



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **A**
ECONOMIC AND SCIENTIFIC POLICY



Tackling Geo-blocking in the EU

Economic and Monetary Affairs

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**Internal Market and
Consumer Protection**

Tackling Geo-blocking in the EU

Study Analysis for the IMCO Committee



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

10th Meeting of the IMCO Working Group on the Digital Single Market

Completing the Digital Single Market for European Consumers and Citizens: Tackling Geo-blocking in the EU

STUDY

Abstract

This report summarizes the discussion during the 10th Meeting of the IMCO Working Group on the Digital Single Market. It summarizes the exchange of views between MEPs, independent academic experts and the European Commission on the topic of geo-blocking in the Digital Single Market.

The proceedings were prepared by Policy Department A for the Internal Market and Consumer Protection Committee.

This document was prepared for the European Parliament's Committee on Internal Market and Consumer Protection.

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ABOUT THE EDITOR

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LIST OF ABBREVIATIONS

B2B	Business to business
DG Comp	Directorate General for Competition
DSM	Digital Single Market
EC	European Commission
ECJ	European Court of Justice
ECCG	European Consumer Consultative Group
EIF	European Investment Fund
EPP	European People's Party
EU	European Union
EUI	European University Institute
IMCO Committee	Internal Market and Consumer Protection Committee
Address IP	Internet protocol address
MEP	Member of the European Parliament
MS	Member State
S&D Group	Socialists & Democrats
SMEs	Small and medium-sized enterprises
UK	United Kingdom

EXECUTIVE SUMMARY

Background

On **14 November 2016** IMCO held the tenth meeting of its **Working Group on the Digital Single Market**, under the leadership of the **Chair of the Working Group, Róża Gräfin von Thun und Hohenstein, Member of the EPP Group**. The meeting focused on the exchange of views between MEPs, independent academic experts and the European Commission on the topic of geo-blocking in the Digital Single Market.

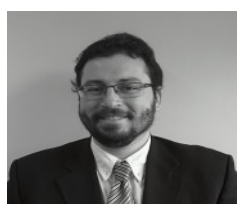
Speakers:

Prof. Dr Jules Stuyck is an emeritus Professor of Consumer Law at Panthéon-Assas Paris University. He already published more than 300 books and articles. His work on technology and innovation has been featured in publications such as Harvard Business Review, the Globe and Mail and the Huffington Post.



Prof. Dr Luís Miguel Poiares Maduro is a Professor of Law at the European University Institute (EUI) (Florence, Italy). From April 2013 to October 2015 he was Portugal's Minister for State and Regional Development and Minister Adjunct to the Prime Minister. From October 2009 to April 2013 he held the Joint Chair in European Law in the Robert Schuman Centre for Advanced Studies and the Department of Law at the EUI. In this capacity Prof. Dr Maduro was the founding director of the Global Governance Programme (GGP). From 2003 to 2009 Prof. Dr Maduro was Advocate General at the European Court of Justice.

Prof. Dr Giorgio Monti is a Professor of competition law at the European University Institute (Florence, Italy) where he presently serves as Head of Department. Prof. Dr Monti is also scientific director at the EUI's Florence School of Regulation where he helps organise trainings and workshops in competition law matters for judges, regulators and practitioners. He serves as non-governmental adviser to the International Competition Network and co-directs the Rome Antitrust Forum, an annual workshop to discuss the work of the Italian Competition Authority. He has written on a broad range of issues pertaining to competition law and EU law. Prof. Dr Monti is co-author of *European Union Law: Text and Materials* (3rd edition, Cambridge University Press, 2014).



Dr Georgios Petropoulos is a research fellow at Bruegel. His research focuses on digital economy, competition policy and regulation. Dr Petropoulos has been a research visitor at the European Central Bank, the Banque de France and the research department of Hewlett-Packard. He received the best teaching assistant award for the academic year 2014-2015 at Toulouse School of Economics in which he did his PhD studies. He has participated in many international academic and policy conferences and workshops and he has economic consulting experience from Compass Lexecon in Madrid.

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1. OPENING STATEMENT

The Chair of the Digital Single Market Working Group, **Ms Róza Gräfin von Thun und Hohenstein (MEP)**, opened the tenth meeting of DSM WG on Tackling Geo-Blocking completing the digital Single Market and welcomed the Members of the European Parliament, officials of the European Commission and academic experts. The Chair indicated at the complexity of this legislation and the importance to bring clarity to Commission’s proposal.

This meeting was divided in three blocs which represent the main dilemmas of geo-blocking.

The aim of the tenth meeting of the Working Group was to assess different aspects of the Commission’s proposal for a Regulation on geo-blocking. Presentations by independent experts on the interplay of the proposal with the Rome 1 Regulation, on the EU measures prohibiting geo-blocking in sectors outside of the Services Directive, and on the economic impact of a potential extension of the scope to the non-audiovisual copyrighted content services, were to be held, examined and debated with MEPs, representatives of the Commissions, stakeholders and participants. The Chairwoman reminded everyone of the importance of the principle of non-discrimination on the basis of nationality. **Ms Thun** introduced to the audience the four experts invited by the IMCO Committee to share their expertise and evaluation of this file.



2. KEYNOTE SPEECHES: CHALLENGES FOR LAWMAKERS

2.1. The interplay of the proposal with Rome 1 Regulation

Prof. Dr Jules Stuyck made his introduction by reminding attendees of the challenges for the European Union regarding this specific topic. His speech focused on the applicable law.

The expert recalled that the article 20(2) of Services Directive (article 4 of the proposal) states that there must not be nationality discrimination on the basis of the place of residence of the recipient. The speaker reminded also that it is possible sometimes to justify some barriers with objective criteria.

Relevant provision for the proposal regarding the private International law, art 1(2) "the regulation applies to the situation where the customer has his residence or establishment on another state of the trader...", has to be understood in the light of Rome 1.

The proposal tries to define the situation where different treatment cannot be justified by the directive. Residence is relevant for consumer but in Rome 1, in primary law, we can see that the notion applied is habitual residence.

Article 4 describes the situation where traders shall not apply different general conditions of sale for reasons relating to residence, nationality and place of business of the customer. The proposal does not compel the individual to sell abroad.

Moreover this proposal does not define place of residence. Logically, according to the expert, this is the same definition of the primary law: habitual residence.

Article 1(5) tries to solve a possible conflict between Rome 1 and the proposal. The Court of Justice case law usually refers to Brussels 1 and Brussels 1 bis.

What is important for the consumer is having his or her law applicable and not the trader's law.

But it can be an impediment for businesses to have to cope with each different legal system, 28 or 27, it could be problematic and could lead to legal uncertainty.

