

# Challenges to Competition of Geographic Restrictions to Online Sales of Goods and Digital Content

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## **Abstract**

When European consumers wish to make an online purchase from a business located in a Member State of the European Union other than their home country, they are often offered higher prices or less favorable terms than those enjoyed by local consumers. This situation should change after the adoption by the Council of the European Union on February 27, 2018 of the Regulation on the prohibition of “geo-blocking” practices. Once this law enters into force in December this year, online traders will have to serve foreign consumers “the same as the locals”. From buying Swedish furniture on an Italian website to renting a car for their next holidays, EU consumers will not have to pay higher prices, be offered different conditions or have their credit card refused because they live in another EU member state. This law is just one of the 16 measures initiated by the Commission as part of its Digital Single Market Strategy for Europe aiming at removing restrictions to competition imposed by suppliers on selling goods and digital content to customers located in another member state. Other key measures include harmonized European Union rules on contracts for the supply of digital content and for online sales of goods, cooperation between national authorities responsible for the enforcement of consumer protection laws, efficient and affordable cross-border parcel delivery, simplified VAT rules, copyright modernization and assessment of the role of online platforms and intermediaries. A fully functioning digital single market has the potential to contribute on the order of EUR 415 billion per year to European GDP.

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## **Keywords**

Online business, barriers to cross-border e-commerce, digital content, geo-blocking, re-routing customers, restrictions to competition, Digital single market for the EU, prohibition of geo-blocking, cross-border portability.

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## **Introduction**

E-commerce in the EU has grown steadily over the past years. Today the EU is one of the largest e-commerce markets in the world. Based on Eurostat data, the percentage of individuals aged between 16 and 74 that ordered goods or services over the internet has grown steadily from 30% in 2007 to 55% in 2016<sup>1</sup>. Nevertheless, EU consumers and e-retailers do not take full advantage of the single market. Only 15% of consumers bought online from other EU countries in 2014, although 44% did so in their own country; over three quarters (84%) of online sales in 2014 were to consumers in the same country where the vendor was located<sup>2</sup>. According to a sector inquiry ordered by the European Commission, 52% of potential cross-border purchases are blocked<sup>3</sup>.

There are several types of obstacles to cross-border e-commerce within the EU. For instance, when a consumer attempts to make an online purchase in a Member State other than his country of permanent residence, he may be required to pay a higher price, be subject to different conditions of sale or even be refused payment.

Such obstacles hamper the realization of a single digital European market which can be defined as a market in which free movement of goods, persons, services and capital is ensured and in which individuals and businesses can freely access files and information on the internet as they conduct online activities in an environment with fair competition and a high level of protection for consumer rights and personal data, regardless of their citizenship or place of residence<sup>4</sup>.

In order to foster the creation of a single digital European market, the European Commission adopted on May 2015 the Digital Single Market Strategy for Europe<sup>5</sup> (DSM). The Strategy outlines several key actions upheld by three pillars through which the Commission envisages creation of a digital single market. One of these pillars involves ensuring access for consumers and businesses to goods and services via e-commerce across the EU.

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<sup>1</sup> 2016 Eurostat Community Survey on ICT usage in households and by individuals//[http://ec.europa/statistics-explained/index.php/E-commerce\\_statistics\\_for\\_individuals](http://ec.europa/statistics-explained/index.php/E-commerce_statistics_for_individuals). See also data from Flash Eurobarometer 397 (2015), Consumer attitudes towards cross-border trade and consumer protection (accessed: 04.01.2018)

<sup>2</sup> EU Open Data Portal; Flash Eurobarometer 413 //<https://data.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com2015-192-final> (accessed: 05.01.2018)

<sup>3</sup> See <http://www.eesc.europa.eu/en/news-media/press-releases/eu-digital-market-consumer-protection-must-be-top-Priority> (accessed: 05.03.2018)

<sup>4</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX%3A52015DC0192>. (accessed: 28.02.2018)

<sup>5</sup> European Commission; COM(2015) 192 final//<http://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com2015-192-final> (accessed 05.01.2018)

For this pillar the Commission has already undertaken several actions, including legislative proposals in the following areas: (i) harmonized EU rules on contracts for the supply of digital content and for online and other distance sales of goods<sup>6</sup> and on cooperation between national authorities responsible for the enforcement of consumer protection laws<sup>7</sup>, (ii) efficient and affordable cross-border parcel delivery<sup>8</sup>, (iii) unjustified geo-blocking<sup>9</sup>, (iv) simplified VAT rules and (v) copyright modernization<sup>10</sup>. The Commission has also assessed the role of online platforms and intermediaries<sup>11</sup>.

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<sup>6</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final//<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-634-EN-F1-1.PDF> (accessed: 03.04.2018); and Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final//<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjzqfzm2wova> (accessed: 28.03.2018)

<sup>7</sup> 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, COM (2016) 283 final // <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-283-EN-F1-1.PDF> (accessed: 18.02.2018)

<sup>8</sup> Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services, COM(2016)286final//<https://www.regjeringen.no/contentassets/4a741ccb94cb4e33925efb846a76398f/konsekvensutgreiing-del-4.pdf> (accessed : 13.02.2018)

<sup>9</sup> 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) 289 final // <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289> (accessed: 09.02. 2018) Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT, COM(2016) 148 final//<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2016%3A148%3AFIN> (accessed: 22.02.2018) ; and the adoption, on December 1, 2016, of the VAT Digital Single Market Package "Modernising VAT for cross-border e-commerce" //[https://ec.europa.eu/taxation\\_customs/business/vat/action-plan-vat\\_en](https://ec.europa.eu/taxation_customs/business/vat/action-plan-vat_en) (Accessed: 05.02.2018); and [https://ec.europa.eu/taxation\\_customs/business/vat/digital-single-market-modernising-vat-cross-borderecommerce\\_en](https://ec.europa.eu/taxation_customs/business/vat/digital-single-market-modernising-vat-cross-borderecommerce_en). (accessed: 13.02 2018)

<sup>10</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework COM(2015) 626 final//<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A626%3AFIN> (accessed: 02.03.2018); and 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 final// <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-627-EN-F1-1.PDF>(accessed: 26.02.2018); 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 organizations and retransmissions of television and radio programs, COM(2016) 594 final// <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0594> (accessed: 11.02.2018); and Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final//<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593> (accessed : 14.02.2018)

<sup>11</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe, COM(2016) 288 final//<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-288-EN-F1-1.PDF> (accessed: 08.02 2018)

The Commission decided on May 6, 2015, on the basis of the EU competition rules, pursuant to Article 17 of Regulation 1/2003<sup>12</sup>, to launch a sector inquiry into trade of consumer goods (“goods”) and digital content in e-commerce in the EU<sup>13</sup>.

While most of the actions of the Strategy essentially seek to address regulatory barriers to cross-border online trade in goods and services, the sector inquiry into e-commerce investigated barriers created by companies<sup>14</sup>. Therefore, the sector inquiry focused on distribution agreements for goods and services that may create barriers to e-commerce. According to the inquiry’s findings, 16% of companies that sold online or tried to do so in 2014 indicate that the existence of restrictions to competition imposed by their suppliers on selling to customers located in another member state is a problem (and for 6% it is a major problem)<sup>15</sup>.

The restrictions to competition revealed in the sector inquiry are found predominantly in vertical agreements, i.e. in agreements entered into between undertakings operating for the purpose of the agreement at different levels of the production or distribution chain; and these agreements pertain to the conditions under which parties may purchase, sell or resell certain products<sup>16</sup>.

