



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects'

Economic and Monetary Affairs

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**Internal Market and
Consumer Protection**

The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects

Study for the IMCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

THE GEO-BLOCKING PROPOSAL: INTERNAL MARKET, COMPETITION LAW AND REGULATORY ASPECTS

STUDY

Abstract

This Study analyses the Commission's May 2016 Proposal for a Regulation addressing geo-blocking and other forms of customer discrimination based on customers' nationality, place of residence or place of establishment within the internal market. The study assesses the Commission's proposal under the Internal Market, Competition law and sector-specific rules and provides for policy recommendations and specific amendments to the proposal.

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LIST OF ABBREVIATIONS

B2B	Business to Business
B2C	Business to Consumer
COD	Ordinary Legislative Procedure
CJEU	Court of Justice of the European Union
COM	European Commission
DSM	Digital Single Market
EC	European Community
ECR	European Court Records
EEA	European Economic Area
EU	European Union
EUR	Euro
FAPL	Football Association Premier League
KG	Kilogram
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
SME	Small and Medium Enterprise
SEPA	Single Euro Payments Area
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America
VAT	Value Added Tax

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EXECUTIVE SUMMARY

Background

This report contains a review of the Proposal for a Regulation on Geo-Blocking (hereinafter, the Proposed Regulation). It is designed in the following manner: chapter 1 considers the possible application of EU primary law (the fundamental freedoms) to geo-blocking; chapter 2 considers the application of competition law to geo-blocking; chapter 3 contains an assessment of the relationship between the Proposed Regulation and existing and proposed secondary rules; chapter 4 sets out an evaluation of the Proposed Geo-Blocking Regulation by considering its scope and other limitations.

There are many ways that geo-blocking may manifest itself in digital markets, for instance:

- A refusal to sell based on territory of access to the site or delivery place.
- Re-routing – without consumer choice – to a different site based on territory of access by consumer. It should be borne in mind that new technologies allow this to take place without the consumer even being aware that they are being re-routed, and can be very sophisticated (by the way the origin of access is automatically identified and processed or even by target but differentiated advertising depending on origin of consumer which can be territorially based too).
- Different conditions of sale and payment based on territory of access to a website or delivery of goods or services (also in this respect see previous remark).

For the purposes of this report we do not provide a more detailed definition which contains all possible forms of geo-blocking: what emerges from the case law discussed below is that any definition will likely be overtaken by technological developments or the inventiveness of parties.

Our principal findings are the following:

- There is a regulatory gap inasmuch as the Treaty rules (free movement, non-discrimination and competition law) cannot cover all manifestations of geo-blocking.
- The application of EU competition law by the Court and the Commission reveals that geo-blocking is a concern which has been addressed in a number of situations and that public enforcement shows that meaningful results can be obtained.
- The Proposed Regulation is modest as to its coverage. In part the scope of coverage is affected by existing rules, especially in the field of transport, where rules prohibiting certain forms of geo-blocking already exist. A wider scope of application is warranted, in particular to include copyrighted works. We suggest that a fruitful way forward could be to determine that geo-blocking of copyrighted works is unjustified when the trader has no legal impediment to making a cross-border sale.
- The Proposed Regulation requires strong public enforcement mechanisms to ensure that it is successful. If one is to rely on private enforcement then the Proposed Regulation will have little or no impact and one may doubt whether it will add any more value to the provisions in Article 20 of the Services Directive.

1. THE TREATY RULES ON FREE MOVEMENT

KEY FINDINGS

- Geo-blocking restrictions stemming from State action are likely to violate the free movement rules, subject to the State being able to provide sufficient policy arguments that make geo-blocking a proportionate and reasonable response to a policy issue.
- Instead, the application of the free movement rules to the action of private parties is limited to situations where the private parties are, de facto, regulating the market and there is no other way for market access to occur than by compliance with the action of private parties.
- The one exception to the above is found in the field of free movement of persons but it is not likely that the approach in that strand of the case law will be transposed to the other freedoms
- There are also policy arguments that militate against asking the CJEU to widen the scope of application of the free movement rules: (i) it would risk promoting a substantial increase in references for preliminary rulings leading with severe consequences in terms of the CJEU workload; (ii) it would render the free movement rules applicable in cases where the Treaty rules on competition are the more suitable provisions; (iii) secondary legislation has a number of advantages: it can be more precise and, as such, so easier for national courts to apply; and it can include public enforcement requirements. This is vital because private litigation by consumers against repeat players is costly and unlikely to be successful.
- The Treaty rules also suggest that secondary legislation should balance the traders' freedom to conduct a business against the rights of consumers; this could impose limits on the regulation of geo-blocking but CJEU and comparative constitutional case-law often leave a wide margin to the legislature in balancing these rights.

If any geo-blocking restrictions are the result of State action – for example, legislation imposing rerouting or forbidding delivery outside the borders - it would likely violate free movement rules and could easily be challenged by the consumer (or trader) on the basis of such provisions or subject to an infringement action by the European Commission. They clearly amount to a restriction on the free movement of goods or services. Exceptions would only be acceptable in case the national rule would be considered necessary and proportional to the pursuit of an EU recognized interest.¹

1.1. Limits to the rights free movement rules afford to individuals

The situation is far more complex if similar restrictions arise from private action. Does the prohibition of non-discrimination on the basis of nationality and/or the free movement provisions applies to restrictions resulting from the actions of private parties of the type involved in geo-blocking?

¹ A possible example could be derived from a non-EU case: *LICRA v Yahoo!*, a French/US case regarding the prohibition of online sales of Nazi memorabilia from the US to France. If such case would emerge in the context of online sales between the territories of two Member States there would be a restriction on free movement possibly justifiable for reasons of public order.

Article 18(1) TFEU states that ‘within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’ There is no doubt in the case law that discrimination on the basis of residence amounts to indirect discrimination on the basis of nationality. However, Article 18 is only applicable within the scope of application of EU Law.

For the present purposes, and to make a long story short: the scope of application of non-discrimination on the basis of nationality largely depends on the scope of the free movement provisions.² Moreover, even if, in abstract, the Court could have applied Article 18 to address discrimination by private parties on the basis of nationality in the internal market it has, in fact, dealt with these issues under the free movement provisions themselves.³

The text of free movement rules does not expressly resolve the issue of the extent of application of such rules to private parties (also known as the horizontal effect of free movement rules). In fact, with the exception of the free movement of goods (whose reference to “quantitative restrictions and measures having an equivalent effect” would appear to presume state action), the free movement provisions prohibit all restrictions, without defining if they are assumed to result from state or private action.

It is therefore necessary to have regard to the place and function of these provisions in the scheme of the Treaty. The provisions on freedom of movement are part of a coherent set of rules aimed at establishing a well-functioning internal market, the purpose of which is described in Article 3 TEU. This purpose is to ensure, as between Member States, the free movement of goods, services, persons and capital under conditions of fair competition.⁴

Member State authorities are generally in a position that enables them to interfere with the well-functioning of the internal market by restricting the cross-border activities of market participants. The same can be said for certain undertakings acting in collusion or holding a dominant position in a substantial part of that internal market. Not surprisingly, therefore, the Treaty bestows rights upon market participants that can be invoked against Member State authorities and against such undertakings. As regards the latter, the rules on competition play the primary role; as regards Member State authorities, that role is played by the provisions on freedom of movement.⁵

It is this that explains the usual distinction between the horizontal application of competition rules and the vertical application of free movement. However, the fact that competition rules will tend to be applicable to private parties (horizontally) and free movement rules to State authorities (vertically) does not prohibit, *a contrario*, the vertical effect of the former and horizontal effect of the latter. On the contrary, the horizontal effect of free movement rules would exist whenever it would, nevertheless, be necessary to guarantee the objectives of the internal market.

In the doctrine, there is also no consensus as regards the horizontal effect of free movement rules. Some Authors reject the application of free movement rules to private parties with the argument that competition rules are sufficient to address obstacles to the internal market

² For a detailed analysis of the cases where the Court of Justice extended the applicability of fundamental freedoms to private parties, see Schulte-Nolke, H. et al. (2013), “Discrimination of Consumers in the Digital Single Market”, Study for the IMCO Committee, European Parliament (Chapter 2).

³ The reasons being the same that explain the limits to the scope of free movement provisions to be discussed below.

⁴ See the discussion in Case 32/65 *Italy v Council and Commission* [1966] ECR 389 and Opinion of Advocate General Van Gerven in Case C-145/88 *B & Q* [1989] ECR 3851, at point 22, both referring to the pre-Lisbon versions of the Treaty, especially Articles 3(a), (c) and (g) EC.

⁵ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779, Opinion of Advocate General Maduro, paragraph 32 et seq

arising from the action of private actors.⁶ Others, however, have pointed out that private action, not subject to competition rules, may effectively restrict access to the internal market and its well-functioning, justifying, in certain cases, the horizontal application of free movement rules.⁷ The Court has endorsed, but in a limited way, the latter view.

The Court, in its case-law, has recognised the horizontal application of the rules on freedom of movement mostly on a step by step prudent approach. From this one crucial standard that seems to emerge is the application of free movement rules to actions by private parties that regulate in a collective manner particular subjects. This notably the case of rules adopted by private associations. Therefore, the Court has applied the rules on freedom of movement to national and international professional sporting associations such as in *Walrave* or *Bosman*.⁸ These associations can adopt regulations (even if private) that can have a decisive impact on the cross-border exercise of their related economic activities. As stated in *Deliège*, 'the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy'.⁹

The Court has extended this line of case law to instances of collective action by trade unions in *Viking* and *Laval* even if these cases did not involve private regulatory actions.¹⁰ The determinant factor, in all this long line of cases, seems to be the circumstance that the private actors in question are in a position to, de facto, impose an effective restriction on free movement that is of a general nature and cannot be overcome by any market alternative in that State.

Another strand of jurisprudence is found in the recent judgment in *Fra.bo*.¹¹ Here the Court was called to consider whether the rules designed by a private law body for certifying the quality of certain water fittings (the DVGW) were subject to the rules on the free movement of goods. The Court placed much emphasis on two findings: the first was that the national legislation provided that certifications by this private law body were considered as compliant with national legislation; the second that the DVGW was the only one able to provide this certification. On these facts the Court concluded that the DVGW 'by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings'.¹² In principle, the conduct of a standard-setting body whose authority did not derive from the state would likely be the subject of scrutiny under the rules of competition and not those of free movement. However, here, there is a tight link with the state, which determines the applicability of the free movement rules (Article 34 TFEU).

⁶ G. Marenco, 'Competition between national economies and competition between businesses – a response to Judge Pescatore', *Fordham International Law Journal*, Vol. 10 (1987) 420.

⁷ See M. Mataja, *Private Regulation and the Internal Market* (Oxford, Oxford University press, 2016) for a survey

⁸ Case 36/74 *Walrave* [1974] ECR 1405; Case 13/76 *Donà v Mantero* [1976] ECR 1333; Case C-415/93 *Bosman* [1995] ECR I-4921; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549; Case C-519/04 P, *Meca-Medina and Majcen v Commission*, [2006] ECR I-06991; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681. Cite OTHERS

⁹ *Deliège*, (above), paragraph 47.

¹⁰ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767, and *Viking Line* (above).

¹¹ Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, [2012] (Court Reports - general)

¹² *Ibid*, paragraph 31.

Another relevant set of cases regards the exercise of intellectual property rights.¹³ The holders of such rights have a legitimate business interest in exercising their rights in the manner they choose.¹⁴ None the less, these interests must be weighed against the principle of the free movement of goods.¹⁵ Otherwise, holders of intellectual property rights 'would be able to partition off national markets and thereby restrict trade between Member States'.¹⁶

The broadest application of the provisions on freedom of movement to private action was done by the Court in its judgment in *Angonese*, when it applied Article 39 EC to a private bank in Bolzano.¹⁷ Mr Angonese was competing for a bank position but access to such competition was conditional on the possession of a certificate of bilingualism. Such certificate was exclusively issued by the public authorities of Bolzano. This requirement mirrored a previously imposed requirement on access to the public. The Court noted that the requirement was easy to be obtained by the residents of Bolzano and a common practice but the same was not the true for non-residents. As a consequence, Mr Angonese was denied access even if he was perfectly bilingual and had other diplomas bearing witness to that. This, according to the Court, amounted to a violation of the free movement of workers.

The Court has, nevertheless, kept the *Angonese* case as an exception, limited to the free movement of workers. One can say that, with the exception of the free movement of workers, the application of free movement rules and non-discrimination on the basis of nationality to private actions is fairly limited.

To sum up: the European Court of Justice's interpretation of primary law provisions certainly limits the possibility to make use of primary law to address geo-blocking restrictions. In fact, the Court defines the scope of application of free movement provisions to public and private action in very different ways and there are good reasons for that. The power held by State authorities entails that these authorities have, by definition, significant potential to restrict access to and the well-functioning of the internal market. Therefore, the scope of the rules on freedom of movement extends to any State action or inaction that is liable to impede or make less attractive the exercise of the rights to freedom of movement.¹⁸

Instead, in many instances private actors simply do not have the power to successfully prevent others from accessing the internal market or to distort its functioning and market alternatives may exist.¹⁹ When they do, many such instances may be better addressed by competition rules. As a consequence the Court is careful in extending the application of free movement rules and non-discrimination to private actions. There is, however, a second reason for this prudence that is independent from the impact on the internal market and may mean why, even when there are restrictions to free movement arising from private actions, the Court may not be in a position to provide effective remedy. The expansion of free movement rules to private actions is liable to impose an excessive burden on the workload of the Court. It would not possible for the Court to deal with all potential challenges by private individuals against traders under the free movement provisions, particularly in light of the undetermined character of such provisions and the concept of restrictions to free movement.

