5 Views of the main parties

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Introduction

5.1. In this chapter we summarize the views of RE and Harcourt put to us in a number of written submissions and at hearings.

RE

The rationale for the proposed acquisition

5.2. RE told us that the acquisition of Harcourt would represent a significant step in the implementation of its strategy. The Harcourt K-12 education and testing businesses would transform RE's education business to create a new global publishing division, with an excellent position in the fast-growing US schools education market.

5.3. The Harcourt STM business represented a largely complementary range of publications that would enhance RE's current offerings in these fields. Both companies were active in STM publishing, but Harcourt was stronger in the areas of clinical medicine, general medical publications and allied healthcare while RE was stronger in the physical and life sciences areas. Harcourt offered an online service directly to medical practitioners in the USA (MD Consult) and had a good range of books and publications directed primarily to medical practitioners mainly in the USA. RE had few equivalent activities. The acquisition would therefore enable RE to become more strongly established in medical publishing, which offered good growth potential. RE said that the only business activities that it had in common with Harcourt in the UK were in STM publishing. Both parties published STM journals and books on a global basis in hard copy and in electronic form, including via the Internet. In addition both parties provided publishing services for various learned society journals.

5.4. The acquisition was expected to enhance RE's adjusted earnings in 2001, and its overall growth rate thereafter, and to add considerable shareholder value.

Market definition

The geographic market

5.5. RE said that the purpose of STM publications was to facilitate dissemination of scientific information, which was not constrained by national boundaries. STM publications (whether books or journals) were, therefore, produced and sold on a global basis. Their content was aimed at academics, researchers, students (usually graduate or doctoral students) and certain professionals (for example, medics and economists). The content of these publications was of interest and relevance to this user community, wherever they were located and wherever the publication came from. The content of STM publications was contributed by individuals from within the user community to appropriate journals (or in the case of books to appropriate publishers) around the world. English, as the global language of the academic scientific community, was the predominant language for STM publications, and publications in other languages formed only a small proportion of overall sales. It might appear that certain STM publications were linked to one country or region in the world, for example the *Journal of the American Chemical Society*, the *European Heart Journal* or the *British Medical Journal*. These publications were owned by learned societies that had been established in a specific country or region but the core scientific articles contained in their journals were relevant to researchers throughout the world and so were sold and contributed to on a global basis. RE did not believe that there were any significant differences between the way in which journals were sold, purchased and used in the UK and in other countries.

5.6. However, not all publications with content that could be regarded as STM were global in nature. Some publications (usually magazines or newsletters) were aimed specifically at local professionals and practitioners, for example, in the medical field. Unlike global STM publications, they did not contain new scientific research (except possibly in summary form), the content was not subject to a peer review process and the publications contained features on regulatory, professional and career issues of relevance only to practitioners within a particular jurisdiction. RE considered that these publications were different in nature to global STM publications and formed separate national or local markets. There was no overlap between the activities of RE and Harcourt in respect of such publications in the UK.

5.7. RE told us that it had a global pricing policy for its STM publications. Pricing decisions were coordinated centrally with no national or regional variations. There were, however, three invoice currencies for its STM journals (NLG (in effect the euro) for Europe, the Japanese yen for Japan, and US dollars for the rest of the world). Any apparent differentials between absolute prices and between annual price increases in these three currencies reflected either currency fluctuations after the price had been set or intentional adjustments to mitigate the effects of strong currency fluctuations and keep the price increases for each of the three currencies below 10 per cent in accordance with RE's commitment on prices (see paragraph 5.32). These differentials were temporary in nature as RE's strategy was to have a single global price. RE believed that the majority of STM publications were priced globally.

The product market

- *STM journals*

5.8. RE did not consider that there was a single market for all types of STM journals. It said that those journals contained the results of specialist and individual academic research. Each article published was the summation of work carried out by one or more individuals and so was unique. (If an article did not contain original research and add value to what had already been published then it would be unlikely to be accepted by any primary STM journal.) As each journal was an aggregation of individual articles, the content of each journal was unique. RE said that there would generally be a few journals within which any particular article could be published. Once that article was published, however, from a reader's perspective there was no substitution for reading that, and only that, article in order to obtain the specific information it contained. Although scientists were likely to read more than one particular journal covering their speciality, there was no substitutability between articles or journals as far as the specific content was concerned.

5.9. Whether publishing research or obtaining information, academics used only those journals that related to a particular, potentially very narrow, subject field or scientific discipline. A physicist would generally have no interest in a chemistry journal. Similarly, it was unlikely that a nuclear physicist would be interested in a journal relating to condensed matter physics. Thus there was little, if any, substitutability between journals outside the scope of narrow subject areas, or across different subject areas.

5.10. RE said that most STM journals were sold to institutions, ie universities, research institutions, academic hospitals or commercial organizations. By way of a general example, it said that librarians bought journals on behalf of, and in consultation with, users within each institution who might be drawn from a wide range of disciplines and subdisciplines within the STM field. After funds had been allocated to each discipline or subdiscipline, choices were made on a title-by-title basis to reflect the use of the journals by particular groups. The choice was unlikely to be, for example, whether to buy a physics journal or a chemistry journal but was, rather, within budgetary constraints, which particular physics journal or chemistry journal to buy.

5.11. RE concluded that, whether looking at librarians' purchasing decisions, an author's selection of a journal for publication or the use of journals by academics and researchers, any competitive interaction between STM journals occurred at a much narrower level than a single overall market.

5.12. RE did not consider STM journals to be part of the same market as STM books. Although they were used by the same scientists and researchers, were generally written by the same group of authors and stocked by the same libraries, journals and books met different needs and served different purposes by virtue of the nature of their content. While STM journals contained information on the latest research results and developments, books were usually either treatises on established principles or general reference works. They were not, therefore, substitutable products and did not form part of the same market. Neither did RE consider magazines containing science, technical or medical content to be part of the same market or markets as STM journals. As described in paragraph 5.6, although they might contain general STM information they did not carry research articles and were focused on professionals in, for example, medicine. Consequently, they were usually local, were bought by the professionals themselves and relied heavily on advertising. RE published such magazines through the business units in its Business segment and not as part of its STM business.

5.13. Because the content of each individual journal was unique and there was little, if any, substitutability between publications in terms of content, RE did not consider it appropriate simply to identify separate markets along the lines of subject area or academic discipline. There were, however, groups of readers and authors active within narrow subject areas and academic disciplines who would use the range of journals published within those narrow subject categorizations. This did not mean that any particular journal was directly substitutable for any other, as in terms of content no journal could provide the information contained in another. RE said, however, that consideration of possible competitive interaction between individual journals should be limited to those journals with similar aims and scope within a narrow subject classification.

5.14. No division by subject classification could be precise. Some journals had more general aims and scope than others and thus might contain content relating to several narrow subdisciplines. Others were very precisely focused on a narrow niche area of research. It could therefore be open to debate precisely where discipline and subdiscipline categorizations were drawn. RE believed, however, that the ISI classification of STM journals within subject areas (205 of which were relevant to this case) was a reasonable way to draw subject areas in the absence of any equivalently comprehensive or well accepted categorization. The 205 categories included all areas in which one or both of RE and Harcourt were active. RE did not consider that each ISI segment was a relevant economic market in its own right, because of the lack of substitutability between individual journals within each category and also because of possible blurring at the edges of categories. It did, however, accept that the ISI categories were reasonable groupings within which to assess the extent of the activities, and the competitive interaction, if any, of the journals of RE, Harcourt and other players.

5.15. RE did not believe that there were differences between the journals produced by commercial publishers and those produced by non-commercial bodies that would justify regarding them as separate markets or market segments. A journal produced by a non-commercial body (whether a learned society or a university press) had precisely the same function as one produced by a commercial publisher. Regardless of the type of publisher, the scientific articles contained in all primary journals underwent peer review and thus were equally valid as new, cutting-edge research. There was no difference in the way in which a researcher used journals produced by commercial and non-commercial publishers. Furthermore, journals owned by learned societies might be published by the society itself or by a commercial publisher under contract. In the latter case, the commercial publishers did not distinguish in their publishing process between their proprietary journals and society-owned journals. Finally, there was no difference in the way in which subscription agents handled the sale of journals produced by commercial publishers and other bodies.

5.16. The only difference, in RE's view, between journals produced by or for learned societies and commercially-published journals was the larger number of individual subscribers to the former category. This arose because in general all members of a learned society received the society journal, the cost of which was often included in the membership fee. In addition, non-commercial bodies might benefit from tax exemptions. These factors affected the cost structure for society journals, the ability to attract advertisements and the logistics of distribution. They did not, however, affect the content, role or function of society-owned journals in any way which would justify separate market definitions. RE believed that the financial returns achieved by learned societies' journal publishing activities and those of commercial companies were broadly similar. Non-commercial bodies might regard their journals as an important source of revenue that could be used to support their other activities and might, therefore, have similar objectives to those of a commercial publisher.

5.17. Content was the key driver in readers' choice of journals. Thus, when considered purely on the basis of demand side need for particular information, RE thought it was possible for each journal to be seen as a separate market. Given, however, that authors chose among a number of alternatives in deciding to which journal to submit a particular paper there might be some competitive interaction between individual journals at the pre-publication stage, although various different factors influenced authors' choices. RE said that such factors might include the quality and reputation of the journal, the quality and nature of the article and thus its suitability for a particular journal, the speed of publication, reprint policy, ease of submission and, increasingly, whether the journal was considered to be reasonably priced. Furthermore, libraries gave some consideration to the content and relevance of a narrow group of journals when deciding which publications to stock, and these factors also influenced academics in deciding which journals to browse through and read on a regular basis (ie without regard to the specific content of a particular journal). This did not, however, mean that there was any substitution in terms of the particular content of a particular journal.

5.18. RE suggested that the appropriate way of assessing the extent of any competitive interaction between journals (primarily in respect of author inputs) was at the level of very specific niches within subject areas. However, even within each subject area there would be journals with different scopes and aims. It believed, therefore, that competitive interaction at the level of narrow discipline or subdiscipline could not be assessed accurately without detailed consideration of the journals on a title-by-title basis, having regard to their actual content.

- *Journal publishing services*

5.19. With regard to journal publishing services provided to learned societies and others, RE said the range of services offered by a publisher differed depending on the terms of the particular contract, which reflected the actual requirements of each customer. Some learned societies merely required assistance with the physical production and distribution of a journal. Others wanted a commercial publisher to take over day-to-day running of the journal, including liaison with the editor and editorial board. In either case, a society would retain a high degree of influence over matters such as the selection of the editors, the aims and scope of the journal and its pricing.

