who reckon that a book that is essentially academic will have a good chance of selling well outside academic circles may decide to market the title as a general book. In view of the higher retail margins booksellers may charge for general books than for academic books, publishers encourage bookshops to buy and promote these publications.

Turnover and sales

In the Netherlands roughly 45.5 million *Dutch-language* general books were sold in 2010.⁹¹ At an average price of €12.39,⁹² total turnover from Dutch general books came in at €563 million. Including general books in other languages, turnover totalled €619 million, and including academic books total turnover topped €690 million.^{93,94}

Figure 3.1 Turnover from general books declined in 2010 (-3.5 per cent)



Source: SEO Economic Research based on (Notenboom, Schrijvershof, & Goudriaan, 2009, p. 17) & SMB. Turnover from general books in the Dutch language for the years 2006, 2007 and 2008 has been estimated on the basis of percentages in 2009 and 2010.

The market for general books grew between 2006 and 2009, before showing a decline of roughly 3.5 per cent in 2010 (see Figure 3.1). In 2008 and 2009 fiction, a subcategory of general books, performed substantially better than non-fiction. In both years, turnover from fiction increased by more than 7.5 per cent, compared with an average drop in non-fiction during these two years of over 2 per cent (Hoofdbedrijfschap Detailhandel 2011). The situation changed in 2010, however, with fiction performing slightly below average and informative non-fiction growing by more than 5 per cent.

⁹¹ Including books that were not produced in the Netherlands and not in the Dutch language: 49.2 million.

⁹² Including books that were not produced in the Netherlands and not in the Dutch language: €12.59.

⁹³ As data from an important market player are missing, the figures for academic books relating to 2010 are unreliable. We have therefore used turnover from academic books in 2009.

⁹⁴ This does not include academic books that go directly to libraries.

Table 3.2 Positive growth informative non-fiction and children's books in 2010

Genre	Share in 2010	Change versus 2009
Total turnover	619.5	-3.5%
Children's books	14.4%	+2.5%
Fiction	44.6%	-4.2%
Non-fiction leisure	14.8%	-2.6 %
Non-fiction informative	23.5%	+5.1%
Non-books	2.2 %	-3.8%

Source: (KBb, 2011, p. 6)

A total of 51 million general and academic books in Dutch and in other languages were sold in 2010. The average price of general books was €12.59⁹⁵; that of academic books was €41.29. Total turnover from general books was about nine times as much as turnover from academic books.

Table 3.3 Turnover, sales and number of Dutch general and academic book titles

	Turnover	Sales	Average price	Number of titles	Turnover/title
General books (2010)	€619.2 million	49.2 million	€12.59	368 thousand	€1.684
Academic books (2009)	€70.2 million	1.7 million	€41.29	65 thousand	€1.082

Source: SEO Economic Research based on SMB 2011

Diversity

Table 3.3 also specifies the number of different titles sold in the general and academic segments in 2010. The number of general titles amounted to 368 thousand, with an average turnover of €1,684 and an average of 134 copies sold per title. In the academic segment the average number of copies sold per title stood at 26, which is considerably lower.

Table 3.4 Highly skewed distribution of turnover in book market (2010)

	Percentage of all titles with a turnover of more than €1,000	Percentage of turnover from titles with a turnover of more than €1,000
General +Academic	12.7%	89.5%
General	13.9%	90.5%
Academic	7.0%	74.6%

Source: SEO Economic Research based on SMB 2011

As shown in Table 3.4, the distribution of turnover across titles is highly skewed. One seventh of the general books on sale account for nine out of ten euros spent by consumers. Whereas the distribution is slightly less skewed for academic books, a similar pattern was found in that segment too.

In 2010, 12.7 per cent of all titles (general +academic) generated a turnover of more than €1,000; together, these titles accounted for 89.5 per cent of total turnover. More than 300 thousand

⁹⁵ Note that the average price of €12.39 referred to earlier in this chapter related to general books in the Dutch language.

general titles offered on sale in 2010 generated a turnover of *less* than €1,000 per title; together, these titles accounted for revenues of €59 million. The average turnover from titles with revenues exceeding €1,000 was over €10 thousand per title (Table 3.5), which is more than 50 times the average turnover from titles that generated less than €1,000. Average turnover per title in this last category was €186.

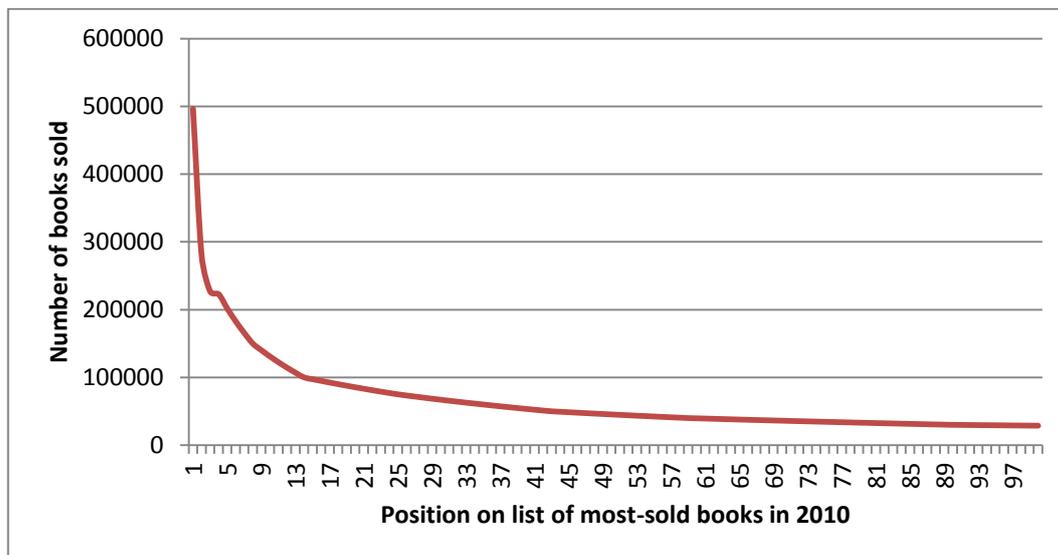
Table 3.5 Turnover and sales of titles with a turnover of more than €1,000

	Number of titles	Turnover	Sales	Aver. price	Turnover/title
General books > €1000 (2010)	51 thousand	€560.2 million	43.3 million	€12.94	€10,975
Academic books > €1000 (2009)	6.8 thousand	€60.3 million	1.5 million	€40.20	€8,824

Source: SEO Economic Research based on SMB 2011

As shown in Figure 3.6, the distribution within the 57.8 thousand general and academic titles with revenues exceeding €1,000 is also skewed. The figure shows that the volume of sales per title drops sharply between the best-selling book and those in 10th to 15th place, with sales of the best-selling book exceeding that of the number 15 by a factor of more than five. This means that a growing, or declining number of bestsellers in any one year will have an impact on total market volume. Any decline in turnover per book will be substantially lower for books ranking below the 10th best-selling book.

Figure 3.6 The book market has a skewed distribution of sales with a long tail



Source: SEO Economic Research based on (CPNB Top 100 2010, 2011)

In addition to underlining the importance of bestsellers, Figure 3.6 highlights the existence of a 'long tail'. The hundred best-selling titles are estimated to have generated the sale of 7 million books in 2010 – more than 85 per cent of sales in 2010 came from books that did not feature in the top 100 of that year and 65 per cent of turnover was from titles outside the top 500 (*Cultuur in Beeld* 2011, p. 88). This implies that despite the skewed distribution referred to, by far the greater part of sales did *not* come from bestsellers. The Dutch market for print books is therefore a combination of a limited number of titles selling many copies and a large number of titles

selling a relatively small number of copies. Not only is this latter category bigger in terms of volume, but the books in this category contribute to the diversity the RPM Books Act seeks to achieve.

New titles

A total of about 11.5 thousand general book titles were published in 2010, one thousand less than in the previous year. Books that appeared in 2010 accounted for 42 per cent of turnover in that same year; books published in 2009 accounted for 28.3 per cent. Assuming that the publication dates of books are evenly distributed across the year, which would mean that *on average* 42 per cent of turnover (referred to above) is achieved in six months, one could say that books generate more than half of their turnover in the first year after publication and about three quarters in the first two years.⁹⁶ Out of all titles with a turnover of more than €1,000, more than 20 per cent (11 thousand titles) were published in 2010. The average turnover of these titles was over €20 thousand in 2010.

Bookshops

Bookshops traditionally enjoy a strong position in general book sales. The share of sales by market players other than physical and online bookshops, referred to here as non-specialist channels, is just over 10 per cent. Physical and online booksellers together account for 88 per cent of turnover from general books (see Table 3.7). Although figures for the ratio between physical and online sellers of printed general books have not been released, older figures *are* available: in 2008 over 10 per cent of general print books were sold through online retailers (Notenboom et al., 2009, p. 17). Note, however, that these days most brick and mortar bookshops also sell online. Still, the online retailer bol.com, which does not have physical retail channels, is still by far the biggest bookseller in the online environment.

The share of online sales may be assumed to have increased since 2008, in line with the strong growth of online sales in every industry in recent years, and further growth is expected for the years to come.⁹⁷ Readers today are already using the internet to look around before buying. The percentage of buyers that research on the internet before buying a book (34 per cent) is slightly higher than the percentage of buyers who do their research in the bookshop (*Dossier Boekhandel* 2010).⁹⁸

⁹⁶ Trends over time were similar in 2009. Note that the average price of the ‘older’ books sold is not much lower than that of more recent editions: the average price of books published and sold in 2010 was €13.08; the average price of books published in 2007 and sold in 2010 stood at €11.19.

⁹⁷ The growth of online book sales is in keeping with the trend of increasing online consumer spending in general. In 2010, 9.25 million consumers in the Netherlands had made at least one online purchase, spending a total of €8.2 billion online. Growth is now fastest in online products, which was up by 16 per cent in 2010 compared with 2009 (Thuiswinkel.org, 2011).

⁹⁸ Note that this does not tally with the argument in favour of resale price maintenance for e-books in France, namely that internet trading is a passive activity, with consumers buying what they are familiar with and that it does not encourage them to buy a variety of new and unknown books. Internet bookstores make intensive use of what they have learned about the purchasing and search behaviour of visitors to their site to draw the attention of potential buyers to titles that match their profile. That said, many people who buy books, in particular when bought as a present, like to do their research in a bookshop.

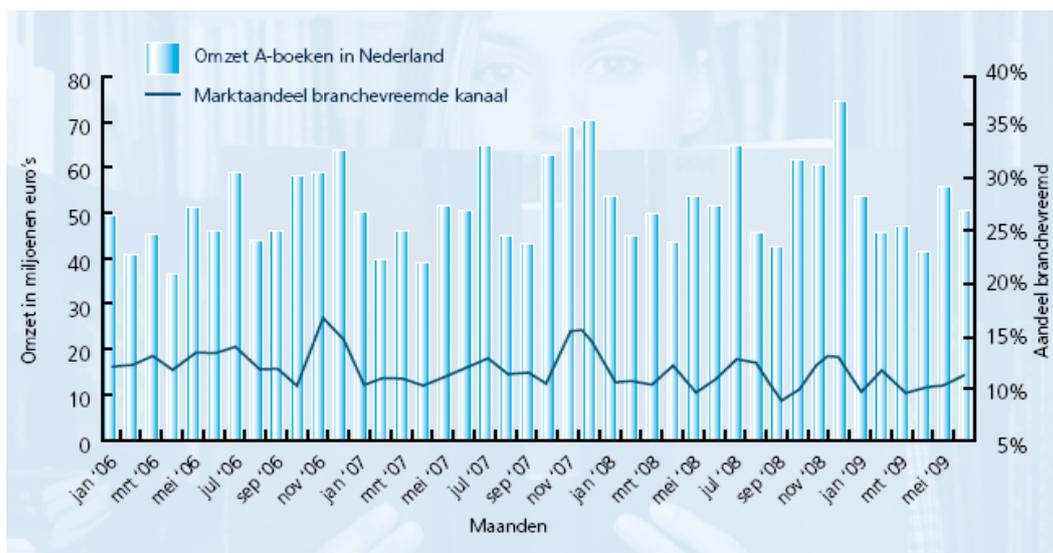
Table 3.7 Booksellers (physical and online) account for almost 90 per cent of turnover derived from general books

Distribution channel	Percentage
Booksellers, physical and online	88.6%
Mass markets	10.6%
Entertainment specialists	0.6%

Source: (KBb, 2011, p. 9)

As shown in Figure 3.8, the market share of retail channels outside the book industry peaks during months when total turnover is also highest (GFK, 2010, p. 147), such as in the December festive season and in July. This means that bookshops benefit less than proportionally from these peaks in total sales. A possible explanation could be that a large share of consumers who tend to buy books mainly for Christmas and before going on holiday are in fact less inclined to buy books in a bookshop. The smaller sales peak around the Dutch national Book Week in March each year does not appear to result in a larger share of turnover through non-specialist channels.

Figure 3.8 Market share non-specialist channels peaks in high-turnover months



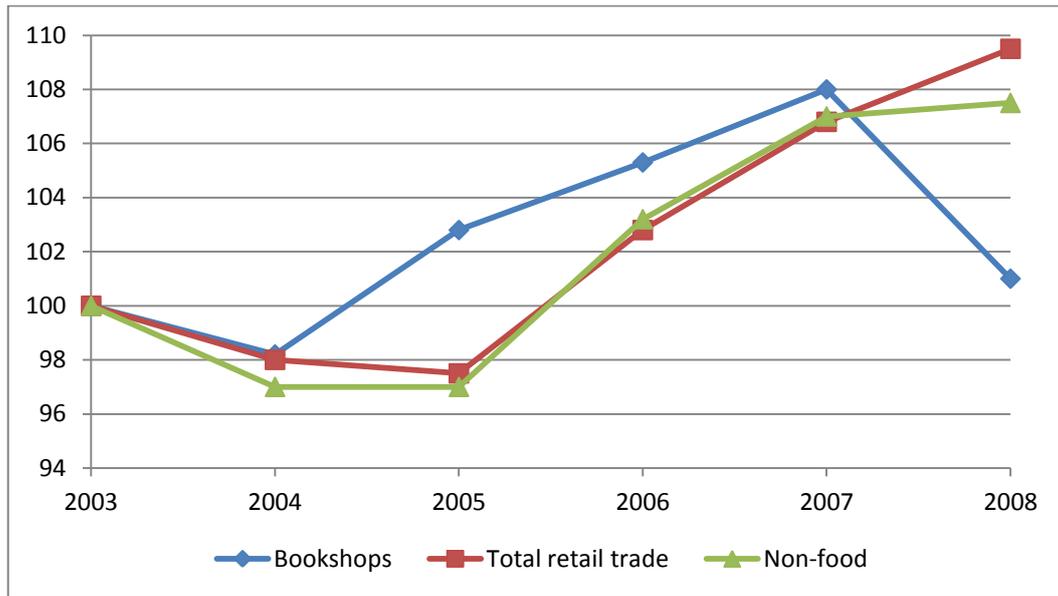
Source: (GFK, 2010, p. 147). Horizontal axis from January 2006 till May 2009; left vertical axis gives turnover general books in the Netherlands in million euro (bars); right vertical axis gives market share of non-specialist channels (line graph).

Figures provided by Statistics Netherlands (CBS) show that turnover from physical bookshops increased by about 8 per cent between 2004 and 2007.⁹⁹ The drop in turnover in 2008 is surprising given that turnover generated by the market for general books actually showed a slight upturn that year.¹⁰⁰ This decline may be explained in part by the diminishing role of physical bookshops in the provision of school books. A second explanation is the loss of market share by bookshops in favour of online retail channels.

⁹⁹ Sales of general books account for 60 per cent of turnover from physical bookstores (Boek en Bedrijf 2009).

¹⁰⁰ More recent figures have not been made available by Statistics Netherlands.

Figure 3.9 Turnover traditional bookshops declined in 2008



Source: Hoofdbedrijfschap detailhandel based on CBS (2003 = 100)

The number of booksellers associated with the Royal Netherlands Booksellers Association (KBb) grew slightly between 2004 and 2010, from 1,430 to 1,530 (Notenboom et al., 2009, p. 34 and KBb 2011). Turnover in an average bookshop stood at around €970 thousand per year in 2008. Cost of sales is about two thirds of turnover: 43 per cent of gross profit (34 per cent of turnover) is spent on personnel and 18 per cent on rent and property costs. Factoring in the entrepreneur’s hypothetical salary, booksellers posted a loss of -2.1 per cent on average. Retailers with a turnover of more than €800 thousand recorded a very modest profit of 0.1 per cent on average and those with a turnover exceeding €1.5 million earned a slightly higher profit (0.9 per cent). Profits for tax purposes (before factoring in the entrepreneur’s hypothetical salary) were positive on average for bookshops of all sizes (Boek&Bedrijf, 2009).

Table 3.10 Negative result average bookseller

	% Turnover	% Gross profit
Turnover	100%	
Cost of sales	66%	
Gross profit	34%	
Personnel costs	15%	43%
Rent and property costs	6%	18%
Other costs	9%	27%
Total costs	30%	88%
Profit for tax purposes	4.2%	12%
Hypothetical salary	6%	
Profit/loss	-2.1 %	

Source: SEO Economic Research based on (Boek&Bedrijf, 2009)

The future of the book trade was the subject of much debate during the first six months of 2011. At the end of June, the discussions were followed by the news that Selexyz, a company that runs several large bookshops in the Netherlands’ big cities, had to cut jobs by 10 per cent in response

to results. Booksellers were reported to have suffered a loss in turnover of around 4 per cent during the first six months of 2011 (Bolwijn, 2011). Experts warn that large physical bookshops are vulnerable. This may be attributed to the fact that revenues per square metre of floor space are declining, or at best have come to a standstill, while real estate costs are rising, as are personnel costs owing to the extended shop opening hours. In this challenging climate, small bookshops that do not form part of a chain and that have seen their profits shrink in recent years, as noted above, are also becoming increasingly vulnerable.

One of the crucial questions in the debate, which has so far not been addressed, relates to trends in the print book market. Is the slight market downturn observed in 2010 a cyclical movement that is taking place in tandem with the slide in consumer spending found in the economy as a whole, or is it a structural phenomenon resulting from a more permanent change in consumer behaviour and from a decline in reading? To answer this question, a distinction needs to be made between developments in the overall market and developments within the different retail channels. Figure 3.9 shows that the position of traditional booksellers deteriorated in 2008, at a time when the retail business as a whole was doing well, as did the total market for general books (see Figure 3.1). Recent austerity measures taken by bookshops suggest that at least part of stagnating sales at specialist bookshops is structural. This is congruent with the emergence of online sales mentioned above, although experts suggest that most of this growth was at the expense of mail order book clubs. For lack of more specific figures, it is not possible to establish whether the recent decline in the overall market relates only to offline distribution, leading to a rapid reshuffle in retail channels, or whether sales of print books through online channels have also suffered.¹⁰¹ The suggestion, however, that the stagnation of the overall market can be explained by consumers overwhelmingly turning to e-books is not valid, as the market for digital books is still very small.