¹³ See, for instance: Case 15/74 *Centrafarm* [1974] ECR 1147, paragraphs 11 and 12; Case 16/74 *Centrafarm* [1974] ECR 1183, paragraphs 11 and 12; and Case 119/75 *Terrapin* [1976] ECR 1039.

¹⁴ See, for example, *Centrafarm*, paragraph 9 (in each case); Case C-10/89 *HAG II* [1990] ECR I-3711, paragraphs 13 to 14; and Case 158/86 *Warner Brothers and Metronome Video* [1988] ECR 2605.

¹⁵ See, for example, the ruling in *HAG II*, cited in footnote 47, paragraphs 15 to 20, and in Case C-9/93 *IHT Internationale Heiztechnik* [1994] ECR I-2789, paragraphs 41 to 60.

¹⁶ Case 15/74 *Centrafarm* (above), paragraph 12.

¹⁷ Case C-281/98 *Angonese* [2000] ECR I-4139.

¹⁸ *Viking Lines*, Opinion of Advocate General Maduro, paragraph 41.

¹⁹ *Viking Lines*, Opinion of Advocate General Maduro, paragraph 48.

This latter reason is particularly important to explain why, even if a certain matter may require the application of free movement principles (such as with geo-blocking), such application might have to depend on secondary legislation. This is so, in order to regulate the matter in more detail and prevent the risk of excessive litigation and a flooding the CJEU.

This is so for three reasons: secondary rules can be more detailed and precise (reducing litigation), are more susceptible to decentralized application by national courts and can include alternative mechanisms of enforcement.

As a consequence: free movement provisions cannot be applied to most cases of geo-blocking and do not provide an adequate remedy to geo-blocking by traders.

In addition, as discussed in the following section of this report, even if primary law provisions might be applicable to some situations which constitute geo-blocking they would still not provide an adequate remedy. In fact, litigation and information costs, as well as the dynamics of litigation, would make it very unlikely that consumers would litigate cases of geo-blocking: claimants are one-shot actors facing defendants who are repeat players, the information costs facing claimants are high, the stakes for an individual are very low and the harm is diffuse. In these scenarios public regulation is often preferred to litigation.

As such, both for reasons of law and policy, this is a matter better addressed through secondary legislation. It is also precisely for circumstances such as these that both Article 18 – non-discrimination on the basis of nationality – and free movement provisions foresee the adoption of secondary legislation to further the internal market and non-discrimination goals.

1.2. The limits the Treaty sets out for the Proposed Geo-Blocking Regulation

A different question is whether there are no other objections to impose such requirements on traders, including arising from primary law rules and principles.

The crucial point regards the need to balance the rights of consumers not to be discriminated against on the basis of nationality with the private autonomy of traders (equally protected by Article 16 of the Charter of Fundamental Rights: the freedom to conduct a business, that includes the negative right to decide with whom not to conduct a business).²⁰

The Court has recognised the need to balance these rights. But, as it is usual the case in national constitutional law, the freedom to conduct a business is among the rights where the Court has given more discretion to the legislator in establishing limits to such right in the pursuit of other public interests. And that will be even more so when such rights are to be balanced with the non-discrimination on the basis of nationality and even free movement.

The Court has even acknowledged that the protection of non-discrimination on the basis of nationality and free of movement may require imposing limits on private autonomy and even the exercise of certain personal freedoms. In *Commission v France*, the upshot of the violent acts of protest by French farmers when exercising their right to strike was to deny to others the freedom to sell or import fruit and vegetables from other Member States and the Court

²⁰ Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 25; Case C-243/08 *Pannon GSM* [2009] ECR I-4713, paragraph 22; and Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 29; C-453/10, *Pereničová and Perenič*, [2012] (Court Reports – general), paragraphs 27 and 28: “the system of protection established by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the trader as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the trader without being able to influence the content of those terms” (...) In view of that weak position, Article 6(1) of Directive 93/13 requires Member States to lay down that unfair terms ‘shall, as provided for under their national law, not be binding on the consumer’. (...) that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.

considered that the latter ought to prevail.²¹ In *Schmidberger*, the obstruction to the free movement of goods was not nearly as serious.²² Crucially, however, the Court weighed the right to freedom of expression of a group of demonstrators against the right of a transport company freely to transport goods from one Member State to another and, in that way, applied the fundamental principle of the free movement of goods horizontally (i.e. to private action). Because the restriction on free movement was not significant, however, the Court gave prevalence to the freedom of expression. Similar sensitive cases involved collective action and right to strike (*Laval* and *Viking Line*). In both cases, the Court, de facto, limited the use of these rights when its aim was the restriction of free movement or discrimination on the basis of nationality.

These cases demonstrate the extent to which the application of free movement principles and non-discrimination on the basis of nationality can interfere with private autonomy. If they can impose limits – even in the absence of anti-competitive behaviour - on the freedom of expression, association or right to strike they can certainly justify the imposition of limits by secondary legislation on the freedom to do business or freedom to contract.

²¹ Case C-265/95, *Commission v France*, [1997] ECR I-06959

²² Case C-112/00, *Schmidberger*, [2003] ECR I-05659

2. EU COMPETITION LAW

KEY FINDINGS

- The rules of EU competition law found in Articles 101 and 102 TFEU have been applied to address a variety of forms of geo-blocking on the grounds that it can damage the integration of the internal market. The case law of the Court has read the prohibition broadly and has regularly confirmed that agreements imposing an export ban on a distributor are restrictive of competition by object. A finding of infringement generally leads to the imposition of high fines.
- The case law of the CJEU suggests that only exceptional circumstances will lead to a finding that an export ban does not infringe Article 101(1) TFEU or may benefit from an exemption under Article 101(3) TFEU. The Commission's statements show that it is willing to tolerate some limits on geo-blocking provided there is an economic rationale behind it.
- The Court of Justice has ratified the Commission's view that a *de facto* ban on internet sales constitutes a restriction by object of Article 101(1) TFEU. An issue that remains to be settled is whether a producer can block a retailer from making use of online marketplaces from distributing their goods. Notwithstanding, a ruling by the CJEU is expected soon in Case C-230/16, *Coty Germany*.
- As regards agreements which concern licensed copyrighted works, the case law indicates that there may be instances where territorial segmentation in certain industries may be justifiable (*Coditel v Ciné Vog Films*). The Commission is presently addressing geo-blocking of copyright works through enforcement action between film producers and broadcasters although the current solutions identified appear incapable of addressing geo-blocking fully.
- From the perspective of competition law, the prohibitions in Articles 3, 4 and 5 of the Proposed Regulation prohibit the kind of unilateral conduct which is already forbidden under competition law when this kind of conduct is part of an agreement between two undertakings, or when the conduct is carried out unilaterally by a dominant undertaking.
- From the perspective of this chapter, the only problematic issue that arises with the Proposed Regulation is Article 6, which provides that 'agreements imposing on traders obligations in respect of passive sales, to act in violation of this regulation shall be automatically void'. Under competition law, the instances where the producer can request a ban on active and passive sales have been designed to balance the rights of traders, the efficiency-generating effects of the restrictions, and the possible harm to competition. For this reason, it seems counter-productive to limit that careful balance in the Proposed Regulation, so the better option is to remove Article 6 from the Proposal.

The rules of EU competition law found in Articles 101 and 102 TFEU have been applied to address a variety of forms of geo-blocking.²³ Some of the major cases and their impact are described below. It is clear from the policy of the European Commission and from the judgments of the Court of Justice of the EU that business conduct which is likely to damage the integration of the internal market can infringe EU competition law: market integration is

²³ Article 102 is beyond the scope of this report, but readers should note that a fair number of abuses of dominance have been found to exist when the dominant firm stifled market integration, see for example Case 27/76 *United Brands v Commission* [1978] ECR 207, and more recently, Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE* [2008] I-07139; Commission Decision from 14.4.2010 in Case 39351 – *Swedish Interconnectors*.

a policy which has been pursued by the Commission since the early days of competition law enforcement and it continues to inform the law to this day.²⁴

The discussion of the law is divided into three segments. In section 2.1 we show how EU competition law addresses geo-blocking directly, in section 2.2 we look at how EU competition law can stimulate online cross-border trade indirectly, in section 2.3 we look to the difficulties that come up when licensed copyright content is at stake, and in section 2.4 we contrast the proposed geo-blocking regulation with competition law. The purpose of the final section is to show the extent to which the proposal seeks to extend the policy which is already part of EU competition law to cases that fall outside the provisions of the Treaty rules.

2.1. Direct control of geo-blocking: vertical restraints

For the purposes of this report, the most relevant topic relates to the way competition law impacts agreements between producers and distributors that make it harder for the distributor to export or for a would be buyer to purchase from distributors situated in another Member State. Two sources of law are of significance: Article 101(1) TFEU, which prohibits agreements that restrict competition, and Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.²⁵ This Regulation is designed to facilitate business planning by setting out that agreements that comply with certain parameters will not face competition law scrutiny. In brief, the parties to the agreement must have low levels of market power (signalled by their market share, which must be below 30%) and the agreement must not contain certain clauses, which are generally considered to restrict competition without any redeeming benefits. If these conditions are met the parties can assume that their agreement does not infringe Article 101(1) TFEU. If these conditions are not met the agreement may well benefit from the exemption of Article 101(3) TFEU, but since 1 May 2004 the Commission has not issued a single exemption decision.²⁶

Of key importance for this report is Article 4(b) of Regulation 330/2010, which provides that export bans are black-listed so that agreements which include this provision cannot benefit from the block exemption and only exceptional circumstances justify an export ban. These are discussed below.

2.1.1. Prohibited agreements under Article 101(1) TFEU

The case law of the Court has regularly confirmed that agreements that impose an export ban on a distributor are restrictive of competition by object, and a finding of infringement leads to the imposition of high fines.²⁷ Since 2000 the majority of the decisions issued by the Commission when applying Article 101(1) TFEU to vertical restraints have been cases where export bans were involved.²⁸

²⁴ See Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299 for a very early example and Joined Cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others (C-403/08) and Karen Murphy v. Media Protection Services Ltd (C-429/08)*, [2011] 2011 I-9083 for a more recent restatement.

²⁵ Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1.

²⁶ Under Regulation 1/2003 (which came into force on 1 May 2004) the Commission has the exclusive power to issue such decisions (on the basis of Article 10), because National Competition Authorities may only issue infringement decisions. This was discussed in Case C-375/09, *Tele2 Polska* [2011] ECR I-03055, where the Court of Justice held that National Competition Authorities lack the power to issue non-infringement decisions.

²⁷ For example: *Volkswagen* [1998] OJ L124/60 where the Commission found that the firm had put pressure on its Italian dealers not to sell cars to purchasers who might export. The fine, after an appeal, was EUR 90 million. Case C-338/00 P *Volkswagen AG v Commission* [2003] ECR I-9189.

²⁸ R. Whish and D. Bailey *Competition Law* 8th ed (OUP, 2015), p.674

The concept of an export ban has been read broadly by the Commission. Here is a sample of the findings that come from the major decisions and court judgments:

- A dual pricing scheme whereby the contract provides that a higher price would be set for goods that the buyer was going to export is restrictive of competition.²⁹
- When the producer provides that the warranty for its product is only valid in a Member State when the consumer bought the product in the same State is restrictive of competition.³⁰ The reasoning is that a distributor in Member State A would be reluctant to export to Member State B unless it could offer an EU-wide guarantee. It is worth noting that by taking this step the Commission was able to go further than the consumer protection Directives.³¹ Thus, for the purposes of this report it is a good example of the fact that competition law can sometimes step in when there is reluctance to legislate.
- Contract clauses that help the producer monitor where the distributor is selling the goods, for example a duty on a distributor to contact the producer before making an on-line sale to another Member State, is restrictive of competition because it discourages dealers from exporting the goods.³²
- Clauses in the contract which make discounts dependent on the distributor not exporting goods, or penalties if goods are exported by a dealer are restrictive of competition.³³
- Clauses that prohibit cross-supplies between distributors so as to prevent parallel trade are found to restrict competition because they prevent the distributor from obtaining goods from other suppliers and shielding national markets from competition.³⁴
- A requirement that foreign customers pay a 15 per cent deposit for a new car, when local customers face no such requirement restricts the capacity to export and thus harms competition.³⁵

There are more examples in the decisional practice but the key takeaways from this sample are two: (1) any agreement which directly or indirectly affects the capacity of a distributor to export or affects the incentives of a would be buyer to purchase outside the Member State of residence is likely to be found to restrict competition, unless there is a good reason for restricting trade; (2) the decisions also reveal that some traders in the EU use agreements to deliberately divide the internal market.

²⁹ Joined Cases C-501/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited (C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P)*, [2009] ECR I-09291. On the facts, the CJEU held that it may be possible to establish that the agreement merited exemption under Article 101(3) but the Commission did not return to this case after the Court's judgment.

