



Are Libraries Violating Procurement Rules?

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Publicly funded institutions commonly have to obey strict spending rules. In a generalized version of this practice, members of such a public institution can only buy goods/services without first obtaining several competitive quotes, if these items are either covered by an existing institutional contract or their price does not exceed certain limits. Above a second price threshold, limited bidding/tender processes are required and above a third, a full bidding process is mandated. At academic institutions, researchers can be excused for getting the impression only they are bound by these spending rules, as, e.g., libraries (alone or in consortia) just negotiate prices with, say, publishers without any such strings. However, this is mainly for historical reasons, as publishers own a copyright monopoly on the subscription content they used to offer (or are still offering), such that they fell under the "single source exemption" from spending rules. Today, however, many publishers either offer publication services for which they charge "article processing charges" (APCs) or have entered into "transformative agreements" (TAs) with an APC component and where the goal is a complete transition to APC-based publication services. One of the main reasons behind this transformation in scholarly publishing was to break out of the vendor lock-in the publisher monopolies entailed and replace it with a *competitive* APC market. If this market became indeed competitive, there cannot be a "single source exemption" any more to justify negotiations with publishers. If, on the other hand, libraries and publishers agree that despite the transition from procuring content to APC-based publication services, the monopolies actually still persist, this agreement amounts to an admission of defeat: APC-based open access has failed to break up the vendor lock-in and is, instead, cementing the parasitic relationship that corporate publishers exert on academic institutions. Tender processes or defeat, which will it be?

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Introduction

The idea to strap publicly funded institutions to strict spending rules is not new. Nelson Rosenbaum wrote for the *Cornell Law Review* in 1942¹:

“The awarding of contracts by municipal and other public corporations is of vital importance to all of us, as citizens and taxpayers. Careless and inefficient standards and procedures for awarding these important community commitments have increased unnecessarily the tax burdens of the public. To secure a standard by which the awarding of public contracts can be made efficiently and economically, and with fairness to both the community and the bidders, the constitutions of some states, and the statutes regulating municipal and public corporations provide for the award of public contracts to the lowest responsible bidder.”

It makes intuitive sense that a university president or provost cannot give, say, the contract for cleaning the buildings to their brother and the contract for

constructing that new department building to their other relative. The public deserves that their money is being spent prudently and efficiently - not according to the whims of individuals or special interest groups. Despite their documented shortcomings over the decades, the bidding procedures referred to by Rosenbaum above, are still common practice for the largest contracts at public institutions today. And yet, for decades, the libraries of public research institutions such as universities have been negotiating journal contracts with individual academic publishers, instead of holding tenders/bidding procedures. How do these library practices square with procurement rules?

The single source exemption

A prerequisite for organizing a bidding procedure is a functioning market with multiple competitors for the goods or services being sought by the institution. Economists agree on what the crucial condition is for

any market: that customers can substitute the goods and services from one vendor with those from another²:

“There is a wide consensus among competition authorities, legal experts and economists about the need to refer to demand-side substitutability for defining relevant markets. The same unanimity, however, does not exist in connection with supply-side substitutability. On the contrary, there seems to be substantial controversy as to the relevance of supply-side constraints for market definition.”

Demand-side substitutability here, of course, refers to customers being able to choose among goods or services from different vendors, while supply-side substitutability refers to a less obvious aspect. Imagine a hypothetical transportation ‘market’, where each vendor sells different vehicles: one vendor, say, offers bicycles, one cars, another trains, the next one busses, another one offers motorbikes and yet another scooters. A customer looking for a scooter cannot really choose the product of another vendor, as none of them sell scooters. So, from the customer-perspective, “demand-side substitutability” is not possible in this hypothetical scenario, so this is not a genuine market. However, from the perspective of the vendors, all the vendors are offering transportation and they each have both faster and slower vehicles as well as bigger and smaller ones. So, in terms of “speed of transportation” or “size of vehicle” the vendors can be seen as substitutable - this substitutability is just irrelevant for the customer. Therefore, supply-side substitutability is not a commonly agreed upon criterion for a functioning market.

Taking the demand-side perspective, it has been long known that academic journal publishing is not a genuine market. For any reader of academic journals, this is obvious: every academic article only exists once and so each journal owns a monopoly on it and, in turn, each publisher owns a monopoly on each of the journals they sell. This obvious situation is not lost on market analysts, e.g., from the European Commission (EC). Since the EU common market aims to protect consumer choice, EC market reports are an excellent source for professional analyses of the academic publishing sector. Over a number of years now, the EC has published various documents that corroborate the lack of demand-side substitutability and hence the characterization of the academic publishing sector as a conglomerate of

monopolies, rather than a genuine market.