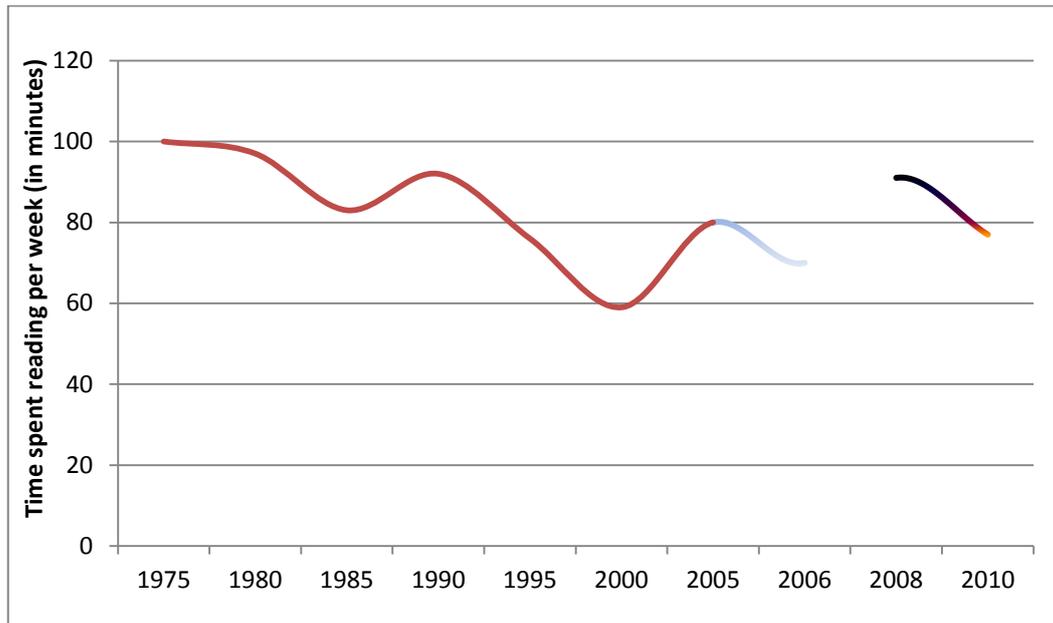
Reading habits

An important element of the objectives of cultural policy is to promote public participation. Appelman & Van den Broek (2002) define three possible dimensions of this concept: (1) Participation by as many people as possible or in as many layers of society as possible; (2) Reading or buying; (3) Books in general, or literary/cultural books in particular (Appelman & Van den Broek, 2002, p. 41). Purchasing behaviour has already been addressed above. Time spent reading is another relevant indicator. The time people spend reading books has dropped since 1975,¹⁰² with reading time now averaging between 1 and 1.5 hours a week.

¹⁰¹ Large bookshops in prime locations in the big cities have been particularly hard hit. This may be attributed to the fact that revenues per square metre of floorspace are declining, or at best have come to a standstill, while real estate costs are rising, as are personnel costs owing to extended shop opening hours. In this challenging climate small bookshops that have seen their profits shrink in recent years are often unable to keep their business afloat.

¹⁰² The climb between 2000 and 2005 in Figure 3.11 may be attributed to a different information gathering method. Post-2005 figures have been taken from another source (see note to figure).

Figure 3.11 Gradual decline in average time spent reading



Source: SEO Economic Research based on SCP and SPOT * trend break in 2005 versus 2000 due to different information gathering methods ** figures from 2006 have been derived from SPOT, figures for years preceding 2006 were provided by SCP

E-books

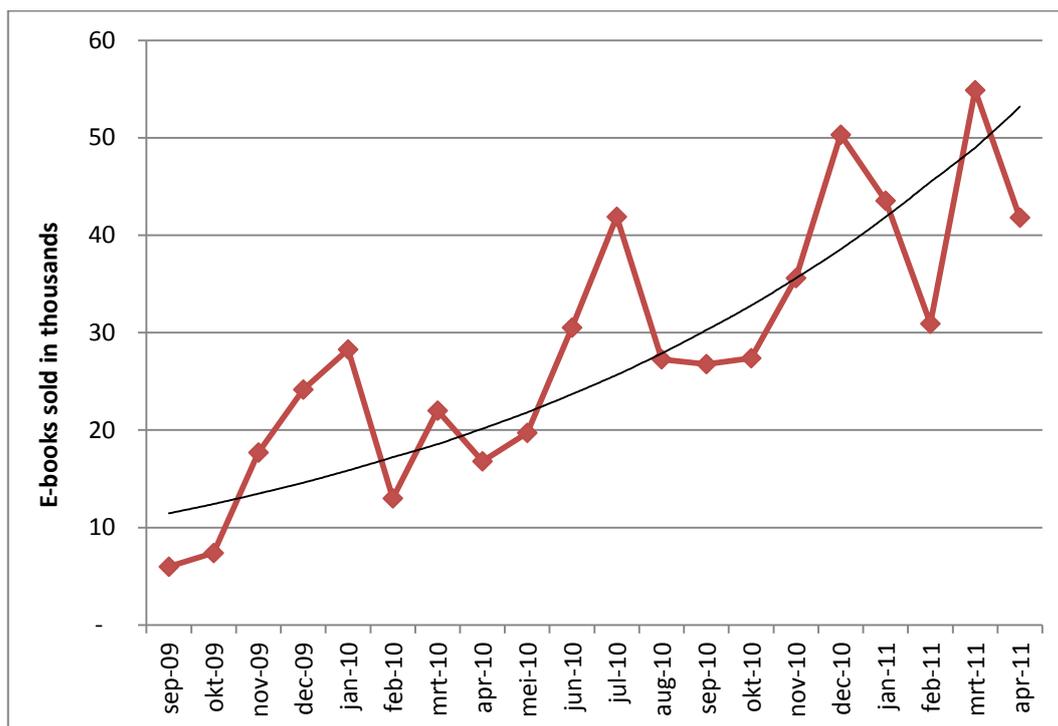
The share of e-books sold in the total book market is still small, but it is growing rapidly. Almost 352 thousand e-books were sold in 2010 (0.7 per cent of the total number of general books). These sales were almost matched in the first half of 2011 alone, with 327 thousand digital books sold (over 1.2 per cent),¹⁰³ an increase of just over 150 per cent compared with the first six months of 2010. Figure 3.12 presents e-book sales between September 2009 and April 2011. Sales showed strong growth, with seasonal peaks around Christmas, the summer holidays and the Dutch national Book Week.

When interpreting these figures, note that no more than 1.2 per cent of all printed titles available at the end of 2010 were also available in digital form. With a total of 8.181 titles, this was approximately 2.7 per cent by mid-2011.¹⁰⁴ This means that the market share within the available titles is much higher. The exact percentage is not known, however, as print sales of titles available digitally is not known. If all titles were *immediately* available as e-books, the share of e-books would presumably be much higher. In the Netherlands it takes a while for titles to be released in digital form. Given that more than 50 per cent of turnover from newly published books is earned in the first year after publication, it would be reasonable to assume that the position of e-books in the market would improve if digital and print books were to appear at the same time. As things stand now, e-books are *bors concours* in the most profitable first months after publication.

¹⁰³ www.boekblad.nl/omzet-e-boeken-eerste-halfjaar-2011-bijna-even.173237.lynkx

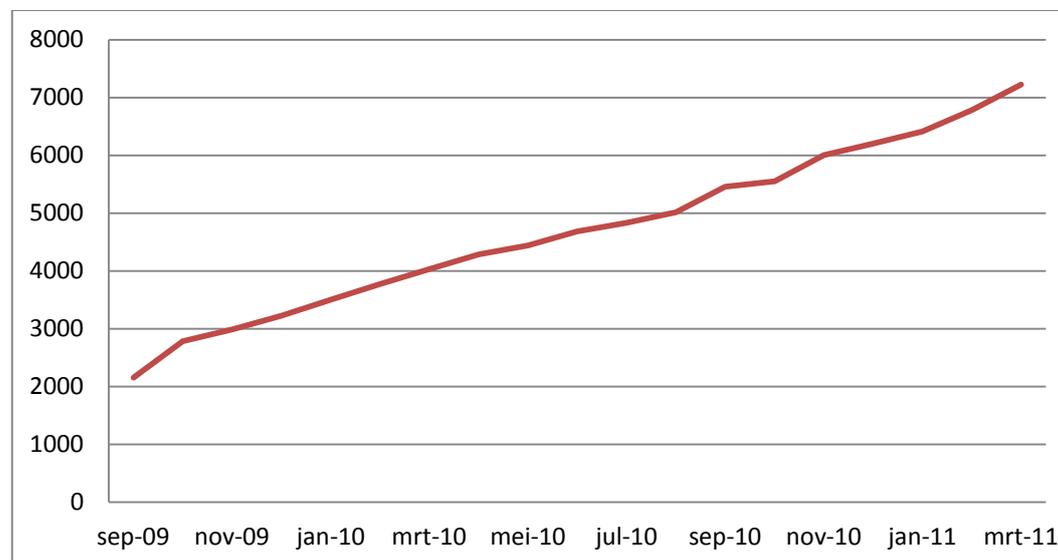
¹⁰⁴ www.boekblad.nl/omzet-e-boeken-eerste-halfjaar-2011-bijna-even.173237.lynkx

Figure 3.12 Trend increase e-book sales: doubled in 8 months



Source: Centraal Boekhuis 2011, adapted by SEO Economic Research

Figure 3.13 Availability of e-book titles topped 7 thousand in March 2011



Source: Centraal Boekhuis 2011

Table 3.14 presents the share of e-books in the total market in terms of titles, as well as the relative availability of e-book titles. The number of e-books sold in 2011 has been estimated on the assumption that the average growth recorded during the first six months of the year (+ 150 per cent) would continue at the same pace during the second half of the year.¹⁰⁵ Bol.com is by far

¹⁰⁵ This is presumably a conservative assumption as growth accelerated in the first six months of the year.

the biggest player in terms of digital books on offer in the Netherlands and is considered the favourite retail channel by over 70 per cent of existing readers of e-books. Whereas 60 per cent of these readers prefer to use e-readers, over 10 per cent would rather read e-books on a tablet (SMB based on GFK Intomart, April 2011).

Table 3.14 The share of e-books in the Netherlands was 0.7 per cent in 2010

	E-books sold	Share of total book market	Available titles
2009	110 thousand	0.22%	0.8%
2010	352 thousand	0.70%	1.2%
2011*	850 thousand*	1.7%	>2.7%

* Market share and sales in 2011 based on the assumption that the 150 per cent growth recorded during the first six months of 2011 would continue at the same pace in the second half.

Source: SEO Economic Research based on SMB and (Romeny, 2011)

3.2 International developments in the market for e-books

E-book sales are growing fast in the international market, with the United States leading the way, followed closely by the United Kingdom and – at a respectable distance – by countries in continental Europe. A substantial market for e-books has already developed in the United States and the United Kingdom.

General international developments

The development of e-books varies greatly from country to country. Whereas the market for e-books has barely taken off in Italy, turnover from digital books in the United States accounted for more than 15 per cent of total turnover in the book trade in the first months of 2011. Issues such as pricing and distribution among retailers, publishers and authors are the subject of conflict the world over. In many EU countries, the higher VAT rate for e-books than for print books is also standing in the way of a breakthrough of books in digital format (see Table 3.15).

Table 3.15 Difference in VAT rates for e-books and print books

Country	E-books	Print books
Belgium	20%	6%
Germany	19%	7%
France	19.6%	5.5%
Ireland	21%	0%
Italy	20%	4%
Netherlands	19%	6%
Austria	20%	10%
Poland	22%	0%
Romania	17.5%	0%
Spain	16%	4%
Czech Republic	19%	5%
Sweden	25%	6%

Source: (Rousseau, 2009, p. 14)

With the exception of the United States and the United Kingdom, publishers in all countries tend to be cautious when it comes to publishing e-books (see also (PWC, 2010)). Publishers often claim that the production of digital books is only marginally cheaper than that of print, underlining that initial investments are needed to set up an e-infrastructure. They point out that, combined with the higher VAT rate, a sharply reduced price compared with print books is not feasible.

However, a factor that has not, or barely been reckoned with is the effect of pricing on sales. Research into the price sensitivity, or *price elasticity* of e-books is felt to offer a solution here. At a price elasticity of less than -1.0, lower prices will result in higher turnover as the percentage increase of sales is greater than the percentage decrease in price. To date, very few studies, either national or international, have been published into the price elasticity of demand for e-books. Publishers, moreover, want to know what the effect of digital sales would be on print book sales as these markets are interrelated and cannot be seen in isolation. Here, too, evidence so far has been anecdotal. The next chapter will address the price elasticity of printed books on e-books in more detail. See Box 3.1 for an explanation of the concept of price elasticity.

Box 3.1 Price elasticity

What is price elasticity?

Price elasticity is a measure that shows the degree to which the demand for a product or service responds to a change in prices. If prices rise by 1 per cent and sales drop by 1 per cent (-1 per cent), price elasticity is equal to -1 (1/-1). If sales respond strongly to price, demand is said to be elastic, in which case the price elasticity is less than -1, e.g. -1.5. If demand is less sensitive to a change in price (price elasticity > -1, e.g. -0.5), we speak of inelasticity.

Maximising turnover

Suppliers who control their own prices (price setters) can maximise turnover by setting a price with a price elasticity of -1. If, for example, price elasticity is -1.5, suppliers can raise turnover by lowering the price because a 1-per cent price drop will result in an increase in sales of 1.5 per cent. Conversely, suppliers will have to raise prices in order to maximise turnover at a price elasticity of -0.7.

Source: SEO Economic Research

In addition to being influenced by publishers, retailers and authors, pricing dynamics depend on whether or not prices for e-books are fixed and whether or not agency pricing is implemented. Under agency pricing, or when book prices are fixed, price control theoretically shifts from retailers to publishers: the publisher determines the retail price, whether fixed or free, and in principle also sets the bookseller's profit margin or wholesale price.¹⁰⁶ In practice, however, the flat rate the retailer receives and profit margins/wholesale prices are negotiated, also under the agency model and under resale price maintenance. Retailers who possess strong market power will exert their influence in order to raise their margins by threatening publishers not to promote a title, or to display a title less prominently.

¹⁰⁶ In the agency pricing model, publishers control the retail price and set the bookseller's flat rate, which boils down to the same.

In this chapter, the analysis of the international market for e-books will focus on the United States, the United Kingdom, France and Germany. Whereas the phenomenon of resale price maintenance for books is not known in the first two countries, many publishers here impose agency pricing. And while France has introduced legislation regulating price fixing of e-books, in Germany digital books automatically come under the scope of resale price maintenance given the broad definition of ‘book’.

The development of the share of e-books in France and Germany lags that in the United States as well as that in the United Kingdom. A trend observed in every market is a declining turnover of paperbacks and the general expectation is that digital books will cannibalise the market of paperbacks in particular. As the market for hardcover books is very small in the Netherlands, the distinction between hardcovers and paperbacks is less relevant in the Dutch market.

The United States is blazing the trail...

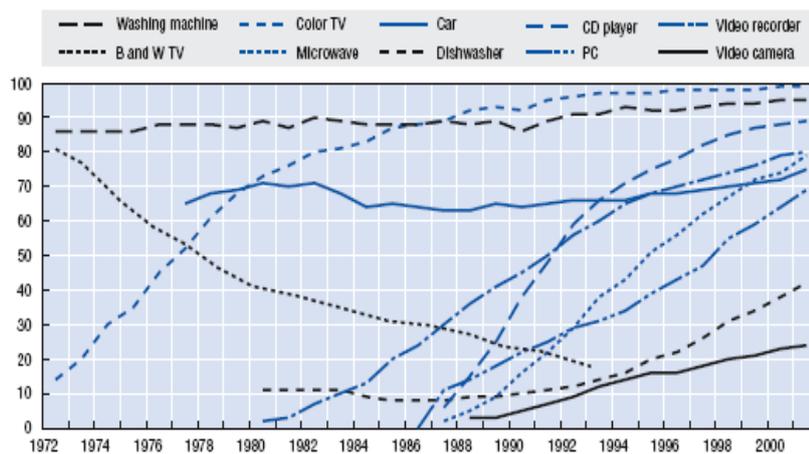
In the United States, 77 million digital general books were sold in 2010, accounting for nine per cent of the market for general books in terms of copies sold. This figure does not include the market for academic and professional e-books. Turnover amounted to around \$ 759 million: six per cent of the value of the entire book market.

Table 3.16 E-books rapidly gaining market share in the US

	2002	2003	2004	2005	2006	2007	2008	2009	2010
General books	3,897.7	3,838.3	3,794.7	5,058.5	5,036.4	5,457.9	5,158.0	5,127.1	3,969.7
E-books	2.1	6.0	9.3	16.0	25.2	31.7	61.3	169.5	345.3
% e-books	0.05%	0.16%	0.25%	0.32%	0.50%	0.58%	1.19%	3.31%	8.70%

Source: Association of American Publishers

Figure 3.17 Adoption of a number of new technologies in the Netherlands since 1972



Source: OECD, 2004: *OECD Information Technology Outlook 2004*

The explosive growth of e-books in the United States (Table 3.16) is illustrated in Figure 3.18, which also presents trends in the area of print books. Digital books now feature in the steep part of the curve, which is illustrative of the successful adoption of new technologies. Whereas it is usually difficult to predict how adoption curves will develop, it is clear that innovations now

move up the curve more swiftly than they did forty years ago. As shown in Figure 3.17, it took more than 15 years for the market penetration of colour TV to grow from 15 per cent to 90 per cent. The microwave needed no more than half that time to almost reach its final market penetration and mobile phones were adopted even more swiftly.

Although not all new technologies achieve a market penetration or market share in the range of 100 per cent – see, for example, the curve for the video camera in Figure 3.17 – the share of e-books in the United States has increased very steeply since 2008 and this growth has certainly not yet come to an end. In February 2011, turnover from e-books was more than 200 per cent higher than in January 2010. As a result, digital turnover in the United States during the first two months of 2011 exceeded turnover from paperbacks, making e-books the dominant format for general books in the American market.¹⁰⁷ In the US, it seems that paperbacks in particular are being cannibalised by e-books. In March 2011, turnover from paperbacks for adults was almost 8 per cent lower than in March 2010, while turnover from hardcovers had increased by 6 per cent compared with the previous year. The total market for print saw turnover drop by 24.8 per cent (AAP, 2011), which goes to show that e-books in the US are rapidly gaining market share these days, and that some cannibalisation is taking place.¹⁰⁸ Between April 2010 and April 2011, digital turnover rocketed by more than 150 per cent, bringing the share of total turnover to 16.7 per cent (American Association of Publishers, 2011). A share of turnover of 36 per cent is expected by 2014.¹⁰⁹

The most important driver of this explosive growth was the purchase of e-books during the 2010 Christmas season by consumers who had been given e-readers or tablets. Interestingly, the study showed up that a relatively large number of backlist titles¹¹⁰ are being sold. Some of these titles were purchased by consumers who, after having read a recent work by an author, decided to buy earlier works published by the same author.¹¹¹ While the total market in the United States was up slightly in 2010, the market for print books showed a marginal decline.

¹⁰⁷ Note that this development is moving faster than anticipated by PWC last year in *Turning the Page: The Future of eBooks*. They predicted a share of e-books of just over 10 per cent in the first quarter of 2011 and believed the current level would not be reached until late 2013.

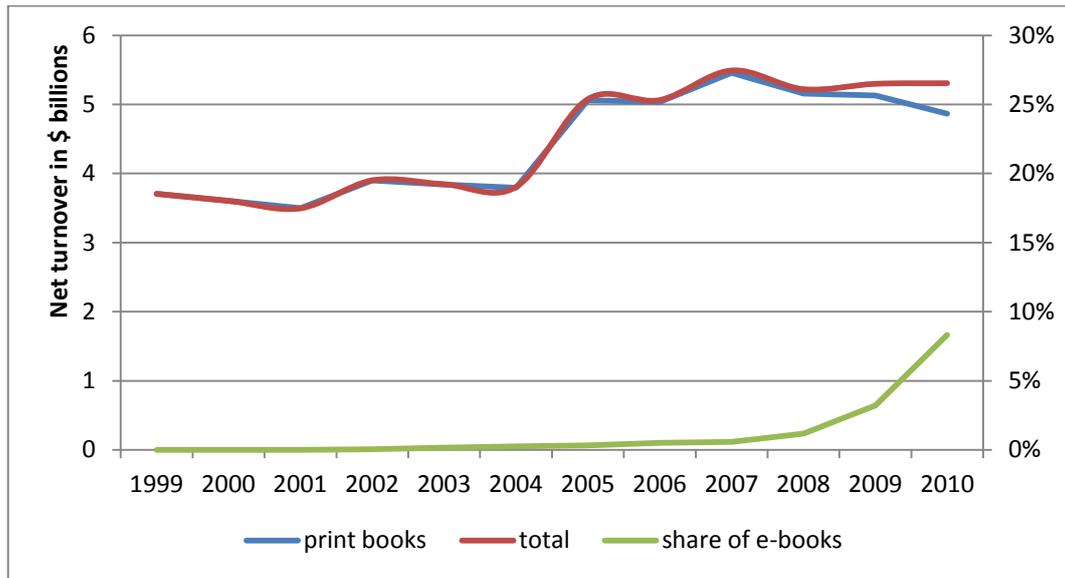
¹⁰⁸ Rather than generating extra demand, the term cannibalisation is used here to indicate that turnover from e-books is being earned partly at the expense of turnover from print.