³⁰ The first decision on this point is *Zanussi* [1978] OJ L322/26. This decision is of interest because the Commission also explains what kind of EU-wide guarantee scheme is lawful. It finds that the supplier is entitled to state that the after sales service may differ depending on the subsidiary where the customer goes to and that while the services offered may thus differ according to which Member State one goes to, this is not discriminatory. See also, on similar lines *Grundig* [1994] OJ L20/15 paragraph 19. This approach was confirmed by the Court in Case 31/85 *ETA Fabriques d'Ébauches v SA DK Investment and others* [1985] ECR 3933.

³¹ This is discussed in G. Monti 'The Revision of the Consumer Acquis from a Competition Law Perspective' (2007) 3(3) *European Review of Contract Law* 295, 306-307.

³² Case COMP/37975 *Yamaha* (16 July 2003) paragraphs 107-109.

³³ *Ford Agricultural* [1993] OJ L20/1, paragraphs 13 and 14.

³⁴ *JCB* [2002] OJ L69/1 paragraphs 176-178, confirmed in Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935.

³⁵ *Mercedes-Benz* [2002] OJ L 257/1.

2.1.2. Possible justifications under Article 101(1) TFEU

The case law of the court suggests that only exceptional circumstances will lead to a finding that an export ban does not infringe Article 101(1). The Commission has provided some examples of situations where it may be possible that agreements that prevent parallel trade may not infringe Article 101(1) TFEU or may benefit from an exemption under Article 101(3) TFEU, we list these here:

- An export ban where the producer has made extensive investments and wishes to protect that investment;³⁶
- In cases where a distributor is the first to sell a new brand or the first to sell a product in a new market, then the producer can take steps to protect the investment made by the distributor by preventing other distributors from making active and passive sales into that territory for two years.³⁷
- If a new product is introduced in a given market for testing, then a ban on active sales outside that territory is allowed for the period necessary to carry out those tests.³⁸
- In case of selective distribution, where the system is organized in such a way that wholesalers are responsible for a set of retail outlets in a given territory, then it may be possible to prevent a wholesaler from making active sales to distributors outside its territory when this prevents free riding on the promotional efforts of other wholesalers.³⁹
- When the distributor sells goods online and off-line, it may be possible to ask the distributor to pay more for goods that are intended to be sold online. The example given by the Commission when this may be tolerated is in cases that the manufacturer can show that online sales will cost more for the manufacturer. Suppose that offline sales include installation of the product (e.g. a car radio); an online sale cannot incorporate installation and thus there may be more customer complaints or warranty claims from online purchasers which the manufacturer may face. Accordingly, the manufacturer may be justified in imposing a higher price for goods intended for online sales. However, in signalling this position the Commission is very careful to state that it will also consider the harm to competition resulting from the reduction in internet sales and the hindrance caused to the distributor as this restriction will limit its ability to reach more customers.⁴⁰

The key point to bear in mind from this non-exhaustive list is that the Commission is willing to tolerate some limits on geo-blocking provided there is an economic rationale behind it: the Commission balances the economic importance of the restriction on trade for the success of the undertaking's business on the one hand with the importance to keep the market integrated on the other.

2.1.3. The application of the Block Exemption Regulation

The discussion above applies to all agreements. However, for distribution agreements parties should first check if their agreement benefits from the exemption foreseen in Regulation 330/2010, which provides for a safe harbour when a distribution agreement complies with the provisions of the Regulation. The approach in the Regulation is consistent with the case

³⁶ For example Case 27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, which deals with plant breeder's rights and where it was held to be necessary for the holder of the rights to select breeders who are to be licensees. Accordingly an export ban on growers was tolerated. The underlying idea was that the plant breeder has made a significant investment and should be entitled to protect it, see paragraph 10.

³⁷ Guidelines on Vertical Restraints, paragraph 61.

³⁸ Guidelines on Vertical Restraints, paragraph 62.

³⁹ Guidelines on Vertical Restraints, paragraph 63.

⁴⁰ Guidelines on Vertical Restraints, paragraph 64.

law discussed above. The Regulation applies to vertical agreements where the market share of the producer and distributor both fall below 30 per cent.

a. General prohibition

Of particular importance for this report is Article 4(b) of Regulation 330/2010, under which the benefit of the block exemption is not applicable if the agreement has as its object:

‘the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services’

Accordingly, the starting point here is in line with the Article 101 TFEU case law discussed above, which prohibits geo-blocking in principle. As the case law above shows there are multiple ways in which territorial restrictions may be imposed. Note that the provision above allows the agreement to limit the buyer’s place of establishment. This can place some limits on the customers that such a buyer may reach, but online sales can remove this limit, in part. We discuss this below.

b. Exceptions

For firms that have low degrees of market power (indicated by the market share threshold of 30 per cent) the Block Exemption has carved out for scenarios where geo-blocking may be tolerated. As these are exceptions they should be read narrowly and it is helpful to interpret the text of the Regulation with the assistance of the Guidelines on Vertical Restraints issued by the Commission. This is particularly so because there are few decisions interpreting the Block Exemption Regulation. We discuss each in turn below.

Article 4(b)(i): the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer.

This exception is best explained with an example: suppose a producer appoints distributor X as the exclusive distributor in Italy and Y as a distributor elsewhere. The contract between the producer and distributor Y may lawfully prevent Y from making active sales into the Italian market. However, Y may not be prevented from making passive sales into the territory assigned to X. (The distinction between active and passive sales is explained below in section 2.1.3.c). The rationale for this exception is that X may invest resources in promoting the goods in Italy and preventing active sales from other distributors makes sure there is limited free riding on that investment.

The next three exceptions to the prohibition all allow the producer to block active and passive sales in the agreement, but as we show below this does not cause irreparable damage to the internal market.

Article 4(b)(ii) ‘the restriction of sales to end users by a buyer operating at the wholesale level of trade’.

The purpose of this exception is to allow the producer to appoint wholesalers and retailers in such a way that he can keep these two distribution channels separate. Thus an agreement between the producer and a wholesaler can prevent the wholesaler from making active and passive sales to end users is authorised. This does not prevent retailers selling across borders, nor wholesalers supplying other wholesalers, so there is hardly any damage to market integration.

Article 4(b)(iii) ‘the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system.’

The rationale behind this is to make sure that the commercial choice of the producer to set out a system of selective distribution (which usually means that the retail outlets have trained staff or have a particular appearance) is not damaged by sales to retail outlets that do not meet those quality standards. This exception allows the blocking of active and passive sales. Again, the damage to cross-border trade is limited because there will likely be a network of retail outlets, each free also to use the internet, as discussed below in section 2.2.

Article 4(b)(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

The idea here is to make sure that the component is not used to facilitate the production of competing goods by someone who would free ride on the efforts of the producer.

In sum, these exceptions to the general prohibition are all reflecting reasonable business practices which the EU is bound to protect on the basis of the freedom of undertakings to conduct a business, safeguarded by Article 16 of the Charter of Fundamental Rights. The practices that are authorised benefit consumers and do not restrict the integration of the market.

c. Active/passive sales

It is vital for the operation of the first exception discussed above that the distinction between active and passive sales is clear. Likewise, for some of the exceptions that the Commission has identified in the Guidelines (reported above in section 2.1.2), this distinction is important. The Commission has consulted widely to come to as precise a formulation as it can, in particular given the wish to promote on-line sales.

Active sales comprise those activities where the seller approaches customers, for example by making unsolicited calls or sending unsolicited emails. Advertising targeted at a group of would-be customers in another Member State would also likely qualify as active sales.

Passive sales, in contrast are instances where the seller responds to a request from customer to sell. A general advertising campaign that happens to target customers outside the seller's zone does not amount to an attempt to make an active sale.

The Commission has also made some effort to explain how the above applies to on-line sales: the default rule is that online sales are seen as passive sales, because this is seen as a reasonable way to reach customers. It provides four examples of restrictions which would constitute restrictions on passive sales and thus forbidden:

- an agreement that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall automatically re-route its customers to the manufacturer's or other (exclusive) distributors' websites;
- an agreement that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;
- an agreement that the distributor shall limit its proportion of overall sales made over the internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model;
- an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a

variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts.⁴¹

In contrast, measures that prevent the retailer from designing on-line territory-specific banners, or paying a website to advertise in another Member State would constitute an attempt to make active sales and may be prevented under the terms of the Block Exemption or on the basis of an individual assessment.⁴²

One of the concerns of producers with the approach above was that the use of the internet could damage the commercial value of the goods – as a compromise the Commission authorizes the producer to specify certain quality standards for the websites through which the goods are to be sold.⁴³

2.2. Indirect prohibitions of geo-blocking

The policy to favor the use of the internet received a significant boost from the Court of Justice in the *Pierre Fabre* case.⁴⁴ The producer imposed a de facto ban on internet sales by requiring that distributors operate from physical premises. The Court held that this ban on internet sales constituted a restriction by object, and the national court was unable to find a good reason why the ban could be justified. This approach has been followed by other National Competition Authorities.⁴⁵

An issue that remains to be settled is whether a producer can block a retailer from making use of online marketplaces like Amazon or eBay from distributing their goods. The issue has arisen in Germany and we expect the Court of Justice to shed some light now that a case concerning a luxury cosmetics manufacturer's bans on sales via third-party online platforms has been referred from the Frankfurt Court of Appeals.⁴⁶

2.3. Licensed programmes

In the discussion so far we have omitted the analysis of agreements which concern licensed copyrighted works. The case law in these kinds of market requires a different analysis.⁴⁷ There are two major judgments of the Court of Justice (*Coditel* and *Murphy*) and an ongoing matter (Sky UK).⁴⁸ We summarise each in turn before offering some general conclusions.

Coditel v Ciné Vog Films is a dispute that arose in the following manner: Ciné Vog had obtained exclusive rights to distribute a film on the Belgian market from the copyright holder.⁴⁹ However the Belgian cable TV providers (including Coditel) allowed users to view a transmission of the same film coming from Germany. Ciné Vog considered that its exclusivity rights were infringed and sought damages. The question for the CJEU was whether the

⁴¹ Guidelines paragraph 52.

⁴² Guidelines paragraph 53.

⁴³ Guidelines paragraph 54.

⁴⁴ One of the authors of this report was critical of the reasoning of the Court on this point, see G. Monti 'Restrains on selective distribution agreements' (2013) 36(4) World Competition 489.

⁴⁵ These are discussed in OECD *Policy Roundtable: Vertical restraints for On-line Sales* (2013), <http://www.oecd.org/competition/VerticalRestrainsForOnlineSales2013.pdf>

⁴⁶ Case C-230/16, *Coty Germany* (case in progress).

⁴⁷ See further C. Saville *EU Intellectual Property Law and Policy* 2nd ed (Edward Elgar, 2016).

⁴⁸ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419. See further G. Monti & G. Coelho, 'Geo-Blocking between Competition Law and Regulation', *Competition Policy International* (January, 2017).

⁴⁹ Case 262/81, *Coditel v Ciné Vog Films* [1982] ECR 03381.

exclusive rights in the contract between the film maker and Ciné Vog could be found to infringe Article 101(1) TFEU. While there is some damage to market integration, the Court of Justice held that the exclusive rights granted did not restrict competition so clearly that they should be condemned. Instead, the Court referred to the specific nature of the cinematographic industry (e.g. dubbing and subtitling, and the system of financing) and held that exclusive licenses need not necessarily restrict competition.⁵⁰ It then advised the national court to consider issues such as: whether exclusivity was unjustifiable having regard to the needs of the industry, or whether the duration of the contract was excessive, or what other considerations may make the agreement harmful to competition.⁵¹

The lesson to be drawn here is that there may be instances where territorial segmentation in certain industries may be justifiable. A related issue arose in 2007 when the Commission sent a Statement of Objections to Apple and the music companies with which it had agreements to distribute music via the iTunes store. At the heart of the complaint was that consumers were only able to download music from the iTunes store of their country of residence and that this affected the prices they paid (UK consumers in particular paid a higher price) and the choice of music they faced. In this setting the policy considerations discussed in *Coditel* do not appear to justify this kind of geo-blocking. However, the issue never continued because, from the information that is publicly available, it appears that geo-blocking was not the result of an agreement between iTunes and the record companies – geo-blocking was taking place because of Apple's unilateral determinations to design the iTunes store based on 'country-specific aspects of copyright laws'.⁵² It is thus perhaps odd that, since there was no legal basis for the Commission to apply antitrust law (in that it is uncertain whether Apple holds a dominant position, which would make it subject to Article 102 TFEU) that Apple announced a decision to equalize prices for music downloads in Europe. This serves to resolve some of the geo-blocking concerns, but not all of them.

The second major judgment is the *Murphy* case.⁵³ Here, the Football Association Premier League ("FAPL") complained about publicans buying decoders in Greece and using these to show premier league football matches in British pubs, thereby avoiding Sky's high fees for the same service sold to UK-based customers. In a nutshell, the FAPL argued that allowing for the resale of the card decoders marketed in Greece would undermine the geographical exclusivity of its licenses and consequently the value of its rights. This would result in a race to the bottom whereby the broadcaster with the cheapest decoders could become the pan-European broadcaster, *de facto*, creating EU-wide licenses.⁵⁴ The Court was not receptive to this policy argument and ruled in a manner that generally favoured publicans, finding infringements of Articles 56 and 101 TFEU, confirming that agreements forbidding passive sales restrictive of competition. There is some tension between the approach in *Coditel* and the approach in *Murphy* on this issue, which may have to do with a concern that in this case the risk to market integration was more significant than in *Coditel*.⁵⁵

However, this was a pyrrhic victory for publicans since the Court concluded that the retransmission of the broadcast in the UK had a profit-making nature and amounted to a transmission to a new public, i.e. to a group of potential viewers that had not been taken

⁵⁰ *Ibid*, paragraphs 15 and 16.