Rome 1, in its main provision art 6(1) states that a contract concluded by a consumer with a professional shall be governed by the law of the country where the consumer has his habitual residence provided that the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence, or by any means, directs such activities to that country or to several countries including that country. Therefore, this is the case of a passive consumer.

The expert also reminded attendees of article 6(2) which is about the choice of law where the parties themselves may choose the applicable law.

The situation is even more complicated if it is considered that different rules can apply to the same situation.



The expert indicated that article 23 provides that a specific regulation can lay down conflict of law rules. Where the trader by any means, directs his or her activities to the country of the habitual residence of the consumer, the law of consumer will apply.

To illustrate these arguments, the speaker presented the case *Pammer and Alpenholf* (C-585/08) concerning Brussels I.

This case law indicates the case when a trader is directing his activities directly to the country of the consumer depends on a series of criteria.

Subsequently, the national judge has to ascertain the evidence of the existence of the facts. It is a broad notion and a wide margin of discretion for a national judge with, again, some legal uncertainty.

To conclude, on the basis of Rome I, Prof. Dr Stuyck recalled that if the consumer is 'passive' the law of the country of the consumer will, normally, apply. He also reminded of the fact that parties can choose the applicable law but they cannot derogate from imperative provisions of the law of the consumer. In addition, the mere accessibility to the trader's website in a Member State of the consumer is insufficient to make the consumer 'passive'.

2.2.1 EU measures prohibiting geo-blocking.

Prof. Dr Luís Miguel Poiães Maduro discussed if the extension of the existing set of rules could properly address the problem generated by geo-blocking. The speaker hoped that their research would be able to demonstrate whether the scope of the proposal is sufficient or not.

The expert described several obstacles that may emerge from geo-blocking. From the refusal to sell based on territory to differentiating conditions imposed on consumers depending on their residence. Prof. Dr Maduro focused as well on the primary rules of the Treaty and if these rules would resolve the problem.

The expert wondered if the prohibition of non-discrimination on the basis of nationality and/or free movement provisions of the Internal Market can eliminate geoblocking restrictions.

Concerning the article 18 TFEU, Prof. Dr Maduro argued that there is no doubt that in the case law, reference to residence amounts to indirect discrimination on the basis of nationality. Even if Article 18 TFEU has direct effect and is not limited, in its text, to state action, it is only applicable within the scope of application of EU law (it includes Treaty rules and competences).

Prof. Dr Maduro indicated that the scope of application of non-discrimination on the basis of nationality largely depends on the scope of the free movement provisions. The text of free movement rules does not expressly resolve the issue of the horizontal effect of free movement. It is therefore necessary to have regard to the place and function of these provisions in the scheme of the Treaty.

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

However, this does not validate the argument *a contrario* that the Treaty precludes horizontal effect of the provisions on freedom of movement. On the contrary, such horizontal effect would follow logically from the Treaty where it would be necessary in order to enable market

participants throughout the Union to have equal opportunities to gain access to any part of the Internal Market.

The Court has acknowledged that the rules on freedom of movement can also be invoked with respect to the actions of private individuals, including by limiting their private autonomy.

The European Court of Justice's interpretation of primary law provisions, however, certainly limits the possibility to make use of primary law. In fact, the Court defines the scope of application of free movement provisions to public and private action in very different ways based on certain underlying assumptions.

Firstly, about state action: the normative and socio-economic power inherent in state authorities entails that these authorities have, by definition, significant potential to thwart the proper functioning of the common market. Moreover, state authorities are less likely than private economic operators to adapt their conduct in response to the commercial incentives that ensure the normal operation of the market. Therefore, the scope of the rules on freedom of movement extends to potentially any state action. Secondly, about private action: by contrast, in many circumstances private actors simply do not wield enough influence to successfully prevent others from enjoying their rights to freedom of movement.

There is, however, a second reason why the Court has to limit the scope of application of free movement provisions in case of private action - workload. The Court could not possibly deal with all potential challenges by private individuals against traders under the free movement provisions.

This later reason is particularly important to explain. Even if a certain matter may require the application of free movement principles (such as with geo-blocking), such application might have to depend on secondary legislation so as to regulate the matter in such way that it prevents the risk of flooding the ECJ (notably because secondary rules are more susceptible to decentralized application by national courts or to include alternative mechanisms of enforcement).

So, when can free movement rules apply to such situations? There seems to be no simple answer to that question. The Court, in its case-law, has proceeded carefully by recognising the direct horizontal application of the rules on freedom of movement in specific cases.

The most explicit and repeated statement seems to regard actions by private parties that regulate in a collective manner particular subjects (notably rules adopted by private associations). But the Court goes further than this. A number of cases have concerned the exercise of intellectual property rights.

Similarly, the Court has applied the rules on freedom of movement to national and international professional sporting associations such as in *Walrave* (C-36/74) or *Bosman* (C-415/93).

The broader application of the provisions on freedom of movement to private action was admitted by the Court in its judgment in *Angonese* (C-281/98), when it applied article 39 to a private bank in Bolzano. The Court has kept the *Angonese* case as an exception rarely applied in other cases, very much limited to much similar facts and the free movement of workers. As a consequence: free movement provisions cannot be applied to most cases of geo-blocking. They do not provide an adequate remedy to geo-blocking by traders.

In addition, I would argue that, even if they were applicable to all such situations they would still not provide an adequate remedy for the following reasons:

- Litigation and information costs would make it very unlikely that consumers would litigate cases of geoblocking;
- One shot vs repeated litigants;

- High information costs.

Low individual stakes but high disseminated cost for consumers (in terms of choice and price) is usually an argument for legislative intervention. As such, both for reasons of law and policy, this is a matter better addressed through secondary legislation (it is for that reason that both Article 18 – non-discrimination on the basis of nationality – and free movement provisions foresee the adoption of secondary legislation to further the internal market and non-discrimination goals)

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

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

The Court has recognised the need to balance these rights. But if it has, even in cases involving the right to demonstrate or to strike, recognised that the later should not prevail over the right not to be discriminated against on the basis of nationality and free movement, it is certainly the case that the right not to be discriminated on the basis of nationality should in principle prevail over the freedom to conduct a business (when in conflict).

A derivative question may still emerge? Why care?

In fact, it could be expected that traders would be the first interested in trade with consumers residents in other Member States and, therefore, extend their market. That might not be the case only if there would be anti-competitive agreements that ought to be dealt by competition law instruments. Why do we need to legislate then?