This sector inquiry singled out not only the existence of restrictions on online sales of goods but also on access to and use of online content services cross-border. Up to 87% of the online content providers who responded to the inquiry declared that their users’ terms of service contain restrictions to the users’ access to content in a member state other than their home country<sup>17</sup>. Such practices impede con-

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<sup>12</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1 // <https://www.consilium.europa.eu/en/press/-releases/2018/02/27/geo-blocking-council-adopts-regulation-to-remove-barriers-to-e-commerce> (accessed : 10.02.2018)

<sup>13</sup> Commission decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (HT.4607), C(2015) 3026, final // [https://ec.europa.eu/competition/antitrust/ecommerce\\_decision\\_en.pdf](https://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf) (accessed : 19.02. 2018)

<sup>14</sup> The Commission 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) 289 final//<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF>(accessed: 17.02.2018) seeks to address company-erected barriers, including also in the form of unilateral business decisions of non-dominant undertakings or intra-group decisions, which are generally not caught by EU competition rules.

<sup>15</sup> European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10 // [https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf) (accessed: 05.01.2018)

<sup>16</sup> Of retailers with sales volume above EUR 500 000, 34 % report having contractual restrictions in at least one product category while 7% of retailers with turnover below EUR 500,000 report having a contractual restriction in at least one product category. Proportions are calculated out of all respondents that provided information on their turnover (798 for the sales volume category above EUR 500,000 and 226 retailers for the sales volume category below EUR 500,000).

<sup>17</sup> European Commission, COM (2017) 229 Final report on the E-commerce Sector Inquiry...

sumers' access to their online subscriptions to films, sports events, e-books, video games or music services when travelling in other EU countries and thus lead to fragmentation of the internal market.

To bring some clarity to the unsettled situation described above, this paper will (in section I) first focus in detail on the restrictions to competition existing in the single digital market highlighted by the e-commerce sector inquiry and then (in section II) examine the legislative proposals put forward by the European Commission as part of its Digital Single Market Strategy for Europe to eliminate those obstacles and thus to ensure that cross-border e-commerce will directly benefit citizens and businesses. A European Parliament Survey<sup>18</sup> has indicated just how much is at stake: a fully functioning digital single market has the potential to contribute on the order of EUR 415 billion per year to European GDP.

## 1. Restrictions to Competition in the E-economy of the EU

Through its E-commerce Sector Inquiry<sup>19</sup>, the Commission sought to understand how the growth of e-commerce has influenced the choices made by companies regarding the distribution of their products and services and to what extent the growth of e-commerce has led to an increase in contractual restrictions or the emergence of new types of contractual restrictions.

Sector inquiries are investigations that the Commission decides to carry out in sectors of the economy or types of agreements when there are indications that competition may be restricted or distorted within the internal market<sup>20</sup>.

Sector inquiries do not target specific companies. However, the results of a sector inquiry may point to potentially anti-competitive practices, and the Commission may follow a sector inquiry with a decision to open case-specific investigations. Thus, sector inquiries allow the Commission to set priorities among the EU rules for competition<sup>21</sup>.

Following the decision<sup>22</sup> to launch the sector inquiry, the Commission started a large-scale fact-finding exercise between June 2015 and March 2016 based on

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<sup>18</sup> European Parliament Research Service, Mapping the cost of Non-Europe, 2014-19, (2015)//[http://www.europarl.europa.eu/EPRS/EPRS\\_Mapping\\_the\\_Cost\\_of\\_Non-Europe-June%202014.pdf](http://www.europarl.europa.eu/EPRS/EPRS_Mapping_the_Cost_of_Non-Europe-June%202014.pdf) (accessed: 13.01.2018)

<sup>19</sup> European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry...

<sup>20</sup> See Article 17 of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition Articles 81 and 82 of the Treaty, OJ L 1, 4.12.2003, p.1 // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0001> (accessed: 10.02.2018)

<sup>21</sup> Ibid.

<sup>22</sup> Commission decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (HT.4607), C(2015) 3026, final // [http://ec.europa.eu/competition/antitrust/ecommerce\\_decision\\_en.pdf](http://ec.europa.eu/competition/antitrust/ecommerce_decision_en.pdf) (accessed: 19.02.2018)

requests for information pursuant to Article 17 of Regulation 1/2003 (“questionnaire”). Questionnaires were sent to various actors in the EU concerning online sales of both goods and digital content.

On September 15, 2016, the Commission published a Preliminary Report<sup>23</sup> followed by the publication on May 10, 2017, of a Final report on the E-commerce Sector Inquiry<sup>24</sup>.

According to the findings of the E-commerce Sector Inquiry Final Report, geographic restrictions to online line sales of goods (A) as well as in digital content (B) can be found.

### **1.1. Geographic Restrictions to Online Sales of Goods**

Manufacturers active in all product categories tend to sell their products in a large number of member states. Manufacturers were asked to indicate in how many EU member states they sold their products in 2014 either directly or via independent wholesalers or retailers<sup>25</sup>. The responses show that, taking all product categories together, the majority of manufacturers distributed their products in at least 21 member states, while only a limited proportion (4%) sold them in only one member state<sup>26</sup>. The majority of manufacturers in each product category sold their products in 21 to 28 EU member states. Manufacturers of cosmetics and healthcare products had the highest proportion selling in at least 21 member states, followed by those that supply consumer electronics<sup>27</sup>.

Geographic sales strategies of retailers varied significantly among respondents<sup>28</sup>. Across all product categories covered by the sector inquiry, many retailers had limited their sales efforts to a specific member state and did not sell cross-border<sup>29</sup>. Cross-border sales come at a cost, and the decision not to sell cross-border is

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<sup>23</sup> See SWD(2016) 312 final, available online at [http://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_preliminary\\_report\\_en.pdf](http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf) (accessed: 05.01.2018)

<sup>24</sup> European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry...

<sup>25</sup> European Commission; COM (2017) 229, paragraph 345//[https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf) (accessed: 05.01.2018)

<sup>26</sup> Proportions are calculated out of all 257 responses to the question. Respondents were asked to provide a separate response for each product category in which they are active. For manufacturers active in multiple product categories, the product category with sales into the highest number of member states was considered as indicative of the presence of the manufacturer across the EU.

<sup>27</sup> About 80% of manufacturers of cosmetics and healthcare products reported selling their products in at least 21 member states while the proportion of manufacturers of consumer electronics selling in the same number of member states was 76%. Proportions are calculated on the basis of the number of respondents active in each product category.

<sup>28</sup> European Commission; COM (2017) 229 final report... para 349.

<sup>29</sup> *Ibid.* para 350.

often based on a retailer's general business decision about whether to expand the geographic scope of its activities to other member states or not<sup>30</sup>.

Some 36% of sector inquiry respondent retailers reported they do not sell cross-border for at least one of the relevant product categories in which they are active<sup>31</sup>, while 38% of retailers collect information on the location of the customer in order to implement geo-blocking measures<sup>32</sup>.

Retailers with a higher turnover are more likely to apply geo-blocking compared to smaller retailers<sup>33</sup>. Geo-blocking most commonly takes the form of refusal to deliver goods to customers in other member states, followed by refusals to accept payments from such customers. The majority of geo-blocking measures in relation to goods result from unilateral business decisions of retailers not to sell cross-border.

To implement geo-blocking, retailers collect various types of information on the location of the customer. The type of information that respondents most commonly collect for geo-blocking purposes is the postal address of the customer, followed by the customer's credit/debit card details or country of residence<sup>34</sup>.

When a company does not occupy a dominant position in its market, the EU competition rules are not concerned with geo-blocking on the basis of unilateral business decisions taken by companies, but only with geo-blocking measures which implement contractual restrictions limiting the ability of online retailers to sell to certain territories or customer groups<sup>35</sup>.

In the absence of a dominant position, the EU competition rules are not concerned with geo-blocking on the basis of unilateral business decisions taken by companies, only with geo-blocking measures which implement contractual restrictions limiting the ability of online retailers to sell to certain territories or customer groups<sup>36</sup>. Approximately three quarters of respondent retailers that sell cross-border indicated that they do not charge different prices when selling cross-border to customers in another member state<sup>37</sup>.

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid, para 351. Proportions are calculated out of all 918 respondents to each question.

<sup>32</sup> Ibid. para 373.

<sup>33</sup> Ibid. para 374.