⁵¹ *Ibid*, paragraph 19.

⁵² Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe (I P/08/22, Brussels, 9th January 2008). Available at: http://europa.eu/rapid/press-release_IP-08-22_en.htm

⁵³ Joined Cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others (C-403/08) and Karen Murphy v. Media Protection Services Ltd (C-429/08)*, [2011] 2011 I-9083.

⁵⁴ *Ibid*, paragraph 43.

⁵⁵ At paragraph 137 in *Murphy* the Court summarises *Coditel* as a situation where the prohibition on retransmission was limited in time.

into consideration when the right holders authorized the communication in Greece. Hence, the publican was still in breach of Article 3(1) of the Copyright Directive and could not get away with showing the FAPL matches using the imported decoders.⁵⁶ Ms. Murphy's only victory was to escape criminal charges since Article 56 TFEU was found to preclude national legislation that makes it unlawful (and even a crime) to import foreign decoders giving access to a broadcasting service from another Member State (even if the publican used it for commercial purposes and under false identity and address to circumvent the territorial restrictions at stake). It is therefore unsurprising that the FAPL merely amended its licensing contracts in ways that makes it able to continue to restrict cross border sales and it is fighting and winning cases against other publicans.⁵⁷ One way of doing so is including certain FAPL copyright logos on the broadcast image so that anyone showing such a video is breaching that copyright.⁵⁸ Moreover, according to one report, FAPL is even reducing the services available to foreign buyers of football matches to deter passive sales of foreign broadcasts into the UK market, leaving consumers in these countries worse off.⁵⁹

More recently, the Commission issued statements of objection about the agreements between the Hollywood majors on one side and Sky UK on the other. The concerns arose from two aspects of these contracts: (a) a broadcaster obligation, by which Sky UK undertook not to respond to requests from consumers outside the UK and Ireland (the territories for which Sky UK holds a license) and (b) a Hollywood major obligation, by which the owner of the copyright undertook to prohibit other EEA broadcasters from responding to unsolicited requests coming from consumers in the UK and Ireland. The result of these clauses is of concern to the Commission for it partitions the internal market, preventing for example a UK consumer from buying pay TV services from another jurisdiction. One of the majors (Paramount) has secured a commitment decision, which has two dimensions: (i) in new licensing agreements the two offending obligations are removed; (ii) for existing licensing agreements Paramount agreed not to act on or enforce those obligations.⁶⁰ It isn't particularly clear what beneficial effect this commitment can have. Under copyright law, the holder of an exclusive license in the UK (e.g. Sky UK) is free to rely upon its copyright to forbid the broadcasting of the film in question from another source. Thus, the passive sale cannot be made into the territory assigned to Sky UK, unless Sky UK decided to forego enforcement action, which is unlikely. Likewise, if a buyer in France wants to secure a pay TV contract from Sky UK, nothing stops the copyright holder in France from challenging that conduct; matters would differ if there were no copyright holder in France, in which case the passive sale would not be in breach of any other licensee's interests, and this may be the consumers the Commission wishes to protect.

In sum, while the approach under discussion in this case tries to align itself in some way to the approach discussed above in section 2 (active sales may be prohibited, passive sales must be allowed), it does not actually resolve the market failure that the Commission identified, because the commitments are only entered into with Paramount and not with the licensees in the Member States. Matters may differ when the passive sale is denied by a firm holding a dominant position because then it may be possible that reliance on copyright law

⁵⁶ Ibid, 195-198 and 205-206.

⁵⁷ For an informative overview, see:

<http://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-landscape>.

⁵⁸ *Football Association Premier League Ltd Ltd v. Luxton* [2014] EWHC 253 (Ch).

⁵⁹ http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf page 102.

⁶⁰ http://europa.eu/rapid/press-release_IP-16-2645_en.htm

for exclusionary purposes might constitute an abuse of dominance,⁶¹ but one would be hard pressed to find dominance in these settings.

For the purposes of this report the key takeaways are two: first, there may be situations where geo-blocking is a legitimate way of carrying out a broadcasting business, such that agreements that partition markets may, at times, be found not to infringe EU competition law – however as suggested above it is likely that the more aggressive approach in *Murphy* means that the broadcasters will have to demonstrate the importance of geo-blocking for their business model in a convincing, concrete manner. Second, even if EU competition law can intervene to address agreements that restrict cross border transmissions, national copyright legislation may still hamper the integration of markets.

2.4. Comparing the Geo-Blocking proposal with competition law

Article 3 of the Proposed Regulation forbids traders from making it more difficult for customers to access on-line services: Article 3(1) forbids traders from blocking access based on the nationality or place of residence or establishment of the customer and Article 3(2) forbids traders from redirecting customers to another version of the website (e.g. a customer in Portugal is redirected from a '.it' website to a '.pt' website).

Under competition law these manifestations of geo-blocking could only be caught if the trader was dominant (thus engaging Article 102 TFEU) or if the trader took the steps it did pursuant to an agreement (thus engaging Article 101(1) TFEU).⁶² Thus, this provision fills a regulatory gap.

Article 4(1) identifies three scenarios where geo-blocking takes the form of discrimination: (a) where the trader sells goods to a buyer based in another Member State and no cross-border delivery is envisaged; (b) where the trader sells electronically supplied services; (c) where the trader provides services that are supplied to the customer at a place where the trader operates (e.g. a car hire service).

Again, if these provisions were contained in an agreement, or if the trader holds a dominant position, they would be prohibited under competition law. Thus, as with Article 3, the prohibitions in Article 4 fill a regulatory gap.

Article 5 forbids traders from discrimination based on the method of payment when this is based on factors like nationality and place of residence. As noted above, any agreement between a manufacturer and a distributor that imposes such a restriction would also be prohibited by Article 101 TFEU.

In sum, the prohibitions in Articles 3, 4 and 5 prohibit the kind of unilateral conduct which is already forbidden when this kind of conduct is part of an agreement between two undertakings, or when the conduct is carried out unilaterally by a dominant undertaking. Insofar as this fills a regulatory gap, then these provisions are to be welcomed.

The only problematic issue that arises with the Proposed Regulation is Article 6. This provides that 'agreements imposing on traders obligations in respect of passive sales, to act in violation of this regulation shall be automatically void.'

This provision is, for most cases unnecessary: as we have seen above many attempts to forbid the making of passive sales are prohibited anyway. The general rule is that a restriction

⁶¹ However, even here the case law does not yet stretch this far.

⁶² It would not matter if the agreement is a cartel among traders to do so or a vertical restraint imposed by a producer on the trader: for both, as we have seen above such a restriction would be deemed restrictive of competition by object.

on the customers or the territories where the seller may offer the goods are prohibited as restrictions by object. To this general rule, there are certain very closely defined exceptions where the Commission has taken the view that a ban on active and passive sales are necessary to ensure the commercial success of the venture. One of the examples is a ban on wholesalers selling to final customers when this would damage the retailers' marketing efforts. Under the Proposed Regulation this ban would not be tolerated if the trader's refusal falls under Article 4. This is problematic and Article 6 should be clarified. As we have suggested above the limited settings where the producer can request a ban on active and passive sales have been designed to balance the rights of traders, the efficiency-generating effects of the restrictions, and the possible harm to competition. It seems counter-productive to limit that careful balance here. The better option is to remove Article 6 altogether from the Proposed Regulation.

3. GEO-BLOCKING AND OTHER SECONDARY LEGISLATION

KEY FINDINGS

- There are a number of pieces of legislation (actual or proposed) that complement the Proposed Geo-Blocking Regulation. Thus, it is important to view this proposal as part of a package of reforms and its success depends on these complementary proposals also being implemented. For instance the proposal on cross-border parcel delivery also helps cross-border purchases.
- Article 3 of the Proposed Regulation goes further than existing secondary legislation, whilst Article 5 appears to only re-state existing legislation concerning means of payment, therefore Article 5 should be redrafted.

From the discussions in chapters 1 and 2 it should be clear that there are limits to how much the Treaty provisions can do to address geo-blocking. Chapter 1 showed that the internal market rules can easily be used to challenge state measures, but it is unlikely that they are applicable to many situations where geo-blocking is organized by traders, unless an association of traders is involved. However, in such a case it would appear more natural to apply EU competition law to the conduct of an association: Article 101(1) TFEU is specifically addressed to decisions by associations of undertakings. Chapter 2 showed that while competition law can attack a variety of forms of geo-blocking, these rules can only be applied either when a firm is dominant or when the geo-blocking is part of an agreement.⁶³ Section 2.4 in particular showed that while the conduct that the Proposed Geo-Blocking Regulation forbids is conduct which would be forbidden if it was part of an agreement or imposed by a firm with a dominant position, and since the Proposed Regulation tackles unilateral conduct, it fills a regulatory gap.

Having said that, it is important to discuss how far the Proposed Regulation fits within the matrix of existing and proposed secondary legislation. Annex 1 provides a table where we examine how far each provision in the Proposed Regulation relates to other legislation. The key message from this table is that there are a number of pieces of legislation (actual or proposed) that complement the Proposed Geo-Blocking Regulation. This shows that it is important to view this proposal as part of a package of reforms. In what follows we set out the key implications of the findings reported in that table.

3.1 Legislation *complementing* Article 4 of the Proposed Regulation

The Proposal on cross-border parcel delivery complements some of the provisions in Article 4: if shoppers are going to buy on-line from overseas they will need to be certain that delivery can be arranged at modest prices. There is evidence that some postal services operators are already providing certain services to facilitate cross-border shopping. Here it is worth in particular to comment on the model offered by Malta Post known as SendOn. This service offers a customer based in Malta an address in the UK, Italy and Germany and delivers the item the customer has bought using a website of those states to the address in Malta.⁶⁴ This kind of innovative market solution serves in part to resolve geo-blocking without the need for regulatory intervention. It provides us with two lessons: the first is that businesses are often quicker than lawmakers at finding ways to resolve certain market failures caused by weak regulation. The second is that while the offer by Malta Post is attractive, it is itself

⁶³ The Court of Justice has at times read the meaning of agreement quite widely, especially in cases where market partitioning was at hand, but discussion of this case law is beyond the scope of this report.

⁶⁴ <https://www.maltapost.com/sendon/>

restricted to Malta and, in highlighting that a problem exists, should not be seen as the kind of solution that makes dedicated regulation unnecessary. Rather it shows us that competitive parcel provision is a vital prerequisite for the success of the proposed Geo-Blocking Regulation.

The proposal for a Directive on certain aspects concerning contracts for the supply of digital content and the proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods both provide consumer protection measures which are also vital to ensure that cross border sales are a success: they are vital to stimulate consumers to buy goods across borders.

In terms of existing legislation, the E-commerce Directive also complements the Proposed Regulation by establishing the country of origin principle for information society services. This means that, in principle, it is sufficient for the service providers to comply with their local laws, even when selling to customers residing in a different Member State, without having to check for compliance with the laws of the latter Member State. However, the practical application of this principle raises a series of difficulties since it involves the application of a foreign law by a national enforcer. Furthermore, the E-commerce Directive also allows national enforcers to derogate from the country of origin principle on grounds of public policy, public health, public security and the protection of consumers, including investors.

3.2 Legislation *affected by* Articles 3 and 5 of the Proposed Regulation

The Consumer Rights Directive would be overtaken by Article 3 of the Proposed Regulation: the Directive provides that consumers should be informed about delivery restrictions and limits on methods of payment, while the Proposed Regulation would remove certain delivery restrictions and open up multiple payment methods. We move from a paradigm where EU law informs the consumer to one which empowers the consumer to make more choices than before.

The Consumer Rights Directive would also be overtaken by Article 5 with respect to payment methods – the regime in the Proposed Regulation is more intrusive on the duties of traders and it is also in line with other legislation concerning means of payment.

Article 3 is in line with the application of Article 101(1) TFEU to website restrictions and automatic re-routing: what the Commission considers is forbidden when found in an agreement between a manufacturer and a distributor is forbidden by Article 3 when it is engaged in by a seller unilaterally.

3.3 Legislation *overlapping with* Article 5 of the Proposed Regulation

The SEPA Regulation (Regulation 260/2012) covers some of the same ground as Article 5: it prohibits traders from requiring bank accounts to be from a given Member State and guarantees that a consumer is entitled to use their debit card for any purchases in the EU.

Article 5 of the Proposed Regulation is said to go a 'step further' relative to the existing means of payment legislation (namely Regulation 260/2012, Regulation 2015/751 and Directive 2015/2366). It prevents traders from applying different payment conditions based-upon the customer's residence when the following conditions are fulfilled:

- a) those payments are made through electronic transactions by credit transfer, direct debit or a card-based payment instrument within the same payment brand;
- b) the payee can request strong customer authentication by the payer pursuant to the Directive (EU) 2015/2366;

c) the payments are in a currency that the payee accepts.⁶⁵

Notwithstanding, Directive 2015/2366 on payment services in the internal market already prohibits the discrimination of consumers on the basis of their place of residence, which basically means Article 5 of the Proposed Regulation largely restates existing legislation concerning means of payment with geo-blocking implications. If this is the case, it's not unique for a new piece of legislation to restate in a specific sector pre-existing general obligations but, in terms of drafting, it may be better option to simply state the prohibition of discrimination for reasons related to payment in Article 5, whilst leaving the references to secondary legislation in the recitals alone.