5.20. RE did not believe that journal publishing services within the STM field should be regarded as a separate market. It suggested that the arrangements between a publisher and a learned society were more akin to joint exploitation than service provision. In most cases a publisher would receive a predetermined share of the profits or revenues from the sale of the journal in place of a fixed fee. A publisher would generally approach the day-to-day management of a society journal it produced under contract in the same way as it treated its own journals. Furthermore, researchers did not generally distinguish between learned society and other journals. If, however, we decided to regard journal publishing services as a separate service market then, in RE's view, it should be considered as part of the far wider potential market for publishing services, including the large number of companies that could manage typesetting, distribution and printing functions generally. (RE did not itself provide those services but subcontracted them out to third parties whether publishing its own or learned society journals.) Each learned society could choose whether to manage the publication itself, completely or in part (subcontracting the physical production if necessary), whether to use electronic means of distribution either by carrying this out itself or using a third party platform such as Ingenta or HighWire, or whether to contract out the management of a journal in its entirety.

5.21. RE thought that there was no basis for the market for publishing services to be subdivided. It said that a publisher did not need any expertise in the subject matter of a learned society's journal in order to carry out the contracted functions. Even where a high degree of day-to-day management was contracted to a third party publisher, the society itself would retain ultimate control of the scope of the journal and the selection of the editorial board and would be the link between the journal and the academic community.

- *Electronic publishing*

5.22. In RE's view, electronic publishing did not constitute a separate market. It was instead a new, alternative medium for distributing journals and accessing their content. It did not change the basic functions of a journal or the content of the journal. The only, but very important, effect of electronic distribution was to enhance the efficiency of dissemination. Authors, editorial boards, reviewers and readers did not distinguish between a print and electronic version of a journal: the content was the same in either case. Moreover, an electronic version would be of no more interest or relevance to a scientist than the hard copy and would not be bought by a librarian just because it became available in electronic form. RE said that there was no competition between electronic platforms as such, since the customer was acquiring the underlying content, not the means of delivery.

Potential for substitution at the boundaries of markets identified

5.23. At the widest level of market definition, RE distinguished between STM books and journals. As the scope of these two types of publication was completely different, there was no substitution between them.

5.24. At the narrowest level, with each journal title regarded as a separate market, there was unlikely to be scope for substitution at the boundaries at the time of first publication of an article in a journal. Ultimately there might be a choice between use of the original primary research and use of abstracts or review articles. Hence, there was some form of substitution between primary, secondary, or tertiary journals, provided that they included the same specific information. For the detail of the original research results, however, it was necessary to refer to the actual article in the individual primary journal. RE said that, given the very limited extent of demand side substitution between the content of any journal and the fact that any market definitions must therefore be drawn at a very narrow level, it was not relevant to consider whether the different types of journals gave rise to different markets.

5.25. In RE's view the main scope for substitution at the boundaries arose with reference to the few narrow subject groupings that could be used to determine working 'market' definitions. It said that no single method of categorization could perfectly reflect the commonality of interest between scientists, the categorization of university departments or the way in which journal selection was made by authors. There were some overlaps between areas of scientific study. A particular piece of research could potentially be of interest to scientists and researchers working in several narrow subject niches; for example, new research in genetics could be of interest to individuals active in certain areas of medicine, biophysics, biochemistry and biology. Any use of narrow sub-groupings would therefore need to recognize the potential for overlaps between areas and the inherent imprecision of such categorization.

Effects of the acquisition on competition

5.26. RE said that the STM publishing industry was large and fragmented, with thousands of publishers and tens of thousands of publications. At the most general level, competition was strong and, as barriers to entry were low and the scientific world was dynamic, there were many new entrants to the industry and journals being launched in new subdisciplines, whether by established STM players or publishers new to the STM industry. Consequently, RE considered that whatever market definition was used, the proposed merger would not give rise to any adverse effect on competition in relation to the production, sale or use of STM publications.

Overlap in STM publishing

5.27. RE said that there was little significant overlap between the content of its publications and those of Harcourt. After the merger there would still be a large number of publishers producing a large number of journals. The merger would not result in any foreclosure of access to information or publication that would either strengthen RE's position or adversely affect that of any other participant (whether publisher, author, purchaser or reader) in the industry. RE had carried out an analysis of the extent to which there was an overlap between the authors contributing to its and to Harcourt's journals within certain ISI categories. This showed that even in those ISI categories where RE and Harcourt had the greatest combined share of articles, the extent of author overlap was low.

5.28. RE said that if we were to take the view that each journal comprised an individual market then the merger would have no effect on competition. The mere fact of change of ownership of individual journals would not give rise to adverse effects. If, however, we were to conclude that the relevant markets were groups of publications within particular narrow subject disciplines, then the extent of actual overlap within those subject groups was limited. The addition of journals in other subject groups would not affect competition within any particular group, and within each group there would remain significant competition from other journals, many of which had a higher reputation than those owned by RE and Harcourt.

5.29. RE did not consider that either the total sales of STM publications as a whole or the total sales of STM journals was a relevant economic market definition. If we were to take a contrary view then RE would argue that the market positions of itself and Harcourt did not give rise to any question of market strength. RE provided details of both parties' overall STM sales in order to indicate the scale of their activities and the extent of general overlaps. On the basis of published information on the value of total STM sales, RE estimated that the combined global share of supply of itself and Harcourt in STM publishing (books and journals) was 17.4 per cent and the combined share in the UK was just over 15 per cent. Looking solely at STM journals, the figures were estimated to be 22.4 per cent (global) and 18.0 per cent (UK).

5.30. RE's STM book publishing business was small (estimated to be 1.8 per cent of global sales), its acquisition of Harcourt would not result in a significant market position (9.8 per cent of global sales) and the extent of content overlap with Harcourt was low. In RE's view, therefore, the merger would raise no issues of concern about STM books.

Prices

5.31. RE acknowledged that, during the 1990s, its subscription prices had risen by considerably more than the rate of inflation. It said that there had been high annual price increases throughout the industry in that period. It attributed part of the increase to the growth in the number of articles carried by some journals, but accepted that this was not a complete explanation. It also told us that it had experienced a steady increase in average attrition rates across its journals as a result of the industry-wide double-digit price increases that institutional libraries had been increasingly unable to afford because their funding budgets had not grown at the same rate. This discrepancy had led to a significantly higher level of cancelled journal subscriptions by libraries. In 1999 RE undertook a re-evaluation of its pricing policy in recognition of the fact that the position was ultimately unsustainable—it was not only difficult for customers but was threatening the visibility and ultimate viability of certain journals. The objectives of the pricing policy were to slow down the rate of attrition (while RE could not do this on its own, it was at least a first step) and to show good will to its customers and the wider academic community, who were increasingly unhappy and hostile because of the pricing spiral. RE's aim was to try to ensure that its journals would be sustainable by reducing the negative effects of attrition on circulation and improving its relations with authors, editors, users and customers of its journals.

5.32. Following its review RE publicly announced in 1999 that it would keep average annual price increases for subscriptions to its STM journals to below 10 per cent in its invoicing currencies (covering inflation, volume increase, attrition levels and currency risk). This level of price increase was lower than the historic and current industry average. The commitment applied to all STM journal subscriptions whether delivered in print, electronic or combined form. RE said that whatever the electronic pricing model might be in future it would commit itself to the same pricing policies as it had introduced in the paper environment, because the fundamentals in the industry did not change. RE's actual price increases since it gave its commitment were 7.5 per cent for 2000 and 6.7 per cent for 2001, although it told us that in many cases consortia of buyers had used purchasing power to obtain more favourable terms. RE assured us that the merger would not affect the commercial logic underlying its current pricing policy. The price commitment would be extended to all of the Harcourt titles that RE would acquire as a result of the merger and would substantially moderate the price increases for those titles, so that they would, on average, be lower than would be likely if the merger had not taken place. (In a letter dated 27 October 2000 to customers, editors and authors about the proposed acquisition of Harcourt, RE had already announced its intention to extend its current pricing policy to AP journals.) RE told us that its commitment on prices would continue indefinitely beyond 2001. It would consider changing its policy only if there were a significant change in the macroeconomic climate, such as a return to high rates of inflation, which would clearly make the commitment no longer appropriate.

5.33. RE's financial calculations prior to its bid for Harcourt had indicated that the transaction would enhance shareholder value. In relation to the STM business, the assessment took into account RE's assumptions on the basis of its own current pricing policy that price increases would be below 10 per cent. RE said that there was therefore no financial basis for it to impose greater price increases in order to deliver shareholder benefits.

5.34. RE said that the merger would not, in any event, increase its ability to raise prices, whatever market definition was adopted. From the demand side there was little substitutability between journals and price was not generally the main driver in a purchasing decision for individual journals (subject to budgetary constraints on institutional libraries resulting in general price sensitivity). There was little price competition between individual titles because journals were bought for their unique content. Nor did the size of the publisher have any bearing on the price of a journal. There was a number of publishers, both large and small, who were more expensive than RE on an average price per article basis. The price of a journal depended significantly on its business model and the mix of journals owned by a publisher therefore affected the average price per article charged. RE had provided information indicating that, when compared on a like-for-like basis, its journals were not significantly more expensive than those of publishers whose average price per article was lower. RE commented that the business models for journals, and thus the pricing structure, would not be affected simply by a change of ownership.

5.35. In RE's view, a number of factors was acting to reduce the commercial incentive for price increases and would continue to operate after the merger. One of these factors was attrition (see paragraph 5.31). Others were related to the dependence of a publisher on its editors and editorial boards and on the supply of third party content. Authors and editors, who were academics and researchers, had a strong professional interest in the maintenance of a journal's circulation and its availability at what was perceived to be a reasonable price. RE said that members of editorial boards would abandon journals (or threaten to do so if the publisher did not take action to address their concerns) if they were dissatisfied with the publisher's management and believed that their interests, and the wider interests of their subject, could be better served by an alternative publication. RE had observed an increasing level of price sensitivity among all members of the academic community. Authors would be less willing to contribute to journals if it appeared that price would adversely affect circulation. RE commented that various initiatives, most notably SPARC, had been developed to assist academics in launching new journals as alternatives to expensive or unpopular existing publications. The growth in electronic publishing offered greater potential for new entry and self-publishing. In addition, in the context of electronic publishing customers were exerting stronger countervailing buyer power than previously, whether individually or through consortia, which further reduced the likelihood of price increases as a result of the merger. RE provided evidence showing the price of Pergamon, JAI Press and Cell Press before and after it acquired them. It said that price rises around the time of the Pergamon merger were the result of the actions and decisions of the previous owners and not of the merger itself. From the time that RE had had direct influence, the levels of price increases had not risen. In the cases of JAI Press and Cell Press, the levels of price increases had fallen in the years when RE had set the prices after acquisition.