¹⁰⁹ Sara Lloyd (Digital director at Pan Macmillan UK). Presentation during the 8th International Non-Fiction Conference, 28 & 29 January, Amsterdam (Dutch Foundation for Literature).

¹¹⁰ These are non-recent titles that are still being sold.

¹¹¹ *Popularity of Books in Digital Platforms Continues to Grow, According to AAP Publishers February 2011 Sales Report. E-Books Rank as #1 Format among All Trade Categories for the Month*. American Association of Publishers, April 14, 2011.

Figure 3.18 Explosive growth of e-books in the US



Source: SEO Economic Research based on *Association of American Publishers*

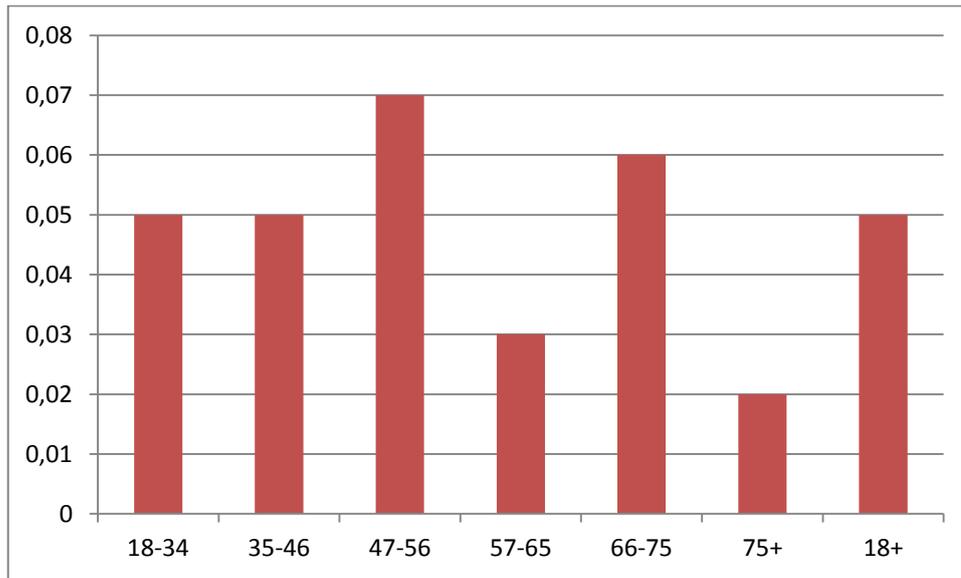
At the end of 2010, about 5.4 per cent of Americans owned an e-reader and 10 per cent of adult American internet users had on occasion paid for e-books (Jansen, 2010, p. 8). Women in the 30-49 age group are overrepresented. E-reader ownership is forecast to amount to about 8.7 per cent at the end of 2011 and around 12 per cent a year later.¹¹² At the same time, ownership of tablets is growing rapidly.

A study by PEW Internet has provided figures on the age distribution in September 2010, when the market penetration of e-readers stood at 5 per cent. Ownership of e-readers was most common among the 47-56 age group. Note also that e-reader ownership is greatest among the highest *and* lowest income groups.¹¹³

¹¹² <http://www.emarketer.com/Article.aspx?R=1008404> One in three users said they shared their e-reader, which means that actual use of e-readers was at least 7 per cent.

¹¹³ In the same period 4 per cent had a tablet. The age distribution of owners of this gadget was more normal than among users of e-readers. Tablet consumers under the age of 46 years were overrepresented.

Figure 3.19 E-reader ownership among adults in the United States



Source: (Zickuhr, 2011, p. 13)

The first-quarter results for 2011 of the American company Simon & Schuster's show that the rapid growth of e-books creates positive dynamics for individual publishers too. Digital content accounted for 18 per cent of turnover, double the figure in the previous year: 17 per cent was generated by e-books and 1 per cent by audio books. And whereas cannibalisation is unmistakable – turnover in print dropped in all segments – these developments were favourable on balance. The company reported a doubling of profit in the first three months of 2011. Hachette, another major publishing company, posted an 88 per cent growth of digital content in the first quarter of 2011, bringing the share of digitals to 22 per cent.¹¹⁴ Forrester recently presented a study held among managers in the publishing business in the United States, revealing that e-books are expected to hold a dominant position in the US market by 2014.¹¹⁵ A notable finding was that publishers in the United States were more positive about e-books than publishers on the European continent, even before the digital breakthrough in 2010 and 2011 (PWC, 2010, p. 2).

¹¹⁴ Simon and Schuster Results U, Digital Doubles. Publishers Weekly, May 4, 2011 (Jim Milliot).

¹¹⁵ Sara Lloyd, loc. cit.

Figure 3.20 E-book sales for *American Assassin*

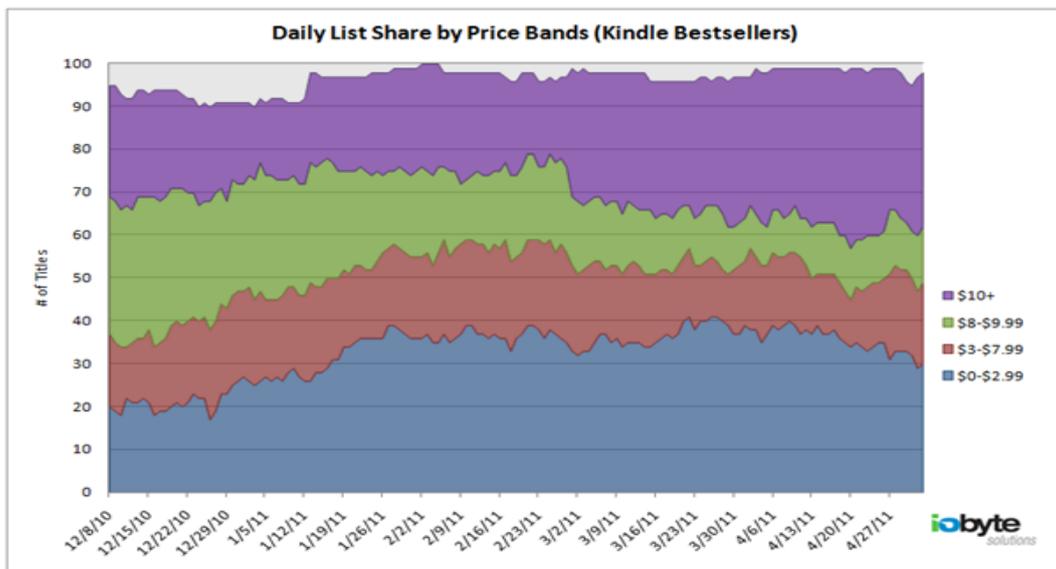


Source: digitalworld.com

Evidence of the price elasticity of e-books in the US is largely anecdotal. Figure 3.20, for example, shows how the bestseller *American Assassin* responded to a price reduction from \$ 12.99 to \$ 8.99 and how the book’s ranking in the top 100 plummeted in response to a subsequent price increase.

This sensitivity to price cuts does not, however, imply that e-book prices are under considerable pressure nor that they follow a downward trend. The top 100 best-selling digital books at Amazon revealed a remarkable pattern between the end of August 2010 and late April 2011. Figure 3.21 shows that both the share of low-priced (< \$2.99) and high-priced (>\$10) e-books increased during these months.

Figure 3.21 Prices of the 100 best-selling titles at Amazon



Source: digitalbookworld.com2011/05042011

This pattern dovetails with a sample of digital book prices from the two biggest e-booksellers in the US – Amazon and Barnes & Noble. Prices were compared on 24 May 2011 of the five best-selling fiction and non-fiction books at the time according to the New York Times as well as the prices of three less recent political biographies. The cheapest editions have been marked in bold in the table. Note that e-books are not always cheapest: at Amazon in particular paperbacks are often lower priced than digitals and in some cases e-books were more expensive at both retailers. All biographies in the sample, for example, were cheaper as a paperback than in digital format.¹¹⁶ This pattern is also confirmed when a broader range of titles is taken into account. That said, a broader range also includes titles that are no longer copyright-protected and that are therefore offered on sale in digital format for \$0.00.

Table 3.22 Price comparison Amazon and Barnes & Noble: e-books are not always cheaper

	Amazon			Barnes & Noble		
	E-books	Paper-back	Hard-cover	E-books	Paper-back	Hard-cover
Top 5 combined ranking e-book fiction and print (top 5 as at 24/05)						
1. WATER FOR ELEPHANTS, by Sara Gruen	4.17	7.99	16.29	6.39	7.99	N/A
2. BURIED PREY, by John Sandford	17.53	N/A	14.71	12.99	N/A	15.73
3. DEAD RECKONING, by Charlaine Harris	13.79	N/A	16.77	12.99	N/A	15.65
3. DEAD RECKONING, by Charlaine Harris	16.01	N/A	N/A	N/A	N/A	N/A
4. 10TH ANNIVERSARY, by James Patterson and Maxine Paetro	18.60	N/A	14.28	12.99	N/A	15.39
5. SOMETHING BORROWED, by Emily Giffin	N/A	8.99	16.47	7.99	7.99	22.48
Top 5 combined ranking e-book and print non-fiction						
1. LIES THAT CHELSEA HANDLER TOLD ME, by Chelsea Handler et al	N/A	N/A	13.08	11.99	N/A	17.59
2. HEAVEN IS FOR REAL, by Todd Burpo with Lynn Vincent	6.13	9.34	N/A	6.13	9.43	N/A
3. BOSSYPANTS, by Tina Fey	N/A	10.87	13.97	12.99	N/A	15.87
4. IN THE GARDEN OF BEASTS, by Erik Larson	N/A	N/A	13.78	12.99	N/A	14.30
5. DOES THE NOISE IN MY HEAD BOTHER YOU?, by Steven Tyler	13.79	17.66	15.20	12.99	N/A	19.99
Biographies						
Living history (Hillary Rodham Clinton)	13.79	10.88	19.60	12.99	11.26	21.29
A Journey (Tony Blair)	16.95	12.92	21.66	18.99	N/A	21.66
My Life (Bill Clinton)	13.79	12.89	21.41	14.99	7.75	21.41

Source: SEO Economic Research based on websites of the New York Times, Amazon and Barnes & Noble prices in US dollars (\$), bold type is cheapest version

... followed by the United Kingdom

In the United Kingdom, a total of 3.7 million general e-books were sold in 2010 (1.5 per cent of the total market), generating a turnover of £31 million. The e-market share is expected to increase to between 13 and 14 per cent in 2014.¹¹⁷ Including academic and professional titles, digital turnover in 2010 amounted to £180 million, or six per cent of the total market. While academic and professional books now account for a substantial portion of digital turnover (72 per cent), the share of general books in the e-market is increasing. With the market for general e-

¹¹⁶ In light of the price differences, this cannot be attributed to agency pricing.

¹¹⁷ Sara Lloyd, loc. cit.

books having increased by 318 per cent since 2009, growth in this segment has outpaced that of the professional and academic market, where digital books have been around for more than a decade. The CEO of the British Publishers Association comments on the relationship between these two markets: “Academic and professional publishing, which embraced digital platforms over a decade ago, continues to lead the field. But now that technology is putting e-reading devices into consumers’ hands, we are starting to see the rapid growth of digital sales in this area too, as consumer publishers develop digital formats to reach wider audiences”¹¹⁸

Note that the emergence of the digital book market is generally seen as the work of a small number of large companies – in different countries – that have their roots in digital services provision or technology. The introduction on the British market of Amazon’s Kindle, accompanied by a specific offering of e-books, is generally felt to have accelerated momentum in the market. Similarly, Apple has a relevant influence with its iPad. The activities of these two companies have therefore had a decisive impact on market trends in the United States and the United Kingdom. A traditional bookseller that has jumped on the bandwagon is Barnes & Noble, with the introduction of its own e-reader, the Nook.

Another interesting development is the growing importance of various platforms and terminals that are bringing e-books to consumers. Specific devices are still overwhelmingly dominant in the market. In the United Kingdom, the market for multifunctional tablet computers, where the iPad is clearly in the lead, accounts for no more than seven per cent of digital book sales. The remaining 93 per cent is generated by the various e-reading devices.¹¹⁹ The importance of tablets for e-books is expected to grow, with an estimated share in the range of fifty per cent by 2014.¹²⁰ Interestingly, recent research has shown that one in seven American consumers who use e-readers or tablets own several of these devices.¹²¹ A new player that has entered the scene and is vying for the attention of e-book consumers is the Canadian company Koboo. This company has great ambitions for the continental European market. In the tablet market, Apple is likely to have to contend with global competition from devices that run on an Android operating system. If recent trends in the US smartphone business are anything to go by, interesting times lie ahead for tablets: in the United States, Android smartphones are now outselling iPhones.

France

As detailed in the previous chapter, France recently passed a Bill regulating price fixing for e-books. The market share of digital books in France is slightly ahead of that in the Netherlands, with turnover climbing from 0.1 per cent of the total book market in 2008 to 0.5 per cent in 2009 and about 1.5 per cent (€68 million) in 2010 (Sénate, p. 10). At the end of 2010, the number of e-titles on offer in France amounted to about 80 thousand compared with 600 thousand print titles – a title offering of over 13 per cent (Senate, p. 10). This is approximately eight times as much as in the Netherlands.

¹¹⁸ The Publishers Association reveals accelerated growth in the 2010 digital book market. Press Release, May 3, 2011.

¹¹⁹ The share of mobile devices is negligible, at less than one per cent in the United Kingdom.

¹²⁰ Sara Lloyd, loc. cit.

¹²¹ Apple iPads, Amazon Kindles and Sony e-readers part of Multi-tablet households study says. Los Angeles Times, December 21, 2010.

No more than about one quarter of all printed books in France are sold through bookshops; almost one quarter of book sales are made through department stores specialised in culture (*Le secteur du livre: Chiffres clés 2009-2010*, 2011, p. 2). Internet sales accounted for 10 per cent of turnover and mail order book clubs for 14 per cent. Almost 50 per cent of turnover from the more than 60 thousand books sold in 2009 comes from books that were *not* among the top 10 thousand best-selling titles; 34 per cent of turnover was generated by books that ranked among the thousand to 10 thousand best-selling titles.

Table 3.23 Long tail in France

Best-selling titles	Share of total turnover
5	1.1%
10	1.7%
1000	16.7%
10,000	51.1%

Source: (*Le secteur du livre: Chiffres clés 2009-2010*, 2011)

A consumer survey conducted in 2009 showed that 5 per cent of the population in France had on occasion read an e-book; 30 per cent indicated they would like to read a novel in digital format (*Le livre sera-t-il numérique?*, 2010).

Germany

In 2010, the turnover of e-books in Germany accounted for no more than about 0.5 per cent of total turnover in the book market, yet consumers in Germany say they are ready to go digital: research carried out by GfK has shown that 54 per cent of readers in Germany are considering buying an e-reader; this was even found to be as much as 86 per cent among young people and students. The e-book title offering in Germany is much higher than it is in the Netherlands, as shown in Table 3.24.

Table 3.24 E-book title offering in Germany much higher than in the Netherlands

Genre	Percentage in digital format
Non-fiction	33%
Academic books	30%
Professional books	28%
Travel guides	15%
Fiction	11%
Children's and teen books	10 %
School books	3%

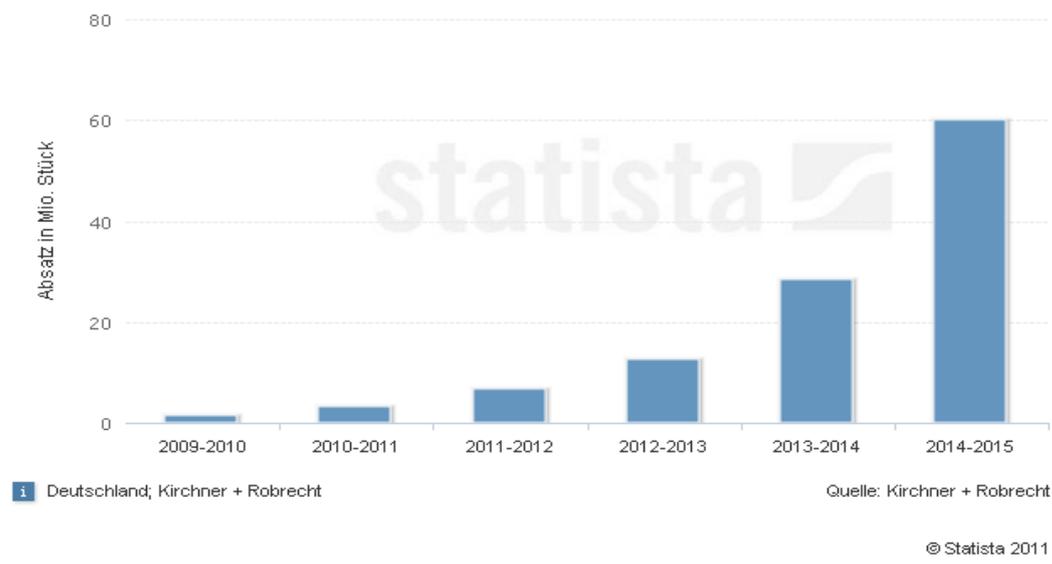
Source: Börsenverein des Deutschen Buchhandels 2011

Current prices, however, would appear to stand in the way of a rapid development of this market in Germany (Spiegel, Patalong, 2010). Yet analysts in Germany predict sales growth from 2 million now to around 60 million in 2014-2015, which would constitute a market share of roughly 15 per cent (Statista 2011).¹²² The growing sales of e-readers and tablets in the German market is expected to trigger a spike in 2011.

¹²² Predictions in a report by PwC are more conservative. They estimated a market share for e-books of around 6 per cent in 2015 (PWC, 2010, p. 30), but developments in the US have shown that these predictions are too conservative.

Figure 3.25 Expected trends in sales of e-books in Germany

Prognose zum Absatz von eBooks* (in Mio. Stück) in Deutschland bis 2015



Source: <http://de.statista.com/statistik/daten/studie/38689/umfrage/absatz-von-e-books-in-deutschland/>

In Germany, the pricing of digital books is influenced by the fixed price for print books. This fixed price is also applied to a digital version of the book in printed form.¹²³ The price of the electronic version is usually the same as the price of the cheapest print edition. As consumers in Germany feel that e-book prices are too high, the market has not yet developed to its full potential. This has prompted a debate in Germany about the pros and cons of price maintenance for digital books.

Opponents of price maintenance see a disruption of market forces and heightened international competition as the main drawbacks, underlining that this is keeping the price of books artificially high.

Publishers and booksellers in Germany are in favour of price maintenance as they fear plummeting prices and a monopoly position for retailers such as Amazon. The German booksellers association is concerned that, if price fixing for books is discarded, price dumping by players such as Amazon will have a negative impact on consumers' price perception of e-books, arguing that they would become accustomed to excessively low prices. An argument to the contrary is that in the long term, the price strategy of suppliers in Germany does not seem to be viable. The same German-language e-books are sold in Switzerland at half the price charged in Germany, also to consumers in Germany. In light of this price difference, the weekly *Der Spiegel* expressed surprise that digital books were selling at all in Germany (*Spiegel* 01-02-2010). Since its publication, German publishers have boycotted Swiss e-book discounters.¹²⁴

¹²³ Digital books are subject to a higher VAT rate (see Table 3.15).