3.4 Legislation that should be read alongside the proposal

In this section we identify a number of actual or proposed pieces of legislation that should probably be considered together with the Proposed Regulation.

First, the VAT action plan proposes to simplify VAT rules so as to avoid imposing an obligation on the trader to register in the Member State of each purchaser. This action plan seems essential to stimulate traders to sell across borders. It also shows that the EU is proposing a regulatory mix that includes two kinds of measures: (i) those that facilitate the trader's business so that they have greater incentives to sell abroad and (ii) those like the Proposed Regulation under scrutiny here which prohibit geo-blocking. It is worth reflecting whether both approaches are needed. The former create incentives for traders willing to export but unable to do so because of excessive red tape; the latter create incentives for firms unwilling to export in order to reap greater profits. It will be important to examine what economic findings are available to determine what the main cause for an absence of cross-border trade is.

Second, while it is clear that sales of prescription medicinal products is included in the scope of the Proposed Geo-blocking Regulation, it is helpful to also recall Directive 2001/83. Article 85 provides that if a Member State chooses to allow the sale of prescription drugs over the internet, then these products must be sold under certain conditions: (i) a common logo; (ii) an identification allowing one to see what Member State the seller is established.

⁶⁵ The trader can still request charges for the use of a card-based payment instrument for which interchanges fees are not regulated under Chapter II of Regulation (EU) 2015/751 and for those payment services to which Regulation (EU) No 260/2012 does not apply (up to the costs borne by the trader for the use of the payment instrument).

4. LIMITS TO THE PROPOSED REGULATION

KEY FINDINGS

- The scope of the proposed Regulation is very limited indeed: while there are arguments in favour of a cautious approach, a Regulation of such limited ambition may not add much value: some of the complementary proposals discussed in Chapter 3 can succeed even without this Regulation
- The list of exclusions is particularly opaque and it would be beneficial if all exclusions were set out clearly in a single article. Geo-blocking in some of the excluded fields may be prohibited by other legislation.
- The exclusion of audio-visual and non-audio-visual copyrighted content is problematic in view of the high potential for cross border sales for such services. Our proposal is that the Regulation could provide that geo-blocking is not justified when the trader has the requisite rights in the relevant territories where buyers wish to obtain the service from that trader. The burden should be placed on the reluctant trader to show that they lack the legal right to sell in the country of destination.
- Public enforcement of the prohibitions found in the Regulation is essential for its success.

4.1. Scope

The scope of the proposed Regulation is modest. Whether this is a wise legislative choice can be debated. In support of this legislative choice is the argument that the Proposed Regulation is a first step, upon which further amendments can be added incrementally. At this stage it may well be that this is the most that EU Law can be expected to deliver: on the basis of an awareness that the Services Directive has not succeeded in removing geo-blocking in the sectors to which the Directive applies, this proposal addresses those failures and not others. A second argument in favour of the modesty of the proposal is that in other sensitive fields (e.g. where copyright is involved) the legal strategy adopted is different and so it would be inappropriate to try to legislate in this field: as we have shown, there are instances where the application of competition law by the Commission is part of a wider strategy to open legislative space.

An argument in favour of broadening the scope of the proposed Regulation is the public impact this can have: a Regulation applicable to nearly all economic sectors which is written in plain, intelligible language, can make a positive impression: it can show that the EU legislator is not incapable of solving practical problems speedily. At a time were the EU's status is undergoing some criticism, this Regulation can be one flagship project that makes the EU visible, much like the EU's action on abolishing roaming charges. If the legislation will be severely limited and incomplete in its scope, it can, instead, fall rather short on the expectations it may generate. This will further undermine the legitimacy of the EU. A second argument in favour of some broadening is to include within a single text all the existing rules that already serve to prohibit geo-blocking and complement the proposal, so that a single legislative text evidences all of the EU's existing efforts in this regard.

4.2. Gaps in the Proposed Regulation (other than copyright)

As is clear, the Proposed Regulation does not apply in a number of cases. In Annex 1 these are mapped out, and we provide an analysis here.

Article 1(3) provides a list of exclusions by reference to Article 2(2) of the Services Directive. However, some other legislation affects or may affect this long list of exclusions. In this part of the report we focus on what measures achieve this. Annex 1 also points out those scenarios where a gap remains even after looking at the *acquis* more generally.

- Financial services: the impact assessment of the Proposed Regulation suggests that there is legislation envisaged on addressing discrimination when accessing certain financial services, as a follow-up to the Green Paper on retail financial services (e.g. mortgages or opening a bank account).
- Electronic communications: The roaming regulation establishes rules with a direct impact on the ability of service providers to geo-block, particularly in terms of net neutrality (prohibition to discriminate when providing internet access services) and abolition of roaming charges as of 15 June 2017.
- Transport services: a number of sector-specific rules (in air, sea, and bus and coach transport) already provide for some measures to address geo-blocking by making sure that every seller may not discriminate on the basis of the nationality of the customer. Nevertheless, the Court has clarified that planning requirements or the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources can be invoked by Member States as overriding reasons of general interest.
- Healthcare services: some cross-border mobility is facilitated by Directive 2011/24 but only where: (i) a specific treatment option is not timely available, or is not equally effective in the country of residence, and (ii) the treatment requested is among the benefits of the state of residence.

In addition to the exclusions in Article 1(3) of the Proposed Regulation, there are other gaps and here we explain the relationship between these gaps and other legislation

- The SME gap that excludes certain undertakings from Article 4(2) due to the costs linked with registration for VAT purposes (recital 22): this complements Article 2(2) of the Services Directive, but it is worth noting that the Portability Proposal does not exclude SMEs.
- The book sales gap (Article 4(3) paragraph 2): this is the result of certain member States still having resale price maintenance rules for book sales as a means of ensuring the wide availability of a range of books.
- The B2B gap in Recital 12 may be at times filled by competition law provisions when the Commission or the National Competition Authority is able to find an agreement between the two traders, and it is worth bearing in mind that the Court has read the notion of agreement fairly widely to include tacit requests not to export.

4.3. The copyright gap

The scope and rationale for the gap

As is clear from Article 4(1)(b), ‘electronically supplied services where the main feature is provision or access to and use of copyright protected works or other protected subject matter’ are not covered by the Proposed Regulation. At the same time a review clause is proposed in Article 9(2) allowing the reconsideration of this exclusion. According to this clause, the Regulation should be re-evaluated 2 years after its entry into force. In principle, this means that Article 4(1)(b) will end-up being re-assessed before being in force for that period since

the Regulation determines this provision will only enter into force on 1 July 2018, whilst the rest of the prohibitions enter into force on the twentieth day following its publication.

Recital 6 adds further specifications (and lack of clarity) to the Proposal: it draws a distinction between audiovisual services and non-audiovisual services. It suggests that the Regulation applies to non-audiovisual services (but subject to the exclusion in Article 4) and that the Regulation does not apply at all to audiovisual content. This is because Article 1(3) provides that the Regulation does not apply to the activities referred to in Article 2(2) of Directive 22006/123 – and here Article 2(2)(g) excludes: ‘audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting.’ However, the wording of Recital 6 is rather convoluted and makes it hard to understand the exact status of copyright under the Proposal. The Proposal uses vague concepts (‘should apply inter alia’); and does not provide an accurate definition of non-audio-visual services (‘the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, subject however to the specific exclusion provided for in Article 4’). Better drafting is required.

In practical terms it means we can distinguish between: (a) music, videogames, computer programmes as examples of non-audiovisual services and (b) films, sports broadcasts, radio transmissions, as audio-visual services.

In general terms, it is hard to disagree with the Commission’s refusal to venture into this terrain. The real problem when it comes to copyright protected goods is well-known: the territorial basis of copyright. This means that a copyright owner is free to license a work separately in say, France and Italy, and this makes exports from France into Italy impossible because the Italian copyright holder will be able to enforce the rights it holds against parallel imports. Matters differ when one is exporting copyrighted goods (e.g. a CD sold in France and re-sold in Germany). Here the intellectual property right is exhausted. But there is no such thing as digital exhaustion.

Thus, the necessary solution to geo-blocking in this context is to create EU wide copyright law, meaning that the goods can be exported easily because there are no national property rights, but this is an unlikely outcome.

We are thus left with a number of second-best solutions (e.g. the examples on the application of competition law in chapter 2), and the question we consider below is how far we use the Proposed Regulation as a way of crafting some more second-best solutions.

At the same time (as noted in the Annex) there are a number of initiatives that are ongoing:

- For audiovisual services the Commission is exploring how far competition law may be used and it has also issued a proposal on the portability of online content which addresses the needs of a small set of consumers. The portability proposal may be criticised on two fronts: (i) it benefits a privileged group of EU residents who travel frequently; (ii) it is actually a step back from the approach the CJEU took in *Murphy* because it is only applicable if the user has the right to view the content in the country of ordinary residence while the spirit of the approach in *Murphy* was to create new rights. In principle, copyright protection does not require territorial partitioning. It can be organised in a different way. For example, instead of selling the exclusive rights to different geographic markets, they can be sold to markets defined on a different basis. It is also possible, as the Court highlighted in *Murphy* for the copyright holder to ask for a price that takes into account the possible audience in other Member States.⁶⁶

⁶⁶ Para 112 of *Murphy*: “when such remuneration is agreed between the right holders concerned and the broadcasters in an auction, there is nothing to prevent the right holder from asking, at that time, for an amount

The *Murphy* judgment also makes clear that the protection of copyright should not be equated with exclusivity, much less territorial exclusivity. When the premium to be paid by such exclusivity may lead to the partitioning of national markets it is irreconcilable with the fundamental aim of the internal market and, as such, incompatible with EU law.⁶⁷ On the other hand, given the sensitivity of the topic we can explain the cautious approach of the Commission in the portability proposal as a first step.

- In addition, for audiovisual services, the cross-border provision of online services ancillary to broadcasts and the digital retransmissions of TV and radio programmes originating in other Member States is expected to be fostered following the Proposal for a Regulation that facilitates the clearance of rights for ancillary online services. This is done through the introduction of a country of origin principle, pursuant to which the copyright relevant act takes place solely in the Member State where the broadcasting organisation is established. This proposal applies only to so-called ancillary services to broadcast (e.g. simultaneous online transmissions, 'catch-up' services, previews) but not to video on demand. Moreover, it extends the mandatory collective management of copyright and related rights relevant for digital retransmissions of tv and radio programs to equivalent digital retransmissions other than cable except for the Internet (e.g. IPTV in one Member State will more easily clear rights for channels from other Member States). Following a similar trend, the Proposal for a Directive on copyright in the Digital Single Market also establishes a set of mechanisms aimed at facilitating the licensing of rights in audiovisual works to video-on-demand platforms.

Possible ways forward

It is clear from the above that a long-term comprehensive solution is linked to a reform of copyright law at EU level. In the meanwhile, however, there are two options that could be explored, also taking into account the CJEU case law.

One promising way forward is to start by noting the slightly different wording of Article 4(1)(b) and Article 9(2). Under Article 9(2) the review of the exclusion is to apply 'to electronically supplied services, the main feature of which is the provision of access to or use of copyright protected works or other protected subject matter, **provided that the trader has the requisite rights for the relevant territories.**' It is not clear why the proviso was added to the review clause, but this does serve as an inspiration for a possible reformulation of the Proposed Regulation: if the trader has the requisite rights in more than one territory, should we not see this as a situation where geo-blocking is prohibited? Let us work with an example: a trader operates in Finland and Sweden selling music on-line and he has a license in both Finland and Sweden. If a consumer in Finland wishes to obtain the relevant services of this trader from the Swedish website, a refusal to sell should be prohibited because the policy rationales discussed in section 3.5.1 do not apply. How to formulate this idea into legislative text? The question arises because a buyer in Finland will not necessarily know that a trader in Sweden has the requisite right to sell in Finland. We recommend that the burden is placed on the trader to show that he has no legal right to make the sale across borders.

which takes account of the actual audience and the potential audience both in the Member State of broadcast and in any other Member State in which the broadcasts including the protected subject-matter are also received."

⁶⁷ Paras 114 and 115 of *Murphy*.

To put it differently: if there is no copyright restriction for a certain audiovisual/non-audiovisual good or service to be sold across the border why should the Regulation exclude such sales from the prohibition of geo-blocking? There is no reason to assume that where a good or a service is more susceptible of copyright geo-blocking should be acceptable. This is even more so in light of the clear trend in the CJEU case-law to limit territorial partitioning on the basis of copyright. There is no justification to establish a general link between copyrightable material and geo-blocking and, on the basis of that link, to exclude certain areas from the prohibition of geo-blocking in general. If the copyright on a particular good or service lawfully restricts its rights to a certain state's market then the seller is entitled to refuse to sell to another state. However, if the copyright is not limited to a state (or cannot be lawfully limited to a state) then the seller cannot refuse to sell. The Regulation should be applicable on this simple and clear basis.