5.36. With regard to publishing services, RE said that contractual terms for the joint exploitation of journals by societies and third party publishers were negotiated between the parties and reflected the different needs of the different societies. Contracts typically ran for three to five years and were generally put out to tender when re-awarded. Many commercial and non-commercial publishers were available to undertake such contracts. RE did not believe that the merger could be expected to result in price increases for publishing services. Neither could it be expected to result in higher prices for STM books.

Discontinuation of titles or services

5.37. RE said that it decided to discontinue titles from time to time as part of its normal operations. It had no plans to close any journals as a result of the merger and there was no commercial rationale for doing so given that the content of each journal was largely unique and the extent of overlap in terms of aims, scope and author contribution was low. In due course it might decide that particular journals were no longer viable, in which case closure or merging of titles would be considered. Any such decision would not be as a direct result of the merger but would reflect normal practice.

5.38. With regard to books, RE said that it was common practice for publishers to carry out periodic reviews of their back catalogues. It would review Harcourt's catalogue after the merger in order to remove any out-of-date and non-commercial titles. It intended, however, to invest significantly in the book programme.

5.39. RE said that there was no scope for it to discontinue learned society journals published under contract. Some contracts contained change of control clauses that gave the society the option to terminate the arrangement if the service provider underwent a change in ownership. RE thought it was likely that certain contracts between Harcourt and learned societies would be terminated if the merger took place and that the titles concerned would be published by third parties.

Quality

5.40. In RE's view, after the relevance of a publication its quality was a key factor in any buying decision. This was largely determined by content. Like other STM publishers, RE depended on good-quality articles from academics and on the quality of its editors and editorial boards. In turn, editors and editorial boards were attracted by the quality of a publication. The importance of quality as a key driver of success would not change as a result of the merger. RE, therefore, had no commercial incentive before or after the merger to reduce the quality of its publications.

Choice and levels of service

5.41. As the merger would not directly result in a reduction in the number of STM titles available from itself and Harcourt and there would continue to be many other publishers active in this area, RE said that there would be no reduction in choice for academics seeking to publish their research. There was also scope for, and evidence of, new entry and new initiatives that would increase the choice available.

RE's ownership of frequently cited journals

5.42. RE commented that in almost every subject area the most frequently cited journal (ie the journal with the highest ISI score) was one owned by a learned society. This would not change as a result of the merger. Harcourt had only five titles (three of which were society journals) and RE had only 12 titles (three of which were society journals) within the top 100 most-cited titles across all subject areas. Their highest-ranking journals tended to be second or third most frequently cited within any particular subject area. RE said that it would not, therefore, control a significantly higher proportion of the most frequently cited journals as a result of the merger. In any event, the addition of other titles would not strengthen the position of an existing title with a high ISI rating, since this was derived from the number of times an individual journal was cited divided by the number of articles published. Whether or not an article was cited was dependent entirely on its content and the ISI rating could not be strengthened or weakened by virtue of any change of ownership. Usually, the identity of the publisher was irrelevant to the standing of a journal and readers were often unaware of the publisher's identity.

5.43. The position of a leading journal could not be enhanced by the fact that its publisher owned other journals with high ISI ratings within the same subject field. RE said that a publisher was unable to switch an article submitted to one journal to another even if it had been rejected by the first journal, because submission was the free choice of the author. In addition, the decision whether or not to publish an article in a particular journal rested with editors and referees. No STM publisher would interfere in the selection and decision process. There was therefore no question of a publisher selecting the best articles submitted to a number of its publications in order to strengthen the position of one particular publication.

5.44. The ability to attract high-quality articles and thus to maintain the ISI rating of a journal depended largely on the journal's reputation. The editor and the editorial board were central to maintaining the quality of a journal and would be committed to its success (thereby increasing their own professional status) and would not condone any attempt by a publisher to link the success of one journal to the success of another. RE said that it made no such attempt and had no practice of bundling prestigious journals with others of lower reputation.

5.45. RE believed that the ownership of a number of highly-ranked publications across a number of different fields had no effect on the ability to sell journals or attract authors in any one particular field. It said that the primary factor in choice of journal was its relevance to potential readers. There was no substitutability between journals in different, unconnected fields and very limited substitutability at any level between journals within the same narrow subject field. The assessment of a journal's relevance, and decisions by libraries to buy it and by authors to submit articles, would not be affected by the ISI ratings of other journals held by the same publisher.

RE's level of returns

5.46. RE did not accept that its level of returns implied that the STM publishing industry was not competitive. It said that, despite the essentially unique nature of the content of individual journals and thus the low level of demand-side substitutability, it faced actual and potential competition and other constraints on its actions. It had to compete for articles and to attract and retain editors and editorial boards. An increasing number of new entrants and the growing possibilities for self-publishing by societies or even individual academics or groups of academics were making the competition more significant.

5.47. RE said that the dual role of academics and researchers as suppliers of content and as end-consumers constrained it from acting in a way that would be detrimental to those parties, whether by charging excessive prices or in other ways. It believed that the perceived reasonableness of the price of a journal would increasingly be a factor in an author's choice of journal or a scientist's willingness to act in an editorial capacity. Academics had shown that they were willing to establish rival journals and initiate alternative publications instead of using commercial publishers.

5.48. Given the structure of the market, RE did not consider that the acquisition of Harcourt's titles would give it any additional strength that would enable it to increase its prices. Even within the narrow subject areas where the parties had the greatest combined activity, the overlaps were limited.

Effect on other suppliers and publications

5.49. RE said that the merger would not create market conditions that would seriously weaken other suppliers of STM publications in the UK. The ability of a publisher to obtain high-quality inputs for its journals or to sell journals would be unaffected by the merger. There was little overlap in terms of author inputs even in subject areas where there appeared to be the highest level of concentration of activity between Harcourt and RE in terms of absolute numbers of articles or journals published. This suggested that after the merger RE would not obtain a significantly higher share of author input in any STM area. In any event, authors were not exclusively tied to any publisher. Although once an article had been submitted to one journal it could not be submitted to another until it had been rejected by the first, the journal's publisher could not use a submitted article in any of its other publications unless submitted voluntarily by the author after rejection by another journal. An author remained free at all times to submit different articles to any number of different journals. Furthermore, the volume of scientific output was continuing to increase, so there was no shortage of content for STM publications.

5.50. It was important to academics that their work was published quickly and efficiently and received maximum coverage, so no author would consider only one journal, to the exclusion of others, as the vehicle for publication of a particular article. An author might have a preferred journal, but this did not mean that he or she would not consider alternatives. RE told us that there was no shortage of editors or members of editorial boards of journals. While an editor would tend to act in that capacity for only one publication, it was possible to be a member of editorial boards of several different publications: no member was exclusively tied to any one publisher.

5.51. For the reasons set out above, RE believed that the merger would not enable it to foreclose access to scientific material or editorial input.

5.52. In terms of sales of publications, a journal's attractiveness to a purchaser was judged by reference to its relevance to the end-user and its reputation. The transfer of Harcourt titles to the control of RE would not, in RE's view, enhance their saleability or reduce that of journals published by others.

5.53. RE said that the market conditions within STM publishing (namely the importance of, and lack of substitutability between, the content of journals) meant that a supplier with only one or two journals in a particular subject area could successfully attract content and subscribers. Many learned society journals had the highest reputation within a particular subject area and were often owned by parties publishing only one journal. In RE's view, this demonstrated that the size of the publisher, the number of publications or the number of subject areas covered was not relevant to strength or influence in STM publishing. RE also told us that publication of a number of journals did not give significant economies of scale or scope that would make publication of a single journal comparatively less profitable. It did not believe, therefore, that the merger would strengthen its competitive position or diminish that of others.

5.54. With regard to electronic distribution of journals, RE said that the fact that a publisher could make available a large number of its own journals on its own platform did not in any way prevent a smaller publisher from successfully distributing its journals electronically. The technology needed to publish journals on the Internet was simple, inexpensive and widely available. Alternatively, platforms such as Ingenta and HighWire and services such as CrossRef were designed to offer smaller publishers and learned societies the opportunity to make their journals available on a sophisticated platform and link them with those of other publishers. Concerns that the ScienceDirect/IDEAL package would be so large that others would find it hard to compete were, in RE's view, misplaced. It believed that there would be increased linkage of STM journal sites based on technologies such as that underlying CrossRef, which it had been instrumental in starting and continued to support. Journals would in future be accessed from a variety of platforms and a typical journal reader was more likely to use different platforms to gain access to articles in his or her specialist area than to be interested in unrelated articles on any one publisher's platform.

5.55. RE told us that it was its policy to allow publishers' databases and any other STM access formats that were in existence or being developed to link with ScienceDirect content, provided that they did so by means of industry-standard IT mechanisms agreed for that purpose. This would continue to be its policy and it would extend it to all of the Harcourt titles that would be available on ScienceDirect if the merger took place. RE said that it had on occasion refused requests for linkage in the past, but had done so only because the requests had been made before industry standards had been agreed, or a particular request had been for use of non-standard links.

Barriers to entry

5.56. RE said that barriers to entry to STM publishing were low and were decreasing as a result of the development and increasing use of electronic publishing. The merger would have no effect on these trends. RE had identified that a significant proportion of new journals was produced by new entrants. It said that some 600 new publishers had appeared in the ISI database between 1984 and 1997, representing 25 per cent of the total publishers at the end of the period. Over the same period 3,874 new journals had appeared in the database, 19 per cent of which belonged to new publishers.

5.57. Start-up costs for publishing an STM journal were low. The main initial costs lay in establishing contacts within the relevant subject area. A completely new entrant to STM publishing would have to devote more effort, time and resources to this than, for instance, an established STM publisher entering a new area. However, in RE's view, the effort involved in researching appropriate new areas for publication, establishing links with relevant scientists and establishing an editorial board was not prohibitive and was no more than would be required by any business entering a new field of activity. There were few other start-up costs. All features of publication, such as typesetting, printing and distribution, could be subcontracted. (The costs associated with those activities were ongoing operational costs rather than start-up costs.) Alternatively, or in addition, a new journal could be published electronically. To do this itself, a new publisher would need to acquire fairly basic electronic capability and Internet expertise, but this was widely available. Alternatively the publisher could make use of successful independent initiatives such as HighWire, Ingenta, Ovid, PubMed Central and Swetsnet.

5.58. Subscription agents could carry out sales and invoicing for paper publications on behalf of the publisher. All the publisher would need to do was ensure that the journal was adequately promoted and advertised. RE said that given the small numbers of scientists working in many specialized areas, even on a global basis, promotion costs were not high. In addition, the editors and editorial board would be active in promoting the new journal to colleagues and contacts, so as to solicit articles and encourage sales.