Already when analyzing a merger case before the EC in 2003, the verdict was clear³:

“From a demand-side point of view, it is rare that two different publications be viewed as perfect substitutes. There usually are differences in the coverage, comprehensiveness and content provided by two different publications. From the point of view of functional interchangeability, two different publications could hardly be regarded as substitutable by the end-users, the readers.”

or

“Consumers will rarely substitute one publication for another in reaction to their relative prices. In this case, a strict demand approach would lead to the definition of a multitude of relevant markets of imprecise boundaries and small dimensions.”

In a document entitled “Study on the economic and technical evolution of the scientific publication markets [sic] in Europe” the authors come to similar conclusions⁴:

“substitution possibilities across journals are limited, so that publishers do have significant market power.”

or

“Since researchers do not see the various publishers as good substitutes and need access to all good journals, consortia only introduce a relatively weak ‘buyer-power’ counterpart to the rising concentration in the publishing market.”

Also in 2015, again on the occasion of a planned merger⁵, the EC confirmed their earlier findings that “from a demand-side point of view, it is rare that two different publications can be viewed as perfect substitutes, as there are differences in the coverage, comprehensiveness and content provided. Therefore, in terms of functional interchangeability, two different publications could hardly be regarded as substitutable by the end-users, the readers. On that basis, the Commission found that consumers will rarely substitute one publication for another following a change in their relative prices and concluded that a strict demand approach would lead to the definition of a multitude of relevant markets of imprecise boundaries and small dimensions.”

or

“Publications in different academic subjects are indeed not substitutable from the readers’ perspective.”

Taken together, over more than 20 years now, the

EU has consistently come to the conclusion that academic publishing is not a market in the sense that it does not provide for customer choice (i.e., demand-side substitutability). It is therefore not surprising, if now, after so many decades of established fact, scholarly organizations such as the German Council for the Sciences and Humanities (WR) also come to the conclusion⁶ that “academic publications are a unique, non-substitutable commodity. [...] a journal title can give a publisher a non-competitive market position [...] Functioning, competition-driven market structures do not exist”

Obviously, if there are no competitors, you cannot hold a bidding process. For these cases, the so-called “single (or sole) source exemption” from spending rules exists. It exempts public institutions from hosting tenders and allows them to negotiate with the monopolists. The fact that academic libraries and their consortia negotiate contracts with academic publishers instead of organizing bidding procedures is thus a symptom of the missing market: the publisher monopolies force the libraries to the negotiation table under the single source exemption, where the monopolists dictate the prices. If there were competition, no such negotiations would be allowed. Just like a university president cannot simply ask the company of, e.g., their brother to clean the university buildings, a library cannot just ask Elsevier to publish their articles. Exemptions from bidding only come into force when there are monopolies at play.

Transformative agreements

While one aspect of the so-called “transformative agreements” (TAs) has been to transform subscription journals into open access journals, another aspect nearly all TAs embrace is the concept of increased competition. The hope is that if the vendor no longer holds a monopoly on content, but competes with other publishers and their publishing services, then the prices will come down. In a genuine open access market, where the payment for the services is aptly called “article processing charges” (APCs), or so the idea goes, service providers compete for the publishing needs of the research institutions. This sentiment is reflected in various publications on the topic, for instance the document from the WR, quoted above⁶:

“Increasing economic efficiency: the previous business model of publishers is based on rights of use. As publishers are not granted exclusive rights under

OA any longer, publishers become publication service providers and enter into competition with other providers. [...] In the view of the WR, these financial flows should be designed to create more competition in the area of publication services and stronger incentives for innovation.”

Analogously, the German DEAL consortium argues⁷:

“the negotiations aim to transform the business model underlying scholarly journal publishing, moving from one based on subscription paywalls to one based on open access publishing services. In this way, the scholarly publishing services and journals wanted by authors are preserved, but the financial streams are restructured to enable open access to research findings and a more transparent and competitive scholarly publishing market.”

Clearly, a genuine market with competitive pricing is a major goal of many if not all TAs. However, if such a market were to emerge, the single source exemption can no longer apply and public institutions need to hold tenders, just like with any other goods or services for which there is competition. The publishers are aware of this, of course, and bundle a subscription component into these TAs (also called “publish and read” or “read and publish” agreements) to escape from the mandate for biddings processes and to maintain their monopoly leverage and negotiation power. Consequently, despite the goal of many TAs to lead to more competition, the negotiations between scholarly institutions and publishers continue more or less in the same way as they have been conducted in the last several decades, when they were still about subscription prices. Perhaps not entirely unexpectedly, the outcome of these negotiations is also the same as in the subscription negotiations of times past: APC prices that increase faster than general inflation⁸⁻¹¹. Similarly unsurprising are reports that the TAs do not seem to transform anything, but rather consolidate the power of the largest publishing houses.