A second approach is to expand the approach promoted by the CJEU in the *Usedsoft* judgment. This concerned the resale of a computer programme: Usedsoft would buy a used computer programme from user A and sell it to user B. The CJEU held, on the basis of the applicable legal framework, that the buyer of software can 'sell' the software on to another person because the right of the property owner is exhausted (provided that the owner of the original copy deletes it). The effect of this judgment is to create a 'secondary market' for copyrighted services. In theory, it could be argued that the thinking in this case could be transposed to the legislative field whereby it could apply for example to video-games. For example, it would allow a trader in Estonia to download a videogame there and then export it to a buyer in Poland. However, it seems more like the scope of the judgment is very much limited to 'simple' computer programmes, meaning the CJEU is not likely to move towards digital exhaustion beyond where we currently stand.⁶⁸ However nothing precludes the legislator from considering this approach. However, our preference is for the first suggestion above, given its simplicity and its reliance on the fundamental premise of facilitating the growth of a single market.

4.4. Enforcement

Irrespective of the scope of the Regulation, it is vital that this regulation can be enforced actively by public enforcers in the Member States. The reason that the Services Directive has proven unsatisfactory is not only the breadth of the exceptions, but also the difficulty in securing any strong deterrent effect. In one notable instance, the Commission intervened ... add detail.

In this context it is encouraging that Recital 30 of the Proposed Geo-blocking Regulation makes reference to the proposals for revising the Regulation on Consumer Protection Cooperation. This proposal is an important one and it will be vital to the success of the proposed Geo-Blocking Regulation, because it confers on national authorities useful enforcement powers. In summary, national authorities have powers to obtain information to discover infringements, they may issue injunctions to prevent the continuation of an infringement, they may even close down websites that infringe the rules in question, and may impose penalties and request that infringers compensate those who have suffered harm. Moreover, a coordination mechanism is created whereby the Commission can support the work of the national authorities. These proposals draw on the powers that Regulation 1/2003 conferred on national competition authorities but are also more closely focused on enhancing

⁶⁸ Eleonora Rosati, 'Online copyright exhaustion in a post-Allposters world', Forthcoming in *Journal of Intellectual Property Law & Practice*.

enforcement in digital markets (e.g. national authorities have the power to act as mystery shoppers to detect infringements).

A useful illustration of how public enforcement can serve to identify and remedy geo-blocking is found by reference to Directive 2009/72 on electricity liberalization. Article 3(2) prohibits discrimination on grounds of (inter alia) geographical location of consumers. In the UK, Ofgem took action between 2009 and 2013 by imposing a non-discrimination clause to all major energy retailers in the UK. We do not engage with the merits of this approach, but the findings of Ofgem was that each of the main retailers was setting higher prices to those customers less likely to switch away from the existing supplier (defined as the more 'sticky' customers). This price discrimination was forbidden by a prohibition enforced by the threat of fines. We do not engage with the economic merits of the remedy, which remain debated. The point for present purposes is that for matters where the harm is diffuse, it makes no sense to impose prohibitions without creating public enforcement capacity.

The Proposed Regulation will largely be meaningless without appropriate mechanisms of public enforcement. These can be foreseen in the Regulation itself or result from other legislation such as the Consumer Protection.

5. CONCLUSION

This report provides a summary of the way EU Law applies to geo-blocking. It has shown that the Proposed Regulation fills a regulatory gap, but that its scope remains limited. Below we summarise the principal recommendations we have to make with respect to the text of the Proposed Regulation.

- The list of exclusions is opaque and it is recommended that all excluded sectors are listed clearly.
- Recital 6 requires clearer drafting.
- Article 5 of the Proposed Regulation largely restates existing legislation and it is suggested that it is best that it just states the general principle of non-discrimination while leaving references to secondary legislation in the recitals
- Article 6 of the Proposed Regulation should be withdrawn: it forbids a very small set of practices which may be authorised on the basis of Article 101(3) TFEU. We have argued that these practices are assessed under competition law in a manner which balance the rights of traders, likely efficiencies and the harm to competition. It seems disproportionate to restrict these practices further especially when the scope of the exemption is very narrow and also reasonable.
- The failure of the Regulation to address “audio-visual” and “non-audio-visual” copyrighted content is perhaps understandable given that the optimal response should be a reform of copyright law, but at the same time the Regulation can be more bold in addressing this kind of content, not least because these are the markets where a large amount of cross-border trade can take place and the likelihood of a substantive copyright reform is low in the short term. We have made two suggestions in this regard. Our favoured suggestion is that geo-blocking in this context is forbidden unless the trader can show that he is legally prohibited from making the service available in the Member State where the buyer is located. A more limited alternative would be to provide for digital exhaustion whereby if a trader downloads content in one Member State, he is then entitled to make that copy available to a buyer in another Member State. The first option is broader in scope and has the advantage of clarity and simplicity.
- The other major point in this report is the need for strong public enforcement in this area, in light of the fact that information and litigation costs will make it very unlikely for consumers to be able to effectively protect their rights.

6. ANNEX 1: GEO-BLOCKING MAPPING

Table 1: Geo-Blocking Mapping

Cross-border sales: Market failures & Gaps	Geo-Blocking Proposal	Other legislation	Relationship between proposal and legislation: Overlapping/ substitution/ complementary/ gap remains
<p>Overly costly or impossible for consumers with residence in one Member State to obtain goods and services from other Member States</p>	<p>Article 4: trader cannot discriminate between customers on the basis of their residence:</p> <p>(i) where the trader is not involved in delivering the product to the Member State of the customer;</p> <p>(ii) where the trader provides electronic services (other than copyright protected works, which are excluded);</p> <p>(iii) where the services are provided by a trader in a member State different from that of the customer's residence.</p>	<p>Proposal on cross-border parcel delivery:</p> <p>1) Parcel delivery providers with 50 or more employees or are active in more than one Member State will be required to send national postal regulators basic information about their operations and annual updates on volumes, turnover and the number of employees.</p> <p>2) Publication of domestic and cross-border prices for a set of basic services (such as sending a 2kg parcel to another country) offered by universal service providers. Postal regulators will be required to assess the affordability of these services and their conclusions will be published on a website.</p> <p>3) Universal service providers must offer transparent and non-discriminatory third party access to multilateral cross-border agreements, in particular on terminal rates, to encourage competition in cross-border parcel markets.</p>	<p>Complementary relationship</p>
		<p>E-Commerce Directive (2000/31/EC):</p> <p>Country of origin principle for providers of information society services:</p>	<p>Complementary relationship</p>

		<p>supervision at the source of the activity (recital 22)</p> <p>- In principle, it is sufficient for the service providers to comply with their local laws, even when selling to customers residing in a different Member State (no need to check compliance with the laws of the latter).</p> <p>However, Member States may derogate from this principle, if the following conditions are met:</p> <p>a) The measure shall be proportional and necessary for one of the following reasons:</p> <p>i) public policy, in particular, the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;</p> <p>ii) the protection of public health;</p> <p>iii) public security, including the safeguarding of national security and defence; or</p> <p>iv) the protection of consumers, including investors.</p> <p>b) the information society service in question must prejudice or present a serious and grave risk of prejudice to one of the abovementioned objectives.</p> <p>c) Prior to any action, an enforcement authority must have had:</p> <p>i) asked the Member State of origin to take measures and the latter did not take them or took inadequate measures;</p> <p>ii) notified the Commission and the Member State of origin of its intention to</p>	
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		<p>take appropriate enforcement measures.</p> <p>d) The duty of prior notification may be waived in case of of urgent threats to the interests of public policy, public security, public health or the protection of consumers.</p> <p>- Example: in Germany, Unfair Competition law tends to be stricter than in other Member States and the discussion on the implementation of the E-commerce Directive led to the abolition of the Laws on Rebates and the Ordinance on Bonuses since they contained concepts not used in most Member States⁶⁹</p>	
		<p>Proposal for a Directive on certain aspects concerning contracts for the supply of digital content:</p> <p>Fully harmonises a set of key rules concerning contracts for the supply of digital content. Clarifies that the Directive includes rules on conformity of the digital content, remedies available to consumers in cases of lack of conformity of digital content with the contract, as well as certain aspects concerning the right to terminate a long term contract and the modification of the digital content</p>	<p>Complementary relationship</p>
		<p>Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods:</p> <p>Lays down certain requirements concerning distance sales contracts concluded between the seller and the consumer, in particular rules on conformity of goods, remedies in case of non-</p>	<p>Complementary relationship</p>

⁶⁹ See <https://www.twobirds.com/en/news/articles/2005/application-of-the-country-of-origin-principle>

		<p>conformity and the modalities for the exercise of these remedies</p>	
		<p>Article 18 TFEU</p> <p>General prohibition of discrimination on grounds of nationality</p> <p>Invoked by the Commission in the Article 102 Svenska Kraftnat Decision: dominant undertakings are not allowed to restrict exports of electricity in order to reserve them for domestic consumption</p>	<p>Overlapping relationship</p>
		<p>Article 35 TFEU</p> <p>Prohibition of quantitative restrictions on exports, and all measures having equivalent effect</p> <p>Invoked by the Commission in the Article 102 Svenska Kraftnat Decision: dominant undertakings are not allowed to restrict exports of electricity in order to reserve them for domestic consumption</p>	<p>Overlapping relationship</p>
<p>Discrimination of consumers on the basis of the payment method selected</p>	<p>Article 5: forbids discrimination on the basis of the payment method selected by the buyer, where:</p> <p>(a) those payments are made through electronic transactions by credit transfer, direct debit or a card-based payment instrument within the same payment brand;</p> <p>(b) the payee can request strong customer authentication by the payer pursuant to the Directive (EU) 2015/2366; and</p> <p>(c) the payments are in a currency that the payee accepts.</p>	<p>Consumer Rights Directive: Trading websites should indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted (Recital 38 and Article 8(2) paragraph 2)</p>	<p>Conflicting relationship: the Geo-Blocking Proposal limits the traders discretion to impose restrictions in terms of delivery and means of payment</p>
		<p>SEPA (Regulation 260/2012):</p> <ul style="list-style-type: none"> - Prohibits traders from requiring bank accounts to be from a certain Member State for a payment to be made. - When shopping abroad consumers can use their bank debit card to make a payment in Euro as they 	<p>Overlapping relationship</p>

		<p>would in their home country</p>	
		<p>Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features:</p> <p>Prohibits discrimination on basis of nationality and residence against consumers who intend to open and use a payment account on a cross-border basis</p>	<p>Overlapping relationship</p>
		<p>Payment Services Directive (2015/2366/EU):</p> <ul style="list-style-type: none"> - Reduces the risk of fraud for electronic payments by obliging payment service providers to apply strong customer authentication (risk of payment fraud no longer considered a valid ground for discrimination) - Recital (64): contractual provisions should not, as their object or effect, discriminate against consumers who are legally resident in the Union, on the grounds of their nationality or place of residence. - Article 69(1)(a): The payment service user entitled to use a payment instrument shall use it in accordance with the terms governing the issue and use of the payment instrument, which must be objective, non-discriminatory and proportionate 	<p>Overlapping relationship</p>
		<p>Regulation 2015/751 on interchange fees for card-based payment transactions: Introduces EU wide ceilings for inter-bank fees regarding transactions with consumer debit and credit cards - retailers cannot refuse</p>	<p>Complementary relationship</p>

		<p>cards with fees capped by the Regulation, even if they are issued in another Member State.</p> <ul style="list-style-type: none"> - Article 6(1): Any territorial restrictions within the Union or rules with an equivalent effect in licensing agreements or in payment card scheme rules for issuing payment cards or acquiring card-based payment transactions shall be prohibited. - Article 6(2): Any requirement or obligation to obtain a country specific licence or authorisation to operate on a cross-border basis or rule with an equivalent effect in licensing agreements or in payment card scheme rules for issuing payment cards or acquiring card-based payment transactions shall be prohibited. - Article 7(4): Any territorial discrimination in processing rules operated by payment card schemes shall be prohibited. 	
<p>Rerouting of customers away from websites hosted in other Member States without their consent (prevents consumers from comparing offers on different websites of the same seller)</p>	<p>Article 3: forbids automatic re-routing on the basis of nationality or place of residence.</p>	<p>Vertical Guidelines: automatic re-routing of customers to another website or blocking a sale when a foreign credit card is issued constitute prohibitions of passive sales</p>	<p>Partial overlapping</p>
		<p>Consumer Rights Directive: Trading websites should indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted (Recital 38 and Article 8(2) paragraph 2)</p>	<p>Overlapping with potential substitution: Geo-Blocking Proposal is more restrictive</p>
<p>Overly broad exceptions in the Services Directive reduce the potential impact of a prohibition on Geo-Blocking</p>	<p>Article 1(3): Proposal does not apply to does not apply to the activities referred to in Article 2(2) of the Services Directive</p>		<p>Gap remains</p>

	(a) non-economic services of general interest;		Gap remains
	(b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;		Gap remains but the Impact Assessment of the Proposed Regulation suggests that there is legislation envisaged on addressing discrimination when accessing certain financial services, as a follow-up to the Green Paper on retail financial services (e.g. mortgages or opening a bank account)
	(c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;	<p>Regulation 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union:</p> <ul style="list-style-type: none"> - (8) When providing internet access services, providers of those services should treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment. - Retail roaming surcharges should be abolished from 15 June 2017 - Applies to roaming services for voice calls and SMS messages, but has also been extended to data roaming - Applies to all customers of a mobile telephone service provider established in a Member State of the EU and using their device in another Member State. Prohibits discrimination 	Complementary relationship as regards internet neutrality and mobile phone roaming

