

# Completed acquisition by Aragorn Parent Corporation (KKR & Co. Inc.) of OverDrive Holdings, Inc.

## Decision on relevant merger situation and substantial lessening of competition

**ME/6880/20**

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 16 June 2020. Full text of the decision published on 28 July 2020.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges for reasons of commercial confidentiality.

### SUMMARY

1. On 9 June 2020, KKR & Co. Inc. (**KKR**) acquired OverDrive Holdings, Inc. (**OverDrive**) via its indirect controlled affiliate Aragorn Parent Corporation (**Aragorn**) (the **Merger**). Recorded Books, Inc. (**RBmedia**) is indirectly solely controlled by KKR. KKR and OverDrive are together referred to as the **Parties** and, for statements referring to the future, the **Merged Entity**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of KKR and OverDrive is an enterprise; that these enterprises have ceased to be distinct as a result of the Merger; and that the share of supply test is met. The four-month period for a decision has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
3. KKR (by virtue of RBmedia's activities) and OverDrive overlap in the supply of (i) eBooks and (ii) eAudiobooks to public libraries in the United Kingdom (**UK**).
4. The CMA found that there is limited substitutability between physical and digital content and therefore did not consider it appropriate to widen the product frame of reference to include the supply of physical content. The CMA also found limited substitutability between different types of digital content and

has therefore assessed the impact of the Merger on the supply of (i) eBooks; and (ii) eAudiobooks separately. Finally, the CMA did not consider it appropriate to widen the product frame of reference to include the supply of (i) eBooks; and (ii) eAudiobooks to types of library other than public libraries.

5. With regard to the geographic frame of reference, the CMA assessed the impact of the Merger on a national basis.
6. For the reasons set out above, the CMA assessed the impact of the Merger on:
  - (a) the supply of eBooks to public libraries in the UK; and
  - (b) the supply of eAudiobooks to public libraries in the UK.
7. The CMA has, therefore, assessed whether the Merger gives rise to horizontal unilateral effects in the supply of (i) eBooks; and (ii) eAudiobooks to public libraries in the UK.
8. The CMA found that the Merged Entity will account for a high combined share of supply of eBooks, and a relatively high combined share of supply of eAudiobooks to public libraries in the UK. With respect to both frames of reference, the CMA found that the Parties compete closely with each other and that there will not remain sufficient competitors post-Merger to effectively constrain the Merged Entity in these markets. The CMA also believes that entry and expansion would not be timely, likely and sufficient to prevent a realistic prospect of a substantial lessening of competition (**SLC**) as a result of the Merger.
9. The CMA therefore believes that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to (i) the supply of eBooks to public libraries in the UK; and (ii) the supply of eAudiobooks to public libraries in the UK.
10. However, as the CMA believes that all of the markets concerned (in aggregate) are not of sufficient importance to justify the making of a reference, and there are no clear-cut undertakings in lieu (**UILs**) in principle available, the CMA has decided to exercise its discretion to apply the de minimis exception to the duty to refer (under section 22(2)(a) of the Enterprise Act 2002 (the **Act**)).
11. The Merger will therefore **not be referred** under section 22(1) of the Act.

## ASSESSMENT

### Parties

12. KKR is a global investment firm that offers a broad range of alternative asset funds and other investment products to investors and provides capital markets solutions for its own firm, its portfolio companies and other clients. KKR is based in the United States (**US**) and is listed on the New York Stock Exchange. KKR's turnover in 2018 was approximately £[~~£~~] worldwide and approximately £[~~£~~] in the UK.
13. Aragorn is a special purpose vehicle established for the purposes of carrying out the Merger. Aragorn is owned by funds advised by affiliates of KKR.<sup>1</sup>
14. RBmedia is indirectly wholly-owned by funds managed by affiliates of KKR and indirectly solely controlled by KKR. RBmedia is a publisher of audiobooks which operates a platform (namely *RBdigital*) for the distribution of digital content (including eBooks, eAudiobooks and eMagazines) to libraries, globally and in the UK.<sup>2</sup> In the UK, RBmedia sells audiobooks and *RBdigital* subscriptions through its subsidiary, W.F. Howes Ltd (**W.F. Howes**).
15. OverDrive is a distributor of digital content (including eBooks and eAudiobooks) to libraries through its *OverDrive Marketplace* platform, globally and in the UK. Prior to the Merger, OverDrive was owned by Rakuten USA, Inc. OverDrive's turnover in 2018 was approximately £[~~£~~] worldwide and approximately £[~~£~~] in the UK.<sup>3</sup>

### Transaction

16. On 24 December 2019, Aragorn, OverDrive and Rakuten USA, Inc. entered into a Stock Purchase Agreement (**SPA**) under which Aragorn acquired all of the issued and outstanding shares of capital stock of OverDrive. Following the Merger, OverDrive has become a wholly owned subsidiary of Aragorn and is solely controlled by KKR.
17. The Parties informed the CMA that the Merger is also the subject of review by competition authorities in Austria, Kenya, the US and Australia.

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<sup>1</sup> Merger Notice (**MN**), paragraphs 2 and 3.

<sup>2</sup> RBmedia distributes digital content to retail customers through its own platform (Audiobooks.com) and via third party retailers such as Amazon and Apple. However, this is not part of the overlap of the Parties' activities and is therefore not considered further in this Decision.

<sup>3</sup> MN, paragraph 30.

## Procedure

18. The Merger was considered at a Case Review Meeting.<sup>4</sup>

## Jurisdiction

19. Each of KKR and OverDrive is an enterprise. As a result of the Merger, these enterprises have ceased to be distinct.
20. The Parties overlap in the supply of eBooks to public libraries in the UK with a combined share of supply of [50-60]% by value and an increment of [5-10]% brought about by the Merger.<sup>5</sup> The Parties also overlap in the supply of eAudiobooks to public libraries in the UK with a combined share of supply of [40-50]% by value and an increment of [10-20]% brought about by the Merger.<sup>6</sup> The CMA therefore believes that the share of supply test in section 23 of the Act is met.
21. The Merger completed, and the CMA was informed about completion, on 9 June 2020. The four-month deadline for a decision under section 24 of the Act is 9 October 2020.
22. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
23. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 20 April 2020 and the statutory 40 working day deadline for a decision is therefore 16 June 2020.

## Counterfactual

24. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers, the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is

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<sup>4</sup> See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from paragraph 7.34.

<sup>5</sup> CMA's estimates of the Parties' shares of supply, Table 1. Based on the Parties' estimates, the Parties have a combined share of supply of [30-40]% with an increment of [5-10]% brought about by the Merger.

<sup>6</sup> CMA's estimates of the Parties' shares of supply, Table 3. Based on the Parties' estimates, the Parties have a combined share of supply of [30-40]% with an increment of [10-20]% brought about by the Merger.

a realistic prospect of a counterfactual that is more competitive than these conditions.<sup>7</sup>

25. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the pre-Merger conditions of competition to be the relevant counterfactual.

## Background

### ***Supply chain and the Parties' products***

26. The supply chain for the distribution of digital content (such as eBooks and eAudiobooks) to public libraries includes the following broad categories of participants: publishers, audiobook producers, digital distributors, public libraries and end-users (ie library patrons).<sup>8</sup>
- (a) **Publishers** produce content. Publishers purchase the rights to an author's work and assist in the scaled production of the title for commercialisation.
  - (b) In the context of audiobooks (including eAudiobooks), production means having a voice actor read out an author's work in a recording studio. Audiobooks can be recorded by the publishers themselves or by independent audiobook producers (**audiobook producers**) who usually negotiate with the publishers to obtain the rights to the author's spoken content.
  - (c) **Digital distributors** (such as RBmedia and OverDrive) supply digital content to libraries. Digital distributors operate (i) a library-facing marketplace; and (ii) a patron-facing application.<sup>9</sup> For digital distributors to provide digital content to public libraries, publishers – and/or audiobook producers – must provide digital distributors with a licence to do so. After obtaining a licence, digital distributors are able to list the digital content on their library-facing marketplaces.
  - (d) **Public libraries** purchase digital content (such as eBooks and eAudiobooks) from a digital distributor's library-facing marketplace to

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<sup>7</sup> *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

<sup>8</sup> MN, paragraphs 72-73 and the Parties' response to RFI 2, paragraph 16.

<sup>9</sup> A patron-facing application is also referred to as the **app** in this Decision.

make it available to library patrons. Libraries also provide distributors with a list of their patrons' library card numbers.

- (e) **Library patrons** access digital content purchased by their libraries via a digital distributor's patron-facing application. Library patrons sign up with the distributor directly, via its website or app, using their library card number.
27. Publishers may also choose to sell their digital content to consumers directly or through a retail platform. Retail platforms either purchase or license the digital content from a publisher and allow that digital content to be purchased and accessed directly by customers.<sup>10</sup>
28. The Parties' activities overlap in the supply of digital content to public libraries in the UK. Specifically:
- (a) RBmedia operates (i) a library-facing marketplace and (ii) a patron-facing application,<sup>11</sup> both called *RBdigital*.<sup>12</sup>
- (b) OverDrive operates (i) a library-facing marketplace called *OverDrive Marketplace* and (ii) three patron-facing applications: *OverDrive*, *Libby* and, for educational institutions, *Sora*.<sup>13</sup>
29. In the context of eAudiobooks, RBmedia is active as an audiobook producer and a digital distributor.<sup>14</sup>
30. The Parties submitted that exclusive distribution agreements between eBook publishers and digital distributors are very rare, and, where they do exist, are relatively short in duration.<sup>15</sup> However, in the context of eAudiobooks, vertically integrated digital distributors (such as RBmedia) may distribute some of their own content exclusively. The newer popular content is typically considered exclusive within the first one to two years of publication. Once the content is classified as an older title, it is generally made available to other digital distributors without restrictions.<sup>16</sup>

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<sup>10</sup> The Parties' response to RFI 2, paragraphs 28 and 29.

<sup>11</sup> A library-facing marketplace and a patron-facing application are together referred to as a **platform** or a **library distribution platform**.

<sup>12</sup> MN, paragraph 7 and Annex 8, slide 8.

<sup>13</sup> MN, paragraph 9.

<sup>14</sup> The Parties' response to RFI 2, paragraph 32.

<sup>15</sup> The Parties' response to RFI 3, paragraph 16. To illustrate, OverDrive generated negligible revenue from the supply of exclusive eBooks to UK libraries in 2019; RBmedia generated none. The Parties' submission on complementarity, 15 April 2020, Table 2.

<sup>16</sup> MN, paragraph 80. To illustrate, OverDrive generated [20-30]% of its UK library eAudiobook revenue from the supply of exclusive titles in 2019; RBmedia generated [80-90]%. The Parties' submission on complementarity, 15 April 2020, Table 2.

31. A digital distributor's cost of making a particular piece of digital content (title) available to libraries is negligible. The digital distributor must simply agree to a publisher's licensing terms. When a library purchases a title, a digital distributor incurs costs associated with the necessary administrative and security steps to make that title available on its patron-facing application.<sup>17</sup> Thus, for a digital distributor to find it profitable to make more titles available, it must be confident that a sufficient number of libraries will actually purchase them.<sup>18</sup> The CMA considers that this is one reason why different platforms may offer access to different titles.

### **Pricing**

32. Digital distributors (including RBmedia and OverDrive) generate profit from:
- (a) the margin that exists between the fee paid to the publishers by the digital distributor and the prices set by publishers for the licensing of the content by libraries; and/or
  - (b) platform fees charged directly to libraries.<sup>19</sup>
33. Public libraries pay a licence fee to access the digital content provided by publishers. Each publisher sets the licence fee for its digital content individually and each digital distributor negotiates with each publisher for a share of that licence fee.
34. Publishers set digital content prices for public libraries using one of a variety of pricing models, which include:<sup>20</sup>
- (a) Cost per copy: a public library pays for a number of copies of a title and each copy of that title can be accessed by only one library patron at a time;
  - (b) Subscription fee: a public library pays an annual subscription fee per title and that title can be checked out by an unlimited number of patrons at the same time; and
  - (c) Cost per checkout: a public library pays a set fee each time a copy is checked out by a library patron.

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<sup>17</sup> The Parties' response to RFI 3, paragraph 16; and the Parties' response to RFI 2, paragraphs 24 and 25.

<sup>18</sup> The Parties' response to RFI 3, paragraph 17.

<sup>19</sup> MN, paragraph 77.