¹²⁴ <http://www.exlibris.ch/buecher-buch/ebooks/>

Table 3.26 German market still very small

Key figures Germany 2010	
Turnover of e-books	€21.2 million
Share of e-book turnover	0.5 per cent
Sales	2 million
Average e-book price	€10.60
Number of e-book buyers	540 thousand
Turnover book market compared with 2009	+0.5%
Turnover hardcover compared 2009	+1.60%
Turnover paperback compared 2009	-1.60%

Source: SEO Economic Research based on Börsenverein des Deutschen Buchhandels & GfK

Booksellers have different expectations when it comes to e-books. Some hope that German readers will stay attached to print as they feel that their very existence will be put at risk if consumers turn to digital books in a hurry. At the same time, about half of all booksellers see opportunities as e-books are set to solve the problem of lack of space in bookshops. Developments in the book market show that physical bookshops are conceding ground mainly to online retailers, but also to publishers who sell directly to consumers (Börsenverein des Deutschen Buchhandels 2011). If e-book sales rise further, brick and mortar bookshops are likely to lose even more ground.

Table 3.27 Physical bookshops losing ground

Distribution channels 2009	Share	Change compared with 2008
Physical bookshops	52%	+0.1%
Direct sales by publishers	18%	+3.8 %
Online booksellers	16%	+20.8%

Source: Börsenverein des Deutschen Buchhandels 2011

There is a big difference between large and small publishers in this respect. Small publishers in particular are afraid that digital books will result in higher costs without generating more turnover in return (Bawaba, 2010; PWC, 2010, p. 12). Whereas 67 per cent of large publishers sell e-books, no more 28 per cent of the smaller publishers are doing so.

There are a few important exceptions to e-book price fixing in Germany. Fixed prices do not apply to multimedia applications. Nor are prices fixed for books that are included in academic databases with the publisher's consent. Another exception are chapters that are sold individually (Die wichtigsten Fragen zur Preisbindung von E-Books, 2011).¹²⁵

3.3 Conclusions

In 2010, turnover from general books in the Netherlands declined for the first time in years, by 3.5 per cent. Although precise figures for the Dutch market are lacking, it is clear that physical bookshops are losing ground every year to online print book retailers, as evidenced by the figures for the German market. The advantage of online booksellers lies mainly in the long tail, due to

¹²⁵ <http://www.preisbindungsgesetz.de/content/aktuelles/1081-die-wichtigsten-fragen-zur-preisbindung-von-e-books.htm>

the skewed distribution of book sales across titles. Another highly relevant factor in the book business, including the digital environment, is *when* turnover is generated. More than half of turnover from newly published books is earned during the first year after publication.

At around one per cent of sales, the market for e-books in the Netherlands is still small. However, bearing in mind the limited offering of e-titles, it is justified to conclude that digital editions are popular among Dutch readers. In Germany, by contrast, a much larger share of titles are available in digital format than in the Netherlands, but the market share of e-books is smaller. Publishers and authors in this country are still wary of publishing e-books for fear of a loss of turnover: at the end of 2010 less than 1.5 per cent of books available in print were also available in digital form. Favourable statistics for the United States, however, show that the digitisation of the book trade does not necessarily take place at the expense of publishers' profits. And – contrary to what is often feared – price erosion caused by selling e-books at dump prices has been curbed. In fact, the price of digitals is now often found to be higher than the price of paperbacks.

In the United States, the digital book market now accounts for more than 15 per cent of turnover, with 65 per cent of e-books reaching consumers through market leader Amazon. The traditional bookshop Barnes & Noble is also a major player, accounting for 25 per cent of e-book sales. In the United States, as in the United Kingdom, many publishers control retail prices based on the agency pricing model. Amazon did not initially accept this model, but followed suit when Apple joined in. As mentioned, it remains to be seen whether the competition watchdogs will accept this model.

4 Scenarios for the future: building blocks

The future of the market for e-books in the Netherlands will be largely determined by publishing strategies in the next couple of years, with government policy being a key factor.

4.1 Consumer demand and behaviour

To date, the market for e-books in the Netherlands has been quite modest in size. That said, it is showing explosive growth, whereas the market for print books is stagnating. What is more, its limited size largely reflects limited supply: in April 2011, a mere 1.6 per cent of printed titles were also available in e-book format. There is hardly anyone, then, who would dare argue that e-books will not take off in the Netherlands, though there is less clarity about the pace of e-book growth and future relationships between e-books and print.

Will there be a process of substitution or will a hybrid arena emerge in which print books and e-books hold equal sway, with e-books dominant in some fields and print books in others? This would seem the obvious development when dealing with the typical phenomenon of emerging media not simply driving out the old, but giving them a different role in daily life. After all, television has not done away with cinemas and there are still theatres to this day. That said, the advent of CDs has pushed LPs to the margins, and videotape and roll film would seem to be going the same way as music cassettes and 8-millimetre film. The ‘die or thrive’ difference would seem to be between media formats being replaced by new formats that are superior on virtually all counts and formats that are more complementary. Electronic reading adoption levels among consumers will tip the scales, as will the extent to which future generations continue to set store by printed books.

So how do consumers value e-books against the print format? In *Diffusion of Innovation Theory* (1962), Everett Rogers argues that people adopt new technologies faster if these:

1. offer major relative advantages over earlier technologies
2. are compatible with older technologies
3. are not complex to use
4. are easy to try
5. are visible in use.

The perceived pros and cons will to a large extent determine the speed at which consumers embrace digital books. One factor delaying adoption is that e-books and e-readers are complementary products, similar to CDs and CD players: one cannot exist without the other. To look at this from a different angle, e-readers are not compatible with the old format, i.e. printed books, even if manufacturers are doing everything they can to make the reading experience and the appearance of e-books on screen resemble printed books, while emphasising the evident advantages of e-readers and e-books.¹²⁶ This is making it harder for digital books to break

¹²⁶ See Paul Rutten (2011) ‘Een ebook is geen boek’ (E-books are not books), *Informatieprofessional*, 06, pp. 20-23.

through than for stand-alone products such as microwaves or MP3 players. That said, e-books are not typically considered very difficult to use and their usage is visible.

E-readers

To read e-books, consumers first have to buy a device to enable them to do so. E-readers simulate the traditional reading experience most closely, as research from the United Kingdom described in Chapter 3 shows, and as research in the Netherlands also corroborates (Bakker, 2010). E-ink technology makes for an easier reading experience. LCD screens, by contrast, are less suited to extended reading, as tablets use more energy – reducing battery life – and their screens have been found to be more tiring when reading over long periods. In addition, LCD screens do less well in bright light than e-ink screens, which become even better to read in sunlight.

Tablets such as iPads, however, offer many more options than e-readers in terms of moving images and sound, and internet connectivity. Looking forward, tablets are expected to account for an increasing share of the market for electronic reading and to prove the decisive catalyst for the e-book market. With the first ink technology-based colour screen launched at the end of 2010, however, e-readers also received a boost. E-readers currently dominate the digital reading markets, but tablets should gain ground over the next few years.

To date, e-readers are predominantly made for reading text and books are their main *raison d'être*. Compared with tablets they offer few internet browsing options, though these are becoming increasingly common. In the Netherlands, internet access from e-readers is limited to LAN (e-readers priced from €125) and WiFi (from €175),¹²⁷ but Amazon's latest e-readers provide round-the-clock connectivity with its e-bookstore via mobile networks in the United States and Europe. By offering users the option to download e-books whenever they want and wherever they are, e-readers have hugely increased functionality. E-reader prices have come down significantly in both the United States and Europe, but are appreciably lower in the United States than in this country.

In the Netherlands, some 50,000 e-readers were sold in 2009 and around 100,000 in 2010, as against 250,000 tablets in 2010 (Intomart GfK). Sales have accelerated since, implying that by mid-2011 there were between 200,000 and 300,000 e-readers in circulation. At present, e-readers still have some functional limitations but these are expected to be addressed over time, with an integration of tablet and e-reader options likely to take place.

Consumers: the advantages and disadvantages of e-books

In terms of the *purchase* of e-books, key pros and cons primarily relate to how e-books compare with printed books. Dutch consumers planning to buy e-books mainly see advantages when travelling and on holiday (GfK Custom Research, April 2011). This reflects e-readers' *portability* and *storage capacity*, which allow users to take a variety of books wherever they are going. A third aspect rated highly by consumers is *ease of purchase* and the fact that e-books are immediately available upon purchase. Of course, the same is also true for books bought at a traditional

¹²⁷ At May 2011 prices.

bookshop, but that involves making their way to the shops and taking account of opening hours.¹²⁸ Amazon has fully leveraged this particular edge by marketing an e-reader that can access its e-bookstore 24/7 via mobile networks.

In a survey of 500 e-book readers in the Netherlands, 75 per cent of respondents considered weight the key advantage of e-books over print. One in three said they liked the experience of reading digital books better than they did print, while 21 per cent cited prices as a major benefit as well as the fact that purchased books were immediately available. A survey conducted in 2008 found that even at that time half of university students preferred e-books over print books: e-books do not harm the environment,¹²⁹ can be consulted anytime and anywhere, are easily searchable and convenient to transport (2008 Global Student E-book Survey). And the *searchability* advantage applies as much to reference books and travel guides as it does to academic books.

The advantages listed so far all relate to features of the types of e-books that are otherwise identical to printed books or to e-books that could be printed without losing functionality – which might be termed *facsimile e-books*. Aside from this category, e-books may come with all kinds of additional functionalities that printed books cannot offer and that might also be considered advantages: digital books can be enhanced with *external links* to the internet or to other books as well as with audio and video clips (*multimedia applications*). Enhanced e-books allow for *updating*: errors can be rectified and new author insights added, while user-generated content may also have a part to play – opening up a whole extra dimension in, say, travel guides and cookery books. Text can become dynamic. Links to *websites or discussion forums* might be interesting for some genres, and some models are already anticipating the interweaving of book publishing with *social* and even *location-based media*. Digital books with additional functionalities are termed *enhanced e-books*.

Lastly, e-books make sales *per chapter or section* possible. Theoretically, of course, this can also be done with printed books, but production considerations soon come into play here. Lonely Planet, for example, is currently offering the option of buying a number of its e-book travel guides by the chapter. Enabling consumers to make their own selection of chapters allows a much wider range of combinations than would be feasible if the books were printed.

Some readers might see some of these features of e-books as disadvantages rather than advantages. Buying a printed book might be a valued experience in and of itself, as might actually holding a book or having it on one's bookshelves. For individuals, lending e-books to family and friends is typically less easy than lending print books.¹³⁰ In addition, to date it is less easy to get a quick idea of an e-book's content by 'skimming through' – a counterpoint to their improved searchability. Similarly, spreading out a number of books alongside each other – for study

¹²⁸ Booksellers typically also offer an online ordering service, but this does not necessarily guarantee prompt delivery. The industry promise at this point is home delivery on the following business day.

¹²⁹ It remains to be seen whether reading e-books is more environmentally friendly: the environmental harm caused by printing books needs to be compared with the damage wreaked by the manufacture and to a lesser extent also the use of e-readers.

¹³⁰ This will depend on the usage (or not) of DRM, which we will discuss in greater depth later in this chapter. Incidentally, even within its file-sharing protection Amazon offers the option to legally lend e-books to others.

purposes, say – presents a challenge. One final drawback is that e-readers are much more prone to damage or theft: people are unlikely to leave them by the pool while going for a swim, while an e-reader might not survive having a cup of tea spilled on it.

The previous chapter distinguished a number of main segments and genres in the book trade, while Chapter 2 introduced academic books, school books and general books. The latter category breaks down into genres such as fiction, children's books, non-fiction leisure and non-fiction informative.¹³¹ The merits and drawbacks of e-books as reviewed here are not equally relevant to all these categories and sub-genres. At this point, additional functionalities such as external links and multimedia hold out less promise for fiction than for such sub-genres as reference books, travel guides and cookery books, even if current developments might prove significant in the future. In academic books, by contrast, such applications are already quite common, building on from functionalities introduced in the world of *scholarly journals*.

In the general market for e-books, enhanced functionalities are still rather embryonic and typically do better on tablets than on e-readers. And so the advantages and disadvantages of e-books do not just weigh in differently for different genres, the pace at which they are becoming relevant also differs, as does the relative suitability of e-readers and tablets in the different sub-markets. Fiction in e-book format is therefore likely to change much less radically over the next few years than non-fiction, where tablets offer a wealth of application possibilities.

In non-fiction, 'stand-alone books' in particular – known as digital facsimiles in the e-book world – are expected to become a thing of the past. A major proportion of e-books are likely to become part of a broad information network – essentially the internet – through digital references in the shape of *hyperlinks*.¹³² One of the advantages of publishing digital text is that continuous adjusting and updating is possible, if the information so requires, as is the inclusion of references and links. Text becomes dynamic and does not need to wait for the next edition to get updated. In fact, text becomes part of a joint process of creation in which users enhance the information by adding their own annotations – a method already applied within our digital cultural heritage and the focus of widespread experimentation in academia.¹³³

Another scenario sees books become interactive, with text never even acquiring a final, fixed form. Wikipedia, the self-styled free encyclopaedia, recently celebrated its tenth anniversary. Although its name suggests a well-known format, Wikipedia has long since developed beyond the bounds of an online encyclopaedia: it has grown into an information service providing access to a massive collection of virtually rolling news stories that are continually adjusted and updated on the basis of the latest views on the matter under wiki discussion. To find out whether Wikipedia

¹³¹ These genres of course break down into sub-genres, e.g. fiction into literature and thrillers. Leisure non-fiction includes books on nature, food and drink, lifestyle, sports, hobbies, collected columns and true stories. Informative non-fiction includes sub-genres such as language and culture, linguistics and literature, art, history and music.

¹³² Rutten (2007)

¹³³ Design agency IDEO has developed three concepts for what it calls 'the future of the book' that clearly illustrate how books might develop in a networked context:
http://vimeo.com/15142335?utm_source=twitterfeed&utm_medium=twitter. Readers able to open the link will immediately see an elementary difference between printed and digital text: digital text enjoys a potential direct link to the electronic information network that the printed book lacks.

is still comparable to an encyclopaedia, one need only consider whether there is any sense in publishing a printed version: obviously, this would be totally nonsensical.

Academic publishing has spawned a plethora of new trends, such as the use of hyperlinks and the unlocking of publications within broader databases, with digital publications bearing less and less resemblance to the way printed books are published. Practices in academic publishing are clearly ahead of developments in general publishing, as electronic publishing became common in academia well before the launch of specific peripherals such as e-readers and tablets – with PCs serving as the tool to unlock the information.

In the general book arena, the e-book as app is gaining ground, a case in point being the launch of *The Solar System* that brought publishers Faber and Faber significant sales in 2010. The publisher's latest app – again a collaborative venture with Touch Press – features T.S. Eliot's poem *The Waste Land*. Incidentally, not all experts agree on the future success of enhanced books and book apps. Evan Schnittman, the managing director of Bloomsbury, caused a great stir at the 2010 London Book Fair digital conference when he contended that enhanced books are a lost cause: "Enhanced will have an incredibly big future in education, but the idea of innovation in the narrative reading process is just a non-starter, I've been smug about this, and now I'm even smugger."

Schnittman distinguished between education and fiction in his assessment of enhanced e-books, and as noted earlier, different genres are differently suited to enhancement. Table 4.1 weighs the importance of the merits and drawbacks and possible enhancement elements per genre to help arrive at an assessment of the extent to which and the pace at which e-books are likely to break through. While reflecting the research that was reviewed as much as possible, the assessment nonetheless entails a degree of subjectivity.

Table 4.1 Relevance of e-book advantages and disadvantages by genre

	Fiction	Children's books	Non-fiction leisure	Non-fiction informative
Current share of turnover in print¹³⁴	46%	14%	15%	22%
Advantages facsimile				
Portability	++	+	+	+
Storage capacity	++	+	+	+
Ease of purchase	+	+	+	+
Prompt delivery	+	+/0	+	+
Searchability	0	0	+	++
Advantages enhanced e-books				
External links	0	0	+	++
Multimedia applications	0	++	++	++
Updates	0	0	++	++
Link to website/forum	0	0	+	++
Availability of separate chapters	0	0	+	++
Disadvantages				
Not on bookshelves	-	-	0	0
Difficult to lend to friends and family	-	-	-	-
Less idea of content when skimming through	0	-	-	-
No spreading out of books alongside each other	0	0	-	-
Prone to theft or damage	-	--	0	0
Suitability as a facsimile e-book (short term)	++	0	+	+
Suitability as an enhanced e-book (long term)	0	+/0	++	++

Source: SEO Economic Research

Note: ++ = Advantage highly relevant; + = Advantage relevant; 0 = Advantage/disadvantage not relevant; - = disadvantage relevant; -- = disadvantage highly relevant

Table 4.1 shows up why, at 55 per cent, fiction accounts for a larger share of the market for e-books than the 46 per cent it commands in the market for printed books: to an important extent the advantages of e-books are already manifest in fiction, whereas they are much more of a promise in children's books. That said, at 43 per cent non-fiction is not performing at all badly. The present analysis and indications in the market imply that fiction currently serves as the main engine behind the market for digital books, with consumer-experienced advantages evident and drawbacks relatively few. This finding gives the lie to earlier suggestions that digital reading conflicts with reading fiction. However, these assertions were based on experience with reading computer screens. The advent of the e-reader has changed all that.

In *non-fiction*, many of the potential advantages of the electronic format are still in their infancy. Looking forward, the potential for school and study books and other non-fiction such as cookery

¹³⁴ Non-text-based formats such as audio books account for three per cent of the market; we will ignore these titles for the purposes of this discussion.

books and travel guides is massive, especially when new functionalities are added and the different types of enhancement put into place. In these genres, the new functionalities of e-books should add a lot of value and, by using the full range of digital possibilities, offer scope for users to help develop and enhance content, as noted earlier. This automatically gives rise to the question of how and even whether books will be defined in the future – a question that came up in the legal sense in Chapter 2. What makes a book? What are its defining features and characteristics? When does it become a different type of product or message?

In academic publishing a large number of these advantages are already manifest, not in e-reader format, admittedly, but in electronic libraries and academic work. In this particular field of publishing, and particularly in the world of academic journals, text is often linked through cross references and databases and only their electronic environment does full justice to scholarly articles. Academic monographs are also increasingly being published in similar or sometimes even identical environments, even if monographs – much more than articles in academic journals – have a printed life outside their existence as electronic files, at the request of their publishers or otherwise. That said, the standard these days is increasingly digital.

In the United States, consumers are well-disposed to e-books, as both technology and offering are now up to scratch. James McQuivey, principal analyst at Forrester Research, is responsible for a range of studies into the future of books and publishers. He sees a bright future for e-books in the United States, predicting a tripling of the market compared with 2010.¹³⁵ McQuivey bases his optimism about e-book market growth on the combination of two factors. Current readers of e-books in the United States, typically Kindle users at present, are pleased with their reading experience and are increasingly turning to digital reading. Their numbers are also growing rapidly. A second factor is that e-reader manufacturers are working very hard on a whole range of innovations and new features, including colour screens, higher resolutions, new interactive formats and operating models, e.g. subscriptions. The market for tablets is also proving a key impetus for digital reading and marketing of books, and McQuivey describes digital publishing as the “new default for publishing”. He predicts a future in which digital publishing leads and print comes second, with print in fact only coming into play if a title commands a substantial electronic market. One of the reasons why McQuivey sees a very rapid changeover from print to digital lies in the very nature of the book trade: it is a single-revenue business. Book publishers derive their revenues virtually exclusively from selling titles to consumers, with any other sources of revenue completely secondary – unlike the music industry, for instance, which is much more complex and in which a lot of money is made on live performances. When channels change, as is happening now in the book trade, developments tend to be fast and furious. This is not to say that print will disappear altogether, just that models based on digital books will become the dominant drivers.¹³⁶

Trends in the United States may not completely indicate where Europe and the Netherlands will be going, but they do map out a direction. As Chapter 3 revealed, e-books in the Netherlands accounted for 0.22 per cent of sales in 2009 and for 0.70 per cent in 2010. In terms of market shares, the 2009 figure is comparable to that for 2004 in the United States, with the percentage

¹³⁵ If we look at trends in 2011, i.e. well over double the market in 2010, this would already seem conservative.

