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The Digital Borders within the EU: Geo-Blocking, IP and Competition Law

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ABSTRACT

Geo-blocking may be defined as a digital instrument aimed at segmenting the purchase applications online, on the basis of customers' nationality, place of residence or place of establishment. Namely, through geo-blocking, online sellers might prevent or re-route consumers who want to access websites – on the basis of their location. In particular, when online purchases of the same product come with the application of different terms and conditions depending on customers' location, we are confronted with a variation to geo-blocking called geo-filtering.

It might come at no surprise, then, that the European Commission made the ban of unjustified geo-blocking one of its top priorities, within the scope of the digital single market strategy.

Therefore, the legislative process addressing geo-blocking went through significative turmoil and, just last February (2018), the European institutions agreed on a final text of a regulation toward a (partial) ban of geo-blocking.

Several branches of law are relevant in the analysis of the geo-blocking conduct and of the path moving toward its abolition.

This thesis investigates the effects of the ban of geo-blocking on existing EU *(i)* fundamental freedoms; *(ii)* competition law; and *(iii)* intellectual property rights. Thus, the primary goal of this work is to find a proper balance between these three sets of rules and the need to foster the digital single market throughout the EU.

In particular, none of these three sets of rules condemns geo-blocking *per se.* First, geo-blocking does not clash with the EU fundamental freedoms, since it interferes only with private activities in the digital market. Therefore, the application of free movement principles has to depend on secondary legislation. Second, discriminations deriving from geo-blocking may actually have pro-competitive effects, e.g. when price differences bring about an increase in the output. Third, the respect of geographical licensing of intellectual property rights may rely on geo-blocking procedures. More generally, geo-blocking might represent an expression of the right to dispose of one's own property and of the freedom of contract.

However, these three categories have to be interpreted in the light of the EU stated goal of establishing a fully-fledged Digital Single Market. Therefore, an assessment of the relevant activity carried out by the EU legislator until now lies under the research question of this thesis.

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CONTENTS

INTRODUCTION

At the European level, there is a significant turmoil around the *geo-blocking* phenomenon and its abolition is one of the objectives of the first pillar of the digital single market strategy, adopted by the European Commission in May 2015, which primarily deals with the territoriality of states and with insufficiently harmonised national rights.

In this context, after more than two years, the European institutions reached an agreement on the legal discipline toward a (partial) abolition of geo-blocking.

The key legislative act that has been put forward is the "Proposal for a Regulation of the European Parliament and of The Council on addressing geo-blocking and other forms of discrimination based on customers" published on 25 May 2016. The final text of the Regulation is available online, and it will be published in the Official Journal of the European Union by the end of March 2018 (hereinafter, also, the "Geo-blocking Regulation").

The general goal pursued by the EU – mainly through the mentioned Geo-blocking Regulation – is to ensure the good functioning of the internal market, giving 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' location. Several branches of law are relevant in the analysis of the geo-blocking conduct and of the path moving toward its abolition. Geo-blocking may be defined as a digital instrument aimed at segmenting the purchase applications on a geographic basis. This definition is in my opinion sufficient to understand the huge implications of a possible abolition of geo-blocking using the categories pertaining to:

(i) fundamental freedoms; *(ii)* competition law; and *(iii)* intellectual property. Then, my research question aims at finding a proper balance between the goal of maintaining and improving the internal market and these three key categories.

In the introduction of this work, geo-blocking is firstly framed in the EU digital single market strategy. Then the work provides the reader with a set of definitions of the phenomenon, focusing on the peculiarities of the digital contents and of the audio-visual sector.

In this sense, the exclusion of audio-visual contents from the scope of the Geo-blocking Regulation needs to be highlighted. Indeed, audio-visuals constitute the key product online, and their exclusion from the Geo-blocking Regulation constitutes a clear stop in the path toward the abolition of geo-blocking. Then, the EU goes for a very gradual approach.

In the first chapter, also the Pay-Tv investigation is analysed: these decisions constitute an essential key to interpreting the EU position on geo-blocking.

The second chapter focuses on how geo-blocking deals with the fundamental freedoms and rights granted by the EU Treaties.

This firstly includes the fundamental freedom of movement of goods and services. In particular, it is necessary to consider whether these rules have relevance in the assessment of a geo-blocking conduct put in place by an individual. In this sense, a section of this chapter is dedicated to the horizontal application of EU free movement rights.

Furthermore, this chapter refers to other fundamental rights and set out their role in the balancing with the internal market goal, being a necessary premise for the following two chapter.

Chapter three contains an assessment of geo-blocking and its abolition with the competition law categories. The key-category here is *discrimination* and, in particular, the geographic discrimination. Therefore, chapter 3 is centred around the price discrimination category in general. Then it focuses on the current economic thought and on the EU competition law perspective, in the light of Article 101 and 102 of the Treaty on the Functioning of the European Union. Moving on, a balance between EU competition law, antitrust law general categories and geo-blocking abolition (or maintenance) is put forward.

The last chapter – 4 – deals with the interactions between geo-blocking and intellectual property. In this sense, two key principles related to intellectual property rights have to be analysed: territoriality and exhaustion. The latter requires a twofold analysis since it finds application offline, but it does not find application online, with the exception of specific instances. The analysis carried out in chapter 4 shows some weaknesses of the IP regulation and, therefore, the reform of copyright rules becomes the subject-matter of the last paragraphs of the last chapter.

CHAPTER 1

INTRODUCTION TO THE GEO-BLOCKING PHENOMENON IN THE SINGLE MARKET

Summary: 1.1. Introduction – 1.2 The digital single market strategy – 1.2.1 Geo-blocking Regulation: legislative timeline – 1.2.2 Geo-blocking Regulation: scope and key provisions – 1.2.3 The Commission's Sector Inquiry into e-commerce – 1.3 A definition of geo-blocking – 1.3.1 Geo-blocking and distribution of digital content – 1.3.2 Geo-blocking and audio-visual contents – 1.3.3 Geo-blocking and cross-border sale of tangible goods and services – 1.3.4 Virtual Private Networks as a way of circumventing geo-blocking – 1.3.5 The distinction between justified and unjustified geo-blocking – 1.3.5.1 Justified geo-blocking – 1.3.6 The landmark cases: the Pay TV investigation – 1.3.6.1 Murphy judgement – 1.3.6.2 Paramount case – 1.3.6.3 Pending cases

1.1 INTRODUCTION

In recent years, the digital single market (hereinafter, also "DSM") gained more and more prominence in European Union policies.

The establishment of a *vibrant Digital Single Market* that would enable European Union to fully exploit present and future digital technologies was one of the key

priorities identified by the European Commission in 2010 within "Europe 2020",[1] and it constitutes the heart of the Digital Agenda.[2]

According to the Commission a digital single market is *"one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence"*.[3]

In May 2015, the European Commission identified the completion of the Digital Single Market as one of its ten political priorities – heading into the so-called digital single market *strategy*.[4]

In this occasion, the Commission put forward a reinforced plan that had three fundamental priorities (the so-called «three pillars» of the Strategy) which together would ensure that Europe achieves a fully functioning Digital Single Market. In particular, they are:

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

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[1] European Commission (2010), Communication from The Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth - COM(2010) 2020 final.*

[2] European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Digital Agenda for Europe - COM(2010) 245 final.*

[3] European Commission, *COM(2010) 245 final*, *cit.*, p. 3.

[4] European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe - COM(2015) 192 final, SWD(2015) 100 final*, Brussels, 6.05.2015.

2. Environment: creation of the right conditions and of a level playing field for digital networks and innovative services;

3. Economy & Society: maximisation of growth potential of the digital economy.

Within the *access'* priority, the strategy focuses on the removal of any online barrier, with a particular reference to *geo-blocking*.

In the Commission view, indeed, this practice heavily curbs access to goods and services between Member States, and thus it segments the very Single Market which European consumers and businesses should take *full advantage* from.[5] This would then constitute an important cause of discrimination among consumers.

Last but not least, for the Commission to bring down geo-blocking in the matter of digital copyright will require an overhaul of copyright law, currently entrenched in each Member State's *national silo*.[6]

1.2 THE DIGITAL SINGLE MARKET STRATEGY

In the European Commission words, geo-blocking represents "*one of several tools used by companies to segment markets along national borders (territorial restrictions)"* that *"by limiting consumer opportunities and choice (…) is a significant cause of consumer dissatisfaction and of fragmentation of the Internal Market"*.[7]

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[5] European Commission, *COM(2015) 100 final, cit.,* p. 6.
[6] *Ibid*, p. 2.
[7] *Ibid*, p. 6.

This stance stems from the idea that a series of reforms are needed for the digital economy of Europe to grow, as written down in the Digital Single Market Strategy unveiled in May 2015. This document defines the DSM as *"a market in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence"*.[8] This entails that existing virtual barriers need to be brought down or removed altogether.

1.2.1 Geo-blocking Regulation: legislative timeline

It is understood that the suppression of geo-blocking is one of the main objectives of the Commission, in the light of the first pillar of the DSM Strategy. To this end, after a period of public consultation in 2015,[9] the Commission – in May 2016 – put forward a Regulation proposal addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (hereinafter, also, the "Regulation proposal").[10]

In October of the same year, the European Economic and Social Committee brought forward its opinion on the matter, falling in line with the Commission for the most

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[8] European Commission, *COM(2015) 100 final*, *cit.*, p. 3.

[9] European Commission (2016), DG Communication Networks, Content & Technology - Unit F1 - Digital Single Market, *Full report on the results of public consultation on geoblocking*.

[10] European Commission (2016), *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.*

part, although it put the accent on the need for more measures other than geo-blocking for the DSM Strategy to be implemented fruitfully.

Later, in November 2016, the European Council released a revised version of the Commission proposal, for a series of requests to be considered – which include the following:

- the Regulation proposal would respect current EU legislation in cross-border matters, with regards to Rome I and Brussels I Regulations and certain aspects of copyright legislation; in particular, it listed a series of economic activities that should be exempt from the Regulation proposal, such as audio-visual services;
- for any barrier or limit to online interfaces to remain in place a precise justification would be required;
- discriminatory payment conditions by traders to customers should not be tolerated, although commercial offers may vary between certain areas or groups of customers;
- in particular cases, such as passive sales, competition law would overrule the Regulation proposal.

In April 2017, the Internal Market and Consumer Protection Committee ("IMCO") published the report from rapporteur Róża Thun which incorporated several additions, whose most relevant provisions were:

- a new scenario where geo-blocking is not allowed, i.e., online sellers would be prevented from offering discriminatory terms and conditions based on the temporary location of consumers;

- having web-supplied goods such as software, video games, music, and e-books – audio-visual services are excluded – fall within the ban on geo-blocking in spite of the fact they are protected by copyright if the seller has a right to such goods in the countries of interest;
- an obligation, for the Commission, to re-evaluate the extension of the geo-blocking ban on more sectors (e.g., audio-visual services, telecommunications, and healthcare);
- the admission that, even under the ban, a seller may vary general conditions for specific territories or consumer groups;
- a restriction for the geo-blocking ban to cover just business-to-consumer deals, limiting its application to business-to-business only for certain dual-purpose contracts.

In May 2017, negotiations commenced between the IMCO, the Council, and the Commission in order to produce the final document.[11] As a result of these negotiations, a trialogue agreement was issued in November 2017. On 5 February 2018, the European Parliament approved the agreement on geo-blocking regulation by 557 votes to 89.[12] On 27 February 2018, the text voted by the Parliament has then

[11] The legislative train schedule of the Regulation proposal is available in the website of the European Parliament, at the following link: http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-geo-blocking (last access 20 March 2018); the preparation for the trialogue, published by the Council is available at http://data.consilium.europa.eu/doc/document/ST-10339-2017-INIT/en/pdf (last access 20 March 2018).

[12] With 33 abstentions; cf. European Parliament (2018), Press Release, *Parliament votes to end barriers to cross-border online shopping*, available at http://www.europarl.europa.eu/news/en/press-

been adopted – without amendments – by the Council of the European Union.[13] Therefore, we expect the publication of the Regulation in the Official Journal of the EU before the end of March 2018 and the Regulation will probably enter into force in December 2018 or January 2019.[14]

1.2.2 Geo-blocking Regulation: scope and key provisions

The field of application is detailed in Article 1 of the Geo-blocking Regulation,[15] that excludes the activities referred to in Article 2(2) of Directive 2006/123/EC,[16] such as: audio-visual; transport; gambling; healthcare, and other social services.

The Geo-blocking Regulation applies to both EU and non-EU sellers if they are dealing with EU consumers.

Article 3 states that preventing access to online websites, software, stores or other interfaces based on customer's place of residence, place of establishment or nationality is prohibited. In addition, the same Article clarifies that re-routing a

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room/20180202IPR97022/parliament-votes-to-end-barriers-to-cross-border-online-shopping (last access 20 March 2018).

[13]Council of the European Union (2018), Press Release, *Geo-blocking: Council adopts regulation to remove barriers to e-commerce,* available at http://www.consilium.europa.eu/en/press/press-releases/2018/02/27/geo-blocking-council-adopts-regulation-to-remove-barriers-to-e-commerce/ (last access 20 March 2018).

[14] Namely, nine months after its publication.

[15] The final text of the Regulation of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC is available at: http://data.consilium.europa.eu/doc/document/PE-64-2017-INIT/en/pdf (last access 20 March 2018).

[16] 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.

customer to a version of the online interface different from the one which he was actually intending to access is not allowed if determined by his/her nationality, place of residence or place of establishment.

Article 4 details when geo-discrimination is not allowed:

- if the seller is not involved in any way with the delivery of its goods;
- if the seller supplies online goods/services that are not protected by copyright (such as web hosting or cloud services);
- if the services sold by the reseller are then physically supplied in a different Member State from that of the current customer (e.g., car rental; accommodation).

Some wiggle room is conceded for geo-blocking in certain instances within current EU legislation,[17] but no actual set of exceptions is given. This means that *ad hoc* assessments shall be required. As a rule-of-thumb geo-blocking may be allowed if the seller incurs additional penalties and costs, while imposing restrictions that are commensurate.[18] However, the Commission is aware that keeping a "*door open for justified geo-blocking may impinge on the functioning of the DSM"*, and it will put more stringent limits on possible exceptions to the geo-blocking ban.[19]

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[17] European Commission, *COM(2015) 192 final*, *cit.*, p. 6.

[18] European Commission (2016), 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" - SWD(2016) 173 final*, pp. 15-16.

[19] *Ibid*, p. 16.

1.2.3 The Commission's Sector Inquiry into e-commerce

Together with the announcement of the DSM Strategy, the European Commission launches on 6 May 2015 a Sector Inquiry into the European e-commerce sector aimed at identifying *"possible competition concerns affecting the European e-commerce market"*,[20] with a focus on the "*potential barriers erected by companies to cross-border online trade*" of goods and services "*as well as digital contents*".[21]

One of the potential barriers that, from the point of view of the Commission could raise competition concerns is precisely geo-blocking to the extent that it prevents European consumers from purchasing tangible goods online from other Member States or from accessing digital content online depending on their location.

On March 2016, after having collected information from diverse actors in the e-commerce markets throughout Europe, the Commission published a first issue paper with the initial findings on geo-blocking practices,[22] which states that *"geo-blocking is widely used in e-commerce across the EU*" both in relation to consumer goods and digital content.[23]

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[20] European Commission (2015), Press Release, *Antitrust: Commission launches e-commerce sector inquiry*, available at http://europa.eu/rapid/press-release_IP-15-4921_en.htm (last access 6 October 2017).

[21] *Ibid*; The Commission's press release also reports the words of Commissioner Margrethe Vestager in this regard: *"European citizens face too many barriers to accessing goods and services online across borders. Some of these barriers are put in place by companies themselves. With this sector inquiry my aim is to determine how widespread these barriers are and what effects they have on competition and consumers. If they are anti-competitive we will not hesitate to take enforcement action under EU antitrust rules."*

[22] European Commission (2016), 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 - SWD(2016) 70 final*, Brussels, 18 March 2016.

[23] European Commission (2016), Staff Working Document, *Preliminary Report on the E-commerce Sector Inquiry - SWD(2016) 312 final,* Brussels, 15 September 2016.

In the light of the initial findings, Commissioner Vestager affirmed that: "*not only does geo-blocking frequently prevent European consumers from buying goods and digital content online from another EU country, but some of that geo-blocking is the result of restrictions in agreements between suppliers and distributors*",[24] which might represent an anti-competitive behaviour and fall under the scope of the existing competition rules.

The last 10 May, the Commission published the Final Report on the e-commerce sector inquiry and the accompanying Staff Working Document which set out the main findings of the e-commerce sector inquiry, taking into considerations the observations submitted by stakeholders during the public consultation.

With regards to online sales of goods and services, more than a third (38%) of online retailers use geo-blocking, which mainly takes the form of a refusal to deliver consumer goods in a different country (however, also the other geo-blocking practices are adopted).

While 12% of retailers report contractual restrictions to sell cross-border in their agreements with suppliers, the most of these geo-blocking practices are based on the unilateral decision of retailers not to sell cross-border rather than resulting from a contractual restriction.[25]

With regard to digital contents, the Commission finds out that providers across Europe widely use geo-blocking.

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[24] European Commission (2016), Press Release, *Antitrust: e-commerce sector inquiry finds geo-blocking is widespread throughout EU*, available at http://europa.eu/rapid/press-release_IP-16-922_en.htm (last access 6 October 2017).

[25] European Commission, *SWD(2016) 70 final*, *cit.*, pp. 21-44.

The majority (68%) of providers, in fact, confirms to restrict access to their online digital content services through geo-blocking practices, especially through the denial of access to the online services by means of the verification of the IP address of the user.[26]

Among the providers that adopt geo-blocking practices, a significant 59% of the responding providers affirms that they are contractually required by the suppliers (i.e., right holders) to use geo-blocking measures. [27]

Thus, geo-blocking in relation to digital content services is mainly the result of contractual restrictions required by right holders in licensing agreements, while only a minority of providers (about 9%) use geo-blocking without being required to do so by the contractual licensing agreement.[28]

Interestingly, the responding providers of virtual private networks ("VPNs") and IP ("Internet Protocol") routing services (in other words, the entities that provide technical solutions to circumvent geo-blocking) state that they can count between 20.000 and 100.000 regular users – only within Europe – who access their services from three times a week to every single day.

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[26] *Ibid*, pp. 45-65.

[27] European Commission (2017), Report from the Commission to the Council and the European Parliament, *Final report on the E-commerce Sector Inquiry - SWD(2017) 154 final,* Brussels, 10 May 2017.

[28] *Ibid*.

Remarkably, the document also shows that a considerable amount of traffic generated by users on their service relates to video, audio or audio-visual streaming.[29]

In light of this sector inquiry conducted by the Commission, geo-blocking is actually proved to be a widespread practice in the European online environment and specially in relation to the provision of digital contents across the European Union.

Moreover, considering the Sector Inquiry outcomes, geo-blocking restrictions that limit cross-border accessibility and portability of digital content may be the result of unilateral decisions of service providers, but – most of the times – they are the result of territorial restrictions in licence agreements between right holders and content providers. In other words, when they offer digital content services, content providers are, not always, but very often, contractually obliged to geo-block.

1.3 A DEFINITION OF GEO-BLOCKING

Geo-blocking is in place when access to web content is prevented *"to users connecting to the Internet from, or from outside of, a certain territory*".[30] In practice, this consists in the exploitation of "*geo location software to prevent internet users from outside a particular region from accessing a website or its services"*.[31]

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[29] European Commission, *SWD(2016) 70 final*, *cit.*, p. 67. For an exhaustive definition of the user generated contents, see L. Mansani (2010), *User Generated Content*, in AIDA, pp. 244 ss.

[30] M. Trimble (2014), *The Territoriality Referendum*, in *WIPO Journal*, Vol. 6, Issue 1.

[31] World Intellectual Property Organization (2015), Standing Committee on Copyright and Related Rights, *Current Market and Technology Trends in the Broadcasting Sector*, SCCR/30/5, Geneva, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_5.pdf (last access 6 October 2017).

From the EU perspective, geo-blocking attracts scrutiny whenever it is applied to block online access to the procurement of goods or services and if such block depends on the Member State location of the potential customer.[32]

There are several ways for geo-blocking to interfere with online sales, in particular:

- an online interface or some parts of its content may not be available, in what constitutes the strictest definition of geo-blocking;
- the connection to said interface (or parts of its content) may be rerouted toward another interface;
- if the customer is required to fill in some registration form before any purchase, such registration may be forbidden if done within (or without) specific Member States;
- deliveries may be denied depending on customer's Member State;
- certain form of payment valid in a Member State may be refused in another.[33]

Besides, we may encounter a variation to geo-blocking, called *geo-filtering*, where online purchases may still be allowed but with the application of different terms and conditions to the sale of the same product depending on customers' location. This practice may also entail that customers are re-routed to an online store where the

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[32] F. Simonelli (2016), C*ombating Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination - IP/A/IMCO/2016-06, PE 587.315*, Study for the IMCO Committee, European Parliament, Directorate-General for Internal Policies, Centre for European Policy Studies.

[33] European Commission, *SWD(2016) 70 final, cit.*

sought-after product is sold with a different price or quality. [34]

Naturally, all these practices rely on seller's ability to *geo-identify* customers and consequently tailor its contents. To retrieve consumers' geographical location a plethora of tools is available, exploiting such data as those coming from internet browsers or operating systems; billing/shipping addresses; the country where the credit card has been issued; and last – not in terms of relevance – the IP address. [35]

These issues take an interesting angle from the perspective of copyright holders, for whom geo-blocking may constitute a tool to enforce digital rights management ("DRM"), [36] by limiting access to their products. Indeed, geo-blocking practices represent the evolution of DVD region codes, which prevented discs from being played or copied in a market area different from their original one. [37]

Delving into the history of geo-location tools, it may come as a surprise that they were not born with geo-blocking in mind, but rather to provide the advertising

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[34] H. Schulte-Nölke et al. (2013), *Discrimination of Consumers in the Digital Single Market - IP/A/IMCO/ST/2013-03, PE 507.456*, Study for the IMCO Committee, European Parliament, Directorate-General for Internal Policies, Centre for European Policy Studies.

[35] M. Trimble (2012), *The Future of Cyber Travel: Legal Implications of the Evasion of Geolocation*, in Fordham Intellectual Property Media & Entertainment Law Journal, Vol. 22, 567, p. 586.

[36] About DRM, see M. Ricolfi (2007), *Individual and collective management of copyright in a digital environment,* in Copyright law: a handbook of contemporary research, Edward Elgar Publishing, pp. 283-314; M. Borghi and M. L. Montagnani (2006), *Proprietà digitale: diritti d'autore, nuove tecnologie e digital rights management*, Egea; V. Moscon (2011), *Rights Expression Languages: DRM vs. Creative Commons,* in JLIS.IT, n. 2; see, also, R. Caso (2014), *Misure Tecnologiche di Protezione: Cinquanta (e più) Sfumature di Grigio della Corte di Giustizia Europea,* Trento Law Tech Research Paper No. 19; N. Abriani (2002), *Le utilizzazioni libere nella società dell'informazione: considerazioni generali,* AIDA, fasc. 11, pp. 98-124.

[37] T. Kra-Oz (2014), *Geo-blocking and the legality of circumvention*, Hebrew University of Jerusalem Legal Research Paper Series, no. 15-31; see also M. Edelman (2015), *The Thrill of Anticipation: Why the Circumvention of Geoblocks Should be Illegal*, Virginia Sports & Entertainment Law Journal, Vol. 15, p. 110.

industry with an efficient way to tailor its content depending on potential customers' location.[38]

Finally, it may be worth spending a few words on the most common geo-localisation tool, that is, the one that employs the IP address used by devices connected to the Internet.

Every device that connects to a network is identified by others through a certain set of numbers: its IP address. Such numbers are coded depending on the actual location from which access has been requested, thus allowing a geo-localisation tool to circumscribe the device's position. This information can be exploited by a geo-blocking tool if it has been designed to prevent access requests coming from, or from outside of, a certain Member State.[39] Then this implies that geo-blocking acts on the basis of the device's location and *not* on the basis of nationality or place of residence of the Internet user.[40] It might come as a technicality, but the Commission held its position on geo-blocking partly on the grounds that this practice amounts to discrimination based on nationality/residence.

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[38] Matrix Insight (2009), *European Commission: Internal Market and Services DG: Contract with regard to access to services in the Internal Market (MARKT/2008/10/E): Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients - Implementation of Directive 2006/123/EC on Services in the Internal Market*, Final Report, p. 72, available at http://ec.europa.eu/DocsRoom/documents/15034/attachments/1/translations/en/renditions/native (last access 6 October 2017), where the Commission identifies other *automatic* geo-location tools that may be implemented to restrict access to websites.

[39] T. Kra-Oz (2014), *Geo-blocking and the legality of circumvention, cit.*

[40] G. Smith (2016), *The Ins and Outs of Geo-blocking*, DigitalBusiness.Law, available at http://digitalbusiness.law/2016/11/the-ins-and-outs-of-geoblocking/ (last access 6 October 2017).

1.3.1 Geo-blocking and distribution of digital content

Geo-blocking can be adopted in the e-commerce sector in relation to the online sale of tangible goods (e.g., clothing, footwear, accessories, books, computer hardware and electronics, etc.) or services purchased online and delivered offline (e.g., travel services, such as car rental and aeroplane tickets, etc.).[41]

Most importantly, geo-blocking is also adopted in relation to the provision of copyright-protected digital content (e.g., films, TV programs, games, sports broadcasting, e-books, etc.), where digital content providers geo-block consumers to limit the accessibility and portability of content across borders.[42]

It is fundamental to distinguish between these two areas in which geo-blocking is applied as, besides being characterised by the same kind of barrier, in its approach and its initiatives, the European Commission (apart from a few exceptions)[43] keeps these two categories always separated[44] and puts forward also different proposals in relation to them.[45]

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[41] According to the European Commission's 2015 Public Consultation on «Geo-blocking and other geographically restrictions when shopping and accessing information in the EU», these are the goods and services which are mostly affected by the use of geo-blocking practices by online sellers. Other relevant categories of goods and services considered by the Commission are: electrical household appliances; cosmetics and healthcare products; computer games, software; other travel services (e.g., hotels, etc.); reservation of offline leisure (e.g., tickets for live concerts, amusement parks, sports events, etc.)

[42] European Commission, *COM(2015) 192 final*, *cit.*, pp. 6-7.

[43] For example, the Commission's Sector Inquiry into the e-commerce sector, with the aim of identifying possible competition concerns deriving from the use of geo-blocking practices, analyses geo-blocking both in relation to goods and services and also in relation to the accessibility and portability of digital content.

[44] *See*, for example, European Commission (2016), Directorate-General for Justice and Consumers, *Mystery Shopping Survey on Territorial Restrictions and Geo-blocking in the European Digital Single Market*,

The reason for this different approach in relation to digital content mainly lies on the fact that, in its objective of eliminating all the existing barriers and obstacles to the Digital Single Market, the Commission must tackle the current rules of copyright law that, in principle, admit the adoption of geo-blocking practices by digital content providers.[46]

In fact, as we will see in the fourth chapter, the combined effect of the principle of territoriality of copyright law and the application of the principle of IPRs' ("Intellectual Property Rights") exhaustion only to tangible copyrighted goods, in principle, still makes the use of geo-blocking practices in relation to digital copyrighted content entirely legitimate.

In this context, we should remember that audio-visual services – including broadcasts of sports events – have been excluded by the scope of the Geo-blocking Regulation. However, the latter includes a review clause regarding the inclusion of audio-visual contents two years after the entry in force of the Regulation and other initiatives of the Digital Single Market, such as the proposal on Copyright and related rights applicable to certain online transmissions of broadcasting

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Final Report, GfK Belgium PS, where we can literally read: *"since geo-blocking in digitally delivered media content can usually be justified by copyright, the study focused only on tangible goods and online services to be used offline"*; see also European Commission, *Public Consultation on Geo-Blocking and other geographically based restrictions when shopping and accessing information in the EU*, 2015, available at https://ec.europa.eu/digital-single-market/en/news/geo-blocking-public-consultation-contributions-received-stakeholders (last access 2 October 2017) where the Commission aims to gather information only in relation to geo-blocking practices in the field of goods and services.

[45] In this field, *see* paragraph 1.3.1 below.

[46] For an overview of online distribution of digital contents, based on around 600 samples, see M. Borghi, M. Maggiolino, M. L. Montagnani, M. Nuccio (2012), *Determinants in the online distribution of digital content: An exploratory analysis*, European Journal of Law and Technology, Vol. 3.

organisations and retransmissions of television and radio programmes[47] could still limit the territorial exclusivity of content.

It should also be underlined that, in the sector of online audio-visual services, digital content providers adopt practices like those used in the online sale of goods and services, namely both geo-blocking and geo-filtering are applied.[48]

With regard to the first stage of the online purchase (i.e., access), on the basis of their IP address, European users located in a certain Member State may be prevented from even accessing content services that are instead available to other European consumers.

Using an example made by the Commission, *"a Belgian user may be blocked from accessing the website of, for example, a French provider of video-on-demand services, on the basis of the user's Belgian IP address (and the website may then display a message saying that the website is only accessible to French residents)*".[49]

In a similar situation, it may also happen that consumers, even though they can access the website, they are still not able to sign up for an account or subscribe to online services offered by content providers located in a different Member State,

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[47] European Commission (2016), *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) 594 final.*

[48] E. Gomez, B. Martens (2015), *Language, Copyright and geographic segmentation in the EU Digital Single Market for music and film*, JRC/IPTS Digital Economy Working Paper, No. 04, available at https://ec.europa.eu/jrc/sites/jrcsh/files/JRC92236_Language_Copyright.pdf (last access 6 October 2017); *see also* P.B. Hugenholtz (2009), *Copyright without frontiers: the problem of territoriality in European copyright law*, in E. Derclaye (edited by), Research Handbook on the Future of EU Copyright, Edward Elgar Publishing.

[49] European Commission, *SWD(2016) 70 final, cit.*

while other European consumers are able to do it.[50]

For example, Italian consumers were not able to subscribe to Netflix until October 2015, while UK and Ireland's consumers were already able to access this service in their countries.