A few reasons:

- The first is that the economic data collected appears to demonstrate that competition and competition law have not, de facto, been effective in eliminating geo-blocking. Geo-blocking remains a wide spread practice. There are several possible reasons for this: the same factors that would render litigation by consumers under free movement unlikely (see above) will tend to affect the decentralized enforcement of competition law in this area and European Commission enforcement resources are limited; anti-competitive agreements and practices, even when resulting in geo-blocking, are not always easy to prove (it is not enough to show that there is geo-blocking)

- Second, many traders are path-dependent on their national markets and either fearful to expand or comfortably attached to differentiated selling conditions. These practices are not violations of competition law (except in cases where they hold a dominant position) but they do restrict consumer's access to the full benefits of the Internal Market.

- Third, unfair trade practices, including geo-blocking, are not limited to anti-competitive practices.

This does not mean that one should not take into account the particular nature of the prohibition of geo-blocking in promoting the rights of consumers not to be discriminated and to access and benefit from the Internal Market at the expense, in that limited respect, of the autonomy of traders.

The strongest argument for geo-blocking on the part of traders may be the fear of litigation in multiple jurisdictions and according to different laws. This problem may be resolved by assuming that on cross-border online sales it is the consumer that chooses to buy in another jurisdiction (as is the case when the consumer is taking his or her car across the border to do shopping). It reverses the usual presumption to favour the consumer but this is justified by

the parallel with other cross-border sales where the consumer actively goes to buy in another State.

This is different from the active and passive sales concept. This concept is useless on the online domain (there may be geo-blocking agreements on active sales justified – eg: advertising - but a general clearance seems excessive and will raise uncertainty: see, a contrario, what is foreseen in Article 6 of the proposed Regulation).

To conclude, Prof. Dr Maduro gave, from this analysis, two additional points:

- The problems with private enforcement in this area highlight the need to think of appropriate mechanisms of enforcement, both in the selection of the bodies entrusted with such role and the powers granted to them (may be coordinated with what is being foreseen for Consumer Protection Agencies). What is foreseen in Article 8 seems insufficient.

- Unified vs fragmented approaches: expert's initial assessment is that a unified approach to geo-blocking is preferable (for reasons related to information costs for consumers and the enforcement problems noted). However, there may be reasons to exclude certain areas (eg: where copyright may be involved in light of the difficulties of regulating such issues, the connection with other issues and the time that may entail).

2.2.2 EU measures prohibiting geo-blocking in sectors outsider of the Services Directive

Prof. Dr Giorgio Monti continued Prof. Dr Maduro's presentation but focused on another aspect of primary law, that is if competition law might address the issue of geo-blocking. The expert also wanted to demonstrate the insufficiency of this measure, and talked about the scope of the legislation and how to optimise it.

When discussing competition law, the speaker indicated at the distinction between geo-blocking of goods or services covered by copyrights and geoblocking when goods/services are not protected by copyrights.

Two competition enforcements are relevant for the expert. Firstly, direct control of geo-blocking with distribution agreements banning retailers from making passive sales are prohibited. Secondly, indirect control of geo-blocking, for example, making distribution agreements ban on internet sales is prohibited. The expert gave the example of two relevant cases: *Jacques Vabres* and *Colti*. This jurisprudence demonstrates the scope of competition law and also how this issue can facilitate cross border trade.

After this explanation **Prof. Dr Monti** focused on copyright issue. Indeed, this aspect is more complex because of national copyright protection. It is important to notice that DG COMP tried to address geo-blocking via competition law and commitment decision: Paramount decision issued in summer of 2016.

This case is about a major Hollywood film company, Paramount, which committed to allow other



broadcasters in the European Union to make 'passive' sales to other consumers in the United Kingdom. The limit to this approach is - and because it is a commitment decision - that it does not create a precedent to understand the limit of the rule. It's also not clear if the other major Hollywood film companies would also follow this decision.

Competition law has some potential to address geo-blocking but Prof. Dr Monti thinks that this measure is generally insufficient. First, because the reach of competition law is weak and secondly it is not an enforcement priority for competition authority. France and Germany already tried to tackle geo-blocking but they do not have the enforcement potential of European competition law.

When discussing the proposal, the Prof. Dr Monti was disappointed that, despite a grandiose title, regulation is actually severely limited because of the exclusion of copyright. With this proposal, the Commission, promised to review this exclusion specifically as soon as the regulation comes up for review.

The Commission proposed a number of compromises, incremental proposals, for example the portability proposal. In this case the issue is that in this special situation the consumer who has a subscription to copyright material who travels around another Member State and continues to download material, still receives the benefit of subscription as though he or she had never left the country of the subscription. The problem in this case is that the benefit is addressed to a small elite group of European consumers and not general consumers.

Regarding these vast discriminatory practices online, and this incremental approach, the expert questioned the attendees on the sufficiency of this proposal which he suggests is also counterproductive. The proposal seems to give the signal that the digital single market is not as important as the single market for goods. There is a dissonance between what the text proposes and what the regulation executes.

Prof. Dr Monti mentioned another exclusion which is also as important for him regarding geo-blocking: transport.

Transport services are excluded in the light of the fact that sector specific regulation. The Commission has realised that there is a gap for rail passengers.

When these specific rules are considered, the expert stated that it is astounding that geo-blocking continues to occur notwithstanding the fact that it is prohibited. There is an enforcement problem. It is now important to know who is enforcing the rules.

The regulation also creates certain risks: risk of circumvention and also to extend the market. One should not only look at the content of what is prohibited, but also who is enforcing the rules. To what extent might the market attempt to overtake any regulatory initiative that may be put forward.

The expert gave an illustration of how the market tried to circumvent geo-blocking: the initiative of the Maltese postal service. This postal service promised consumers the possibility to purchase goods that are available online in a number of European Member States and allows them a form of seamless transaction wherein they pretend to be in a particular jurisdiction so as to make a purchase at the price set in that jurisdiction which is then processed as such by the Maltese postal service.

This is the way that circumvents any kind of geo-blocking. This case demonstrates clearly how the market found a solution.

One thing about optimising the regulation that is important to remind attendees is the context of the regulation. In the preliminary study of the legislation the expert identified over 30 pieces of legislation which are directly or not directly addressing geo-blocking. It is the reason why any measure or tweak to this proposal needs to consider the possible effect that this

adjustment may have on these other measures. The broader legislative context is still important.

The expert addressed a number of drafting issues. The expert advised to only have one single article with all exclusions. Also the article 4(2) avoids awkward exceptions because it is only worth it for specific cases. For the expert, article 3, is not really useful because it creates transaction costs between the consumer and the seller. In addition to this, article 6 avoids overlap with competition law, this article will be stricter than competition law. The last point is to wonder if there is really any benefit to broadening the scope with this horizontal measure and the specificity of topics.

There is a paradox between the title of the proposal and its narrow scope. On one side, for economy reasons and legal certainty, it can be good to think about a horizontal approach, but on the other hand this approach may not capture the idiosyncrasies and some sectors can be excluded. Another difficulty of this horizontal approach is copyright law because it should be optimised before.