<sup>20</sup> MN, paragraph 74.

35. In addition to the fees listed above, digital distributors may charge public libraries a platform fee that is separate from the price of the digital content.

### ***Relevant parameters of competition within digital distribution***

36. Digital distributors negotiate contract terms with public library authorities rather than individual library branches. The Parties estimated that there are 208 public library authorities and around 3,500 – 4,000 public library branches in the UK.<sup>21</sup> Digital distributors can be awarded contracts with public library authorities via a formal tender process or bilateral negotiations (in the case of small value contracts).
37. Almost all of the Parties' public library customers who responded to the CMA's merger investigation indicated that the (i) price; (ii) range of content (titles) available; and (iii) usability of the library-facing marketplace and the patron-facing application are important factors when choosing their library distribution platform. In addition to these factors, a minority of customers identified back-office facilities and the support offered by digital distributors (such as training to library staff) as factors that influence their choice of a library distribution platform. The Parties provided a sample invitation to tender in which price and 'stock' were the factors given the most weight.<sup>22</sup> A library provided the CMA with an invitation to tender in which 'range of stock' was the most important factor and cost was the second most important.<sup>23</sup>

### ***Multi-sourcing and single-sourcing***

38. Public libraries can purchase all of their required digital content from one digital distributor (supplier) (**single-source**) or use multiple suppliers (**multi-source**). Public libraries can multi-source:
- (a) across digital content categories (eg purchase eBooks from one supplier and eAudiobooks from another supplier); and/or
  - (b) within a single digital content category (eg purchase eAudiobooks from multiple suppliers).

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<sup>21</sup> The Parties' additional response to RFI 2 dated 8 March 2020.

<sup>22</sup> MN, paragraph 33 and footnote 8. Price had a weighting of 30%, stock had a weighting of 29.4%, customer experience had a weighting of 12.6%, various ICT requirements had an aggregate weighting of 17.5% and various delivery requirements had an aggregate weighting of 10.5%.

<sup>23</sup> Range of stock was given a weighting of [X], cost a weighting of [X] and various other factors an aggregate weighting of [X]. [X].



39. The Parties submitted that around 55% of public libraries single-source, ie use one and the same supplier for both eBooks and eAudiobooks.<sup>24</sup> The Parties<sup>25</sup> and third parties submitted that there are some advantages to single-sourcing as (i) it reduces complexity by allowing libraries to manage all their titles and make purchasing decisions in one marketplace;<sup>26</sup> and (ii) it simplifies the process of borrowing digital content for library patrons (ie library patrons only need a single app on their device).<sup>27</sup>
40. The Parties' data shows that about a third of public library authorities in the UK currently multi-source within a single digital content category (specifically, within each of the eBooks and eAudiobooks categories).<sup>28</sup> The main reason for multi-sourcing identified by the Parties' customers who responded to the CMA's merger investigation was to enable a wider selection of titles for library patrons. For example, purchasing eAudiobooks from multiple suppliers would enable a public library to offer a broader range of titles, as digital distributors that are vertically integrated with audiobook producers may hold some exclusive titles.

## Frame of reference

41. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.<sup>29</sup>
42. The Parties overlap in the supply of eBooks and eAudiobooks to public libraries in the UK.
43. The Parties also offer eMagazines to public libraries in the UK. This overlap is not, however, considered further in this decision, as no competition concerns arise on any plausible basis. In particular, while [X].<sup>30</sup>

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<sup>24</sup> Issues Meeting presentation, slide 16.

<sup>25</sup> MN, paragraphs 122 and 123.

<sup>26</sup> MN, paragraph 122; and the Parties' submission on complementarity, 15 April 2020, paragraph 13.

<sup>27</sup> MN, paragraph 123.

<sup>28</sup> Annex 087.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>29</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2.

<sup>30</sup> The Parties' response to RFI 2 paragraph 71 and the Parties submissions dated 14 April 2020.

## ***Product scope***

44. The Parties submitted that the market definition should include the distribution of all content (both physical and digital content) to all libraries in the UK.<sup>31</sup>
45. The CMA's starting point for the product frames of reference is the narrowest overlaps between the Parties, ie (i) the supply of eBooks to public libraries; and (ii) the supply of eAudiobooks to public libraries.
46. The CMA has considered whether it is appropriate to widen the product frame of reference to include:
  - (a) the supply of physical content to public libraries;
  - (b) the supply of other types of digital content to public libraries (and the CMA has considered whether a single frame of reference for eBooks and eAudiobooks is appropriate); and
  - (c) other types of library (school, academic and corporate libraries).

## ***Physical content***

47. As well as eBooks and eAudiobooks, public libraries also purchase physical copies of books, audiobook CDs and play away devices (MP3 players with a single title installed).<sup>32</sup>
48. The Parties submitted that the product market should include all types of content (both physical and digital) supplied to libraries, on the basis that:
  - (a) library patrons frequently check out content irrespective of whether it is offered in physical or digital format;
  - (b) library patrons are interested in titles and genres and in many cases may be flexible in terms of the format in which the title is offered; and
  - (c) libraries set their content budget across both physical and digital formats.<sup>33</sup>
49. The CMA has not previously considered the supply of digital and physical content types. However, in *Bertelsmann / Pearson / Penguin Random*

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<sup>31</sup> MN, paragraphs 27 and 50. The Parties also referred to a 'narrower segment which includes all digital content supplied to libraries' (MN, paragraph 54) and 'a still narrower segment [which] includes all digital content to public libraries ... excluding educational or professional institutions' (MN, paragraph 56).

<sup>32</sup> MN, paragraphs 44 and 45.

<sup>33</sup> MN, paragraphs 50 to 52.

*House*,<sup>34</sup> the European Commission (the **Commission**) assessed a possible distinction between print books, eBooks and audiobooks. In that case, the Commission considered that:

- (a) the supply of eBooks and print books may constitute separate product markets on the basis that the majority of customers and publishers considered that print books and eBooks differed in terms of sales channel, pricing at the wholesale and retail levels and promotion of specific titles;<sup>35</sup> and
- (b) the supply of audiobooks was distinct from print books on the basis that the majority of customers and publishers considered that audiobooks differed from print books in terms of wholesale and retail pricing (audiobooks tend to be more expensive both at wholesale and retail level). The majority of customers also saw differences between audio books and print books in terms of the typical end consumers, sales channel and the mode of consumption.<sup>36</sup>

50. Third-party evidence received by the CMA in the course of its merger investigation indicates that there is very limited demand-side substitution between physical content (eg print books, audiobook CDs) and digital content (eg eBooks, eAudiobooks). In particular:

- (a) A large majority of the Parties' customers who responded to the CMA's merger investigation indicated that the main determinant for budget allocation between physical and digital content is patron demand. Of these, a significant number of customers told the CMA that they would be unlikely to transfer the budget allocated to digital content to physical content unless there was a significant drop in library patrons' demand for digital content and/or a significant degradation in the quality of the digital content.
- (b) Some customers told the CMA that it is unlikely that public libraries would replace digital content with a physical copy since these tend to appeal to different categories of library patrons. For example, one customer noted that it tends to acquire the rights to a title in a range of formats because there is a 'group of library patrons who use physical books, a group who

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<sup>34</sup> COMP/M.6789, *Bertelsmann / Pearson / Penguin Random House*, 5 April 2013.

<sup>35</sup> COMP/M.6789, *Bertelsmann / Pearson / Penguin Random House*, 5 April 2013, paragraph 141. The Commission also noted, at paragraph 142, that the majority of respondents to its investigation considered that there would be little switching from eBooks to print books (and vice versa) in response to a 5-10% price increase.

<sup>36</sup> COMP/M.6789, *Bertelsmann / Pearson / Penguin Random House*, 5 April 2013, paragraph 144. The Commission also noted, at paragraph 145, that the majority of respondents to its investigation considered that there would be little switching from audiobooks to print books in response to a 5-10% price increase.

use digital (eBook) formats and only a small cross-over between these two.

51. Evidence received by the CMA from the Parties and third parties also indicates that public libraries' spending on digital content is increasing,<sup>37</sup> which the CMA considers may reflect library patrons' changing preferences for digital content over physical content. For example:
  - (a) OverDrive's internal document titled '[REDACTED]' states '[REDACTED]';<sup>38</sup>
  - (b) One customer submitted that 'if eBooks became more expensive, [the customer] would to a certain extent have to accept the price increase, but it would depend on usage. If eBooks were continuing to grow, as they are currently, [the customer] would struggle in justifying cutting eBooks'.
52. In addition, some customers observed that they are currently reliant on digital content while libraries are closed due to the Coronavirus (COVID-19) outbreak. It is, however, unclear to what extent this will result in a permanent shift in library patrons' behaviour in favour of using digital content once libraries reopen.
53. The CMA also observes that physical content has different characteristics from the perspective of library patrons. In particular, a physical book has to be collected from the library and returned. In contrast, digital content can be downloaded by patrons, for example at home.
54. Based on the evidence set out above, the CMA believes that there is limited demand-side substitutability between physical and digital content. The CMA therefore does not believe that it is appropriate to widen the product frame of reference to include the supply of physical content.

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<sup>37</sup> RBmedia's call dated 27 March 2020 and one commercial due diligence document prepared for KKR by L.E.K. Consulting LLC (L.E.K.) for the purposes of the Merger imply that there has been a 'continued shift in spend from print and physical media to digital / downloadable media' – MN, Annex 013. While the primary focus of the document is the US (page 4), the document states that 6% growth per annum is forecast through to 2024 for the supply of digital content to public libraries in Western Europe (which is defined as including the UK) (pages 163 to 170). The CMA has not received any evidence to indicate that the described shift of public libraries' spend from physical to digital content is not also being observed or expected in the UK.

<sup>38</sup> Annex 03. Momentum\_INT\_UK 2019 Country Plan.pdf to OverDrive's response to section 109 notice dated 28 February 2020.

### *Type of digital content*

55. The Parties submitted that digital content includes eBooks, eAudiobooks, as well as eMagazines, eComics, music and video, online periodicals, reference materials and tests.<sup>39</sup>
56. The Parties submitted that the product frame of reference should include all types of digital content supplied to libraries on the basis that libraries manage the portion of their budget allocated to digital content across multiple mediums. In that regard, the Parties submitted that distributors of all types of digital content compete for a share of a library's digital spend and view different content mediums as substitutable to some degree.<sup>40</sup>
57. The CMA has not previously considered the supply of eBooks and eAudiobooks. However, in *Bertelsmann / Pearson / Penguin Random House*, the Commission considered whether the supply of audiobooks (by publishers to dealers) was a separate product market from the supply of eBooks. The Commission's investigation found that audiobooks were distinct from eBooks. In particular, the Commission noted that the majority of publishers and customers that responded to its investigation considered that audiobooks differed from eBooks in terms of pricing at the wholesale and retail levels (with audiobooks said to be more expensive at both levels). The majority of customers also saw differences between audiobooks and eBooks in terms of the typical end customer, sales channel and the mode of consumption.<sup>41</sup>
58. The evidence received by the CMA from the Parties and third parties indicates that, from the library patrons' perspective, there are differences between different types of digital content. For example, in contrast to most other types of digital content provided by libraries (including eBooks), eAudiobooks is a listening activity. The Parties' internal documents indicate that eAudiobooks are consumed in a different way.<sup>42</sup> Several customers also told the CMA that eAudiobooks are important to visually impaired library patrons. eBooks also have different characteristics to other visual forms of digital content. For

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<sup>39</sup> MN, paragraph 44.

<sup>40</sup> MN, paragraph 54.

<sup>41</sup> COMP/M.6789, *Bertelsmann / Pearson / Penguin Random House*, 5 April 2013, paragraphs 146 and 147. The Commission also noted, at paragraph 148, that the vast majority of customers did not think that end consumers would switch from audiobooks to eBooks in response to a 5-10% increase in the retail price of audiobooks.