Outside help

For decades now, scholarship has struggled to break free from the vendor lock-in academic publishing entails. The locks that keep scholarship in place are multitude: the non-substitutability of articles/journals has already been mentioned, authors, bound by the “publish or perish” culture are not free to publish in other venues, libraries believe they need

to serve their faculty whatever they require, and so on. In this locked-in system, researchers have been selected over decades to strive mainly for the prestige and reputation of the traditional journals, even to the detriment of their scholarship. In an attempt to escape the vendor lock-in, a whole new business model of open access journals charging for publication services has been invented, only to be usurped by the big publishers. Funding agencies around the globe have implemented mandates in an attempt to force authors to stop publishing in the legacy journals. The latest high hopes had been placed on transformative agreements, but they, like all the other attempts, initiatives and ideas in the decades before them, are failing. Today, these past failures have accumulated and reinforced each other to an extent that experts now speak of a trifecta of crises in academia¹²: one of reliability, one of affordability and one of functionality. In brief, monopolist publishers overcharge institutions, which then cannot afford to implement the infrastructure that supports their faculty both in scrutinizing the work of their colleagues and in making open science the default for their own work. This lack in functionalities, in turn, leads to a lack in replicability at the journals. This “replication crisis” has grown to such proportions that, depending on the field of study, anywhere between 40% to almost 90% of public funds spent on research end up in non-replicable publications.

More and more experts now agree that time is running out and that academia literally cannot afford any more failures or lack of action. However, by now it has become evident that all the academic stakeholders have too little room to effectively maneuver and make truly transformative decisions, mainly because they would face negative consequences if they were the first to act in this massive collective action problem. In such a dire situation, help from outside academia may well help break the vendor lock-in.

Government accountability

There are various ways in which governments and the public can make sure that their public institutions spend public money according to procurement rules. In some cases it is direct ministerial oversight, in others government accountability offices and in again others non-governmental organizations exerting public pressure when they encounter cases of egregious tax waste. It would be the task of these

organizations (or of experts with the relevant expertise advising them), given a newly emerging competitive APC-based publishing service market, to evaluate if the behavior of public research institutions is still in compliance with procurement rules. Are the traditional negotiations still admissible, now that so many publishers charge for services, rather than content?

If these organizations find that nothing fundamental has changed, then the current route of TAs is an abject failure: the monopolists can still charge what they want, just as in the subscription situation. In this case, the vendor lock-in is just as strong as it was before and the fact that not only the APCs are rising, but the rise in the number of articles is also accelerating, entails total costs for academic institutions spiraling out of control even faster than with subscriptions.

On the other hand, if it turned out that the APC market really is competitive, then the negotiations with single publishers must end and proper tenders be organized for the publishing needs of each institution. In this case, institutions may still negotiate access to the increasingly old, paywalled back-issues, but all new articles will no longer be published in the legacy journals.

EU setting the example

Such bidding procedures for publishing services are nothing new. In 2021, the European Commission (EC) organized a tender for their publishing needs. The EC now hosts “Open Research Europe” (ORE), a diamond open access platform, where grant holders can publish without paying any APCs. Experience with tender processes is not limited to ORE. Scholarly societies have held tenders for their publication needs and the SCOAP3 project goes back over a decade¹³⁻¹⁵. It is straightforward to imagine ORE as the start of a federated (e.g., using the ActivityPub protocol, or the COAR Notify protocol, or some development out of both) global library not only for scholarly texts, but also research data and code/software. Each institution would implement a node or instance in this federated network. As such, they can set the criteria for their bidding procedure, just like with any other infrastructure component, depending on their in-house expertise and current pricing structure. Institutions may even decide to forgo the option of an instance of their own and pay another institution to host the instance, or groups of institutions may form consortia

and out-source this part of their infrastructure. As long as service providers remain substitutable and the code-base for the network is open source, no new lock-in effects can arise. The question whether negotiations with publishers are still legal today, is developing into a central question for the reform of scholarly digital infrastructure.

Caveats

Of course, tenders come with their own problems^{16,17}, but there is a reason they are still the main tool with which to procure with public funds. Substitutability entails standards according to which content can be migrated between providers. The W3C is a great example organization maintaining evolvable standards for the web, even though there are recognized issues also with this standards body. A scholarly standards body will eventually have to form that will try to prevent the known issues¹². A federated network depends on all nodes “playing by the rules”. As the envisaged journal replacement would be a global network, it needs to be resilient against potential rogue players. Such resilience, for instance by using redundancy technology such as the InterPlanetary File System (IPFS), not only serves to buffer against political catastrophes, but also natural ones. Thus, even without any rogue player in sight, it would be wise to consider this sort of resilience from the start. A network that serves not only narratives, but also data and code will of course be more complex than one for text-based articles only. However, because academia is currently paying about 5-10 times the publishing costs of a scholarly article¹⁸, a redirection of these funds towards the envisaged journal replacement should be more than sufficient for such a state-of-the-art federated network for all scholarly output¹².

Disclaimer: I am not a legal scholar. This article is hence not a legal, but a political argument.

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