We have to remember enforcement: whether it is horizontal or sector specific regulation, enforcement is a vital ingredient to making sure that geo-blocking is stopped. The Commission proposed a regulation on cooperation between national authorities integrating the kind of power that the proposal includes in a geo-blocking proposal. The remedial scope that is afforded to national authorities by this proposal is extremely important.

Offering compensation for consumers who suffer geoblocking will create even more possibility to ameliorate the current situation.

2.3 Dr Georgio Petropoulos, The economic impact of a potential extension of the scope to the non-audio-visual copyrighted content services

Dr Petropoulos started his presentation by explaining potential impact of allowing geo-blocking restrictions in non-audiovisual copyright services.

Online sales have become increasingly important. In general, with the growth of online sales we see that the domestic part is more important than cross border sales. The graph in Dr Petropoulos' presentation showed geo-blocking by sector.

The European Commission's proposal prohibits unjustified geo-blocking and increases transparency. The issue is that article 4 states that it will not apply to electronic copyrighted services such as: audiovisual, sports, e-books, online games, software, etc. It does not apply even though these sector constitute the most important part of the market.

Dr Petropoulos specified the importance of keeping in mind that this part of the market will not be covered by the proposal. Concerning the impact assessment of the Commission, the numbers are clear, when the geo-blocking restriction is removed, purchases increase (1.2% on average).



Economic impact of lifting geo-blocking can bring positive impact on consumers, because they will have better prices and a better variety of products. Positive impacts will be also available for sellers.

Dr Petropoulos explained impact assessment of inclusion of non-audiovisual services in the proposal and that it can have real benefits.

Dr Petropoulos focused first on the example of the music industry. The year of 2015 was a record for the music industry because digital sales exceeded physical sales for the first time. It shows how important it is for the future. On streaming, the annual growth is 45%. The market continues to expand and become more important.

The speaker indicated that if we lift the restrictions of geo-blocking we will have a gain of 19 million euros for consumers and 10 million euros for producers including EU countries, Norway and Switzerland.

In this industry, some cultural and language preferences are important, and for this reason the United Kingdom can have a bigger impact on the market than Germany.

For producers, the impact is generally positive but for some sellers in some countries the impact is different because of the increase in competition and because prices might decrease.

According to the expert, it may not be a win-win situation but we have clear gains. It could be interesting also if the study would take into account some other countries.

Subsequently, the expert presented the market for e-books. The penetration of the digital content is not as striking as in the music sector.

The question is whether the fragmentation of the e-book market constrains the choice of the consumers to particular titles. The study by Batikas, focused on the Amazon model: EU online market and the U.S.

Who has access to this market? This market is restricted regarding the nationality or the residence of the consumer. Also, if a seller is not found within the EU, then consumers choose the market in the U.S.

Further, the expert made a comparison of computer game market and mobile gaming which also need portability, because of playing online.

In conclusion, Dr Petropoulos stated that we need to come up with an answer regarding article 1 of the draft regulation now, without hesitation for another year.

2 GENERAL DISCUSSION.



After the interventions of all speakers, the floor was given to the Members of the European Parliament. The first was **Mr Pascal Arimont, MEP** and Rapporteur of the IMCO Committee. Mr Arimont thanked the four speakers for their highly relevant presentation. Shoppers online and consumers in a shop should have the same rights. For that reason it will be useful to harmonise the legislation in order to avoid any conflicts of rules (Rome I and other provisions).

Mr Arimont, also, agreed that article 23 provides some exception but he wondered if we needed a clause to assure the rights of the consumer in any circumstances. Would better terms definition be helpful for the Court of Justice?

Ms Evelyne Gebhardt, MEP, thanked **Ms Thun, MEP**, and the speakers for their useful contributions and also, explained her point of view. Concerning Rome I, Ms. Gebhardt cannot agree with using article 23 of the proposal to cancel the consumer protection. The MEP wanted to find another solution to guarantee consumers' rights while ensuring the comprehension and the coherence of this legislation.

As Prof. Dr Monti and Dr Petropoulos have said, the scope of the directive is limited while the title is very long. The directive contains negative lists which make the text complex to understand. Ms Gebhardt worried that there may be fragmentation of law across the areas of goods, services and consumer protection.

The MEP asked Prof. Dr Monti if a sectorial approach can be useful and if a narrow scope can be acceptable. Ms Gebhardt stated that we need to resolve this fundamental question.

Ms. Gebhardt mentioned the services directive. The MEP thought that we have to find a sensible regulation to geo-blocking problem and to tackle those issues that really matter for citizens.

Ms Julia Reda, MEP talked about Rome I with similar approach to Ms Gebhardt.

Ms Reda was concerned that removing geo-blocking for those who cannot purchase goods and services for the moment, could have as a consequence lowering the level of consumer protection for consumers who are currently not suffering from geo-blocking.

Ms. Reda also asked if it is a huge problem to only apply Rome I. Because nowadays is not a real problem for offline sales so it will be not a problem for online sales either.

Ms. Reda wanted to caution against giving the consumer the option to voluntarily agree because if we are looking to the way that consumers currently agree on the internet, they do not effectively make their choices.

The MEP asked how is it possible to differentiate traders who use geo-blocking because of the legal provisions and the others who are geo-blocking anyway.

Ms. Gebhardt agreed with **Prof. Dr Maduro's** speech, that the primary law is not going to resolve the issue of geoblocking but she asked if it is possible to have a list of the case law which was mentioned and also a list of the 30 laws addressing geo-blocking topic.

Concerning the copyrighted content, few days before the Commission released its proposal, there was a draft leak circulated, which did include at least non-audiovisual copyrighted content in the scope of the regulation. This draft was differentiating between situations when the seller has or does not have a licence to distribute content in another Member State.

Mr Dennis de Jong, MEP, had a question concerning **Prof. Dr Maduro and Prof. Dr Monti's** speeches. Thus, the fact that the Court of Justice could be overloaded with cases could be because national courts do not have a look of the Court's jurisprudence? Especially for the Prof. Dr Monti if he wanted to discuss the exception for SMEs. Is it better to have an exception for SMEs or a broader exception?

The first panellist, **Prof. Dr Stuyck**, replied to Ms. Gebhardt regarding the conflict of laws rules. He thought that we are - with article 23 of Rome I being very general - in 'terra incognita'. He stated that article 7, about insurances, shall not prejudice the application of provision of EU law which relates to particular matter.

Prof. Dr Stuyck could not give a different solution than it was already indicated. On the point concerning services directive, the treaty rules on free movement of services are also about the recipient. The treaty freedom which the services directive is based on is not unilateral.