<sup>42</sup> For example, a document prepared by an external consultancy (The Boston Consulting Group) for RBmedia indicates that over 90% of end users multitask when listening to an eAudiobook (eg while exercising or driving). The Parties' response to RFI 2, Annex 30.

example, eBooks are distinct from eMagazines in terms of length and the typical content and/or genre.<sup>43</sup>

59. RBmedia's internal documents also indicate that it considers its commercial strategy for eBooks and eAudiobooks separately. For example:
- (a) RBmedia's internal document titled '[REDACTED]' refers to '[REDACTED]' as a deliverable;<sup>44</sup>
  - (b) RBmedia's '[REDACTED]' provides the following update: '[REDACTED]';<sup>45</sup>
  - (c) RBmedia's '[REDACTED]' mentions '[REDACTED]';<sup>46</sup>
  - (d) RBmedia's '[REDACTED]' discusses the supply of eBooks separately from other types of digital content. The document states '[REDACTED]'.<sup>47</sup>
60. The CMA asked the Parties' customers whether they run separate tenders for each type of digital content, ie eBooks, eAudiobooks and eMagazines. Most of the Parties' customers who responded to the CMA's merger investigation and who tender for the supply of digital content procure eMagazines separately from other digital content. The CMA believes that this evidence also indicates that, from a supply side perspective, it is not appropriate to consider all types of digital content within the same frame of reference.
61. Based on the evidence set out above, the CMA believes that there is limited substitutability between different types of digital content. The CMA therefore does not believe that it is appropriate to widen the product frame of reference to include the supply of other types of digital content and has assessed the impact of the Merger on the supply of (i) eBooks; and (ii) eAudiobooks separately.

#### *Type of library*

62. The Parties submitted that the product market should not be segmented by type of library. The Parties submitted that, on the supply side, all types of library (public, school, academic and corporate) need to manage and acquire content. Moreover, the Parties submitted that digital distributors view all types

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<sup>43</sup> For example, the Parties submitted that one of the key eMagazine titles that UK public libraries demand from their digital distributors is *The Economist*. *The Economist* deals with the news and current affairs and is thus distinct from the content of most eBooks.

<sup>44</sup> Annex 073.26.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>45</sup> Annex 072.9.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>46</sup> Annex 072.6.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>47</sup> Annex 073.10.docx to RBmedia's response to section 109 notice dated 28 February 2020.

of library as potential customers and supply them with essentially the same product.<sup>48</sup>

63. In *Smiths News plc/Dawson Holdings plc*,<sup>49</sup> the Office of Fair Trading (**OFT**) considered that there were a number of differences in the characteristics of the supply of books to public and academic libraries. The OFT noted, in particular, that public and academic libraries serve different customers and that suppliers to public and academic libraries have different specialisms.
64. From a demand-side perspective, the CMA notes that, although some of the titles offered by public libraries may also be offered by other types of libraries, the primary purpose of educational and corporate libraries is different to that of public libraries. Thus, the CMA considers that the types of titles that they are most interested in are likely to differ.
65. From a supply-side perspective, evidence received by the CMA from the Parties indicates that the Parties' main competitors in the supply of eBooks and eAudiobooks to public libraries differ from their competitors in the supply of eBooks and eAudiobooks to other types of libraries.<sup>50</sup> For example, there are several firms that are active in the supply of digital content to educational libraries that do not supply eBooks and eAudiobooks to public libraries in the UK (including Wheelers, RM Books, Follett, Snapplify, Dawson, ProQuest, Elsevier, Wiley, Springer and Cambridge). This is supported by third party evidence, as competitors of the Parties who supply eBooks and/or eAudiobooks to public libraries indicated that they only consider public libraries (but not other library types) to be their customers.
66. Moreover, evidence received from the Parties indicates that the focus of their catalogues is on public libraries rather than school or academic libraries. In particular, the Parties submitted that in the UK:
  - (a) RBmedia [REDACTED];<sup>51</sup> and
  - (b) Academic textbooks or other academic content are [REDACTED].<sup>52</sup>
67. Finally, the Parties' internal documents discuss competitive conditions for the supply of eBooks and eAudiobooks to public libraries separately from

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<sup>48</sup> MN, paragraphs 27, 58 and 59.

<sup>49</sup> ME/5041/11, *Acquisition by Smiths News plc of Dawson (Holdings) plc*, 19 July 2011.

<sup>50</sup> The Parties' response to RFI 2, paragraphs 52 and 53.

<sup>51</sup> The Parties' response to RFI 4, paragraph 3.

<sup>52</sup> The Parties' response to RFI 4, paragraphs 4 and 5.

competitive conditions for the supply of eBooks and eAudiobooks to other types of libraries. For instance:

- (a) OverDrive's presentation titled '[redacted]'<sup>53</sup> refers to the opportunities in the 'UK Public Library Market' separately from the 'UK School Library Market'. The document also outlines [redacted], indicating that OverDrive considers its commercial strategy in these two segments independently from one another.
- (b) RBmedia's document titled '[redacted]' refers separately to KKR's 'Library Revenue' and the 'Higher Education Market', implying that RBmedia considers educational libraries to be distinct from other libraries.<sup>54</sup>

68. Based on the evidence set out above, the CMA does not believe that it is appropriate to widen the product frame of reference to include the supply of (i) eBooks; and (ii) eAudiobooks to other types of library. On this basis, the CMA has assessed the impact of the Merger on the supply of (i) eBooks; and (ii) eAudiobooks to public libraries separately.

#### *Conclusion on product scope*

69. For the reasons set out above, the CMA has considered the impact of the Merger in the following product frames of reference:
- (a) the supply of eBooks to public libraries; and
  - (b) the supply of eAudiobooks to public libraries.

#### **Geographic scope**

70. The Parties submitted that the geographic frame of reference is national.<sup>55</sup> The Parties noted that they and their competitors typically set their pricing and distribution strategies nationally.<sup>56</sup>
71. The Parties' internal documents indicate that they consider competition and their commercial strategy for the supply of eBooks and eAudiobooks in the UK separately from other countries.<sup>57</sup> For example, RBmedia's presentation

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<sup>53</sup> Annex [redacted] to OverDrive's response to section 109 notice dated 28 February 2020.

<sup>54</sup> Annex [redacted] to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>55</sup> MN, paragraph 61.

<sup>56</sup> MN, paragraph 62.

<sup>57</sup> For example, OverDrive's [redacted] to OverDrive's response to section 109 notice dated 28 February 2020), and several RBmedia's weekly 'In Focus' reports for the UK (eg Annexes 071 and 073 to RBmedia's response to section 109 notice dated 28 February 2020).



entitled '[X]' discusses '[X]' and the supply of eBooks and eAudiobooks to customers in the UK separately.<sup>58</sup>

72. Furthermore, the CMA notes that the majority of suppliers of eBooks and eAudiobooks to public libraries in the UK have UK-based offices and staff.
73. The CMA has seen no indications that conditions of competition vary locally within the UK.
74. For the reasons set out above, the CMA has considered the impact of the Merger in the UK.

### ***Conclusion on frame of reference***

75. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
  - (a) the supply of eBooks to public libraries in the UK; and
  - (b) the supply of eAudiobooks to public libraries in the UK.

## **Competitive assessment**

### ***Horizontal unilateral effects***

76. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.<sup>59</sup> Horizontal unilateral effects are more likely when the merging parties are close competitors.
77. The CMA has assessed whether it is or may be the case that the Merger has resulted or may be expected to result in an SLC in relation to:
  - (a) horizontal unilateral effects in the supply of eBooks to public libraries in the UK; and
  - (b) horizontal unilateral effects in the supply of eAudiobooks to public libraries in the UK.

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<sup>58</sup> Annex 080.pptx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>59</sup> [Merger Assessment Guidelines](#), from paragraph 5.4.1.

## ***Horizontal unilateral effects in the supply of eBooks to public libraries in the UK***

78. In order to assess the likelihood of the Merger resulting in horizontal unilateral effects in the supply of eBooks to public libraries in the UK, the CMA has considered:
- (a) shares of supply;
  - (b) closeness of competition between the Parties; and
  - (c) competitive constraints from alternative suppliers.

### *Shares of supply*

79. The Parties submitted that their combined share of supply of eBooks to public libraries in the UK is [30-40]%, with an increment of [5-10]% brought about by the Merger. According to the Parties' estimates, Bolinda is the market leader with a [50-60]% share of supply, followed by OverDrive ([30-40]%), Bibliotheca ([5-10]%), RBmedia ([5-10]%), Ulverscroft ([0-5]%) and Baker & Taylor (less than [0-5]%).<sup>60</sup>
80. The Parties' figures were based on an estimate of the total market size using Chartered Institute of Public Finance and Accountancy data, adjusted based on the Parties' best estimate of the ratio of total content spend accounted for by the eBook segment, and using the Parties best estimates of their competitors' shares.<sup>61</sup> The Parties' estimates are thus reliant on the accuracy of the various assumptions used to construct them.
81. As part of its investigation, the CMA received revenue data from the Parties and their competitors and has compiled its own share of supply estimates based on this data. Since the CMA's estimates are based on actual revenue data obtained from each supplier of eBooks in the UK,<sup>62</sup> the CMA believes that these estimates are more reliable than the Parties' estimates. The CMA has therefore placed more weight on its own figures within its assessment. The CMA's estimates of shares of supply of eBooks to public libraries in the UK are set out in Table 1 below.

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<sup>60</sup> MN, Table 3.

<sup>61</sup> MN, paragraph 67. The Parties' response to RFI 1, paragraph 30.

<sup>62</sup> Baker & Taylor did not provide revenue data to the CMA and thus the CMA's estimates of the total market size and the shares of supply do not include Baker & Taylor's revenues. However, the CMA believes that given its limited market presence, the inclusion of Baker & Taylor's revenue estimates would not materially affect the CMA's share of supply estimates or the CMA's assessment.

**Table 1: The CMA’s estimates of shares of supply of eBooks to public libraries in the UK in 2019 (by value)**

Company	Share
RBmedia	[5-10]%
OverDrive	[40-50]%
<b>Combined</b>	<b>[50-60]%</b>
Bolinda	[30-40]%
Bibliotheca	[5-10]%
Ulverscroft	[0-5]%
Baker & Taylor	[0-5]%
<b>Total</b>	<b>100%</b>

Source: CMA analysis based on the Parties’ and third parties’ data.

82. The CMA’s estimates indicate that the Merged Entity will have a high combined share of supply of eBooks to public libraries in the UK of [50-60]%, with an increment of [5-10]% brought about by the Merger.
83. The CMA’s estimates indicate that OverDrive is currently the largest supplier of eBooks to public libraries in the UK with a [40-50]% share of supply. The Merger will further increase OverDrive’s share of supply to [50-60]%. The next largest supplier, Bolinda, will have a smaller share of supply of [30-40]%, with Bibliotheca, Ulverscroft and Baker & Taylor having much smaller shares of supply of [0-10]%.
84. RBmedia is therefore one of a very limited number of suppliers in a concentrated market in which, post-Merger, the Merged Entity would face only one other strong competitor – Bolinda.
85. The Parties submitted that shares of supply are a weak indicator of their competitive position, as the market is characterised by bidding processes and product differentiation.<sup>63</sup>
86. The CMA notes that, in some markets characterised by bidding processes, shares of supply may be a poor guide to competition. The Parties did not, however, provide any evidence that this is the case in relation to the supply of eBooks to public libraries in the UK. Furthermore, the CMA notes that this market is not characterised by a small number of bidding contests that might skew the shares of supply figures (ie a so-called ‘lumpiness’), but rather that there is a high number of low value contracts.<sup>64</sup> The CMA also notes that not all public libraries who responded to the CMA’s merger investigation select their eBook suppliers through a tender process.

<sup>63</sup> Issues Meeting presentation, slide 10.

<sup>64</sup> As set out in paragraph 36, there are 208 public library authorities in the UK.

87. With regards to the Parties' submission in relation to product differentiation, the CMA has taken this into account in its assessment of closeness of competition between the Parties and the competitive constraints imposed by alternative suppliers, as set out below.
88. The CMA therefore believes that the shares of supply set out in Table 1 provide a reliable indication of the current market position of the different providers in the supply of eBooks to public libraries in the UK and the extent to which this market is concentrated. As suppliers are differentiated, the CMA has considered shares of supply in conjunction with a range of other evidence relevant to the competitive assessment.

#### *Closeness of competition between the Parties*

89. The CMA has assessed the closeness of competition between the Parties and considered within its assessment:
- (a) the Parties' service propositions;
  - (b) the Parties' bidding data analysis;
  - (c) third party views; and
  - (d) the Parties' internal documents.