5.59. RE did not consider that economies of scale or scope were particularly significant in STM publishing or that any advantages they conferred acted as a barrier to entry. It told us that a publisher could operate effectively and profitably with only one or two titles. The low costs involved meant that it was not necessary to spread costs over a large product range in order to be commercially viable. RE drew attention to the number of publishers with only one or two journals that successfully operated in the industry.

5.60. RE told us that there were no economies of scale in respect of journal content, editors and editorial boards, since each was specific to the individual publication. Small economies of scale might be achievable when publishing more than one title, in that one employee could oversee the production of a small number of journals. The returns on any such economies were to a certain extent offset by higher overhead costs when more than a handful of journals was managed. A publisher with a number of journals might be able to negotiate discounts with typesetters or printers but these were unlikely to be substantial. Since subscription agents' commission was based on individual orders processed there were no economies of scale in terms of sales of a number of individual journals. Small economies of scale could be achieved through bulk discounts from independent distributors, for example courier companies, but this opportunity generally arose only when a large number of individual journals was involved. In most cases, because of the low numbers of subscribers for particular journals, it was cost effective to use normal postal services.

5.61. In order to provide electronic access to journal content a publisher required electronic files of the journals and an electronic distribution platform. RE said that many typesetters/printers were able to deliver electronic versions of a journal as part of their print production process. In many cases, electronic files suitable for loading on to the electronic platform without any further processing were used to transfer content between the typesetter and the printer. These electronic files were provided to the publisher at little or no cost by the typesetters/printers and the number of journals being published made no difference to the cost. There were no economies of scale to be achieved in this respect. RE said that a publisher with a larger number of journals might wish to develop its own electronic platform. A publisher with only a small number of journals might not have the same strategic rationale to invest in a sophisticated platform with search facilities (and in the absence of a large back catalogue would have no need of such a platform). It could instead either establish a simple electronic platform or make use of platforms provided, at low cost, by third parties. These platforms contained sophisticated search engines and a high degree of functionality. Economies of scale in this respect were small or non-existent.

Possible restrictions of competition

Links between publishers and the academic community

5.62. RE said that links between publishers and the academic community were an essential part of STM publishing. They did not restrict competition in any way. Publishers were entirely dependent on articles for their journals from independent academics and were also dependent on the assistance of independent editorial boards and editors in judging the quality of articles submitted. Academics needed to publish in order to announce the results of their work, to form a permanent record and to promote further discussion and advancement of their subject area. Publication also enabled their work to be validated objectively so that it could attract funding for themselves or their institutions. They therefore needed publishers. There were, however, no exclusive links between authors and journals or authors and publishers—see paragraph 5.49. Members of editorial boards were free to submit articles to any journal and also to act in an editorial capacity for other journals. In some cases editors-in-chief might be subject to non-compete provisions to prevent them acting for journals with the same subject matter while working for one journal or for a short period afterwards. RE said that these provisions were designed to protect the publisher's legitimate commercial interests and were of limited scope and duration.

5.63. RE told us that once an article was accepted by a journal, the copyright in that article was transferred to the publisher in order to protect the copyright of the journal. Copyright protected only the expressive aspects of an article and not the facts or theories expressed therein. It did not, however, prevent discussion or debate of the subject of an article within the scientific community. In addition, RE allowed its authors to use their articles for teaching and internal use.

Links between journal publishing and the provision of publishing services

5.64. RE said that no restriction of competition arose from the fact that publishers (commercial or non-commercial) also published journals for certain learned societies. These publishing services were provided under contract, usually following a tendering exercise. Contracts were usually only three to five years in duration and a society was free to switch publisher or start self-publishing at the end of that period. Many publishers offered these services and any society would have a choice of publishers.

Links between publishers and distributors

5.65. RE told us that subscription agents were wholly independent from all publishers and carried out a service for the library customers as much as for the publishers. There were no exclusive relationships between subscription agents and publishers. All agents carried price lists for a large number, if not all, of the publishers and received commission from publishers and fees from libraries for their services. Libraries were free to order journals directly from publishers, but mostly used subscription agents in order to reduce their administrative burden. In respect of STM books, there were no exclusive relationships between publishers and wholesalers or booksellers. RE did not consider, therefore, that these relationships between publishers and distributors operated to restrict competition.

Construction of databases and access to them

5.66. RE's ScienceDirect electronic platform was launched commercially in 1999. RE told us that each journal database made available through ScienceDirect currently contained every issue since 1995 and it was working to include all back issues from the inception of any journal, within the next three to five years. It said that the availability of electronic databases gave academics easier access to archived materials and thus facilitated scientific research. Such databases should also make archiving easier and cheaper for libraries. They were constructed using open industry standards and hence no publisher could attempt to exclude other publishers by constructing databases that could not be widely used and accessed from other platforms.

5.67. RE said that the development of electronic databases did not mean that paper copies of journals would cease to be available. Its policy in relation to electronic archiving ensured that, even when a customer ceased to subscribe to a journal, it would be given rights to past issues to which it had subscribed. The archive of back issues would be made available to the customer, either in paper form or electronically on CD-ROM. This meant that there was no need for a customer to continue to subscribe to ScienceDirect in order to have access to the issues for which it had already paid.

5.68. RE, in cooperation with academic libraries, was investigating how best to construct databases to ensure their longevity. The results of its work would be made available to the industry as a whole.

5.69. On the basis of the facts set out above, RE did not believe that there was any aspect of the compilation of, or access to, electronic databases which was restrictive of competition.

Bundling of titles

5.70. RE said that discounts were occasionally available for the combined purchase of certain journals where the subject matter was objectively linked. There were only a few such cases and it was always possible to buy the journals separately or in a range of combinations. In some cases supplements to large journals were published. These were not available separately as they were inextricably linked to the content of the parent journal. Except in these few special cases, it was not RE's practice to bundle together titles and to the best of its knowledge it was not the practice of other publishers in the industry. RE commented that any practices by a publisher which could be seen to serve its own commercial interests but damage the position of an individual journal, for example bundling the sale of a successful journal with a less successful one, could lead to the resignation of an editor and editorial board. This would damage reputation and subsequent sales and would thus be a commercially unattractive policy for a publisher.

5.71. In general, purchases of journals (and books) were made title by title. Customers were charged the list price for each individual publication without reference to what else they were buying and they were free to buy any selection of titles within those offered. RE did not therefore consider that there was any bundling of titles such as to restrict competition.

Mechanisms for purchasing electronic access

5.72. RE did not regard its mechanisms for the sale of electronic access as restrictive of competition in any way. Every purchaser could decide, on an individual title-by-title basis, to take a print-only subscription, an electronic-only subscription or a subscription with combined print and electronic access. The subscription price for print-only or electronic-only access (via ScienceDirect) was almost the same. The subscription price for both print and electronic was on average 10 per cent higher than a print-only or electronic-only subscription. This reflected the fact that buyers were paying for the content only once, and content accounted for some 90 per cent of the price both for print-only and for electronic-only subscriptions. RE offered purchasers free electronic access to journals purchased in hard copy by way of a system called Web Editions. This gave the customer free access, via the Internet, to articles published in the last 12 months in each journal to which it subscribed. No terms were imposed additional to a hard copy subscription, ie an annual subscription that could be cancelled or renewed at the end of the year. Customers were under no obligation to use Web Editions or to take out further licences for ScienceDirect.

5.73. Conditions of access to RE journals via ScienceDirect were negotiated with the customer. The starting point for these negotiations was a basic framework of terms and conditions, which would be adjusted to reflect the needs of individual customers. Generally, customers wanted as a first step to obtain electronic access to all journals to which they currently subscribed in print form. RE thought it likely that over time more customers would choose electronic access only to the journals previously subscribed to in print and, possibly, to other journals. Electronic delivery via platforms like ScienceDirect was still comparatively new and was changing the pricing model for STM journals by making it possible to provide access, at low incremental cost, to more content. RE was offering customers a range of options designed to provide flexibility during the period of migration to electronic delivery, together with greater value for small additional expenditure. While it had a model framework for terms and conditions of access, RE was working with its customers to establish how they wished to use electronic publications and the most appropriate way to charge for access in the future.

5.74. RE told us that discussions about the use of electronic products had taken place within consortia of purchasers or purchaser interest groupings. In the UK NESLI had agreed framework contracts with RE and other publishers over the past two years. CURL had agreed an additional deal on more favourable terms with RE, which had been incorporated in the NESLI contract. However, universities remained free to negotiate with RE outside the scope of the NESLI/CURL framework agreements.

5.75. RE had made available an option, commonly referred to as 'cross-access', whereby a customer could obtain electronic access to all or most journals within ScienceDirect in addition to those to which it subscribed directly. The genesis of this option had been deals negotiated with certain purchasing consortia worldwide who had agreed terms whereby each member of the consortium obtained cross-access to all the journals subscribed to by other members of the consortium in addition to those to which that particular member directly subscribed. This typically gave access to 700 to 800 journals.

5.76. Similar arrangements had since been agreed with negotiating groups such as NESLI and CURL. These gave electronic access to all Elsevier Science journals and thus extended the terms of the original cross-access concept. Cross-access was available to members of consortia and, in its extended form, to those entitled to use negotiated framework contracts (for example, HEI libraries in the UK) at no, or little additional cost, typically up to 5 per cent of current subscription expenditure on print journals.

5.77. A contract including a cross-access option was typically of two to three years' duration. The customer agreed to maintain, during the contract period, a spending level equivalent to its historic print subscriptions, although it could readjust its holdings within that subscription level. RE said that taking historic print subscription expenditure as a base spending level was a fair way of measuring the value to the customer of material currently being accessed and the likely use. The customer had the benefit of an agreed cap on price increases during the contract period. The requirement to maintain the spending level during the term of the contract had been introduced because, without such a commitment, a customer could easily cancel a substantial proportion of its current subscriptions (in the extreme case, all but one) but keep electronic access to the cancelled journals under the cross-access terms virtually without cost. As well as making more content available at a low unit cost, the contract had the advantage of allowing the customer to monitor accurately, for the first time, the use made of particular journals and thus to evaluate its holdings at the end of the contract period. In addition, cross-access removed the need to incur the cost of inter-library loans and document delivery for non-subscribed titles and so could represent a saving.

5.78. RE said that at the end of a customer's current contract it would enter into negotiations with the customer for new licences for subscriptions. Its policy was to allow customers to subscribe to whatever number of printed journals and level of electronic access best met their needs, and it would seek to accommodate any combination of options. Where however, a customer with a cross-access arrangement wanted to continue obtaining full electronic cross-access to all journals after its contract ended while at the same time cancelling, say, 50 out of 200 subscriptions in order to reduce total expenditure, it would not automatically receive cross-access at the revised price. There would be negotiations at that time that would reflect the value and usage of the 50 cancelled journals that the customer still wanted to obtain electronically. RE stated that it would not be its practice to impose any form of bundling, ie refusing to sell any journal or access option except as part of a wider package.