Ms Thun asked the panellist to indicate which solution is the best.

Prof. Dr Stuyck, indicated that it is important to know what the European Parliament really wants to achieve. These rules are really complex because we don't know in advance which law will apply. The expert prefers to have only one solution which means one direction. For that it is advisable to define upfront such terms like cross border activities online.

Prof. Dr Monti indicated that the real question for him is why there is so much geo-blocking going on? We have to decide on the strategy to address this issue.

Concerning the compartmentalisation, if we are looking at article 3 and 4 we need to understand what we see on the market and how to react to it? This design of legislation is experimental and if it addresses geo-blocking we can probably extended it.

Prof. Dr Monti agreed that having a coherent piece of legislation is better but sometimes to have a sectorial one can be useful as well and adapted to the situation, in this case to geo-blocking. About the fact to allow licences for extra territorial sales, the Paramount case law tries to facilitate cross border activities.

Prof. Dr Maduro replied by focus on two points: it is not simple to provide free movement provision in a horizontal way. The Court of Justice has a real difficulty to manage workload. Secondary legalisation is probably better because it will mean less workload for the Court. Because if we apply free movement provisions, the concept needs to be developed. The secondary legislation enters into more details than the primary law. Also, the number of national cases will be reduced.

For **Prof. Dr Maduro** the effectiveness of the mechanism of enforcement is more important than the conflict of laws because several aspects of consumer law have been harmonised between the Member States. Also because consumers cannot individually enforce the prohibition of geo-blocking. The information costs are simply too high for consumers.

Effectiveness is also important because of the fragmentation that was already mentioned. One piece of legislation will be ideal but of course if it is fragmented there has to be a mechanism of enforcement. To illustrate it, imagine if we have an agency which is in charge of enforcement. It would also need to have the expertise to deal with the fragmentation of the legislation. Prof. Dr Maduro advised to take this point into account.

Dr Petropoulos took the floors indicating that it depends on the structure of the market. When the market is more fragmented, the market has to be seen in details and there is a need for better guidelines to treat geo-blocking cases.

Subsequently, the floor was taken by Mr Bertin Martens from Joint Research Centre, Information Society Unit of the European Commission. The expert started his intervention by analysing the reasons for geoblocking. The expert indicated that geoblocking occurs due to verticals restraint: for example the producer of the goods can only sell them on domestic market but is not allowed to sell cross border. The other reasons is that the seller has different shops in different country and wants to discriminate prices regarding the country and make a geographic segmentation. We can see it with Amazon case. On the other hand it is very difficult to see particularly what is blocked. The largest category is what Prof. Dr Monti called laziness market. When the seller does not want to be a part of the e-commerce because sometimes is involves high costs.

European Commission collects a lot of data from Member States. This data shows the diversity of products and also the differences of prices. The impact of lifting restrictions will benefit buyers and sellers in all Member States. Buyers can find what they want at a better price and sellers can sell more in the market. The Commission found also profit to 'slower' States like Malta, Cyprus, etc. These countries have a small domestic market, limited production and also competition, so consumers can go abroad to find more competitiveness.

When we said that we only saw prices convergence between EU countries is a simplistic view. We have to look at the market conditions and we will have a better view. This is the reason why, the Commission proposed the option to shop like a local.

The expert, agreed with Prof. Dr Monti that auto-regulation of the market and e-commerce shops which are changing their models, go in a right direction. Concerning non-audiovisual services, the speaker wanted to give more details. The Commission made some research and studies about e-books and the case of Amazon. In European Union, we only have 5 Amazon markets but everyone can buy books on the e-shop. All the e-books are available in every Member States shops, and prices are different. Cross border viability of e-books is around 95%. The same is true with iTunes (Apple) where the percentage of music which are cross border available is around 80%. Concerning computer games cross border viability 98%. When not available it is because it is a product of the local market. The restriction is very limited and is concerned a part of the market which is less significant.

Mr Martens explained that the Commission relied on services directive. This directive already contains some sectors and it will be more difficult to include more sectors like media or transports for example. The services directive also, cares about customers not as a text for consumer's protection but it has the vocation to provide services for customers. Mr Martens hoped that the geoblocking regulation could assist the services directive. Concerning the rest of the proposal and the fact to buy like a local it is important to reduce some risks for consumers and traders also. With this pragmatic approach, the Commission wanted more benefits than cost.

Regarding Rome I, this proposal tried to strike the right balance between consumers' interest and traders' interest. It is not the willingness of the European Commission to change Rome I or to substitute it. Now it is a political choice to decide the way that this proposal is going to take.

The representative from the Commission, **Mr Werner Stengg**, had some observations concerning the scope. Mr. Stengg explained that this proposal builds on the existing acquis of the European law.

We focus on the same sectors and the Commission follows the same logic, specifically legal frameworks. **Mr. Stengg** pointed out that the main risk was having a proposition covering too many sectors and therefore not adequately adapted to them all. Also, building on the directive, following the same logic and covering Business to Business, as the directive speaks of service recipients. Lastly, the legal instruments are built on article 22, in particular, and on effective implementation. Finally, his last observation was that the proposal aims to strike the right balance between the interests of consumers and those of traders without making changes to Rome I, insisting that it is not the Commission's wish to have article 23 as a derogation from Rome I.

Ms Thun indicated that the fact that SMEs are not trading cross border is not a question of laziness but a question of fear of costly litigation. Finally, **Prof. Dr Monti** answered about SMEs, because maybe it is better to exclude them from the proposal if the fear is linked to exportation questions. The choice is between a total or partial exclusion for SMEs and this is not coherent nor clear.

Ms Reda returned to the idea that sometimes it is in the scope of the proposal and sometimes is out because of article 4. Why, at least, is not possible to ban geoblocking of copyrighted content when the trader has a licence to distribute it in another Member State?

The Chair, Ms Thun (MEP), closed the debate thanking the experts and the MEPs, who participated to the discussion.

3 PRESENTATIONS

4.1 Prof. Dr Jules Stuyck's presentation

Liedekerke
welters
waelbroeck
kirkpatrick

The Interplay of the proposal for a Geo-Blocking Regulation with the Rome I Regulation

Jules Stuyck, em. Professor KU Leuven
Advocaat Brussels



Brussels • London - www.liedekerke.com

Outline

- Introduction
- The (PIL) relevant provisions of the Proposal
- The relevant provisions of Rome I
- Interplay
- Alternatives
- Conclusion

Introduction

- Background: Article 20(2) Directive 2006/123: no discrimination relating to the nationality or place of residence of the recipient, but possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria
- The Proposal on geo-blocking defines situations where different treatment cannot be justified within the meaning of Article 20(2) in case of delivery in trader's Member State (Article 4 Proposal)
- See also Article 3 on access to online interfaces (not discussed here)

3

The relevant provisions of the Proposal

- Art. 1(2) Commission proposal: The Regulation applies to situations where the customer has his place of residence or establishment in another MS than the trader
- See alternative formulations of the Council (simplification in Article 1(2): purely internal situations)

4

The relevant provisions of the Proposal 2

- Art. 4: Traders shall not apply different general conditions for reasons related to the nationality, place of residence or place of business of the customer:
 - (a) where the trader sells goods and those goods are not delivered cross-border
 - (b) certain electronic services (no access to IP protected works);
 - c) other services , delivered in the premises of the trader.