#### *The Parties' service propositions*

90. The Parties submitted that catalogue content (ie titles) was one of the most important criteria for public libraries when selecting their supplier of eBooks.<sup>65</sup> The Parties submitted that OverDrive and RBmedia are not close competitors in the supply of eBooks to public libraries in the UK as they are widely viewed by libraries as complements rather than substitutes due to differentiation in the content offered.<sup>66</sup> In particular, the Parties submitted that:
- (a) RBmedia is more active in the distribution of eAudiobooks and other forms of content (eg eMagazines and eComics), whereas OverDrive is more active in the distribution of eBooks.<sup>67</sup> RBmedia generates minimal revenues from the sales of eBooks to UK public libraries (£[X]), while

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<sup>65</sup> MN, paragraphs 33-35.

<sup>66</sup> MN, paragraph 85; the Parties' submission on complementarity, 15 April 2020, paragraph 3; and Issues Meeting presentation, slide 5.

<sup>67</sup> MN, paragraph 70.

supplying eBooks to public libraries is OverDrive's largest source of revenue in the UK (£[£]);<sup>68</sup>

(b) their content is largely complementary, with RBmedia achieving most of its revenues from newer eBook titles and OverDrive achieving most of its revenues from older titles;<sup>69</sup> and

(c) RBmedia has a much smaller eBook catalogue than OverDrive.<sup>70</sup>

91. As explained at paragraph 37, third parties submitted that when choosing supplier, public libraries consider that all the following factors are important:

(a) the quality and range of content;

(b) the distribution platform's functionality (including accessibility and ease of use from the end-user perspective); and

(c) price.

92. The CMA has assessed these parameters of competition in the round when assessing the closeness of competition between the Parties.

- *Quality and range of content*

93. The Parties submitted that OverDrive has a significantly larger portfolio of eBook titles than RBmedia: OverDrive has approximately 2.5 million of eBook titles available to UK public libraries, whereas RBmedia has approximately 270,000 eBook titles available in the UK.<sup>71</sup> The CMA notes that of the c.270,000 eBook titles available on the *RBdigital* platform, just under 220,000 titles (approximately 80%) are also available on OverDrive.<sup>72</sup>

94. The Parties submitted that newer titles play a more important role within RBmedia's portfolio, whereas older titles are more important within OverDrive's offering. The Parties did not, however, explain or evidence whether this is relevant to customer decision-making and, therefore to competition between the Parties. In any event, the CMA considers that it is the absolute number of new and old titles that a library can choose from that is likely to be more relevant than the proportionate split (which the Parties focused on). In this respect, most of the titles available on the *RBdigital*

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<sup>68</sup> MN, paragraph 86.

<sup>69</sup> The Parties' submission on complementarity, 15 April 2020, paragraph 3.

<sup>70</sup> MN, paragraph 70; and Issues Meeting presentation, slide 5.

<sup>71</sup> The Parties' response to RFI 3, paragraphs 2 and 3.

<sup>72</sup> The Parties' response to RFI 2, question 22.

platform are also available on the *OverDrive Marketplace* platform, and OverDrive also has a greater number of newer titles than RBmedia.<sup>73</sup>

95. The Parties submitted that what matters as much as, or more than, the number of titles supplied to a public library is the popularity of those titles. The Parties stated that RBmedia focuses on a smaller number of ‘highly saleable’ titles, while OverDrive aims to build a large collection of titles.<sup>74</sup> The CMA considers, however, that since 80% of titles available on RBmedia’s *RBdigital* platform are also available on OverDrive, OverDrive is likely to have many of the ‘highly saleable’ titles that RBmedia has.

96. While OverDrive has around nine times as many titles as RBmedia, the CMA considers that a large amount of extra titles does not necessarily mean that OverDrive’s proposition is vastly more appealing. This is because different titles will vary in their attractiveness to library patrons – for example, having a large number of less popular titles by little-known authors may only modestly increase a platform’s appeal to public libraries. Indeed, although [X] has [X] more titles than RBmedia, [X] (see Table 1).<sup>75</sup>

97. Competitors of the Parties also indicated that there is similarity in the Parties’ quality and range of content. In particular:

(a) a competitor said that ‘eBook availability [is] historically stronger on OverDrive. However, there is an extensive range of eBooks on RBdigital also’; and

(b) another competitor said that ‘eBook publishers generally sell all titles to all parties, so OverDrive and [RBmedia] have roughly the same access to titles as each other’.

- *Distribution platform’s functionality*

98. While the core function of the Parties’ distribution platforms (ie digital distribution of eBooks to public libraries) are comparable, third party evidence indicates that the Parties’ customers and competitors perceive OverDrive’s app and platform to be superior to RBmedia’s. For example:

(a) two competitors submitted that OverDrive’s ‘App is considered the marketing [sic] leading app’ and ‘is stronger than RBdigital’s app’; and

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<sup>73</sup> This is despite OverDrive’s definition of newer titles (namely, titles no older than one year) being more restrictive than RBmedia’s definition (namely, titles no older than two years). The Parties’ response to RFI 3, paragraphs 2 and 3.

<sup>74</sup> The Parties’ response to RFI 3, paragraph 4.

<sup>75</sup> [X]. The Parties’ response to RFI 2, question 22.

(b) several customers submitted that Overdrive has a good app compared to its competitors.

- *Price*

99. As set out in paragraph 32 above, the licence fee for digital content is set by publishers. Therefore, the price component that can be directly controlled by the digital distributors is the platform fee.

100. The Parties submitted that RBmedia does not charge public libraries a platform fee for the distribution of eBooks and eAudiobooks, whereas OverDrive charges platform fees to public libraries in the UK,<sup>76</sup> indicating that RBmedia's platform is cheaper than OverDrive's.

- *Conclusion on the Parties' service propositions*

101. The CMA notes that the Parties' offerings are somewhat differentiated. In particular, based on the evidence set out above, the CMA believes that each of the Parties' eBook service propositions has different strengths. OverDrive offers a wider range of eBook titles, including most of those available from RBmedia, and stronger platform functionality, whereas RBmedia is more attractive in terms of price. The CMA considers further evidence on the closeness of substitution between the Parties' service propositions below.

*The Parties' bidding data analysis*

102. The Parties submitted data on OverDrive's and RBmedia's bids to win public library customers between 2015 and 2020.

103. The Parties further submitted two analyses based on the bidding data:

(a) an assessment of the proportion of the times that RBmedia lost to each of its competitors (ie, for those contracts that RBmedia unsuccessfully bid for, which a competitor won). This exercise was repeated for OverDrive;<sup>77</sup> and

(b) an assessment of the number of contracts where RBmedia was the incumbent supplier and lost to each of its competitors. This exercise was repeated for OverDrive.

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<sup>76</sup> OverDrive platform fees are charged on an annual basis and are predominantly based on the size and service area of a library (the Parties' response to RF1 1, paragraphs 3 and 4).

<sup>77</sup> For those tenders won by multiple winners, the Parties assigned weight to each winner. The weighting is based on the number of winners.

104. The results of the Parties' analyses are set out in Table 2 below. The table shows that where RBmedia unsuccessfully bid, Bolinda won [X]% of the time and OverDrive won [X]% of the time. Of the [X] contracts where RBmedia was the incumbent supplier but lost, Bolinda won [X] and OverDrive won [X].

**Table 2: The Parties' bidding data analysis: eBooks**

Winning competitor	RBmedia		OverDrive	
	Lost bids	Lost contracts	Lost bids	Lost contracts
Bolinda	[X]%	[X]	[X]%	[X]
OverDrive	[X]%	[X]	N/A	N/A
RBmedia	N/A	N/A	[X]%	[X]
Bibliotheca	[X]%	0	[X]%	[X]
<b>Total</b>		[X]		[X]

Source: Issues Meeting presentation, slide 12.

105. The CMA considers that the Parties' dataset provides some insight into who the Parties compete closely with (although less weight can be placed on the data in relation to an incumbent's loss of contracts, given the small sample size).
106. Overall, the CMA considers that the Parties' analysis outlined in Table 2 shows that, for each Party, the other Party is its second closest competitor in the supply of eBooks to public libraries in the UK. Bolinda is the strongest competitor to both of the Parties; Bibliotheca also competes to a lesser degree (alternative suppliers are discussed from paragraph 113 onwards below).

### *Third party views*

107. The majority of the Parties' customers who responded to the CMA's merger investigation considered that the Parties are close alternatives to each other in the supply of eBooks to public libraries in the UK. In particular:
- (a) Almost all customers considered that RBmedia is an alternative to OverDrive. Most of these customers considered that RBmedia competes closely (or at least moderately) with OverDrive. Only a few of these customers considered RBmedia to compete weakly with OverDrive, mainly because of RBmedia's inferiority in terms of app functionality and customer service.
  - (b) Most of the customers indicated that OverDrive is an alternative to RBmedia. All of these customers considered that OverDrive competes closely (or at least moderately) with RBmedia.



### *Internal documents*

108. The CMA believes that the Parties' internal documents show that the Parties monitor each other and consider each other to be close competitors.
109. In general, RBmedia appears to produce few documents that capture the commercial strategy of its UK business. To the extent that relevant documents do exist, primarily in the form of weekly updates in relation to its business performance (including, notably, specific tenders and/or customer contracts), RBmedia's internal documents indicate that it views OverDrive as a close competitor in the supply of eBooks to public libraries in the UK. For example:
- (a) '[REDACTED]' document mentions RBmedia having lost a tender which included eBooks to OverDrive: '[REDACTED]';<sup>78</sup>
  - (b) '[REDACTED]' document mentions RBmedia having a lost a tender to OverDrive: '[REDACTED]';<sup>79</sup> and
  - (c) '[REDACTED]' document discusses RBmedia competing with OverDrive: '[REDACTED]'.<sup>80</sup>
110. OverDrive has produced some documents that capture the broader commercial strategy of its UK business. These documents indicate that it views RBmedia as a close competitor in the supply of eBooks to public libraries in the UK. For example:
- (a) '[REDACTED]' document lists the UK public library authorities that OverDrive would target in 2019. About a half of these public library authorities have RBmedia as their eBooks and/or eAudiobooks supplier;<sup>81</sup>
  - (b) '[REDACTED]' document analyses RBmedia's content, providing a list of all 'Publishers on RB Digital';<sup>82</sup> and
  - (c) '[REDACTED]' document analyses RBdigital's 'Digital Library Service' and discusses a number of aspects of RBmedia's product and service offering eg listing all of the app's features and content types (including eBooks).<sup>83</sup>
111. The CMA notes that the Parties' internal documents contain few references to any other competitors, with the exception of Bolinda. The CMA believes that

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<sup>78</sup> Annex 072.12.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>79</sup> Annex 73.3.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>80</sup> Annex 72.11.docx to RBmedia's response to section 109 notice dated 28 February 2020.

<sup>81</sup> Annex 03. [REDACTED] to OverDrive's response to section 109 notice dated 28 February 2020.

<sup>82</sup> Annex 08. [REDACTED].

<sup>83</sup> Annex 06. [REDACTED].

this also indicates that the Parties see each other as close competitors in the supply of eBooks to public libraries in the UK.

*Conclusion on closeness of competition between the Parties*

112. Based on the evidence set out above, the CMA believes that the Parties are close competitors in the supply of eBooks to public libraries in the UK.

*Competitive constraints from alternative suppliers*

113. Unilateral effects are more likely where customers have little choice of alternative supplier. The CMA considered whether there are alternative suppliers of eBooks to public libraries in the UK which would provide a competitive constraint on the Merged Entity.
114. The Parties submitted that, in the supply of eBooks to public libraries in the UK, they are and will continue to be constrained by a number of other competitors: Bolinda, Bibliotheca, Ulverscroft and Baker & Taylor.<sup>84</sup> The Parties submitted that Bolinda is each Party's closest competitor.<sup>85</sup>
115. The CMA assessed the extent of the competitive constraint imposed by each of these suppliers.
116. The CMA has also considered submissions from the Parties that, in the context of the supply of eBooks to public libraries in the UK, a small number of competitors can be sufficient to generate competitive outcomes.<sup>86</sup>

*Bolinda*

117. The CMA's shares of supply estimates show that Bolinda is the second largest supplier of eBooks to public libraries in the UK with an approximate share of [30-40]% by value. Post-Merger, it will be the only remaining competitor with a share of supply of over [5-10]%.
118. The Parties' bidding data analysis set out in Table 2 above shows that Bolinda is the strongest competitor to both of the Parties (winning more bids against them than any other supplier).
119. The majority of the Parties' customers that responded to the CMA's merger investigation indicated that Bolinda competes closely with each of RBmedia and OverDrive. Only one customer suggested that Bolinda competes weakly

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<sup>84</sup> MN, paragraph 93.