<sup>34</sup> Ibidem.

<sup>35</sup> Unilateral conduct may, however, be caught by Article 102 of the TFEU and/or by Article 20(2) of Directive 2006/123/EC on services in the internal market, which provides that "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". The Commission adopted a proposal on May 25, 2016, (COM (2016) 289 final//<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF> (accessed: 09.02.2018))

<sup>36</sup> Ibid.

<sup>37</sup> European Commission; COM (2017) 229 Final report on the E-commerce Sector Inquiry, May 10, 2017, paragraph 376//[URL.https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_)

Almost 12% of retailers indicate that they have contractual cross-border sales restrictions in at least one product category in which they are active<sup>38</sup>.

A higher proportion of the larger retailers (in terms of sales volume) experience cross-border sales restrictions compared to smaller retailers<sup>39</sup>. The product category in which the highest proportion of retailers experiences cross-border sales restrictions is clothing and shoes with 13%, followed by consumer electronics and sports and outdoor<sup>40</sup>.

Contractual cross-border sales restrictions take multiple forms and are not always written in agreements, but are sometimes communicated orally<sup>41</sup>.

The findings of the sector inquiry suggest that certain territorial restrictions such as geo-blocking may raise concerns regarding their compatibility with EU competition rules as can be seen in Box 1.

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### **Box 1**

#### *Geo-blocking measures under Vertical Block Exemption Regulation (VBER) and Vertical Guidelines.*

The European courts have on a number of occasions held that agreements or concerted practices which are aimed at partitioning markets according to national borders or which make the interpenetration of national markets more difficult, in particular those which are aimed at preventing or restricting parallel exports, have as their object the restriction of competition pursuant to Article 101(1) of the TFEU (Treaty on the Functioning of the European Union, also known as the Treaty of Rome)<sup>42</sup>.

Geo-blocking measures implemented by undertakings that manufacture goods and sell them through their own websites fall outside the scope of

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en.pdf (accessed: 05.01.2018). The proportion of respondents is calculated out of all respondents that sold cross-border and that replied to a particular question (603 retailers). As retailers were asked to provide separate responses for website operated by them, the responses received do not provide information on price differences applied by retailers when selling products at different prices on different websites.

<sup>38</sup> Ibid. para 397.

<sup>39</sup> Ibid. para 399.

<sup>40</sup> Ibid. para 401.

<sup>41</sup> Ibid. para 402.

<sup>42</sup> See, for example, the judgment in *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, 56/64 and 58/64, EU:C:1966:41; the judgment in *Commission v GlaxoSmithKline*, C-513/06, EU:C:2008:738, para 58 to 61; the judgment in *Sot.Léloskai Sia and Others*, C-468/06 to C-478/06, EU:C:2008:504, para 65; judgment in *NV IAZ International Belgium and Others v Commission*, 96 to 102, 104, 105, 108 and 110/82, EU:C:1983:310, para 23 to 27; judgment in *Javico*, C-306/96, EU:C:1998:173, para 13 and 14; judgment in *General Motors v Commission*, C-551/03 P, EU:C:2006:229, para 67 to 69 and judgment in *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 139.



Article 101 of the TFEU<sup>43</sup>. Equally, if an individual retailer unilaterally decides not to sell to customers in certain member states and implements this decision through geo-blocking measures, that decision does not fall under Article 101 of the TFEU<sup>44</sup>.

If geo-blocking measures result from an agreement or concerted practice that is not a genuine agency agreement<sup>45</sup> between two undertakings (such as a manufacturer and a retailer), they fall within the scope of Article 101 (1) of the TFEU.

There are four general categories of restrictions under consideration as follows:

**(a) Territorial sales restrictions under Article 4(b) of the VBER**

The Article 4(b) of the Vertical Block Exemptions Regulation (VBER) provides that, subject to a number of limited exceptions, the exemption provided for in the VBER does not apply to a vertical agreement between a supplier and distributors that directly or indirectly has as its object to restrict the territory into which, or the customers to whom, the distributor may sell the contract goods.

Article 4(b) of the VBER covers both direct and indirect restrictions (such as reduction of bonus payments or rebates) aimed at inducing distributors not to sell to customers in certain territories<sup>46</sup>.

A supplier can, however, restrict the territory into which or the customers to whom a distributor may sell the goods or services if one of the exceptions listed in Article 4(b)(i) to (iv) of the VBER is met.

In particular, Article 4(b)(i) of the VBER provides that a supplier can restrict active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor.

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<sup>43</sup> Agreements between legal entities within the same undertaking fall outside the scope of Article 101(1) of the TFEU. See for example judgment in *Centrafarm BV and Adriaan De Peijper v Sterling Drug Inc*, 15/74, EU:C:1974:114, para 41 and judgment in *Viho Europe BV. Commission*, C-73/95 P, EU:C:1996:405, para 51.

<sup>44</sup> As indicated above, the Commission adopted a proposal on 25 May 2016 (COM(2016) 289 final// <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF> (accessed: 09.02.2018) to tackle unilateral geo-blocking of companies.

<sup>45</sup> Geo-blocking measures in agreements between undertakings may fall outside Article 101(1) of the TFEU if the relationship between the parties is qualified as a “genuine” agency relationship within the meaning of case law. The decisive element is whether the agent bears financial or commercial risks in relation to the activities for which it has been appointed as an agent to the principal. See judgment in *CEES*, C-217/05, EU:C:2006:784, para 51 to 61 and the judgment in *CEPSA*, C- 279/06, EU:C:2008:485, para 36.

<sup>46</sup> See Vertical Guidelines, para 50, for further examples of such indirect measures// [http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf) (accessed: 06.02.2018)

Active sales mean actively approaching individual customers, for instance, by direct mail, including sending unsolicited e-mails or making visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory<sup>47</sup>. Online advertisement which is specifically addressed to customers in certain territories is also considered as a form of active selling (e.g. territory-based banners on third party websites or paying a search engine or online advertisement provider to have advertisements displayed in a particular territory)<sup>48</sup>. Similarly, launching a website which targets a specific member state by using a country-specific top-level domain (e.g. “.it” for Italy) can be considered as actively selling into that territory.

The reason for the exception in Article 4(b)(i) of the VBER is that exclusive territorial distribution can create efficiencies that justify a restriction on active sales. A distributor that has been exclusively allocated a territory may be incentivized to invest in additional promotion and marketing efforts, possibly to enter a new geographic market, on which other distributors could free-ride absent any territorial protection<sup>49</sup>.

By contrast, a restriction of passive sales into an exclusively allocated territory falls outside of the scope of Article 4(b)(i) of the VBER and constitutes a hardcore restriction as this would grant the distributor absolute territorial protection. Passive sales generally mean sales in response to unsolicited requests from individual customers including delivery of goods to such customers<sup>50</sup>. Sales that result from advertising or promotion aimed at customers in one’s own territory or in non-exclusive territories but that also reach customers in other distributors’ (exclusive) territories or customer groups are considered passive sales<sup>51</sup>.

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<sup>47</sup> Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory. See Vertical Guidelines, paragraph 51// [http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf) (accessed: 06.02.2018)

<sup>48</sup> Ibid, para 53.

<sup>49</sup> Restrictions of active sales into certain territories or customer groups that are unrelated to an exclusive territory or an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer constitute a hardcore restriction under Article 4 (b) of the VBER.

<sup>50</sup> Restrictions of passive sales constitute hardcore restrictions under Article 4(b) of the VBER. They fall outside the scope of Article 101 (1) of the TFEU only in exceptional circumstances (see para 61 of the Vertical Guidelines // [http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf) (accessed: 06.02.2018)

<sup>51</sup> Ibid, para 51.

The Vertical Guidelines provide several examples of restrictions that are considered to have as their object restricting passive sales via the internet and thus are hardcore restrictions unable to qualify for the exemption provided in the VBER.

This includes, for example, restrictions that require a retailer to apply different geo-blocking measures (such as blocking access to its website to customers located in another member state or re-routing customers to an alternative website)<sup>52</sup>.