5

The relevant provisions of the Proposal 3

- Essential: no obligation to deliver cross-border
- Note: place of residence and establishment are not defined
- Residence is relevant for consumers, but note that Rome I speaks about “habitual residence” (see Article 19)
- Establishment for businesses (Art. 19 Rome I: place of central administration of company or principal place of business for natural persons)

6

The relevant provisions of the Proposal 4

- Art. 1(5): This Regulation shall not affect acts of Union law concerning judicial cooperation in civil matters. Compliance with this Regulation shall not be construed as implying that a trader directs his or her activities to the Member State where the consumer has the habitual residence or domicile within the meaning of Brussels *Ibis* (jurisdiction) and Rome I (applicable law) Regulations

7

Relevant provisions of Rome I

Preliminary observations:

- Rome I and Brussels *Ibis* contain similar provisions as to consumer contracts
- The proposal also applies to B2B
- Importance for consumers: where the law is not harmonised
- Impact of rules concerning the applicable law on (willingness to conclude) cross-border contracts?

8

Relevant provisions of Rome I 2

- *Article 6(1) Rome I*: a contract concluded by a consumer with a business shall be governed by the law of the country where the consumer has his **habitual residence**, provided that the trader
 - (a) (...) or
 - by any means, **directs such activities to that country** or to several countries including that country, and the contract falls within the scope of such activities.

i.e. the « »passive consumer »

9

Relevant provisions of Rome I 3

- *Article 6(2) Rome I*: nevertheless freedom of choice if consumer is not deprived of protection afforded by mandatory provisions of law that would be applicable in the absence of choice (see hereafter)
- Article 23 :Regulation is without prejudice of provisions of Union law which, in relation to particular matters, lay down conflict of law rules
- P.S. Article 9 Rome I *Overriding mandatory provisions* (not directly relevant here))

10

Relevant provisions of Rome I 4

- Scope: where the trader by any means, **directs his activities to the country of the habitual residence of the consumer**
- *Pammer and Alpenhof*, C-585/08; (Brussels I): to be determined on the basis of a series of criteria (also C-279/14 *Rüdiger Hobohm*): non exhaustive list
- National judge to ascertain the evidence
- Broad notion, but wide margin for national judge (and legal uncertainty)

11

Relevant provisions of Rome I 5

- Protection of “passive consumer” under Rome I: not only distant contracts, but also where trader directs his activity to the country of the consumer’s habitual residence and after having received the offer (via internet) the consumer goes to the residence of the trader to fetch the goods and finalise the contract there (C-190/11 *Mühlleitner*)

12

Relevant provisions of Rome I 7

- Art. 6(2). Notwithstanding paragraph 1, the parties **may choose the law applicable (...)**. Such a choice **may not**, however, have the result of **depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law** which, in the absence of choice, would have been applicable(...)
- See C-191/15 *VKI v Amazon* : clause referring to law of trader is unfair if exception of Article 6(2) is not mentioned

13

Relevant provisions of Rome I 8

- Conclusion: On the basis of Rome I:
 - If the consumer is “passive” the law of the country of the consumer applies
 - parties may chose another law (e.g. that of the country of the business) but they cannot derogate from imperative provisions of the law of the consumer
 - The mere accessibility of the trader’s website in MS of consumer is insufficient to make the consumer “passive”

14

Interplay between Rome I and the Proposal

- *Art. 1(5), first sentence Proposal*: This Regulation shall not affect acts of Union Law (such as Rome I)
- Remember: Rome I relates to any contract between a trader and a 'passive' consumer irrespective of whether goods or services are delivered cross-border

15

Interplay between Rome I and the Proposal 2

- Art. 1(5), second sentence Proposal: "*Compliance with this regulation shall not be construed as implying that a trader directs his or her activities to the Member State where the consumer has the habitual residence or domicile (...) "*
- See also Recital 10

16

Interplay between Rome I and the Proposal

3

- In other words: while the Proposal provides that traders shall not, block or limit customer's access to their online interfaces for reasons related to their nationality, place of residence or establishment, the fact of complying with this provision does not constitute an indication that the trader directs his activities to other MS, leading to the applicability of the law of the consumer's MS, or *Pammer* revisited....

17

Alternatives?

- An autonomous qualification of what is 'directing activities' to the consumer's MS?
- Freedom of choice where trader cannot refuse to conclude a contract? (Article 3 Rome I)
- Application of the trader's home law if the consumer expressly agrees?(after the trader has informed the consumer in a clear way about the consequences of that choice?)(Article 3 Rome I)

18

Alternatives 2

- A specific derogation from Rome I on the basis of Art. 23
- Which is not the trend now, see e.g. Article 25(1) CRD:
“If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.”

19

Remaining problems

If the problem of the law applicable is satisfactorily solved

- Digital content: IP rights remain territorial
- Interaction with the Unfair Contract terms Directive 93/13, especially where the consumer would “expressly” consent with the law of the trader

20

Some concluding remarks

- Article 6 Rome I only relates to the law applicable in case of *consumer contracts*, with 'passive consumers' but applies to all cross-border situations
- Notwithstanding Article 1(5) the Proposal does affect Rome I in that compliance with the geo-blocking provisions does not indicate that the trader directs his activities to the MS of the consumer
- If it cannot be avoided that Rome I is affected would it not be better to provide for a clear derogation from Rome I?

3.2 Prof. Dr Luís Miguel Maduro and Prof. Dr Giorgio Monti's presentation




European University Institute

Proposed Geo-Blocking Regulation

Miguel Poiares Maduro and Giorgio Monti

Research prepared for Policy Department A at the request of IMCO Committee

EUI



Outline

- 1. Gaps in the Regulation:** scope and alternative instruments
- 2. Options:** how to optimize the proposed Regulation

EUI



Gaps and competition law: **Goods**

- **Direct control of geo-blocking**: distribution agreements banning retailer from making passive sales are prohibited
- **Indirect control of geo-blocking**: Distribution agreements banning internet sales prohibited

EUI ■



Gaps and competition law: **copyrighted material**

- Ongoing efforts by DG COMP to address some geo-blocking via competition law (e.g. Paramount commitments)
- Limited by national copyright protection

EUI ■



Exclusion & other regulation: Copyright protected works

- Article 9 Proposed Regulation: review clause specifically targets copyrighted works
- Compromise: Incremental proposals (e.g. portability proposal)

EUI ■



Exclusion & other regulation: transport

- Rationale for exclusion
- Air services; sea and inland waterways; bus and coach: non-discrimination between passengers on transport conditions and tariffs
- Rail passengers – gap: COM plans to address this

EUI ■



Risks

- Even if the Regulation applies, can it be circumvented?
- Could 'the market' overtake the Regulation?