Linking of purchase of printed titles and electronic access

5.79. RE said that at present most of its electronic licences were sold in combination with print subscriptions not because it had in any way tied these together but because it was what customers wanted. The subscription price for access to both print and electronic journals was on average 10 per cent higher than a print-only or electronic-only subscription because buyers were paying for the content only once (see paragraph 5.72). The link between libraries' print purchases and payment for electronic access had been explained (see paragraph 5.77). RE thought that over the next five years or so most customers would continue to subscribe to both print and electronic access, a small but growing minority would subscribe to electronic-only access and a an even smaller and shrinking minority would subscribe to print-only access. The current pricing model seemed likely to endure over that period.

5.80. In the cross-access arrangements described in paragraphs 5.75 to 5.77 the customer received access to the entire database at little or no additional cost. RE said that the customer was permitted to cancel an individual print subscription and receive the journal electronically only, at a lower price.

5.81. RE stated that it did not impose any exclusivity requirements relating to the use of ScienceDirect. Customers were free to buy electronic platforms available from other publishers and any other journals, whether electronically or in print, from other publishers. RE said that it was a member of PILA, which had developed CrossRef with the aim of ensuring that content in each publisher's electronic platform could be easily linked to give users access to all relevant content. ScienceDirect used web-based technology that was compatible with software available on almost every PC, so there was no need for a library to invest in any particular hardware or software to use it.

Anti-competitive practices that might arise from the merger

Tying in authors by exclusive contracts

5.82. RE confirmed that authors of STM articles were not tied by exclusive contracts with any particular journal or any particular publisher (see paragraphs 5.49 and 5.62). As publishers were dependent on academics for submission of articles they could not risk jeopardizing those relationships by imposing such terms against the wishes of the academic community. That would continue to be the case following the merger. Authors would have plenty of scope for publishing their work in other journals, or by other means, if RE tried to adopt such a strategy.

Excessive pricing

5.83. RE said that the merger would not give it any additional strength in any market (however defined) such as to enable it to charge excessive prices. It maintained that on a price per article basis for journals with similar cost structures its journal prices were not notably higher than those of many other publishers and in some cases were lower. Current constraints on RE's pricing activities (see paragraph 5.35) would continue after the merger.

Forcing portfolios of journals

5.84. RE stated that it did not require its customers to purchase portfolios of journals and had no intention of introducing such a requirement. The merger would not increase its ability to do so. Demand for any journal arose from its content, its relevance to readers and its reputation and quality. Any artificial tying of sales of some journals to sales of others would not reflect the way purchasing decisions were made and would inevitably meet strong opposition from authors, editorial boards and libraries. RE was not in a position to adopt such a strategy either before or after the merger without suffering loss of sales, content and editors.

Failure to supply back numbers

5.85. RE told us that it maintained back issues of journals and supplied them as required. If it received a request for a back issue that was out of stock, RE would generally make a copy rather than reprinting, the costs of which would be significant. It made an additional charge to reflect the cost of obtaining, copying or reprinting particular back issues. RE stated that its policy would not change as a result of the merger. It was committed to electronic archiving of its journals, as explained in paragraph 5.66. After the merger this policy would also apply to Harcourt journals.

Attempts to preclude other publishers' titles from the market

5.86. RE said that STM publishing was too diverse and fragmented for one publisher to be able to preclude other publishers' titles from the market. It would never be possible, given the continual growth and diversification of academic research, for one publisher to have sufficient power within any academic field (never mind STM as a whole) to preclude access to STM content. While STM content was available and published, those publications would be of use to readers and so would find an audience. RE commented that the extent of recent new entry, the continual growth of new entry and the number of incumbent players in the industry demonstrated the impossibility of any attempt to preclude another publisher's titles. Nor was there any realistic method by which this could be done, since no publisher had control over the distribution chain or over the supply chain for author inputs.

Countervailing power of buyers

5.87. RE said that institutional customers had been content to buy paper journals through subscription agents in order to avoid administrative costs. Certain corporate customers had, however, negotiated discounts when buying a large number of individual subscriptions. In the electronic environment buyer power was very prevalent because negotiations for electronic licences were conducted between the institutional customers, or consortia representing a number of such customers, and the publisher. This had led to customers individually negotiating favourable terms for their institutions and to the growth of powerful purchasing consortia and negotiating bodies.

5.88. Buyer power also derived from the dual role of academics as content providers and consumers. RE said that this had been evidenced by the resignation of editorial boards in order to establish rival publications in situations where they were dissatisfied as customers of the journal. It provided a number of examples where this had happened or where the threat of resignation had influenced publishers' decisions about subscription prices. RE commented that publishers could not afford to take commercial decisions that jeopardized their relationships with academics. Furthermore, initiatives such as SPARC had demonstrated that academics were willing to start their own publications, thus becoming actual or potential competitors to RE and other publishers.

5.89. There were a great many STM publishers and publications, even within the 14 ISI categories where RE and Harcourt had the greatest combined activity. There had also been significant new entry to the market in recent years. RE said that these facts demonstrated the ease with which authors could find alternative outlets for their work. While most published content in most STM journals was unique this did not mean that one journal could not replace another in terms of its ability to attract high-quality research. Although journals with a high impact factor were generally the most popular in attracting submissions, there was also available a large number of lower impact journals, and this would not change as a result of the merger. RE said that it did not have a disproportionate share of high impact journals and nor would it have as a result of the merger.

5.90. RE told us that the use of inter-library loans and document delivery services had increased with the failure of library budgets to keep up with the price increases (resulting from inflation, volume growth and attrition) for academic publications. These services provided a genuine alternative way of obtaining content for a particular user and removed the need to subscribe to particular journals. RE believed that the use of these services would continue to increase as far as print was concerned. However, the need for them would eventually decline as more content (including historic content) became easily accessible at low additional cost through electronic platforms.

5.91. RE said that the increasing use of electronic-only publications and Internet community groups for the dissemination of information was facilitating new low-cost entry, leading to a number of initiatives within the academic community and potentially diminishing the role of the traditional publisher in the dissemination of peer-reviewed scientific research. There was also evidence that academics were seeking alternative sources for new ideas (for example, services which published papers on the Internet) and were taking opportunities for self-publishing. This was an example of the power of academics that was stimulating traditional publishers to review and improve their services and to be increasingly responsive to the needs of the academic community.

Public interest benefits of the proposed merger

5.92. In RE's view, the following public interest benefits could be expected as a result of the merger:

(a) Customers would continue to benefit from RE's publishing expertise and commitment to the STM field. Harcourt would become part of a dedicated international publishing company with the strategy and focus necessary to ensure that customers received publications of high quality with the benefits of increased functionality and value resulting from increased investments in online delivery.

(b) A large number of Harcourt employees in the UK would have security of employment as part of a large European publishing organization. There were job creation opportunities as a result of RE's commitment to invest in Harcourt. [*Details omitted. See note on page iv.*]

(c) Harcourt and its customers would benefit from many industry initiatives where RE had been in the lead, including CrossRef and Adonis. It would also benefit from RE projects, such as, in the past, the TULIP project, designed to assess customers' needs for electronic delivery, and from future initiatives.

(d) Harcourt journals would benefit from RE's commitment to, and investment in, maintaining an active electronic archive and providing all subscribers with access to it. Its programme to create an electronic archive of all RE journals would be extended to the Harcourt portfolio.

(e) RE's commitment to keep price increases to less than 10 per cent would also apply to Harcourt journals after the merger. Price increases for those journals could therefore be expected to be lower, on average, than in the absence of the merger.

(f) The integration of Harcourt, a US company, within RE, an Anglo-Dutch company, would ensure the profile and success of Harcourt's UK operations and enhance the continued UK and European activities within this global business.

Harcourt

Market definition

The geographic market

5.93. Harcourt said that the relevant market for STM journals was global. A number of factors supported that conclusion: Harcourt operated its business on a global basis with some 30 per cent of its journals being published in the UK and 70 per cent in the USA; most of the print production for Harcourt journals published in the UK now took place overseas; and Harcourt's STM journals were distributed and sold globally, regardless of their origin. It said that, overall, its STM journal revenue split in the year 2000 was 5.7 per cent in the UK compared with 52.4 per cent in the USA and 41.7 per cent in the rest of the world.

5.94. Within the overall geographic split, there might be, for certain journals, some slight emphasis towards sales in a particular country or region. Harcourt said that this might be so with some health science journals, or those with a following among learned society members or individual practitioners, but in its view the geographical differences between sales were insufficient to qualify the conclusion that in all relevant respects the market was global. Harcourt pointed out that even in the case of its UK imprints of medical and health science journals with significant sales in the UK around three-quarters of all sales were made overseas. Harcourt had identified 14 ISI subject categories in which there was a significant overlap between its journals and those published by RE. In none of these categories was a substantial proportion of Harcourt's sales made in the UK.

5.95. Harcourt said that it did not operate a regional pricing policy for its STM journals. For UK publications, a single price was set globally. The US publications were also moving to a single global price although for historic reasons AP and HHS in the USA had charged a premium for higher post and packaging for all sales of their print STM journals outside the USA.

5.96. For the reasons set out above, Harcourt did not consider that the UK was a relevant market for any of its STM journals.

The product market

- *STM journals*

5.97. In Harcourt's view, STM journals were not part of a wider market. It said that STM publishing was an integral part of the cycle of scientific and medical research and development, whereby new ideas and theories were subjected to academic discussion and validation before gaining consensual acceptance and entering the mainstream of acquired knowledge. STM journals performed the important function of providing peer review by expert editors and editorial boards of original work submitted by scientists and researchers. The editors and editorial boards decided whether or not the work would be published in a particular journal. STM journal readership comprised or included academics and researchers throughout the world, who would over time discuss and validate the article in question. In some cases, readership would also include members of learned societies or practitioners in particular health science fields.

5.98. Harcourt said that it followed from the function of STM journals that they did not serve the same needs as, and thus were distinct from, what might be called 'local content' journals, particularly in the health sciences. These journals might contain academic contributions (typically not peer reviewed) as well as other editorial content (such as professional and regulatory news, notices and advertisements) and which were primarily directed to practitioners and professionals in a particular country, rather than academics and researchers more widely. Journals that had a large number of individual subscribers and attracted advertising had a different pricing model from that of STM journals sold primarily to institutions.