**(b) Territorial sales restrictions concerning end users by members of a selective distribution system operating at the retail level under Article 4(c) of the VBER**

Article 4(c) of the VBER provides that the exemption does not apply to a vertical agreement between a supplier and a retailer that directly or indirectly has as its object restricting active or passive sales to end users by members of a selective distribution system, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorized place of establishment.

Retailers in a selective distribution network should, therefore, generally be free to sell to all customers and this freedom can only be restricted to protect an exclusive distribution system operated in another territory<sup>53</sup>.

Conversely, sales to end users by distributors operating at the wholesale level can be restricted according to Article 4 (b) (iii) of the VBER without losing the benefit of the block exemption.

**(c) Territorial sales restrictions between distributors within a selective distribution system under Article 4 (d) of the VBER**

The exemption from the VBER also does not apply to restrictions of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade. Unlike Article 4 (c) of the VBER, Article 4 (d) does not concern sales to end users. If a selective distribution system is operated across several member states, cross-border sales restrictions (either active or passive) between authorized distributors at whatever level of trade would amount to a hardcore restriction under Article 4(d) of the VBER.

This means that within a selective distribution system, members must not only be free to sell cross-border to other members at the different levels of

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<sup>52</sup> Ibid. para 52.

<sup>53</sup> Vertical Guidelines, para 56.

the selective distribution system. They must also be free to source products from any other member of the selective distribution network in another member state, including those that are active at the wholesale level<sup>54</sup>.

The hardcore restrictions under Article 4 of the VBER therefore significantly constrain the ability to combine territorial exclusivity and a selective distribution system within the same territory<sup>55</sup>. While a supplier can agree with a certain authorized distributor in a selective distribution system not to supply to any other distributor in a particular part of the territory where the selective distribution system is applied, it cannot protect this distributor from active or passive sales from other authorized distributors into its territory. The supplier can however impose restrictions on the ability of other distributors to determine the location of their business premises<sup>56</sup>.

Companies can therefore — as frequently observed in the sector inquiry — in principle operate a selective distribution system by appointing specific “exclusive” wholesalers for certain member states. Such wholesalers would typically be members of the selective distribution system as they undertake not to sell to unauthorized distributors in the territory in which the selective distribution system operates. They would normally select authorized retailers on behalf of the supplier in the territory by applying the selection criteria provided by the supplier. However, any restrictions imposed on other authorized members of the selective distribution network concerning active or passive sales into the territory of this “exclusive” wholesaler would constitute hardcore restrictions of competition under Article 4 (d) VBER.

#### **(d) Combination of selective and exclusive distribution for the same products in different member states**

Companies can in principle also combine selective and exclusive distribution in different territories, for example use a selective distribution system in some member states in which their brand is already well established while using exclusive distribution in member states in which their brand is less well known. In this case, an active sales restriction imposed on the selective distributors with regard to sales into exclusive territories not covered by the selective distribution system is possible under the VBER<sup>57</sup>. Conversely, a restriction imposed on distributors (exclusive or not) operating outside the territory in which selective distribution is applied not to actively or passively

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<sup>54</sup> Ibid. para 58.

<sup>55</sup> Ibid. para 57.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid. para 56.

sell into the territory in which selective distribution is applied, including to unauthorized distributors is a hardcore restriction under Article 4 (b) of the VBER, as the territory in which selective distribution is applied is not and cannot be exclusively allocated to any distributor (based on Article 4 (c) of the VBER).

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According to the findings of the Commission's e-commerce inquiry commissioned by the Commission, geographic restrictions on competition do not only exist in the area of electronic commerce of goods, as we've seen in Section I.A, but also in digital content.

## **1.2. Geographic Restrictions on E-commerce in Digital Content**

Digital content that is protected by copyright law, similar to other copyright-protected works, does not enjoy unitary protection in the EU. Instead, national copyright laws are applicable in each of the 28 member states<sup>58</sup>. Copyright protection is "territorial" in the sense that exclusive rights are enforced under the national laws of each member state.

In order to provide online services that include copyright-protected content, a digital content provider must generally obtain a license from the holders of the copyrights of that content, such as film producers or record labels. Rights for broadcasts of sports events are licensed in a similar way, as in some member states such broadcasts also benefit from certain protections under the national copyright laws.

With respect to digital content, the sector inquiry aims at identifying potential contractual restrictions originating from the contractual relationships between suppliers (rights holders) and providers of online digital content services (licensees)<sup>59</sup>.

The sector inquiry focused on the online provision of audio-visual and music products. At the retail level, a total of 278 digital content providers including na-

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<sup>58</sup> National copyright laws are nevertheless harmonized to a large extent by several EU Directives, such as Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in information society; Directive 2014/26/EU of the European Parliament and of the Council of February 26, 2014, on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market; Directive 2006/115/EC of the European Parliament and of the Council of December 12, 2006, on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property; and Directive 2011/77/EU of the European Parliament and of the Council of September 27, 2011, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

<sup>59</sup> COM (2017) 229 final, para 654.

tional operators covering only one member state, large groups operating in more than one member state, and hosting operators were surveyed with results presented in Table A.

*Table A*

**Digital content provider respondents classified according to type of operation<sup>60</sup>**

Type of operator	Number of respondents	Proportion in sample, %
Commercial broadcaster	79	28
Online audiovisual operator	53	19
Public service broadcaster	50	18
Fixed line PSTN operator	21	8
Portal / Web TV	17	6
Fixed line cable operator	17	6
Publisher	16	6
Mobile operator	15	5
Other	10	4
<b>Total</b>	<b>278</b>	<b>100</b>

These respondents submitted info on 6,426<sup>61</sup> licensing agreements covering films, sports, television, fiction and non-fiction, children’s television, news and music products.

A total of 53 rights holders replied<sup>62</sup> and submitted information on 282 licensing agreements covering television fiction and non-fiction, sports and music products.

**1.2.1. Contractual Restrictions in Relation to Territories**

There are two main types of contractual restrictions in relation to territories: geo-blocking of digital content services (a) and Geo-blocking measures are also used to restrict cross-border access and portability (b).

**1.2.1.1. Geo-blocking of Digital Content Services**

The results of the sector inquiry show that online rights are to a large extent licensed on a national basis. Online rights are often licensed bundled with rights for the distribution of content via other transmission technologies. The territorial

<sup>60</sup> Ibid. para 658.

<sup>61</sup> Ibid. para 689.

<sup>62</sup> Ibid. para 671.

scope of online and offline rights is therefore often the same, as offline rights are traditionally licensed on a national basis<sup>63</sup>.

Moreover, right holders have indicated in their responses that their business models are built on licensing of rights on a national basis. This allows them to extract the highest possible value from the rights in terms of revenues<sup>64</sup>.

A majority of online digital content seems to be made available to users prevalently on a national basis, or for a territory covering two to four Member States, in the latter case when they share a common language<sup>65</sup>.

The main reasons why digital content providers do not make their services available in other territories are the cost of purchasing content for territories in which the digital content provider is not yet active<sup>66</sup>, and that the rights for the content is not available for licensing in some territories<sup>67</sup>. Digital content providers that make their services available in two or more Member States do not necessarily offer the same catalogue of content in each of those Member States<sup>68</sup>.

The main indicated reason for differences in catalogue between different member states is that the same rights are not always available for licensing in all the member states where the digital content provider is active<sup>69</sup>.

In order to limit the online transmission of digital content to certain member states and to implement (exclusive) territorial licensing agreements, digital content providers have recourse to geo-blocking measures<sup>70</sup>.

Geo-blocking is widely used by respondents across the EU. 70% of the responding digital content providers restrict access to their online digital content services from other member states<sup>71</sup>.

However, the responses suggest relatively large differences in the extent to which geo-blocking is used across different types of business models<sup>72</sup>.

There are also large differences in the extent to which geo-blocking is used between different member states.

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<sup>63</sup> Ibid. para 754.