<sup>85</sup> Issues Meeting presentation, slide 12.

<sup>86</sup> Issues Meeting presentation, slides 2, 10 and 16.

with OverDrive, as Bolinda is 'more orientated to audio' and only one customer considered Bolinda to compete weakly with RBmedia.

120. Generally, customers considered that Bolinda's and RBmedia's service propositions are similar in the supply of eBooks. For example, in response to a question asking customers to compare Bolinda and RBmedia, one customer submitted that Bolinda has 'similar range of titles as RBdigital'. In relation to how customers compare Bolinda to Overdrive, Bolinda is considered to have a good app and a good range of content. However, Bolinda does not have the same breadth of content as OverDrive.<sup>87</sup>
121. The Parties' internal documents indicate that they view Bolinda as a [redacted] competitor in the supply of eBooks to public libraries in the UK. For example:
- (a) OverDrive's internal document titled '[redacted]' provides that 'Bolinda is the [redacted] competitor in the UK'. It notes, in particular, that Bolinda has [redacted]';<sup>88</sup> and
  - (b) RBmedia's [redacted] in the UK indicate that RBmedia [redacted] in the context of the supply of eBooks (as well as eAudiobooks) to public libraries in the UK. For example, one of the reports states that RBmedia '[redacted] [...] Identified 22 Libraries that are open to eBook offer'.<sup>89</sup>
122. Based on the evidence set out above, the CMA believes that Bolinda will continue to exert a significant competitive constraint on the Merged Entity in the supply of eBooks to public libraries in the UK.

### *Bibliotheca*

123. The CMA estimates that Bibliotheca's share of supply of eBooks to public libraries in the UK is [5-10]% by value.
124. The Parties' bidding data analysis set out in Table 2 above shows that Bibliotheca competes to a relatively limited degree with the Parties in the supply of eBooks to public libraries in the UK. Where one Party's bid is unsuccessful, Bibliotheca was successful a fairly small ([10-20]% or [10-20]%) proportion of the time. This is a considerably lower figure than Bolinda and also lower than the other Party. The data for contracts where one of the Parties was the incumbent but lost exhibits a broadly similar ranking of competitors (Bolinda first, then the other Party, then Bibliotheca third or in joint second place). However, as explained in paragraph 105, the CMA has placed

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<sup>87</sup> For example, one customer submitted that 'although [Bolinda's app] *the BorrowBox* provides a good user experience [...] Bolinda offer[s] a smaller range of titles than OverDrive who are the largest content supplier in the world for libraries'.

<sup>88</sup> Annex 03. [redacted] to OverDrive's response to section 109 notice dated 28 February 2020.

<sup>89</sup> Annex 071.22.docx.

less weight on the data for incumbent's loss of contracts, given the small sample size.

125. A relatively limited proportion of the Parties' customers who responded to the CMA's merger investigation indicated that Bibliotheca competes closely with each of RBmedia and OverDrive, although only one customer considered that Bibliotheca competes weakly with OverDrive as Bibliotheca has a 'poor customer experience'.
126. The Parties' internal documents contain very limited mention of Bibliotheca in the context of the supply of eBooks to public libraries in the UK. The limited number of documents which do mention Bibliotheca are consistent with the position that it provides only a weak competitive constraint on the Parties. For example:
  - (a) RBmedia's internal document providing analysis of a customer's tender says that RBmedia '[redacted]';<sup>90</sup> and
  - (b) OverDrive's '[redacted]' says that Bibliotheca is a '[redacted]'.<sup>91</sup>
127. Based on the evidence set out above, the CMA believes that Bibliotheca will exert a weak competitive constraint on the Merged Entity in the supply of eBooks to public libraries in the UK.

#### *Ulverscroft*

128. The CMA's estimates that Ulverscroft's share of supply of eBooks to public libraries in the UK is [0-5]%
129. The Parties' bidding data analysis set out in Table 2 above indicates that Ulverscroft exerts a negligible competitive constraint on the Parties, as it [redacted] against RBmedia or OverDrive.
130. Only a few of the Parties' customers who responded to the CMA's merger investigation indicated that Ulverscroft competes closely with RBmedia. No customer considered that Ulverscroft competed closely with OverDrive. One customer noted that Ulverscroft was 'late to the market so not so well established. [Ulverscroft has] [redacted] little knowledge of this system'.

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<sup>90</sup> Annex 088, [redacted].

<sup>91</sup> Annex 03. [redacted] to OverDrive's response to section 109 notice dated 28 February 2020.

131. The Parties' internal documents contain very limited mention of Ulverscroft in the context of the supply of eBooks to public libraries in the UK.<sup>92</sup>
132. Based on the evidence set out above, the CMA believes that Ulverscroft will exert a negligible competitive constraint on the Merged Entity in the supply of eBooks to public libraries in the UK.

#### *Baker & Taylor*

133. The Parties submitted that Baker & Taylor is a recent entrant with a share of supply of under [0-5]% by value.<sup>93</sup> The CMA received no evidence to verify Baker & Taylor's share of supply.
134. The Parties' bidding data analysis set out in Table 2 above indicates that Baker & Taylor exerts a negligible competitive constraint on the Parties as it [redacted] against RBmedia and OverDrive.
135. Baker & Taylor was mentioned by only one of the Parties' customers who responded to the CMA's merger investigation. This customer considered that Baker & Taylor is a weak competitor to RBmedia as it has a 'weak content and app' compared to RBmedia.
136. None of the internal documents produced to the CMA by the Parties identify Baker & Taylor as a credible competitor in the supply of eBooks to public libraries in the UK.<sup>94</sup>
137. Based on the evidence set out above, the CMA believes that Baker & Taylor will exert a negligible competitive constraint on the Merged Entity in the supply of eBooks to public libraries in the UK.

#### *Conclusion on the competitive constraints from alternative suppliers*

138. For the reasons set out above, the CMA believes that the Merged Entity will only be constrained by one strong competitor in the supply of eBooks to public libraries in the UK – Bolinda. The CMA believes that Bibliotheca will exert only a weak competitive constraint on the Merged Entity whereas Ulverscroft and Baker & Taylor will exert only a negligible competitive constraint.

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<sup>92</sup> For example, OverDrive's internal document titled [redacted] notes that Ulverscroft supplies eBooks and/or eAudiobooks to [redacted] accounts (public libraries in the UK), compared to OverDrive's [redacted] and RBmedia's [redacted] accounts. RBmedia's internal document titled [redacted] shows that Ulverscroft serves a significantly smaller number of libraries in the UK compared to each of the Parties and Bolinda.

<sup>93</sup> MN, Table 3.

<sup>94</sup> One OverDrive internal document titled [redacted] mentions Baker & Taylor as [redacted]. However, this document has a US focus and refers to several other suppliers not active in the UK – Hoopla and Onleihe (Annex 012.pdf).

*The Parties' submission that post-Merger competition would continue to be effective*

139. As set out above, the CMA believes that Bolinda will remain a significant competitive constraint on the Merged Entity in the supply of eBooks to public libraries in the UK. The Parties submitted that a small number of competitors can be sufficient to generate competitive outcomes, consistent with the position adopted by the OFT in *DPG/Zoopla*.<sup>95</sup>
140. Whether a particular merger is likely to give rise to competition concerns is a fact-specific assessment carried out on case-by-case basis. An outcome in a different merger investigation in a different market is therefore only of limited relevance to the present investigation. The CMA notes, in addition, that many of the market features that led to the OFT's clearance decision in *DPG/Zoopla* are not present in this case. For example, in *DPG/Zoopla*: (i) the market was characterised by network effects;<sup>96</sup> (ii) there was limited pre-merger competition between the merging parties (so the loss of competition brought about by the merger was considered to be limited);<sup>97</sup> (iii) the merger did not create or enhance a market-leading position (the merged entity in that case would be smaller than the market leader, Rightmove);<sup>98</sup> and (iv) the position that the merger was likely to have pro-competitive effects, by creating a stronger constraint on Rightmove, was strongly supported by third parties.<sup>99</sup>
141. By contrast, in the present case: (i) network effects are not a feature of the supply of eBooks to public libraries in the UK; (ii) the available evidence indicates that the Parties compete closely with each other in the supply of eBooks to public libraries in the UK at present; (iii) the Merger will strengthen the position of the largest eBooks supplier at present (OverDrive); and (iv) a significant number of customers have expressed competition concerns about the Merger (see paragraph 202).
142. The CMA therefore does not believe that, in the context of the supply of eBooks to public libraries in the UK, a small number of competitors (primarily the Merged Entity and Bolinda) will be sufficient to generate competitive outcomes.

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<sup>95</sup> Issues Meeting presentation slides 2 and 10; ME/5233/11 *DPG/Zoopla*, 16 April 2012.

<sup>96</sup> ME/5233/11 *DPG/Zoopla*, 16 April 2012, paragraph 8.

<sup>97</sup> ME/5233/11 *DPG/Zoopla*, 16 April 2012, paragraph 60.

<sup>98</sup> ME/5233/11 *DPG/Zoopla*, 16 April 2012, Table 1.

<sup>99</sup> ME/5233/11 *DPG/Zoopla*, 16 April 2012, paragraph 61.

### ***Conclusion on horizontal unilateral effects in the supply of eBooks to public libraries in the UK***

143. Based on the evidence set out above, the CMA believes that the Merged Entity will have a very strong market position in a concentrated market. The CMA believes that the Parties compete closely in the supply of eBooks to public libraries in the UK and that there will not remain sufficient competitors post-Merger to effectively constrain the Merged Entity.
144. Accordingly, the CMA found that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the supply of eBooks to public libraries in the UK.

### ***Horizontal unilateral effects in the supply of eAudiobooks to public libraries in the UK***

145. In order to assess the likelihood of the Merger resulting in horizontal unilateral effects in the supply of eAudiobooks to public libraries in the UK, the CMA has considered:
- (a) shares of supply;
  - (b) closeness of competition between the Parties; and
  - (c) competitive constraints from alternative suppliers.

#### *Shares of supply*

146. The Parties submitted that their combined share of supply of eAudiobooks to public libraries in the UK is [30-40]%, with an increment of [10-20]% brought about by the Merger. According to the Parties' estimated shares of supply, Bolinda is the market leader with a [50-60]% share of supply, followed by RBmedia ([20-30]%), OverDrive ([10-20]%), Bibliotheca ([5-10]%) and Ulverscroft ([0-5]%).<sup>100</sup>
147. As set out in paragraph 80 above, since the Parties' estimates of total market size and their competitors' shares are reliant on the accuracy of the various assumptions used to construct them, the CMA believes that its own estimates (based on revenue data from the Parties and third parties) are more reliable. The CMA has therefore placed more weight on its own figures within its assessment. The CMA's estimates of shares of supply of eAudiobooks to public libraries in the UK are set out in Table 3 below.

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<sup>100</sup> MN, Table 3.

**Table 3: The CMA’s estimates of shares of supply of eAudiobooks to public libraries in the UK in 2019 (by value)**

Company	Share
RBmedia	[20-30]%
OverDrive	[10-20]%
<b>Combined</b>	<b>[40-50]%</b>
Bolinda	[50- 60]%
Ulverscroft	[0-5]%
Bibliotheca	[0-5]%
<b>Total</b>	<b>100%</b>

*Source: CMA analysis based on the Parties’ and third parties’ data.*

148. The CMA’s estimates indicate that the Merged Entity will have a relatively high combined share of supply of eAudiobooks to public libraries in the UK of [40-50]%, with an increment of [10-20]% brought about by the Merger.
149. The CMA’s estimates indicate that RBmedia is currently the second largest supplier of eAudiobooks to public libraries in the UK with a [20-30]% share of supply, while OverDrive is the third largest supplier with a [10-20]% share of supply. Post-Merger, Bolinda will remain the largest supplier with a [50-60]% share of supply, followed by the Merged Entity ([40-50]%), Ulverscroft ([0-5%]) and Bibliotheca ([0-5%]). Therefore, the CMA believes that the remaining constraints on the Merged Entity would be limited to, principally, Bolinda, and, to a much lesser degree, Ulverscroft.
150. Although the Parties submitted the shares of supply are a weak indicator of their competitive position, as explained in paragraphs 86 and 87 above, the CMA believes that the shares of supply set out in Table 3 provide a reliable indication of the current market position of the different providers in the supply of eAudiobooks to public libraries in the UK and the extent to which this market is concentrated. As suppliers are differentiated, the CMA has considered shares of supply in conjunction with a range of other evidence relevant to the competitive assessment.