In another scenario, European users might also be automatically re-routed by online service providers to the national version of the provider's website targeted at their country of residence.[51]

A meaningful example is the Apple iTunes case: even though iTunes is available across Europe, European consumers can purchase digital copyrighted contents only from the iTunes Library of the Member State in which they live while they cannot purchase contents on offer in different countries where the digital content availability is different.[52]

Although digital content providers make the same service available in the diverse Member States, they may also force European users to access only the version of the service targeted at the Member State in which they are located, which is generally offered at different conditions and prices.[53]

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[50] A. Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, CEPS Special Report No. 120, Centre for European Policy Studies, available at https://www.ceps.eu/system/files/SR120_0.pdf (last access 6 October 2017).

[51] G. Mazziotti (2016), *Is geo-blocking a real cause of concern in Europe?*, in European Intellectual Property Review, Vol. 38, Issue 6, p. 365.

[52] *Ibid.*

[53] G. Mazziotti and F. Simonelli (2016), *Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law*, Digital Policy, Regulation and Governance, Vol. 18, No 6, Emerald Group Publishing Limited, p. 57.

For example, Netflix – the dominant VoD ("Video-on-demand") streaming service in Europe – applies geo-filtering to automatically adjust its catalogue to the subscriber's location:[54] "*consumers can lawfully subscribe only their national service and this is reflected in price discrimination across EU: the monthly price for a premium account in euro ranges from € 4.99 in Bulgaria to € 9.99 in, for example, Belgium, France, Germany, Ireland and Spain, going up to £ 9.99 in the UK*".[55]

Similarly, we can consider the YouTube case; very often a user can access the video sharing platform but, when he tries to watch a video, he might be blocked by the message "*this content is not available in your country*".[56] Indeed, in some Member States, consumers can access local versions of the famous video sharing website, which offer tailored content not accessible by consumers located in a different Member State.[57]

Concerning the last phase of the potential online purchase, a European consumer may be prevented from paying for the chosen service or downloading or streaming (or otherwise watching) the digital content provided on websites located in different Member States due to, for example, its card billing address.

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[54] P. B. Hugenholtz (2010), *Copyright Territoriality in The European Union - PE 419.621*, DG for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs Brussels.

[55] A. Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, *cit.*, p. 5.

[56] P. Kataja (2017), dissertation: *"Content is not available in your country" – Is Geo- Blocking Compatible with the Internal Market*?, University of Turku – Faculty of Law.

[57] A. Renda et al. (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, cit.*

1.3.2 Geo-blocking and audio-visual contents

The mentioned exclusion of the audio-visuals from the scope of the Geo-blocking Regulation profoundly decreases its impact on the market.[58]

However, an analysis of the geo-blocking phenomenon *per se* requires that audio-visual ("AV") contents are in any case considered.

As we can read from the Digital Single Market Strategy document, in fact, the Commission explicitly refers to 'audio-visual programmes' when describing the issues connected to the limited availability of content across Europe and highlights that *"less than 4% of all video on demand content in the EU is accessible cross-border"*.[59]

The main reason why the Commission concentrates on online AV services is connected to the fact that these services are the ones in which digital content providers adopt geo-blocking practices more frequently, both in relation to cross-border accessibility and portability.[60]

For example, the document released by the Commission shows that the cross-border availability of content is limited especially for audio-visual services, i.e.,: "*only 40% of all films on offer on a major online distribution platform are available in the 27 national country stores of this platform (for music the share is closer to 80%), and the share is lower*

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[58] For an economic analysis, see: J. S. Marcus, G. Petropoulos, (2017), *Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment - IP/A/IMCO/2016-15, PE 595.364*, available at http://bruegel.org/wp- content/uploads/2017/02/IPOL_IDA2017595364_EN.pdf (last access 6 October 2017).

[59] *Ibid.*

[60] *Ibid.*

for EU-produced films (about 28%);[61] *with the regard to Video-on-Demand film services, cross-border accessibility is around 1,9%".*[62]

At the same time, the Commission is also aware of the fact that consumers are increasingly asking to access audio-visual services over the Internet.

According to a study carried out by Plum Consulting for the European Commission, cross-border demand for online audio-visual contents is usually generated by different categories of European consumers.[63]

For example, long-term migrants, who are permanently away from their country of residence (in 2014, they were 14 million),[64] might be interested in accessing contents which are not available in the Member State in which they reside.[65]

Other categories of Europeans that might be interested in accessing digital content available in different Member States might be: non-migrant European consumers with proficiency in a different language from the national language of the country in which they live (48 million in 2012); linguistic minorities speaking a language different from the national language of the country in which they live (4 million in

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[61] European Commission (2015), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe – COM(2015) 192 final, SWD(2015) 100 final*, p. 26.

[62] *Ibid.*

[63] Plum Consulting (2012), Final report for the European Commission, *The economic potential of cross-border pay-to-view and listen audio-visual media services*, available at http://ec.europa.eu/internal_market/media/docs/elecpay/plum_tns_final_en.pdf (last access 6 October 2017).

[64] G. Mazziotti, F. Simonelli (2016), *Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law*, *cit.*, p. 57.

[65] Plum Consulting (2012), *The economic potential of cross-border pay-to-view and listen audio-visual media services*, *cit.*, p. 68.

2012); or also people who are simply trying to learn another language (60 million in 2012).[66]

According to this study carried out by Plum Consulting, up to 4.7 million of Europeans, including both short-term migrants (1 million) – such as students participating in the Erasmus program or living in another Member State for learning reasons, or people who stays no more than a year in a different Member State[67] – and travellers (3.7 million), may be affected every day by the limited access to digital contents.[68]

The AV market is characterised by an increasing number of new services enabled by the Internet, such as online on-demand audio-visual services, catch-up TV services [69] provided by broadcasters (e.g., Sky), video sharing platforms (e.g., YouTube) or other internet-based services.[70]

In this context, VoD services may be defined as those services where users can access *on demand* – at the moment chosen by the user and at his request – to a catalogue of films or other audio-visual programmes on their internet-enabled devices.[71] These

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[66] *Ibid.*

[67] Plum Consulting (2012), *The economic potential of cross-border pay-to-view and listen audio-visual media services*, *cit.*, p. 80.

[68] *Ibid*, p. 67.

[69] *Ibid*; as we can read from this study, "*a catch-up TV service is an on-demand audio-visual service provided by a broadcaster who makes available recent programmes, after their initial broadcasting and during a limited period of time. A catch-up service can be delivered on different platforms (Internet, IPTV, cable, telephone, applications for smartphone, tablet or Smart TV)*".

[70] *Ibid.*

[71] From the study conducted by the European Audiovisual Observatory we can read: *"VoD services are those services providing access on demand to a catalogue of films or audio-visual programmes (animation, TV series, documentaries, music, archives, training, general interest, etc.) independently of any television broadcast of those works. While catch- up TV services are almost exclusively provided by broadcasters, VoD services are*

services might be provided both by traditional broadcasters (e.g., Sky) and by other service providers (e.g., OTT service providers).[72]The VOD services can be offered using different business models, i.e.:

- Subscription Video-on-Demand ("Svod"): video-on-demand services that give users unlimited access to a catalogue on a subscription basis (e.g., Netflix, HBO Go, FilmoTV and Sky Online);
- Transactional Video-on-Demand ("TvoD"): video-on-demand services where users pay for each video-on-demand and they can either rent or purchase it (e.g., iTunes and ChiliTv);
- Advertising Video-on-Demand ("AVoD"): video-on-demand services supported by placing advertisements (e.g., YouTube).[73]

Moreover, the audio-visual sector evolved, and the key role of new players enabled by the Internet has been affirmed. The most important ones are over-the-top (OTT) service providers, which are those providers that distribute on-demand content without going through cable or telecommunications operators, instead using the public Internet as a means for distributing content.[74] Moving in the audio-visual sector,[75] the well-known ones are Netflix, YouTube, Amazon, Apple, etc.[76]

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provided by a wide range of companies: distributors of TV services (IPTV, cable, satellite, pay-DTT operators), film companies, video publishers, retailers, newspapers, companies created just for this activity. Some broadcasters may also provide VoD services in addition to their catch-up TV services".

[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.*

[75] Notably, the most common example of OTT provider is Skype but it does not provide on-demand audio-visual services.

In light of the above, for the scope of this work, the broadcasters or online service providers that offer audio-visual services online are those who use geo-blocking practices to limit the availability or portability of digital copyrighted content.

1.3.3 Geo-blocking and cross-border sale of tangible goods and services

In the field of the cross-border sale of goods and services, online sellers use to adopt all the four geo-blocking forms listed in paragraph 1.3 above and analysed below.[77]

From a statistic point of view, geo-blocking appears to be much more prevalent with regard to the cross-border offer of tangible goods rather than with services.[78]

The first form of geo-blocking – the access denial – may be adopted by online traders at the very beginning of a potential online purchase: European consumers located in a certain Member State may be even denied access to online shops or other online interfaces (e.g., apps or marketplaces) based in different Member States because

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[76] *Ibid.*

[77] European Commission (2015), *COM(2015) 192 final, cit.,* p. 22; According to a consumer survey launched by the Commission on the obstacles to the Digital Single Market in relation to the cross-border sale of goods and services, among the respondents, *"5% indicated that they were not able to access the seller's website because they were redirected to the seller's website in their own country and a further 6% indicated that foreign sellers refused to sell to the because of their country of residence. Similarly, 7% of respondents attempting to purchase from another EU member state reported that they could not access the foreign seller's website (or only limited content was displayed to them), whereas another 4% reported that their means of payment was refused by the foreign seller".*

[78] European Commission (2016), *Mystery Shopping Survey on Territorial Restrictions and Geo-blocking in the European Digital Single Market, cit.*

online traders do not allow their websites to be accessed by users located outside of the country in which they are located.[79]

The second geo-blocking practice consists in the non-possibility to purchase products on offer in a website, even if a customer of a State can access to online shops based in the different Member States.[80]

The forms of these purchase denials may vary: in some cases, it may be due to the credit card used for payment, which is connected to the consumers' country of residence or location; in other cases, the online shop may refuse to deliver the purchased goods to the consumers' country of residence or location.[81]

In some cases, the stop is put in place through a mandatory registration procedure which requires for personal details (such as the delivery address or the telephone number) which might be not possible to complete on the basis of the location of the client.[82]

The third type of geo-blocking practice identified by the Commission is *less extreme* than the straightforward denial of access to websites and the refusal to sell. It can happen that European consumers are able to access online shops of certain

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[79] European Commission, *COM(2015) 192 final, cit.,* p. 21; for instance, it can happen that a certain Italian consumer may want to purchase a pair of shoes from a UK-based online shop, however, due to his Italian IP address, he cannot even access the website located in the United Kingdom.

[80] *Ibid*, p. 4; see also, p. 21.

[81] European Commission (2016), *Mystery Shopping Survey on Territorial Restrictions and Geo-blocking in the European Digital Single Marke*t; *see also* European Commission, *SWD(2016) 70 final.*

[82] For example, it may be the case that an Italian consumer intends to buy a book from a UK-based e-shop. The Italian consumer can access the UK website and see the products on offer, however, when he tries to place his for the desired good, the UK online shop shows a denial message thereby impeding the Italian consumer to finalise his purchase.

companies based in different Member States but when they try to purchase the goods that they want to buy, they are automatically redirected to the company's local website (or the website of a different provider) that is targeted to their country of residence or location.

Notably, this usually happens without the consumer's consent or ability to impede the re-routing. Thus, very often, the consumer does not even understand that he has been re-routed.

The re-routing may take place automatically, through the identification of the IP-address of the user, or also through a note of non-delivery to the Member State of the user and a link to the local website.[83]

Furthermore, it happens very often that the second website – the one not voluntarily chosen by the user for its purchases – offers the same products, but at different terms and conditions; sometimes it may even sell different products.[84]

With regard to this last practice – which is more precisely defined as geo-filtering – it may also happen that European consumers can access online shops based in different Member States, but still, due to their location, they can purchase the products they want to buy only at different prices (generally higher prices than the ones applied in

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[83] H. Schulte-Nölke et al. (2013), *PE 507.456, cit.*

[84] *Ibid*; see also European Commission, *COM(2015) 192 final*, *cit.*, p.21; in this case, our Italian consumer can access the UK-based e-shop and see the products on offer, however, when he tries to finalise his purchase, he is automatically re-routed to the correspondent Italian e-shop of the same company that owns the UK website firstly visited. After being redirected to the Italian website, it may also happen that our Italian consumer can buy the desired good, but only at a different price from the UK one (usually at a higher price). In other cases, it may happen the Italian consumer cannot even buy the desired good anymore but he has to choose from different goods available for his country of residence.

the Member State of the websites) or at different terms and conditions, which are automatically applied in relation to their country of residence.[85]

For example, national consumers may have more payment and delivery options or fewer delivery costs than other consumers based in different Member States.[86]

1.3.4 Virtual Private Networks as a way of circumventing geo-blocking

Having understood how geo-blocking works, it is also easy to understand that it generally frustrates the expectations of European consumers who increasingly wish to access not only goods and services over the Internet but specially to access culture and entertainment on an EU-wide basis.[87]

Then, European consumers are very often tempted to circumvent the various geo-localisation practices[88] adopted by online sellers and digital content service providers through various technological workarounds, such as: free or subscription proxy services, smart DNS ("domain name system") proxy servers,[89] the TOR ("The Onion

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[85] *Ibid*; see also European Commission, *COM(2015) 192 final, cit.,* p. 21.

[86] H. Schulte-Nölke et al. (2013), *PE 507.456, cit.*; due to this practice, for example, our Italian consumer may be able to access the UK-based website, however, he will be able to buy his desired good only at a different price (generally a higher price than the one applied for UK costumers) due to his country of residence.

[87] G. Mazziotti (2016), *Is geo-blocking a real cause of concern in Europe?, cit.,* p. 366.

[88] M. Trimble (2012), *The Future of Cyber Travel: Legal Implications of the Evasion of Geolocation, cit.*

[89] T. Riis, J. Schovsbo (2017), *The borderless online user – Carving up the market for online and streaming services*, in P. Torremans, Research Handbook on Copyright Law (Second ed.), Edward Elgar Publishing. The copyright implications of the use of streaming technologies on the internet are analysed in M. Borghi (2011), *Chasing Copyright Infringement in the Streaming Landscape*, in International Review of Intellectual Property and Competition Law, Vol. 42, No. 3.

Router") network,[90] virtual private networks ("VPNs"), file sharing networks or even illegal streaming websites.[91]

The most common method to circumvent geo-blocking is using a VPN. Technically, a VPN is a technology that extends a private network across a public network, such as the Internet, thereby enabling a computer or also other internet-enabled devices (e.g., smartphones, tablets and even smart TVs) to send and receive data across the public network as if they were connected to the private network, while benefiting from the functionality, security, and management policies of the private network.[92]

In concrete, a VPN enables users to hide their IP address and use one of the IP addresses given by the VPN service provider when connecting to the desired website. Then, the website's data will be sent to the provider's IP address and securely forwarded to the user's device without showing its real geographic location.

In this way, users can bypass the geo-blocking practices adopted by online companies by connecting their devices to servers based in the Member States in which the content is made available and receiving the data from those countries.[93]

There is a number of free or subscription-based VPN services available for online users, such as: IPVanish,[94] Hola,[95] Unblock-Us,[96] or Private Internet Access.[97]

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[90] http://www.thetorproject.org (last access 6 October 2017).

[91] G. Mazziotti (2016), *Is geo-blocking a real cause of concern in Europe?, cit.*; for further information on the various geo-location tools see H. Roberts, E. Zuckerman and J. Palfrey (2007), *Circumvention Landscape Report: Methods, Uses, and Tools*, The Berkman Center for Internet and Society, Harvard University, p. 9; M. Trimble (2012), *The Future of Cyber Travel: Legal Implications of the Evasion of Geolocation, cit.*; *see also* T. Kra-Oz (2014), *Geo-blocking and the legality of circumvention, cit.*

[92] A. Renda et al. (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, cit.*

[93] *Ibid.*

It is worth remarking that, when it comes to copyright-protected digital content, activities enabled by the VPNs or other circumvention tools might constitute a copyright infringement.[98]

The legal implications of circumventing geo-blocking are beyond the scope of the present discussion,[99] although they might increase in relevance in light of the growing availability of VPN services, which could hamper the effectiveness of geo-blocking.

1.3.5 The distinction between justified and unjustified geo-blocking

From the Digital Single Market Strategy document, we can read that the European Commission affirms that it intends to prohibit *unjustified* geo-blocking practices because, by denying or limiting access to goods, services, and digital contents, they lead to the fragmentation of the Internal Market and they are a significant cause of consumers' dissatisfaction and discrimination.

Thus, the Commission affirms that unjustified geo-blocking practices are, in principle, at odds with the fundamental objectives of the Single Market and, in

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[94] Available at the following website: http://www.ipvanish.com (last access 6 October 2017).
[95] Available at the following website: http://www.hola.org (last access 6 October 2017).
[96] Available at the following website: http://www.unblock-us.com (last access 6 October 2017).
[97] Available at the following website: http://ita.privateinternetaccess.com (last access 6 October 2017).
[98] A. Renda et al. (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, cit.*
[99] For an in-depth analysis on geo-blocking and its circumvention, see R. Lobato and J. Meese (2016), editors, *Theory on Demand #18, Geoblocking and Global Video Culture*, Institute of Network Cultures, available at: http://networkcultures.org/blog/publication/no-18-geoblocking-and-global-video-culture/ (last access 20 March 2018).

particular, with the aim of establishing also a fully functioning Digital Single Market.[100]

Instead, even though they might fragment the market or lead to consumer dissatisfaction, the Commission also specifies in the Strategy document that, in some situation, *"these restrictions on supply and ensuring price differentiation can be justified"*.[101]

1.3.5.1 Justified Geo-blocking

It should be noted that, while the reasons why the use of geo-blocking is not justifiable are identified clearly by the European Commission, the same cannot be affirmed about the cases in which geo-blocking can be considered justified.

In fact, the Commission does not provide an exact list of all the exceptions that should constitute justified reasons for adopting geo-blocking practices.

Even more, instead of introducing a neat boundary between justified and unjustified geo-blocking, the Commission affirmed that *"in many instances, it is impossible [to determine] without a case-by-case investigation into the specific circumstances whether such restrictions are justified or not"*.[102]

Trying to find some possible justifications, we can refer to the fact that the Commission pointed out that in certain cases geo-blocking is justified because online

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[100] *Ibid.*

[101] European Commission, *COM(2015) 192 final, cit.,* p.6.

[102] European Commission, *SWD(2016) 173 final, cit.,* p. 6.

sellers are required to adopt these restricting practices to comply with specific legal obligations, i.e., the existing EU legislation or national rules.[103]

In this context, some relevant legal barriers are: rules on advertising; legislation on the protection of minors; rules on certain prohibited product or services, such as tobacco or firearms; rules regarding the consumption of certain alcoholic products and the minimum legal drinking age; rules that prohibit online gambling in certain Member States.[104]

Another category of justified geo-blocking practices identified by the European Commission includes situations whereby online traders decide not to sell cross-border and geo-block *"when they would incur disproportionate adaptation costs due to regulatory constraints"*.[105]

In other words, when the decision to use geo-blocking is *"based on objective and actual additional complications and extra costs for the seller"* and the restrictions are proportionated to these complications, the reasons not to offer goods and services across borders may be justified.[106]

Some examples provided by the European Commission, that will be analysed from a competition law perspective in the third chapter of this work, are: the complexity of VAT ("Value added tax") rules; the necessity to comply with different national tax

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[103] European Commission, *COM(2015) 192 final, cit.,* p.6.
[104] European Commission, *COM(2015) 192 final, cit.,* p. 23; see also European Commission, *SWD(2016) 173 final, cit.,* Annex 11, p. 153.
[105] F. Simonelli (2016), *PE 587.315*, *cit.,* p. 16.
[106] European Commission, *SWD(2016) 173 final*, *cit.*, pp. 15-16; *see also* F. Simonelli (2016), *PE 587.315*, *cit.,* p. 16.

systems; differences in national consumer laws; the lack of harmonisation of labelling and selling requirements; the lack of high-quality and cheap delivery services; the overall uncertainty as to whether the trader should apply foreign law or not; etc.[107]

Remarkably, we can notice that these are between the other areas of action addressed by the other Commission's legislative proposals put forward as part of the DSM Strategy – and especially within the first pillar (i.e., access)[108] – aimed at ensuring better online access across Europe.[109]

Thus, the Commission is also working to limit the cases in which geo-blocking can be considered justified, due to these additional complications, *"as a consequence, justified geo-blocking can be expected to decrease in the future"*.[110]

1.3.6 The landmark cases: the Pay TV investigation

For the current analysis, EU Court of Justice's decisions and Commission investigations on the cross-border provision of pay TV services are significant. Indeed, even if they do not refer to the online market, they deal with geo-blocking provisions and territorial licensing. Therefore, they provide us with important tools to better identify the concrete concerns about geo-blocking practices.[111]

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[107] *Ibid.*

[108] European Commission, *COM(2015) 192 final*, *cit.*, pp. 4-9.

[109] *Ibid*., pp. 4-7; *see also* European Commission, *SWD(2016) 173 final*, *cit.*, Annex 11, pp. 148-153; see also Chapter 1 above.

[110] European Commission, *SWD(2016) 173 final*, *cit.*, p. 16.

[111] The same EU institutions refer to those cases in their documents dealing with geo-blocking; see, *inter alia,* T. Madiega (2015), *Digital Single Market and geo-blocking*, European Parliamentary Research Service.

1.3.6.1 Murphy judgment

The pay-tv investigation revolves around the implementation of geo-blocking clauses in film distribution, with the Murphy case being an important landmark.[112]

In this case of 2008, the United Kingdom's Football Association Premier League ("FAPL") denounced that in British pubs Premier League matches were being shown using decoders bought in Greece. This allowed publicans to avoid the fees applied by Sky for that service to United Kingdom ("UK") customers. The FAPL argument was, in brief, that such practice was breaching its licences' territorial exclusivity. Eventually, this would bring about a European race-to-the-bottom, where the broadcaster with the cheapest appliance would be propelled as an actual EU-wide distributor, territorial licences notwithstanding.[113]

The final ruling rejected such argument, even adding that bans on passive sales curbed competition and therefore infringed Articles 56 and 101 TFEU. Yet, the Court's stance on the matter was mixed, since it acknowledged that the publicans were showing matches for a profit and that such shows were being diffused among a different pool of customers than what had been agreed upon by copyright holders

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[112] Judgment of the Court (Grand Chamber) of 4 October 2011, Joined Cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others and Karen Murphy v. Media Protection Services Ltd*, ECLI:EU:C:2011:631; *see* P. Ibáñez Colomo (2014), *The Commission Investigation into Pay TV Services: Open Questions*, Journal of European Competition Law & Practice, Volume 5, Issue 8, pp. 531–541; A. Wood (2012), *The CJEU's ruling in the premier league pub TV cases - the final whistle beckons: "Football Association Premier League Ltd v QC Leisure (C-403/08)" and "Karen Murphy v Media Protection Services Ltd (C-429/08)"*, European Intellectual Property Review, Vol. 34, n. 3, pp. 203-207.

[113] *Ibid*, paragraph 43.

when dealing with their Greek customers. Therefore, such conduct amounted to a breach of Article 3(1) of the Copyright Directive.[114]

Such turn of events allowed the FAPL to merely amend its licensing agreements so as to continue restricting cross-border sales.[115] In practice, for example, the FAPL started to print its copyright logos on its broadcasts, in order to enforce current copyright rules to those who show its programs.[116] Also, the FAPL has scaled down on services to foreign viewers, so as to reduce the potential for passive sales to seep back into the UK market – with foreign customers ending as net losers in all this.[117]

1.3.6.2 Paramount case

In July 2015, a set of clauses in film licensing contracts for pay-TV between Paramount (and other major producers) and Sky UK were called into question by the European Commission, which issued a Statement of Objections for alleged breaches of antitrust rules.

The Commission put the accent on two conditions, i.e.:

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[114] *Ibid*, paragraphs 195-198 and 205-206.

[115] See S. Hornsby (2012), *Case Comment FAPL v QC Leisure & Karen Murphy: What's Wrong with the "Exclusivity Premium" and Why Can't It Be Protected*, Entertainment Law Review, 23, p. 157; for a clear summary of the case, see: G. Monti and G. Coelho, *Geo-Blocking between Competition Law and Regulation*, CPI Antitrust Chronicle January 2017, available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Monti-Coelho.pdf (last access 20 March 2018).

[116] Joined Cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others and Karen Murphy v. Media Protection Services Ltd, cit.*

[117] *See* Asser Institute – Centre for International & European Law and IVIR (2014), *Study on sports organisers' rights in the European Union Final Report - EAC/18/2012*, p. 102, available at: http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf (last access 6 October 2017).

(i) Sky UK made sure that its customers were not able to access Paramount's movies if accessing Sky's online or satellite services from without the UK and Ireland licensed territory;

(ii) Paramount, on its part, had to prevent that foreign broadcasters were not allowing access to their services from within the UK and Ireland.

The consequent partition of the internal market caused by these conditions was of particular interest to the Commission.

To address these concerns, Paramount offered that:

(a) it would not enforce the conditions mentioned above in current film licensing contracts with any pay-TV broadcaster in the European Economic Area ("EEA");

(b) it would not introduce these conditions in future film licensing contracts with any broadcaster in the EEA.[118]

Later on, the Commission started a consultation with the market stakeholders, that verified Paramount's compliance. Satisfied by the results, the Commission then proceeded to make these commitments legally binding for Paramount.

That such commitments actually have any positive effect is debatable, as shown by the IMCO,[119] because of copyright law. Indeed:

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[118] See European Commission (2016), Press Release, *Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services*, available at http://europa.eu/rapid/press-release_IP-16-2645_en.htm (last access 6 October 2017).

[119] M. Poiares Maduro *et al.* (2017), *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects - IP/A/IMCO/2016-14, PE 595.362*, Study for the IMCO Committee, European Parliament.

- an exclusive license holder in the UK, such as Sky UK, may ban the broadcasting of a certain film by another player on the basis of its copyright. Passive sales, then, would be possible only if the copyright holder waived its license – an unlikely course of action;
- at the same time, if Sky UK tried to subscribe a contract with a customer located, say, in France, the exclusive license holder for France would be able to enforce copyright rules and forbid such contract.

In the second case, there might be instances were no exclusive license holder exists in France, thus making passive sales possible. In its decision, the Commission may have been trying to protect customers finding themselves in this particular situation.

As a conclusion, the market failure found by Commission has not been adequately addressed, as only Paramount was made to comply with the commitments mentioned above, while licensees in other Member States were not.

1.3.6.3 Pending cases

In 2017, the Commission started three distinct inquiries into e-commerce practices suspected of hampering competition and employed by prominent suppliers in hotel accommodation, video games, and consumer electronics.[120]

The investigation in hotel accommodation concerns agreements between hotel groups (Melià Hotels) and some of the most significant European tour operators

[120] European Commission (2017), Press Release, *Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce*, available at http://europa.eu/rapid/press-release_IP-17-201_en.htm (last access 7 October 2017).

(Kuoni, REWE, Thomas Cool, TUI).[121] Although the Commission welcomed innovation in room management, it decried practices of customer discrimination based on nationality or country of residence, as they prevented customers from seeing actual hotel availability or from enjoying to certain room rates. Thus, such method of discrimination and the resulting partitioning of the Single Market may infringe EU competition rules.

The second inquiry regards bilateral agreements between Valve Corporation, owner of the *Steam* video game distribution platform, and five video game publishers: Focus Home;[122] Koch Media;[123] Zeni Max;[124] Bandai Namco;[125] Capcom.[126] Also, in this case, geo-blocking practices have been put in place, enabling/disabling the purchasing of digital content on the basis of geographic location or country of residence: after having bought a product, consumers are required to provide Steam with an *activation key*, supposedly to confirm that their copy has not been pirated. The investigation aims at understanding whether this key acts as a geo-blocking tool as well since it can be used to provide access exclusively to customers from within

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[121] European Commission, COMP/AT.40308, *Kuoni, REWE, Thomas Cook, TUI, Meliá Hotel* (vertical restraints), Economic Activities: I.55.10 - Hotels and similar accommodation, and N.79.12 - Tour operator activities, Competition, European Commission, 2017.

[122] European Commission, COMP/AT.40413, *Focus Home* (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017.

[123] European Commission, COMP/AT.40414, *Koch Media* (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017.

[124] European Commission, COMP/AT.40420, *Zeni Max* (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017.

[125] European Commission, COMP/AT.40422, *Bandai Namco* (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017.

[126] European Commission, COMP/AT.40424, *Capcom* (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017.

certain Member States. Such stifling of *parallel trade* within the Single Market, which allows customers from a Member State to buy games at lower prices in another Member State, may infringe EU competition rules.

The third inquiry is concerned with the following manufacturers of consumer electronics: Philips;[127] Pioneer;[128] Asus;[129] Denon & Marantz.[130] Allegedly, they would have narrowed the possibility for online retailers to set their own prices for a range of every-day products (notebooks; hi-fi systems; etc.), resulting in a breach of EU competition rules. Moreover, these practices may have an even greater impact on prices charged to consumers, because many retailers employ algorithms to set their prices with respect to their competitors automatically.

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[127] European Commission, COMP/AT.40181, *Philips* (vertical restraints), Economic Activity:G.47.91 - Retail sale via mail order houses or via Internet, DG Competition, European Commission, 2017.
[128] European Commission, COMP/AT.40182, *Pioneer* (vertical restraints), Economic Activity: G.47.91 - Retail sale via mail order houses or via Internet, Competition, European Commission, 2017.
[129] European Commission, COMP/AT.40465, *Asus* (vertical restraints), Economic Activity:G.47.91 - Retail sale via mail order houses or via Internet, DG Competition, European Commission, 2017.
[130] European Commission, COMP/AT.40469, *Denon & Marantz* (vertical restraints), Economic Activity:G.47.91 - Retail sale via mail order houses or via Internet, DG Competition, European Commission, 2017.