<sup>64</sup> Ibid. para 755.

<sup>65</sup> Ibid. para 759.

<sup>66</sup> Ibid. para 786.

<sup>67</sup> Ibid. para 787.

<sup>68</sup> Ibid. para 791.

<sup>69</sup> Ibid. para 795.

<sup>70</sup> The Commission published in March 2016 its initial findings on geo-blocking in an Issues Paper (See SWD (2016) 70 Final//[http://ec.europa.eu/competition/antitrust/e-commerce\\_swd\\_en.pdf](http://ec.europa.eu/competition/antitrust/e-commerce_swd_en.pdf) (accessed: 01.03.2018). The initial findings of the Issues Paper are confirmed by the Report. However, as the Commission received some of the responses only after the data extraction date for the Issues paper, certain figures have been slightly modified.

<sup>71</sup> European Commission; COM (2017) 229 final, para 807.

<sup>72</sup> Ibid. para 817.

Geo-blocking measures are reported to be used more widely in certain member states. More than half of the respondents use such measures in Spain (65%) and the Netherlands (67%), while more than three quarters of respondents use such measures in France (81%), the UK (83%), Denmark (86%) and the Czech Republic (87%)<sup>73</sup>.

By contrast, in some member states such as Estonia (33%) and Italy (46%) only a minority of respondents use geo-blocking. Geo-blocking also appears to be more used by some kinds of operators than others<sup>74</sup>.

Geo-blocking appears to result from contractual restrictions in licensing agreements between digital content providers and rights holders<sup>75</sup>. Almost 60% of the responding digital content providers are contractually required by rights holders to geo-block, and the majority of licensing agreements submitted include such requirements for all product types except for news products. Geo-blocking is most prevalent in agreements for films, sports and TV series<sup>76</sup>.

### **1.2.1.2. Restrictions on cross-border portability**

Geo-blocking measures are also used to restrict cross-border access and portability. Access and portability restrictions are defined for the purpose of this paper as technical geo-blocking measures which restrict the ability of users to access and use content from outside the territory of their member state<sup>77</sup>. Replies by digital content providers indicate that access and portability restrictions are frequently used<sup>78</sup>. 72% of them admit using at least one access and use measure<sup>79</sup>. The most common restriction consists of limiting the catalogue of content and accessible services in different member states<sup>80</sup>.

A majority (65%) of respondents to the question of whether the technical measures that they apply have any impact on the user's ability to play previously downloaded content in certain territories, or on the catalogue of content and/or services available to a given user in different territories, or on the ability of an existing user to access the service in different territories indicate that geo-blocking measures are used to restrict the content and services made available in different member states. This leads to different content catalogues being offered to users in different territo-

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<sup>73</sup> Ibid. para 812.

<sup>74</sup> Ibid. para 811.

<sup>75</sup> Ibid. para 820.

<sup>76</sup> Ibid. para 820.

<sup>77</sup> Ibid. para 827.

<sup>78</sup> Ibid. para 829.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid. para 830.



ries. A number of respondents also indicate that the restrictions in place affect the ability of an existing user to access the service from certain territories (55%). And 34% of the respondents indicate that they use technical geo-blocking measures to restrict a user's ability to play previously downloaded content in certain territories.

In addition to being asked whether they use geo-blocking measures to prevent or restrict access to and use of digital content, digital content providers were also asked whether they restrict through their terms of service a user's ability to access content or to play downloaded content in some member states<sup>81</sup>. The responses indicate that most digital content providers also required to include restrictions in their terms of service concerning the member states in which users may access content<sup>82</sup>. 83% of the licensing agreements submitted by digital content providers require them to include at least one of the restrictions above in their terms of service.

In order to monitor the application and implementation of technical geo-blocking measures, rights holders include clauses in licensing agreements to verify or audit the way such measures are applied or whether they meet the required standards for geo-blocking. Some agreements also enable rights holders to impose sanctions or ask for compensation in the event the digital content provider does not comply with technical geo-blocking measures or with the provisions defining the territorial scope of the licensing agreement<sup>83</sup>.

### **1.2.2. Competition Concerns Regarding Geo-blocking of Digital Content Services**

Exclusive licensing on a territorial basis does not raise a competition concern in and of itself. However, when coupled with contractual restrictions on cross-border passive sales, it may be detrimental to competition<sup>84</sup>. Any assessment of these licensing practices under EU competition rules would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and/or the characteristics of the particular product and geographic markets<sup>85</sup>.

Having highlighted in section I of this paper the main restrictions to competition existing within the single market according to the findings of the E-commerce Sector Inquiry<sup>86</sup>, I will now focus on the legislative proposals that were put for-

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<sup>81</sup> *Ibid.* para 831.

<sup>82</sup> *Ibid.* para 837.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, para 859.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibidem.*

ward by the European Commission in its Digital Single Market Strategy for Europe (DSM) in order to eliminate those restrictions<sup>87</sup>.

## **2. Legislative Proposals Aimed at Improving Access for Consumers and Businesses to Online Goods and Digital Content across Europe**

The Digital Single Market Strategy for Europe was adopted on May 6, 2015. The strategy aims to provide new opportunities by eliminating key differences between the online and offline worlds and also by breaking down barriers to cross-border activity.

The Digital Single Market Strategy sets out 16 key initiatives gathered under three main headings<sup>88</sup>:

Access: better access for consumers and businesses to digital goods and services across Europe;

Environment: creating the right conditions and a level playing field for digital networks and innovative services to flourish;

Economy & Society: maximizing the growth potential of the digital economy.

Under the first of these headings, the European Commission made some legislative proposals to counteract restrictions to competition in cross-border e-commerce in goods (see A below) as well as in cross-border e-commerce in digital content within the EU (see B below).

### **2.1. Legislative Proposals Aiming at Fighting Restrictions on E-commerce in Goods**

In order to remove barriers to e-commerce on goods within the EU, the Commission proposed prohibiting unjustified geo-blocking on e-commerce as well as encouraging affordable cross-border parcel delivery services within the EU.

#### **2.1.1. Prohibition of Geo-blocking on E-commerce in Goods**

Geo-blocking refers to practices used by traders that result in discrimination against customers on the basis of their nationality or their place of residence or establishment. This can refer to denial of access to websites from other member states or to situations in which a customer from another member state is discrimi-

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<sup>87</sup> European Commission; COM (2015) 192 final // <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com> (accessed: 05.01.2018)

<sup>88</sup> European Commission; “Shaping the Digital Single Market” // <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market> (accessed: 13.01.2018)

nated against or prevented from accessing the product or service or is required to pay only with a debit or credit card from a certain country.

By limiting consumer opportunities and choice, geo-blocking is a significant cause of consumer dissatisfaction and of fragmentation of the European internal market. According to a mystery, shopping survey carried out in 2016<sup>89</sup>, only a little over a third of attempted cross-border purchases online were successful (37%). A full removal of geo-blocking barriers could result by 2020 to an aggregate consumer gain of 500 million euros or 0.7% in consumer surplus and an aggregate increase in enterprise profits of 283 million euros from new trade opportunities<sup>90</sup>. These gains come mainly from reduced prices which decrease in all countries both online (-1%) and offline (-0,5%)<sup>91</sup>.

In order to prevent online traders from unjustifiably discriminating against consumers from other member states, the European Commission adopted its Digital Single Market Strategy<sup>92</sup> in May 2015 and its Single Market Strategy<sup>93</sup> in October 2015. Both documents announced legislative action to address unjustified geo-blocking and comprehensively fight discrimination based on nationality or place of residence or establishment.

Within those strategies, the European Commission proposed a regulation of the European Parliament and of the Council to address 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) No2006/2004 and Directive 2009/22/EC. The general objective of this proposal<sup>94</sup> is to give customers better access to goods and services in the single market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence. Customers experience such differences in treatment when purchasing online and also when travelling to other member states to buy goods or services.