¹³⁶ James McQuivey (2010) ‘Why the Book Business May Soon Be the Most Digital of All Media Industries’, 8 November 2010, PaidContent.Org.

for 2010 pegged between the US figures for 2007 and 2008. For 2011 the percentage is expected to grow to 1.7, between the 2008 and 2009 numbers for the United States. So instead of lagging the United States by five years, the Netherlands is now between two and three years behind – and let us not forget Chapter 3’s conclusion that e-books account for a much bigger share of the market where they are actually available: at the end of 2010 only 1.6 per cent of the total offering of titles in the Netherlands were available in digital format. If e-books in this country matched those in the United States in terms of numbers of titles and timing, their share of the market would also be comparable, perhaps even higher.¹³⁷

Readers in the United States report reading e-books while travelling, waiting and relaxing (Drolet & Brock, 2011). Digitisation does not necessarily just mean cannibalisation of the printed books market, it also holds out new sales opportunities.¹³⁸ The same survey of 304 tablet readers found that over 60 per cent of respondents read more because of e-books. Nearly half (46 per cent to be precise) said reading digital books encouraged them to read more in print (Drolet & Brock, 2011). Other studies of readers of e-books in the United States have found that digital possibilities typically induce consumers to buy more books (Nawotka, 2009). As noted, reading new books by more or less established authors often sparks readers’ interest in their back catalogues – a demand that digital books are eminently suited to meet. Consumers will make a point of searching for previous titles by the same author, which publishers can deliver immediately if they have the right infrastructures and a digitised backlist. Opportunity makes the buyer, one might say in this instance.

The biggest buyers of e-books are in the same age group as are those of print books: 35-49 years (see Figure 3.19). The way that e-readers and e-books are sold differs in various ways from the traditional pattern, however. One notable feature of e-books is that readers can choose their own font size – an attractive feature for older consumers, typically late adopters of new technologies.

Readers of e-books are generally happy with their reading experience. A survey among 500 readers of e-books in the Netherlands found that an impressive 98 per cent felt the e-books they had read largely or totally met their expectations (SMB, 2010). Meanwhile, 58 per cent of readers said they intended to keep buying printed books – readers obviously enjoy the advantages of both digital *and* printed books. E-books and print are likely to continue to co-exist for a while yet, albeit in uncertain proportions. That said, the latest figures from the United States speak volumes: e-books have now overtaken paperbacks. Market predictions that e-books will push out paperbacks in the longer term would seem to be confirmed by recent developments in various countries’ books markets.¹³⁹

¹³⁷ One observation supporting this assertion is that the penetration of broadband and home PCs is higher in the Netherlands than in the United States: the Netherlands has 37.8 per 100 inhabitants on a broadband internet connection compared with 27.1 for the United States (OECD, 2011). In 2006 there were 85.4 computers per 100 inhabitants in the Netherlands, compared with 76.2 in the States. Usage of social network sites in the Netherlands is also the highest in the world.

¹³⁸ Particularly if, as is already the case in the United States, consumers can buy and download e-books via mobile data networks at no extra charge and whenever they like, e.g. from a delayed train.

¹³⁹ It is worth noting that the Dutch market for hardcover books is a lot smaller than in the US, and the disappearance of the paperback market in this country is not very plausible right now.

Digital printing makes it possible to print fewer copies of books in one batch and enables a flexible response to any market contraction in favour of e-books: fixed costs for commissioning and managing authors, design and marketing can be allocated to both e-books and print books sold. By contrast, the fixed costs traditionally involved in the printing process will become variable: the marginal costs of printing on demand are much higher per book, but start-up costs much lower than in the traditional printing process.

DRM

Digital rights management or DRM involves technological restrictions to help prevent unlawful usage and to ensure that people pay for content. Examples of DRM include copy protection, watermarks and user registration.

In the Netherlands, around 40 per cent of readers of e-books reckon the protection of legal content is too strict (Elzinga, 2011), and SMB studies have also shown up user criticism of copy protection. However, Amazon's copy protection on its Kindle, though causing a great deal of teeth-gnashing on internet forums, has been widely accepted by the public: Amazon's share of the American market for e-books is estimated at a stunning 80 per cent.¹⁴⁰ This does not reflect different attitudes or any stricter legal rules on illegal downloading – while statistics for unauthorised e-book sharing are not available, file sharing in music is just as widespread in the United States as it is in the Netherlands.¹⁴¹ That said, guides on how to remove DRM from Kindle abound on the internet and, with this knowledge now freely available, some readers have indicated they now buy more and more expensive e-books as they feel confident they will be able to keep using their books even if they end up buying other e-readers not compatible with the Kindle DRM at some point in the future.¹⁴² Working from within its DRM fences, meanwhile, Amazon is trying to boost ease of use and reader options by enabling temporary on-lending of e-books: books so lent out will temporarily disappear from the lender's Kindle and automatically return after two weeks.¹⁴³ And let's not forget that many people do not mind Amazon's DRM so much because it is the biggest participant in the market by far; those pleased with the Kindle environment run into negligible issues with its content protection. In other markets no such dominant player exists and systems interoperability is much more important – which is when DRM can prove a real nuisance.

In the Netherlands, the industry is agreed that today's DRM systems do not make for good user experience. The danger is that e-books from illegal sources provide greater ease of use than the e-books offered by the industry, and that consumers will choose illegal offerings instead. The industry is therefore more taken with the use of 'social DRM', one example of which would be marking the content with a digital watermark stating who originally bought an e-book. Buyers could read their e-books on other readers, tablets or computers without any restrictions as well as lending them to family and friends, but the watermarks would discourage them from uploading

¹⁴⁰ With the Barnes & Noble reader making inroads, this has since come down to around 65 per cent.

¹⁴¹ See: TNO/SEO/IViR, *Ups and downs. Economic and cultural effects of file sharing on music, films and games, A study carried out by a consortium of TNO Informatie- en Communicatietechnologie*, January 2009. More recent figures from the United States confirm this picture.

¹⁴² George Orwell's *1984* and *Animal Farm* are the stuff of e-books legend: Amazon remotely deleted thousands of copies of these e-book titles from Kindles worldwide in 2009 because the publisher turned out not to have the rights to the books.

¹⁴³ <http://www.amazon.com/gp/help/customer/display.html?nodeId=200549320>

the files onto file sharing sites. Offering value added services is another way to protect the original books. If consumers are not hindered by DRM in any way, acceptance will be sure to follow. That said, social DRM might involve privacy issues, investigation of which falls outside the remit of this study.

Purchasing behaviour and price sensitivity

As noted earlier, owning e-readers and easily accessible backlists of established authors typically boosts sales of e-books. What is more, e-books reach new readers who tend to read few if any books in print, a particularly notable feature of the tablet market. In addition to availability, price is also highly relevant to e-book sales. At this point, most publishers typically settle on 80 per cent of the price of their cheapest hardcover version. A survey among readers of digital books in the Netherlands found that they consider e-books relatively expensive and that they would buy more if they were cheaper (Bakker, 2010, pp. 48-49).

Chapter 3 found that, to date, publicly available research into the price elasticity of e-book demand is scarce and anecdotal, both in this country and worldwide. That said, price reductions on e-books in the United States have been found to significantly affect sales, and bol.com's experience in the Netherlands corroborates that demand responds strongly to any changes in price: price elasticity is well below -1 (-3 for example – see Box 3.1 in Section 3.2). The elasticities so measured are heightened by a range of substitution effects, making it difficult to gauge the extent of actual price elasticity in the broader market for e-books as well as that of individual titles across the entire market spectrum (measured for all retail channels and including both e-books and print).¹⁴⁴

Firm data about the price elasticity of the demand for *printed books* do exist and indicate that:

- Price elasticity of bestsellers is high, as lower income groups also buy them.¹⁴⁵ Other books tend to be price inelastic, implying that their price elasticity exceeds or equals -1 (e.g. -0.6).
- The findings of studies into the price elasticity of the Dutch market for printed books as a whole work out at around -0.8. (Ours, 1989; Appelman & Van den Broek, 2002; Goudriaan, Groot, Notenboom, Schrijvershof, & Hout, 2008).
- Individual print titles are looking at a much higher elasticity: Bittlingmayer arrives at -2 to -3 for individual titles.

These findings suggest that individual sellers and publishers will generally benefit from lower prices, as price elasticity is typically below -1. This encourages price competition between booksellers stocking the same titles and between publishers of different titles. If price elasticity for the overall market is at -1, total turnover will not rise (or fall) due to price competition. The number of copies sold will increase under these circumstances, a beneficial effect in terms of the objectives of cultural policy.

¹⁴⁴ No data were available for other large suppliers. Analysis of a number of titles whose prices bol.com has varied in the past year suggest elasticity at less than -3 (bol.com, 2011). That said, individual titles are likely to be more elastic than the broader market. In fact, a low price for an individual title from a single supplier may negatively affect sales of other e-books, of the same book in print and of other sellers. These cross-elasticities significantly increase the price elasticity measured for individual titles.

¹⁴⁵ The underlying idea is that the opportunity costs of reading a book – in terms of invested leisure time – are much higher than the price of the book itself and make for low elasticity, a factor that carries less weight for people in lower income groups.

Note that, if price elasticity is -1 and the production costs of a single extra copy (marginal costs) are not negligible, higher sales will reduce the coverage of fixed costs, as turnover stays the same while total costs go up. With marginal costs very low for e-books, this effect plays no role of significance.

E-book sales are not just sensitive to price; the way and context in which they are sold also matter: the supply model. Bundled offerings, for instance, have been shown to boost turnover. Other business models are also being considered, e.g. subscription models. In the United States, nearly half of readers of e-books currently spend between \$7 and \$20 a month on e-books, and at such amounts rental or subscription models selling *access* to books might be an attractive option for both suppliers and consumers. In the Netherlands, bol.com recently revealed it is studying just such a model.¹⁴⁶ For suppliers, the additional costs are few because of e-books' low marginal costs, while for readers, such a model would provide access to many more books than would be feasible in print for the same amount of money. Other model options include arrangements in which readers pay for actual use.

Conclusion

To summarise: consumers in the Netherlands would seem ready to embrace e-books. If the supply matched that in the United States, e-books' share of sales would be comparable. At this point, fiction is already very suited to reading in e-book format, explaining the relatively higher proportion of the Dutch market for e-books that fiction commands. Potentially, e-books hold out great promise, particularly for non-fiction, if enhanced with extra functionalities. To some degree, e-books are replacing print but they also offer opportunities to tap into new groups of readers and encourage repeat purchases.¹⁴⁷

4.2 Supplier strategies

At the supply end, digitisation is sending shock-waves through the book markets, with new market players entering and existing publishers and booksellers reviewing their strategies. Meanwhile, relationships between publishers and authors are also changing, and there is a range of conceivable models that may govern future relationships between the various actors. It is not known to what extent bookshops will be able to retain their current positions. They are playing the information and high-quality advice card, but internet stores have trumps up their sleeve in both e-books and print: economies of scale allow large web-based booksellers to tailor advice based on other consumers' purchasing behaviour – a strength that Chris Anderson in *The Long Tail* identified as one of the key forces behind the success of players such as Amazon (Anderson, 2006, p. 16). And the possibility of downloading a first chapter of e-novels may significantly boost sales of the 'experience goods' that books are.

If they are to play any part in offering e-books, bookshops will have to develop digital platforms. In addition, new initiatives are seeing authors find their own way to consumers and the signs are

¹⁴⁶ webwereld.nl/nieuws/106522/bol-com-broedt-op-spotify-voor-e-books

¹⁴⁷ A comparison with the music industry in the 1980s would seem appropriate, when many repurchased their vinyl and cassette tape collections on CD.

that authors will not automatically grant their digital rights to the publishers that market their printed books.

New markets

A key new market involves books that feature in this long tail. In other words, consumers will find it easier to find less mainstream titles in digital format than in print. Not fully leveraged to date, this long tail currently accounts for 30 per cent of Amazon's sales. The figures presented in Chapter 3 also showed book sales in the Netherlands to have a long tail (see Figure 3.6): thirteen per cent of over 400,000 titles sold in the Netherlands in 2010 (both in Dutch and in other languages) were niche titles with sales of below €1,000 in 2010 (derived from SMB 2011). The central premise of the long tail is that, in a digitised world, a sizeable proportion of turnover may be derived from products with comparatively low sales. Anderson even goes as far as saying that the 20th century may have seen the entertainment industry driven by trends, but that niches will become the dominant force in the 21st century (Anderson, 2006, p. 16). Suppliers of e-books do not have space issues to grapple with and should find it easy to serve the long tail. This century has started off with the likes of Amazon and bol.com: large internet booksellers, having the operational scale to successfully leverage the long tail. E-books are different in that they involve zero inventory costs in terms of both the capital and the space tied up. In effect, any supplier with the requisite digital infrastructure should be able to leverage the long tail.

A second potential new market are Dutch speakers outside the Netherlands and Belgium, for instance in the Netherlands Antilles, Canada and New Zealand, as it will become a lot easier for them to buy Dutch-language books. That said, the industry does not have very high expectations of these overseas markets as they reportedly total only about 400,000 people. Moreover, any such expansion would also require marketing outreach.

Supply of e-books

How the market develops closely ties in with the availability of e-books. Many publishers in the Netherlands have been wary of marketing digital books for fear of piracy, and by the end of 2010 only 1.6 per cent of printed titles were also available as e-books – backlist titles, more often than not. At this point, digital editions very rarely coincide with the publication of the printed book. This may have something to do with the fact that new books typically generate over half of their sales in the first twelve months after release. Within the industry, however, a majority reckon that the release of e-books will have to coincide with print publication, as the current set-up puts readers of digital books at a disadvantage. If no legal offering exists, or so it is feared, unauthorised digital offerings might step in to fill the void, as the music industry has discovered to its cost. Seventy-five per cent of readers of e-books also feel digital and print editions should be released simultaneously (SMB, 21 March 2011). One has to wonder how real the threat is of book scans distributed as e-books: the trouble of scanning and loss of functionality are likely to serve as a drag on this type of unlawful digital distribution.¹⁴⁸

¹⁴⁸ Comparable to hand-filmed cinema recordings prior to DVD release (or other digital leaks). Such scans would appear a real threat only to bestsellers.

Costs

A wide range of factors inform the pricing of e-books. Necessary costs are of course a key element, with most experts agreeing that the total costs of producing e-books are lower than for print. Fixed costs related to writing (advances and fees), commissioning and managing authors, editing, design and marketing will remain, but the costs of printing, distribution and inventory will virtually disappear. Generally speaking, then, fixed costs are here to stay but variable costs look set to fall dramatically. One hitch is that VAT on e-books in the Netherlands is higher than on print, as is the case in many other EU countries (see Table 3.15). This may not actually cause higher *costs*, but does push up *prices* of e-books: the difference in VAT rates is over 10 per cent in all countries on the list.

Another key factor is that the costs of digitisation, and of setting up and maintaining digital infrastructures, are substantial. What is more, such costs will have to be incurred while at the same time existing systems for printing, stocking and distribution will have to be kept going – and in a period when these systems are losing in importance and face declining returns precisely because of the emergence of digital books. Over time, falling volumes will lead to trimming at the print end, but savings always come after the actual demise of business. Significant cuts in the production and distribution infrastructure for printed books are not on the table just yet, even if variable costs are already declining. New investment in digital products and services should also start to pay off, the assumption being that print will eventually make way for digital. It is as yet unknown how many of these trends will play out.

Turbulence in the value chain

Quite aside from specific pricing based on costs, price movements are caused by the turbulence in market relationships and the new value chain taking shape. And book prices are not the only issue at stake – the distribution of revenues and value between authors, publishers, booksellers, hardware manufacturers and consumers is also contested. This distribution is based partly on the creation of value in the chain, on who is adding what value and who has what powers to claim a substantial part of the value so created.

In the United States, Amazon used the price weapon to rapidly create a large pool of Kindle users, and thus successfully achieved market leadership by cleverly positioning its own format on sheer user numbers. Other market players are Barnes & Noble with its own Nook e-reader and of course Apple's iPad, even if it serves a broader market than just e-books.

By marrying its online bookstore for e-books (amazon.com) with its own e-reader giving access to downloads (the Kindle), Amazon has devised a strong formula and built a dominant market position. To really leverage its first-mover advantage, Amazon marketed its e-books at razor-sharp prices, in some cases even below wholesale prices, and put publishers under a lot of pressure to cut their wholesale prices for Amazon. Platform and price, coupled with the Amazon brand in the United States, helped the Amazon platform to build a rock-solid position in the e-book market. Amazon's share of the US market after this operation was put at a massive 80 per cent and has since come down to around 65 per cent. Amazon's price policies and its enormous clout based on market share ruffled some brows at major publishing houses. As Amazon is a retailer primarily focusing on mass sales, publishers expected this strategy to end in Amazon

leveraging its market position to force publishers to cut their published prices to dealers (PPD) even further. The Amazon platform's position of power has become a real threat to publishers' position in the e-books value chain. If Amazon managed to leverage the situation even further, it might actually end up dictating prices, which would not be in the interest of publishers.

Whatever the impact of Amazon's purchasing power on wholesale prices, concerns that its aggressive pricing would permanently erode prices would seem unfounded: Chapter 3 found that an ever larger proportion of Amazon's most-sold e-books cost over \$10. In fact, a random check found that high-selling e-books will regularly cost more than their paperback equivalents.

Publishers have not been passive in the face of Amazon's purchasing power. US publisher Macmillan introduced the so-called agency pricing model (see Chapter 2), which considers resellers of e-books as parties commissioned by publishers, who in turn work for authors. Resellers in this model (i.e. agents) are paid a margin on the price set by the publisher, 30 per cent at this point. The model could chip away at the negotiating power that Amazon has managed to secure on the basis of the large number of people using its e-readers.

That said, it is not a silver bullet: as long as Amazon's purchasing power remains robust, it can always reject this model out of hand, which is exactly what it initially did. Amazon dismissed the agency model proposed by Macmillan and promptly removed all buy buttons for all of the publisher's print and e-books stocked by Amazon. Not long after, though, Amazon caved in and accepted Macmillan's conditions. Since then, a range of large publishers have adopted the agency pricing model: Hachette, Harper Collins, Simon & Schuster and Penguin. In February 2011, Random House also embraced the strategy.¹⁴⁹

Macmillan's handling of the Amazon threat would not have been possible if Apple had not been about to enter the market for e-books. There was no second-guessing Macmillan's timing: it announced its new agency model conditions one day after Apple launched its iPad as – among its other uses – a possible alternative to the Kindle. Apple offers e-books to consumers under much the same conditions as Macmillan's agency model, collecting 30 per cent of its retail price as a consideration for selling the books. The model was accepted by Macmillan first and subsequently also by five other large American publishers. That said, Apple imposes a number of contract provisions that significantly restrict publishers' pricing power: it makes distinctions between book categories and sets limited price ranges for different categories, severely curtailing publishers' price policies. There are obvious arguments for publishers to synchronise retail prices on the different platforms, making it highly likely that prices for e-books as sold by Amazon and Apple will converge. In fact, this is exactly what has happened: the American majors no doubt considered which pricing strategy was more favourable for them, Amazon's or Apple's, and the group of five publishers mentioned earlier came down in favour of Apple because its strategy enabled them to sidestep prices pressures imposed by Amazon. To achieve this, they had to bow to Apple's conditions, prompting one expert to say: "In the agency model it is Apple that sets the prices."

¹⁴⁹ 'Random House switches to e-book agency model; little booksellers chagrined', Los Angeles Times, 28 February 2011.

In a response to this deal, small online booksellers in the United States note that the model works to their disadvantage as they pay twice the margin if they want to sell books in the iBookstore, i.e. once to publishers when buying the books and then to Apple for delivery from the iBookstore. As a small online retailer commented: “The economic damage that Apple has wreaked on small eBook sellers is enormous. ... It is all pocket change for Apple, but life and death for many. There is something fundamentally wrong when companies can wield such power.”¹⁵⁰ It is quite clear that online booksellers looking to sell through the iBookstore are in a tight spot, as this is actually piling one retail channel on top of another.