CHAPTER 2

INTERACTIONS BETWEEN GEO-BLOCKING AND THE FUNDAMENTAL FREEDOMS GUARANTEED BY THE EU SYSTEM

Summary: 2.1 Introduction – 2.2 The free movement rules basics – 2.3 The constitutional dimension of EU free movement rights – 2.4 The horizontal application of free movement rules – 2.5 Fundamental freedoms and fundamental rights – 2.5.1 Consumers' human rights – 2.5.2 Freedom to conduct a business and to provide services – 2.5.3 Right not to be discriminated – 2.6 Concluding remarks

2.1 INTRODUCTION

The analysis of the geo-blocking conduct carried out in chapter 1 moves in the context of the need to establish a well-functioning internal market, under Article 3(3) of the Treaty of the European Union ("TEU"). Therefore, geo-blocking conflicts naturally with the internal market goal, placing it firmly in the Commission's crosshair.

I will focus on the category of *justified* geo-blocking in the next chapter, dealing with competition law. Out of that context, the geo-blocking conduct constitutes an

obstacle to the internal market, i.e., *"by limiting consumer opportunities and choice, geo-blocking is a significant cause of (…) fragmentation of the Internal Market".*[131]

Article 26(2) of the Treaty on the Functioning of the European Union ("TFEU") better clarifies that the internal market is based on the four fundamental freedoms and defined it as: *"(…) an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".* Article 26(2) has been therefore dubbed "*the umbrella article."*[132]

Considering the geo-blocking practice, the two free movement rights involved are those of goods (ruled by Articles 28-37 TFEU),[133] and services (ruled by Articles 56-62 TFEU):[134] through the geo-blocking tool a private actor can impede or limit access to goods and services across the European Union, partitioning the internal market.

In this context, the key-analysis to be carried out concerns the distinction between State action and private actors action and the consequent limits of application of the

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[131] European Commission (2015), *COM(2015) 192 final, cit*.

[132] D. Chalmers, G. Davies and G. Monti (2010), *European Union Law: Cases and Materials,* Cambridge University Press, p. 677.

[133] See, *inter alia,* L. Woods (2004), *The Free Movement of Goods and Services within the European Community,* in European Business Law Library, Ashgate; L. Sbolci (2017), *La libera circolazione delle merci,* in Diritto dell'Unione europea, Girolamo Strozzi ed., Giappichelli Editore, pp. 1-62.

[134] See, *inter alia,* M. Condinanzi (2017), *La libertà di stabilimento,* in Diritto dell'Unione europea, Girolamo Strozzi ed., Giappichelli Editore, pp. 178-182; M. Andenas and W.-H. Roth (2003), *Services and Free Movement in EU Law*, Oxford University Press; M. Condinanzi and B. Nascimbene (2006), *La libera prestazione dei servizi e delle professioni in generale,* in Il Diritto privato dell'Unione europea, ed. A. Tizzano, Giappichelli Editore, pp. 330 ss.

free movement rules to individuals, namely the issue of the vertical application of free movement rules.[135]

2.2 THE FREE MOVEMENT RULES BASICS

The statistics of judicial activity shared on an annual basis by the Court of Justice of the European Union ("CJEU") reveal that the exercise of free movement rights keeps representing a significant proportion of the total of references for a preliminary ruling made by national courts: between 2010 and 2015 around 1 preliminary ruling out of 10 concerned the four fundamental freedoms.[136]

The CJEU usually follows a three-step methodology to resolve disputes related to alleged free movement breaches:[137]

1. Does the measure constitute a *restriction* on free movement rights?
2. If yes, can the measure be *justified*?
3. If yes, is the measure nevertheless *proportionate*?

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[135] In this sense, see H. Schepel (2012), *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law*, European Law Journal - Review of European Law in context.

[136] In particular, these are the precise proportions in the different years: in 2015, 47 on 436; in 2014, 37 on 428; in 2013, in 2012, 39 on 404; in 2011, 44 on 423; in 2010, 56 on 385. These data are available in the annual reports on the judicial activity - synopsis of the judicial activity of the Court of Justice, the General Court and the Civil Service Tribunal, published annually on the website of the CJEU at the following link: https://curia.europa.eu/jcms/jcms/Jo2_11035/en/ (last access 6 October 2017).

[137] N. Nic Shuibhne (2013), *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice,* Oxford University Press, p. 26 ss.

A measure can be restrictive in the sense that it can be: *(i)* discriminatory in law, i.e., directly discriminatory on the grounds of nationality; *(ii)* discriminatory in result or effect, i.e., indirectly discriminatory; *(iii)* non-discriminatory but still restrictive of free movement rights.

Free movement rights are never absolute, in the sense that restrictive measure can nonetheless be justified. The key exceptions – provided by the Treaty – concern the protection of public health, the safeguard of public security and public policy exceptions.

Direct discriminations, in particular, can be evaluated and, eventually, justified only on the basis of the Treaty and then the causes for justifications are limited to the policy objectives predetermined in the Treaty's provisions. Differently, the exam of indirect discriminations and non-discriminatory restrictions is not limited to the Treaty's provision and other policy arguments – out of the Treaty – can certainly constitute justifications for a restriction to the free movement.[138]

The jurisprudence of the CJEU, in this way, made space to policy concerns that were not present or sufficiently specified in the Treaty of Rome, such as consumer protection, without any revision to the Treaty.

The third step consists in the proportionality test, which usually comprises two sub-tests for: *(i)* the suitability or appropriateness of the measure to achieve the stated

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[138] In this sense, *see Cassis de Dijon* Case which opens the use of justifications arguments beyond the Treaty; cf. Judgment of the Court of 20 February 1979, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979), ECLI:EU:C:1979:42.

public interest objective; *(ii)* the necessity of the measure for that objective. Therefore, the measure under analysis must be the one appropriate to reach the policy purpose and this latter must need that measure for its achievement. Moreover, the necessity test includes the exclusion of alternative measures which could be equivalent in terms of achieving the objective, being less restrictive to the EU trades.[139]

2.3 THE CONSTITUTIONAL DIMENSION OF EU FREE MOVEMENT RIGHTS

The key-implication of the constitutional dimension of these rights is that a purely economic reason certainly does not justify a restriction of free movement, which includes all the four freedoms.[140]

In this context, the CJEU mainly refers to the functions that a State pursues and this analysis has a clear constitutional relevance.

From a macro-level perspective, the constitutional dimension of free movement rights is linked to the changing role of the States. The wider literature in this field identifies a transformation of the nature of States,[141] with the EU as a protagonist in this transformation: it offers some collective protective capacity that small Member

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[139] *See* K. Engsig Sørensen (2012), *Non-discriminatory restrictions on trade*, in Sanford E. Gaines, B. Egelund Olsen, K. Engsig Sorensen eds., Liberalising trade in the EU and the WTO: a legal comparison, p. 200.

[140] C. Barnard (2004), *The Substantive Law of the EU: The Four Freedoms,* Oxford University Press; N. Nic Shuibhne (2014), *Exceptions to Free Movement Rules*, in C. Barnard and S. Peers eds., *European Union Law*, Oxford University Press; J. Snell (2016), *Economic Justifications and the Role of the State* in P. Koutrakos, N. Nic Shuibhne and P. Syrpis eds., *Exception from EU Free Movement Law, Derogation, Justification and Proportionality*, pp. 12 ss., Hart Publishing.

[141] P. Bobbit (2002), *The Shield of Achilles: War, Peace and the Course of History,* Penguin.

States are not able to provide on their own and it also reduces the ability of Member States to protect their citizens, by setting rules concerning, in particular, free movement and undistorted competition.

Therefore, the check of the interest in enacting the restriction in question, that is to see if it is purely economic or not, is no more linked to politics and finds its basis on the markets sphere. In this sense, a State cannot protect an interest when it restricts free movement, and the effect is that States have fewer instruments to protect the economic stability and security of their citizens.[142]

Then, the CJEU[143] built a fence between economic and non-economic interests and put the bases of the doctrine of the inadmissibility of purely economic justifications. In particular, the case-law provides us with some examples of purely economic justifications. Micro-reasons are the easiest to understand, and they refer to the protection of a specific undertaking, i.e., the erosion of the tax base or the loss of tax revenue, but the jurisprudence identifies other less clear scenarios.[144]

Breaches might happen only in exceptional circumstances, such as a commercial decision taken as a consequence of an offensive communication, based on racial discrimination. These forms of discrimination are forbidden also when they concern

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[142] J. Snell (2016), *Economic Justifications and the Role of the State, cit.*

[143] Dating back to 1961, see: Judgment of the Court of 19 December 1961, C-7/61, *Commission of the European Economic Community v Italian Republic*, ECLI:EU:C:1961:31.

[144] For an analysis of the other categories of justifications, *see*: J. Snell (2016), *Economic Justifications and the Role of the State, cit.*

citizens of non-EU States; therefore, the protection of consumers' human rights actually can hinder the establishment of the internal market.[145]

2.4 THE HORIZONTAL APPLICATION OF FREE MOVEMENT RULES

If geo-blocking measures were put in place by a Member State, for example through legislation, this would undoubtedly be considered as a restriction to the free movement of goods or services, with the sole exception of a measure that is necessary and proportionate.

Therefore, a State legislation which imposes rerouting is *per se* illicit but it can be justified – for example – in the case that it was intended forbid the sale of products contrary to the public order.

Then there is no doubt that free movement rules apply in relation to Member States, while the text of these rules does not clarify the extent of their application to private parties, i.e., their horizontal effect.[146] Similarly, the competition rules certainly apply to private parties. Therefore, we use to consider competition law as applicable – horizontally – to private parties and free movement rules as applicable – vertically – to States. However, there is no rule which prohibits the application of competition law to States and of free movement rules to private parties. Moreover, the goal of the internal market seems to be the key to interpret free movement rules; therefore, their

[146] N. Nic Shuibhne (2013), *Chapter 4: The Negative Scope of Free Movement Law: Cross-Border Connections and the Significance of Movement* in The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice, Oxford University Press, p. 102.

horizontal effect would be effective whenever it is functional to establish the internal market.

As mentioned in the introduction to this chapter, the issue of the horizontal effect is essential if one wants to better understand the role covered by free movement rules in the geo-blocking assessment.

The general rule is that the fundamental freedoms usually do not protect market participants from one another.[147]

The literature is not uniform on the point. Part of the Authors argues that competition rules are sufficient to address those obstacles to the internal market which derive from actions of private parties and, therefore, fundamental freedoms do not apply to them.[148] Another part of the literature has the contrary position, i.e., that a private action, which is not subject to competition rules, can affect the access or the functioning of the internal market and that – in these cases – free movement rules have to be applied horizontally.[149]

The debate can be framed in the broader context of direct effect, i.e. the attribution by the EU law of enforceable rights to individuals, overriding the dualism which asks the reception of external laws into the domestic legal system.[150]

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[147] H. Schulte-Nölke *et al*. (2013), *PE 507.456, cit.*

[148] G. Marenco (1987), *Competition between national economies and competition between businesses - a response to Judge Pescatore*, in Annual issue on European Community law, vol. 10, n 3, p. 420.

[149] M. Mataja (2016), *Private Regulation and the Internal Market,* Oxford University Press.

[150] N. Nic Shuibhne (2013), *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice, cit.*; Editorial Comment (2010), *The Scope of Application of the General Principles of Union Law: An Ever Expanding Union,* Common Market Law Review, 47 (6), p. 1598.

The case-law helps us in setting the horizontal application of free movement rules. The approach of the Court has been prudent and open to this horizontal application on a case-by-case basis. In its jurisprudence, the Court has framed four different levels of *horizontality* in the free movement application:

(i) having a collective regulatory impact;

(ii) linking private actors to Member States when private actions concretely obstacle the free movement of goods;

(iii) balancing with intellectual property rights;

(iv) reaching a full horizontal application, in the case of free movement of workers.

(i) The first relevant jurisprudence relates to the application of free movement rules to privates organised in a collective manner, such as private associations. In this sense, the Court argued that the 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 organisation not governed by public law, of their legal autonomy"*.[151] The *ratio* beyond this statement seems to be that in these cases we are in front of private actors which are in the condition to impose an effective restriction on free movement and that cannot be overcome by any market alternatives.[152]

In line with this interpretation, national and international professional sporting association have been considered by the Court as subject to the rules on freedom of

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[151] Judgment of the Court of 11 April 2000, Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL*, ECLI:EU:C:2000:199, paragraph 47.
[152] M. Poiares Maduro *et al.* (2017), *PE 595.362, cit*.

movement since they can have regulations with a substantial impact on their cross-border activities.[153] Similarly, in *Viking*[154] and *Laval,*[155] the fundamental freedoms apply toward the collective actions put in place by trade unions.

(ii) In other cases, the Court applied the free movement rules to private actors due to their link to States' activities. In this sense, in *Fra.bo.*, a private law body in charge to certificate the quality of certain water fittings has been considered as such as the holder of the *"power to regulate the entry into the German market of products such as the copper fittings […]".*[156]

(iii) A parallel strand of jurisprudence concerns the limitation of intellectual property rights in the light of the free movement of goods. In this sense, in *Centrafarm* – case which will be analysed in chapter 4 of this work – the Court declared: *"In fact, if a patentee could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby*

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[153] Judgment of the Court of 12 December 1974, C-36/74, *Walrave and Koch v. Union Cycliste*, ECLI:EU:C:1974:140; Judgment of the Court of 15 December 1995, C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*, ECLI:EU:C:1995:463.

[154] Judgment of the Court (Grand Chamber) of 11 December 2007, C-438/05, *Viking*, ECLI:EU:C:2007:772.

[155] Judgment of the Court (Grand Chamber) of 18 December 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809; see R. Zahn (2008), *The Viking and Laval Cases in the Context of European Enlargement*, in Web Journal of Current Legal Issues; M. V. Ballestrero (2008), *Le sentenze Viking e Laval: la Corte di Giustizia "bilancia" il diritto di sciopero, in Lavoro e diritto*, XXII, n. 2, pp. 389-391; F. Vecchio (2010), *Dopo Viking, Laval e Rüffert: verso una nuova composizione tra libertà economiche europee e diritti sociali fondamentali?*, in www.europeanrights.eu, p. 7.

[156] Judgment of the Court (Fourth Chamber) of 12 July 2012, C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV*, ECLI:EU:C:2012:453, paragraph 31; for an analysis of the case, see: H. Schepel (2013), *Case C-171/11 Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches*, in European Review of Contract Law; A. Crespo van de Kooiji (2013) *The Private Effect of the Free Movement of Goods: Examining Private-Law Bodies' Activities under the Scope of Article 34 of the Treaty of the Functioning of the European Union*, 40 Legal Issues of Economic Integration, Issue 4, pp. 363–374.

restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents".[157] In other words, the interest of the proprietor to exercise his/her intellectual property rights in the manner he/she prefers, has to be balanced with the principle of the free movement of goods.[158]

(iv) The last relevant case-law to be considered is the one concerning the free movement of workers. In this field, the Court has been more open to the application of the provision of freedom of movement to private actions. In this sense, in *Angonese* case,[159] a private bank in Bolzano was subject to Article 39 EC (now Article 45 TFEU). In brief, a private person, Mr Angonese, which applied for a work, had been discriminated by the necessity to have a specific certificate of bilingualism issued only by the public authorities of Bolzano. The concrete result was that this requirement was very easy to be fulfilled by residents and the opposite for non-residents. Therefore, even if Mr Angonese was bilingual and owned other certifications attesting its knowledge, he was not admitted to the competition for the bank position and this constituted a breach of free movement of workers.

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[157] Judgment of the Court of 31 October 1974, C-15/74, *Centrafarm v. Sterling*, ECLI:EU:C:1974:114, paragraphs 11 ad 12.

[158] Judgment of the Court of 17 October 1990, C-10/89, *SA CNL-SUCAL NV v. HAG GF AG ("HAG II")*, ECLI:EU:C:1990:359, paragraphs from 15 to 20; Judgment of the Court of 22 June 1994, C-9/93, *IHT Internationale Heiztechnik GmbH*, ECLI:EU:C:1961:31, paragraphs from 41 to 60.

[159] Judgment of the Court of 6 June 2000, C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:2000:296.

Therefore, the CJEU's case-law set up a limit in the application of primary law to geo-blocking restrictions.[160]

In the majority of the cases, private parties do not have the power to prevent other private actors to access the internal market or to distort its functioning, and market alternatives continue to exist.

The Advocate General Maduro – in the *Viking Lines* case – referring to the application of rules on freedom of movement to private actions, asked himself: *"does the Treaty imply that, in order to ensure the proper functioning of the common market, the provisions on freedom of movement protect the rights of market participants, not just by limiting the powers of the authorities of the Member States, but also by limiting the autonomy of others?"* and he clearly answered that: "*[…] the provisions on freedom of movement apply [only] to private action that, by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent*".[161]

The literature listed a series of reasons behind this very conservative jurisprudence, among which we find the necessity to not impose an excessive burden on the Court in terms of workload, and the higher appropriateness of competition law rules in the assessment of conducts of private parties. In this context, due to the undetermined character of free movement principles, we use to refer to more specific secondary rules which: better regulate the matter; are more susceptible to be applied by national

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[160] See M. Poiares Maduro *et al.* (2017), *PE 595.362*, *cit.*, p. 10.
[161] Opinion of Advocate General Maduro, C-438/05, *Viking*, ECLI:EU:C:2007:292, paragraph 48.

courts on a decentralised basis; might include alternative mechanisms of enforcement.[162]

2.5 FUNDAMENTAL FREEDOMS AND FUNDAMENTAL RIGHTS

Other fundamental freedoms and rights – protected at the EU level – will be analysed in the next three sub-paragraphs – in order to exclude or not their application to the geo-blocking phenomenon.

2.5.1 Consumers' human rights

The refusal to sell in one or more Member State can theoretically constitute a discrimination on grounds of race which is firmly forbidden by Articles 19 TFEU and 21(1) of the Charter of Fundamental Rights of the European Union (hereinafter, also, the "Charter"),[163] as well as by the Directive 2000/43/EC.[164]

However, the simple commercial decision of not to sell in a country does not constitute a breach of the consumers' dignity, being endangered only their interest to take part to the internal market. Such breach might happen only in exceptional circumstances, as we have seen in paragraph 2.3 above, as the case of offensive

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[162] See M. Poiares Maduro *et al.* (2017), *PE 595.362., cit.,* p. 11.

[163] Charter of Fundamental Rights of the European Union 2000/C, 364/01, Official Journal of the European Communities, 18.12.2000.

[164] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19.07.2000, p. 0022 – 0026.

communications based on racial discrimination, which can be stopped, not depending by the fact that it concerns citizens of EU or non-EU States.[165]

2.5.2 Freedom to conduct a business and to provide services

The EU action aimed at improving the internal market by incentivising companies to have cross-border activities needs to be balanced with the fundamental rights of business, recognised at the EU level, i.e., the freedom to conduct a business and the freedom to provide services in every Member State.[166]

In particular, we can find the basis for the freedom to provide services in Article 15(2) of the Charter and for the freedom to conduct business in Article 16 of the Charter. These two freedoms are the result of the sum of the provisions of the Charter and the right to liberty,[167] which the Court considers intrinsically linked to the Charter, even though it is not *expressis verbis* in the Charter.

In this path, the CJEU case-law is clear in considering the freedom to pursue a trade as a general EU principle and the freedom to choose whom to do business with as a specification of this principle.[168]

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[165] H. Schulte-Nölke et al. (2013), *PE 507.456*, *cit.*, p. 27 ss.

[166] Judgment of the Court of 16 January 1979, C-151/78, *Nykobing*, ECLI:EU:C:1979:4, paragraph 20; Judgment of the Court (Sixth Chamber) of 5 October 1999, C-240/97, *Spain/Commission*, ECLI:EU:C:1999:479, paragraph 99; H. Schulte-Nölke et al. (2013), *PE 507.456*, *cit.*, pp. 27 ss.

[167] W. Kiemel (2003), *Art. 56 EG*, in von der Groeben/Schwarze, Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, Vol. 1, point 24.

[168] Judgment of the Court of 13 December 1979, C-44/79, *Hauer*, ECLI:EU:C:1979:290, paragraphs from 31 to 33; Judgment of the Court (Fifth Chamber) of 11 July 1989, C-265/87, *Schraede*, ECLI:EU:C:1989:303, paragraph 15; Judgment of the Court (Third Chamber) of 10 July 1991, Joined

These freedoms can be considered as restricted in a very limited number of cases, which usually revolve around discrimination on certain grounds – such as ethnic origin or gender – or which endanger fundamental needs – such as water supply.[169]

2.5.3 Right to not be discriminated

Article 18 TFEU – which will be analysed in chapter 3 below – is related to free movement rules in the sense that it provides for a non-discrimination principle on the grounds of nationality which mainly depend on the scope of free movement rules.[170]

In particular, Article 18(1) TFEU prohibits discriminations based on nationality, while Article 18(2) TFEU grants the EU the competence to prevent – through the legislation – such discrimination.

The CJEU has defined Article 18 as a basic principle of European Union law.[171] It should be noticed that the same provision specifies its enforceability as *"within the scope of application of the Treaties"*. For what is relevant here, the four fundamental freedoms have been considered to fall within the scope of the Article 18 TFEU.[172]

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cases C-90/90 and C-91/90, *Jean Neu and others v Secrétaire d'Etat à l'Agriculture et à la Viticulture*, ECLI:EU:C:1991:303, paragraph 13.

[169] See M. Poiares Maduro *et al.* (2017), *PE 595.362*., *cit.*, p. 30.

[170] See M. Poiares Maduro *et al.* (2017), *PE 595.362, cit*.

[171] Judgment of the Court (Grand Chamber) of 27 October 2009, C-115/08, *Land Oberosterreich/CEZ*, ECLI:EU:C:2009:660.

[172] Judgment of the Court of 13 February 1985, C-293/83, *Gravier*, ECLI:EU:C:1985:69; Judgment of the Court of 2 February 1989, C-186/87, *Cowan*, ECLI:EU:C:1989:47; Judgment of the Court (Sixth Chamber) of 26 September 1996, C-43/95, *Data Delecta*, ECLI:EU:C:1996:357; Judgment of the Court of

However, there are doubts concerning the direct applicability of Article 18 to private persons.[173] Indeed, the provision certainly finds application in favour of individuals against Member States[174] and toward the EU legislation.[175] Therefore, the horizontal application of fundamental rules, i.e., the direct application of these rules to private parties, is a forerunner of the application of the non-discrimination principle in this field. Thus, the analysis carried out in paragraph 2.4. above might be considered as valid also with regard to the application of the non-discrimination principle in the scope of the fundamental freedoms toward individuals. In this sense, while large part of the jurisprudence does not apply Article 18 TFEU to individuals, the landmark case *Angonese* – briefly analysed in paragraph 2.4 above – states: *"Consequently, the prohibition of discrimination on the ground of nationality laid down in Article 48 [Article 18] of the Treaty must be regarded as applying to private persons as well".*[176]

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7 July 2005, C-147/03, *Commission/Austria*, ECLI:EU:C:2005:427; Judgment of the Court (Grand Chamber) of 13 April 2010, C-73/08, *Bressol*, ECLI:EU:C:2010:181.

[173] H. Schulte-Nölke et al. (2013), *PE 507.456, cit.*

[174] C-26/62, *Van Gend & Loos, cit.*; Judgment of the Court (Sixth Chamber) of 16 December 1992, C-17/91, *Lornoy,* ECLI:EU:C:1992:514, paragraph 24; Judgment of the Court (Sixth Chamber) of 2 October 1997, C-122/96, *Saldanha*, ECLI:EU:C:1997:458, paragraph 15; Judgment of the Court of 24 November 1998, C-274/96, *Bickel,* ECLI:EU:C:1998:563, paragraph 31; Judgment of the Court (Sixth Chamber) of 23 April 2002, C-234/99, *Niels Nygard*, ECLI:EU:C:2002:244, paragraph 51.

[175] Judgment of the Court of 1 October 1987, C-311/85, *Vereniging van Flaamse Reisbureaus*, ECLI:EU:C:1987:418, paragraph 30; Judgment of the Court (Fifth Chamber) of 6 June 2002, C-159/00, *Sapod Audic*, ECLI:EU:C:2002:343, paragraph 74.

[176] , C-281/98, *Angonese, cit.*, paragraph 36.

2.6 CONCLUDING REMARKS

Geo-blocking is a tool in the hands of private actors in the online market, and it interferes with private activities in the said market. Moreover, its use does not conflict with fundamental rights, and the eventual application of free movement principles might have to depend on secondary legislation.[177] Therefore, free movement rules cannot be applied to most cases of geo-blocking and they certainly do not constitute an effective remedy in the hands of traders.

On the contrary, it is crystal clear that competition rules produce their effect on private actors – fundamental rights being irrelevant in this case – and then they apply also in the geo-blocking context.

However, the fundamental freedoms continue to constitute a crucial element in the balancing between different objectives of EU law, such as the freedom of businesses to choose the commercial partners with the consumers' interests or with the IP protection.[178]

[177] See M. Poiares Maduro *et al.* (2017), *PE 595.362, cit.,* p. 11.
[178] H. Schulte-Nölke et al. (2013), *PE 507.456, cit.*

CHAPTER 3

COMPETITION EFFECTS OF THE GEO-BLOCKING PRACTICE

Summary: 3.1. Introduction – 3.2 Non-discrimination as a milestone in the single market – 3.3. The price discrimination category – 3.3.1 Price discrimination: the framework – 3.3.2 Price discrimination: a set of definitions – 3.3.3 Price discrimination: the conditions – 3.3.4 Price discrimination: relevant categories – 3.4 Price discrimination in the current economic thought – 3.5 Price discrimination in Antitrust Law – 3.5.1 Article 101 TFEU – 3.5.1.1 Article 101 TFEU and vertical agreements – 3.5.2 Article 102(c) TFEU – 3.6 The special category of geographic discrimination – 3.6.1 The relevant case-law on geographic discrimination – 3.6.2 Exceptions to the ban – 3.6.2.1 Active sales restrictions – 3.6.2.2 Parallel imports restrictions – 3.6.2.3 Objective justifications – 3.7 The exceptional nature of the equal treatment obligation – 3.8 The competition law assessment of geo-blocking: conclusions

3.1 INTRODUCTION

In the first chapter, we saw the primary function of geo-blocking: it helps service/goods providers to set apart customers into groups with different accesses to contents and with different terms and conditions.

From a competition law perspective, the tool of geo-blocking *per se* is not relevant. Instead, the conducts made possible by geo-blocking have relevance.

Therefore, geo-blocking is connected to the discrimination category as it allows to categorise consumers of products and services sold online, i.e., to apply different trade conditions and, more commonly, different prices.

According to the EU Commission, the employment of geo-blocking hampers the establishment of the digital single market, thus placing such practice under the provisions of TFEU Articles 101 and 102 – whether it occurs in the form of a unilateral conduct of an online seller or of an agreement among competitors.[179] The Geo-blocking Regulation, therefore, would forbid this conduct in the same way as current competition law does, where agreements between two undertakings or certain unilateral conducts by a dominant undertaking are sanctioned.

3.2 NON-DISCRIMINATION AS A MILESTONE IN THE SINGLE MARKET

The prohibition of any discrimination on the grounds of nationality is one of the core principles of the internal market. In general, this is covered by Art. 18 TFEU, where no other specific right of non-discrimination has been stated, and the CJEU has already applied it to several conducts and sectors.[180]

More in general, the CJEU affirmed that the main goal of Article 18 TFEU[181] is to ensure that *"comparable situations are not treated differently and different situations are not treated the same unless such treatment can be objectively justified"*.

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[179] European Commission, *COM(2015) 192 final*, *cit.,* p. 25; see also COM (2015) 192 final, *cit.,* p. 6.
[180] W. Friedl, C. Kaupa (2014), *European Union Internal Market Law*, Cambridge University Press, p. 98.
[181] Judgment of the Court (Grand Chamber) of 12 September 2006, C-300/04, *Eman and Sevinger*, ECLI:EU:C:2006:545.

The very nature of geo-blocking, therefore, becomes relevant in the EU context, since it allows online providers to build virtual boundaries on the basis of nationality and/or location of customers.

Indeed, the Geo-blocking Regulation intends purposely to remove discrimination based on customers' nationality, place of residence or place of establishment. In this view, geo-blocking restricts consumers' choice in goods, services, and digital contents, thereby constituting objective discrimination among European consumers.

Article 20(2) of the so-called Services Directive[182] implements the non-discrimination principle: *"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."*

However, the European Commission does not find this sufficient, since customers keep facing different conditions (geo-filtering) or outright refusals to sell (geo-blocking) when they buy across borders.[183]

With regards to the main form of discrimination, i.e., the diversification in terms of prices, the Geo-blocking Regulation states that *"Where a trader provides a service or a good on an individual basis outside a bundle, the trader should remain free to decide the price*

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[182] 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.

[183] Explanatory Memorandum to COM(2016)289 - *Addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market* - Main contents, p. 2.

to be applied to such a service or a good outside a bundle in so far as the trader does not apply different pricing for reasons related to nationality, place of residence or place of establishment".[184] In other words, price differentiation based on factors other than customers' location is not forbidden. Then, we might argue, the employment of a tool that selects people with more than 70 years, regardless of their residence, would be allowed since it does not result in geographic discrimination.

Thus, price discrimination is the key category to analyse for assessment of geo-blocking and geo-filtering in the light of competition law.

3.3 THE PRICE DISCRIMINATION CATEGORY

3.3.1 Price discrimination: the framework

Price discrimination is a very common practice between companies' business strategies. In 1989, Varian wrote: *"price discrimination is one of the most prevalent forms of marketing practices".*[185]

Market evolution justifies an increasing use of the price discrimination practice, for a number of reasons.

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[184] Geo-blocking Regulation, preamble, paragraph 10.

[185] Cit. H. R. Varian (1989), *Price discrimination*, in Handbook of Industrial Organization, Volume I, Chapter 10, edited by R. Schmalensee and R.D. Willig, Elsevier Science Publishers, p. 598.