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<sup>89</sup> GfK Belgium, Mystery Shopping Survey on Territorial Restrictions and Geo-Blocking in the European Digital Single Market, May 2011// [https://ec.europa.eu/info/sites/info/files/geoblocking-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/geoblocking-final-report_en.pdf) (Accessed: 09.01.2018)

<sup>90</sup> *Duch-Brown N., Martens B.* The Economic Impact of Removing Geo-blocking Restrictions in the EU.Digital Single Market, JRC Technical Report, 2016, p. 1 // <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC101100.pdf> (accessed: 14.01.2018)

<sup>91</sup> *Ibid.* P. 18

<sup>92</sup> European Commission; COM (2015) 192 final // <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com> (accessed: 05.01.2018)

<sup>93</sup> COM (2015) 550 final// <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A550%3AFIN> (accessed: 23.02.2018)

<sup>94</sup> European Commission; COM (2016) 289 final // <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF> (accessed: 17.02.2018)

Despite the implementation of the non-discrimination principle in Article 20(2) of Directive 2006/123/EC (“Services Directive”)<sup>95</sup> customers still face refusals to sell and different conditions when buying goods or services across borders. According to the Commission, this is mainly due to uncertainty over what constitutes objective criteria that justify differences in the way traders treat customers. In order to remedy this problem, the Commission suggests traders and customers should have more clarity about the situations in which differences in treatment based on residence are not justifiable.

The aforementioned Commission’s proposal<sup>96</sup> prohibits blocking access to websites and other online interfaces. According to Article 3 of the proposal pertaining to access to online interfaces, “traders shall not, through the use of technological measures or otherwise, block or limit customers’ access to their online interface for reasons related to the nationality, place of residence or place of establishment of the customer.”

The proposal also prohibits rerouting customers from one country’s version of a commercial website to another. The prohibition is stipulated in point 2 of Article 3 which provides that “traders shall not, for reasons related to the nationality, place of residence or place of establishment of the customer, redirect customers to a version of their online interface that is different from the online interface which the customer originally sought to access.” Rerouting is possible but only with the “customer’s explicit consent”<sup>97</sup> and on condition that “the original version of the online interface shall remain easily accessible for that customer”<sup>98</sup>.

The proposal furthermore sets out three specific situations under which discrimination against customers based on residence is prohibited.

The first situation concerns the selling of physical goods when the trader is not involved in the delivery of the product to the member state of the customer. This covered by article 4 (a) according to which “traders shall not apply different general conditions of access to their goods or services, for reasons related to the nationality, place of residence or place of establishment of the customer (...) where the trader sells goods and those goods are not delivered cross-border to the Member State of the customer by the trader or on his or her behalf”<sup>99</sup>.

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<sup>95</sup> Directive 2006/123/EC (“Services Directive”) <https://eur-lex.europa.eu/legal-content/En/LSU/?uri=celex%3A32006L0123> (accessed : 03.02.2018)

<sup>96</sup> European Commission; COM (2016) 289 final // <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF> (accessed: 17.02.2018)

<sup>97</sup> Ibid. Article 3 of the proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking.

<sup>98</sup> Ibid.

<sup>99</sup> European Commission; COM (2016) 289 final, Article 3 of the proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking // <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-289-EN-F1-1.PDF> (accessed: 17.02.2018)

The second situation concerns the provision of electronically supplied services, other than services the main feature of which is the provision of access to and use of works under protection of copyright or other protected subject matter. According to article 4 (b), traders shall not discriminate customers based on residence “where the trader provides electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter”.

The third situation applies to services, which are provided by a trader in a member state different from that of the customer’s member state of residence. Article 4 (c) prohibits discrimination of customers based on residence “where the trader provides services, other than those covered by point (b) and those services are supplied to the customer in the premises of the trader or in a physical location where the trader operates, in a member state other than that of which the customer is a national or in which the customer has the place of residence or the place of establishment”<sup>100</sup>.

Both consumers and businesses as end users of goods or services are affected by discrimination practices based on residence and should therefore benefit from the rules set out in Article 4. Transactions where goods or services are purchased by a business for resale are, however, excluded in order to allow traders to set up their distribution systems in compliance with European competition law. The proposal then lays down non-discrimination rules specifically in the context of payments. This rule provides that, in certain cases, traders cannot reject or otherwise discriminate with regards to payment instruments (such as credit or debit cards). This is stipulated by Article 5.1 according to which “Traders shall not, for reasons related to the nationality, place of residence or place of establishment of the customer, the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union, apply different conditions of payment for any sales of goods or provision of services, where: (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; and (c) the payments are in a currency that the payee accepts”<sup>101</sup>.

Finally, the proposal provides that agreements with traders containing passive sales restrictions which would lead to violations of the rules set out in this Regulation are automatically void. It is designed to avoid circumvention of those rules by contractual means. Article 6 indeed states that “agreements imposing on traders obligations, in respect of passive sales (...) shall be automatically void”<sup>102</sup>.

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid. Article 3.

<sup>102</sup> Ibid.

### 2.1.2. Affordable Cross-Border Parcel Delivery Services

Business acceptance of e-commerce opportunities also depends on affordable cross-border parcel delivery services<sup>103</sup>. Nevertheless, consumers and small businesses complain that problems with parcel delivery, high prices in particular, prevent them from selling more to or buying more from other member states<sup>104</sup>.

Research shows that the public cross-border prices charged by universal service providers are often three to five times higher than the domestic equivalent<sup>105</sup> and that these differences cannot be explained by labor or other costs in the destination country. Prices from seemingly similar originating member states over comparable distances sometimes vary significantly without obvious justification by cost factors.

The Commission's 2012 Communication on e-commerce<sup>106</sup> identified improving the physical delivery of goods ordered online as one of the key elements for e-commerce growth. In its 2015 Digital Single Market Strategy<sup>107</sup>, the Commission committed to launching measures to improve the price transparency and regulatory oversight of cross-border parcel delivery in the first half of 2016.

The European Commission made a proposal for a Regulation on cross-border parcel delivery on May 25, 2016<sup>108</sup>, as part of the digital single market e-commerce package together with a proposal addressing unjustified geo-locking and a revision of the Consumer Protection Cooperation Regulation. This is a package of complementary measures aiming at allowing consumers and companies to buy and sell products and services online more easily and confidently across the EU. The proposed Regulation on cross-border parcel delivery builds on and complements the rules on cross-border parcel delivery services provided by Directive 97/67/EC<sup>22</sup> as amended by Directive 2002/39/EC<sup>23</sup> and Directive 2008/6/EC<sup>24</sup>. The specific objectives of the proposed Regulation are to: 1) make markets work more effectively by a) making the regulatory oversight of the parcels markets more effective

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<sup>103</sup> European Commission; COM (2016) 285//URL:[https://eur-lex.europa.eu/procedure/EN/2016\\_149](https://eur-lex.europa.eu/procedure/EN/2016_149) (accessed: 24.02.2018)

<sup>104</sup> European Commission consumer survey identifying the main cross-border obstacles to the DSM and where they matter most, 2015. Special Eurobarometer 398 of October 2013 which concluded that nearly 40% of consumers indicate that problems with delivery prevent them from shopping online.

<sup>105</sup> Saint-Louis University (2015) Econometric study on cross-border prices// [http://ec.europa.eu/growth/content/cheaper-cross-border-parcel-delivery-boost-e-commerce-eu-0\\_en](http://ec.europa.eu/growth/content/cheaper-cross-border-parcel-delivery-boost-e-commerce-eu-0_en) (accessed: 15.02.2018)

<sup>106</sup> European Commission; COM (2011) 942 final // <https://eur-lex.europa.eu/procedure/EN/201268> (accessed: 09.02.2018)

<sup>107</sup> European Commission; SWD (2015) 100 final // [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/cia\\_2015\\_en.htm](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2015_en.htm) (accessed: 02.02.2018)

<sup>108</sup> European Commission; COM (2016) 285// [https://eur-lex.europa.eu/procedure/EN/2016\\_149](https://eur-lex.europa.eu/procedure/EN/2016_149) (accessed: 24.02.2018)

and consistent and b) encouraging competition; and 2) increase the transparency of tariffs in order to a) reduce unjustifiable tariff differences and b) lower the tariffs paid by individuals and small businesses, especially in remote areas.