5.99. Harcourt also believed that STM journals were distinct from STM books. It said that STM books included review journals or book serials, which consolidated research findings to provide a more accessible overview on the subject, as well as monographs, encyclopaedias and high-level textbooks.

5.100. Harcourt said that it was necessary to classify journals by reference to the academic disciplines and research areas they covered as a first step towards identifying overlaps between its STM journals and those of RE. This was necessary both for supply side reasons (journals, contributing authors and editors and editorial boards each having specialized interests) and demand side reasons (for example, an astro-physicist would not be interested in zoology or oncology and might have only a limited interest in other areas of physics).

5.101. As a starting point, Harcourt suggested use of the ISI classification of STM journals into 205 separate subject matter areas or disciplines. Subject matter areas thus described represented the outer bounds of any product market that might be recognized as relevant for economic analysis.

5.102. Harcourt's own analysis of the extent of overlap between its and RE's STM journals concluded that:

(a) within the 205 ISI subject matter areas, a test of a post-merger share of articles published of 40 per cent with a 5 per cent accretion resulted in the identification of 14 subject matter areas;

(b) exclusion from the calculation of journals published by either RE or Harcourt on behalf of a learned society reduced the number to eight subject matter areas;

(c) once the markets were analysed so as to take account of journal standing (measured on a share of citation or impact factor basis), the list was further reduced to five or six areas;

(d) those five or six ISI subject matter areas together represented only about 4 per cent of all STM journals covered by ISI; and

(e) there were, in each of those subject areas, a number of other well-established journals of high reputation from third party publishers.

5.103. Harcourt believed that there were no grounds for segmenting the market by reference to whether journals were published by a commercial publisher or by a not-for-profit publisher such as a learned society or university press. It said that all STM journals, whatever the identity of the publisher, performed a similar function. All publishers, regardless of type, were seeking high-quality content and editors and editorial boards that would enhance the standing and reputation of their journals. Many academics published in or served on the board of several journals, produced by both commercial and not-for-profit publishers.

5.104. Journals from both types of publisher were found across the whole range of subject matter areas identified by ISI, but Harcourt commented that titles could not be neatly classified by reference to the identity of the publisher as commercial or not-for-profit. In particular, many not-for-profit learned society journals were published under contract by commercial publishers and even self-publishing not-for-profit publishers typically ran STM journal publication as a commercial activity to generate funds to support other objectives.

5.105. While many not-for-profit learned society or university press journals enjoyed a high reputation (based on influence or impact factor), this was equally true of a number of commercially-published journals. Harcourt said that the 15 leading publishers of top-ten ranked journals in the 205 ISI categories comprised three societies, two university presses and ten commercial publishers. However, the ISI data attributed only self-published journals to societies and therefore the position of the commercial publishers would in part be attributable to journals published on behalf of societies.

5.106. Harcourt said that, if the ISI subject matter areas represented the outer bounds of any relevant economic market, then it could be argued that each journal constituted a distinct market, since each peer-reviewed article it contained was an individual and original contribution, not reproduced elsewhere and not substitutable by another article. Harcourt suggested that competition was on a journal-by-journal basis, with publishers positioning their journals, and measuring their performance, against a limited range of other selected journals in the same discipline. That might suggest that small clusters of journals could be regarded as distinct markets.

- *Journal publishing services*

5.107. Harcourt believed that the correct approach to analysis of the market was to concentrate on the output of publishing (ie the STM journals) rather than on the activity itself. It commented that few, if any, aspects of STM publishing set it apart from other types of publishing, and that many of the component parts of the publishing process were habitually contracted out. It suggested that these factors made it unsatisfactory to regard STM journal publishing in market-definitional terms. In any case, neither RE nor Harcourt had any power in such a market.

- *Electronic publishing*

5.108. Harcourt viewed electronic publishing not as a separate market but simply as an alternative means of distribution of the same product. In support of this view it said that the means of delivery of STM journals were irrelevant to their function. Established publishers of STM journals tended to make content available both in printed and electronic form. The target audience of academics and researchers in institutions was unchanged, regardless of means of delivery. The immediate purchaser was the institutional library and the choice made at point of purchase related not to content (which was identical and was the overriding consideration behind purchase) but to cost and convenience in use of the alternative delivery systems.

5.109. Harcourt did not ignore the fact that convenience and functionality might differ between printed and electronic delivery. It suggested, however, that the distinctions were no different or greater than, for example, those between analogue and digital delivery of mobile telephony where the fundamental service was the same. Harcourt thought that we would be wrong to draw an artificial distinction between the two means of delivery and that by so doing we would fail to recognize that the delivery mechanisms were dynamic and in an evolving state, thus providing competitive opportunities for third parties.

Potential for substitution at the boundaries of markets identified

5.110. Harcourt said that the definition of markets was not susceptible of scientific precision, so there might be scope at the margin for classifying some journals as falling into more than one of the ISI subject areas or for treating a serial periodical as a journal or a book. These were, however, questions of classification alone. They did not address the issues of substitutability and external constraints on the behaviour of competitors in any so-called market.

Effects of the acquisition on competition

5.111. Harcourt reminded us that we had to investigate and report on whether the creation of a merger situation operated or might be expected to operate against the public interest. It commented that it was necessary for us to establish a causal connection between the merger and the public interest detriment that we identified. In the absence of such a causal connection, a public interest detriment could not serve as grounds for an adverse finding in respect of the merger. Harcourt further commented that the presumption under the law lay in favour of letting a merger proceed, and any public interest detriment must be identified with a sufficient degree of probability as flowing from the merger. Harcourt said that earlier MMC inquiries had established that the test required, as a minimum, a ‘reasonable expectation’ of public interest detriments: without such an expectation, the merger should be allowed to proceed.

Prices

5.112. The pricing models for STM journals varied according to whether or not a journal had significant sales of individual subscriptions and attracted advertising. Harcourt told us that some journals, especially those in medicine and the life sciences, had substantial sales to individuals (practitioners and/or learned society members) as well as to institutions. Such a journal might have a circulation of, say, 10,000 as opposed to around 500 subscribers to a journal sold only to institutions. This would change the pricing model in a number of ways. As circulation increased, the unit costs of the journal would fall, with fixed and semi-variable costs spread over a larger sales base. The publisher would obtain a substantial income from individual subscriptions—40 per cent of its UK revenues in the case of HHS. As individual subscribers tended to be more price sensitive than institutions, a publisher needed to take care in setting individual subscription prices, or in increasing them, that prices were not out of line with those of other journals in the same subject area, or were not excessive. Otherwise individual subscriptions would be cancelled. A substantial individual subscriber base allowed a journal to attract significant advertising revenue, which, being highly dependent on circulation, could be lost if subscriptions were cancelled as a result of pricing decisions.

5.113. Harcourt said that STM journals were atypical in that there was little functional substitutability between one journal and another: academics and researchers wanted access to particular journal content and the choice of journal was dictated primarily by this and by the reputation of the journal in question. On institutional sales, the price of a journal in absolute terms, and certainly relative to another journal, was a secondary consideration at most. There was little price elasticity of demand.

5.114. Over recent years, certain factors had constrained STM journal pricing to some extent: in particular, librarians had been forced to cancel journal subscriptions because budgets had not kept pace with the growth in STM journal content. They were increasingly relying instead on alternatives like inter-library loan and document delivery arrangements. Reduced subscriber numbers for particular journals had resulted in income attrition and higher unit costs. Publishers might choose to moderate their price increases to mitigate these effects.

5.115. Harcourt said that the introduction of new technologies gave coalitions of academics, learned societies, librarians and funders opportunities to bypass publishers, for example by using independent electronic platforms like HighWire and Ingenta. These groups were seeking to use their ability to use other channels as a means of exercising leverage in their dealing with publishers.

5.116. These pressures were already at work in the market and would continue to be so, regardless of the merger. There were many publishers, and barriers to entry and expansion were low. Harcourt said that, for so long as that continued to be the case, there could be no reasonable expectation that the proposed merger would result in any higher prices. Indeed, RE (no doubt recognizing the forces at work in the industry) had already given certain ongoing public commitments regarding future price increases, which would, Harcourt understood, be extended to cover the STM journals to be acquired as part of the merger. In Harcourt's view, RE would have to honour its commitment in order to maintain its credibility in the marketplace.

Discontinuation of titles

5.117. Harcourt said that STM journals succeeded on the basis of the reputation of their editorial boards and the quality and authority of their contributors. There was an increasing amount of academic content available to be published and this encouraged publication of a range of STM journals. For so long as a journal was profitable, there was no incentive on the publisher to discontinue it. The merger would change none of that.

5.118. There might be an incentive to amalgamate two titles with similar content but, Harcourt said, this would be done only where the publisher was confident that the merged publication would succeed to the status of its predecessor titles, or where loss of subscriptions had undermined the profitability of one or other title in the first instance so that amalgamation would preserve a journal that might otherwise be lost. Changes of this kind occurred in the normal course of events and the merger would make no difference.

5.119. More generally, any discontinuation of titles following the merger would be unlikely to produce effects contrary to the public interest. Harcourt said that diversity of journal content was a driving force in the industry. Furthermore, there was no shortage of content, the pressures to publish were strong and barriers to entry were low. There was, therefore, no risk of material loss of published content or choice.

Quality, choice and levels of service

5.120. Harcourt regarded RE as an established, expert and committed publisher of STM journals. Quality, choice and level of service were integral to success in STM journal publishing. There would in any case be pressures on RE to maintain adequate standards after the merger: there would still be several other large and established publishers of STM journals; learned societies would still have the option of publishing their journals in-house or finding an alternative commercial publisher to RE; barriers to entry and expansion were low, and falling in consequence of the availability of new technology; and academics, institutional librarians and even funders could exercise pressure in a variety of ways. In Harcourt's view, there were no grounds for concluding that the merger would adversely affect quality, choice or service available to customers.

RE's ownership of frequently cited journals

5.121. Harcourt said that in 1999 it had five journals (of which three were published on behalf of learned societies) which were among the 100 journals with the highest ISI citation factors. [*Details omitted. See note on page iv.*] Harcourt also had some 61 journals (of which 42 were owned by or affiliated to learned societies) that enjoyed a top-ten ranking in the 205 ISI categories. Apart from society journals that had left or were leaving Harcourt, those journals would, in the first instance at least, be acquired by RE if the merger took place.

5.122. In Harcourt's view, little turned on those facts. It said that 61 top-ten ISI-ranked journals was a share of only some 5 per cent (which when added to RE's 282 corresponding top-ten ISI-ranked titles still only amounted to a 27 per cent combined share). As some of the journals were owned by learned societies any share would be more realistically attributable to the societies. Reputation and standing belonged to the journal (and indirectly, its editor and editorial board) and did not accrue to the commercial publisher to any significant extent. In consequence, there was no particular reputational benefit to be gained from publishing a number of well-regarded journals. This explained why, within the 205 ISI categories, there were no less than 80 different publishers of the top-ranked journal in any given category and around 350 publishers of a top-ten ISI-ranked journal.