Firstly, in the high technology markets, industries often have high fixed and low marginal costs; thus, they have an interest in charging above marginal costs those consumers willing to pay, in order to recover some fixed costs.[186]

Second, in the online market, information technology makes price discrimination easier in the sense that suppliers often have precise data on individual customers, because of their actions online.[187]

Price discrimination can have various forms of expression. For example, different versions of the same product may be designed, with the more expensive ones intended for customers with a willingness to pay higher prices. In this way, the seller incentivises customers to second their willingness to pay.[188] For example – in the book market – at first, we often have a hard-cover version of a new book and some months later the cheaper paperback version. Those who are very interested in the book and that can afford the expense will buy the hardcover version, while those

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[186] D. Ridyard (2002), *Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis*, European Competition Law Review, no. 6, p. 286; J. Temple Lang and R. O'Donoghue (2002), *Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 102EC*, 26 Fordham Int'l LJ 83, pp. 89-90; A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials*, Sixth Edition, Oxford University Press, p. 381.

[187] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials*, *cit.*, p. 381. In this context, we have to consider the privacy issues arising from the use of customers' preferences, cf. A. Odlyzko (2003), *Privacy, Economics and Price Discrimination on the Internet*, ICEC2003: Fifth International Conference on Electronic Commerce, N. Sadeh ed., pp. 355-366.

[188] C. Shapiro, H. R. Varian (1999), *Information rules: a strategic guide to the network economy*, Boston, Harvard Business School Press.

who are not willing to pay the higher price – for lack of interest or means – will buy the cheaper version later.[189]

Furthermore, price discrimination may involve a huge range of practices – i.e., predatory pricing, discount or rebate policy, selective price cuts, etc.[190] – which pursue different scopes and have different impacts on competition, but for the purposes of this work the general category and its interpretation – in the light of the jurisprudence of the Court of Justice of the European Union – are the main points to go through. The key issue related to price discrimination – which constitutes the core of this chapter – concerns its compatibility with EU competition law.

3.3.2 Price discrimination: a set of definitions

From a very general perspective, we are in front of price discrimination *"when the same commodity is sold at different prices to different customers"*.[191] In this sense, price discrimination can also be defined as "targeting". This basic definition has to be

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[189] S. Clerides (2002), *Price discrimination with differentiated products: definition and identification*, 20 International Journal of Industrial Organization.

[190] On these practices, see *inter alia:* C. Ahlborn & D. Bailey (2006) *Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison*, European Competition Journal, pp. 101-143; A. Heimler (2005), *Below-Cost Pricing and Loyalty-Inducing Discounts: Are They Restrictive and, If So, When?*, Competition Policy International, Vol 1, Number 2; G. Faella (2008), *The Antitrust Assessment of Loyalty Discounts and Rebates,* Journal of Competition Law & Economics, Volume 4, Issue 2, p. 375; E. Rousseva (2010), *Rethinking exclusionary abuses in EU competition law*, Hart Publishing.

[191] Cit. Varian (1989), *Price discrimination*, in Handbook of Industrial Organization, Volume I, Chapter 10, edited by R. Schmalensee and R.D. Willig, Elsevier Science Publishers, p. 598; *inter alia*, Landsburg defines price discrimination as "*the act of charging different prices for identical items*", cf. S. E. Landsburg (1998), *Price Theory & Applications.* 4th. Cincinnati: OH: South-Western College Publishing; while Nicholson defines price discrimination as "*selling identical units of output at different prices*", cf. W. E. Nicholson (1997), *Intermediate Microeconomics and its Application.* Fort Worth: TX: The Dryden Press, p. 305.

further specified: the prices charged must be in different ratios with respect to marginal costs.[192] The discrimination can be found in the evidence that binding costs are not sufficient to explain differences in price.[193] As a consequence, price discrimination might occur also in the practice to charge a single price to customers for whom supply costs differ.[194]

The price discrimination category is linked to the customers' *reservation price* one, i.e. the maximum price they are willing to pay for the commodity. In this sense, the supplier who wants to discriminate between its customers pursues the goal of charging each of them with its reservation price (this conduct has been defined as *perfect* first-degree discrimination, see also paragraph 3.3.4. below).[195]

In concrete, it is more common that the supplier identifies groups of customers with similar reservation price (second-degree discrimination, see paragraph 3.3.4. below), which can be calculated based on tangible characteristics – such as age or occupation – and charges different prices on the different categories (third-degree discrimination, see paragraph 3.3.4. below).[196]

Another relevant category is the *arbitrage* one, i.e. trading between customers, where those who are charged less sell on to those who are charged more. It is self-evident

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[192] G. J. Stigler (1987), *The theory of price*, Edition 4, Macmillan; L. Philips (1983), *The Economics of Price Discrimination,* Cambridge University Press; H. R. Varian (1989), *Price discrimination, cit*.

[193] H. R. Varian (1989), *Price discrimination, cit*.

[194] R. Thompson QC, C. Brown and N. Gibson (2013), *Article 102*, in Bellamy & Child, European Union Law of Competition, seventh edition, edited by V. Rose and D. Bailey, Oxford University Press, paragraph 10.081, p. 800.

[195] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials, cit.,* p. 381.

[196] M. Motta, *Competition Policy,* Cambridge University Press, 2004, p. 492.

that arbitrage disincentives and often excludes price discrimination. Clearly, services are more affected by price discrimination since they are often consumed on the spot, thus excluding opportunities for arbitrage.[197]

3.3.3 Price discrimination: the conditions

We can identify three main conditions that are necessary for a company to discriminate in terms of price.

First, the company must have considerable market power, i.e., it must be able to set *supra*-competitive prices. Dominance is not necessary, however.[198]

Second, the company needs to categorise its customers depending on their willingness to pay for each unit. The level of information, which the company has access to, determines the type of price discrimination that may be employed.[199]

Third, the company must prevent arbitrage between consumers, i.e.avoid or limit the resale of its goods and services by customers paying lower prices to those who pay higher prices.[200]

3.3.4 Price discrimination: relevant categories

Traditionally, price discrimination used to be classified in a three-degree scale.[201]

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[197] D. Begg, G. Vernasca, S. Fisher and R. Dornbush (2011), *Economics*, McGraw-Hill, p. 190; A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials, cit.*, p. 382.
[198] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach*, The Global Competition Law Centre Working Papers Series, no. 07/05, p. 4.
[199] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.*, p. 5.
[200] D. W. Carlton, J. M. Perloff (1999), *Modern Industrial Organization*, Third Edition, Addison-Wesley, Chapter 9.

First-degree or perfect price discrimination requires the seller practicing a different price for each unit of goods in such a way that the price charged for each unit is equal to the maximum willingness to pay for that unit.[202] In other words, the buyer will pay the maximum that he is willing and able to pay.[203]

First-degree price discrimination can be linked to the "personal discrimination"[204] since the seller must know specific information about every customer, in order to set the highest possible price for each unit. Therefore, in first-degree price discrimination, the seller is able to make a take-it-or-leave-it offer, bargaining with the buyer in order to reach its reservation price.[205] In concrete, sellers are very unlikely to have this level of information: this form of discrimination has been described as "perfect discrimination", and it is usually regarded as a theoretical hypothesis; under perfect price discrimination, the seller is able to charge for each consumer the exact amount he wants to pay, capturing the entire consumer surplus, gaining a profit that corresponds to the total welfare (i.e., the sum of profits and surplus).

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[201] Cf. A. C. Pigou (1920), *The economics of welfare*, London, Macmillan and Co.; C. Shapiro, H. R. Varian (1999), *Information rules: a strategic guide to the network economy*, *cit*.

[202] H. Varian (1985), *Price Discrimination and Social Welfare*, The American Economic Review 75, no. 4, pp. 870-875.

[203] K. Carroll, D. Coates (1999), *Teaching Price Discrimination: Some Clarifications*, Southern Economic Journal , 66 (2), pp. 466-80.

[204] F. Machlup (1952), *The Political Economy of Monopoly.* Baltimore: MD: The Johns Hopkins University Press; W. G. Shepherd (1997), *The Economics of Industrial Organisation,* Englewood Cliffs: NJ: Prentice-Hall.

[205] K. Carroll, D. Coates (1999), *Teaching Price Discrimination: Some Clarifications, cit.*

Second-degree price discrimination, or "nonlinear pricing", occurs when customers are pushed to self-select into groups based on their willingness to pay.[206] Therefore, second-degree price discrimination depends on the characteristics of the good or service to be sold, such as the number of units of goods being bought or the particular moment when the service is acquired. As a consequence, the customers reveal their reserve prices, making a choice. Quantity discounts are the obvious example:[207] the price per unit decreases after the purchase of some pre-set number of units.[208] That is, each consumer faces the same price schedule, but the schedule involves different prices for different amounts of purchased good.

Another example is the two-part tariff: the customers pay a lump sum fee and a per-unit charge.[209]A similar scheme can be found in the pricing structure of telephone services composed of a flat tariff and of additional costs based on usage. Regarding the timing aspect, prices for public transportation tickets which consider peak hours constitute second-degree discrimination.

Third-degree price discrimination means that different purchasers are charged different prices, but each purchaser pays a constant amount for each unit of the good

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[206] K. Carroll, D. Coates (1999), *Teaching Price Discrimination: Some Clarifications, cit.*

[207] H. Varian (1985), *Price Discrimination and Social Welfare, cit.*

[208] K. Carroll, D. Coates (1999), *Teaching Price Discrimination: Some Clarifications, cit.*; when the discount is a consequence of the reduction of costs per unit of large-volume transactions, there is no price discrimination.

[209] K. Carroll, D. Coates (1999), *Teaching Price Discrimination: Some Clarifications, cit.*; W. G. Shepherd (1997), *The Economics of Industrial Organisation, cit.*

bought.[210] This form of price discrimination is based on certain characteristics of groups of customers.

Examples of common third-grade discrimination are income-based tuition fees for universities, senior discounts or differences between business and tourist airfares. In these cases, it is understood that certain groups have reduced spending power.[211] Therefore it is also defined as "group discrimination":[212] the seller uses verifiable criteria such as age, work position, religious orientation, geographic origin, or other characteristics of the customers, in order to identify their willingness to pay for a specific product or service and to create categories of customers *ex ante*, which are then subject to different prices.

As an example, movie theatres apply discounts to children and older people, because they are supposed to have reduced budget. These groups of customers are then created on the basis of their elasticity of demand.[213]

Third-degree price discrimination is perhaps the most common form of price discrimination, and geo-blocking is a perfect instrument to put it in place, as it allows to create groups of customers based on their geographic location. Anyway, we have to consider that the emergence of big data, in the form of search histories, preferences on social media, geographical location, etc., has enabled a level of consumer characterisation previously unfeasible. This, in turn, is allowing e-commerce

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[210] H. Varian (1985), *Price Discrimination and Social Welfare, cit.*

[211] See M. Maggiolino (2016), *Big data e prezzi personalizzati*, in Concorrenza e Mercato, n. 23, p. 95.

[212] K. Carroll, D. Coates (1999), *Teaching Price Discrimination: Some Clarifications, cit.*

[213] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.*

companies to edge from a third-degree price discrimination closer to a first-degree type.

Another distinction can be made between primary line and secondary line injury,[214] where the first one prejudices the competitors, often through exclusionary price discrimination,[215] whereas the second one causes distortions to competition between the agents. Therefore, secondary line injury is expressly listed as an abuse by Article 102(c) TFEU,[216] while the primary line injury has to be settled by the European Commission on a case by case basis, through a functional interpretation of Articles 101 and 102 TFEU.[217]

3.4 PRICE DISCRIMINATION IN THE CURRENT ECONOMIC THOUGHT

In the large literature on the economics of price discrimination, there is – in a nutshell – a general consensus that price discrimination is pro-competitive if it increases output and thus has welfare-enhancing effects.[218] However, we cannot exclude the existence of anti-competitive price discrimination which produces adverse effects on efficiency.

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[214] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials, cit.*, p. 381.
[215] In this sense, see: Judgment of the Court (Fifth Chamber) of 16 March 2000, C-395 and 396/96 P, *Compagnie Maritime Belge,* ECLI:EU:C:2000:132, where the dominant undertakings pursued selective low pricing policies in order to exclude their competitors.
[216] Cf. E. Østerud (2010), *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests, International Competition Law Series*, Wolters Kluwer.
[217] Cf. D. Geradin, A. Layne-Farrar and N. Petit (2012), *EU Competition Law and Economics*, Oxford University Press, pp. 4.999 ss.
[218] R. Schmalensee (1985), *Price Discrimination and Social Welfare*, 75 Am Econ Rev, p. 870.

In economics,[219] "price discrimination" refers to those cases of imperfect competition[220] in which a company provides the same goods at different prices, higher than the marginal cost of these products or services.[221] The primary objective of other companies following this strategy is to apply demand-based pricing and, in particular, pricing based on customers' *willingness to pay* – that is, on their reservation price – rather than cost-plus pricing, where instead a fixed mark-up is added to the production price. However, as already mentioned in paragraph 3.3.4 above, the reservation price of customers is not easy to determine, or rather, it is uncommon for a company to have access to all of the information required to learn about its buyers' preferences.[222]

The economic literature struggled on the topic of relations between price discrimination and welfare. For the most part, economists agree that the welfare

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[219] There is abundant economic literature on the field; see, *inter alia,* D. Ridyard (2002), *Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis, cit.*; D. W. Carlton, J. M. Perloff (1999), *Modern Industrial Organization, cit.*; J. Tirole (2003), *The Theory of Industrial Organization*, The MIT Press, Chapter 3; H. Varian (1985), *Price Discrimination and Social Welfare, cit.*; R. Schmalensee (1981), *Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination*, American Economic Review, pp. 242-247.

[220] L. A. Stole (2003), *Price discrimination and imperfect competition*, available at http://web.mit.edu/14.271/www/hio-pdic.pdf (last access 6 October 2017), P. Areeda and H. Hovenkamp (2007), *Antitrust law. An analysis of antitrust principles and their application*, Boston, Aspen Publishers, IIB, p. 150; S. Carbonneau, P. McAfee and S. Mialon (2004), *Price discrimination and market power*, *Emory economics*, p. 413; M. E. Levine (2002), *Price discrimination without market power*, 19 *Yale J. on Reg*.

[221] S. Clerides (2002), *Price discrimination with differentiated products: definition and identification*, *cit.,* p. 1385.

[222] For a more general and complete analysis, see M. Maggiolino (2016), *Big data e prezzi personalizzati, cit.,* p. 95.

effects of price discrimination are ambiguous.[223] Surely there is no logical correlation between price discrimination and the decrease of the welfare, just as it is clear that price discrimination is not inherently unfair.[224] Even more, price discrimination easily results in better outcomes for everyone.[225] The dominant literature argues that *"generally discriminatory prices [are] required for an optimal allocation of resources in real life situations*"[226], i.e., it often stimulates efficiency in the economy.

Another certainty is that welfare effects cannot be determined *a priori*, but rather a case-by-case analysis is necessary.[227]

In 1981 Richard Schmalensee introduced a necessary condition for price discrimination to increase social welfare, i.e. the increase of the output, considering this statement as valid only in the case of independent demands and constant marginal costs.[228] Varian clarified that Schmalensee's observation is true in much more general circumstances.[229] Today, this position is consolidated in the literature.[230] Economic schemes show that price discrimination is more likely to increase the

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[223] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit*.

[224] This expression has been used in: J. M. Elegido (2011), *The Ethics of Price Discrimination*, *Business Ethics Quarterly* 21, no. 4, pp. 633-660.

[225] W. J. Baumol and D. G. Swanson (2003), *The New Economy and Ubiquitous Competitive Price Discrimination*, 70 Antitrust L.J., p. 661; E. Levine (2002), *Price discrimination without market power, cit.*

[226] L. Philips (1983), *The Economics of Price Discrimination, cit.*

[227] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.*, p. 5.

[228] R. Schmalensee (1981), *Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination, cit.*

[229] H. Varian (1985), *Price Discrimination and Social Welfare, cit.*

[230] S. Bishop, M. Walker (2002), *The Economics of EC Competition Law,* Sweet & Maxwell.

output, where the seller has a decrease in average total costs.[231] Fixed costs recovery is one of the main reasons that push a company to practice price discrimination, as it allows an expansion of the output while spreading the fixed costs over a larger number of units.[232]

More recently, part of the economic literature argued that the probability of price discrimination raising social welfare increases when the preferences or the incomes of consumer groups become more heterogeneous.[233]

In the case of first-degree price discrimination, this analysis is strictly connected to the welfare standard selected.[234] Indeed, first-degree price discrimination – on one side – enhances total welfare, i.e. the sum of producer and customer welfare. On the other side, it decreases the consumer welfare, since the consumer surplus is fully absorbed by the producer.[235]

Second- and third-degree price discriminations increase welfare, at the condition that they allow to supply a group of customers that otherwise would not be supplied.[236] In addition, both second and third price discriminations allow price-sensitive

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[231] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.*; D. Ridyard (2002), *Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis, cit*.

[232] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.*; D. Ridyard (2002), *Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis, cit.*

[233] Y. Kwon (2006), *Third-Degree Price Discrimination Revisited,* The Journal of Economic Education (Taylor & Francis) 37, no. 1, pp. 83-92.

[234] S. Bishop, M. Walker (2002), *The Economics of EC Competition Law, cit.,* p. 196.

[235] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.,* p. 6.

[236] *Ibid*., p. 7.

consumers access to services that would be unavailable to them otherwise: third-degree price discrimination through the uniformity of the price (e.g., peak and off-peak train tariffs);[237] second-degree price discrimination by taking the form of rebates for new categories of consumers which would not be able to buy a product or a service at a uniform price.

Part of the literature argues that – in case of linear market demands and constant marginal costs – monopolistic third-degree price discrimination lowers welfare.[238] This does not exclude the position that in many cases price discrimination is more likely to produce greater welfare than uniform pricing conduct.

Looking for a link between price discrimination and geo-blocking, we shall focus on the scenario previously defined as third-degree discrimination:[239] a company chooses a verifiable criterion – such as job, geographic location, age of the customer – and uses it as a measure of its customers' wealth and/or demand for a particular product or service. This, then, allows the application of different prices to each group.

In particular, the practice of geo-blocking may realize a third-grade discrimination based on the well-established assumption that people living in different geographical areas have different spending power in general.[240]

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[237] S. Bishop, M. Walker (2002), *The Economics of EC Competition Law, cit.,* p. 198.
[238] V. Kaftal, D. Pal (2008), *Third Degree Price Discrimination in Linear-Demand Markets: Effects on Number of Markets Served and Social Welfare*, *Southern Economic Journal* 75, no. 2, pp. 558-573.
[239] A.C. Pigou (1920), *The economics of welfare*, London, Macmillan and Co.; *C.* Shapiro, *H.R.* Varian (1999), *Information rules: a strategic guide to the network economy*, Boston, Harvard Business School Press.
[240] European Commission, *COM(2015) 192 final*, *cit.,* p. 9.

The additional implementation of geo-filtering, moreover, may allow the automatic application of different pricing based on location. For example, on average, a customer in Finland may pay more than a customer based in Portugal for an identical service.

Finally, a last consideration: in the balance between price discrimination and social welfare, *ethics* are often taken into account. In this regard, a sum-up of the prevalent literature may be that there is no independent ethics of price discrimination. The price paid – in case of price discrimination – is not wrong according to the appropriate standard of fairness and, therefore, it is not unjust. In other words, the presence of price discrimination is irrelevant to the justice of a price.[241]

3.5 PRICE DISCRIMINATION IN ANTITRUST LAW

The hostility of antitrust law to price discrimination finds its origin in the comparison of perfect competition without price discrimination to monopoly with price discrimination. However, the perfect competition is a theoretical limiting case which does not exist in reality.[242]

As we will see in the next two paragraphs, in the EU competition law, price discrimination may represent a unilateral policy, that shall be examined as a practice set up by a company in a dominant position, or a multilateral policy, that shall be considered as an agreement between companies. To briefly summarise, pursuant to

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[241] M. Elegido (2011), *The Ethics of Price Discrimination, cit.*

[242] See M. Maggiolino (2016), *Big data e prezzi personalizzati, cit.*

lett. (c) in art. 102 of the TFEU, a dominant company abuses of its position when *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*; likewise, in accordance with lett. (d) in art. 101 of the TFEU, an agreement is anticompetitive when it applies *"dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*.

It is understood that the European Commission set out to preserve the integrity of the EU internal market – a clear objective of its policy when putting competition law in effect – with a rather uncompromising attitude, somewhat detached from the actual legislative framework or, at least, from its current leading interpretation.

Then one may argue that if the European institutions raised consumers' interests as a proper legal priority, a ban on discriminatory conducts might enforced by stretching the interpretation of Article 101(c), putting forward the same kind of arguments employed in the case of the prohibition on geo-blocking. Otherwise, Article 102 TFEU may still be applied, knowing that it does not foresee a closed number of abuses.

3.5.1 Article 101 TFEU

Article 101 (1) of the TFEU prohibits all agreements between undertakings which may affect trade between Member States and which have as an object or effect the prevention, restriction, or distortion of competition within the internal market, *"and in particular those which: […] (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage […]."* Therefore,

an agreement in breach of Article 101(2) is null and void since it impedes free competition on the internal market.[243]

Thus, Article 101 TFEU is aimed at condemning a discriminatory practice that is the outcome of an agreement[244] between two or more independent undertakings and not the result of a unilateral conduct.

In *Vitamins* Case[245] the Commission stated: *"Article [101(1)] of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market"*. Even more, in the Glaxo *Wellcome* Case,[246] it declared: *"it is well established that (…) Article [101(1)], while dealing with different types of restrictions on parallel trade,[247] (…) seek[s] to achieve the same goal, i.e., market integration"*.

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[243] Article 101, Consolidated version of text on the functioning of the European Union: "*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".*

[244] On the distinction between agreement, decision by associations of undertakings and concerted practice, see *inter alia:* O. Odudu (2012), *Collusion: Agreement and concerted practice,* in The Boundaries of EC Competition Law, Oxford Studies in European Law.

[245] See European Commission, COMP/E-1/37.512, *Vitamins* [2003], O.J. L 6/1.

[246] See European Commission, Case IV/36.957/F3, *Glaxo Wellcome* [2001], O.J. L 302/01.

[247] Parallel imports will be analysed in the following chapters of this work; see European Commission (2004), Press Release, *Commission Communication on parallel imports of proprietary medicinal products frequently asked questions*, available at http://europa.eu/rapid/press-release_MEMO-04-7_en.htm?locale=en (last access 6 October 2017).

The application of 101 TFEU is ruled by Regulation 330/2010 (hereinafter, also, "Block Exemption Regulation"), which is designed to facilitate business planning by setting out that agreements which comply with certain parameters will not face competition law scrutiny. In brief, the parties to the agreement must have low levels of market power (i.e., their market share has to be below 30%), and the agreement must not contain a number of clauses, which are generally considered restrictive *per se*. If these conditions are met, the parties can assume that their agreement does not infringe Article 101(1) TFEU. However, article 4(b) of Regulation 330/2010 decreed that export bans are black-listed, in the sense that agreements which include these provisions cannot benefit from the block exemption and that an export ban can be justified only by exceptional circumstances.

In this sense, it is useful to set out the boundaries of the export ban category. The Commission and the CJEU provide us with a series of sample of export ban, i.e.,: *(i)* a dual pricing scheme whereby the contract provides that a higher price would be set for goods allocated to export;[248] *(ii)* a warranty only valid in a Member State when the consumer bought the product;[249] *(iii)* a contract clause aimed at helping the producer

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[248] Judgment of the Court (Third Chamber) of 6 October 2009, Joined Cases C-501/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services and Others v Commission and Others,* ECLI:EU:C:2009:610. On the facts, the CJEU held that it may be possible to establish that the agreement merited an exemption under Article 101(3) but the Commission did not return to this case after the Court's judgment.

[249] The first decision on this point is: European Commission, Case IV/1.576, *Zanussi SpA Guarantee* [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, along similar lines: European Commission, Case IV/29.420, *Grundig* [1994], OJ L20/15, paragraph 19. This approach was confirmed by the Court in: Judgment of the Court (Fourth

to monitor where the distributor is selling the goods;[250] *(iv)* a contract clause which provides for discounts if the distributor does not export goods, or penalties if goods are exported; [251] *(v)* a contract clause that prohibits cross-supplies between distributors so as to prevent parallel trade;[252] *(vi)* a difference in the amount of the deposit to be given by local and foreign customers.[253]

Therefore, the case-law of the CJEU 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.[254] Since 2000, the majority of the decisions issued by the Commission when applying Article 101(1) TFEU have been cases where export bans were involved.[255]

As already mentioned, 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 might be possible that agreements that prevent parallel trade may not infringe Article 101(1) TFEU or may benefit from an

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Chamber) of 10 December 1985, C-31/85 *ETA Fabriques d'Ébauches v SA DK Investment and others,* ECLI:EU:C:1985:494.

[250] European Commission, COMP/37975 *Yamaha* [2003], unpublished, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/37975/37975_91_3.pdf (last access 6 October 2017), paragraphs 107-109.

[251] European Commission, Case IV/31.400, *Ford Agricultural* [1993], OJ L20/1, paragraphs 13 and 14.

[252] European Commission, COMP/35.918, *JCB* [2002], OJ L69/1, paragraphs 176-178, confirmed in: Judgment of the Court (Second Chamber) of 21 September 2006, C-167/04 P *JCB Service v Commission,* ECLI:EU:C:2006:594.

[253] European Commission, Case IV/31.204, *Mercedes-Benz* [2002], OJ L 257/1.

[254] For example: European Commission, Case IV/35.733, *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. Cf. Judgment of the Court (Sixth Chamber) of 18 September 2003, C-338/00, P *Volkswagen AG v Commission,* ECLI:EU:C:2003:473.

[255] R. Whish and D. Bailey (2015), *Competition Law*, 8th ed., Oxford University Press, p. 674.

exemption under Article 101(3) TFEU; one example is an export ban where the producer has made extensive investments and wishes to protect that investment.[256] These exceptions are analysed in the paragraphs 3.6.2. below.

3.5.1.1 Article 101 TFEU and vertical agreements

Geo-blocking has to be banned as a horizontal discriminatory conduct when it integrates a cartel for market sharing or price fixing and as a vertical discriminatory conduct when there is a decrease in the welfare, i.e., a not-increase of the output.

Vertical and horizontal agreements fall naturally within the scope of Article 101, as they both represent compacts that may impact trade between Member States: vertical agreements are stipulated between different levels in the supply chain, while in horizontal agreements undertakings operate at the same level. With regards to competition policy enforcement, vertical agreements usually attract less scrutiny than horizontal ones, which may constitute unlawful compacts between would-be competitors. However, vertical agreements may still get a lot of attention when they try to limit passive sales,[257] as a result of licensing or distribution agreements.

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[256] See, for example, Judgment of the Court (Fifth Chamber) of 19 April 1988, C-27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC,* ECLI:EU:C:1988:183, 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. For an analysis of the exceptions, see European Parliament (2017), *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects* - Study, IP/A/IMCO/2016-14, PE.595.362.

[257] Passive sales are *"sales in response to unsolicited requests from individual customers […]. Sales generated by general advertising or promotion in media or on the Internet that reaches customers in other distributors' exclusive territories or customer groups […] are normally considered passive",* cit. European Commission,

In particular, in its Guidelines on Vertical Restraints,[258] the Commission argues that if a distributor uses the internet and/or it has a website, this may be *"considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The fact that it may have effects outside one's own territory or customer group results from the technology."*[259] At the same time, the Guidelines acknowledge that by using the internet the distributor may increase and diversify its customer base and that such use must always be allowed. The Commission also provides a few examples of practices that it considers as hard-core restrictions under Art. 4 of the Block Exemption Regulation, some of which may be recognised as geo-blocking (such as preventing access to a website when a customer location does not match that of the distributor's territory). Therefore, licensing or distribution agreements that entail some form of geo-blocking and thus generate barriers to cross-border sales might, in fact, go against Art. 101 TFEU.

3.5.2 Article 102(c) TFEU

Article 102(c) TFEU reads that an abuse of a dominant position may consist in *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*. On this basis, the CJEU has accrued a considerable case-law, relating certain instances of price discrimination with abuses

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DG Comp., *Passive Sales,* in Glossary of Competition Terms, Concurrences, available at: http://www.concurrences.com/en/droit-de-la-concurrence/glossary-of-competition-terms/Passive-sales (last access 20 August 2017).

[258] European Commission (2010), *Guidelines on Vertical Restraints*, SEC(2010)411, [2010] OJ C 130/1.

[259] On this field, see also paragraph 3.6.2.1.

of a dominant position, or rather, with "dissimilar conditions".[260] In addition, the hampering of market integration by dominant companies has been related to abuses of dominance.[261]

For the possible interpretations of this Article, it is useful to focus briefly on each component, i.e.:

i) abuse;

ii) dominant position;

iii)dissimilar conditions to equivalent transactions;

iv) competitive disadvantage.

i) <u>*Abuse*</u>: an abusive behaviour may fall into two categories:

a. *Exploitative abuses* are conducts intended to harm consumers directly; for example: unfair conditions, excessive charges, and market segmentation.

b. *Exclusive abuses*, instead, are behaviours acting against competitors; eventually, the detriment they cause on competition may have an effect on consumers too. Examples of this behaviour include exclusivity agreements, predatory prices, refusals to license IPRs, tying/bundling.

Price discrimination, in this respect, might entail exploitative or exclusionary effects.

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[260] Judgment of the Court of 17 July 1963, C-13/63, *Italian Republic v Commission,* ECLI:EU:C:1963:20.
[261] Judgment of the Court (Grand Chamber) of 16 September 2008, Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia,* ECLI:EU:C:2008:504; European Commission, COMP/39351, *Swedish Interconnectors* [2010], OJ C142/28; Judgment of the Court of 14 February 1978, C- 27/76 *United Brands v Commission*, ECLI:EU:C:1978:22.

ii) <u>*Dominant position*</u>: the CJEU has provided a definition of dominance under Art. 102 TFEU: "*The dominant position […] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"*.[262] In other words, for an undertaking to be dominant as such, it requires "substantial and durable market power".

The Court further deepened this definition through the *Hoffmann-La Roche* case:[263] some degree of competition might even be present, but a firm is deemed as dominant if it can still have an observable influence on the conditions with which such competition occurs.[264]

For an appraisal of whether or not a company is dominant, a definition of its *relevant market* is necessary as well, that is, "*a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face"*.[265] This

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[262] C-27/76, *United Brands v. Commission*, *cit.* Whish and Bailey argue that paragraph 65 of United Brands Case is fundamental since it links the legal definition of "dominant position" and the economic concept of "market power"; cf. R. Whish and D. Bailey (2015), *Competition Law, cit.*

[263] Judgment of the Court of 13 February 1979, C-85/76, *Hoffmann-La Roche & Co AG v. Commission,* ECLI:EU:C:1979:36, paragraphs 38-39.