Article 3 of the Proposal<sup>109</sup> clarifies that the requirement to provide information to national authorities applies to all parcel delivery service providers with more than 50 employees and to those who are established in more than one member state. It obliges national regulatory authorities to monitor the market and gather a limited set of statistical data. Only larger operators in addition to those established in more than one member state and therefore providing cross-border services would be included in order to ensure that national regulatory authorities have the core data on the range of parcels that are used for e-commerce. The aim is to unify and clarify the currently fragmented regulatory competences and build on existing best practices.

Article 4(1) of the proposal contains a targeted obligation only for universal service providers to submit annually (on January 31st at the latest) to the national regulatory authority the public list of tariffs applicable on January 1st of each calendar year for a specific set of services.

Article 5(1) of the proposal obliges national regulatory authorities to assess the affordability of the tariffs of universal service providers obtained under Article 4(1) on the basis of objective elements. In that assessment, in particular the following elements shall be taken into account: (a) the domestic tariffs of the comparable parcel delivery services in the originating member state and in the destination member state; (b) the terminal rates obtained in accordance with Article 4(3); (c) any application of a uniform tariff to two or more Member States.

If the national regulatory authority concludes that cross-border parcel delivery tariffs are not affordable, it shall ask the parcel delivery service provider in question for further information and/or justification. The assessment together with the justification, if applicable, are to be communicated not only to the Commission but also to the other national regulatory authorities. Furthermore, the assessment should also be communicated to the relevant authorities entrusted with the implementation of competition law. This enhanced transparency should create significant pressure to modify those tariffs that substantially higher and that might be considered non-affordable or even prohibitive.

Article 7 of the proposal<sup>110</sup> is a standard provision aiming at providing the national regulatory authorities with effective, proportionate and dissuasive penalties for breaches of EU law. Within the framework of its Digital Single Market Strategy for Europe<sup>111</sup>, the European Commission not only made legislative proposals aiming at fighting restrictions to competition on cross-border e-commerce on goods as we've seen in section II (A) of this Paper but also on e-commerce in digital content.

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> COM (2015) 192 final.

## **2.2. Legislative Proposals Aimed at Eliminating Restrictions on E-commerce in Digital Content**

These proposals are to establish cross-border portability of online content services (1) as well as abolish roaming charges (2).

### **2.2.1. Cross-Border Portability of Online Content Services**

The Internet has become a key distribution channel for content. In 2014, 49% of European Internet users accessed music, video and games online<sup>112</sup>, and this percentage is expected to grow. Tablets and smartphones further facilitate such uses with 51% of individuals in the EU using a mobile device to connect to the Internet<sup>113</sup>. End-users increasingly enter into contractual arrangements with service providers for the provision of online content services. However, consumers that are temporarily present in another member state of the Union cannot access and use the online content that they have acquired for use in their home country.

There are a number of barriers which hinder the provision of these services to consumers temporarily present in another Member state. Certain online services include content such as music, games or films protected by copyright and/or related rights under EU law. In particular, the obstacles to cross-border portability of online content services stem from the fact that the rights for the transmission of such content as audiovisual works that are protected by copyright and/or related rights are often licensed on a territorial basis as well as from the fact that online service providers may choose to serve specific markets only.

In December 2015, the Commission proposed a new Regulation<sup>114</sup> ensuring the cross-border portability of online content services to which a consumer has subscribed in their member state of residence. This means that consumers can continue using online content services such as watching films or sporting events, listening to music, reading e-books or playing games when temporarily traveling in other member states, e.g., on holidays or business. Based on a 2015 estimate, over 29 million people would have used this feature then and as many as 72 million would do so in 2020<sup>115</sup>.

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<sup>112</sup> Eurostat, 'Community survey on ICT usage in households and by individuals', 2014// [http://ec.europa.eu/statistics-explained/index.php/Ecommerce\\_statistics\\_for\\_individuals](http://ec.europa.eu/statistics-explained/index.php/Ecommerce_statistics_for_individuals) (accessed: 07.02.2018)

<sup>113</sup> Eurostat, 'Information society statistics — households and individuals', 2017// [https://ec.europa.eu/eurostat/statistics-explained/index.php/Digital\\_economy\\_and\\_society\\_statistics\\_-](https://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-) (accessed: 16.02.2018)

<sup>114</sup> European Commission; Com [2015] 627 final// <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-627-EN-F1-1.PDF> (accessed: 26.02.2018)

<sup>115</sup> Impact Assessment Report accompanying the 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; p. 12, 17; SWD(2015) 271 // <http://edz.bib.uni-mannheim.de/edz/pdf/swd/2015/swd->



The European Parliament and the Council reached a political agreement on the proposed Regulation. The Regulation (EU) 2017/1128 of the European Parliament and of the Council of June 14, 2017, on cross-border portability of online content services in the internal market<sup>116</sup> aims to remove barriers to cross-border portability so that the needs of users can be met more effectively as well as to promote innovation for the benefit of consumers, service providers and rights holders. The Regulation introduces a common approach in the Union while maintaining a high level of protection for right holders.

Article 3 of the Regulation 2017/1128 sets out the obligation for the provider of an online content service to enable a subscriber who is temporarily present in a member state to access and use the online content service.

Article 4 stipulates that the provision of an online content service to a subscriber, as well as the access to and the use of this service by that subscriber shall, in accordance with Article 3(1), be deemed to occur solely in the member state of the subscriber's residence.

Finally, Article 5 of the Regulation provides that any contractual provisions which are contrary to Articles 3(1) and 4 including contractual provisions between holders of copyright and related rights, those holding any other rights relevant for the use of content in online content services and service providers, as well as between service providers and subscribers, shall be unenforceable. Thus Regulation 2017/1128 introduces a common approach to the rights for the transmission in the EU of such content as audiovisual works protected by copyright and/or related rights while maintaining a high level of protection for rights holders.

### **2.2.2. Abolition of Roaming Charges**

Over a third (34%) of Europeans travel abroad within the EU at least once a year<sup>117</sup>. In 2014, about half of Europeans said they would not use mobile internet abroad because it was too costly<sup>118</sup>.

The Commission has been working since 2007 to reduce and ultimately remove the surcharges citizens face each time they cross a border while using their mobile devices.

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2015-0271-en.pdf (Accessed: 25.02.2018) SEC(2015) 484//URL. [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/cia\\_2015\\_en.htm](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2015_en.htm) (accessed: 24.02.2018)

<sup>116</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of June 14, 2017, on cross-border portability of online content services in the internal market// URL. <https://publications.europa.eu/en/publication-detail/-/publication/ddebcc82-5d59-11e7-954d-01aa75ed71a1/language-en/format-PDFA1A> (accessed: 19.02.2018)

<sup>117</sup> Special Eurobarometer 414 (2014) // <https://ec.europa.eu/digital-single-market/en/news/special-eurobarometer-414-e-communications-household-survey> (accessed: 22.02.2018)

<sup>118</sup> Ibid.

To that end, the Commission made a proposal establishing a policy objective that the difference between roaming and domestic tariffs should approach zero. The proposal was enacted into EU law when the European Parliament and the Council adopted Regulation (EU) No531/2012<sup>119</sup>, also known as the “roaming regulation”.

The aforementioned regulation introduces the “Roam Like at Home” (RLAH) principle according to which “roaming providers shall not levy any surcharge in addition to the domestic retail price on roaming customers in any member state for any regulated roaming calls made or received, for any regulated roaming SMS messages sent and for any regulated data roaming services, including MMS messages”<sup>120</sup>. As a result of the implementation of Regulation No531/2012<sup>121</sup>, roaming charges have sharply accelerated since 2014 (see **Table B** below) up to the point that they have completely disappeared as of June 15, 2017.