A preliminary conclusion is that, market power inevitably translates into control over prices. And that has thrown up some interesting and significant legal competition issues with potential repercussions on an international scale. Both European and British competition authorities are currently investigating any competition law-related aspects of agency pricing. At this point, it is unclear exactly who alerted the European and British authorities to the issue, but the outcomes of this are obviously hard to predict. In the United Kingdom, publishers have been cautious about following in the footsteps of the American majors. Faber and Faber, for one, is reportedly willing to adopt the model but playing wait-and-see in light of the proceedings currently under way.

One notable difference between the United States and Europe is that competition law in the States leaves more options for resale price maintenance than does Europe.¹⁵¹ This might well mean that agency pricing as currently applied in the United States would fail Europe’s competition test. The competent authorities in the United Kingdom and the European Union will have the final say.

Whereas in the United Kingdom and the United States all eyes are trained on major league players Apple, Amazon and to some extent also Google, the e-books landscape looks quite different in continental Europe. In the Netherlands, Dutch-speaking Belgium and a number of Scandinavian countries, booksellers are getting together to create a joint electronic platform to sell e-books, in some cases joining forces with publishers. Individual specialist shops and larger chains of booksellers are together trying to develop the local market for e-books, the idea being that this is the only way in which they will achieve the kind of scale they need to hold their own against the likes of Google, Apple and Amazon. Different market experts suggest that individual booksellers and domestic chains in small countries will be unable to achieve the critical mass to profitably manage e-book platforms in view of the capital spending and clout needed to properly serve online customers. The irony is that the digital world completely upsets the ‘natural order’ of the analogue age, when knowledge of and service to customers were in inverse proportion to the scale of operations. To provide appropriate advice to online customers, e-tailers need to harvest and analyse data on the search and purchasing behaviour of a large number of customers. A network effect is observed here: consumers benefit from each other’s purchasing behaviour. Small online retailers lack the mass and the means to get such a system up and running, and to leverage its advantages. In the Netherlands, bol.com is the only market player developing the required scale; it is the country’s biggest seller of e-books by far and also a proponent of DRM

¹⁵⁰ ‘Random House switches...’ loc.cit.

¹⁵¹ The landmark case is the Leegin case of 2007:
http://en.wikipedia.org/wiki/Leegin_Creative_Leather_Products,_Inc._v._PSKS,_Inc

restraint and reasonable prices for consumers. It remains to be seen to what extent bol.com will be able to survive as an independent online retailer in the Netherlands as trends unfold. Another issue that sometimes crops up in discussions on the viability of online retail operations is whether there will be a place in the future landscape for an e-books operation as an independent economic activity. The major players currently calling the shots internationally have long since moved away from book sales only (Amazon) or have completely different main sources of income than selling books to consumers (Apple and Google). The question is whether the rapid digitisation as predicted by Forrester, coupled with fierce competition and tough battles in the value chain between publishers and e-tailers and ultimately also authors, will leave any room for local players at all – even joint platforms of booksellers and possibly also publishers.

Bookshops in the Netherlands are in a precarious position today. The market for printed books is stagnating and traditional specialist bookshops have seen a proportion of their turnover siphoned off by relative newcomer bol.com. As a result, the industry has seen its profit margins eroded while at the same time incurring higher real estate costs and a steeper wage bill because of longer opening hours. However, bookshops feel their retail margins have been unchanged for many years apart from the odd volume deal every once in a while. Gauging publishers' sentiment on developing a market for e-books, little willingness is found to protect the book trade as robustly as they have brick and mortar shops in the past, primarily because of concerns about the added value of current physical trade in the digital domain.

4.3 Academic books

Just as in the rest of the media and information industry, creation and production in academic communication are completely digitised. In one area of academic publishing, the process of release, distribution and consumption is likewise virtually entirely digital: the world of academic or scholarly journals. The science, technology and medicine (STM) disciplines blazed the trail for the digital publishing models currently in place in nearly all disciplines. University libraries buy licences granting digital access to a package of journals for students and staff, and many universities club together to negotiate the best possible joint deals for purchasing academic information. Academic publishers supply these packages of digital journals to academic libraries that in turn make them available to students and staff. Usage is via desktops and laptops, with e-readers currently irrelevant, even if some institutions are running experiments with these.

Publishers of articles in academic journals typically enhance these products with additional services, for instance by digitally linking different articles based on references that transcend journals and publishers and by providing state-of-the-art searchability. Meta information about academic books and journals has turned into an essential service, e.g. Elsevier's Scopus. Academic publishing is quite profitable when compared with general book and magazine publishing. Dutch or formerly Dutch companies such as Elsevier Science and Springer Science+Business Media have been at the cutting edge of these developments and introduced various innovations, making them key players in the global marketplace.

Academic books started out on a different path than academic journals. Academic monographs continued to appear as printed books and largely targeted the same readers as digitised journals.

However, academic monographs lost market share as academic library budgets merely inched up and as the packages of digital journals proved more attractive for academic libraries in terms of the amount of information, accessibility and costs (through ‘big deals’). Numbers of copies have fallen and in many cases dipped below the point of viability. John Thompson (2005) has described and analysed the so-called monograph crisis in great detail in one of his studies.

Monographs are particularly relevant to the humanities and social sciences. With authors in these disciplines frequently also publishing books for markets outside academia, the demarcation lines between academic and general books tend to be fuzzy. Publishers in the fields of the humanities and social sciences are often active in both markets for reasons of both content and commerce. They would be unable to survive without the turnover generated in the general markets and typically work with authors able to write books that straddle the two. Numerous authors in the humanities and social sciences migrate to the general market and their output features on the shelves of the general and specialist bookshops. This makes it difficult to categorically define the markets for general books and academic books as separate domains. The distinction does exist in terms of the books’ functions, but is not airtight. There is a sizeable category of books that will never make the transfer from academia to the general public and that are unlikely ever to end up on bookshop shelves, for reasons including the size of the edition and prices, but also because their enhanced nature makes it virtually impossible to put them into printed books. Purely academic books will increasingly go down this route, while publishers are likely to market other books with academic content but more suited to wider readerships as general books that might indeed make it to the bookshops.

In academia more than in the field of general books, non-English scholars typically publish in English, particularly academic articles and to a lesser degree also monographs. When Dutch authors publish monographs in English, which they increasingly do through Dutch publishers, fixed book prices do not come into play at all.

Meanwhile, academic books are increasingly included in the digital packages of academic journals. In a number of cases, universities and publishers agree licences for collections of academic e-books, much as they do for academic journals, and access per chapter is often possible in these set-ups. Metadata typically enable users to switch between digital journals and books by simply clicking a link. This is particularly true for the STM monographs mentioned before – though these are limited in number – but also for e-books in a whole range of other disciplines, from economics to psychology and sociology. This type of linking and metadata use makes the operation of the academic books market fundamentally different from that for general books. In addition, academic e-books are sometimes marketed as separate titles: social sciences and humanities publishers will offer such books per title through independent e-book vendors. In this format, these books bear a strong resemblance to their counterparts in the world of general books, even if they often still enable access to other works by way of hyperlinks.

The world of academic books is no single, uniform animal. At one end, there are authors writing in English for large academic publishers that mainly sell their output to university libraries and other business customers and that play hardly any role outside the academic and professional markets. For them, printed books are a residual product. These typically large and internationally operating publishers often choose to publish digital monographs in series that organisations can

subscribe to, the advantage being that advance payments ensure early cash flows that may be put towards production if need be. The books are delivered as e-books with metadata added to link their content to other relevant digital material. Publisher catalogues will typically also offer these books as single items at relatively high prices, as stand-alone e-books and in some cases even as hard copy. As part of the digital series proposition, publishers will often offer additional services to subscriber organisations, e.g. the option to order printed versions of books alongside the digital service offering at relatively low expense. The actual printing on demand (POD) and fulfilment will typically be farmed out to external providers. To prevent confusion with the stand-alone catalogue, POD copies come without ISBN numbers.

Enhanced e-books provide another model for publishing these kinds of academic e-books. In some cases this will take the shape of managing access to a database that is regularly updated, while in others it will involve e-books with material underlying the text provided as an additional service – illustrations, for instance, or underlying databases enabling readers to check or verify the validity of the arguments or even make their own changes to the material. And such additional services become dynamic if they are regularly updated where relevant. There are many reasons why publishers would choose to publish enhanced e-books – marketing being an obvious one. Author requirements also play a part: writers of academic material typically operate in academia and are as much consumers of information as they are producers, and they will be used to patterns of access to academic information which they will also want to use in their own output. Publishers have no real option to cut authors off from digital possibilities if they are to retain their authors.

At the very other end of the spectrum are those academics writing in their local languages – e.g. in Dutch – and publishing their academic output in print via an academic publishing house, serving the local general public via book retailers. A special website devoted to the book might be accessed through its e-book version – typically a facsimile e-book. That said, printed books are these authors' main format and publishers are likely to market both e-book and print as general books, to ensure the bookseller's efforts. General books command significantly higher margins than academic books, encouraging bookshops to do more to promote these titles. In this instance, putting a title in the general books category reveals more about its publisher's market intentions than about its actual contents. This concerns academic books that could potentially appeal to a larger public. In a sense, these are academic books that have washed up on the shores of 'general books country'. Publishers and the book trade often distinguish between academic work written entirely for the consumption of fellow academics and writing for a broader readership that is making academic findings accessible and stirring debate in society. It is this latter category that benefits from exposure in bookshops: along with reviews in the serious press, these bookshops create a platform to help showcase this work. By giving such books pride of place in shops and by co-hosting debates and lectures with publishers, booksellers add to these books' impact on society at large. Business opportunities for both bookshops and publishers weigh in heavily here.

It is as yet unclear how the rise of e-books will affect this particular model. If specialist bookshops – which serve as an important channel for this category of books – for whatever reason see their positions eroded because of the rise of e-books, they reckon the cultural position of academic books will suffer. The current set-up includes a range of activities and debates revolving around a book and the themes it raises, a significant proportion of which are sponsored

by booksellers, possibly supported by the publishers, and these give academic books their place in the public discourse. It remains to be seen whether specialist shops will have the position and resilience to continue to fulfil their established role in the market for e-books as well.

This review would not be complete without mention of a notable new digital publishing trend in the world of academic publishing: open access. This, too, started in the domain of STM journals, but has since become widespread in the humanities and social sciences (HSS) and in academic book publishing.¹⁵² Open access implies that complete books are accessible through the internet, free of charge. The system is not financed by individual readers or academic libraries, but costs are paid through a combination of subsidies and sometimes also involves research budgets and institutional sources, e.g. the sale of printed copies based on a POD formula. Open access publications may also include extra services similar to those described in the previous model. These materials are now also freely available to the general public, as well as to academics and professionals.

4.4 Resale price maintenance for books

Having now reviewed consumer perspectives, supplier strategies and the specific position of academic books, this section will describe at greater length how governments can influence the markets by fixing book prices.

4.4.1 Fixed prices for e-books

The legal analysis in Chapter 2 found that e-book price fixing is anything but a foregone conclusion under European law. There are several legal snags to the French proposals currently on the table, making them vulnerable. This much is clear, though: France has opted for a narrow definition of e-books earmarked for RPM: facsimile e-books – one-on-one conversions of print into e-books, complemented with a limited number of functionalities. A broader definition that also encompasses enhanced e-books is both more difficult to provide and more likely to run into trouble under European law.

To sidestep this problem, this analysis of the expected effects of fixed e-book prices has looked at fixed prices for the digital versions of printed books: *facsimile e-books*. A fixed price for enhanced e-books is considered not feasible. It is not possible to establish legally appropriate demarcation lines for enhanced e-books and to separate them from other digital sources of information and services. To arrive at a fixed price for facsimile e-books, one does not need to actually produce the printed equivalents, but it should be possible without too much loss of functionalities. Such e-books may be searchable and contain internal links, but will not offer multimedia applications, updates or links to external sources of user-generated content. The definition does not include separate chapters taken from books, which are therefore not subject to resale price maintenance.¹⁵³

¹⁵² See Janneke Adema & Paul Rutten (2010). *Digital Monographs in the Humanities and Social Sciences: Report on User Needs* (ECP-2007-DILI-537002). Open Access Publishing in European Networks (OAPEN) report.

¹⁵³ The obvious course if in doubt would seem to be to take the matter to the courts and ask them to test whether a book is governed by the facsimile definition and therefore subject to RPM.

The next question is what exactly constitutes price fixing for e-books. The assumption is that fixed e-book prices, like RPM for printed books, are fixed *net* retail prices that are set by publishers and apply to a fixed minimum term.¹⁵⁴ It is up to the publishers to continue RPM beyond this term or not. However, there is *no need* for fixed e-books prices to be the same as or reflect a fixed ratio to print. In fact, RPM on printed books might well be scrapped while price fixing for e-books is still in place, or the exact opposite might happen. With the market for e-books more dynamic, a shorter minimum term for e-books might actually turn out better than the full year currently in force for printed books, as may be a shorter term after which change is possible rather than six months.

If RPM for e-books is indeed agreed, retailers will not be allowed to sell e-books for any other amount than the fixed price and neither will publishers be able to adjust or relinquish fixed prices as laid down in the terms of the agreement. Any such a system would not allow price discrimination between groups of users – e.g. discounts for students or owners of the e-book’s printed version. One would imagine, though, that any arrangements for special prices and discounts currently possible under RPM for print, would have their counterparts in a fixed-price system for e-books, and it will be up to publishers to avail themselves of such arrangements – or not.

Compared with print, e-books lend themselves to a range of alternative supply models. A subscription model springs to mind here, with readers paying a fixed amount per month to access a large selection of books – a model already prevalent for academic books. Or maybe the future is a model already in place for music and video: streaming e-books and paying on the basis of reading time or actual reading behaviour. Time will tell if consumers will embrace these same models when it comes to books.

Any such models would fall outside the scope of RPM for e-books, as their payment could not be traced back to the fixed prices of the books so consumed. And the point has already been made that any sale of separate chapters would not be covered by a fixed e-book price. Price maintenance would not apply to a *book rental model*: a book rental service would fall outside the scope of RPM. For printed books, commercial rental propositions pose many practical challenges: delivery and returns involve significant costs and books get damaged. The timeframe within which publishers generate robust turnover from the sale of any one title is short, whereas readers will want to keep the books for a number of weeks at least, unlike DVD rentals. Rentals would be most attractive over such a period but it would take a large number of copies during a brief window to actually make money. Which is why there is no such thing as a commercial rental market for printed books outside the school books segment.¹⁵⁵

E-books open new vistas for rental services, as none of these practical impediments apply. In addition, provisions currently governing the *purchase* of e-books include limitations that narrow

¹⁵⁴ Alternatively, a fixed *gross* retail price (exclusive of VAT) might be considered, but that would imply that foreign-based booksellers would be allowed to charge VAT rates applicable in the country of incorporation if this is deemed not to constitute tax evasion (e.g. Amazon or Google). American suppliers would be looking at a competitive advantage of 10-20 per cent, which would basically spell the end to fixed prices.

¹⁵⁵ Libraries lend books to readers for social and not commercial reasons. As commercial book rentals become an attractive option, frictions between libraries and bookshops are bound to emerge.

the gap with rentals: e-books bought can often only be downloaded to a limited number of e-readers and DRM prevents reading such books on other devices or lending them to friends and family. Given these restrictions, it remains to be seen whether buyers of e-books will be able to actually read the books they once bought 15 years later and many e-readers down the line. The question is also whether average readers and buyers of e-books see this as a problem.

The upshot is that buying or renting books are much closer substitutes for e-books than for print, enabling publishers to make their readers of e-books a rental offer that is virtually equivalent to buying. Rental agreements for an indefinite term or an x number of years, rentals offering free or cheap renewal options – the fact that rentals would not be covered by any price-fixing arrangement has important implications: it will be up to the publishers to decide whether they will abide by RPM or wriggle out by going down the rental route. To arrive at their decisions, publishers will carefully weigh costs and income.

4.4.2 The effect of fixed prices

Booksellers

Price regulation eliminates retail competition on individual books, and challenges booksellers to compete on quality of service. Bookshops excelling at quality service stand to benefit even if their cost structures are less favourable. RPM for books increases their chances of survival, provided retail margins are adequate – i.e. wholesale prices low enough.

In the market for printed books in the Netherlands, profit margins are essentially fixed – as are retail prices. This set-up contributes to a broad distribution network as long as it enables bookshops to recoup their costs. Right through 2010, the number of bookshops – a measure of this broad physical distribution network – stayed much the same, as was found in the previous chapter, albeit that the consensus predicts a fall in numbers in the near future. The same chapter also noted that the average bookshop dipped into the red in 2008 if a hypothetical salary for its owner was factored in. Larger bookshops still turned a small profit, but even these will have been dragged down by the loss of market share that bookshops have suffered in the past two years. Meanwhile, essentially fixed retail margins are greatly benefiting large players with low inventory and location costs and economies of scale, such as bol.com.

The relationship between RPM for printed books and the variety and range on offer at booksellers is more complex than is often made out. More often than not, there is no obvious link between price fixing and shops' variety and range. Supermarkets or CD shops looking to turn the highest possible profit are much more likely to simply pocket profits on high-selling items than to reinvest them in low-margin or low-turnover merchandise. Fixed prices might help smaller grocers or CD shops to earn higher profits but do not serve as a catalyst for expanding their product range. That said, low-turnover or low-margin products might indeed contribute to the depth and breadth of a shop's offering, making it more attractive for customers, driving up footfall and raising sales on balance. This network effect of a shop's product range also occurs if no fixed prices are in force and might explain why many markets have both very narrowly stocked and very well-stocked retailers.

Fixed prices are most relevant in markets marked by a large degree of doubt as to whether or not products will sell. *Without RPM for books* in place, bookshops with small ranges will be able to sell at more competitive prices than well-stocked and varied bookshops just by selling popular authors only, as they have lower inventory costs thanks to higher turnover. In this way, narrowly stocked bookshops benefit from pioneering broad-range retailers. If titles turn out good sellers, these will get included in the product range – and at lower prices to boot. This erodes the profitability of varied and well-stocked booksellers, whereas an *RPM for books* will make it more rewarding to invest in such ventures, as even these shops stand to gain more from titles that turn out to be better sellers.¹⁵⁶

Fixed prices for printed books, then, might contribute to maintaining the *number* of bookshops – provided publishers grant enough margin on wholesale prices – and to bookshops’ willingness to offer a *broad and varied range* of titles that *might turn out profitable* or that add to their overall profitability.

By the same token, fixed prices – or, more precisely, fixed gross margins – for e-books might contribute to larger numbers of suppliers of e-books (e-tailers): in such an environment, economies of scale and network effects would not serve to push higher-cost players out of business through price competition. More quality-based differentiation in online offerings might be the result, although it remains to be seen on what points of quality smaller e-tailers would stand out. As observed, scale actually helps online retailers to provide tailored advice by factoring in other customers’ purchasing behaviour. The ‘broad and varied’ argument does not apply to e-books, as the costs of offering a broad range of e-books are low. There is no link between fixed prices and a broad range of books in the digital domain.

The effect of resale price maintenance for e-books is therefore primarily that it keeps afloat a broad retail network in what should be a hybrid market over the next couple of years: in so far as fixed prices for e-books will help today’s bricks and mortar bookshops to also survive in the digital arena, the measure will serve to keep physical bookshops up and running and contribute to the wide availability of printed books.

Publishers

Publishers’ interest in fixed prices for books is also more subtle than often suggested. Copyright typically bestows on publishers exclusive rights to publish a title, a prerogative agreed in a book contract with authors or their agents. It is in publishers’ financial interest to set retail prices that maximise profits, and they benefit most from the lowest possible retail margins – leaving greater margins for the publishers themselves. Competitive retail margins are typically small, suggesting that publishers essentially benefit from fierce competition among retailers and not from fixed retail prices.