[264] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials, cit.*

[265] European Commission (1997), *Notice on the definition of the Relevant Market for the purposes of Community Competition Law*, OJ C372, pp. 5–13.

brings us to the conclusion that dominance is not forbidden by itself, but rather it is its abuse that raises concern under EU competition law.

iii) *Dissimilar conditions to equivalent transactions*: the simplest criterion is that of a different cost for two sales of the same product.[266] However, the degree of significance of this difference must be taken into account, for any single transaction might vary with respect to the others due to various legit factors, such as the time of the purchase of an airline ticket, for example.[267] Moreover, one should assess whether the situation of different buyers has to be considered and in which measure, so as to evaluate the equivalence of two transactions or their lack thereof.[268] The CJEU case-law provides many elements that may be used in discriminating transactions, such as disparities in taxation, labour wages, transportation costs, etc.[269] Indeed, the determination of equivalence needs a case-by-case basis, since clear guidelines are not available in this regard.[270]

In any case, the price of goods is understood as the key variable considered by consumers for their transactions and price discrimination may stand for *dissimilar conditions* since, according to the CJEU case-law, such conditions should also include

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[266] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit.*; J. Faull, A. Nikpay (2014), *The EU law of competition, cit.*

[267] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit*.

[268] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit*.

[269] C-27/76, *United Brands Company v. Commission*, *cit.*

[270] Van Beal & Bellis (2005), *Competition Law of the European Community,* Kluwer Law International.

different prices.[271] The *United Brands* Case will give me ample opportunities to explore this argument in the following section. EU law regards a similar treatment of different situations and, vice versa, a diverse treatment of similar situations as discriminatory. The actual discrimination would spring from the different rate of return inherent in two otherwise similar transactions. In addition, EU rule does not require the awareness of the dominant undertaking that it is, in fact, providing dissimilar conditions. The lack of this requirement is particularly critical, since dominant companies are expected to assess in advance the legitimacy of their conducts, or lack thereof.[272]

iv) *Competitive disadvantage*: for an abuse to occur, it is generally understood that the employment of dissimilar conditions should "harm competition". This suggests that customers are seen as competing among themselves within their relevant market, which would consist in where one may find *"the same level of trade in the same relevant product and geographic market"*, according to the Commission and the EU courts.[273] The way case-law has interpreted the relevance of such a requirement, however, has not been uniform at all. Several discording examples may be found, such as the *Corsica Ferries* Case,[274] where the possibility of competitive disadvantages was not even considered, or the *Irish Sugar* Case[275] where, on the contrary, this

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[271] D. Geradin, N. Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach, cit*.
[272] R. O'Donoghue, J. Padilla (2013), *The Law and Economics of Article 102 TFEU*, Hart Publishing.
[273] R. O'Donoghue, J. Padilla (2013), *The Law and Economics of Article 102 TFEU, cit.*
[274] See Judgment of the Court of 17 May 1994, C-18/93, *Corsica Ferries*, ECLI:EU:C:1994:195.
[275] See Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, T-228/97, *Irish Sugar v. Commission*, ECLI:EU:T:1999:246.

element was taken as a given. Lastly, in *British Airways v. Commission*, the CJEU argued that one should bring forward proof that discrimination *"tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to others"*.[276] Therefore, lacking any actual evidence, one may still suffice by showing that there is a "tendency" from the undertaking to put its trading partners at a competitive disadvantage.

It is a tenet that competitive disadvantages occur only in relations between *companies*.[277] However, certain policies toward customers – such as geo-blocking – may be punished under Article 102 of the TFEU, according to its usual *functional* interpretation. Indeed, there are cases where the Commission used Article 102(c) TFEU in order to forbid discriminatory conducts affecting mainly consumers. This certainly occurred when such discriminatory conducts were seen as obstacles toward the implementation of the internal market, since their use of geographical location, nationality and/or place of residence of the discriminated was covertly re-establishing barriers between Member States.[278]

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[276] See Judgment of the Court (Third Chamber) of 15 March 2007, C-95/04 P, *British Airways v. Commission,* ECLI:EU:C:2007:166, paragraph 144.
[277] J. Faull, A. Nikpay (2014), *The EU law of competition,* Oxford University Press, p. 387; C. Bellamy and G. Child (2016), *European Union Law*, Oxford University Press, p. 803; M. Libertini (2014), *Diritto della concorrenza dell'unione europea*, Giuffrè, p. 326.
[278] See, *inter alia*, C-27/76, *United Brands v. Commission, cit.*

3.6 THE SPECIAL CATEGORY OF GEOGRAPHIC DISCRIMINATION

In the document for the launch of a public consultation on geo-blocking, the European Commission underlined that "*current rules prohibit discrimination on the basis of residence or nationality, both in the online and offline world*".[279]

In the light of the internal market objective, any discriminatory behaviour among countries or geographical area is under a status of *per se* prohibition in EU Law.[280]

As mentioned in paragraph 3.2 of this chapter, the prohibition of discrimination because of nationality is a fundamental tenet of EU law, enshrined in Article 18 TFEU, on the basis that it hampers the internal market.

Geographic discrimination constitutes a special category or a particular case, since it reproduces the barriers between Member States and, in the EU, it is banned without any consideration related to welfare. In other words, this ban might be considered as purely instrumental in reaching the goal of the internal market.

Article 102(c) TFEU remains the key-provision, and it has been the legal basis for sentences against discrimination based on nationality, domicile or place of establishment.[281] In particular, price discrimination has been highly condemned in the light of the goal of the internal market.[282]

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[279] European Commission, *Public consultation on geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU*, published on 24 September 2015.
[280] M. Motta, *Competition Policy, cit.*
[281] M. Siragusa (2008), *Is there an Independent/Additional (European, International) Open-Market Criterion for Determining Abuse*, in Intellectual Property, Market Power and the Public Interest, I. Govaere and H. Ullrich eds., PIE-Peter Lang.
[282] P. Furse (2004), *Competition Law of the EC and UK*, 4th ed., Oxford University Press, p. 320.

Part of the literature considers that competition authorities should be concerned by geographic price discrimination only in so far as the dominant undertaking is involved in practices aimed at reducing arbitrage.[283] Another position considers that we are in the presence of a harm to competition as a consequence of price discrimination only in cases where State-related entities apply dissimilar conditions to trading parties from diverse Member States.[284]

3.6.1 The relevant case-law on geographic discrimination

The relevant CJEU decisions have been motivated by the desire to prevent market segmentation along national lines.

In a nutshell, I was not able to find EU decisions that tolerate geographic discrimination; below I will recap some of the landmark cases which condemn it.

The *United Brands*[285] and *Tetra Pak I*[286] are the main cases which make it clear that if a dominant firm charges different prices in different Member States, it may also infringe Article 102 TFEU. The reading of these decisions manifests the desire of the EU Courts to prevent market segmentation along national lines. However, these cases are less straightforward than those where discrimination on the basis of nationality is expressly involved because it is not clear whether it is the

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[283] M. Siragusa (2008), *Is there an Independent/Additional (European, International) Open-Market Criterion for Determining Abuse, cit.*

[284] D. Gerard (2005), *Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities*, College of Europe - Global Competition Law Centre, Research Paper on the Modernisation of Article 82 EC.

[285] C-27/76, *United Brands v. Commission*, *cit.*

[286] European Commission, Decision 88/501/EEC, *Tetra Pak I*, [1991], OJ No L 272, 4.

discrimination as such which has been condemned, or the discrimination combined with other market-partitioning factors specific to those cases.

In particular, in *United Brands*, UBC (United Brands Company) had a long-standing policy of supplying bananas to ripener-distributors in the Member States where it operated, at considerably varying price levels. Bananas were of identical quality, they were sold in identical conditions, and in the same place (usually Bremerhaven or Rotterdam). The Commission, in a decision upheld by the Court, found this to be an infringement of Article 102(c) TFEU. In their decisions, the Commission and the Court appear to have been particularly influenced by what they saw as UBC's deliberate attempt to partition the EU along national market lines, in particular by forbidding its customers from reselling green bananas. In general, differential prices would stimulate parallel trade,[287] but this additional restriction had the effect of reducing the possibilities for arbitrage by hampering the development of a cross-border wholesale trade in bananas. However, the resale restrictions and discriminatory pricing were separately condemned by the Commission and the Court. UBC argued that its pricing policy was objectively justified since it was charging what the market would bear, and that this differed significantly from one geographic market to another (i.e., variety of locally specific factors such as seasonal demand variations). Neither the Commission nor the Court accepted this argument.

[287] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials, cit.*

In *Tetra Pak II*,[288] the Commission – confirmed by the General Court – condemned geographical price discrimination by a vertically integrated dominant firm that was selling directly to customers in a variety of national markets. In addition, customers for milk packaging machines could purchase cartons only from Tetra Pak itself or from a company designed by it and arbitrage was not possible since customers in high-price countries were not free to buy cartons by third parties in lower-price countries.[289] Moreover, Tetra Pak applied wide differences in the prices, without objective market conditions. Therefore, the Commission and the EU Courts came to the conclusion that the price differences had the attempt to partition the internal market along national lines as the only legitimate explanation. Once again, the resale restrictions had been imposed on Tetra Pak's customers and once again the resale restrictions and discriminatory prices were separately condemned.

Furthermore, in *GVL* (C-7/82)[290] the Court held that a refusal by a dominant company to supply a category of customers, depending on those customers' nationality or domicile, was contrary to Art. 102 TFEU.

In *Corsica Ferries* (C-18/93)[291] the Court of Justice found that pilot tariffs had been set in such a way as to discriminate indirectly against certain ships on the basis of nationality.

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[288] Judgment of the Court of First Instance (Second Chamber) of 6 October 1994, T-83/91, *Tetra Pak Rausing v Commission*, ECLI:EU:T:1994:246; Judgment of the Court (Fifth Chamber) of 14 November 1996, C-333/94 P, *Tetra Pak International SA v Commission*, ECLI:EU:C:1996:436.

[289] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials, cit.*

[290] Judgment of the Court of 2 March 1983, C-7/82, *GVL v Commission,* ECLI:EU:C:1983:52.

[291] C-18/93, *Corsica Ferries*, *cit.*

In the already cited *Irish Sugar* case,[292] the Commission impugned a series of 'sugar export rebates' granted on the sale of sugar to companies exporting to other Member States.[293] These export rebates constitute an abuse since market mechanism were distorted by pricing according to the location of the buyers. These measures were evidently aimed at protecting the Irish sugar market from imports.

In *Fifa World Cup*,[294] the European Commission firmly condemns the practice consisting in requiring the general public outside France to provide a postal address in France to which the tickets of 1998 Fifa World Cup finals could be delivered. The effect was *"to discriminate specifically against the general public resident outside France, given that those resident in France were significantly better placed to meet that requirement [...]. This discrimination amounted in practice to an imposition [...] of unfair trading conditions on residents outside France [...] contrary to Article [102]."* This decision also had further implications since it raised the question – analysed in paragraph 3.5.2. above – whether price discrimination between consumers should constitute an abuse of a dominant position under Article 102 (c) TFEU.

Therefore, the mentioned jurisprudence confirms a ban of geographic discrimination *per se*. This approach founds a validation also in the more recent case-law focusing on conducts qualifiable as geo-blocking, analysed in the previous chapter 1.

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[292] T-228/97, *Irish Sugar v. Commission*, *cit.*

[293] A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials*, *cit.*

[294] European Commission, Case IV/36.888, *1998 Fotball Worldcup*, [1999] OJ L 5, 8.1.2000.

3.6.2 Exceptions to the ban

As already mentioned, pursuant to article 4(b) of Regulation 330/2010 export bans can be justified only by exceptional circumstances.[295]

For the scope of this study, I will briefly frame the three more relevant categories of exceptions, in the context of a geo-blocking and geo-filtering analysis – i.e.: the restriction of active sales; the (very limited) restrictions to parallel imports; and, lastly, other objective justifications.

All these three categories of exceptions represent an expression of the Charter of Fundamental Rights, which binds the EU to safeguard the freedom of undertakings to conduct business.

3.6.2.1 Active sales restrictions

We are in front of an active sale when such sale is made by approaching the final customer actively. This mainly happens through direct mails, including the sending of unsolicited mails or visits or through advertisement in media, on the internet or

[295] In particular, Article 4(b) of the Block Exemption Regulation lists the following exceptions: *"(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, (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade, (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, and (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".*

other promotions specifically targeted at that customer group or targeted at customers in a specific territory.[296]

Article 4 of Regulation 330/2010[297] expressly consents to the restriction of active sales into the exclusive territory or within an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer. Therefore, active sales restrictions in vertical agreements can be allowed, since they benefit from the block exemption. These are mainly expressed by clauses which limit the right of a distributor to actively sell in the territory of exclusive competence of another distributor.

At this point, it is, however, important to refer to the already mentioned passive sales category, defined by the guidelines on vertical restraints which set out the principles for the assessment of vertical agreements.[298] In particular, at paragraph 52 they read: "*In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group; however, such effects result from the technology allowing easy access from everywhere".* The result is that this form of sale – being included in the passive category – cannot be restricted.

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[296] European Commission, *Guidelines on Vertical Restraints*, SEC(2010)411, [2010] OJ C 130/1, paragraph 51.

[297] European 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*, OJ L. 102, p. 1.

[298] European Commission, *Guidelines on Vertical Restraints, cit.*

3.6.2.2 Parallel imports restrictions

At the EU level, we deal with a parallel import when a product is imported from one Member State to another, where the market of destination is outside the formal channels of the manufacturer or of its licensed distributor. Therefore, a significant difference in prices between Member States may incentivise parallel imports, but they may also represent a consequence of national regulations or manufacturers' policies.[299]

EU regulation is particularly severe with regard to restrictions on parallel imports across the European Union. The Court has clearly stated that "*in completing the Internal Market as an area without internal frontiers in which free competition is to be ensured, parallel imports play an important role in preventing the compartmentalisation of national markets*".[300]

Indeed, as already mentioned, the EU internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured (in this sense, see Article 26.2 TFEU).

More specifically, Article 34 TFEU forbids quantitative restrictions on imports, and the following Article 35 does the same with reference to quantitative restrictions on exports.

Therefore, any restriction of customers' ability to resell products within the European Union is likely to constitute a serious infringement of competition law.

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[299]European Commission, *Communication on parallel imports of proprietary medicinal products frequently asked questions*, MEMO/04/7, 19.01.2004.

[300] Judgment of the Court of 8 April 2003, C-44/01, *Pippig Augenoptik v Hartlauer*, ECLI:EU:C:2003:205.

The landmark case in this field involved *Volkswagen,*[301] that had prevented its dealers in Italy from selling new cars to non-residents, in particular German and Austrians consumers. The Commission upheld by the Tribunal and by the Court considered the conduct of Volkswagen as illicit – in agreement with the dealers operating in the Member State – aimed at limiting the sale of its products to the final consumers of another Member State.

There are exceptions but they require a complex legal analysis. Article 36 of TFEU reads: *"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".*

Therefore, pursuant to Article 36 TFEU, parallel imports can be restricted when they offend public morality, policy and/or security, protection of health and life, protection of national treasures, and protection of industrial and commercial property.[302] The same Article 36 put on Member States the burden to justify any refusal to the entrance in their market of products from another Member State. The

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[301] European Commission, Case IV/35.733, *Volkswagen* [1998], OJ L 124, 25.4.1998, p. 60.

[302] For an analysis of all these categories, see O. İnanılır (2008), *Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine*, Ankara Bar Review, 2008/2.

jurisprudence developed the categories of proportionate and necessary as requirements for a restriction to be legal.[303]

In other words, a restrictive measure may be established only when there is no other regulation protecting the interests listed in Article 36 TFEU, which does not restrict intra-EU trade.[304] For example, when the UK decided to ban imports of poultry meat from other Member States, officially on the grounds of public health concerns for the spread of the New Castle disease, the Court considered that this restriction was actually made to protect domestic producers, in particular from French meat.[305] Similarly, the measure adopted by Italy – the prohibition against the marketing of energy drinks with caffeine on the basis that this substance can be harmful to people's health – was stricter than the necessary. In this sense, the Court affirmed that Italy was infringing Article 36 (at the time Article 30 TCE) *"by applying to drinks produced and marketed in other Member States a rule prohibiting the marketing in Italy of energy drinks containing caffeine in excess of a certain limit, without showing that that limit is necessary and proportionate for the protection of public health"*.[306]

Furthermore, in the well-known case *Cassis de Dijon,*[307] the Court introduced further objective justifications for the limitation of a parallel import. In short, Germany banned the importation of a French liqueur – the Cassis de Dijon – on the basis that

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[303] C-15/74, *Centrafarm v. Sterling, cit.*

[304] A. Philipson (2001), *Guide to the Concept and Practical Application of Articles 28-30 EC*, European Commission, Internal Market DG, p. 20.

[305] Judgment of the Court of 31 January 1984, C-40/82, *Commission v. UK*, ECLI:EU:C:1984:33.

[306] Judgment of the Court (Third Chamber) of 19 June 2003, C-420/01 *Commission v. Italy*, ECLI:EU:C:2003:363.

[307] C-120/78, *Rewe-Zentral (Cassis de Dijon), cit.*

its alcohol content (between 15% and 20%) was lower than the necessary level to define it as a proper liqueur, pursuant to German regulation (32%). From the German perspective, the importation of the Cassis de Dijon would constitute a threat to public health and consumer protection, as well as an unfair commercial practice. The Court condemned the German conduct as a barrier to trade since the Cassis fulfilled all French standards. What is relevant is that the Court acknowledged that certain measures might be necessary for the protection of public health, the effectiveness of fiscal supervision and for the fairness of commercial transactions and consumer protection, even if this was not the case. The Court added further objective justifications to those listed in Article 36 TFEU (at that moment 30 TCE).

The legality of parallel import is linked to the *principle of exhaustion of intellectual property rights* (IPR), also known as the *first sale doctrine*, which states that once a product protected by an IPR has been marketed under the authorisation of the IP owner, the IPR of commercial exploitation over this given product can no longer be exercised, as it is exhausted.[308] Therefore, third parties can exploit these goods commercially, by reselling, renting or lending them. Thus, this principle limits the power of the owner to control the downstream distribution and use of its intellectual good.[309]

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[308] WIPO, *International Exhaustion and Parallel Importation*, available at: http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm (last access 6 October 2017).

[309] A. Katz (2016), *The Economic Rationale of Exhaustion: Distribution and Post-Sale Restraints*, in Research Handbook on IP Exhaustion and Parallel Imports, I. Calboli and E. Lee eds., pp. 23-43, Edward Elgar Publishing.

A section of the intellectual property part of this work, in chapter 4 below, will be dedicated to the exhaustion principle and, in particular, to the differences it has in the tangible and digital framework.

3.6.2.3 Objective justifications

As already mentioned in paragraph 3.2., discriminations based on nationality, place of residence or establishment are in principle contrary to EU treaties. This rule clearly finds its application also to unjustified geo-blocking, geo-filtering and other forms of geographically-based discrimination. In this sense, Article 20(2) of the Services Directive[310] implements Article 18 TFEU establishing a burden on Member States to ensure that companies do not treat service recipients differently based on their place of residence or establishment or nationality, unless justified by objective criteria.

The category relevant in this section – dealing with the exceptions to the general ban to geographic discrimination – is indeed the *objective criteria*.

Recital 95 of the Services Directives clarifies that we are not in front of an unlawful discrimination*"(…) where those [different] tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra*

[310] 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.

risks linked to rules differing from those of the Member State of establishment. Neither does it follow that the non provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination".

Therefore, Recital 95 provides us with a long list of generic justifications that a company might involve in order to diversify between customers, on a geographic basis.

With specific regard to the conduct ruled by Article 102 TFUE, the case-law[311] shows that a dominant company may raise a justification for its indictable behaviour.[312]

Therefore, this third category of exception to the total ban of geographic discrimination is constituted by the objective justifications that can be invoked.

With specific regard to geo-blocking and geo-filtering, I selected a series of drivers, that might constitute the basis of possible objective justifications.

First – from a general point of view – the same EU Parliament[313] stressed the existence of positive effects of geo-blocking in particular for the audio-visual industry, mainly related to the need of preventing online content suppliers and

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311 See C-27/76, *United Brands v. Commission*, *cit.*, paragraph 184; Judgment of the Court (Fifth Chamber) of 3 October 1985, C-311/84 *CBEM v CLT*, ECLI:EU:C:1985:394, paragraphs 26–27; Judgment of the Court of First Instance (Second Chamber) of 12 December 1991, T-30/89, *Hilti v Commission*, ECLI:EU:T:1991:70, paragraphs 115–119; Judgment of the Court of First Instance (Second Chamber) of 1 April 1993, T-65/89, *BPB Industries Plc v Commission*, ECLI:EU:T:1993:31, paragraphs 71–72; Judgment of the Court of 6 April 1995, Joined Cases C-241/91 P and C-242/91, *P RTE and ITP v Commission*, ECLI:EU:C:1995:98, paragraph 55.

312 On this point, see T. van der Vijver (2013), *Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?*, Journal of European Competition Law & Practice, Volume 4, Issue 2, p. 121.

313 European Parliament (2016), *Geo-blocking and discrimination among customers in the EU*, Briefing - EU Legislation in Progress, July 2016, PE 586.620.

consumers from infringing copyrights through accessing unauthorised works, and allow rights-holders to discriminate on price in order to match demand from different customer groups in the EU.[314] This last consideration is linked to the analysis of the economic theory about price discrimination carried out in paragraph 3.4. above, which the EU Parliament recognise in the sense that, price discrimination and market segmentation are not negative *per se.*

Second, geo-blocking might be justified in the light of the protection of cultural diversity and of industry's economic model. In particular, the European Parliament considered the financing of audio-visual and film productions which are still based on the territoriality of rights in Europe, asking the Commission to better identify and take into account the specific impact of territoriality on the financing of audio-visual works.[315]

Third, targeting customers cross-border requires specific measures that come at a cost and limited cross-border activities of retailers can partially be explained by the costs/efforts needed to successfully sell in other Member States.[316]

Fourth, the reputation and positioning of a brand can be endangered, if some marketplace sells its products.[317]

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[314] See G. Mazziotti (2015), *Is geo-blocking a real cause for concern in Europe?,* EUI Department of Law Research Paper No. 2015/43, p. 11.

[315] European Parliament (2016), *Geo-blocking and discrimination among customers in the EU*, *cit.* In this sense, see also the opinion of IMPALA – an independent music companies' association – quoted by the Parliament, which considers that extending the geo-blocking regulation to copyright-related services would have negative effects, including for cultural diversity.

[316] European Commission, *SWD(2017) 154 final, cit.*

Fifth, marketplace operators sometimes do not sufficiently address the problem of counterfeit products.[318]

Sixth, the seller might be subject to significant additional complications and extra costs, due to a series of barriers, i.e.:[319]

- Differences in national legal and tax systems (and, in particular, differences in the VAT);
- Differences in national consumer laws (for business to consumers relations);
- Differences in technical specifications or rules on labelling and, in particular, on packaging, with specific regard to linguistic versioning;
- Differences in other relevant laws (e.g., rules concerning: warranties, health and safety of products, electronic waste disposal, etc.) and consequent compliance issues;
- Uncertainty on the applicable law;

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[317] *Ibid.;* in this context, we have to recall the on-going *Coty* case (C-230/16) which deals with the strategy of a luxury brand to limit its access to the market only through specific retailers in order to preserve the brand image; we are waiting for the Court decision; on the 26 July 2017, the opinion of the Advocate General has been published, and it stated that a supplier of luxury goods might prohibit its authorised retailers from selling its products on third-party platforms such as Amazon or eBay, cf. Opinion of Advocate General in C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603.

[318] European Commission, *SWD(2016) 312 final*, *cit.*

[319] European Commission (2016), *SWD(2016) 173 final*, *cit.* See, also: European Commission (2016), *Synopsis Report, Summary of responses to the European Commission's 2015 public consultation on 'Geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU'*; European Commission (2012), *Staff working document, with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive'), accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region on the implementation of the Services Directive: A partnership for new growth in services 2012-2015, SWD(2012)146 final*; Business Europe, *Position Paper, Geo-blocking and different treatment in the single market*, 18 December 2015.

- Lack of possibilities to arrange for good after-sales services, which is also related to the language barriers issue; [320]
- Differences in shipping, distance and delivery costs and, therefore, lack of affordable, high-quality delivery services;
- Need to refuse to sell to residents of other Member States because of legislation forcing them to do so (for example in gambling sector, legal requirements require restrictions in terms of territoriality or a product can be legal in a country and illegal in another country);
- Need to respect lawful (vertical) agreements;
- For online content services, need to respect the license for the use.

This analysis aimed at identifying possible objective justifications to geo-blocking and geo-filtering has the goal to demonstrate that we need a case by case analysis in all circumstances in order to determine *"whether different treatment is being applied to recipients and whether or not that treatment is justified for objective reasons"*[321] and that even the Geo-blocking Regulation does not exclude *in toto* the existence of objective justifications. In this sense, the EU Commission in its Staff Working Document of 8 June 2012, with a view to establishing guidance on the application of Article 20(2) of the Services Directive, stated: *"...some instances justify different treatment given the current degree of completion of the internal market"*.

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[320] See, also, *SWD(2017) 154 final, cit.*

[321] European Commission, *SWD(2012) 146 final, cit.*

Therefore, the non-exhaustive list made in this paragraph permits to better understand the distinction between justified and unjustified geo-blocking which is mainly the result of a balance between the economic importance of the restriction on trade for the success of the undertaking's business and the importance to keep the market integrated. Then, the same EU Commission is willing to tolerate some limits on geo-blocking, provided there is an economic rationale behind it: the Commission balances the undertaking's freedom to conduct a business with the internal market goal.[322]

3.7 THE EXCEPTIONAL NATURE OF THE EQUAL TREATMENT OBLIGATION

The subject of equal treatment sparked calls for a ban on discriminatory pricing to be applied also to non-dominant companies and even to consumers.[323] However, in free-market economies companies are conceived as free to choose what transactions to make, with whom and at what price. This is something so embedded in the general feeling that the regulation of prices, tariffs, and other contractual terms is usually seen as a corrective instrument – and a very obtrusive one – to be used only when free-market dynamics fail for some reason.[324]

In national jurisdictions, the equal treatment obligation represents an exception to the principle of the autonomy of private enterprises.[325] As a matter of fact, this last

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[322] See M. Poiares Maduro *et al.* (2017), *PE 595.362, cit*.
[323] D. M. Kochelek (2009), *Data Mining and Antitrust*, 22 Harv. J. L. & Tech., p. 515.
[324] For a more general analysis, see M. Maggiolino (2016), *Big data e prezzi personalizzati, cit.*
[325] G. Pasetti (2010), *Parità di trattamento,* in Enc. Giur., Treccani.

case occurs when the equal treatment obligation is put into effect to balance a *lack* of competition that, if otherwise present, would warrant a more homogeneous distribution of bargaining power and would foster better awareness and independence of stakeholders.

Therefore, there is a *cultural* basis for regarding antitrust regulation in matters of discrimination as a set of exceptional rulings. This should mean that prohibitions on discrimination applied by any active (companies in dominant or non-dominant positions) or passive (other companies or consumers) stakeholder should not be tolerated.

3.8 THE COMPETITION LAW ASSESSMENT OF GEO-BLOCKING: CONCLUSIONS

According to antitrust law *per se*, the exceptional nature of the case of geo-blocking may not be dismissed, thus granting companies the freedom to manage their own market, limiting access to it or changing prices and conditions according to geographical location.[326]

Instead, as it is well known, the European Competition Law identifies the establishment of the internal market as its main goal.

In the light of the analysis made in this chapter, I consider that the abolition of geo-blocking constitutes a choice of industrial policy that sheds light on the gradual path started by the European Commission. Therefore, the geo-blocking and geo-filtering

[326] J. Temple Lang (2009), *L'art. 82. I problemi e la soluzione*, in Mercato Concorrenza Regole, p. 240.

conducts since they build boundaries between customers on the basis of their geographic location have to be banned. A ban that is not justifiable by antitrust law *per se* since it does not justify a limitation in the firm autonomy *ex ante,* as EU competition law does, due to the goal of the establishment of the internal market.

However, also at the EU level, there are instances where territorial segmentation in certain industries may be justifiable. In addition to the huge limitation of the freedom of private enterprises, there are several reasons to allow them to limit access to online customers, that we already mentioned in paragraph 3.6.2.3. above such as: copyright licenses; different rules in the different Member States; disproportionate adaptation costs due to regulatory constraints (e.g., VAT rules) and other obstacles to cross-border sales (e.g., costs of delivery services).

Another essential point that I would like to stress is the enormous impact of the ban of geographic discrimination online. Indeed, offline, a firm can *de facto* limit its market, considering just local customers. Offline, competition law intervenes only when there is a limitation to passive sells, i.e., unsolicited request by customers. This means that, of course, a little shop in Venice cannot prevent a German customer to buy its products. And the consequence is that a firm can certainly have a limited territorial range of action, remaining offline.

On the contrary, a firm which operates online – thanks to the technology – is subject to passive sells arising from requests of customers in every Member State. The result is that – not considering for a moment the possible exceptions and objective justifications – an EU firm operating online cannot be local, being asked to cover the entire EU market. Then, brought to the extreme, a ban on geographic discrimination

in toto may exclude some actors from the online market: those who are not able to cover the entire EU market.

In conclusion, of course, we are in front of a Regulation that has implications for the establishment of the digital internal market and thus for the EU competition law, but it also constitutes an *industrial policy* in the sense that it forces firms that want to operate online to cover the entire EU internal market. This industrial policy, concerning only *unjustified* geo-blocking, leaves the door open to exceptions and objective justifications.

Furthermore, as seen, geo-filtering can also boast pro-competitive effects, by seconding customers' willingness to pay. Banning price discrimination *per se* would lead to higher prices overall for downstream customers and would also increase the market power of enterprises in oligopolistic markets since price discrimination constitutes a tool that intensifies competition between enterprises.[327]

[327] P. Papandropoulos (2007), *How should price discrimination be dealt with by competition authorities?*, in *Revue des droits de la concurrence*, Concurrences N° 3-2007, pp. 34-38.