*Table B*

**Evolution of roaming retail prices since the adoption of the 2012 “Roaming regulation”**

	July 2014	April 30, 2016	June 15, 2017
Outgoing voice calls (per minute)	EUR 0.19	Domestic price + up to EUR 0.05	Roam like at home with no extra fee, same as domestic price when travelling in the EU
Incoming voice calls (per minute)	EUR 0.05	EUR 0.0108	
Outgoing text (per SMS message)	EUR 0.06	Domestic price + up to EUR 0.02	
Online (data, download, per MB)	EUR 0.20	Domestic price + up to EUR 0.05	

In order to prevent abusive or anomalous usage by roaming customers of regulated retail roaming services (such as the use of such services by roaming customers in a member state other than that of their domestic provider for purposes other than periodic travel), roaming providers may apply a “fair use policy”<sup>122</sup> which enable the roaming provider’s customers to consume volumes of regulated retail roaming services at the applicable domestic retail price.

<sup>119</sup> Regulation (EU) No531/2012 of the European Parliament and the Council of June 2012 on roaming on public mobile communications networks within the Union//URL.<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0531> (accessed: 21.02.2018)

<sup>120</sup> Ibid. Article 6a of Regulation.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid. Article 6(b).

When any limit established under any “fair use policy” is exceeded, the roaming regulation establishes that “a roaming provider [may apply] a surcharge for the consumption of regulated retail roaming meeting the following requirements (excluding VAT):

a) any surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent and regulated data roaming services shall not exceed the maximum wholesale charges...;

b) the sum of the domestic retail price and any surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent or regulated data roaming services shall not exceed EUR 0,19 per minute, EUR 0,06 per SMS message and EUR 0,20 per megabyte used, respectively;”

The Commission adopted an implementing act with detailed rules on ‘fair use’ measures that operators may take to prevent abuse of roaming services and on a exemption that operators may apply for when the provision of regulated roaming services at domestic prices threatens the sustainability of their model for domestic tariffs. National regulators that authorize such exemptions are permitted to grant them only in exceptional circumstances and as determined by the methodology included in the implementing act. Article 6(b) of the Commission’s implementing act states that “any fair use policy shall enable the roaming provider’s customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective tariff plans”. Article 6(e) establishes that Roaming providers are not to apply any surcharge to a regulated roaming SMS message received or to a roaming voicemail message received. This is to be without prejudice to other applicable charges such as those for listening to such messages.

Finally, the second paragraph of Article (e) stipulates that roaming providers are to charge roaming calls made and received on a per second basis and may apply an initial minimum charging period not exceeding 30 seconds to calls made.

## **Conclusion**

On May 2017, the European Commission published a “mid-term review” of its Digital Single Market Strategy for Europe that assessed the work, which had been achieved two years after launching of the DSM<sup>123</sup> and laid out what remained to be done to fully meet the DSM objectives.

One of the most successful achievements of the DSM so far has been the entry into force of the “roaming regulation”<sup>124</sup> on June 15, 2017. It stipulates that Euro-

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<sup>123</sup> Consilium Europa (European Council & Council of the EU), Press Releases, End of roaming charges in the EU: Joint statement by the European Parliament, the Council and the Commission, June, 14, 2017, last update October 24, 2017.

<sup>124</sup> Regulation (EU) No 531/2012...

pean citizens who travel from one member state to another should not be charged more than they would be at home for text messaging, calling or even browsing the internet from any other EU country.

Another important stage in the implementation of the DSM Strategy has been the adoption by EU legislative bodies of Regulation (EU) 2017/1128 on June 14, 2017, on cross-border portability of online content services in the internal market<sup>125</sup>. This legislation ensures cross-border portability of the online content services to which a consumer subscribed in their member state of residence. That means consumers can continue using such online content services as watching films or sporting events, listening to music, reading e-books or playing games while temporarily traveling in other member states, e.g. on holidays or business.

Despite of those landmark achievements, the Strategy remains very much a work in progress. That is certainly the case with the proposed regulation on cross-border parcel delivery services, which is far from being adopted. Nevertheless, the European Parliament, the Council and the Commission reached a provisional agreement on December 13, 2017. As explained in section II (A) (2) of this paper, price transparency and regulatory oversight are the main elements of the proposed new regulation on cross-border parcel delivery. The aforementioned provisional agreement needs to be finally approved by the Parliament and the Council. It is expected to formally come into effect at the beginning of next year and should be fully applicable in 2019<sup>126</sup>.

Last but not least, although adoption of the “geo-blocking regulation” by the European Parliament and of the Council which was adopted on February 27, 2018, is a big step forward for consumers who will now be able to shop freely across borders, it leaves out such products as e-books, video games and music.

When this Regulation comes into effect around Christmas this year, traders will have to serve foreign consumers ‘like the locals’. From buying Swedish furniture on an Italian website to renting a car for their next holidays in Spain, consumers will not have to higher prices, be offered different conditions or have their credit card refused because they live in another EU member state.

As we found in section I of this paper, this change will open many doors for consumers because the current restrictions are very often unjustified. One the main reasons given by many online retailers for not selling to foreign consumers is that they are contractually obliged by their suppliers not to sell products outside their own country<sup>127</sup>. The Vertical Guidelines provide several example of

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<sup>125</sup> Regulation (EU) 2017/1128 on June 14, 2017 // <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02017R1128-20170630&from=EN> (accessed: 02.03.2018)

<sup>126</sup> Provisional agreement of December 13, 2017 between the European Parliament, the Council and the Commission on a new regulation on cross-border parcel delivery// [http://europa.eu/rapid/press-release\\_IP-17-5203\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5203_en.htm) (accessed: 01.03.2018)

<sup>127</sup> European Commission; COM (2017) 229, para 350, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0154> (accessed: 06.03.2018)

restrictions that are considered to have as their object restricting passive sales via the internet and therefore to be hardcore restrictions ineligible for the exemption provided in the VBER. For example, restrictions that require a retailer to apply different geo-blocking measures (such as blocking access to its website to customers located in another member state or re-routing customers to an alternative website) would be ineligible<sup>128</sup>.

Once the geo-blocking regulation enters into force, such practices will automatically be deemed illegal. Is this finally the end of geo-blocking in Europe? Unfortunately, it seems the EU is only halfway there. The Regulation adopted by EU legislative bodies on the February 28, 2018, still allows suppliers to geo-block online services involving content protected by copyright. Geo-blocking for some services is here to stay...at least for a while.

Due to intensive lobbying from the copyright industry and a protectionist attitude from many national governments, products such as e-books, video games and music were excluded from the scope of the Regulation. The European Parliament and in particular its rapporteur MEP Roza Thun fought up to the last minute to keep those goods in but lost.

At least, legislators have agreed that in two years' time the Commission must submit a report on whether copyrighted services should also be included in the scope of the Regulation. This would be a game-changer for Europeans who would be able to access all content from other countries.

The new law against geo-blocking does show the determination of the EU authorities to give consumers the advantage of a single market, but it also shows the strength of the resistance by entrenched interests. Europeans expect decision makers to develop the conditions in which our increasingly networked market economy will thrive. Allowing consumers to decide from which provider to purchase products and services across the entire EU is a crucial element for this economic success, and European consumer associations will probably not accept half-way measures. Banning geo-blocking for shoes, tickets for theme parks or tablets is a good step, but it is not the top of the ladder. The geo-blocking ban should also cover TV programs, films, e-books and video games. That would boost European cultural diversity and not destroy it.

Twenty-five years after the establishment of a single market, European consumers have won their place in it. It must not take another quarter of a century before consumers no longer face access restrictions to content in the EU. After next year's European Parliament elections, policy makers should remind themselves to construct a single market that delivers to consumers as a whole and not as the sum of its national parts.

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<sup>128</sup> Vertical Guidelines, para 52 // [http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf) (accessed: 06.02.2018)



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