		<p>against 'roaming customers' on the ground of mobility by the home provider and on the basis of the establishment of the home provider by the host providers</p>	
		<p>Directive 2002/22 (telecoms universal service):</p> <p>Article 3(1): universal services should be made available to all end-users, independently of geographical location, and, in the light of specific national conditions, at an affordable price.</p>	<p>Complementary relationship although the potential of application to cross-border services is negligible (e.g. calling emergency numbers using foreign number)</p>
	<p>(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;</p>	<p>Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community:</p> <p>Article 23(2): without prejudice to public service obligations, access to air fares and air rates for air services from an airport located in the territory of a Member State to which the Treaty applies, available to the general public shall be granted without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community.</p>	<p>Complementary relationship</p>
		<p>Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway:</p> <p>– Article 1(a): (a) non-discrimination between passengers with regard to transport conditions offered by passenger services between ports situated in the territory of the Member States, but also passenger services between such ports and ports situated outside the</p>	<p>Complementary relationship</p>

		<p>territory of the Member States</p> <ul style="list-style-type: none"> - Article 4(2): Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers or ticket vendors shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of carriers or ticket vendors within the Union. 	
		<p>Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport:</p> <ul style="list-style-type: none"> - Article 1(a): non-discrimination between passengers with regard to transport conditions offered by carriers (i.e., any natural or legal person other than a tour operator, travel agent or ticket vendor, offering transport by regular or occasional services to the general public); - Article 4(2): Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of the carriers, or ticket vendors within the Union 	<p>Complementary relationship</p>
		<p>Regulation 1371/2007 on rail passengers' rights and obligations</p> <p>No provisions on geo-blocking</p>	<p>Gap remains</p>
		<p>Article 95 TFEU</p> <p>Prohibition of transport carriers to charge different rates and impose different conditions for the carriage of the same goods over the same transport links on</p>	<p>Overlapping relationship</p>

		grounds of the country of origin or of destination of the goods	
	(e) services of temporary work agencies;		Gap remains
	(f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;	<p>Directive 2011/24/EU on the application of patients' rights in cross-border healthcare:</p> <p>The cross-border care Directive (2011/24/EU) facilitates patient mobility in the EU, but only where (i) a specific treatment option is not timely available, or is not equally effective in the country of residence, and (ii) the treatment requested is among the benefits of the state of residence.</p> <p>Confirmed by the Court in Case C-268/13, Petru [2014] (Court Reports - general)</p> <ul style="list-style-type: none"> - Article 4(3) 3. The principle of non-discrimination with regard to nationality shall be applied to patients from other Member States. - This shall be without prejudice to the possibility for the Member State of treatment, where it is justified by overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory. Such measures shall be limited to what is necessary and proportionate and may not 	Complementary relationship

		<p>constitute a means of arbitrary discrimination and shall be made publicly available in advance.</p>	
<p>(g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;</p>		<p>Satellite and Cable Directive (93/83/EEC):</p> <p>Allows broadcasters the clearance of the copyright and related rights relevant for satellite broadcasting and for cable retransmission in one Member State.</p> <p>Establishes a legal fiction that the copyright relevant act takes place solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. Thus, rights only need to be cleared for the "country of origin" of the broadcast (and not for the countries where the signals are received).</p>	<p>Gap remains: Directive does not apply to online services</p>
		<p>Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes:</p> <p>Introduces country of origin principle but does not oblige broadcasting organisations to provide their online ancillary services across borders, nor does it oblige operators of retransmission services to offer programmes from other Member States (see cell above on the Satellite and Cable Directive).</p>	<p>Complementary relationship with the Satellite and Cable Directive</p> <p>Complementary relationship with the Geo-Blocking proposal: acts as a facilitator of the cross-border provision of broadcasting services</p>
		<p>Commission Proposal for a Directive on</p>	<p>Complementary relationship with the</p>

	<p>copyright in the Digital Single Market:</p> <p>(30) To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.</p>	<p>Geo-Blocking proposal: acts as a facilitator of the cross-border provision of copyrighted services</p>
<p>(h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;</p>	<p>Case C – 243/01 Gambelli</p> <p>- Restrictions on the provision of gambling services must be 'consistent and systematic'</p>	<p>Complementary relationship: whilst the Court tolerates State measures in online gaming, namely geo-blocking, it does not eschew to analyse the merits of State monopolies</p>
<p>(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;</p>		<p>Gap remains</p>
<p>(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;</p>		<p>Gap remains</p>
<p>(k) private security services;</p>		<p>Gap remains</p>

	(l) services provided by notaries and bailiffs, who are appointed by an official act of government.		Gap remains
SME gap	Article 4(2): The Geo-Blocking prohibition on electronically supplied services shall not apply to SMEs that are exempted from VAT on the basis of the provisions of Chapter 1 of Title XII of Directive 2006/112/EC		Complementary relationship with Article 2(2) of the Services Directive Establishes a more restrictive regime for copyrighted services since the Portability Proposal does not exclude SMEs
Public order gap	Article 4(3): Geo-Blocking prohibition shall not apply in so far as a specific provision laid down in Union law or in the laws of Member States in accordance with Union law prevents the trader from selling the goods or providing the services to certain customers or to customers in certain territories	A possible example could be derived from: Lycra vs Yahoo, a French/US case regarding the prohibition of online sales of Nazi memorabilia from the US to France. If such case would emerge in the context of online sales between the territory of two Member-States there would be a restriction on free movement possibly justifiable for reasons of public order.	Complementary relationship with Article 2(2) of the Services Directive
Book sales gap	Article 4(3) paragraph 2: With respect to sales of books, the prohibition shall not preclude traders from applying different prices to customers in certain territories in so far as they are required to do so under the laws of Member States in accordance with Union law.	Several countries have resale price maintenance laws on books, including Germany, Spain and France, which prevents competition between booksellers (in Germany, the law applies to physical and online books as well).	Complementary relationship with Article 2(2) of the Services Directive Gap remains in terms of books RPM
Copyright gap	Article 4(1)(b): Copyright is outside the scope of the proposal Recital 6: Audio-visual services, including services the main feature of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses	Murphy: Exclusive geographic licensing along national lines breaches Articles 56 and 101 TFEU	Partially substituted/limited by the Portability Proposal
		Paramount commitments: When licensing its films for pay-TV to a broadcaster in the EEA, Paramount will not (re)introduce contractual obligations, which: (i) prevent or limit a broadcaster from responding to unsolicited requests from consumers	Complementary relationship

		<p>within the EEA but outside of the broadcaster's licensed territory; or (ii) require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory.</p>	
		<p>Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market:</p> <p>applies the rules of the country of the consumer's residence; and imposes an obligation upon online content service providers to ensure portability of those services</p>	<p>Complementary relationship with the Geo-Blocking proposal/</p> <p>Potential conflict/substitution of <i>Murphy</i> and the <i>Paramount</i> commitments: restricts the universe of potential subscribers to those who could already access the copyrighted service</p>
<p>Choice of law gap</p>	<p>Recital 10: The Proposal should not affect the application of Regulations 593/2008 and 1215/2012</p> <p>In particular, the mere fact that a trader acts in accordance with the provisions of this Regulation should not be construed as implying that he directs his activities to the consumer's Member State for the purpose of such application.</p>	<p>The choice of law applicable to contracts between a consumer and a professional who pursues his or her commercial or professional activities in the country where the consumer has his or her habitual residence or, by any means, directs such activities to that country or to several countries including that country, may not deprive the consumer of the protection afforded by the law of the consumer's residence.</p> <p>In matters related to a contract between a consumer and a professional who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, a consumer may bring proceedings against the other party in the courts of the Member State where he is domiciled and proceedings may be brought against the</p>	<p>Gap remains</p>

		consumer only in those courts.	
B2B gap	Recital 12: The protection afforded by the Proposal should not extend to customers purchasing a good or a service for resale	Competition law	Complementary relationship
		Block Exemption Regulation for Vertical Restraints: agreements which restrict the territories or the customers to whom a distributor may sell are “hardcore restrictions”	Complementary relationship
		Pierre Fabre: requirement that the buyer may only sell goods through a physical store is a competition restriction by object for not affording distributors the chance to use the internet	Complementary relationship
Potential pharma gap		<p>Directive 2001/83 on the Community code relating to medicinal products for human use as amended by Directive 2011/62</p> <p>Article 85c(1) establishes that, without prejudice to national legislation prohibiting the offer for sale at a distance of prescription medicinal products to the public by means of information society services, Member States shall ensure that medicinal products are offered for sale at a distance to the public by means of information society services under certain conditions.</p> <p>Article 85(c)(3). A common logo shall be established that is recognisable throughout the Union, while enabling the identification of the Member State where the person offering medicinal products for sale at a distance to the public is established. That logo shall be clearly displayed on</p>	Overlap with potential conflict

		<p>websites offering medicinal products for sale at a distance to the public in accordance with point (d) of paragraph 1.</p> <p>Commission Implementing Regulation 699/2014 on the design of the common logo to identify persons offering medicinal products for sale at a distance to the public and the technical, electronic and cryptographic requirements for verification of its authenticity</p>	
		<p>Joined Cases C-501/06P, C-515/06P and C-519/06P, GlaxoSmithKline Services</p> <p>An agreement that aims at preventing parallel imports of pharmaceutical products constitutes a by-object infringement of Article 101(1) TFEU.</p>	<p>Complementary relationship</p>
		<p>Case C-468/06 - Sot. Lélos kai Sia</p> <p>A dominant company that refuses to meet ordinary orders from certain wholesalers, in order to put a stop to parallel exports carried out by those wholesalers, is abusing its dominant position.</p>	<p>Complementary relationship</p>
		<p>As regards consumers: Conseil de la concurrence decision no. 07-D-07, §112 ff</p> <p>With respect to the clauses designed to restrict the number of items bought through an internet order introduced by certain manufacturers of pharmaceuticals, the Conseil noted that such clauses are designed to avoid the development of a parallel trade in the products in question but that this requirement does not exist for sales at</p>	<p>Overlap with potential conflict</p>

		<p>physical points of sale. The Conseil nevertheless accepted the clauses whereby the distributor undertakes to reject any order for products which would be unusual (with respect to frequency or quantity) for an end consumer and/or to inform the manufacturer when a purchaser places a number of orders that do not correspond to a normal request for an end consumer or to reject any order greater than 5 identical units.</p>	
<p>Potential overlap with electricity</p>		<p>Directive 2009/72 (electricity): Article 3(2): prohibition of discrimination on grounds of geographical location and financial status of end-consumers.</p>	<p>Overlap with potential conflict: Between 2009 and 2013, Ofgem imposed a non discrimination clause to large retailers in the UK energy market (the clause was not re-inserted afterwards for fear of anticompetitive effects).</p> <p>In its "Energy Supply Probe - Initial Findings Report" from 6 October 2008, Ofgem shown concern regarding differential pricing practices: "Until very recently, the five former incumbent electricity suppliers charged electricity customers in their former monopoly areas an average of over 10 per cent higher prices than comparable "out-of-area" customers. (...) Overall, these price differentials mean that companies charge more to existing ("sticky") customers whilst maintaining competitiveness in more price sensitive segments of the market. The ability to price differentially in this way means that pressure on prices in the most competitive segments of the market does not</p>

			<p>always constrain prices for all other consumers.”</p> <p>To tackle this discrimination, Ofgem imposed a new condition in the licences of the big suppliers limiting the differences in the tariffs that suppliers could charge to ‘in-area’ customers compared with ‘out-of- area’ customers.</p>
		<p>Commission Decision from 14.4.2010 in Case 39351 – Swedish Interconnectors:</p> <p>Dominant undertakings are not allowed to restrict exports of electricity in order to reserve them for domestic consumption</p>	<p>Overlap with potential conflict</p>
Potential overlap with gas		<p>Directive 2009/73 (gas):</p> <p>Article 3(2): prohibition of discrimination on grounds of geographical location and financial status of end-consumers</p>	<p>Overlap with potential conflict: see Ofgem example above</p>
Weak structure of public enforcement		<p>Article 20(2) of the Services Directive:</p> <p>Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.</p> <p>Only a very limited number of the cases brought to the attention of these bodies have resulted in administrative or judicial enforcement action at national level.</p>	<p>Gap remains</p>

		<p>Member States designate the authorities responsible for this enforcement in their territories. Most Member States have attributed the task of administrative enforcement to the authorities that are in charge of the administrative enforcement of consumer protection rules.</p> <p>Enforcement of the provision shall be carried out in conformity with the powers of supervision provided for in national law.</p> <p>The Commission will coordinate the exchange of information and good practices between authorities with regard to their enforcement actions.</p>	
	<p>Recital 30 Geo-Blocking Proposal</p>	<p>Proposal for a revised Regulation on Consumer Protection Cooperation:</p> <ul style="list-style-type: none"> - Defines the role of designated bodies that competent authorities may instruct to stop an infringement or to obtain the necessary evidence. The mutual assistance mechanism may be used in actions against widespread infringements in particular where evidence is located in a Member State that is not concerned by the widespread infringement - The Commission's role in the mutual assistance mechanism is strengthened: systematic monitoring, guidance to competent authorities and possibility to adopt opinions upon request of competent authorities or of its own motion. - Calculation of compensation for harm to the collective interests of consumers: (i) sectoral legislation: the rules for passengers such as Regulation 261/2004, Regulation 1371/2007, 	<p>Complementary relationship</p>