CHAPTER 4

GEO-BLOCKING AND INTELLECTUAL PROPERTY

SUMMARY: 4.1. Introduction – 4.2. The principle of territoriality – 4.2.1 The relevant case-law – 4.2.2 Territoriality principle and audio-visuals – 4.3 The exhaustion principle – 4.3.1 The exhaustion principle online – 4.3.2 The non-application of the exhaustion principle to intangible works – 4.3.3 Attempts at applying exhaustion online – 4.3.3.1 The case of software – 4.4 The European need to change copyright rules – 4.4.1 The public consultation on the review of EU copyright rules – 4.5 Concluding remarks

4.1 INTRODUCTION

From an IP perspective, geo-blocking is aimed at making territorial licensing agreements[328] effective by limiting access to copyright works to a public located in a given territory.[329]

Thus, an analysis of the geo-blocking conduct mainly deals with two key principles pertaining the intellectual property realm: the exhaustion and the territoriality principles.

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[328] Geographic licensing is an essential tool that allows copyright holders to grant a licence to exploit their products or services only in a specified territory.

[329] See T. Madiega (2015), *Digital Single Market and geo-blocking*, *cit.*

Indeed, the abolition of geo-blocking contradicts the territoriality of the intellectual property rights ("IPRs") intrinsically, asking in a way to make contents/products online to be available in the entire EU market and it is incoherent with the non-application of the exhaustion principle online, asking the proprietor of the IPR to lose the control on its creation.[330]

4.2 THE PRINCIPLE OF TERRITORIALITY

Territoriality is one of the core principles of copyright.[331]

The key assumption of the principle is that States are free to decide the extent and scope of protection of IP rights, providing States with the exclusive competence to rule IPRs in its territory, with the consequence that IPRs are limited to the territory of the State which grants or protects this specific right.[332]

The territoriality principle has two key fundaments: IP rights should have a territorial validity, and the territoriality basis has to be exclusive. Indeed, an IP right

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[330] See also P. Auteri (2006), *Il paradigma tradizionale del diritto d'autore e le nuove tecnologie,* in Proprietà digitale: diritti d'autore e Digital Rights Management, M.L. Montagnani e M. Borghi eds., Egea, pp. 23-51.

[331] P. B. Hugenholtz (2010), *PE 419.621, cit.*; see also L. Lundstedt (2016), *Territoriality in Intellectual Property Law*, Stockholm University; KEA European Affairs and MINES ParisTech (2010), *Multi-Territory Licensing of Audiovisual; Works in the European Union*, prepared for the European Commission, DG Information Society and Media; D. Keeling (2003), *Intellectual Property Rights in EU Law*, Oxford University Press.

[332] W. Cornish, D. Llewelyn, T. Aplin (2013), *Intellectual property: patents, copyright, trade marks and allied rights*, 8th ed., Sweet & Maxwell, p. 28.

confers to his holder a right to stop third parties from doing any infringements, while the State has no title to enforce this right outside its territory.[333]

The territoriality principle has been affirmed at international level in the Berne Convention[334] and in several other international treaties.[335] Notably, in light of the obligation under the European Economic Agreement (EEA) for Member States to adhere to the Berne Convention, the principle of territoriality has been even described as *quasi acquis*.[336]

Specifically, the principle of territoriality is enshrined in Article 5(2) of the Berne Convention, which reads:[337] *"the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed"*.[338]

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[333] L. Lundstedt (2016), *Territoriality in Intellectual Property Law, cit.*; W. Cornish, D. Llewelyn, T. Aplin (2013), *Intellectual property: patents, copyright, trade marks and allied rights, cit.,* p. 6.

[334] Berne Convention for the Protection of Literary and Artistic works, 9 September 1886.

[335] See, for example, Agreement on Trade and Related Aspects of Intellectual Property Rights (TRIPS), 1994.

[336] M. Van Eechoud *et al.* (2012), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Amsterdam Law School Legal Studies Research Paper No. 2012-07; see also P. B. Hugenholtz (2010), *PE 419.621, cit.,* p. 5.

[337] Berne Convention, *cit.*, Article 5: *"(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention. (2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed. (3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors […]".*

[338] *Ibid.*

Therefore, territoriality entails, that, within the framework of international treaties and EU directives, each country has its own national regime on copyright.[339] Copyright, in fact, is still granted by national law and the protection of a right holder is actually limited to the territory of the Member State where the right is granted.[340]

In other words, the exclusivity conferred by copyright upon a certain right holder of a work of authorship is, in principle, strictly limited to the territorial boundaries of the granting Member State.[341] In fact, as opposed to other intellectual property rights there is still no EU-wide copyright title in the sense that there is no single title granted for all the European Union territory.

The territorial nature of copyright has relevant legal consequences.[342] First of all, we can notice that, since copyright rules are limited to the single territory of each granting Member State, rules on copyright may be different from one Member State to the other. [343]

A second relevant aspect of copyright is the fact that, according to the rule of private international law,[344] the law of the country of the Member State in which the

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[339] European Audiovisual Observatory (2015), *Territoriality and its impact on the financing of audio-visual works*, *cit.*, p. 27.

[340] A. Peukert (2012), *Territoriality and Extraterritoriality in Intellectual Property Law,* in G. Handl, J. Zekoll, P. Zumbansen eds., Beyond Territoriality: Transnational Legal Authority in an Age of Globalization, Queen Mary Studies in International Law, Brill Academic Publishing, p. 189.

[341] P. B. Hugenholtz (2009), *Copyright without frontiers: the problem of territoriality in European copyright law*, *cit.*

[342] P. B. Hugenholtz (2010), *PE 419.621*, *cit.*, p. 5.

[343] *Ibid.*

[344] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007; Article 8 reads: *"The law*

protection is sought also governs copyright infringement (the so-called *lex loci protectionis*).[345]

In this regard, we can notice that, making a work available online, i.e., over the Internet, *"which transcends borders by definition"*,[346] affects as many copyright laws as the number of countries where the work can be accessed and thus the legality of this act should be judged on the basis of all the different laws of the countries in which the communication over the Internet can be received.[347]

Therefore, when making a work available online, copyright licenses for such acts need to be cleared in every country of reception (e.g., for a service aimed at the entire European Union, in all 28 Member States).[348]

Moreover, another important consequence of copyright is that the right holder is protected by a bundle of 28 parallel exclusive rights and he is entitled to exercise 28 different national rights.[349] In light of Article 5 (2) of the Berne Convention, in fact, copyrighted works are protected by a bundle of 28 parallel sets of exclusive rights,

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applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed".

[345] P. B. Hugenholtz (2010), *PE 419.621, cit.,* p. 6.

[346] M. Van Eechoud *et al.* (2012), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, *cit.,* p. 309.

[347] *Ibid.* For an in-depth analysis, see M. Trimble (2015), *The Multiplicity of Copyright Laws on the Internet,* Fordham Intellectual Property, Media & Entertainment Law Journal 25.2.

[348] P. B. Hugenholtz (2010), *PE 419.621, cit.,* p. 6.

[349] L. Guibault (2017), *Individual Licensing Models and Consumer Protection,* in Remuneration of Copyright Owners - Regulatory Challenges of New Business Models, K. C. Liu and R. M. Hilty eds., MPI Studies on Intellectual Property and Competition Law, p. 223.

the existence and the scope of which are determined by the law of each Member State.[350]

Consequently, copyright on a single copyrighted work of authorship can be divided into multiple territorial rights, which may be individually owned or exercised for each territory by a different entity.[351]

For the sake of completeness, it should be stressed that geo-blocking practices in connection with IP licensing are not necessarily grounded in the territoriality principle. The practice of "geographic licensing" (i.e., when the IP holder grants a licence to exploit the product or service only in a specified territory) is based on general principles of right to dispose of its one's own property and freedom of contract. Therefore, prohibition of geo-blocking affects also the exercise of IPRs as such, and not only their inherent territoriality.

4.2.1 The relevant case-law

The principle of territoriality and its importance for copyright law have been reaffirmed by the Court of Justice of the European Union in several occasions, where the Court considered various circumstances in which the principle of territoriality applied in light of the different harmonising directives that have been introduced

[350] P. B. Hugenholtz (2010), *PE 419.621, cit*.
[351] *Ibid*.

over the years in this field.[352] Notably, part of these judgements was delivered by the Court even before the starting of the harmonisation process of copyright law.

Among all the judgements made by the CJEU before the starting of the harmonisation process, there are two relevant cases regarding the territorial nature of copyright: the well-known *Coditel* cases, which concerned the territorial exclusivity in broadcasting.

Broadly speaking, the relevant facts of the case bearing the outcome of the dispute were the following: on 8 July 1969, *Cinè Vog Films*, a Belgian cinematographic film distribution company and *Les Films La Boetiè*, a French company who owned the proprietary rights over the film «Le Boucher», concluded an exclusive licence agreement where the former was granted the exclusive right to distribute the film in Belgium for 7 years.[353] However, the film was shown on German television, where a different exclusive licence was granted, before it could have been shown on Belgian television on the basis of the terms of the agreement. The Belgian Cable company Coditel picked up the German signal and retransmitted it on its cable network, something that needed the authorisation of the Belgian licensee under Belgian copyright law because it was held to be a communication to the public. However, since no authorisation was given and since it feared a loss of revenue due to the fact

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[352] European Audiovisual Observatory (2015), *Territoriality and its impact on the financing of audio-visual works*, *cit.*, p. 55.

[353] P. Torremans, J. Holyoak (2016), *Intellectual Property Law*, Oxford University Press, 8th edition, p. 332.

that the film was already seen in Belgium, Ciné Vod sued Coditel for infringement of copyright.[354]

In *Coditel I*,[355] the Court affirmed that the provision of the Treaty concerning the freedom to provide services do not prevail over the territorial application of copyright: *"Whilst article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States."*

Within the same proceedings, the Belgian Court submitted to the CJEU other preliminary questions regarding a possible infringement of competition law and, in particular, on the interpretation of the scope of Article 85 of the Treaty (today, Article 101 TFEU).

Thus, in *Coditel II*,[356] the CJEU also concluded that: *"a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory of a Member State is not, as such, subject to the prohibitions contained in Article 85*

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[354] *Ibid.*

[355] Judgment of the Court of 18 March 1980, C-62/79 *Coditel v CinéVog Films* (*Coditel I*), ECLI:EU:C:1980:84.

[356] Judgment of the Court of 6 October 1982, C-262/81, *Coditel SA Compagnie Generale pour la Diffusion de la télévision v Ciné Vog Films* (*Coditel II*), ECLI:EU:C:1982:334.

of the Treaty [today, Article 101 TFEU]. It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market."

Therefore, with regard to competition law, in *Coditel II* the Court affirmed that the mere fact that a right holder gives an exclusive territorial licence to a certain distributor could not be considered, in principle, a restriction of competition under Article 101 TFEU.

Remarkably, *Coditel I* and *Coditel II* have been considered over the years the leading cases for the application of the principle of territoriality as they confirmed the prevalence of copyright territoriality over the internal market principles and competition law.

Other judgements of the CJEU explicitly confirming the principle of territoriality of copyright were delivered also more recently with respect to the application of different copyright-related harmonising Directives introduced over the years.

Taken chronologically, we can recall, first of all, the *Lagardère* (2005) judgement.[357] In particular, in its *Lagardère* ruling of 2005, the Court explicitly recognised the

[357] Judgment of the Court (Third Chamber) of 14 July 2005, C-192/04, *Lagardère Active Broadcast v Société pour la perception del la rémunerération équitable (SPRE) and Others*, ECLI:EU:C:2005:475.

territorial nature of copyright within the European Union[358] by affirming that the Directive 92/100/EEC (the so-called Rental Directive) provides only for a minimal harmonisation of copyright and related rights and that it is not intended to limit the internationally and EU-wide recognised principle of territoriality, thus copyright still remains of territorial nature: *"At the outset, it must be emphasised that it is clear from its wording and scheme that [the Rental Directive] provides for minimal harmonization regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory".*[359]

Other, more recent, cases are the *Stichting De Thuiskopie* (2011),[360] *Donner* (2012)[361] and *Sportradar* cases (2012).[362]

4.2.2 Territoriality principle and audio-visuals

The current copyright regime and in particular the territorial nature of copyright has important economic consequences, especially within the audio-visual sector. In fact,

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[358] P. Goldstein, P.B. Hugenholtz (2013), *International Copyright: Principles, Law and Practice*, Third Edition, Oxford University Press, pp. 99-100; M. Van Eechoud *et al.* (2012), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, *cit.*, p. 309.

[359] C-192/04, *Lagardère, cit.*, paragraph 46.

[360] Judgment of the Court (Third Chamber) of 16 June 2011, C-462/09, *Stichting De Thuiskopie v Opus Supplies Deutschland GmbH and Other*, ECLI:EU:C:2011:397.

[361] Judgment of the Court (Fourth Chamber) of 21 June 2012, C-5/11, *Criminal Proceedings against Titus Alexander Jochen Donner*, ECLI:EU:C:2012:370.

[362] Judgment of the Court (Third Chamber) of 18 October 2012, C-173/11, *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG*, ECLI:EU:C:2012:642.

according to the principle of territoriality, right holders are not obliged to, but they have, in principle, the right to grant distinct territorial licences in the different Member States.

The audio-visual industry is actually based on the principle of territoriality as the territorial sale of rights and exclusivities plays an important role in the financing and distribution of European films.[363]

In other words, territorial licensing schemes are at the basis of the financing schemes used to fund the production of the audio-visual industry. Notably, three main financing schemes have been identified by the World Intellectual Property Organisation (WIPO) for films, a combination of which is the basis of the budget of a certain film, in particular: the subsidy finance model, the pre-sale model and the pure equity model.[364]

For our purposes, it is important to look closely at the pre-sale model, as it properly relies on territorial licensing schemes. As defined by the WIPO, the pre-sale model is *"where the sale of distribution rights to territorial distributors […] forms the collateral for a production loan from a bank"*.[365]

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[363] European Audiovisual Observatory (2015), Study for the Council of Europe, *Territoriality and its impact on the financing of audio-visual works*, Iris Plus, available at http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e (last access 6 October 2017).

[364] World Intellectual Property Organisation (2011), *From Script to Screen – The importance of Copyright in the Distribution of Films*, Creative Industries, n. 6 p. 30, available at http://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo_pub_950.pdf (last access 6 October 2017).

[365] *Ibid*

In other words, the pre-sale of rights on a certain film during its production phase is a common practice for producers, who, in order to cover high up-front production costs, usually try to secure pre-sales of the rights to television broadcasters, distributors or publishers for a certain territory, language or platform to obtain financing.[366]

Specifically, in a territorial pre-sales deal, a distributor based in a certain territory agrees to pay an advance against a negotiated royalty upon completion and delivery of the film.[367] Pre-sales are usually associated with licensing on a territory-by-territory basis, as financial advances are secured against exclusive local distribution rights before the film enters into production.[368]

This exclusivity provides the distributor with the possibility of recoupment on each investment. When we refer to the cross-border distribution of films across the EU, these investments are particularly relevant as, contrary to the US market, the EU market is heterogeneous and highly fragmented – as a result of different languages, cultures and tastes of the public – and requires that distributors adapt to different national specificities and put into place specific marketing and distribution efforts on all platforms: advertising, subtitling and dubbing.

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[366] European Audiovisual Observatory (2015), *Territoriality and its impact on the financing of audio-visual works*, *cit.*, p. 20.

[367] World Intellectual Property Organisation (2011), *From Script to Screen – The importance of Copyright in the Distribution of Films*, *cit.*, p. 32.

[368] For an exhaustive analyse of the use geo-blocking as a tool of regulation and enforcement, see M. Trimble (2016), *Geoblocking, Technical Standards and the Law,* in Geoblocking and Global Video Culture, edited by R Loboto and J. Meese, *cit.*

Moreover, territorial licensing schemes are of key importance for the film industry's distribution strategies, which are based on the so-called *release windows*.[369]

Release windowing means that an audio-visual content is sequentially released through different media platforms (e.g., cinemas, DVD/BlueRay, Video-on-Demand, Pay-TV, and free-to-air television).[370] In other words, audio-visual contents are very often distributed following a specific timeline release pattern based on different media windows.[371] The profitability of this strategy is based on the fact that the date of the first release and the length of the different *windows* are different across Member States.

It should also be noted that territorial licenses are very often the result of the substantial cultural and linguistic diversity which is still present in Europe, as opposed, for example, to a greater homogeneity that can be found in the United States.[372]

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[369] Charles River Associates (2014), *Economic Analysis of the Territoriality of the Making Available Right in the EU*, commissioned by European Commission, p. 18; *see also* A. Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, *cit.*, p. 64; *see also* G. Mazziotti (2013), *Copyright in the EU Digital Single Market*, Report of the CEPS Digital Forum, Brussels.

[370] For example, with regard to films, usually they are only initially shown in cinema as this «window» is the most important to determine the overall success of a film. After this phase, the film is shown by online video-on-demand services or it is offered for sale or rental on a physical media. This window remains open indefinitely, as there is no perishable date assigned to DVD commercialisation. In a third phase, the film is offered by pay-television. Finally, the film is distributed through free-to-air broadcasts, i.e., transmissions which are not encrypted and which can then be received by any viewer within the range of transmission.

[371] Charles River Associates (2014), *Economic Analysis of the Territoriality of the Making Available Right in the EU*, *cit.*, p. 18.

[372] G. Mazziotti (2013), *Copyright in the EU Digital Single Market*, p. 53.

Cultural tastes and languages play an essential role in this sector, especially in the smaller European territories. Moreover, different countries and regions in Europe have different preferences regarding the way in which the foreign content is offered.[373]

This means that, in order to provide a certain audio-visual work in a certain Member State, it is necessary to introduce national adaptations in relation to the language spoken by consumers in a certain Member State (e.g., subtitling or dubbing).[374] Moreover, it is also necessary to target the offer in relation to the local preferences of a said public of consumers as, for example, a certain film may meet the demand only of a limited part of EU consumers.[375]

In light of that, due to the fact that there is no homogeneous European demand for audio-visual content, it is more profitable for a right-holder to grant only territorial licences targeted to a specific public of consumers and not pan-European licences.[376]

4.3 THE EXHAUSTION PRINCIPLE

For the analysis of geo-blocking carried out in this thesis, exhaustion of copyright is a relevant principle.

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[373] Charles River Associates (2014), *'Economic Analysis of the Territoriality of the Making Available Right in the EU*, p. 17; see also A. Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, *cit.*, p. 64.
[374] A. Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, *cit.*, p. 64.
[375] *Ibid.*
[376] *Ibid.*

The exhaustion principle finds its origins in the CJEU's jurisprudence, and its primary justification is the exigency of preventing private actors from limiting the free movement of goods in the EU internal market.[377]

In a nutshell, the exhaustion principle establishes that the proprietor of an intellectual property right not oppose further uses, after that the first sale of the product embodying the IPR in the EU market is made by him or with his consent.[378] In other words, after the first licit commercialisation, the proprietor loses the control of the good with is IPR[379] and any third party can resell the product in another Member State without limitations concerning the conditions of sale.

Therefore, a direct consequence of the exhaustion principle is the lawfulness of the parallel importations between Member States, already analysed in chapter 3 above, i.e. the importation of a product from a Member State to another, without the express consent of the intellectual property owner.[380]

The first relevant case is *Consten-Grundig,*[381] and it was the starting point of a number of cases aimed at affirming the exhaustion principle. Here the Court stated that: *"Since the agreement […] aims at isolating the French market for Grundig products and*

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[377] The US literature uses to refer to the *first sale doctrine.*

[378] M. M. Slotboom (2003), *The Exhaustion of Intellectual Property Rights Different Approaches in EC and WTO Law,* The Journal of World Intellectual Property, Volume 6, Issue 3.

[379] B. Batchelor and L. Montani (2015), *Exhaustion, Essential Subject Matter and Other CJEU Judicial Tools to Update Copyright for an Online Economy*, 10 Journal of Intellectual Property Law & Practice.

[380] D. E. Donnelly (1997), *Parallel Trade and International Harmonization of the Exhaustion of Rights Doctrine*, 13 Santa Clara Computer & High Tech. L. J., p. 445.

[381] Judgment of the Court of 13 July 1966, Joined cases 56 and 58-64, *Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community,* ECLI:EU:C:1966:41.

maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market."

Then, the first landmark case concerning exhaustion and copyright is *Deutsche Grammophon*.[382] In this case, Deutsche Grammophon tried to prevent the resale in Germany of records which its French subsidiary had sold in France on the basis of the exclusive distribution right as a producer of phonograms (which is a right analogous to copyright under German law).[383]

Specifically, in said judgement, the Court clearly stated that *"it is in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State".*[384]

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[382] Judgment of the Court of 8 June 1971, C-78/70, *Deutsche Grammophon GmbH v Metro-SB-Grossmarkte GmbH & Co KG*, ECLI:EU:C:1971:59; the Court provides us with useful parameters – even if concerning trademarks – in C-15/74, *Centrafarm v. Sterling, cit.*, where it affirmed that: *"An obstacle to the free movement of goods may arise out of the existence, within a national legislation concerning industrial and commercial property, of provisions laying down that a trade mark owner's right is not exhausted when the product protected by the trade mark is marketed in another Member State, with the result that the trade mark owner can prevent importation of the product into his own Member State when it has been marketed in another Member State. Such an obstacle is not justified when the product has been put onto the market in a legal manner in the Member State from which it has been imported, by the trade mark owner himself or with his consent, so that there can be no question of abuse or infringement of the trade mark.".*

[383] World Intellectual Property Organization (2011), *Interface Between Exhaustion of Intellectual Property Rights and Competition Law*, CDIP/4/4 REV./STUDY/INF/2, available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4rev_study_inf_2.pdf, p. 18.

[384] C-78/70, Grammophon, *cit.*, p. 18.

Therefore, in this occasion, the CJEU established, for the first time, the principle of exhaustion of copyright: whenever the right holder gives his consent to the sale of goods in a certain Member State, he is precluded from invoking said right to prevent importation of the goods into any other Member State.[385]

This means that, once a copyrighted good (or a copy of it) is placed on the market (i.e., it is sold or the ownership is otherwise transferred[386]) by the right holder or with his consent in the EEA, it is not possible to prevent third parties to further distribute said good within the European Union.[387] In other words, parallel imports of tangible copyrighted goods are lawful as long as the right holder has given his consent and cannot be lawfully prevented by the same.[388]

Notably, the first sale of the good should be made by the author or right holder himself or with his consent.[389] Hence, third parties, such as, for example, licensees or distributors, are able to sell the good in the European Union after having received this consent on the basis, for example, of an agreement or a license.[390]

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[385] *Ibid.*

[386] For the sake of completeness, it should be pointed out that if a certain copyright-protected tangible good is sold outside the EU, the right of distribution cannot be considered exhausted as the principle of exhaustion applies only within the European Union.

[387] C. Geiger, F. Schönherr, I, Stamatoudi, P. Torremans (2014), *The Information Society Directive,* in I. Stamatoudi, P. Torremans eds., EU Copyright law – A Commentary, Edward Elgar Publishing, p. 427.

[388] A. Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, *cit.,* p. 57.

[389] *Ibid.*

[390] C. Geiger, F. Schönherr, I, Stamatoudi, P. Torremans (2014), *The Information Society Directive*, *cit.,* p. 429.

As a result, the principle of exhaustion mitigates the market fragmentation deriving from the principle of territoriality. Indeed, it strikes a balance between copyright and the free movement of goods.

After having been coined and implemented by the jurisprudence of the CJEU, the principle of Community exhaustion has also been codified as a general rule in the in the Information Society Directive.[391]

Recital 28 of the InfoSoc Directive states *"copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the right holder or with his consent exhausts the right to control resale of that object in the Community"*.[392]

Indeed, this Directive requires Member States to grant a distribution right, whereby authors have the exclusive right to authorise or prohibit any form of distribution to the public by sale or of the original of their works or copies of them.[393]

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[391] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L 167/10; see G Ghidini (2013), *Exclusion and access in copyright law: the unbalanced features of the European directive 'on information society' (InfoSoc),* in Rivista di Diritto Industriale, 1/2013; P. Frassi (2001), *Direttiva 2001/29/CE del Parlamento europeo e del Consiglio del 22 maggio 2001 ,sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione, Commento*, in Rivista di diritto industriale, 4-5/2001; M. Winkler (2001), *Brevi note intorno alla Direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società, in* Diritto del commercio internazionale, 15(3), pp. 705-713.

[392] *Ibid.*

[393] C. Geiger, F. Schönherr, I, Stamatoudi, P. Torremans (2014), *The Information Society Directive*, *cit.*, p. 423.

Specifically, this right refers to the distribution of works incorporated in tangible media, in contrast, as we will see below, to the right of communication to the public, which only refers to works in non-tangible forms.[394]

The application of the principle of exhaustion only to the distribution right and, as a consequence, only to tangible works, is enshrined in article 4(2) of said Directive which states that *"the distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent"*.[395]

4.3.1 The exhaustion principle online

In today's information society, the most discussed aspect of the exhaustion discipline concerns the applicability of the principle of circulating online works. The advent of the Internet and its quick and continuous development have in fact affected radically the discipline of circulation of certain categories of intellectual works, for which these forms of circulation have become prevalent.

The size of the phenomenon has made it inevitable for lawmakers to extend the protection of copyright to works spread across the network, internationally, at the EU and at the national level. On this occasion, however, law had to deal with the high degree of technicality of the matter. Issues relating to the circulation of

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[394] *Ibid.*

[395] Directive 2001/29/EC, *cit.*

intellectual property in the information society result from the fact that the internet network connects millions of computers belonging to every kind of subjects, from private individuals who use them for personal purposes, to associations and companies, to public institutions.[396] It is crystal clear that internet allows for instantaneous exchange of information, which can be directed to individuals as well as to groups of people. The peculiarity of the web is reflected in the lack of centralised management: Internet works thanks to the contribution of millions of individual and network operators which voluntarily choose to use the web in order to share and receive information and ideas. Users, for their part, have extensive access to information spread across the network and can use them in various ways just as easily.

Also, works which are produced on other platforms, such as the television, are easily shared through the internet.[397]

Concerning the circulation of intellectual works, digitisation produced relevant effects both on the side of the exclusive rights holders and on the side of the users-recipients of the widespread works.[398] Indeed, with regard to the first profile, digitisation has resulted in the need to resort to intermediaries for the distribution of protected works. Many authors decide to put their literary works or songs online,

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[396] See V. Tosi (1999), *I problemi giuridici di internet*, in ALPA, Diritto dell'informatica, Vol. 15, Giuffrè, pp. 411 ss.

[397] In this sense, we mainly refer to the video-on-demand technology.

[398] See S. Ercolani (2004), *Il diritto di distribuzione di esemplari dell'opera protetta e l'esaurimento comunitario, in Il diritto di autore*, Giuffrè.

limiting access to those who are willing to pay a fee. This circumstance determines the overcoming of the distinction between the creator of the work and the subject who is responsible for the distribution or dissemination of the work.

As far as users are concerned, they are not only passive actors but, potentially, they can also start spreading the works they have access to. In many cases, the form of the digital transmission chosen by the holder does not only allow the user to listen to and/or view the protected content, but also allows him to obtain a permanent copy that can be used in many ways. This circumstance testifies that the structure of the Internet is not such as to ensure that the use of the copy obtained is purely personal. Unauthorized copies can, therefore, circulate without intermediaries and with a good quality, since – on the contrary of recordings of photocopies – they perfectly reproduce the original.

A substantial difference between protected works within the digital and non-digital world is that the firsts are inextricably linked to their reproduction, as online distribution can only be dematerialised. In the case of cinematographic works, the streaming is, in fact, a reproduction, albeit only temporary, and the same can be said, for example, of displaying the content of freely accessible online textbooks.

From a factual point of view, a work can only circulate online if it is diffused in such a way as to allow the user to make a copy, whether it is legal or illegal. The problem is represented by the fact that it is extremely easy to make copies and to start at circulating them. Furthermore –online – the one who sells the work can of course keeps a copy of it.

This *digital revolution* opens a new debate on the balance between the authors' interest in protecting their IPR and the conflicting interest of the community in the free circulation of information and ideas.[399]

This balance – at the EU level – uses to be ensured by the principle of exhaustion, but in the information society it is an inadequate tool to protect the interests of authors, as the exclusivity on distribution would lose its effectiveness in the digital environment. This circumstance makes the applicability of the exhaustion principle to the circulation of intellectual property in the internet subject to strong discussion.

The complexities mainly derive first from the high level of technical complexity, second, the approach of the EU legislator shows critical circumstances which raise doubts as to the likelihood of such a solution.[400] Lastly, the Court itself has recently contributed to revitalising the debate, confirming the non-applicability of the exhaustion principle online, without providing an opposite solution to that codified by the EU legislature.[401]

For these reasons, the question of the applicability of the exhaustion to digital reality, which seemed to be out-dated, still has some problematic issues that need to be analysed.

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[399] C. Lenk, N. Hoppe, R. Adorno (2007), *Ethics and Law of Intellectual Property - Current Problems in Politics, Science and Technology,* Routledge.

[400] See M. Ricolfi (2002), *Comunicazione al pubblico e distribuzione,* AIDA, p. 54.

[401] In this sense, see: Judgment of the Court (Fourth Chamber) of 22 January 2015, C-419/13, *Art & Allposters International BV v Stichting Pictoright*, ECLI:EU:C:2015:27.

4.3.2 The non-application of the exhaustion principle to intangible works

As clearly stated by article 4(2) of the Information Society Directive, the principle of exhaustion applies only to the exclusive right of distribution. Therefore, the principle of Community exhaustion refers only to physical media embodying copyrighted works.

Instead, the rule of Community exhaustion does not apply in relation to intangible copyrighted works. As a result, with regard to intangible copyrighted goods, parallel imports can be still prevented on the basis of copyright territoriality. The InfoSoc Directive – codifying the conclusion of *Coditel*[402] – explicitly restricts the scope of the exhaustion principle to the sole distribution right, which concerns just physical media.[403] Therefore, services in general, and not only those in the online market, are not subject to exhaustion.