EUI ■



The Proposed Regulation in context

- The proposal fits within a large number of other existing/proposed instruments
- Implication: revisions must take into account wider legislative context

EUI ■



Drafting issues

- A single article with all exclusions is necessary
- Avoid awkward exceptions (e.g. Art 4(2))
- Ensure prohibitions are useful (e.g. Art 3 seems useless and/or contradictory)
- Avoid overlap with competition law (Art 6)

EUI ■



Horizontal v sector-specific

- Proposal's paradox: broad title, narrow scope
- Pros and cons of a horizontal approach
- Pros and cons of a sectoral approach
- Remember enforcement

EUI ■




Takeaways and Open issues

- Restrictive scope of Proposal is a major weakness
- Enforcement Gap
- Why have sector regulators failed?
- Align the powers of Consumer Agencies with other sector regulators

EUI ■

3.3 Dr Georgios Petropoulos' presentation



Geo-blocking and non audiovisual copyrighted content services

Tenth Meeting of the IMCO Working Group on the Digital Single Market
Monday 14th November 2016
European Parliament, Brussels

Georgios Petropoulos, Research Fellow, Bruegel
Research prepared for Policy Department A at the request of IMCO Committee

IMPROVING ECONOMIC POLICY WWW.BRUEGEL.ORG @BRUEGEL_ORG

Definitions

Traders operating in one MS block or limit the access of their online interfaces to costumers from other MS

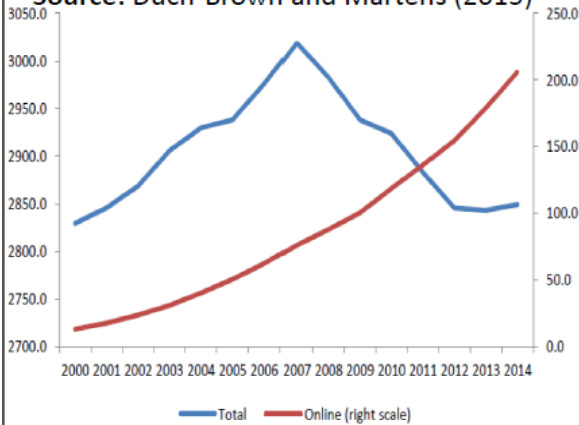
When is it justified?

- Language barriers
- Regulatory complications (different VAT systems)
- Technical specifications (rules for labeling)
- Legal uncertainty
- Fraud prevention system
- Vertical agreements (Chicago school doctrine)
- Ability to provide services after the sale
- Lack of affordable quality of delivery services

Domestic and cross-border e-commerce

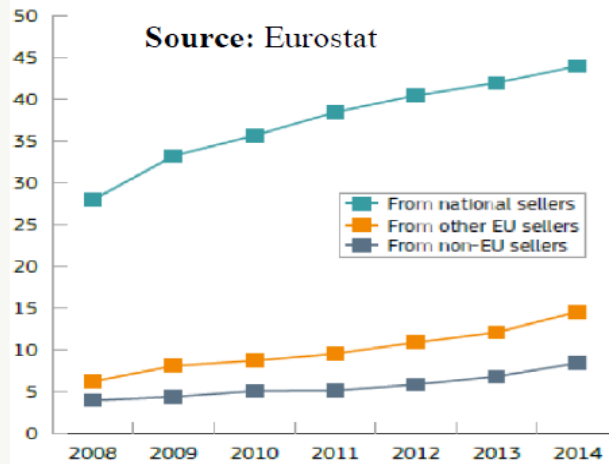
Total and online sales in goods, 2000-2014 (EUR billion)

Source: Duch-Brown and Martens (2015)



Domestic and cross-border online shopping, EU28, 2008-2014 (% points)

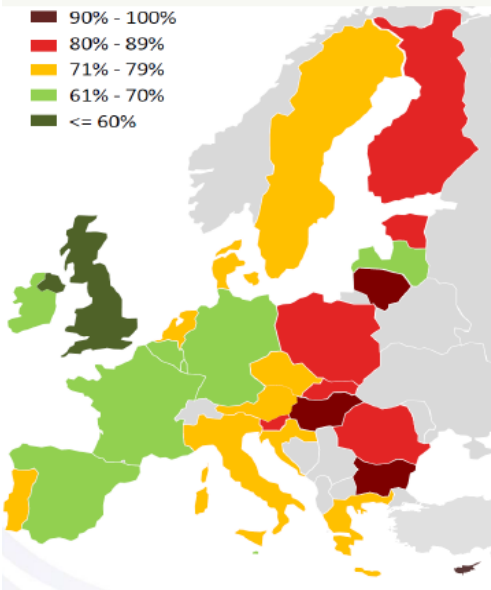
Source: Eurostat



Average annual growth rate of 22%

Is geo-blocking a problem?

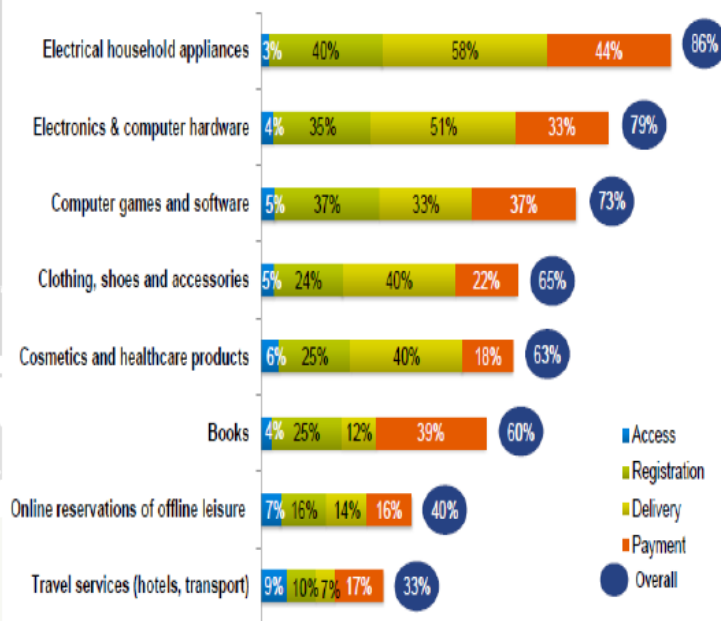
- 90% - 100%
- 80% - 89%
- 71% - 79%
- 61% - 70%
- <= 60%