*Closeness of competition between the Parties*

151. The CMA has assessed closeness of competition between the Parties and considered within its assessment:
- (a) the Parties’ service propositions;
  - (b) the Parties’ bidding data analysis;
  - (c) third party views; and



(d) the Parties' internal documents.

*The Parties' service propositions*

152. The Parties submitted that catalogue content (ie titles) was one of the most important criteria for public libraries when selecting their supplier of eAudiobooks.<sup>101</sup> The Parties submitted that OverDrive and RBmedia are not close competitors in the supply of eAudiobooks to public libraries in the UK as they are widely viewed by libraries as complements rather than substitutes due to differentiation in the content offered.<sup>102</sup> In particular, the Parties submitted that:

- (a) as set out in paragraph 90(a), RBmedia is more active in the distribution of eAudiobooks and the other forms of content (eg eMagazines and eComics), whereas OverDrive is more active in the distribution of eBooks;<sup>103</sup>
- (b) there is a minimal overlap between the Parties in terms of eAudiobook titles given *RBdigital's* focus is on RBmedia-produced titles, and newer titles and OverDrive's focus is on older titles;<sup>104</sup> and
- (c) over 50% of *RBdigital's* UK revenues come from RBmedia-produced eAudiobooks content that is distributed exclusively through *RBdigital*.<sup>105</sup>

153. As explained at paragraph 37 above, third parties submitted that when choosing supplier, public libraries consider the following:

- (a) the quality and range of content;
- (b) the distribution platform's functionality (including accessibility and ease of use from the end-user perspective); and
- (c) price.

154. The CMA has assessed these parameters of competition in the round when assessing the closeness of competition between the Parties.

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<sup>101</sup> MN, paragraphs 33-35.

<sup>102</sup> MN, paragraph 85; and Issues Meeting presentation slide 6.

<sup>103</sup> MN, paragraph 70.

<sup>104</sup> MN, paragraph 70. Parties' submission on complementarity, 15 April 2020, paragraph 2.

<sup>105</sup> MN, paragraph 87.

- *Quality and range of content*

155. The Parties submitted that OverDrive has a larger portfolio of titles than RBmedia. In particular, OverDrive has approximately 160,000 eAudiobook titles available to UK public libraries, whereas RBmedia has approximately 50,000 eAudiobook titles available in the UK.<sup>106</sup> There is a degree of differentiation between the Parties. For example, most of (circa [80-90]%) RBmedia's revenue generated by the sales of eAudiobooks to public libraries comes from the supply of RBmedia-produced titles and these titles are typically available on RBmedia's platform two years before they are available on OverDrive's platform.<sup>107</sup>

156. The CMA believes that while OverDrive has a stronger offering in terms of number of titles, RBmedia also has a strong catalogue due to its RBmedia produced content.<sup>108</sup> Competitors of the Parties who responded to the CMA's merger investigation also referred to the strengths of the Parties' offerings:

- (a) one competitor submitted that 'eAudio[books] content strong on OverDrive though less than Rbdigital. Rbdigital is [sic] arguable [sic] the world's largest audiobook producer'; and
- (b) another competitor submitted that 'Rbdigital has a very large catalogue of audiobooks [sic] that produce and retain [sic] the exclusive right to sell to libraries'.

- *Distribution platform's functionality*

157. The core functions of the Parties' platforms (ie digital distribution of eAudiobooks to public libraries) are comparable. However, as mentioned in paragraph 98 in relation to eBooks, third party evidence indicates that the Parties' customers and competitors perceive OverDrive's app and platform to be superior to RBmedia's.

- *Price*

158. As noted at paragraph 32 above, the licence fee for digital content is set by publishers. Therefore, the price component that can be directly controlled by the digital distributors is the platform fee. While there is some evidence indicating that RBmedia's platform is cheaper than OverDrive's (see

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<sup>106</sup> The Parties' response to RFI 2, question 22 and the Parties' response to RFI 3, footnote 2.

<sup>107</sup> Parties' submission on complementarity, 15 April 2020, paragraph 6.

<sup>108</sup> Indeed, the fact that RBmedia has a higher share of supply than OverDrive despite having fewer titles indicates that number of titles alone does not determine the attractiveness of a platform's offer.

paragraph 100), the CMA believes that this may not provide a full picture of the overall price being charged by RBmedia given that as a vertically integrated supplier it controls the terms of the licence, including the licence fee paid by the libraries for RBmedia-produced titles.<sup>109</sup>

- *Conclusion on the Parties' service propositions*

159. Similar to many of the markets that the CMA investigates, the Parties' offerings are differentiated. Based on the evidence set out above, the CMA believes that each of the Parties' eAudiobook service proposition has different strengths. OverDrive offers a wider range of eAudiobook titles and stronger platform functionality, whereas RBmedia offers a good range of exclusive eAudiobook titles and may be more competitive in terms of pricing. The CMA considers further evidence on the closeness of substitution between the Parties' service propositions below.

*The Parties' bidding data analysis*

160. As set out in paragraph 102, the Parties submitted data on OverDrive's and RBmedia's bids to win public library customers between 2015 and 2020.<sup>110</sup>

161. The Parties submitted analysis based on data on OverDrive's and RBmedia's bids to win public library customers. The results of the Parties' analyses are set out in Table 4 below.

**Table 4: The Parties' bidding data analysis: eAudiobooks**

Winning competitor	RBmedia		OverDrive	
	Lost bids	Lost contracts	Lost bids	Lost contracts
Bolinda	[X]%	[X]	[X]%	[X]
OverDrive	[X]%	[X]	N/A	N/A
RBmedia	N/A	N/A	[X]%	[X]
Bibliotheca	[X]%	[X]	[X]%	[X]
<b>Total</b>		[X]		[X]

Source: Issues Meeting presentation, slide 13.

162. The CMA considers that the Parties' dataset provides an indication of who the Parties compete closely with (although less weight can be placed on the data in relation to an incumbent's loss of contracts, given the small sample size).

163. Overall, the CMA considers that the Parties' analysis outlined in Table 4 shows that, for each Party, the other Party is its second closest competitor in

<sup>109</sup> The Parties' response to RFI 2, paragraph 23.

<sup>110</sup> Annexes to the Parties' submissions on the bidding data consolidation, dated 22 May 2020.

the supply of eAudiobooks to public libraries in the UK. Bolinda is the strongest competitor to both of the Parties for the supply of eAudiobooks to public libraries in the UK (alternative suppliers are discussed from paragraph 170 onwards).

### *Third party views*

164. The majority of the Parties' customers who responded to the CMA's merger investigation considered that the Parties are close alternatives to each other in the supply of eAudiobooks to public libraries in the UK. In particular:
- (a) All customers indicated that RBmedia is an alternative to OverDrive. Most of these customers considered that RBmedia competes closely (or at least moderately) with OverDrive. Only a few of these customers considered RBmedia to compete weakly with OverDrive, mainly because of RBmedia's inferiority in terms of app functionality and customer service and its limited content.
  - (b) Most customers indicated that OverDrive is an alternative to RBmedia. More than half of these customers considered that OverDrive competes closely (or at least moderately) with RBmedia. Only a few customers considered OverDrive to compete weakly with RBmedia, mainly because of OverDrive's poorer selection of content compared to RBmedia.

### *Internal documents*

165. The CMA believes that the Parties' internal documents show that the Parties monitor each other and consider each other to be close competitors.
166. In general, RBmedia appears to produce few documents that capture the commercial strategy of its UK business. To the extent that relevant documents do exist, primarily in relation to specific tenders, RBmedia's internal documents indicate that RBmedia views OverDrive as a close competitor in the supply of eAudiobooks to public libraries in the UK. For example:
- (a) '[REDACTED]' document mentions RBmedia having lost a tender which included eAudiobooks to OverDrive: '[REDACTED]';<sup>111</sup>
  - (b) '[REDACTED]' document states: '[REDACTED]'.<sup>112</sup>
167. OverDrive does appear to produce some documents that capture the broader commercial strategy of its UK business. These internal documents indicate

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<sup>111</sup> Annex 072.12.docx.

<sup>112</sup> Annex 72.13.docx.

that it views RBmedia as a close competitor in the supply of eAudiobooks to public libraries in the UK. For example:

- (a) '[REDACTED]' document lists the UK public library authorities that OverDrive would target in 2019. About [REDACTED] of these public library authorities have [REDACTED] as their eBooks and/or eAudiobooks supplier;<sup>113</sup>
- (b) '[REDACTED]' document which discusses the supply of eAudiobooks to public libraries in the UK, lists 'RB Digital/WF Howes' as a '[REDACTED]', noting that RBmedia publishes audio content and therefore holds exclusive rights to those titles;<sup>114</sup>
- (c) '[REDACTED]' document provides a detailed description of [REDACTED]. The document discusses in detail [REDACTED];<sup>115</sup>
- (d) A presentation titled '[REDACTED]' which assesses the UK public library market lists 'RB Digital/ WF Howes' as a '[REDACTED]', further noting that RBmedia '[REDACTED]'.<sup>116</sup>

168. The CMA notes that the Parties' internal documents contain few references to any other competitors with the exception of Bolinda. The CMA also believes that this indicates that the Parties see each other as close competitors in the supply of eAudiobooks to public libraries in the UK.

*Conclusion on closeness of competition between the Parties*

169. Based on the evidence set out above, the CMA believes that the Parties are close competitors in the supply of eAudiobooks to public libraries in the UK.

*Competitive constraints from alternative suppliers*

170. Unilateral effects are more likely where customers have little choice of alternative supplier. The CMA considered whether there are alternative suppliers of eAudiobooks to public libraries in the UK which would provide a competitive constraint on the Merged Entity.

171. The Parties submitted that the 'competitive landscape is robust' in the supply of eAudiobooks to public libraries in the UK, naming the following competitors:

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<sup>113</sup> Annex 03. [REDACTED] to OverDrive's response to section 109 notice dated 28 February 2020.

<sup>114</sup> Annex 05. [REDACTED].

<sup>115</sup> Annex 06. [REDACTED].

<sup>116</sup> [REDACTED]. An OverDrive internal document [REDACTED] suggests that exclusive content is [REDACTED]. In particular, OverDrive notes that RBmedia (W.F. Howes) '[REDACTED]' and lists various [REDACTED].

Bolinda, Bibliotheca and Ulverscroft.<sup>117</sup> The Parties submitted that Bolinda is each Party's closest competitor.<sup>118</sup>

172. The CMA assessed the extent of the competitive constraint imposed by each of these suppliers.
173. The CMA has also considered arguments raised by the Parties that, in the context of the supply of eAudiobooks to public libraries in the UK, a small number of competitors can be sufficient to generate competitive outcomes.<sup>119</sup>

### *Bolinda*

174. The CMA's share of supply estimates indicate that Bolinda is the largest supplier of eAudiobooks to public libraries in the UK with a [50-60]% share of supply.
175. The Parties' bidding analysis set out in Table 4 above shows that Bolinda is the strongest competitor to both of the Parties (winning more against them than any other supplier).
176. The majority of the Parties' customers that responded to the CMA's merger investigation indicated that Bolinda competes closely with each of RBmedia and OverDrive. Only one customer considered Bolinda to compete weakly with RBmedia because of the 'maintenance charge, author exclusivity. Lending model'.
177. Generally, customers considered that Bolinda's and RBmedia's service propositions are similar in the supply of eAudiobooks. For example, in response to a question asking to compare Bolinda and RBmedia, one customer submitted that both RBmedia and Bolinda 'have a really good UK [eAudiobook] content range and improving availability'. In comparison with OverDrive, customers generally considered that Bolinda has a good range of eAudiobooks content not available on OverDrive.
178. The Parties' internal documents indicate that Bolinda is a [redacted] in the supply of eAudiobooks to public libraries in the UK. For example:
  - (a) OverDrive's internal document titled '[redacted]' provides a detailed description of [redacted];<sup>120</sup>

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<sup>117</sup> MN, paragraph 94.

<sup>118</sup> Issues Meeting presentation, slide 13.

<sup>119</sup> Issues Meeting presentation, slides 2, 10 and 16.

<sup>120</sup> Annex 06. [redacted].