Placing a good on the market only includes an act of distribution of physical copyrighted goods, while it does not include other restricted acts. Hence, it does not include other activities that can be indefinitely repeated and can result in an infinite number of users.[404]

Among these activities, we can find performance, broadcasting or cable diffusion and, today, also online dissemination over the internet. These activities are

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[402] C-62/79, *Coditel I*, *cit.*

[403] Directive 2001/29/EC, *cit.*, point 29.

[404] B. Ubertazzi (2014), *The Principle of Free Movement of Goods: Community Exhaustion and Parallel Imports*, in EU Copyright Law - a Commentary, Elgar Commentaries series, I. Stamatoudi and P. Torremans eds., p. 42.

considered as consisting in the making available to the public of copyrighted works and therefore in the *performance of services* rather than the sale of goods. In light of that, the Community exhaustion principle does not apply to these activities.[405]

The distinction between the act of distribution of physical goods and other acts that can be indefinitely repeated and, consequently, the non-application of the rule of Community exhaustion to content-related services has been firstly affirmed in *Coditel I*,[406] where the CJEU refused to apply the rule of Community exhaustion in respect of acts of secondary cable retransmission.[407]

Specifically, the Court affirmed that: *"A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records".*[408]

In light of that, the Court of Justice refused to recognise a rule of Community exhaustion of the rights where films are made available to the public by performances that are capable of being repeated without limits.

The effect of this is that, *"whilst copyright entails the right to demand fees for any showing*

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[405] B. Ubertazzi (2014), *The Principle of Free Movement of Goods: Community Exhaustion and Parallel Imports*, *cit.*, p. 38.
[406] C-62/79, *Coditel I*, *cit.*
[407] *Ibid.*
[408] *Ibid.*

or performance, the rules of the treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organised in the Member States largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable".[409]

The exclusive assignee of the performing right in a film for the whole of a Member State may, therefore, rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, without thereby infringing community law.[410]

Much later after this judgement delivered by the CJUE, the EU legislator has also codified this general rule introduced with *Coditel I* in Article 3(3) of the InfoSoc Directive, where we can read that *"the rights [...] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article*".[411]

As clarified by Recital 29 of said Directive, *"the question of exhaustion does not arise in the case of services and on-line services in particular. [...] Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every*

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[409] C-62/79, *Coditel I*, *cit.*, paragraph 16.
[410] C-62/79, *Coditel I*, *cit.*
[411] Directive 2001/29/EC, *cit.*

on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides".[412]

In light of that, an interpretation based on the rules brings to the conclusion that the principle of exhaustion does not apply to the exclusive right of communication to the public. Since this exclusive right provided to authors refers to services rather than goods, the rule of Community exhaustion does not apply to services, and especially to online services. As a consequence, content-related services offered in the diverse Member States still require a licence from all right holders covering all the territories concerned. Thus, if a service is offered to all European consumers, it will be necessary to clear all the rights for all the Member States involved.

4.3.3 Attempts at applying exhaustion online

One cannot ignore that the emphasis on the *tangibility* requirement put by the laws and case-law mentioned in the paragraph above is essentially instrumental.[413]

Furthermore, the WIPO treaties, which originally introduced the right of communication to the public, do not openly exclude the application of the exhaustion principle online.[414] Besides, at the EU level – where the InfoSoc Directive

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[412] *Ibid.*

[413] For an in-depth analysis of the mechanisms used in order to apply exhaustion online, see S. Karapapa (2014), *Reconstructing copyright exhaustion in the online world*, I.P.Q., pp. 307-325.

[414] WIPO Copyright Treaty (1996) and the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty available at http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_111709.pdf (last access 20 March 2018).

clearly denies the application of the exhaustion principle to the digital dissemination of works[415] – we have (very limited) cases where exhaustion or equivalent tools applied also online. In particular, these concern, first, the case of digital dissemination of software and, second, the case of hyperlinks, which can be seen as communications that do not reach a new public (the effect, then, is the same: non-infringement of copyright, even if without its exhaustion).[416] In the following paragraph, the case of software dissemination is analysed, since it may be considered as the first step toward the extension of the exhaustion principle in the digital sector.

4.3.3.1 The case of software

The CJEU – on 3 July 2012 – ruled that the right of distribution of a copy of a computer program has to be considered as exhausted when the copyright holder who has authorised the download of this copy online, has also conferred a right to

[415] Article 4(2) of the Information Society Directive.

[416] This specific scenario is not analysed here, since its practical implication is extremely limited: it only concerns the communication made with the same forms allowed by the right-holder and which do not reach a new public. However, it should be noticed that, *de facto*, the Court of Justice – in the case of hyperlinking – applies limits equivalent to exhaustion on the communication right (without applying the exhaustion principle); see the following cases of the Court of Justice: *Svensson*, C-466/12, ECLI:EU:C:2014:76; *Bestwater*, C-348/13, ECLI:EU:C:2014:2315; *GS Media*, C-160/15, ECLI:EU:C:2016:644; *Filmspeler*, C-527/15, ECLI:EU:C:2017:300; and *Ziggo*, C-610/15, ECLI:EU:C:2017:456. For an analysis of this equivalent to exhaustion developed by the CJEU, see Karapapa (2014), *Reconstructing copyright exhaustion in the online world*, *cit.*

use that copy for an unlimited time, obtaining a payment of a fee as a form of remuneration corresponding to the economic value of the copy if the work.[417]

Therefore, Oracle's licence agreements contained the following provision: "*With the payment for services you receive, exclusively for your internal business purposes and for an unlimited period, a non-exclusive, non-transferable user right, free of charge, in respect of everything which Oracle develops and makes available to you on the basis of this agreement*".[418]

This decision opened a considerable debate concerning the potential application of the exhaustion principle to copyrighted digital products, different from software. The debate is even more serious considering that the CJEU based its reasoning in *UsedSoft v. Oracle* on Computer Software Directive,[419] which constitutes a *lex specialis* with respect to the InfoSoc Directive.[420]

This legal basis – at the same time – constitutes a limit to the application of the exhaustion principle to other digital goods. In this sense, it is the case to recap the

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[417] Judgment of the Court (Grand Chamber) of 3 July 2012, C-128/11, *Usedsoft GmbH v. Oracle Intel Corp.*, ECLI:EU:C:2012:407; see A. Goebel (2012), *The Principle of Exhaustion and the Resale of Downloaded Software – The UsedSoft/Oracle Case*, European Law Reporter (ELR), No. 9. For a landscape of the software protection at the EU level, see M. Bertani (2007), *La tutela del software nell'Unione Europea,* in Rivista di diritto dell'impresa, pp. 287-312.

[418] C-128/11, *Usedsoft, cit.*, paragraph 19.

[419] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, OJ L 111, 5.5.2009, pp. 16–22.

[420] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.06.2001 pp. 10-19; see R. Hilty (2016), *Exhaustion in the Digital Age*, Research Handbook on Intellectual Property Exhaustion and Parallel Imports, I. Calboli and E. Lee eds., Edward Elgar Publishing, pp. 64-83.

evolution of the jurisprudence of the CJEU. Indeed, in 2015, in the *Art&Allposters* ruling,[421] a case not concerning digital exhaustion, the Court affirmed that exhaustion under Article 4 of the InfoSoc Directive only applies to the tangible support of a work. Therefore, the Court seemed to imply that there is no such thing as a general digital exhaustion under EU copyright. In other words: the decision in *UsedSoft* might be considered as possible only because of the *lex specialis* nature of the Software Directive. This logical reasoning has been confirmed by the Court in the Nintendo case,[422] where the Court restate that the Software Directive is a *lex specialis*.

Therefore, the case-law analysed in this paragraph can be seen as an application of the exhaustion in the digital sector, even if it expressly refers to software only. In conclusion, this short framework permits us to understand that – as of today – the exhaustion principle of IPRs has not found a proper application to intangible goods.[423]

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[421] C-419/13, *Art & Allposters International, cit.*

[422] Judgment of the Court (Fourth Chamber), 23 January 2014, C-355/12 *Nintendo v PC Box*, ECLI:EU:C:2014:25.

[423] On this point, see G. Westkamp (2016), E*xhaustion and the Internet as a distribution channel: the relationship between intellectual property and European law in search of clarification*, Chapter 26, in Research Handbook on Intellectual Property Exhaustion and Parallel Imports.

4.4 THE EUROPEAN NEED TO CHANGE COPYRIGHT RULES

"Europe needs a more harmonised copyright regime which provides incentives to create and invest whilst allowing transmission and consumption of content across borders, building on our rich cultural diversity".[424]

The Commission considers that the fragmentation of copyright law impedes the integration of the digital markets.[425]

Specifically, the Commission states that it intends to reduce the difference between the diverse national copyright regulations and to ensure that Europeans can access more online content across borders.[426]

The Strategy also affirms that it will ensure *"greater legal certainty for cross-border use of content for specific purposes (e.g., research, education, text and data mining, etc.) through harmonised exceptions"*.[427] In order to promote the harmonisation of copyright rules, the Strategy also promotes the review of the Satellite and Cable Directive[428] to evaluate the necessity of enlarging "*its scope to broadcasters' online transmissions, and to*

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[424] European Commission, COM (2015) 192 final, *cit*., p. 7.
[425] Cf. M. Ricolfi (2011), *Making Copyright Fit for the Digital Agenda*, 12th EIPIN Congress 2011 - Constructing European IP: Achievements and new Perspectives.
[426] For a reconstruction of the relationship between intellectual property and competition rules, see E. Arezzo, G. Ghidini (2006), *On the Intersection of IPRS and Competition Law with Regard to Information Technology Markets*, European Competition Law Annual 2005: The Relationship between Competition Law and Intellectual Property Law, C. D. Elherman and I. Atanasiu eds., Hart Publishing; D. Sarti (2002), *Proprietà intellettuale, interessi protetti e diritto antitrust*, Riv. Dir. Ind., 1/2002, pp. 543-576; M. Maggiolino (2012), *Intellectual Property and Competition Law: Some present tenets*, in Crossroads of Intellectual Property: Intersection of Intellectual Property and Other Fields of Law, C. Angelopoulos, A. Ramalho eds., Nova Science Pub Inc, pp. 121-139.
[427] European Commission, COM (2015) 192 final, *cit*., p. 8.
[428] See B. Hugenholtz (2009), *Satcab Revisited: The Past, Present and Future of the Satellite and Cable Directive*, Convergence, Copyrights and Transfrontier Television, European Audiovisual Observatory.

explore potential changes relating to cross-border access to broadcasters' services in Europe".[429]

Moreover, the Commission wants to review and deliver an effective and balanced cross-border civil enforcement system for intellectual property rights so as to address more effectively commercial scale infringements of copyright in the EU. In the light of the increasing involvement of online intermediaries in content distribution, it is also necessary to clarify the rules on the activities of these subjects in relation to copyright-protected content.[430]

4.4.1 The public consultation on the review of EU copyright rules

Importantly, with the aim of gathering information for different stakeholders, the Commission also holds – between December 5, 2013 and March 5, 2014 – a public consultation in relation to the potential review of EU copyright rules, which covers a broad range of issues connected to digital contents in the Digital Single Market.[431]

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[429] *Ibid*.

[430] *Ibid*, pp. 7-8.

[431] European Commission, Directorate General Internal Market and Services, *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, July 2014, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf (last access: 6 October 2017); Specifically, the issues covered by the consultation are: "*territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform*".

Among the others, the European Commission achieved relevant information on the stakeholder's opinions in relation to cross-border accessibility of digital copyrighted content.[432]

On the one hand, the vast majority consumers report being frequently geo-blocked when trying to access online services in another EU country or when trying to access content they have purchased online when travelling abroad. In general, the majority of the responding consumers *"would like to be able to access all content from any online stores whether directed to the Member State in which they reside or not"*.[433]

In light of that, we can affirm that users believe that geo-blocking should be eliminated as they are increasingly requesting access to digital content across borders.

The public consultation, however, reports also other diverging views from other interested stakeholders.

With regard to service providers, they generally affirm that geo-blocking is an issue connected to copyright territoriality and they highlight that they use geo-blocking measures because they are contractually required to prevent cross-border access as a result of territorial licensing.[434]

Right holders, film producers and distributors generally affirm that the limited cross-border accessibility of digital content that the European Commission intends to

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[432] *Ibid.*
[433] *Ibid.*
[434] *Ibid.*

address is less an issue of copyright as it does not result from the fact that copyright is still territorial or from problems connected to licensing agreements.[435] The lack of accessibility of digital content is rather the result of a limited demand for cross-border services due to, among the others, cultural, language and regulatory differences between Member States that brings online service providers to offer contents on a territorial basis.[436] They also affirm that territorial licensing with exclusive distributors per territory is actually fundamental for them "*to secure adequate financing in the pre-production stage*".[437]

Authors do generally agree with the Commission that accessibility of content should be ensured but measures to increase cross-border access should not be taken in the area of copyright as limiting the territorial application of copyright law would be detrimental and not positive for contents accessibility.[438]

Broadcasters generally affirm that – due to, among the others, the viewing habits of consumers, consumer demand, language – there is actually no incentive for them to provide services across Europe. Moreover, they state that the full exclusivity, that is usually guaranteed to distributors that pre-finance productions, is a means to ensure a return on their investments. They also emphasise the role of territoriality in maintaining cultural and linguistic diversity in Europe.[439]

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[435] *Ibid.*
[436] *Ibid.*
[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*

In light of the Public consultation, we can conclude that the Commission's plans to reform copyright law and improve access to digital contents are generally opposed by the film industry which points out that the limited accessibility of digital contents across Europe is the answer of the industry to the existing demand for digital contents in Europe.

4.5 CONCLUDING REMARKS

The two principles which constitute the core of this chapter use the geo-blocking tool in order to be effective. Indeed, geo-blocking can be seen as an expression of the need of keeping IPRs as territorial, and the non-application of the exhaustion principle to intangible goods (except for the listed specific instances) is perfectly fulfilled through geo-blocking since the lack of exhaustion online permits to limit the cross-border access to digital copyrighted contents. Therefore, we can consider geo-blocking as a licit or, even more, necessary practice, in the light of the existing IP rules and principles.

In this sense, we have to remember that – as of today – audio-visual contents have been excluded by the scope of the Regulation. Thus, rules concerning the large part of intangible-digital contents are not modified.

However, I consider that we have to move in a double direction, in order to make it compatible the abolition of geo-blocking and the intellectual property framework: *(i)* generally extend the application of the non-exhaustion principle online (today limited to the specific instances listed in paragraph 4.3.3 above), developing a *fictio iuris* in order to circumvent the technical problem due to the media's intangibility;

and *(ii)* increase the level of harmonisation of copyright rules at the EU level, which is part of the EU intention of modernising copyright rules as such that they fit for the digital age.[440]

[440] *Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*, COM/2016/0596 final - 2016/0278 (COD); see also, T. Madiega (2015), *EU Copyright Reform: Revisiting the Principle of Territoriality*, European Parliamentary Research Service; G. Mazziotti, F. Simonelli (2016), *Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law, cit.*

CONCLUSIONS

Geo-blocking ban formally constitutes a priority in the European Commission's agenda: the Regulation, the Pay-TV investigation and the three inquiries started by the Commission in 2017 (in the hotel accommodation, video games and consumer electronics sectors) are the key expressions of that.

However, it should be pointed out that – with the exclusion of the audio-visual contents from the scope of the Geo-blocking Regulation – the Commission took a step back, being audio-visuals key-goods sold online and being geo-blocking, in the form of geo-filtering, very often used in order to diversify the libraries of contents on the basis of the location of the customer. In this sense, it is well known that Netflix or Amazon Prime Video has very different libraries of contents in different Member States.

The research carried out in this thesis is mainly aimed at understanding the implications of a ban on geo-blocking and its sustainability, using the categories of European Union Law, Intellectual Property and Competition Law.

The first relevant category of EU law is the internal market goal that is clearly followed by the Commission in the path toward the abolition of geo-blocking, since this latter allows online providers to build virtual boundaries on the basis of nationality and/or location of customers.

Furthermore, chapter 2 shows that – even if fundamental freedoms of movement of goods and services are Treaties' rules to be enforced against Member States and geo-blocking is a tool in the hands of private actors – those rules constitute a key element

in balancing the different goals pursued by the EU law in the settlement of geo-blocking conduct, including the good functioning of internal market, but also intellectual property rights, freedom of businesses, *et cetera*.

However, the competition law provisions are the key-rules protecting the internal market goal which certainly find application with reference to geo-blocking.

In this context, the research shows a contrast between antitrust law *per se* and European Competition Law. Indeed, the first one – at certain conditions – might justify geo-blocking as a form of discrimination which can have pro-competitive effects, increasing the social welfare, e.g., increasing the total output. Instead, the European competition law pursues the key-scope of establishing the internal market and therefore, in general, it condemns geographic discriminations *per se*, since they put in place barriers between Member States.

Lastly, the IP analysis shows that the current context needs geo-blocking, since it is a tool necessary for the IP principles – territoriality and exhaustion – to be effective. Indeed, in the light of these two principles, IP rights are territorial, and they are not normally exhausted online. Therefore, providers need geo-blocking in order to limit the online circulation of products and services which incorporate intellectual property rights and, thus, in order to make territorial licence agreements effective.

From a policy-oriented perspective, the abolition of geo-blocking might cause an exclusion of those providers which are not able to cover the overall European market. Furthermore, only those contents which are appreciated in a good number of Member States would maintain a significant economic relevance and this would risk causing a cultural impoverishment, mainly in the context of audio-visual contents.

Over-simplifying the reasoning and considering in general the context of online sales, the abolition of geo-blocking would imply – then – a serious industrial policy choice, since a producer of shoes of Gothenburg who wanted to go online would have to cover the overall EU market, if there were no objective justifications to limit its operability.

Therefore, in the geo-blocking assessment, a gradual approach which pursues the scope of balancing both competition law and intellectual property interests, as well as the European Union principles, is essential.

In this sense, we certainly need to reform the copyright rules in order to increase their harmonisation at the EU level, and this may happen also thanks to the application of competition law rules. Meantime, objective justifications are the key to moving toward a limitation of geo-blocking, on a gradual basis.

TABLE OF CASES

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Judgment of the Court (Fifth Chamber) of 11 July 1989, C-265/87, *Schraede*, ECLI:EU:C:1989:303;

Judgment of the Court (Fifth Chamber) of 14 November 1996, C-333/94 P, *Tetra Pak International SA v Commission*, ECLI:EU:C:1996:436;

Judgment of the Court (Fifth Chamber) of 16 March 2000, C-395 and 396/96 P, *Compagnie Maritime Belge,* ECLI:EU:C:2000:132;

Judgment of the Court (Fifth Chamber) of 19 April 1988, C-27/87, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC,* ECLI:EU:C:1988:183;

Judgment of the Court (Fifth Chamber) of 3 October 1985, C-311/84 *CBEM v CLT*, ECLI:EU:C:1985:394;

Judgment of the Court (Fifth Chamber) of 6 June 2002, C-159/00, *Sapod Audic*, ECLI:EU:C:2002:343;

Judgment of the Court (Fourth Chamber) of 10 December 1985, C-31/85 *ETA Fabriques d'Ébauches v SA DK Investment and others,* ECLI:EU:C:1985:494;

Judgment of the Court (Fourth Chamber) of 21 June 2012, C-5/11, *Criminal Proceedings against Titus Alexander Jochen Donner*, ECLI:EU:C:2012:370;

Judgment of the Court (Fourth Chamber) of 22 January 2015, C-419/13, *Art & Allposters International BV v Stichting Pictoright*, ECLI:EU:C:2015:27;

Judgment of the Court (Fourth Chamber), 12 July 2012, C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV*, ECLI:EU:C:2012:453;

Judgment of the Court (Fourth Chamber), 23 January 2014, C-355/12 *Nintendo v PC Box*, ECLI:EU:C:2014:25;

Judgment of the Court (Grand Chamber) of 11 December 2007, C-438/05, *Viking*, ECLI:EU:C:2007:772;

Judgment of the Court (Grand Chamber) of 12 September 2006, C-300/04, *Eman and Sevinger*, ECLI:EU:C:2006:545;

Judgment of the Court (Grand Chamber) of 13 April 2010, C-73/08, *Bressol*, ECLI:EU:C:2010:181;

Judgment of the Court (Grand Chamber) of 16 September 2008, Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia,* ECLI:EU:C:2008:504;

Judgment of the Court (Grand Chamber) of 18 December 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809;

Judgment of the Court (Grand Chamber) of 27 October 2009, C-115/08, *Land Oberosterreich/CEZ*, ECLI:EU:C:2009:660;

Judgment of the Court (Grand Chamber) of 3 July 2012, C-128/11, *Usedsoft GmbH v. Oracle Intel Corp.,* ECLI:EU:C:2012:407;

Judgment of the Court (Grand Chamber) of 4 October 2011, Joined Cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others and Karen Murphy v. Media Protection Services Ltd*, ECLI:EU:C:2011:631;

Judgment of the Court (Second Chamber) of 21 September 2006, C-167/04 P *JCB Service v Commission,* ECLI:EU:C:2006:594;

Judgment of the Court (Sixth Chamber) of 16 December 1992, C-17/91, *Lornoy,* ECLI:EU:C:1992:514;

Judgment of the Court (Sixth Chamber) of 18 September 2003, C-338/00, P *Volkswagen AG v Commission,* ECLI:EU:C:2003:473;

Judgment of the Court (Sixth Chamber) of 2 October 1997, C-122/96, *Saldanha*, ECLI:EU:C:1997:458;

Judgment of the Court (Sixth Chamber) of 26 September 1996, C-43/95, *Data Delecta*, ECLI:EU:C:1996:357;

Judgment of the Court (Sixth Chamber) of 5 October 1999, C-240/97, *Spain/Commission,* ECLI:EU:C:1999:479;

Judgment of the Court (Third Chamber) of 10 July 1991, Joined cases C-90/90 and C-91/90, *Jean Neu and others v Secrétaire d'Etat à l'Agriculture et à la Viticulture*, ECLI:EU:C:1991:303;

Judgment of the Court (Third Chamber) of 14 July 2005, C-192/04, *Lagardère Active Broadcast v Société pour la perception del la rémunerération équitable (SPRE) and Others*, ECLI:EU:C:2005:475;

Judgment of the Court (Third Chamber) of 15 March 2007, C-95/04 P, *British Airways v. Commission,* ECLI:EU:C:2007:166;

Judgment of the Court (Third Chamber) of 16 June 2011, C-462/09, *Stichting De Thuiskopie v Opus Supplies Deutschland GmbH and Other*, ECLI:EU:C:2011:397;

Judgment of the Court (Third Chamber) of 18 October 2012, C-173/11, *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG*, ECLI:EU:C:2012:642;

Judgment of the Court (Third Chamber) of 19 June 2003, C-420/01 *Commission v. Italy*, ECLI:EU:C:2003:363;

Judgment of the Court (Third Chamber) of 6 October 2009, Joined Cases C-501/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services and Others v Commission and Others,* ECLI:EU:C:2009:610;

Judgment of the Court of 1 October 1987, C-311/85, *Vereniging van Flaamse Reisbureaus,* ECLI:EU:C:1987:418;

Judgment of the Court of 11 April 2000, Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL*, ECLI:EU:C:2000:199, paragraph 47;

Judgment of the Court of 12 December 1974, C-36/74, *Walrave and Koch v. Union Cycliste*, ECLI:EU:C:1974:140;

Judgment of the Court of 13 December 1979, C-44/79, *Hauer,* ECLI:EU:C:1979:290;

Judgment of the Court of 13 February 1979, C-85/76, *Hoffmann-La Roche & Co AG v. Commission,* ECLI:EU:C:1979:36;

Judgment of the Court of 13 February 1985, C-293/83, *Gravier,* ECLI:EU:C:1985:69;

Judgment of the Court of 13 July 1966, Joined cases 56 and 58-64, *Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission of the European Economic Community,* ECLI:EU:C:1966:41;

Judgment of the Court of 14 February 1978, C- 27/76 *United Brands v Commission*, ECLI:EU:C:1978:22;

Judgment of the Court of 15 December 1995, C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*, ECLI:EU:C:1995:463;

Judgment of the Court of 16 January 1979, C-151/78*, Nykobing*, ECLI:EU:C:1979:4;

Judgment of the Court of 17 July 1963, C-13/63, *Italian Republic v Commission*, ECLI:EU:C:1963:20;

Judgment of the Court of 17 May 1994, C-18/93, *Corsica Ferries*, ECLI:EU:C:1994:195;

Judgment of the Court of 17 October 1990, C-10/89, *SA CNL-SUCAL NV v. HAG GF AG ("HAG II"),* ECLI:EU:C:1990:359;

Judgment of the Court of 18 March 1980, C-62/79 *Coditel v CinéVog Films* (*Coditel I*), ECLI:EU:C:1980:84;

Judgment of the Court of 19 December 1961, C-7/61, *Commission of the European Economic Community v Italian Republic*, ECLI:EU:C:1961:31;

Judgment of the Court of 2 February 1989, C-186/87, *Cowan*, ECLI:EU:C:1989:47;

Judgment of the Court of 2 March 1983, C-7/82, *GVL v Commission*, ECLI:EU:C:1983:52;

Judgment of the Court of 20 February 1979, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979), ECLI:EU:C:1979:42;

Judgment of the Court of 22 June 1994, C-9/93, *IHT Internationale Heiztechnik GmbH*, ECLI:EU:C:1961:31;

Judgment of the Court of 24 November 1998, C-274/96, *Bickel,* ECLI:EU:C:1998:563, paragraph 31; Judgment of the Court (Sixth Chamber) of 23 April 2002, C-234/99, *Niels Nygard*, ECLI:EU:C:2002:244;

Judgment of the Court of 31 January 1984, C-40/82, *Commission v. UK*, ECLI:EU:C:1984:33;

Judgment of the Court of 31 October 1974, C-15/74, *Centrafarm v. Sterling*, ECLI:EU:C:1974:114;

Judgment of the Court of 6 April 1995, Joined Cases C-241/91 P and C-242/91, *P RTE and ITP v Commission*, ECLI:EU:C:1995:98;

Judgment of the Court of 6 June 2000, C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:2000:296;

Judgment of the Court of 6 October 1982, C-262/81, *Coditel SA Compagnie Generale pour la Diffusion de la télévision v Ciné Vog Films* (Coditel II), ECLI:EU:C:1982:334;

Judgment of the Court of 7 July 2005, C-147/03, *Commission/Austria*, ECLI:EU:C:2005:427;

Judgment of the Court of 8 June 1971, C-78/70, *Deutsche Grammophon GmbH v Metro-SB-Grossmarkte GmbH & Co KG*, ECLI:EU:C:1971:59;

Judgment of the Court of First Instance (Second Chamber) of 1 April 1993, T-65/89, *BPB Industries Plc v Commission*, ECLI:EU:T:1993:31;

Judgment of the Court of First Instance (Second Chamber) of 12 December 1991, T-30/89, *Hilti v Commission*, ECLI:EU:T:1991:70;

Judgment of the Court of First Instance (Second Chamber) of 6 October 1994, T-83/91, *Tetra Pak Rausing v Commission*, ECLI:EU:T:1994:246;

Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, T-228/97, *Irish Sugar v. Commission*, ECLI:EU:T:1999:246;

Judgment of the Court, 8 April 2003, C-44/01, *Pippig Augenoptik v Hartlauer*, ECLI:EU:C:2003:205;

Opinion of Advocate General Maduro, C-438/05, *Viking*, ECLI:EU:C:2007:292;

Opinion of Advocate General in C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, ECLI:EU:C:2017:603,

EUROPEAN COMMISSION

European Commission, Case IV/1.576, *Zanussi SpA Guarantee* [1978], OJ L322/26;

European Commission, Case IV/29.420, *Grundig* [1994], OJ L20/15;

European Commission, Case IV/31.204, *Mercedes-Benz* [2002], OJ L 257/1;

European Commission, Case IV/31.400, *Ford Agricultural* [1993], OJ L20/1;

European Commission, Case IV/35.733, *Volkswagen* [1998], OJ L 124, 25.4.1998, p. 60;

European Commission, Case IV/35.733, *Volkswagen* [1998], OJ L124/60;

European Commission, Case IV/36.888, *1998 Fotball Worldcup,* [1999] OJ L 5, 8.1.2000;

European Commission, Case IV/36.957/F3, *Glaxo Wellcome* [2001], O.J. L 302/01;

European Commission, COMP/35.918, *JCB* [2002], OJ L69/1;

European Commission, COMP/37975 *Yamaha* [2003], unpublished, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/37975/37975_91_3.pdf (last access 6 October 2017);

European Commission, COMP/39351, *Swedish Interconnectors* [2010], OJ C142/28;

European Commission, COMP/AT. 40181 Philips (vertical restraints), Economic Activity:G.47.91 - Retail sale via mail order houses or via Internet, DG Competition, European Commission, 2017;

European Commission, COMP/AT. 40182 Pioneer (vertical restraints), Economic Activity: G.47.91 - Retail sale via mail order houses or via Internet, Competition, European Commission, 2017;

European Commission, COMP/AT. 40465 Asus (vertical restraints), Economic Activity:G.47.91 - Retail sale via mail order houses or via Internet, DG Competition, European Commission, 2017;

European Commission, COMP/AT.40308. Kuoni, REWE, Thomas Cook, TUI, Meliá Hotel (vertical restraints), Economic Activities: I.55.10 - Hotels and similar accommodation, and N.79.12 - Tour operator activities, Competition, European Commission, 2017;

European Commission, COMP/AT.40413. Focus Home (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017;

European Commission, COMP/AT.40414. Koch Media (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017;

European Commission, COMP/AT.40420. Zeni Max (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017;

European Commission, COMP/AT.40422. Bandai Namco (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017;

European Commission, COMP/AT.40424. Capcom (vertical restraints), Economic Activity: J.58.21 – Publishing of Computer Games, Competition, European Commission, 2017;

European Commission, COMP/AT.40469 Denon & Marantz (vertical restraints), Economic Activity:G.47.91 - Retail sale via mail order houses or via Internet, DG Competition, European Commission, 2017;

European Commission, COMP/E-1/37.512, *Vitamins* [2003], O.J. L 6/1;

European Commission, Decision 88/501/EEC, Tetra Pak I, [1991], OJ L 272.