Fixed prices for e-books do not automatically result in broad and varied publishers’ lists. In fact, the opposite is often true wherever RPM causes average retail margins to go up: with retail

¹⁵⁶ Of course, some booksellers might consciously opt to plough back RPM-derived profits into expanding their product ranges, simply because they feel they should stock specific titles without necessarily boosting their profitability.

margins higher, the higher retail prices will typically push down sales and reduce profitability for publishers.¹⁵⁷ Publishers will find it takes longer for individual titles to become profitable and will be less quick to publish. Likewise, fixed prices for *bestsellers* do not guarantee higher profits for publishers and, even if they did, there is no guaranteeing that such revenues would be invested in encouraging new talent or alternatively in culturally rewarding yet commercially risky projects. Shareholders, for one, would rather receive such profits in the shape of dividend payments.¹⁵⁸

Conversely, publishers stand to gain by there being as many outlets as possible, as bookshops provide *advertising value*. Book promotions and marketing in physical bookshops help raise public awareness of titles and potentially boost sales of both printed books and e-books. Bookshops' easy proximity may also act as a sales catalyst.¹⁵⁹ With RPM in place, publishers can help keep relatively high-cost bookshops in business through a combination of fixed retail prices and wholesale prices, potentially benefiting sales.

The 'ease of proximity' value of bookshops is indirect at best for e-books, for reasons explained earlier. Consumers see little point in buying e-books at actual physical bookshops and place particular value on online availability. Advertising value through regular bookshops may still have a role to play, as long as printed books continue to dominate the market.

Price fixing for books can also act as a counterforce to the bigger purchasing power of some retailers by keeping a differentiated retail network going. Retail market concentration leads to market power which in turn can lead to major retailers demanding higher margins by threatening to take publishers off their supplier lists.¹⁶⁰

When it comes to e-books, publishers have some leverage in that they can serve customers themselves, but this does not outweigh the disadvantages of not being in stock at major retailers, and this sort of move will hardly ruffle international players such as Apple, Amazon and Google. In a power struggle with such companies, legal resale price maintenance might help publishers stick to their pricing guns, as RPM gives them something to hold on to. But let's not expect miracles: the first skirmishes between Macmillan and Amazon saw the latter initially reject agency pricing, caving in only because the iPad entered the scene. Admittedly, legally binding fixed prices for books would offer more protection than self-imposed agency pricing, but any near-monopoly at the retail end would inevitably translate into the retailer dictating the fixed price. As was so cynically summarised in Section 4.2: "In the agency model it is Apple that sets the prices."

Publishers' interests in RPM therefore lie mainly in retaining a broad and differentiated retail network, with fixed prices possibly preventing or at least slowing down concentration at the retail

¹⁵⁷ This is also true if publishers choose to reduce their own margins by way of steeper retail margins.

¹⁵⁸ Like bookshops, publishers often do not know which books will turn into bestsellers. Risky investment in new titles comes with the trade, as it does in the music and film industries. And just like in those industries, such investment will be needed whether prices are fixed or not. The art of publishing is to create a list featuring enough successes to make up for the flops. Publishers sometimes also consciously choose to publish titles they expect to lose money on, simply because they want to keep the author 'on board' or because they feel the title fits their profiles. There may be solid reasons for such choices from publishers' long-term perspectives – but even if there are not, fixed book prices have nothing to do with it.

¹⁵⁹ Mathewson & Winter (1998) list the continued existence of a broad retail network as a possible indirect effect of higher retail prices, implying that sales might not necessarily go up when prices come down.

¹⁶⁰ See (Appelman & Broek, 2002, p. 32).

end and loss of negotiating power for publishers. A more extensive network will give readers plenty of opportunity to buy printed books and has advertising value to boot. Easy physical access does not come into play for e-books, but the other two arguments – advertising value and counteracting retail concentration – remain valid arguments to some degree.

Keeping a wide retail network going closely ties in with the *system* of price maintenance. A single publisher going down the RPM route does not add much. The broad network serves like a collective good that benefits all publishers and to which they all contribute by observing price maintenance. Individual publishers might in some cases be better off if *everyone else* observes RPM but they do not – for example, when marketing a bestseller that does not need quality sales efforts from the book trade. Competing on price might boost this publisher's profits through bigger sales, particularly given the extreme price sensitivity of demand for individual e-titles.¹⁶¹ Combined with the earlier conclusion that publishers will have ample scope to evade fixed prices for books – such as by enhancing e-books and by introducing rental models – this creates a potential prisoner's dilemma. Retaining the broad retail network might be in everyone's interests, but individual publishers have both the interest and the opportunity not to contribute but rather to experiment with rental schemes or enhanced e-books not subject to RPM – particularly for bestsellers. If many publishers choose to do this, fixed prices for books will do little to keep up a broad retail network.

4.5 Conclusion

This chapter has outlined the building blocks for the scenarios that will be presented in Chapter 5. It is difficult to predict how the relationship between e-books and print books will develop, but a hybrid market would seem the obvious future landscape for the book market. In the short term, having to actually buy a device to read e-books is a hurdle – but one that should feature less prominently over time. At this point, fiction accounts for the biggest share of the Dutch market for e-books, as its advantages are already manifest. Potentially, non-fiction offers even greater advantages but enhanced e-book trends have not yet fully taken off.

Aside from cannibalisation, e-books also offer fresh sales opportunities, as digital reading might actually help increase time spent on reading. Available – admittedly sparse – anecdotal evidence on price suggests that lower prices for e-books might actually increase turnover.

DRM is a key factor in the user-friendliness of e-books. Both the industry and users criticise current DRM systems for their user-unfriendliness. There is a danger that DRM will act as a drag on the development of the market for e-books and will actually encourage what it aims to combat: file sharing.

E-book retailers will initially have to invest in setting up digital infrastructures. However, variable costs are likely to fall dramatically in the longer term, making such investment worth their while. Amazon in the United States really capitalised on its first-mover advantage and has built itself an exceedingly strong position in selling e-books. Meanwhile, Barnes & Noble and also Apple have

¹⁶¹ Publishers also generate higher profits if retail prices and sales remain the same, but retail margins are squeezed by retail competition (increasing publisher margins).

both gained a foothold in this market, pushing back Amazon's market share. In continental Europe, publishers and bookshops are together creating infrastructures to facilitate the development of local markets for e-books.

Generally, the effect of RPM for e-books is similar to fixed prices for printed books: by eliminating price competition between retailers, fixed prices – or, more precisely, fixed gross margins – can help increase the number of viable businesses. Unlike for print, RPM for e-books does not affect the breadth and variety of e-books on offer. In an online environment, all players will explore the full range of possibilities, as this involves relatively low costs. Publishers stand to gain from fixed prices in as much as a higher number of retailers kept afloat by such price maintenance will add more to sales than price competition would. Having more outlets means greater awareness of what's on offer and creates more opportunities for consumers to buy books – not a factor that carries weight in the e-books arena. In addition, a more differentiated retail channel strengthens publishers' negotiating positions.

That said, a broad retail network for publishers barely increases in value through just a single contribution – for it to work it needs to be a collective effort. And yet despite the collective interest in a broad retail network, individual publishers have an interest and an opportunity not to contribute but to experiment to their heart's content with rental schemes or enhanced e-books not subject to RPM. In the case of bestsellers, in particular, publishers will thus be able to claim a bigger proportion of overall margins and use consumer price sensitivity to their advantage. Publishers are free to act on these commercial considerations and cannot be stopped by laws or regulations; agreements between publishers not to act may be construed as obstructing competition.

In keeping with the French and German situations, the present analysis of the expected effect of fixed prices for e-books is based on a narrow definition of e-books: facsimile e-books without multimedia applications. Fixed prices for enhanced e-books are not feasible. The scenarios outlined in Chapter 5 draw on net retail prices and do not assume a fixed relationship between prices of print and e-books – in the shape of a fixed percentage, for example.

5 Scenarios and analysis

5.1 Four scenarios for the future of general books

The market share of e-books in the Netherlands is still very small. The previous chapter explained that this may be attributed in part to the fact that the offering is limited. Dutch consumers are ready to embrace e-books. At the same time, the chance of succeeding in the digital market is not – or not yet – the same for all book genres. In the short term, opportunities are greatest for facsimile e-books. This is of particular relevance to a genre such as fiction. In the long term, enhanced e-books, which are set to play a major role in non-fiction, appear to have the best chance of success.

In order to shed light on the implications of fixed prices for e-books, scenarios have been developed for the future of digital books in the Netherlands in which the suitability of various book genres for digitisation, now and in the future, is defined in terms of expected market shares. The analysis in this chapter focuses on general books. The estimated market share of e-books in the overall market is based on the current share of turnover in print of the various genres.

This exercise yields four scenarios that predict the share of turnover from e-books in the short and long run and the share of physical bookshops in this market. The crucial determining factors in these scenarios are suppliers' (publishers and booksellers) attitudes towards e-books (reactive versus proactive) and whether or not digital books are subject to resale price maintenance. In light of the findings presented in the previous chapters, the degree to which consumers are willing to embrace e-books is not considered to be a limiting factor. Note that the precise figures presented in the scenarios are not central to the analysis as they leave room for considerable uncertainty. That said, the mutual relationships and trends identified are sufficiently robust to be of value.

Scenario 1: Make way for e-books; no e-book price fixing

In this scenario, publishers' existing strategies and methods restricting the availability of e-books have been revised to produce a proactive strategy where:

- new titles are released in digital form without delay (no windowing)
- older titles are also made rapidly available in digital format
- DRM is not applied, or only in a manner that users do not perceive as being restrictive
- bookshops succeed in developing a shared sales infrastructure for e-books.

The percentages in Scenario 1 are based on market information and analyses presented in the previous chapters. Note, however, that in a dynamic market such as this one predicting trends is always a tricky business.

The table below presents the key figures used in this scenario. The items 'suitability as a facsimile e-book' (short term) and 'suitability as an enhanced e-book' (long term) have been taken from Table 4.1 (p. 58). They were compiled using a number of underlying criteria. This information,

also bearing in mind current market trends in the Netherlands and in the United States, was used to estimate the short- and long-term market share of e-books in the various book genres. In the short run (3 to 5 years), market share will range from 5 per cent for children's books to 30 per cent for fiction, giving a weighted average share of turnover of 23 per cent.¹⁶² In the long run (5 to 10 years) non-fiction is predicted to enjoy the best opportunities, at a share of 80 per cent. The market for print fiction, in particular printed children's books, is expected to remain substantial, also in the long term. Under this scenario, the average share of digital turnover in the long term will come in at 57 per cent.

The item 'Relevance of e-book price fixing (facsimile)' indicates the degree to which the possible introduction of price fixing for facsimile e-books could affect the various genres. This will depend on the pace of introduction of enhanced products and the degree to which alternative models (such as selling separate chapters or sections at a time, but also book rental services) are adopted. As alternative types of publications would fall outside the scope of resale price maintenance for e-books, if introduced, they would erode the influence of price fixing on market structures and trends. An important observation in this respect is that genres that are most likely to successfully break through in enhanced digital format will be least affected by fixed book prices.

In the long term, resale price maintenance will be highly relevant to fiction only. Here too, however, publishers could dodge price fixing by offering rental services and subscription models. As Scenario 1 assumes that e-books *will not be subject to resale price maintenance*, price competition between retailers should be all the more fierce. And as print books will not compete on price, the market share of e-books will be higher in each genre than would be the case if digital books *were* subject to price fixing. In the face of this sharp competition, specialist bookshops will not succeed in capturing a proportional share of the market for digital books.

Physical bookshops currently have a market share in print of approximately 75 per cent. Scenario 1 assumes that they will retain this market share and that one third of sales (25 per cent) will be achieved in the digital environment on the strength of these booksellers' shared infrastructure and knowledge of the local markets – albeit challenged by cut-throat domestic and international price competition in the market for e-books. In the short term this would give offline bookshops a share of $(1 - 23\%) \times 75\% = 58\%$ of the total market through print books, and a market share of $23\% \times 25\% = 6\%$ through e-books, entailing a decline in their total market share from 75% to 64%. In the long run, their share of the market would drop even further, serving 46% of the total market: 32% in print and 14% in digital format.

¹⁶² Compare this with the share of turnover of e-books in the US: in April 2011 this stood at 16.7 per cent and a share of 35 per cent is expected for 2013 (see Section 3.2).

Scenario 1 Make way for e-books; no e-book price fixing

	Fiction	Children's books	Non-fiction leisure	Non-fiction informative	Total
Current share of turnover¹⁶³	47%	14%	15%	23%	100%
Short term					
Suitability as a facsimile e-book	++	0	+	+	
Share of e-books within genre	30%	5%	20%	20%	23%
Relevance of e-book price fixing (facsimile)	++	+/0	+/0	+/0	
Long term					
Suitability as an enhanced e-book	0	+/0	++	++	
Share of e-books within genre	50%	20%	80%	80%	57%
Relevance of e-book price fixing (facsimile)	++	-	--	--	
Market share physical bookshop					
Print books	75%	75%	75%	75%	75%
E-books (short and long term)	25%	25%	25%	25%	25%
<i>Total</i>				<i>Short term</i>	64%
				<i>Long term</i>	46%

Source: SEO Economic Research

Scenario 2: Make way for e-books; with e-book price fixing

In Scenario 2, suppliers in the book market will pursue a similar strategy to the one in Scenario 1, except that under this scenario government will introduce a fixed price for facsimile e-books. The implication would be that price competition is eliminated for facsimile editions, enabling physical bookshops to obtain a larger market share in digital fiction: 50% compared with 75% in the market for print books and 25% in the market for e-books in Scenario 1, without price fixing. The assumption here is that publishers will not be in a hurry to offer rental and subscription services. And if they do choose to sidestep price fixing in this manner in the near future, as set out in the previous chapter, the outcomes of this scenario would be even more similar to those in Scenario 1. Before long, the share of brick and mortar bookshops in the market for digital books would be smaller than 50 per cent for non-fiction and children’s books as part of this market would no longer be subject to resale price maintenance for e-books. This would be the case, for example, when books become available complete with external links or updates or when they are sold in sections (see the item ‘relevance of e-book price fixing’ in the table). In these e-book genres, physical bookshops are expected to command a market share of no more than 37.5% in the near future.

Resale price maintenance for e-books will, however, slow down the pace at which e-books gain market share. Not only will the elimination of price competition result in higher prices, but a fixed price will at the same time limit the ability of publishers and retailers to adjust their prices to changing market conditions. RPM could also restrict price discrimination between groups of

¹⁶³ Non-books such as audio books account for 3 per cent of the total market; we will ignore these titles for the purposes of this discussion. The percentages stated therefore exclude non-books.

consumers, which may be desirable for marketing reasons. Such flexibility would not be possible under price fixing legislation (see Section 4.4.1).

The implications of e-book price fixing compared with Scenario 1 will be greater in the short term than in the long term given the expectation that both non-fiction and children's books will with time be transformed into enhanced e-books, which are not subject to resale price maintenance. Alternatively, publishers may increasingly apply rental models, in which prices are not fixed either. This development is also likely to affect fiction. The previous chapter argued that a fixed price for e-books would encourage both enhancement and the introduction of new business models as it will generally be in the interest of individual publishers to evade RPM. As a result, the market share of physical bookshops in these genres of the e-market should in the long run be equal to that in Scenario 1. In fiction, the market share of bookshops is expected to remain high, at 37.5%, because price fixing will continue to be more relevant in this market.

The figures for this scenario are presented below. Differences with Scenario 1 are marked in red.

Scenario 2 Make way for e-books; with e-book price fixing

	Fiction	Children's books	Non-fiction leisure	Non-fiction informative	Total
Current share of turnover	47%	14%	15%	23%	100%
Short term					
Suitability as a facsimile e-book	++	0	+	+	
Share of e-books within genre	20%	4%	15%	15%	16%
Relevance of e-book price fixing (facsimile)	++	+/0	+/0	+/0	
Long term					
Suitability as an enhanced e-book	0	+/0	++	++	
Share of e-books within genre	40%	20%	80%	80%	52%
Relevance of e-book price fixing (facsimile)	++	-	--	--	
Market share physical bookshops					
Print books	75%	75%	75%	75%	75%
E-books - short term	50%	37.5%	37.5%	37.5%	43%
E-books - long term	37.5%	25%	25%	25%	31%
<i>Total</i>				<i>Short term</i>	70%
				<i>Long term</i>	51%

Source: SEO Economic Research

Scenario 3: Wait-and-see stance; no e-book price fixing

Under Scenario 3, suppliers will be less quick to offer e-books than in the previous two scenarios. The availability of e-titles will gradually increase, but will remain limited compared with the print offering. New titles will typically first be published in print before they are released in digital format and before DRM is implemented to prevent users from sharing e-books. Publishers will be less inclined to experiment with new functionalities to enhance digital books. In keeping with their wait-and-see stance towards e-books, investments in a shared sales infrastructure for digital

books will also be limited. In view of the meagre title offering, foreign suppliers such as Amazon, Apple and Google will also show very little interest in the Dutch market. The government will not introduce a fixed price for e-books.

In this scenario, e-fiction will gain a market share of 5% in the short term, and stagnate at 15% in the long run as new titles will not become available in digital format. Children’s books will lag far behind, and in the long term non-fiction will show a somewhat more favourable development than fiction. E-books in all genres taken together will achieve market shares of 4 per cent in the short term and 17 per cent in the long term (more or less equal to current levels in the total US market).

The market share of brick and mortar shops in print books will remain the same, at 75%, and their share in the e-book market will come in at 25% in both the short and long term, as was the case in Scenario 1. In the near future, physical bookshops will retain a share of $(1 - 4\%) \times 75\% = 72\%$ of the total market through sales of print books, and a market share of $4\% \times 25\% = 1\%$ through e-book sales. Their total market share will therefore decrease from 75% to 73 %. In the rather more distant future, the market share of traditional bookshops will slide further, with them serving 66% of the total market (62% through print book sales and 4% through e-books).

Scenario 3 Wait-and-see stance; no e-book price fixing

	Fiction	Children’s books	Non-fiction leisure	Non-fiction informative	Total
Current share of turnover	47%	14%	15%	23%	100%
Short term					
Suitability as a facsimile e-book	++	0	+	+	
Share of e-books within genre	5%	1%	5%	5%	4%
Relevance of e-book price fixing (facsimile)	++	+/0	+/0	+/0	
Long term					
Suitability as an enhanced e-book	0	+/0	++	++	
Share of e-books within genre	15%	4%	25%	25%	17%
Relevance of e-book price fixing (facsimile)	++	-	--	--	
Market share physical bookshops					
Print books	75%	75%	75%	75%	75%
E-books (short and long term)	25%	25%	25%	25%	25%
<i>Total</i>				<i>Short term</i>	73%
				<i>Long term</i>	66%

Source: SEO Economic Research

Scenario 4: Wait-and-see stance; with e-book price fixing

The fourth scenario is the same as Scenario 3 except that under this scenario the government will introduce a fixed price for facsimile e-books. As there will be no price competition, the pace at which facsimile e-books gain market share will be somewhat slower than in Scenario 3. As was the case in Scenario 2, physical bookshops will manage to obtain a larger market share in the

facsimile e-book market thanks to RPM for e-books: 50% compared with 75% in the print market and 25% in Scenario 3. In non-fiction and children's books, the share of bookshops in the market for e-books will be just under 50% in the short run as part of this market will no longer be subject to RPM. As experiments in enhancement typically take time, however, their market share will still be higher than in Scenario 2, at 45%.

The relevance of price fixing for non-fiction and children's e-books will decline further in the long term. As a result, the market share of traditional bookshops in these segments of the e-market will, with time, edge down towards those predicted under Scenarios 1 and 3. In fiction, the market share of bookshops will remain high, at 37.5%.