5.123. Harcourt said that RE would gain no additional reputational or commercial benefits from its acquisition of Harcourt's titles, over and above ownership of the titles and their associated revenues. Ownership of a particular journal with a high standing did not confer any ability to leverage or 'pull-through' other journals in the same ownership. The standing of a journal was unique and not readily transferable to another journal; authors (not publishers) chose where articles were submitted for publication; and editorial boards were independent.

5.124. RE would need to acquire the support and goodwill of the learned societies whose journals were currently published by Harcourt. The societies could choose to take journal publication away from RE and either do it in-house or find another commercial publisher. In the last three years society journals representing over $[✂] million had left Harcourt and it knew of further instances where societies were actively considering such a step.

Effects on other suppliers and publications

5.125. In Harcourt's view, it would be wrong to assume that the current market conditions were likely to change significantly in consequence of the transaction. It said that the expansion of RE would bring neither special scale benefits nor any particular reputational benefits. Instead, following the merger:

(a) there would continue to be a large number of academics writing papers for publication or prepared to serve on editorial boards or act as referee;

(b) there would still be many publishers of STM journals, both large and small;

(c) barriers to entry and expansion would remain low and fall further under the impact of new technology and a variety of industry initiatives;

(d) new journals from a variety of sources would be successful: around 120 recent top-ten-ranked journals (ie those which published no papers cited by the ISI five years previously) had appeared in the ISI citations for 1999, from over 50 different publishers, including learned societies and university presses as well as commercial publishers.

There was in consequence no risk of market foreclosure to the detriment of other suppliers of STM journals.

Barriers to entry

5.126. Harcourt said that barriers to entry and expansion were low in STM publishing. Statistics indicated a large number of recent new entrants (over 600 in the period 1981 to 1997) and new journals (nearly 4,000 over the period 1986 to 2000, 42 per cent of which were published by new market entrants). Many of these had achieved high recognition within a few years (see paragraph 5.125*(d)*). Learned societies and university presses were as well represented as commercial publishers among new publishers and journals. New publishing opportunities frequently came about as new areas of scientific research and development opened up, for example genomics, and researchers sought publication of peer-reviewed research.

5.127. Harcourt supplied further information to the effect that 21 publishers had each launched more than 20 new titles in the previous ten years (ranging from 21 to over 350 titles). Harcourt said that in terms of numbers of papers published, over the period 1994 to 1998, 109 publishers had experienced growth of over 100 per cent, a further 126 growth of over 50 per cent and a further 184 growth of over 25 per cent. These growth rates were not limited to small publishers adding small numbers of papers. Within the top 100 publishers (by number of papers published) growth rates varied from over 448 per cent to –67 per cent. Harcourt maintained that, on the basis of those figures, there was no doubt that competitors had experienced real growth.

5.128. Learned societies had been particularly active in the launch of new journals. Harcourt suggested that this might be because they were prepared to launch journals where a commercial publisher would not see a sufficient potential for profit. Commercial publishers might also have narrower perceptions of demand for new journals than societies, which had immediate access to the views of their members.

5.129. Harcourt said that the requirements for new entry were minimal:

(a) journal content was provided by authors, who had significant ‘publish or perish’ incentives;

(b) content was peer reviewed free of charge by other academics;

(c) there was no shortage of academics willing to act as journal editors or to serve on editorial boards;

(d) journal planning and design could be done quite simply through desktop publishing and over-the-counter software; alternatively self-publishing kits might be available from initiatives such as SPARC;

(e) typesetting, printing and binding were invariably outsourced, even by the larger commercial publishers;

(f) distribution could be done online, or through subscription agents or freight forwarders;

(g) marketing could be done online, by word of mouth within the academic community, or by relatively inexpensive mailshots to libraries; and

(h) patents were not significant within STM publishing and there were no licence or other regulatory approval requirements.

5.130. Harcourt added that a significant portion of costs in STM publishing was variable and there were very few sunk costs in printed journal publishing. Most of the costs—printing, binding, postage and packaging—arose only if and to the extent that a journal was successful. As a result, the costs of entry (and exit) were low. Although new entry was easy for all, Harcourt said that learned societies were particularly advantaged in this respect for a variety of reasons including their tax exempt status and the absence of any need to satisfy shareholders interested in financial performance ratios.

5.131. Harcourt explained that barriers to entry had been further reduced by the introduction of new technology, for the reasons that follow.

5.132. First, the costs of publication had been reduced in several ways:

(a) the availability of journals in electronic form minimized or in some cases entirely avoided printing costs;

(b) planning and design costs had been reduced through the ready availability of desktop software and over-the-counter software;

(c) costs of packing and posting journals could be reduced or even eliminated through electronic distribution; and

(d) new forms of online promotion of journals could substantially reduce marketing costs to end users and librarians.

5.133. Second, online information and communication made it easier to identify and react to trends. The greater transparency made it easier to identify potential demand for a new journal or dissatisfaction with existing journals.

5.134. Third, it allowed learned societies and academics to take over some of the project management roles traditionally assumed by commercial publishers. For example, the process of peer review could now be conducted entirely online with little publisher involvement and the marketing of new journals could be done quickly and effectively online, minimizing any time lag between launch and recognition. This trend facilitated new entry.

5.135. Fourth, hyperlinking and other forms of electronic cross-referencing within electronic journals increased the accessibility and visibility of journals other than those published by incumbents or category leaders. An important development in this respect was the CrossRef initiative of PILA, an association of publishers that included Harcourt. CrossRef allowed for the hyperlinking of articles published by 67 different publishers, including not-for-profit publishers. It was an open system through which disparate files, journals, books and other information sources could be searched. More than 1 million articles were already accessible using CrossRef.

5.136. Fifth, electronic platforms such as HighWire and BioOne offered new entrants, in particular learned societies, the electronic infrastructure necessary to access a large subscriber base. The availability of this infrastructure overcame any sunk costs associated with establishing an electronic platform and thereby minimized the costs associated with new entry into STM publishing. Harcourt described the variety of options available and said that all publishers, regardless of size, could achieve electronic distribution. Size, and therefore scope for investment, would be one factor in determining whether a publisher should establish its own platform, establish a joint venture with another publisher, use an existing platform for a fee or publish journal by journal on simple web sites. Each option gave access to users globally and could be adopted in conjunction with a variety of pricing models.

5.137. In Harcourt's view, the proposed merger would have no effect on entry or future expansion by other publishers. The contacts (and opportunities for new contacts) with potential editors and authors and the options for distribution (postal services, subscription agents, electronic platforms) would be unaffected. Established electronic platforms would also be unaffected by the merger. There was no risk that libraries or individuals would cancel access to such platforms, because access was free and the user paid only for such content as it desired, either in the form of pay-per-view or under subscription terms agreed direct with the publisher.

Possible restrictions of competition

Links between publishers and the academic community

5.138. Harcourt said that the relationship between publishers and the academic community was open and non-exclusive. Contributing authors were not bound to publish in one journal only (though they were required to say that any article submitted for publication was original and had not been simultaneously submitted elsewhere) and many of them did publish in different journals. A journal editor would usually agree not to edit another comparable journal while remaining in the editorship role, but extended post-term prohibitions were not typical. Other members of an editorial board could at the same time interact with other journals in various capacities (contributor, editor, editorial board member, referee etc) and many did so. There was no lack of independence of mind among the academic community and academics had not hesitated to exert pressure on STM publishers through such initiatives as direct electronic publishing, by editorial boards resigning in protest over journal pricing and, increasingly, by lobbying on such issues as free access via the Internet to information immediately after publication.

Links between journal publishing and provision of publishing services

5.139. Although Harcourt published journals under contract for some learned societies, as did other commercial publishers, any such arrangements were typically of limited duration (three to five years, coupled with a right to terminate on change of control), allowed the society to retain copyright and choose the editorial board and gave the society a strong influence over journal pricing. Societies could, and did periodically, decide to publish in-house or change their commercial publisher. Harcourt provided a few examples of recent moves in these directions by certain societies.

Links between publishers and distributors

5.140. Harcourt said that there was no market foreclosure in regard to relationships between publishers and subscription agents, who operated as independent intermediaries on a basis of non-exclusivity. Agents would list the STM journals of a wide variety of publishers and place orders for them on behalf of institutions.

Construction of databases and access to them

5.141. Harcourt stated that it was not its practice to establish databases or search facilities that prioritized or gave preference to its own (or another publisher's) journals over those of third parties. Instead, data was displayed by reference to search terms, chronologically, alphabetically by author or otherwise so as to provide the greatest assistance to the end-user.

Bundling of titles

5.142. Harcourt stated that it did not pursue a practice of bundling titles. Print titles were sold on an individual basis, with the few exceptions of pairs of journals in related areas also being available as a package at discounted rates. AP might also offer to supply an additional new journal at a preferential introductory rate to subscribers taking a journal in a related area.

5.143. With regard to electronic access to journals, Harcourt offered a variety of options on its IDEAL electronic platform. These include pick and choose access (of various kinds) for institutional subscribers, enabling them to choose the individual AP titles to which they required access and to select single user access or one of two levels of concurrent access. Pay-per-view access to specific articles was also available, at a price of $35 per article. The pay-per-view option covered articles from all AP and HHS journals.

5.144. Harcourt also made its AP journals available to institutional subscribers on the basis of its APPEAL licence. Here the licence fee for electronic access was based on the value of recent and relevant print subscriptions held by participating institutions (so there was no element of full-line forcing in the pricing). This figure was used to determine the base price and the APPEAL licence fee was a percentage (between 90 and 94 per cent) of the base price. Institutions with an APPEAL licence were entitled to buy print subscriptions to AP journals at 25 per cent of list price. Harcourt told us that the APPEAL offering was designed to encourage switching from print to electronic delivery and it had proved both attractive to institutions and successful in achieving that objective.

5.145. Harcourt stated that universities and consortia taking the APPEAL licence made overall savings, as they had access to content not previously subscribed to and avoided the costs of inter-library loan for such articles.

5.146. Harcourt commented that electronic delivery of STM journals was still relatively new and publishers were still seeking to agree suitable pricing structures with their customers: the initiatives of NESLI, CURL and consortia such as the Southern Universities Purchasing Consortium showed that there were different preferences for contractual models.