		<p>Regulation 1177/2010 and Regulation 181/2011; (ii) where the sectoral Union legislation does not cover compensation for the harm caused by intra-Union or widespread infringements, the compensation should be established based on applicable national law</p> <p>- Article 8 (2): Minimum powers of competent authorities:</p> <p>(a) have access to any relevant document, data or information related to an infringement under this Regulation, in any form or format and irrespective of the medium on which or the place where they are stored;</p> <p>(b) require the supply by any natural or legal person, including banks, internet service providers, domain registries and registrars and hosting service providers of any relevant information, data or document in any format or form and irrespective of the medium on which or the place where they are stored, for the purpose of among others identifying and following financial and data flows, or of ascertaining the identity of persons involved in financial and data flows, bank account information and ownership of websites;</p> <p>(c) require any public authority, body or agency within the Member State of the competent authority to supply any relevant information, data or document in any format or form and irrespective of the medium on which or the place where they are stored, for the purpose among others, of identifying and following of financial and data flows, or of ascertaining the identity of persons involved in financial and data flows,</p>	
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		<p>bank account information and ownership of websites;</p> <p>(d) carry out the necessary on-site inspections, including in particular the power to enter any premises, land or means of transport or to request other authorities to do so in order to examine, seize, take or obtain copies of information, data or documents, irrespective of the medium on which they are stored; to seal any premises or information, data or documents for a necessary period and to the extent necessary for the inspection; to request any representative or member of the staff of the trader concerned to give explanations on facts, information or documents relating to the subject matter of the inspection and to record the answers;</p> <p>(e) purchase goods or services as test purchases in order to detect infringements under this Regulation and obtain evidence;</p> <p>(f) purchase goods or services under a cover identity in order to detect infringements and to obtain evidence;</p> <p>(g) adopt interim measures to prevent the risk of serious and irreparable harm to consumers, in particular the suspension of a website, domain or a similar digital site, service or account;</p> <p>(h) start investigations or procedures to bring about the cessation or prohibition of intra-Union infringements or widespread infringements of its own initiative and where appropriate to publish information about this;</p> <p>(i) obtain a commitment from the trader responsible for the intra-Union infringement or widespread</p>	
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		<p>infringement to cease the infringement and where appropriate to compensate consumers for the harm caused;</p> <p>(j) request in writing the cessation of the infringement by the trader;</p> <p>(k) bring about the cessation or the prohibition of the infringement;</p> <p>(l) close down a website, domain or similar digital site, service or account or a part of it, including by requesting a third party or other public authority to implement such measures;</p> <p>(m) impose penalties, including fines and penalty payments, for intra-Union infringements and widespread infringements and for the failure to comply with any decision, order, interim measure, commitment or other measure adopted pursuant to this Regulation;</p> <p>(n) order the trader responsible for the intra-Union infringement or widespread infringement to compensate consumers that have suffered harm as a consequence of the infringement including, among others, monetary compensation, offering consumers the option to terminate the contract or other measures ensuring redress to consumers who have been harmed as a result of the infringement;</p> <p>(o) order the restitution of profits obtained as a result of infringements, including an order that those profits are paid to the public purse or to a beneficiary designated by the competent authority or under national legislation;</p> <p>(p) publish any final decisions, interim measures or orders, including the publication of the identity of the trader responsible for the intra-</p>	
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		<p>Union infringement or widespread infringement;</p> <p>(q) consult consumers, consumer organisations, designated bodies and other persons concerned about the effectiveness of the proposed commitments in ceasing the infringement and removing the harm caused by it.</p> <p>- Article 9(1): The competent authorities shall exercise the powers set out in Article 8 in accordance with this Regulation and national law either:</p> <p>(a) directly under their own authority; or</p> <p>(b) by application to courts competent to grant the necessary decision, including, where appropriate, by appeal, if the application to grant the necessary decision is not successful.</p>	
	<p>Recital 31 Geo-Blocking Proposal</p>	<p>Directive 2009/22/EC on injunctions for the protection of consumers' interests</p> <p>Article 2(1)(a): Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;</p> <p>Article 3 - Entities qualified to bring an action:</p> <p>(a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or</p> <p>(b) organisations whose purpose is to protect the interests referred to in</p>	<p>Complementary relationship</p>

		<p>Article 1, in accordance with the criteria laid down by the national law.</p>	
		<p>Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property/ Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features</p> <p>Member States shall designate the national competent authorities empowered to ensure the application and enforcement of the Directive in relation to the protection of the collective economic interests of consumers in matters concerning payment accounts services and credit agreements relating to residential immovable property this Directive.</p> <p>Member States shall ensure that designated authorities are granted investigating and enforcement powers and adequate resources necessary for the efficient and effective performance of their duties.</p>	<p>Complementary relationship</p>
<p>Difficulties dealing with VAT issues: need to register in the Member State of the customer when (unless the total value of sales of goods to that country in the year falls below the limit set by the country - EUR 35 000 or EUR 100 000)</p>		<p>VAT Action Plan: envisages ways to simplify VAT rules for e-commerce in the context of the Digital Single Market (DSM) Strategy</p> <p>Initiative to extend the Single Electronic Mechanism for VAT registration, declaration and payment to all ecommerce supplies, allowing companies to handle all VAT affairs with their home country administration when selling to multiple Member states.</p> <p>VAT mini-one-stop-shop extension to B2C supplies of tangible goods (it already applies to</p>	

		<p>electronically supplied services since 2015) – trader needs to pay foreign VAT but no to register</p>	
		<p>Consumer Rights Directive: Trader is bound to inform the total price of the goods or services inclusive of taxes, which requires knowing the applicable taxes in the State of the consumer and immediately internalizing them on the announced price</p>	<p>Gap remains</p>

REFERENCES

LEGISLATION, LEGISLATIVE PROPOSALS AND NON-LEGISLATIVE ACTS

- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1–16
- Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67–128
- Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51–77
- Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement, OJ L 46, 17.2.2004, p. 1–8
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315, 3.12.2007, p. 14–41
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16
- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (Text with EEA relevance), OJ L 293, 31.10.2008, p. 3–20
- Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Text with EEA relevance), OJ L 110, 1.5.2009, p. 30–36
- Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance), OJ L 211, 14.8.2009, p. 55–93
- Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance), OJ L 211, 14.8.2009, p. 94–136
- Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical

- agreements and concerted practices (Text with EEA relevance), OJ L 102, 23.4.2010, p. 1–7
- Commission Guidelines on Vertical Restraints (Text with EEA relevance), OJ C 130, 19.5.2010, p. 1–46
 - Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (Text with EEA relevance), OJ L 334, 17.12.2010, p. 1–16
 - Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (Text with EEA relevance), OJ L 55, 28.2.2011, p. 1–12
 - Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4.4.2011, p. 45–65
 - Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22.11.2011, p. 64–88
 - Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 Text with EEA relevance, OJ L 94, 30.3.2012, p. 22–37
 - Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32
 - Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance, OJ L 60, 28.2.2014, p. 34–85
 - Commission Implementing Regulation (EU) No 699/2014 of 24 June 2014 on the design of the common logo to identify persons offering medicinal products for sale at a distance to the public and the technical, electronic and cryptographic requirements for verification of its authenticity (Text with EEA relevance), OJ L 184, 25.6.2014
 - Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance, OJ L 257, 28.8.2014, p. 214–246
 - Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (Text with EEA relevance), OJ L 123, 19.5.2015, p. 1–15
 - Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (Text with EEA relevance), OJ L 337, 23.12.2015, p. 35–127

- Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance), OJ L 310, 26.11.2015, p. 1–18
- Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, COM (2015) 627 - 2015/0284/COD
- Proposal for a Regulation of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final - 2015/0287 (COD)
- Proposal for a Regulation of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM/2015/0635 final - 2015/0288 (COD)
- Green Paper on retail financial services Better products, more choice, and greater opportunities for consumers and businesses, COM/2015/0630 final
- Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services, COM/2016/0285 final - 2016/0149 (COD)
- Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, COM/2016/0289 final - 2016/0152 (COD)
- Commission Staff Working Document, Impact Assessment Accompanying the Document 'Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market', COM(2016) 289 final - SWD(2016) 174 final
- Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD)
- Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance), COM(2016) 283 final - 2016/0148 (COD)
- Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM/2016/0594 final - 2016/0284 (COD)
- Commission Staff Working Document, 'Geo-blocking practices in e-commerce: Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition', 18.3.2016 - SWD(2016) 70 final

CASES AND DECISIONS

- Case C-281/98 *Angonese* [2000] ECR I-4139
- Case C-145/88 *B & Q* [1989] ECR 3851
- Case C-415/93 *Bosman* [1995] ECR I-4921
- Case 15/74 *Centrafarm* [1974] ECR 1147
- Case 16/74 *Centrafarm* [1974] ECR 1183
- Case 262/81, *Coditel v Ciné Vog Films* [1982] ECR 03381
- Case C-265/95, *Commission v France*, [1997] ECR I-06959
- Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299
- Case C-230/16, *Coty Germany* (case in progress)
- Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549
- Case 13/76 *Donà v Mantero* [1976] ECR 1333
- Case 31/85 *ETA Fabriques d'Ébauches v SA DK Investment and others* [1985] ECR 3933
- *Football Association Premier League Ltd Ltd v. Luxton* [2014] EWHC 253 (Ch)
- Case V/31.400, *Ford Agricultural* [1993] OJ L20/1
- Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, [2012] (Court Reports - general)
- Case C – 243/01 *Gambelli* [2003] ECR I-13031
- Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, [2009] ECR I-09291
- *Grundig* [1994] OJ L20/15
- Case C-10/89 *HAG II* [1990] ECR I-3711
- Case C-9/93 *IHT Internationale Heiztechnik* [1994] ECR I-2789
- Case C-336/14, *Ince*, [2016] (Court Reports – general)
- Case 32/65 *Italy v Council and Commission* [1966] ECR 389
- Case COMP/35.918, *JCB* [2002] OJ L69/1
- Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935
- Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767
- Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681
- *LICRA v Yahoo!: UEJF and Licra v. Yahoo!*, 20 November 2000, No. 00/05308 (Tribunal de Grande Instance de Paris); *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168,1171 (N.D. Cal. 2001) ; *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001)
- Case COMP/36.264, *Mercedes-Benz* [2002] OJ L 257/1
- Joined Cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others (C-403/08) and Karen Murphy v. Media Protection Services Ltd (C-429/08)*, [2011] 2011 I-9083
- C-268/13, *Petru* [2014] (Court reports – general)
- Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, [2011] ECR I-09419
- Conseil de la concurrence decision no. 07-D-07, §112 ff, relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle,
- 8.3.2007

- Case C-112/00, *Schmidberger*, [2003] ECR I-05659
- Joined Cases C-458/06 to C-498/06 [*St. Michael*] [2008] I-07139
- Case 27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919
- Case AT.40023 - Cross-border access to pay-TV – *Paramount commitments*, 26.7.2016
- Case COMP/39351, *Svenska kraftnät – Swedish Interconnectors*, 14.4.2010
- Case C-375/09, *Tele2 Polska* [2011] ECR I-03055
- Case 119/75 *Terrapin* [1976] ECR 1039
- Case 27/76 *United Brands v Commission* [1978] ECR 207
- Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779
- Case IV/35.733, *Volkswagen* [1998] OJ L124/60
- Case C-338/00 P *Volkswagen AG v Commission* [2003] ECR I-9189
- Case 36/74 *Walrave* [1974] ECR 1405
- Case 158/86 *Warner Brothers and Metronome Video* [1988] ECR 2605
- Case COMP/37975 *Yamaha* (16 July 2003)
- Case IV/1.576, *Zanussi* [1978] OJ L322/26

LITERATURE, STUDIES AND PRESS RELEASES

- Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe (IP/08/22, Brussels, 9th January 2008). Available at: http://europa.eu/rapid/press-release_IP-08-22_en.htm
- Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services (BIP/16/2645, Brussels, 26 July 2016). Available at : http://europa.eu/rapid/press-release_IP-16-2645_en.htm
- Asser Institute, *Study on sports organisers' rights in the European Union - Final Report*, February 2014, available at : http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf
- Bird & Bird, *Application of the Country of Origin Principle*, 24 February 2005: <https://www.twobirds.com/en/news/articles/2005/application-of-the-country-of-origin-principle>
- Bird & Bird, *Broadcasting: Post-Murphy: the territorial TV sports licensing landscape*, 15 July 2014 : <http://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licensing-landscape>
- M. Mataja, *Private Regulation and the Internal Market* (Oxford, Oxford University press, 2016)
- G. Marenco, 'Competition between national economies and competition between businesses – a response to Judge Pescatore', *Fordham International Law Journal*, Vol. 10 (1987) 420
- G. Monti 'The Revision of the Consumer Acquis from a Competition Law Perspective' (2007) 3(3) *European Review of Contract Law* 295
- G. Monti & G. Coelho, 'Geo-Blocking between Competition Law and Regulation', *Competition Policy International* (January, 2017)
- OECD *Policy Roundtable: Vertical restraints for On-line Sales* (2013)
- E. Rosati, 'Online copyright exhaustion in a post-Allposters world', Forthcoming in *Journal of Intellectual Property Law & Practice*.
- C. Saville *EU Intellectual Property Law and Policy* 2nd ed (Edward Elgar, 2016)
- Schulte-Nolke, H. et al. (2013), 'Discrimination of Consumers in the Digital Single Market', *Study for the IMCO Committee, European Parliament*
- R. Whish and D. Bailey *Competition Law* 8th ed (Oxford University Press, 2015)

NOTES

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