Scenario 4 Wait-and-see stance; with e-book price fixing

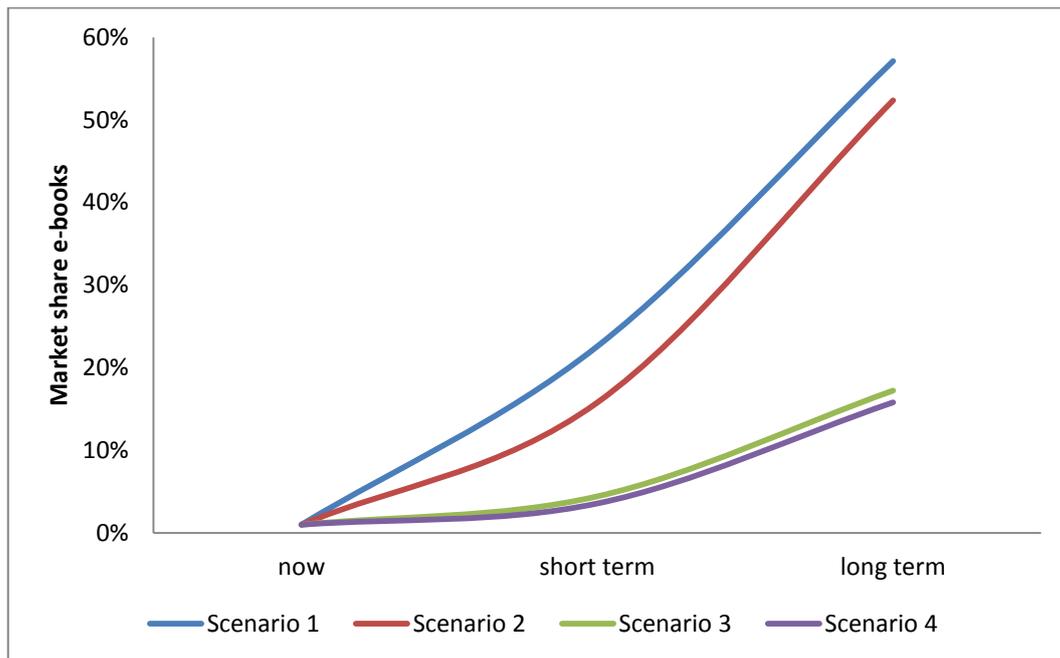
	Fiction	Children's books	Non-fiction leisure	Non-fiction informative	Total
Current share of turnover	47%	14%	15%	23%	100%
Short term					
Suitability as a facsimile e-book	++	0	+	+	
Share of e-books within genre	4%	1%	4%	4%	4%
Relevance of e-book price fixing (facsimile)	++	+/0	+/0	+/0	
Long term					
Suitability as an enhanced e-book	0	+/0	++	++	
Share of e-books within genre	12%	4%	25%	25%	16%
Relevance of e-book price fixing (facsimile)	++	-	--	--	
Market share physical bookshops					
Print books	75%	75%	75%	75%	75%
E-books – short term	50%	45%	45%	45%	47%
E-books – long term	37.5%	25%	25%	25%	31%
<i>Total</i>				<i>Short term</i>	74%
				<i>Long term</i>	68%

Source: SEO Economic Research

5.2 Analysis of scenarios and synthesis

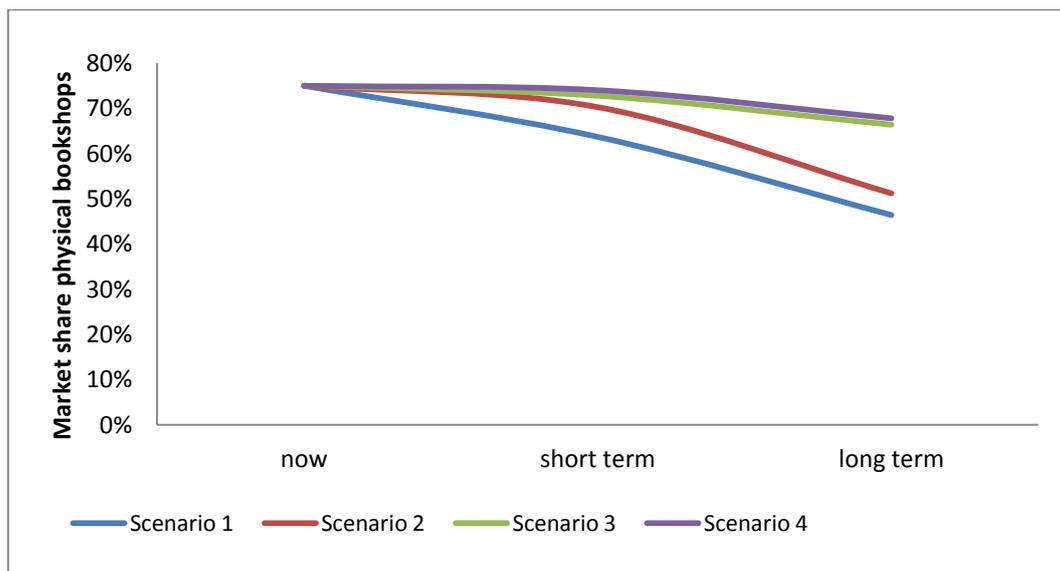
The figures below graphically present the outcomes of the four scenarios. Figure 5.1 illustrates the expected development of the e-book market over time; Figure 5.2 summarises the expected development of the share of physical bookshops in the total market under the various scenarios. The two figures are closely related: the growing market for e-books and the declining position of brick and mortar bookshops are two sides of the same coin.

Figure 5.1 Scenarios for market share of e-books in the short and long term



Source: SEO Economic Research

Figure 5.2 Scenarios for market share of physical bookshops in the short and long term



Source: SEO Economic Research

Impact of e-book price fixing and suppliers’ strategies

Both figures clearly show that the effect of e-book price fixing on the market share of digital books will remain limited (the difference between Scenarios 1 and 2 and between 3 and 4). This can be explained by the fact that a fixed price is least relevant precisely in that part of the market that offers the best opportunities for digitisation, especially in the long term. The expected impact of resale price maintenance on the share of bookshops in the total market will also be relatively small, leading to a slight delay in both the breakthrough of e-books and the loss of

market share of offline booksellers. And as the fixed price is expected to affect an ever smaller portion of the market, the impact of RPM is set to decline over time – especially in Scenarios 1 and 2, under which suppliers embrace digital platforms, as well as offering additional functionalities and providing access to titles without delay and in a user-friendly manner. The introduction of rental models is also likely to rapidly erode the relevance of a fixed price for e-books.

Publishing strategies – including the degree to which both new editions and the backlist are released in user-friendly digital format – will have a more profound impact on e-book sales and the position of traditional bookshops (the difference between Scenarios 1 and 3 and between Scenarios 2 and 4). If publishers (and authors) continue to take a wary stance, they will significantly hold back the development of digital books, creating a real risk that major international retailers will not actively target the Dutch market. This in turn will keep the decline in the market share of physical bookshops within bounds.¹⁶⁴

The market share of traditional bookshops is set to decline under all scenarios. Even if they set up a shared infrastructure, these bookshops will have to cede market share to domestic or international online specialists, who benefit more from economies of scale and are able to leverage network effects between users on the strength of their customised advice. The pace at which this will take place will depend largely on how soon e-books capture market share. Resale price maintenance for digital books will have a slight positive effect on the position of bookshops in the market as a whole (print books plus e-books) owing partly to the improved competitive position and partly to the fact that the emergence of e-books will be slowed down.

If the extent to which publishers experiment with enhanced e-books and rental models lags behind what has been assumed in these scenarios, growth in the digital market will also be retarded. This will be the case in particular in the non-fiction segment, which is best suited for enhancement and where rental models, too, will presumably – by analogy with the academic and professional market – stand the best chance of successfully breaking through. The curves in Figure 5.1 will flatten somewhat and the decline in the market share of physical bookshops (Figure 5.2) will be kept in check. In Scenarios 2 and 4, publishing strategies in which enhancement and rental systems have no place would enhance the scope of price fixing, causing the slide in market share of bookshops to proceed marginally slower. Under this assumption, the curves in Figure 5.2 relating to Scenarios 2 and 4 would become relatively flatter.

How does e-book price fixing relate to file sharing?

The scenarios have not explicitly factored in the risk of *unauthorised file sharing*. As long as the offering of e-books remains limited, file sharing too will remain within bounds. Section 4.2 argued that books scanned by private individuals – using today’s technology and available methods of reproduction – are functionally inferior to the legal supply. At the same time, with scanning being a time-consuming and labour-intensive business for private uploaders, this is expected to constitute a threat to bestsellers only – and a minor threat at that. This implies that the risk of file sharing is greater in Scenarios 1 and 2 than it is in Scenarios 3 and 4: file sharing is

¹⁶⁴ Foreign-based retailers will be able to gain only a limited share of the market in the Netherlands, alongside the offering by Dutch publishers, as Dutch-language books now account for approximately 90 per cent of turnover in the general book segment.

expected to primarily affect the digital offering. If this offering is substantial, as in Scenarios 1 and 2, the susceptibility to file sharing will also be greater.¹⁶⁵ At the same time, file sharing will put on the pressure to innovate and promote the further development of enhanced and alternative business models.

Conversely, restrictive DRM could encourage file sharing as the hacked version offers readers more freedom of use and greater certainty that they will be able to keep using their books on future generations of e-readers and tablets. There is a strong analogy with the music industry, where most players have also turned their backs on strict DRM. And so there appears to be growing consensus in the Dutch book trade that it would not be judicious to go down the road of restrictive DRM.

That said, the relationship between resale price maintenance for e-books and file sharing *is* a matter of concern. If suppliers are bound by a fixed price for a fixed term, they will be less able to swiftly respond to changing market conditions and to discriminate on price between users.¹⁶⁶ In this sense RPM for e-books limits publishers in their ability to use price as a weapon in the fight against illegal books. The risk that file sharing will negatively affect turnover is therefore greater in scenarios based on price fixing for e-books.

Public participation

Research has shown that digital books can tap new groups of potential users and that e-book readers find new reading moments, encouraging them to buy more books. The emergence of digital books could therefore prompt a partial revival in reading and bookselling. The fact that the price increases that are expected to come with e-book price fixing are set to slow down the emergence of e-books will therefore have a negative impact on the goal of trying to achieve greater public participation.

In this respect, a wait-and-see publishing strategy by suppliers (Scenarios 3 and 4) will have a far more unfavourable effect on public participation and innovation in the book trade. Resale price maintenance for e-books will hardly stand in the way of innovation as both innovative formats (enhanced e-books) and alternative supply models are typically not subject to price fixing.

Widespread availability of books

Global and instant online access to the e-book title offering will provide a major impetus to the availability of e-books. Amazon has brought this to perfection with its Kindle-3G, which provides access to the e-bookstore anywhere, at any time, even to people who do not have an internet connection, by offering them free wireless internet. Price fixing for e-books will not directly affect the availability of digital titles, but it will keep their market share down.

At the same time, the scenarios have shown that the relative effect of RPM on the position of physical bookshops will be slightly *positive*. In all scenarios, bookshops will shed market share in

¹⁶⁵ Note that at first glance this is at odds with the reproach typically directed towards the music industry, namely that it has encouraged file sharing by failing to adequately innovate. The difference is that content in the music industry was offered digitally (on CD) as early as the 1980s, making distribution without loss of quality much easier.

¹⁶⁶ Rental models that evade price fixing could offer a partial solution here.

the coming years. In light of the financial plight of many bookshops these days, the odds are that a substantial number of offline booksellers will have to exit the market. The scenarios have not yet factored in this development; or rather, they assume that the market share of physical bookshops that exit the market will be taken up by bookshops that survive.

Resale price maintenance for e-books will not succeed in reversing the eroding market share of brick and mortar bookshops. RPM will, however, be a drag on this process, in particular among bookshops specialising in fiction, being the segment that will be most strongly affected by e-book price fixing.

It remains to be seen how the growing – and, through 3G, omnipresent – online availability of e-books will relate to the decreasing physical availability of print. Developments in the area of *printing on demand* will ensure that print will remain available to those interested – with time, however, these editions will be facsimiles of e-books rather than vice versa. The availability of print books sold in bookshops in the vicinity will inevitably decline. RPM for e-books will slow down this process, albeit only marginally so.

A broad and varied supply

By adding out-of-print books to the offering, speedy digitisation of the backlist would help towards creating diversity of the title offering. And whereas this would not add new titles to the offering, it would contribute to the *renewed availability* of titles. The pace at which this will take place is determined by publishers and authors, depending on how swiftly they reach agreement on matters such as royalties and other conditions. The influence of the introduction of resale price maintenance for e-books, if at all, is negligible.

Analysis of the effect of a fixed retail price has shown that in the case of *new* titles, physical bookshops today have advertising value for publishers. In this light an intricate and visible network of bookshops with slightly higher retail prices and retail margins could be of greater importance to publishers than a more concentrated retail channel with lower prices. Book price fixing could help sustain this situation for print books.

In the digital environment, the proximity criterion (an intricate network) is of very little consequence: consumers are hardly inclined to make their way to a shop to download an e-book. And so with time, publishers will benefit only from the advertising value of brick and mortar bookshops, but as book buying increasingly shifts to the online environment, this value, too, will decline. Note, again, that it is in the self-interest of individual publishers not to contribute to but only to benefit from an intricate retail network. With the advent of enhanced e-books and even more so of rental models, the door has been opened for publishers to dodge book price fixing.

5.3 Academic books

Previous sections of this report briefly addressed categories other than general books, namely academic books and school books. Unlike school books, which are defined functionally in terms of their specific uses, the line between general and academic books is not always clear. The entire spectrum of printed academic books – without exception – is therefore subject to price fixing.

This may be largely explained by the fact that giving a precise definition of an academic book is difficult as many academic books have the same characteristics as non-fiction general books whereas others – used for educational purposes – bear resemblance to school books; some academic books combine the characteristics of both. And so quite apart from the fact that legislators will have a hard time establishing a criterion based on content, a sound functional criterion is lacking too. This explains why – contrary to the equivalent legislation for school books – compulsory textbooks in higher education are not exempted from resale price maintenance by law. The situation is complicated further by the fact that publishers who release academic books for the general public may opt to market them as general books. Their main reason for doing so is to gain booksellers' commitment, as margins are higher for general books than for books categorised as academic books by the *Centraal Boekhuis*. By marketing them as general books, bookshops get more out of their promotional efforts. This means that, rather than content being the defining criterion that distinguishes academic books from general books, other motives and criteria are at play when books are classified into segments.

That said, the publishing cultures and user contexts of the various types of publications each give rise to their own, appropriate publishing practices and consumption patterns. In the academic arena, licensing agreements for e-books are concluded with universities or groups of universities giving scholars and students unlimited access to digital information within their own organisations. Use of such information is widespread – to date mainly through PCs and to a lesser extent using e-readers and tablets, although it is probably a matter of time before use of these devices will take off. Most of the information published in this manner is enhanced and more often than not far removed from the nature of a facsimile e-book. These publications will therefore never be bound by price fixing: either because they are subject to licensing agreements (rental models) or because of e-book enhancement. Whereas, to an extent, this trend is also visible in the area of school books and university textbooks, the process is far less advanced here than would be possible given today's technological know-how and the patterns of information use among school pupils and university students.

There is still a significant category of academic books, however, that appear mainly in print or in digital facsimile format, such as the traditional monographs commonly published in the humanities and social sciences. For strictly marketing reasons, publishers often market them as general books. Given their almost narrative structure, monographs resemble fiction in a number of aspects and find their way to their readers through physical bookshops. Their digital counterparts would also be subject to resale price maintenance for e-books, if introduced. Here too, however, publishers could decide to evade RPM for e-books by entering into rental and licensing agreements where appropriate, in which case the trend towards the growing use of licensing models, which was embraced by academic publishers some time ago, would not be affected by the introduction of e-book price fixing. In the private market, academic publishers wishing to use traditional bookshops to position their digital facsimile publications might choose to market e-books as general or academic books, in which case they would be subject to fixed prices. Alternatively, they may decide to dodge fixed pricing in this segment too by opting for enhancement or rental models.

5.4 Conclusions

The previous chapters have examined the feasibility and enforceability of e-book price fixing. Other issues analysed were the functionality of price maintenance in terms of the diversity and broad availability of supply, the market structure of the book business and the availability of print books. The analyses show clearly that this is a complex matter fraught with uncertainty. The fundamental questions inherent in the legal framework are being studied at European level. With the market being dynamic and in various stages of development, a judicious approach is to be preferred, keeping close tabs on developments, rather than going for rash intervention.

The functionality of resale price maintenance for e-books in terms of the degree to which it contributes to broad availability, participation and pluralism is limited. In the digital environment, the availability of books is better than it is in the world of print, assuming that publishers are increasingly turning to e-books. Anyone with an internet connection, an e-reader, a tablet or computer and sufficient means has access to a vast array of digital books. Initial findings with regard to e-book readership show that the digital formats are reaching new readers in addition to existing groups of readers.

As availability improves, pluralism in the digital arena is essentially a matter of ensuring a sufficiently broad production of new titles. This is mainly up to publishers – a direct relationship between a fixed price and scope to invest is lacking. The key question is rather whether publishers will succeed in employing the digital means of production and marketing instruments at their disposal to improve operations with a view to creating more scope to invest in new titles. The assumption here is that the benefits achieved are not passed on to owners and shareholders. E-book price fixing is not a functional instrument that can be used to influence these processes. In fact, fixed prices could even damage market participants' business prospects, for example by cutting publishers' margins or lowering sales and by denying the possibility for publishers to respond flexibly to market trends through the implementation of price adjustments.

Where publishers are set to benefit from resale price maintenance for e-books, the advantage will lie in the fact that RPM will contribute to improving the position of physical bookshops, which in turn would benefit print books. For the time being, e-book price fixing will offer existing retailers (specialist bookshops and e-booksellers) a degree of protection, in part because e-books will not be as quick to grow their market share if sold at fixed prices. The role played by physical bookshops in promoting individual titles (attention value) and the accessibility of the print offering will erode less rapidly as a result. In the long run, however, the advantage enjoyed by established booksellers will be limited.

The legal analysis of a possible fixed price for e-books shows that efforts to enforce legislation on e-price fixing would be far more prone to fail than the Resale Price Maintenance (Books) Act, which relates to print books. Major complications could arise because of their different natures (whereas print books are considered to be a 'good', e-books are a 'service'). Barriers to interstate trade are more likely to arise and obstacles to innovation more likely to occur. As a result, national legislation is set to more strongly impact the free movement of goods and services within the European Union, causing it to conflict more with policy and regulations aimed at achieving a friction-free internal European market.

Defining e-books is more difficult than it is to define print books. Introducing a fixed price would seem to be most feasible for digital books that closely resemble print versions: the

facsimile e-book. Other types of editions, such as those enhanced with multimedia applications, extensive digital links and regular updates, are becoming increasingly indistinguishable – if at all – from other online services. The scope of RPM for e-books, if introduced, is therefore difficult to define and subjecting enhanced books to a fixed price barely feasible. The fact that enhanced books are expected to constitute a fair share of the non-fiction market will undermine the functionality of e-book price fixing. A significant part of the market will evade the effect of any such law. Rental and subscription services, which are already very common in academic publishing and are fast emerging in professional publishing, will not come under the scope of price fixing. This means that publishers will have a whole set of instruments at their disposal to exclude publications from the scope of any future regulations in this area, in particular in the case of titles they expect will generate considerable sales outside traditional retail channels, such as bestsellers. In fiction, however, the majority of e-books *will* qualify for legally enforced price fixing. As works of fiction tend to have a linear structure, they are less suited to enhancement than non-fiction. That said, digital extras may of course also find their way into fiction. In the short term the emergence of digital books is expected to be driven by the fiction market, as enhanced e-books are still in their infancy.

In the academic arena, resale price maintenance is set to make an even smaller contribution to achieving the objectives of accessibility, participation and pluralism than general books, precisely because enhancement has made greater strides in this segment and because use of rental and subscription models is widespread there. Academic publications tend to find their way to users by bypassing traditional bookshops, more often than not in electronic format. A fixed price could have the same degree of functionality for academic facsimile e-books, which *do* reach their end users through brick and mortar shops, as for facsimile general books due to the promotional role of bookshops. Where appropriate, however, publishers could decide to evade RPM for these books too by entering into rental and licensing agreements.

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