- (b) OverDrive’s document titled ‘[REDACTED]’ which discusses the supply of eAudiobooks to public libraries in the UK states: ‘Main competitors: [REDACTED]’;<sup>121</sup>
- (c) RBmedia’s weekly ‘[REDACTED]’ reports in the UK indicate that RBmedia has been targeting [REDACTED] for the supply of eAudiobooks: ‘[REDACTED]’;<sup>122</sup>
- (d) Another RBmedia ‘[REDACTED]’ report provides: ‘[REDACTED]’;<sup>123</sup>
- (e) RBmedia’s ‘[REDACTED]’ provides: ‘[REDACTED]’.<sup>124</sup>

179. Based on the evidence set out above, the CMA believes that Bolinda will continue to impose a significant competitive constraint on the Merged Entity in the supply of eAudiobooks to public libraries in the UK.

*Ulverscroft*

- 180. The CMA estimates that Ulverscroft’s share of supply of eBooks to public libraries in the UK is [0-5]% by value.
- 181. The Parties bidding analysis set out in Table 4 shows that Ulverscroft currently exerts a negligible competitive constraint to the Parties, as it has [REDACTED] where RBmedia’s and OverDrive’s [REDACTED].
- 182. Almost half of the Parties’ customers that responded to the CMA’s merger investigation indicated that Ulverscroft competes closely with each of RBmedia and OverDrive. One customer considered it to compete weakly with OverDrive as Ulverscroft was ‘Late to the market so not so well established. Little knowledge of this system’, and another customer specified that Ulverscroft competed with RBmedia weakly because of its ‘title selection for specific market narrow choice [sic]’.
- 183. Generally, customers considered Ulverscroft’s offering is not as strong as the Parties’ as it has less attractive eAudiobook content which is targeted at narrower demographics. For example:
  - (a) a customer submitted that ‘Ulverscroft is not as well used by [...] library users because the content is relatively limited, and their content is

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<sup>121</sup> [REDACTED]. An OverDrive internal document [REDACTED] suggests that [REDACTED] is an important factor in competition in the supply of eAudiobooks. In particular, OverDrive notes that Bolinda has [REDACTED].

<sup>122</sup> Annex 071.20.docx.

<sup>123</sup> Annex 071.22.docx.

<sup>124</sup> Annex 072.2.docx.

targeted to elderly readers. Ulverscroft app does not have a great appearance'; and

- (b) another customer submitted that 'Ulverscroft does not have as good range of e-audiobooks, they are mostly sagas and the council's library users do not tend to borrow as many sagas'.

184. The Parties' internal documents have very limited discussion of Ulverscroft in the context of the supply of eAudiobooks to public libraries in the UK. The documents which mention Ulverscroft indicate that it is [REDACTED]. For example:

- (a) OverDrive's document titled '[REDACTED]' indicates that the number of accounts (customers) held by Ulverscroft is [REDACTED] than the number of accounts held by the Parties in the UK;<sup>125</sup>

- (b) RBmedia's internal documents indicate that it views Ulverscroft as a [REDACTED]. For example, RBmedia's '[REDACTED]' states: '[REDACTED]'.<sup>126</sup> Similarly, RBmedia's '[REDACTED]' says: '[REDACTED]'.<sup>127</sup>

185. Finally, the CMA notes that while [REDACTED] has [REDACTED], it has a [REDACTED] compared to the Parties.

186. Based on the evidence set out above, the CMA believes that Ulverscroft will exert a weak competitive constraint on the Merged Entity in the supply of eAudiobooks to public libraries in the UK.

### *Bibliotheca*

187. The CMA's estimates that Bibliotheca's share of supply of eAudiobooks to public libraries in the UK is [0-5]% by value.

188. The Parties' bidding analysis set out in Table 4 shows that Bibliotheca currently exerts a negligible competitive constraint on the Parties, as it [REDACTED] and where OverDrive bid unsuccessfully, Bibliotheca won only [5-10]% of the time.

189. Only a few of the Parties' customers who responded to the CMA's merger investigation indicated that Bibliotheca competes closely with RBmedia and OverDrive. One customer who considered Bibliotheca to compete weakly with OverDrive said that Bibliotheca offers a 'poor customer experience'.

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<sup>125</sup> Note that the figures seem to include both eBook and eAudiobook customers. Annex [REDACTED].

<sup>126</sup> Annex 072.6.docx.

<sup>127</sup> Annex 072.45.docx.



Moreover, another customer submitted that OverDrive and Bibliotheca have ‘similar content, but [Bibliotheca has a] less advanced product’.

190. The Parties’ internal documents indicate that Bibliotheca is not seen as a strong competitor in the supply of eAudiobooks to public libraries in the UK by either of the Parties. For example:
- (a) OverDrive’s [redacted] document states that Bibliotheca is a [redacted];<sup>128</sup>
  - (b) OverDrive’s [redacted] document indicates that [redacted] held by Bibliotheca is [redacted] held by either of the Parties;<sup>129</sup> and
  - (c) there is very limited discussion of Bibliotheca in RBmedia’s internal documents.
191. Based on the evidence set out above, the CMA believes that Bibliotheca will exert a negligible competitive constraint on the Merged Entity in the supply of eAudiobooks to public libraries in the UK.

*Conclusion on the competitive constraints from alternative suppliers*

192. For the reasons set out above, the CMA believes that the Merged Entity will only be constrained by one strong competitor in the supply of eAudiobooks to public libraries in the UK – Bolinda. The CMA believes that Ulverscroft will exert only a weak competitive constraint, whereas Bibliotheca will exert a negligible competitive constraint.

*The Parties’ submission that post-Merger competition would continue to be effective*

193. As set out in paragraph 139 above, the Parties submitted that a small number of competitors can be sufficient to generate competitive outcomes in the supply of eAudiobooks to public libraries in the UK.
194. For the same reasons as set out at paragraph 140 above in relation to the supply of eBooks to public libraries in the UK,<sup>130</sup> the CMA does not believe that, in the context of the supply of eAudiobooks to public libraries in the UK, a small number of competitors (primarily the Merged Entity and Bolinda) will be sufficient to generate competitive outcomes.

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<sup>128</sup> Annex 03. [redacted] to OverDrive’s response to section 109 notice dated 28 February 2020.

<sup>129</sup> Note that the figures seem to include both eBooks and eAudiobooks customers. Annex 07. [redacted].

<sup>130</sup> The only difference being that in relation to the supply of eAudiobooks, the Merger will not result in the Merged Entity being the largest supplier (by value). However, the other factors noted in relation to the supply of eBooks also apply to eAudiobooks.

## **Conclusion on horizontal unilateral effects in the supply of eAudiobooks to public libraries in the UK**

195. Based on the evidence set out above, the CMA believes that the Merged Entity will have a strong market position in a concentrated market. The CMA believes that the Parties currently compete closely in the supply of eAudiobooks to public libraries in the UK and that there will not remain sufficient competitors post-Merger to effectively constrain the Merged Entity.
196. Accordingly, the CMA found that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the supply of eAudiobooks to public libraries in the UK.

## **Barriers to entry and expansion**

197. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.<sup>131</sup> The CMA's guidelines indicate that it may consider entry or expansion within two years as timely, but this is assessed on a case-by-case basis.<sup>132</sup>
198. The Parties submitted that, while they are not aware of any likely entrants into the market for the supply of eBooks and/or eAudiobooks to public libraries in the UK,<sup>133</sup> the barriers to entry are low, especially for established international competitors, leading retail distributors and publishers. The Parties submitted that barriers to acquiring content are low since publishers have an incentive to distribute eBooks and eAudiobooks widely; rather, the main cost is developing a suitable platform. The Parties submitted that there are examples of firms creating their own platforms (eg Bolinda) and acquiring them (eg Bibliotheca which acquired 3M's library business).<sup>134</sup>
199. The total combined size of these two markets (the supply of eBooks and/or eAudiobooks to public libraries in the UK) is small, namely £[5-10] million.<sup>135</sup> One competitor who responded to the CMA's merger investigation indicated that this makes entry less attractive.<sup>136</sup> Indeed, some suppliers (namely

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<sup>131</sup> [Merger Assessment Guidelines](#), from paragraph 5.8.1.

<sup>132</sup> [Merger Assessment Guidelines](#), paragraph 5.8.11.

<sup>133</sup> MN, paragraph 120.

<sup>134</sup> MN, paragraphs 115-119.

<sup>135</sup> See paragraphs 221-222 below.

<sup>136</sup> Although this competitor did not think this precluded entry into the UK. [X].

Askews and Wheelers) have exited the market in recent years.<sup>137</sup> With respect to the Parties' reference to Bibliotheca's acquisition of 3M Cloud Library platform in 2015,<sup>138</sup> the CMA notes that five years after the acquisition Bibliotheca only exerts a weak competitive constraint on the Parties and has a share of supply of less than 10% in each market (see Table 1 and Table 3).

200. For the reasons set out above, the CMA believes that entry or expansion would not be sufficient, timely and/or likely to prevent a realistic prospect of an SLC as a result of the Merger.

### **Third party views**

201. The CMA contacted customers, competitors and suppliers (publishers) of the Parties. Some customers raised concerns in relation to the Merger, including that it could further reduce remaining competition in an already concentrated market and result in higher prices. Two competitors raised concerns in relation to the Merger and stated that combining the titles available on OverDrive's and RBmedia's platforms would make it difficult for these competitors to compete with the Merged Entity. No other third parties raised concerns about the Merger.
202. Third party comments have been taken into account where appropriate in the competitive assessment above.

### **Conclusion on SLC**

203. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result in an SLC as a result of:
- (a) horizontal unilateral effects in relation to the supply of eBooks to public libraries in the UK; and
  - (b) horizontal unilateral effects in relation to the supply of eAudiobooks to public libraries in the UK.

### **Exceptions to the duty to refer**

204. Where the CMA's duty to refer is engaged, the CMA may, pursuant to section 22(2)(b) of the Act, decide not to refer the merger if any relevant customer benefits in relation to the creation of the relevant merger situation concerned

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<sup>137</sup> See for instance [§].

<sup>138</sup> <https://www.bibliotheca.com/en-gb/bibliotheca-announces-new-academic-focused-product-range/>.

outweigh the SLC concerned and any adverse effects of it (the **relevant customer benefits exception**). Where the CMA's duty to refer is engaged, the CMA may also, pursuant to section 22(2)(a) of the Act, decide not to refer the merger under investigation for a Phase 2 investigation on the basis that the market(s) concerned is/are not of sufficient importance to justify the making of a reference (the **de minimis exception**).

205. As set out above, the CMA believes that its duty to refer is engaged in relation to (i) the supply of eBooks to public libraries in the UK; and (ii) the supply of eAudiobooks to public libraries in the UK. The CMA has considered below whether it is appropriate to apply the relevant customer benefits exception or the *de minimis* exception to the present case.

### **Relevant Customer Benefits**

206. As set out in the CMA's Guidance,<sup>139</sup> to count as relevant customer benefits, customers need to be better off with the merger, despite the fact that the CMA believes that the merger raises the realistic prospect of an SLC. These will be rare cases since, ordinarily, the CMA would expect an SLC to lead to harm to customers in the form of higher prices, lower quality, reduced service and/or reduced innovation.
207. Under section 30 of the Act, the CMA must believe that the claimed relevant customer benefits have accrued or may be expected to accrue as a result of the merger. For the CMA to consider exercising its discretion, the claimed relevant customer benefits must be clear, and the evidence in support of them must be compelling. In other words, the parties should be able to produce detailed and verifiable evidence of any anticipated price reductions or other benefits. The parties should also be able to provide evidence that the claimed benefits will be:
- (a) merger specific (ie unlikely to accrue without the merger);
  - (b) timely (ie expected to accrue within a reasonable period from the merger);
  - (c) likely; and
  - (d) sufficient (ie large enough to outweigh the SLC that arises as a result of the merger).<sup>140</sup>

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<sup>139</sup> *Mergers: Exceptions to the duty to refer*, paragraph 83.

<sup>140</sup> *Merger Assessment Guidelines*, paragraph 5.7.4.