5.147. Commenting on evidence put to us that 80 per cent of one institution's spend on electronic journals was accounted for by Harcourt and RE, Harcourt said that it was impossible to comment categorically without knowing the identity of the institution. Nevertheless it believed that the figure was likely to misrepresent the general position and might be largely explained by the fact that different publishers used different pricing models. Harcourt's model was a base price of 90 per cent of previous subscription costs and 25 per cent of the subscription cost for print copies. Therefore, of the total Harcourt subscription cost, at least 78 per cent would be attributable to electronic access.

5.148. On a similar analysis for Wolters Kluwer online journals, the price for electronic journals was a 20 per cent addition to the print subscription. Thus, in the librarians' accounts, the print subscription would account for the bulk of the spend, with a much smaller percentage being attributable to electronic delivery. In fact, the additional costs for taking electronic access in addition to print would be greater (120 per cent) for Wolters Kluwer than for Harcourt (115 per cent), but because of the different ways of allocating the costs, this could be misrepresented in the librarian's accounts for electronic spend. There were other publishers with a similar model, while yet others gave 'free' electronic access to print subscribers, effectively bundling print and electronic access for institutional subscribers. In such cases no spend on electronic access would be recognized by the librarian, whether or not the print subscription was priced higher to reflect the additional delivery options.

5.149. Harcourt concluded that in the current state of evolution of electronic pricing models it was impossible to make a sensible comparison of the percentage of electronic spend attributable to any publisher. Those publishers (including Harcourt and RE) who attributed a large proportion of the total price to electronic access would have their share of spend overstated in comparison with others.

Mechanisms for purchasing electronic access

5.150. Harcourt said that its IDEAL electronic platform did not host any third party STM journals, though RE's ScienceDirect platform did. Harcourt journal content was licensed to be supplied on other competing platforms, notably Ingenta, HighWire and Ovid. Use of any of these and similar options allowed publishers to retain control over charging for access to their own STM journal content. There was a variety of charging models for different combinations of electronic and print access. In the interests of making research widely available, Harcourt and other members of PILA supported CrossRef (see paragraph 5.135).

5.151. It was a misconception to believe that only the large commercial publishers were successful in providing electronic platforms. Harcourt said that this was countered by the facts about three examples of such platforms:

(a) Ingenta offered full text access to over 2,800 journals from over 35 leading publishers. As with other third party platforms, the control of the subscription, and therefore access rights to the journals, remained with each of the publishers. However, a user with a subscription, or using pay-per-view services, did not need to leave the Ingenta site to access any of the content covered by subscription. A number of commercial publishers (including AP, Blackwell Science, Wiley and Elsevier Science) had journal content hosted on the Ingenta platform as well as including it on their proprietary platforms. Other publishers without proprietary sites used the Ingenta

platform exclusively. Overall, Ingenta was considerably bigger than ScienceDirect, which gave access to 1,200 journals.

(b) HighWire had been established by Stanford University to offer electronic publishing services to smaller (mostly not-for-profit) publishers. It had 393 journals (a small number of which were not STM titles). Of these, 213 were ISI ranked, 30 were top ranked for their ISI category and 126 were top-ten ranked. The relative impact factor for all of these journals was 2.79. HighWire was therefore bigger than Harcourt, had a higher impact factor than either Harcourt or RE (impact factors of 1.294 and 0.964 respectively) and was possibly more significant than RE and Harcourt combined.

(c) BioOne was launched very recently by a collaboration of five partners including SPARC. It had approximately 40 journals, 32 of which were ranked by the ISI. Half of these 32 are top-ten ranked in an ISI category and three were top ranked in a category.

Harcourt said that each of these platforms had attracted high-quality content despite having developed some time after IDEAL or ScienceDirect.

5.152. There were already numerous providers, including commercial publishers, learned societies and other organizations, offering a range of services via the Internet and this provision was likely to continue to grow. Harcourt commented that no provider had yet developed a model that was completely satisfactory to all purchasers and it seemed likely that a multiplicity of options would continue to be available. It was clear that neither its IDEAL platform nor RE's ScienceDirect enjoyed a gatekeeper or essential facility status, whether as a platform for content, searching or archiving.

Linking of purchase of printed titles and electronic access

5.153. Harcourt said that, although subscribers taking the APPEAL licence were entitled to purchase individual print journals at a large discount (see paragraph 5.144), this was an option and not a requirement and thus did not involve tying. The arrangement helped Harcourt to mitigate the adverse effect on print journal sales of subscriber cancellation, income attrition and higher unit costs that otherwise would follow the change to electronic delivery. It also helped overcome librarians' concerns over archiving of electronically delivered journals.

Anti-competitive practices that might arise from the merger

5.154. We invited Harcourt to comment on whether certain anti-competitive practices might be expected to come into existence or be exacerbated as a result of the merger. It told us that such practices did not currently occur and that there could be no reasonable expectation that any of them would occur in the future as a consequence of the merger, or indeed at all.

Tying in authors by exclusive contracts

5.155. Harcourt said that authors were not tied to particular journals or publishers by exclusive contracts, as explained in paragraph 5.138.

Excessive pricing

5.156. Harcourt referred to its comments about factors that were constraining STM journal pricing and its view that there could be no reasonable expectation of higher prices as a result of the merger (see paragraphs 5.114 to 5.116).

Forcing portfolios of journals

5.157. Harcourt said that it had no policy of forcing portfolios on to customers, whether institutions or individuals. It told us that its print journals were individually available and that with regard to electronic publication it was making content available on a pay-per-view or pick-and-choose basis.

Failure to supply back numbers

5.158. Harcourt said that it had no policy of refusing to supply back numbers and it was not aware of any other publisher with such a policy.

Attempts to preclude other publishers' titles from the market

5.159. Harcourt said that the STM journals market was characterized by diversity of choice and the multiplicity of publishers active in the market. It believed that there had been no previous attempt at market foreclosure by any one publisher.

Countervailing power of buyers

5.160. Harcourt said that the academic community and institutional libraries were becoming increasingly assertive with regard to STM publishing. This was evidenced by the resignations of editors or editorial boards that were dissatisfied with a publisher (as with *Evolutionary Ecology* published by Wolters Kluwer and *Journal of Logic Programming* published by RE). More commonly, threats to leave were sufficient to gain concessions from publishers, for example, lower institutional subscriptions. There had also been mass petitions for content to be deposited with PubMed Central for free distribution with no remuneration to the publisher. Institutional libraries were active through the SPARC coalition initiative, which encouraged authors to set up new publications, particularly in direct competition with existing journals, and through groupings such CURL and NESLI, which negotiated on prices.

5.161. In Harcourt's view, the fact that end-users were the same individuals as the authors and editors of journal articles gave them additional power vis-à-vis the publisher. This could be exercised by editorial boards moving to a different publisher if dissatisfied with a journal's aims or with the publisher's pricing policy. Although from a purchasing point of view the content of each article was unique, an author who was displeased with the actions of a publisher could instead supply content to another journal or elect to self-publish on the Internet.

5.162. It appeared from inquiries made by Harcourt that most, if not all, institutional customers in the UK were extensive users of inter-library loans. For journals with a small readership, this was a cost-effective alternative to a subscription. It was likely that if the price of journal subscriptions rose disproportionately to the cost of such loans, many libraries would switch to loans for little-used journals and would cancel their subscriptions, resulting in decreased sales for the publishers.

Public interest benefits of the proposed merger

5.163. Harcourt believed that it was to the general public benefit that, given its decision to exit the market, the STM journals business should be acquired by RE, which was experienced in and committed to STM journal publishing. Harcourt suggested that it was also of benefit to the UK to have a major Anglo-Dutch company active in the dissemination, validation and publication of research and development in the STM area, which was of considerable economic significance.

Consequences if the transaction did not proceed

5.164. Harcourt said that its board had decided in June 2000 to put the business up for sale and the outcome of the auction process had been announced in October 2000. The transaction involved splitting the current Harcourt business into two parts, for eventual acquisition by RE and Thomson respectively. [

Details omitted. See note on page iv.

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Details omitted. See note on page iv.

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Comity

5.165. In Harcourt's view, the inquiry raised important policy issues in relation to the principle of comity, which it believed should inform the CC in its assessment. It said that the OECD 1995 Recommendation Concerning Co-operation Between Member Countries on Anti-competitive Practices Affecting International Trade sought to support the principle. The recommendation specifically provided that in an increasingly international business environment there was a need to give effect to the principles of international law and comity, and to use moderation and self-restraint in the interest of cooperation in the field of anti-competitive practices.

5.166. Harcourt said that, although the principle encompassed positive comity (ie the provision of assistance and support in antitrust matters) between states, it also extended to negative comity, which involved states taking into account the economic and policy interests of a foreign country before taking action under the antitrust rules that might damage those interests. Harcourt believed that negative comity was particularly important in the absence of any bilateral cooperation agreement. It suggested that it was a key tenet in the approach of the UK antitrust authorities in dealing with extra-territoriality issues. In support of this view, it referred to speeches by the Deputy Director of the OFT to the Canadian Bar Association in August 1996, by the DGFT to the Global Forum for Competition and Trade in March 1997 and by the Director of Competition Policy at the OFT to the Solicitors' European Forum in June 1997.

5.167. Harcourt said that if we were to identify a problem with the proposed merger we would be required to make an adverse public interest finding in respect of the entire acquisition of Harcourt by RE; and for this purpose to ignore the facts that the purchasing vehicle was a US company; that Harcourt was a US company; that part of the business would be sold on to a Canadian company; that no UK competition issues arose in relation to the non-STM parts of the Harcourt business (nearly 70 per cent of the whole); that even within STM publishing the concerns were limited to a part of the journals business; and that less than 6 per cent of Harcourt's STM journal turnover arose in the UK. In Harcourt's view that was a jurisdictional claim that infringed any principle of negative comity.

5.168. Nor did it appear to Harcourt that there was an enterprise conducted by Harcourt within the UK that could be subject to a prohibition order. Part of each of the divisions engaged in STM journal publishing was established in the UK, but their business activities were internationally focused and not UK-centric. Harcourt further stated that those activities were not coextensive with, or even naturally connected to, areas of overlap with the activities of RE in the UK that might give rise to concern. In the areas of overlap, divisions of Harcourt established in the USA and selling into the UK were equally present.

5.169. Harcourt said that it would be very difficult, in a global market, to restrict any remedies involving divestment to the UK. The great majority of STM journal sales (even in respect of any journals published in the UK) were overseas, notably in the USA. Harcourt argued that an approach that encouraged negative comity would recognize that the natural lead jurisdiction was the USA, which was the largest national market for STM journals and was where the weight of STM research and development was funded and took place. Application of the principle of negative comity would suggest, in Harcourt's view, that the UK authorities should acquiesce in the views formulated by the US Department of Justice at the conclusion of a six-month inquiry.