TABLE OF LEGISLATION AND OFFICIAL DOCUMENTS

Agreement on Trade and Related Aspects of Intellectual Property Rights (TRIPS), 1994;

Berne Convention for the Protection of Literary and Artistic works, 9 September 1886;

Charter of Fundamental Rights of the European Union 2000/C, OJ C 364, 18.12.2000;

Council of the European Union (2017), Proposal for a Regulation of the European Parliament and of The Council on addressing unjustified 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, 10339/17 - preparation for the trialogue, available at http://data.consilium.europa.eu/doc/document/ST-10339-2017-INIT/en/pdf (last access 20 March 2018)

Council of the European Union (2018), Press Release, *Geo-blocking: Council adopts regulation to remove barriers to e-commerce,* available at http://www.consilium.europa.eu/en/press/press-releases/2018/02/27/geo-blocking-council-adopts-regulation-to-remove-barriers-to-e-commerce/ (last access 20 March 2018);

Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000;

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L 167, 22.06.2001;

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;

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, OJ L 111, 5.5.2009;

European Commission (1997), *Notice on the definition of the Relevant Market for the purposes of Community Competition Law*, OJ C 372, 9.12.1997;

European Commission (2004), *Communication on parallel imports of proprietary medicinal products frequently asked questions*, MEMO/04/7;

European Commission (2004), Press Release, *Commission Communication on parallel imports of proprietary medicinal products frequently asked questions, 19 January 2004*,

available at: http://europa.eu/rapid/press-release_MEMO-04-7_en.htm?locale=en (last access 6 October 2017);

European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Digital Agenda for Europe - COM(2010) 245 final*, OJ C 54, 19.2.2011;

European Commission (2010), Communication from The Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth - COM(2010) 2020 final*, OJ C 88, 19.3.2011;

European Commission (2010), *Guidelines on Vertical Restraints*, SEC(2010) 411, OJ C 130;

European Commission (2012), Staff working document, with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive'), accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region on the implementation of the Services Directive: A partnership for new growth in services 2012-2015, SWD(2012)146 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0146 (last access: 6 October 2017);

European Commission (2014), Directorate General Internal Market and Services, *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf (last access: 6 October 2017);

European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A Digital Single Market Strategy for Europe* – COM(2015) 192 final, SWD(2015) 100 final;

European Commission (2015), Press Release: *Antitrust: Commission launches e-commerce sector inquiry*, available at http://europa.eu/rapid/press-release_IP-15-4921_en.htm (last access 6 October 2017);

European Commission (2015), *Public consultation on geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU*, published on 24 September 2015;

European Commission (2016), DG Communication Networks, Content & Technology - Unit F1 - Digital Single Market, *Full report on the results of public consultation on geoblocking*;

European Commission (2016), Directorate-General for Justice and Consumers, *Mystery Shopping Survey on Territorial Restrictions and Geo-blocking in the European Digital Single Market*, Final Report, GfK Belgium PS;

European Commission (2016), Explanatory Memorandum to COM(2016)289 - *Addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market*, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0289 (last access 6 October 2017);

European Commission (2016), Press Release, *Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services*, available at http://europa.eu/rapid/press-release_IP-16-2645_en.htm (last access 6 October 2017);

European Commission (2016), Press Release, *Antitrust: e-commerce sector inquiry finds geo-blocking is widespread throughout EU*, available at http://europa.eu/rapid/press-release_IP-16-922_en.htm (last access 6 October 2017);

European Commission (2016), 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 - SWD(2016) 70 final*, Brussels, 18 March 2016;

European Commission (2016), 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" - SWD(2016) 173 final*;

European Commission (2016), Staff Working Document, *Preliminary Report on the E-commerce Sector Inquiry - SWD(2016) 312 final*;

European Commission (2016), Synopsis Report, *Summary of responses to the European Commission's 2015 public consultation on 'Geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU'*, available at: https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-geoblocking (last access 6 October 2017);

European Commission (2017), Press Release, *Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce*, available at http://europa.eu/rapid/press-release_IP-17-201_en.htm (last access 7 October 2017);

European Commission (2017), Report from the Commission to the Council and the European Parliament, *Final report on the E-commerce Sector Inquiry - SWD(2017) 154 final;*

European Parliament (2016), *Geo-blocking and discrimination among customers in the EU*, Briefing - EU Legislation in Progress, July 2016, PE 586.620;

European Parliament (2017), *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects* - Study, IP/A/IMCO/2016-14, PE.595.362;

European Parliament (2018), Press Release, *Parliament votes to end barriers to cross-border online shopping*, available at http://www.europarl.europa.eu/news/en/press-room/20180202IPR97022/parliament-votes-to-end-barriers-to-cross-border-online-shopping (last access 20 March 2018);

Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, COM/2016/0596 final - 2016/0278 (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) 594 final;

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;

Regulation 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, OJ L. 102, 23.04.2010;

Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007;

Regulation of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC unpublished, available at http://data.consilium.europa.eu/doc/document/PE-64-2017-INIT/en/pdf (last access 20 March 2018);

WIPO Copyright Treaty (1996), available at http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_111709.pdf (last access 20 March 2018).

BIBLIOGRAPHY

Abriani (2002), *Le utilizzazioni libere nella società dell'informazione: considerazioni generali,* AIDA, 11, pp. 98-124;

Ahlborn and Bailey (2006) *Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison*, European Competition Journal, pp. 101-143;

Andenas and Roth (2003), *Services and Free Movement in EU Law*, Oxford University Press;

Areeda and Hovenkamp (2007), *Antitrust law. An analysis of antitrust principles and their application*, Boston, Aspen Publishers, IIB, p. 150;

Arezzo and Ghidini (2006), *On the Intersection of IPRS and Competition Law with Regard to Information Technology Markets*, European Competition Law Annual 2005: The Relationship between Competition Law and Intellectual Property Law, C. D. Elherman and I. Atanasiu eds., Hart Publishing;

Asser Institute – Centre for International & European Law and IVIR (2014), *Study on sports organisers' rights in the European Union Final Report - EAC/18/2012*, p. 102, available at: http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf (last access 6 October 2017);

Auteri (2006), *Il paradigma tradizionale del diritto d'autore e le nuove tecnologie,* in Proprietà digitale: diritti d'autore e Digital Rights Management, M. L. Montagnani and M. Borghi eds., Egea, pp. 23-51;

Ballestrero (2008), *Le sentenze Viking e Laval: la Corte di Giustizia "bilancia" il diritto di sciopero, in Lavoro e diritto*, XXII, n. 2, p. 389;

Barnard (2004), *The Substantive Law of the EU: The Four Freedoms,* Oxford University Press;

Batchelor and Montani (2015), *Exhaustion, Essential Subject Matter and Other CJEU Judicial Tools to Update Copyright for an Online Economy*, 10 Journal of Intellectual Property Law & Practice;

Baumol and Swanson (2003), *The New Economy and Ubiquitous Competitive Price Discrimination*, 70 Antitrust L.J., p. 661;

Begg, Vernasca, Fisher and Dornbush (2011), *Economics*, McGraw-Hill, p. 190;

Bellamy and Child (2016), *European Union Law*, Oxford University Press;

Bertani (2007), *La tutela del software nell'Unione Europea,* in Rivista di diritto dell'impresa, pp. 287-312;

Bishop and Walker (2002), *The Economics of EC Competition Law,* Sweet & Maxwell;

Bobbit (2002), *The Shield of Achilles: War, Peace and the Course of History*, Penguin;

Borghi (2011), *Chasing Copyright Infringement in the Streaming Landscape*, in International Review of Intellectual Property and Competition Law, Vol. 42, No. 3;

Borghi and Montagnani (2006), *Proprietà digitale: diritti d'autore, nuove tecnologie e digital rights management*, Egea;

Borghi, Maggiolino, Montagnani and Nuccio (2012), *Determinants in the online distribution of digital content: An exploratory analysis*, European Journal of Law and Technology, Vol. 3;

Business Europe, Position Paper, *Geo-blocking and different treatment in the single market*, 18 December 2015;

Carbonneau, McAfee and Mialon (2004), *Price discrimination and market power*, *Emory economics*, p. 413;

Carlton and Perloff (1999), *Modern Industrial Organization*, Third Edition, Addison-Wesley, Chapter 9;

Carroll and Coates (1999), *Teaching Price Discrimination: Some Clarifications*, Southern Economic Journal , 66 (2), p. 466;

Caso (2014), *Misure Tecnologiche di Protezione: Cinquanta (e più) Sfumature di Grigio della Corte di Giustizia Europea,* Trento Law Tech Research Paper No. 19;

Chalmers, Davies and Monti (2010), *European Union Law: Cases and Materials,* Cambridge University Press, p. 677;

Charles River Associates (2014), *Economic Analysis of the Territoriality of the Making Available Right in the EU,* commissioned by European Commission;

Clerides (2002), *Price discrimination with differentiated products: definition and identification*, 20 International Journal of Industrial Organization;

Condinanzi (2017), *La libertà di stabilimento,* in Diritto dell'Unione europea, Girolamo Strozzi ed., Giappichelli Editore, pp. 178-182;

Condinanzi and Nascimbene (2006), *La libera prestazione dei servizi e delle professioni in generale,* in Il Diritto privato dell'Unione europea, ed. A. Tizzano, Giappichelli Editore, pp. 330 ss.;

Cornish, Llewelyn and Aplin (2013), *Intellectual property: patents, copyright, trade marks and allied rights*, 8th ed., Sweet & Maxwell, p. 28;

Crespo van de Kooiji (2013), *The Private Effect of the Free Movement of Goods: Examining Private-Law Bodies' Activities under the Scope of Article 34 of the Treaty of the Functioning of the European Union*, 40 Legal Issues of Economic Integration, Issue 4, pp. 363–374;

Donnelly (1997), *Parallel Trade and International Harmonization of the Exhaustion of Rights Doctrine*, 13 Santa Clara Computer & High Tech. L. J., p. 445;

Edelman (2015), *The Thrill of Anticipation: Why the Circumvention of Geoblocks Should be Illegal*, Virginia Sports & Entertainment Law Journal, Vol. 15, p. 110;

Editorial Comment (2010), *The Scope of Application of the General Principles of Union Law: An Ever Expanding Union,* Common Market Law Review, 47 (6), p. 1598;

Engsig Sørensen (2012), *Non-discriminatory restrictions on trade*, in Sanford E. Gaines, B. Egelund Olsen, K. Engsig Sorensen, *Liberalising trade in the EU and the WTO: a legal comparison*, p. 200;

Ercolani (2004), *Il diritto di distribuzione di esemplari dell'opera protetta e l'esaurimento comunitario, in Il diritto di autore*, Giuffrè;

European Audiovisual Observatory (2015), Study for the Council of Europe, *Territoriality and its impact on the financing of audio-visual works,* Iris Plus, available at http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e (last access 4 October 2017);

Faella (2008), *The Antitrust Assessment of Loyalty Discounts and Rebates,* Journal of Competition Law & Economics, Volume 4, Issue 2, p. 375;

Faull and Nikpay (2014), *The EU law of competition,* Oxford University Press, p. 387; M. Elegido (2011), *The Ethics of Price Discrimination*, *Business Ethics Quarterly* 21, no. 4, pp. 633-660;

Frassi (2001), *Direttiva 2001/29/CE del Parlamento europeo e del Consiglio del 22 maggio 2001 sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione, Commento*, in Rivista di diritto industriale, 4-5/2001;

Friedl and Kaupa (2014), *European Union Internal Market Law*, Cambridge University Press, p. 98;

Furse (2004), *Competition Law of the EC and UK*, 4th ed., Oxford University Press, p. 320;

Geiger and Schönherr (2014), *The Information Society Directive,* in I. Stamatoudi, P. Torremans eds., EU Copyright law – A Commentary, Edward Elgar Publishing;

Geradin and Petit (2005), *Price Discrimination under EC Competition Law: the Need for a Case-by-case approach*, The Global Competition Law Centre Working Papers Series, no. 07/05, p. 4;

Geradin, Layne-Farrar and Petit (2012), *EU Competition Law and Economics*, Oxford University Press, p. 4.999;

Gerard (2005), *Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities*, College of Europe - Global Competition Law Centre, Research Paper on the Modernisation of Article 82 EC;

Ghidini (2013), *Exclusion and access in copyright law: the unbalanced features of the European directive 'on information society' (InfoSoc),* in Rivista di Diritto Industriale, 1/2013;

Goebel (2012), T*he Principle of Exhaustion and the Resale of Downloaded Software – The UsedSoft/Oracle Case*, European Law Reporter (ELR), No. 9;

Goldstein and Hugenholtz (2013), *International Copyright: Principles, Law and Practice*, Third Edition, Oxford University Press, New York;

Gomez and Martens (2015), *Language, Copyright and geographic segmentation in the EU Digital Single Market for music and film*, JRC/IPTS Digital Economy Working Paper, No. 04, available at https://ec.europa.eu/jrc/sites/jrcsh/files/JRC92236_Language_Copyright.pdf (last access 6 October 2017);

Guibault (2017), *Individual Licensing Models and Consumer Protection,* in Remuneration of Copyright Owners - Regulatory Challenges of New Business Models, K. C. Liu and R. M. Hilty eds., MPI Studies on Intellectual Property and Competition Law, p. 223;

Heimler (2005), *Below-Cost Pricing and Loyalty-Inducing Discounts: Are They Restrictive and, If So, When?,* Competition Policy International, Vol 1, Number 2;

Hilty (2016), *Exhaustion in the Digital Age*, Research Handbook on Intellectual Property Exhaustion and Parallel Imports, I. Calboli and E. Lee eds., Edward Elgar Publishing, pp. 64-83;

Hornsby (2012), *Case Comment FAPL v QC Leisure & Karen Murphy: What's Wrong with the "Exclusivity Premium" and Why Can't It Be Protected*, Entertainment Law Review, 23, p. 157;

Hugenholtz (2009), *Copyright without frontiers: the problem of territoriality in European copyright law*, in E. Derclaye (edited by), Research Handbook on the Future of EU Copyright, Edward Elgar Publishing;

Hugenholtz (2009), *Satcab Revisited: The Past, Present and Future of the Satellite and Cable Directive,* Convergence, Copyrights and Transfrontier Television, European Audiovisual Observatory;

Hugenholtz (2010), *Copyright Territoriality in The European Union - PE 419.621*, DG for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs Brussels;

Ibáñez Colomo (2014), *The Commission Investigation into Pay TV Services: Open Questions*, Journal of European Competition Law & Practice, Volume 5, Issue 8, p. 531;

İnanılır (2008), *Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine*, Ankara Bar Review, 2008/2;

Jones and Sufrin (2016), *EU Competition Law: Text, Cases and Materials*;

Kaftal and Pal (2008), *Third Degree Price Discrimination in Linear-Demand Markets: Effects on Number of Markets Served and Social Welfare*, *Southern Economic Journal* 75, no. 2, pp. 558;

Karapapa (2016), *Reconstructing copyright exhaustion in the online world*, IPQ;

Kataja (2017), dissertation: *"Content is not available in your country" – Is Geo- Blocking Compatible with the Internal Market*?, University of Turku – Faculty of Law;

Katz (2016), *The Economic Rationale of Exhaustion: Distribution and Post-Sale Restraints*, in Research Handbook on IP Exhaustion and Parallel Imports, I. Calboli and E. Lee eds., pp. 23-43, Edward Elgar Publishing;

KEA European Affairs and MINES ParisTech (2010), *Multi-Territory Licensing of Audiovisual; Works in the European Union*, prepared for the European Commission, DG Information Society and Media;

Keeling (2003), *Intellectual Property Rights in EU Law*, Oxford University Press;

Kiemel (2003), *Art. 56 EG*, in von der Groeben/Schwarze, Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, Vol. 1, point 24;

Kochelek (2009), *Data Mining and Antitrust*, 22 Harv. J. L. & Tech., p. 515;

Kra-Oz (2014), *Geo-blocking and the legality of circumvention*, Hebrew University of Jerusalem Legal Research Paper Series, no. 15-31;

Kwon (2006), *Third-Degree Price Discrimination Revisited*, The Journal of Economic Education (Taylor & Francis) 37, no. 1, p. 83;

Landsburg (1998), *Price Theory & Applications.* 4th. Cincinnati: OH: South-Western College Publishing;

Lenk, Hoppe and Adorno (2007), *Ethics and Law of Intellectual Property - Current Problems in Politics, Science and Technology*, Routledge;

Levine (2002), *Price discrimination without market power*, 19 *Yale J. on Reg.*;

Libertini (2014), *Diritto della concorrenza dell'unione europea*, Giuffrè;

Lobato and Meese editors (2016), *Theory on Demand #18, Geoblocking and Global Video Culture*, Institute of Network Cultures, available at: http://networkcultures.org/blog/publication/no-18-geoblocking-and-global-video-culture/ (last access 20 March 2018);
Lundstedt (2016), *Territoriality in Intellectual Property Law*, Stockholm University;

Machlup (1952), *The Political Economy of Monopoly*. Baltimore: MD: The Johns Hopkins University Press;

Madiega (2015), *Digital Single Market and geo-blocking*, European Parliamentary Research Service;

Madiega (2015), *EU Copyright Reform: Revisiting the Principle of Territoriality*, European Parliamentary Research Service;

Maggiolino (2012), *Intellectual Property and Competition Law: Some present tenets*, in Crossroads of Intellectual Property: Intersection of Intellectual Property and Other Fields of Law, C. Angelopoulos, A. Ramalho eds., Nova Science Pub Inc, pp. 121-139;

Maggiolino (2016), *Big data e prezzi personalizzati*, in Concorrenza e Mercato, n. 23, p. 95;

Mansani (2010), *User Generated Content*, in AIDA, p. 244 ss.;

Marcus and Petropoulos, (2017), *Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment - IP/A/IMCO/2016-15, PE 595.364*, available at http://bruegel.org/wp- content/uploads/2017/02/IPOL IDA2017595364 EN.pdf (last access 6 October 2017);

Marenco (1987), *Competition between national economies and competition between businesses - a response to Judge Pescatore*, in Annual issue on European Community law, vol. 10, n 3, p. 420;

Mataja (2016), *Private Regulation and the Internal Market,* Oxford University Press;

Matrix Insight (2009), *European Commission: Internal Market and Services DG: Contract with regard to access to services in the Internal Market (MARKT/2008/10/E): Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients - Implementation of Directive 2006/123/EC on Services in the Internal Market*, Final Report, p. 72;

Mazziotti (2015), *Is geo-blocking a real cause for concern in Europe?,* EUI Department of Law Research Paper No. 2015/43, p. 11;

Mazziotti (2016), *Is geo-blocking a real cause of concern in Europe?*, in European Intellectual Property Review, Vol. 38, Issue 6, p. 365;

Mazziotti and Simonelli (2016), *Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law*, Digital Policy, Regulation and Governance, Vol. 18, No 6, Emerald Group Publishing Limited, p. 57;

Monti and Coelho, *Geo-Blocking between Competition Law and Regulation,* CPI Antitrust Chronicle January 2017, available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Monti-Coelho.pdf (last access 20 March 2018);

Moscon (2011), *Rights Expression Languages: DRM vs. Creative Commons*, in JLIS.IT, n. 2;

Motta, *Competition Policy,* Cambridge University Press, 2004;

Nic Shuibhne (2013), *Chapter 4: The Negative Scope of Free Movement Law: Cross-Border Connections and the Significance of Movement* in The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice, Oxford University Press, p. 102;

Nic Shuibhne (2013), *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice,* Oxford University Press, p. 26 ss.;

Nic Shuibhne (2014), *Exceptions to Free Movement Rules*, in C. Barnard and S. Peers, *European Union Law*, Oxford University Press;

Nicholson (1997), *Intermediate Microeconomics and its Application.* Fort Worth: TX: The Dryden Press, p. 305;

O'Donoghue and Padilla (2013), *The Law and Economics of Article 102 TFEU*, Hart Publishing;

Odlyzko (2003), *Privacy, Economics and Price Discrimination on the Internet,* ICEC2003: Fifth International Conference on Electronic Commerce, N. Sadeh ed., pp. 355-366;

Odudu (2012), *Collusion: Agreement and concerted practice,* in The Boundaries of EC Competition Law, Oxford Studies in European Law;

Østerud (2010) *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests, International Competition Law Series*, Wolters Kluwer;

Papandropoulos (2007), *How should price discrimination be dealt with by competition authorities?*, in *Revue des droits de la concurrence*, Concurrences N° 3-2007, p. 34;

Pasetti (2010), *Parità di trattamento,* in Enc. Giur., Treccani;

Peukert (2012), *Territoriality and Extraterritoriality in Intellectual Property Law,* in G. Handl, J. Zekoll, P. Zumbansen eds., Beyond Territoriality: Transnational Legal

Authority in an Age of Globalization, Queen Mary Studies in International Law, Brill Academic Publishing;

Philips (1983), *The Economics of Price Discrimination,* Cambridge University Press;

Philipson (2001), *Guide to the Concept and Practical Application of Articles 28-30 EC*, European Commission, Internal Market DG, p. 20;

Pigou (1920), *The economics of welfare*, London, Macmillan and Co;

Plum Consulting (2012), Final report for the European Commission, *The economic potential of cross-border pay-to-view and listen audio-visual media services*, available at http://ec.europa.eu/internal_market/media/docs/elecpay/plum_tns_final_en.pdf (last access 6 October 2017);

Poiares Maduro *et al.* (2017), *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects" - IP/A/IMCO/2016-14, PE 595.362,* Study for the IMCO Committee, European Parliament;

Renda *et al.* (2015), *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, CEPS Special Report No. 120, Centre for European Policy Studies, available at https://www.ceps.eu/system/files/SR120_0.pdf (last access 6 October 2017);

Ricolfi (2002), *Comunicazione al pubblico e distribuzione,* AIDA, p. 54;

Ricolfi (2007), *Individual and collective management of copyright in a digital environment,* in Copyright law: a handbook of contemporary research, Edward Elgar Publishing, pp. 283-314;

Ricolfi (2011), *Making Copyright Fit for the Digital Agenda*, 12th EIPIN Congress 2011 - Constructing European IP: Achievements and new Perspectives;

Ridyard (2002), *Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis*, European Competition Law Review, no. 6;

Riis and Schovsbo (2017), *The borderless online user – Carving up the market for online and streaming services*, in P. Torremans, Research Handbook on Copyright Law (Second ed.), Edward Elgar Publishing;

Roberts, Zuckerman and Palfrey (2007), *Circumvention Landscape Report: Methods, Uses, and Tools*, The Berkman Center for Internet and Society, Harvard University, p. 9;

Rousseva (2010), *Rethinking exclusionary abuses in EU competition law*, Hart Publishing;

Sarti (2002), *Proprietà intellettuale, interessi protetti e diritto antitrust*, Riv. Dir. Ind., 1/2002, pp. 543-576;

Sbolci (2017), *La libera circolazione delle merci,* in Diritto dell'Unione europea, Girolamo Strozzi ed., Giappichelli Editore;

Schepel (2012), *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law,* European Law Journal - Review of European Law in context;

Schepel (2013), *Case C-171/11 Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches,* in European Review of Contract Law;

Schmalensee (1981), *Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination*, American Economic Review, p. 242;

Schmalensee (1985), *Price Discrimination and Social Welfare*, 75 Am Econ Rev, p. 870;

Schulte-Nölke et al. (2013), *Discrimination of Consumers in the Digital Single Market - IP/A/IMCO/ST/2013-03, PE 507.456*, Study for the IMCO Committee, European Parliament, Directorate-General for Internal Policies, Centre for European Policy Studies;

Shapiro and Varian (1999), *Information rules: a strategic guide to the network economy*, Boston, Harvard Business School Press;

Shepherd (1997), *The Economics of Industrial Organisation,* Englewood Cliffs: NJ: Prentice-Hall;

Simonelli (2016), C*ombating Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and other Forms of Geo-Discrimination - IP/A/IMCO/2016-06, PE 587.315*, Study for the IMCO Committee, European Parliament, Directorate-General for Internal Policies, Centre for European Policy Studies;

Siragusa (2008), *Is there an Independent/Additional (European, International) Open-Market Criterion for Determining Abuse*, in Intellectual Property, Market Power and the Public Interest, I. Govaere and H. Ullrich eds., PIE-Peter Lang;

Slotboom (2003), *The Exhaustion of Intellectual Property Rights Different Approaches in EC and WTO Law,* The Journal of World Intellectual Property, Volume 6, Issue 3;

Smith (2016), *The Ins and Outs of Geo-blocking*, DigitalBusiness.Law, available at http://digitalbusiness.law/2016/11/the-ins-and-outs-of-geoblocking/ (last access 6 October 2017);

Snell (2016), *Economic Justifications and the Role of the State* in P. Koutrakos, N. Nic Shuibhne, & P. Syrpis, *Exception from EU Free Movement Law, Derogation, Justification and Proportionality*, Hart Publishing, p. 12;

Stigler (1987), *The theory of price*, Edition 4, Macmillan;

Stole (2003), *Price discrimination and imperfect competition*, 1, available at http://web.mit.edu/14.271/www/hio-pdic.pdf (last access 6 May 2017);

Temple Lang (2009), *L'art. 82. I problemi e la soluzione*, in Mercato Concorrenza Regole, p. 240;

Temple Lang and O'Donoghue (2002), *Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 102EC*, 26 Fordham Int'l LJ 83, pp. 89-90; A. Jones and B. Sufrin (2016), *EU Competition Law: Text, Cases and Materials*, Sixth Edition, Oxford University Press;

Thompson QC, Brown and Gibson (2013), *Article 102*, in Bellamy & Child, European Union Law of Competition, seventh edition, edited by V. Rose and D. Bailey, Oxford University Press, paragraph 10.081, p. 800;

Tirole (2003), *The Theory of Industrial Organization*, The MIT Press, Chapter 3;

Torremans and Holyoak (2016), *Intellectual Property Law*, Oxford University Press, Oxford, 8th edition;

Tosi (1999), *I problemi giuridici di internet*, in ALPA, Diritto dell'informatica, Vol. 15, Giuffrè;

Trimble (2012), *The Future of Cyber Travel: Legal Implications of the Evasion of Geolocation*, in Fordham Intellectual Property Media & Entertainment Law Journal, Vol. 22, 567, p. 586;

Trimble (2014), *The Territoriality Referendum*, in *WIPO Journal*, Vol. 6, Issue 1;

Trimble (2015), *The Multiplicity of Copyright Laws on the Internet,* Fordham Intellectual Property, Media & Entertainment Law Journal 25.2;

Ubertazzi (2014), *The Principle of Free Movement of Goods: Community Exhaustion and Parallel Imports*, in EU Copyright Law - a Commentary, Elgar Commentaries series, I. Stamatoudi and P. Torremans eds., p. 42;

Van Beal & Bellis (2005), *Competition Law of the European Community,* Kluwer Law International;

van der Vijver (2013), *Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?*, Journal of European Competition Law & Practice, Volume 4, Issue 2, p. 121;

Van Eechoud *et al.* (2012), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Amsterdam Law School Legal Studies Research Paper No. 2012-07;

Varian (1985), *Price Discrimination and Social Welfare*, The American Economic Review 75, no. 4, p. 870;

Varian (1989), *Price discrimination*, in Handbook of Industrial Organization, Volume I, Chapter 10, edited by R. Schmalensee and R.D. Willig, Elsevier Science Publishers, p. 598;

Vecchio (2010), *Dopo Viking, Laval e Rüffert: verso una nuova composizione tra libertà economiche europee e diritti sociali fondamentali?,* in www.europeanrights.eu, p. 7;

Westkamp (2016), E*xhaustion and the Internet as a distribution channel: the relationship between intellectual property and European law in search of clarification*, Chapter 26, in Research Handbook on Intellectual Property Exhaustion and Parallel Imports;

Whish and Bailey (2015), *Competition Law*, 8th ed., Oxford University Press;

Winkler (2001), *Brevi note intorno alla Direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società,* in Diritto del commercio internazionale, 15(3), pp. 705-713;

Wood (2012), *The CJEU's ruling in the premier league pub TV cases - the final whistle beckons: "Football Association Premier League Ltd v QC Leisure (C-403/08)" and "Karen Murphy v Media Protection Services Ltd (C-429/08)"*, European Intellectual Property Review, Vol. 34, n. 3, p. 203;

Woods (2004), *The Free Movement of Goods and Services within the European Community,* in European Business Law Library, Ashgate;

World Intellectual Property Organisation (2011), *From Script to Screen – The importance of Copyright in the Distribution of Films*, Creative Industries, n. 6 p. 30, available at http://www.wipo.int/edocs/pubdocs/en/copyright/950/wipo_pub_950.pdf (last access 4 October 2017);

World Intellectual Property Organisation, *International Exhaustion and Parallel Importation*, available at: http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm (last access 6 October 2017);

World Intellectual Property Organization (2011), *Interface Between Exhaustion of Intellectual Property Rights and Competition Law*, CDIP/4/4 REV./STUDY/INF/2, available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4rev_study_inf_2.pdf;

World Intellectual Property Organization (2015), Standing Committee on Copyright and Related Rights, *Current Market and Technology Trends in the Broadcasting Sector*, SCCR/30/5, Geneva, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_5.pdf (last access 6 October 2017);

Zahn (2008), *The Viking and Laval Cases in the Context of European Enlargement*, in Web Journal of Current Legal Issues.

INDEX OF ABBREVIATIONS

AV: audio-visual

AVoD: Advertising Video-on-Demand

CD: Compact disk

CJEU: Court of Justice of the European Union

DNS: Domain name system

DRM: Digital rights management

DSM: Digital single market

DVD: Digital versatile disk

EC Treaty: Treaty Establishing the European Community

EEA: European Economic Area

EU: European

FAPL: Football Association Premier League

IMCO: Internal Market and Consumer Protection Committee

IP (address): Internet protocol address

IPR(s): Intellectual property right(s)

OTT (service providers): Over the top (service providers)

SVoD: Subscription Video-on-Demand

TEU: Treaty of the European Union

TFEU: Treaty on the Functioning of the European Union

TOR: The Onion Router

TV: Television

TVoD: Transactional Video-on-Demand

UK: United Kingdom

VAT: Value added tax

VoD: Video-on-demand

VPN: Virtual private network