208. The Parties submitted that the Merger will produce tangible, Merger-specific benefits to public libraries and their patrons. In particular, the Parties submitted that:
- (a) libraries and their patrons will be able to access a broader array of complementary content on a single platform;
  - (b) the Merger will result in reduced complexity and administration for public libraries, as they will be able to manage a greater number of titles in one library-facing marketplace and will not have to pay multiple platform fees to have a comprehensive content portfolio;
  - (c) the Parties will merge the best features of the two platforms into one;
  - (d) post-Merger, the Parties will have the incentive and the resources to accelerate innovation stemming from a combined development budget; and
  - (e) the Merger allows for a dramatic expansion in the distribution of RBmedia's exclusive eAudiobooks content and the elimination of double marginalisation on RBmedia's content which is delivered through OverDrive.<sup>141</sup>
209. The Parties also submitted that the Merged Entity will be a more effective competitor to Bolinda, particularly for those public libraries that prefer to source both eBooks and eAudiobooks from a single supplier.<sup>142</sup>
210. In relation to the Parties' submission in paragraph 209, and as discussed in paragraphs 40 to 42 above, a significant proportion (45%) of public libraries use multiple digital distributors. For those public libraries currently using a single digital distributor, it is unclear how strong this preference for single-sourcing is and therefore how significant this claimed customer benefit would be.
211. Several third parties that responded to the CMA's merger investigation indicated that the Merger may bring about some benefits to library patrons due to improved ease of access to a greater number of titles (of both Parties) through one app.
212. However, the CMA notes that the Parties' and third parties' submissions regarding Merger-specific benefits are high level. The Parties did not provide further evidence to support their views on the benefits arising from the

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<sup>141</sup> MN, paragraphs 124 and 125 and the Parties' submission on complementarity, paragraphs 12 to 17.

<sup>142</sup> Issues Meeting presentation, slide 16.

Merger, particularly in relation to timeliness or the scale of the benefits, nor did the Parties provide evidence that allows quantification of these benefits. On the basis of the limited evidence provided, the CMA does not believe that there is compelling, detailed and verifiable evidence of relevant customer benefits arising from the Merger. The CMA therefore does not have sufficient evidence that relevant customer benefits will outweigh the competition concerns it has identified to warrant the application of the relevant customer benefits exception.

### **Markets of insufficient importance**

213. In considering whether to apply the *de minimis* exception, the CMA will consider, in broad terms, whether the costs involved in a reference would be disproportionate to the size of the market(s) concerned, taking into account also the likelihood that harm will arise, the magnitude of competition potentially lost and the duration of such effects.<sup>143</sup>

#### *'In principle' availability of UILs*

214. The CMA's general policy, regardless of the size of the affected market, is not to apply the *de minimis* exception where clear-cut UILs could, in principle, be offered by the parties to resolve the concerns identified.<sup>144</sup> In most cases, a clear-cut UIL will involve a structural divestment.<sup>145</sup> The CMA will not consider that UILs are in principle available where the CMA's competition concerns relate to such an integral part of a transaction that to remedy them via a structural divestment would be tantamount to prohibiting the merger altogether.<sup>146</sup> Nor will the CMA consider UILs to be in principle available where the minimum structural divestment that would be required to ensure the remedy was effective would be wholly disproportionate in relation to the concerns identified.<sup>147</sup>

215. The CMA considered whether a clear-cut UIL would be available in principle in the present case.

216. The CMA considered whether its concerns regarding (i) the supply of eBooks to public libraries in the UK; and (ii) the supply of eAudiobooks to public libraries in the UK could have been addressed in a clear-cut way by the divestment of the OverDrive or the RBmedia business. Such a divestment would, however, be tantamount to prohibiting the Merger, as it would amount

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<sup>143</sup> [Mergers: Exceptions to the duty to refer](#) (CMA64), 13 December 2018.

<sup>144</sup> [Mergers: Exceptions to the duty to refer](#), paragraph 28.

<sup>145</sup> [Mergers: Exceptions to the duty to refer](#), paragraph 31.

<sup>146</sup> [Mergers: Exceptions to the duty to refer](#), paragraph 32.

<sup>147</sup> [Mergers: Exceptions to the duty to refer](#), paragraph 33.

to divesting either all of the acquired business or all of the existing overlapping business of KKR. Accordingly, consistent with the position set out in its guidance, the CMA does not consider this to be a clear-cut UIL that is available ‘in principle’.

217. The CMA also considered whether a divestiture package other than a full divestiture of either of the OverDrive or RBmedia businesses could provide a clear-cut UIL to resolve the competition concerns identified. The CMA found that the Parties’ worldwide operations (including their global platforms and associated intellectual property rights) are highly integrated, and therefore that neither KKR nor OverDrive has a readily-separable business, encompassing their eBooks and eAudiobooks businesses in the UK, which could address the CMA’s competition concerns in a clear-cut way. In particular, the CMA found that significant difficulties exist in relation to the design, implementation and/or monitoring of a remedy involving a package of assets that fell short of a full divestiture of either of the Parties’ businesses. The CMA found that, for this reason, there was no clear-cut package of assets which could ‘in principle’ be sold to a third-party purchaser to resolve the identified competition concerns.
218. In the context of a *de minimis* assessment, the CMA takes a conservative approach in assessing whether UILs are ‘in principle’ available.<sup>148</sup> To the extent that there is any doubt as to whether UILs would meet the ‘clear-cut’ standard, as is the case here, they will not be included in the ‘in principle’ assessment.<sup>149</sup>
219. Accordingly, the CMA does not believe that ‘in principle’ clear-cut UILs are available in this case.

### *Relevant factors*

220. Where the CMA concludes that clear-cut UILs are not in principle available, the CMA will then consider the likely level of consumer harm arising from the merger when deciding whether or not to apply the *de minimis* exception. The CMA will consider several factors in this assessment: the size of the market, the strength of the CMA’s concerns that harm will occur as a result of the merger, the magnitude of competition that would be lost by the merger, and the likely durability of the merger’s impact.<sup>150</sup> The CMA will also consider the wider implications of a *de minimis* decision.<sup>151</sup> Each is considered in turn below.

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<sup>148</sup> *Mergers: Exceptions to the duty to refer*, paragraph 34.

<sup>149</sup> *Mergers: Exceptions to the duty to refer*, paragraph 34.

<sup>150</sup> *Mergers: Exceptions to the duty to refer*, paragraph 35.

<sup>151</sup> *Mergers: Exceptions to the duty to refer*, paragraphs 47-51.

221. Consistent with the approach set out in the CMA’s guidance, the fact that one of these factors may point towards or against exercise of the discretion should not be regarded as decisive in any individual case. The CMA considers these factors in the round as part of its overall assessment of whether the expected impact of the merger in terms of customer harm is likely to materially exceed the public costs of a reference.<sup>152</sup>

*Market size*

222. Based on the data provided by the Parties and third parties, the CMA estimated the following market sizes for the markets concerned in the UK:

<b>Markets concerned</b>	<b>CMA’s estimate of market size (£)</b>
The supply of eBooks to public libraries in the UK	Approximately £[0-5] million
The supply of eAudiobooks to public libraries in the UK	Approximately £[0-5] million

223. The CMA therefore estimates that the total size in aggregate of all the markets concerned in the UK is approximately £[5-10] million. The CMA notes that the available evidence does not suggest that the market size may significantly expand (or contract) in the foreseeable future. One commercial due diligence document prepared for KKR by L.E.K. for the purposes of the Merger forecasts 6% growth per annum through to 2024 for the supply of digital content to public libraries in Western Europe (which is defined as including the UK).<sup>153</sup> The CMA notes that, on this basis, the total size in aggregate of all the markets concerned in the UK would remain at the lower end of the £5 million to £15 million range within which the CMA typically undertakes a broad cost/benefit analysis in deciding whether to exercise its discretion to apply the *de minimis* exception for the foreseeable future.<sup>154</sup>

*CMA’s belief regarding the likelihood of an SLC*

224. The CMA considers it appropriate to attach weight to the belief it holds regarding the likelihood of an SLC (ie whether its level of belief is on the ‘may

<sup>152</sup> [Mergers: Exceptions to the duty to refer](#), paragraph 36.

<sup>153</sup> MN, Annex 013. While the primary focus of the document is the US (page 4), the document discussed market trends in Western Europe (which is defined as including the UK).

<sup>154</sup> [Mergers: Exceptions to the duty to refer](#), paragraphs 9-10. Below this range the CMA would generally not consider a reference justified, unless a clear-cut UIL is available.



be the case' standard) rather than on the 'is the case' (more likely than not) standard.<sup>155</sup> In this case, the CMA's level of belief in relation to the markets concerned is higher than the minimum required to make a reference.

225. With respect to the supply of eBooks to public libraries in the UK, the Parties' combined share of supply will be high post-Merger (with the Merged Entity being the largest supplier). The Parties compete closely with each other and there are limited alternative suppliers in this market. However, the CMA notes that the Parties are not each other's closest competitors (with evidence indicating that Bolinda is each of the Parties' closest competitor) and Bolinda will continue to impose a significant competitive constraint on the Merged Entity.
226. With respect to the supply of eAudiobooks to public libraries in the UK, the Parties' combined share of supply will be relatively high post-Merger. The Parties compete closely with each other and there are limited alternative suppliers in this market. However, the CMA notes that the Parties are not each other's closest competitors (with evidence indicating that Bolinda is each of the Parties' closest competitor) and that Bolinda (which will remain the largest supplier post-Merger) will continue to impose a significant competitive constraint on the Merged Entity.

#### *Magnitude of competition lost by the Merger*

227. In accordance with its guidance, when considering the magnitude of competition lost by the Merger, the CMA has taken into account the conditions of competition discussed at paragraphs 225 and 226 above, and has also had regard to whether a substantial proportion of the likely detriment would be suffered by vulnerable customers.<sup>156</sup> The CMA has therefore considered the potential impact of the Merger on public libraries in the UK, and the patrons that use those libraries. Public library budgets are under increasing pressure. Expenditure on eBooks and eAudiobooks accounts for a material proportion of expenditure of public libraries. While public libraries play an important role in UK society, the available evidence suggests that they are, in practice, used by a broad cross-section of consumers.<sup>157</sup> While these data do not provide complete insight into the potential use of eBooks and eAudiobooks by vulnerable consumers, the CMA notes that they suggest that a substantial proportion of the likely detriment would not be suffered by vulnerable consumers.

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<sup>155</sup> *Mergers: Exceptions to the duty to refer*, paragraph 38.

<sup>156</sup> *Mergers: Exceptions to the duty to refer*, paragraph 44.

<sup>157</sup> Department for Digital, Culture, Media & Sport, *Taking Part Survey*, 2018/19.

### *Durability*

228. As discussed at paragraphs 199 and 200, the CMA did not identify evidence of sufficiently likely and timely entry or expansion into the relevant markets. It is possible that entry and/or expansion may occur in the longer term, but this would depend on a number of factors including costs of entry and market growth. As noted in paragraph 223 above, any market growth in future is expected to be moderate in nature.

### *Wider implications of a 'de minimis' decision*

229. The CMA is less likely to apply the *de minimis* exception where it believes that the merger is one of a potentially large number of similar mergers that could be replicated across the sector in question.<sup>158</sup>
230. Given the nature of the markets at issue, the CMA considers it unlikely that a potentially large number of similar mergers could be replicated across the sector.
231. As regards the economic rationale for the Merger, the CMA has not seen any evidence to suggest that the Merger is solely or primarily motivated by the acquisition of market power in UK markets. By contrast, available evidence indicates that KKR's primary rationale for the Merger is to expand the distribution of RBmedia's published content through OverDrive's library distribution network.<sup>159</sup>
232. The CMA therefore considers that the wider implications of a *de minimis* decision do not point against the application of the *de minimis* exception in this case.

### *Conclusion on the application of the de minimis exception*

233. Taking all the above factors into consideration, the CMA believes that the markets concerned in this case are not of sufficient importance to justify the making of a reference. As such, the CMA believes that it is appropriate for it to exercise its discretion to apply the *de minimis* exception in accordance with section 22(2)(a) of the Act.

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<sup>158</sup> *Mergers: Exceptions to the duty to refer*, paragraph 48.

<sup>159</sup> MN, paragraph 16.

## Decision

234. Consequently, the CMA believes that it is or may be the case that (i) a relevant merger situation has been created; and (ii) the creation of that situation has resulted, or may be expected to result, in an SLC within a market or markets in the UK. However, pursuant to section 22(2)(a) of the Act, the CMA believes that the markets concerned are not of sufficient importance to justify the making of a reference.
235. The Merger will therefore **not be referred** under section 22 of the Act.

**Colin Raftery**  
**Senior Director, Mergers**  
**Competition and Markets Authority**  
**16 June 2020**