Geo-blocking by the country of the online retailer

Source: Mystery shopping survey 2015

Geo-blocking prevalence by sector



The European Commission's proposal

Prohibits unjustified geo-blocking and increases transparency

But, it **does not apply** to electronic copyrighted services (article 4) such as

- Audiovisual (59%)
- Sports (35%)
- Ebooks (27%)
- Music (60%)
- Online games (37%)
- Software

33% of online trade by individuals in 2014

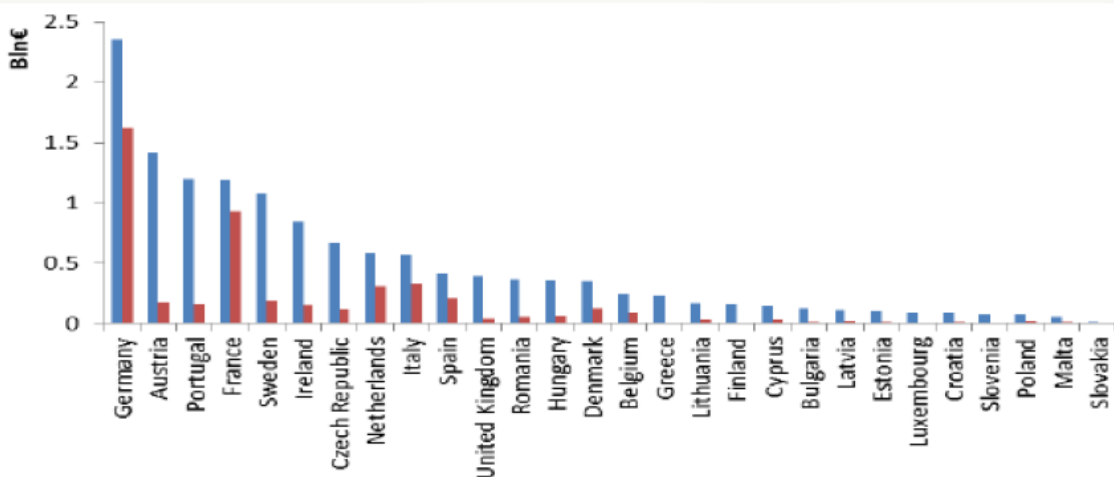
Source: Eurobarometer 411 (2015)

The impact assessment

What is the economic impact of lifting geo-blocking restrictions?

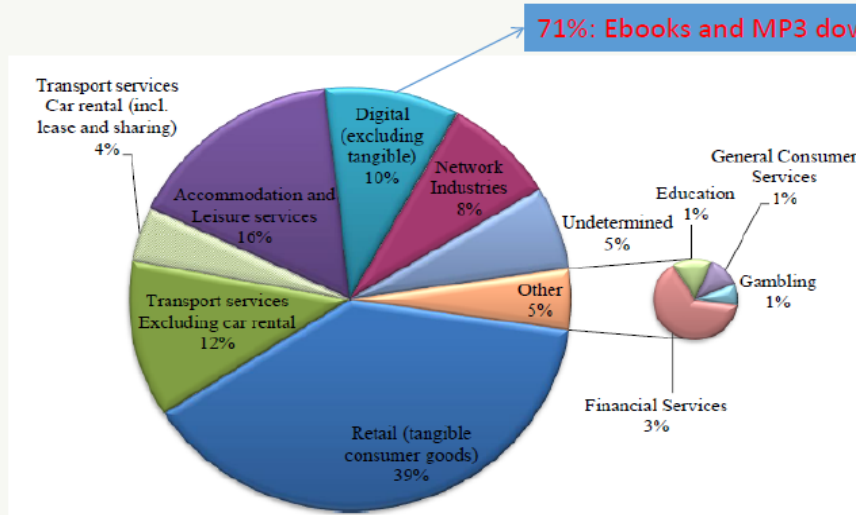
CS: 1.2%

PS: 1.4%



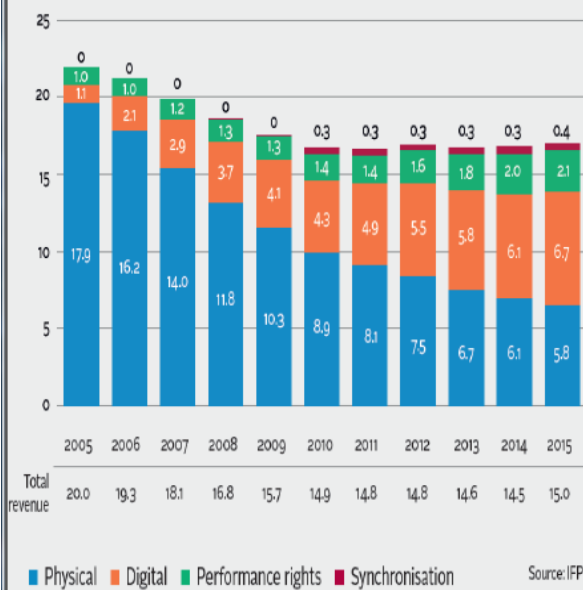
Source: Duch-Brown and Martens (2016) ■ CS ■ PS

Geo-blocking complaints collected by EC

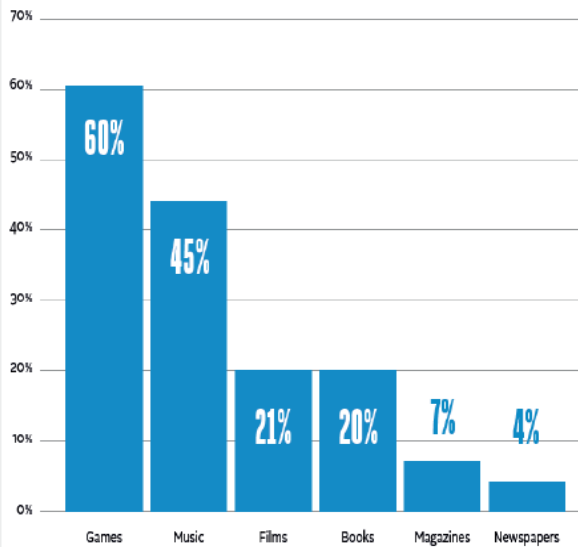


Music

GLOBAL RECORDED MUSIC INDUSTRY REVENUES 2005-2015 (US\$ BILLIONS)



MUSIC'S DIGITAL SHARE COMPARED TO OTHER SECTORS 2015

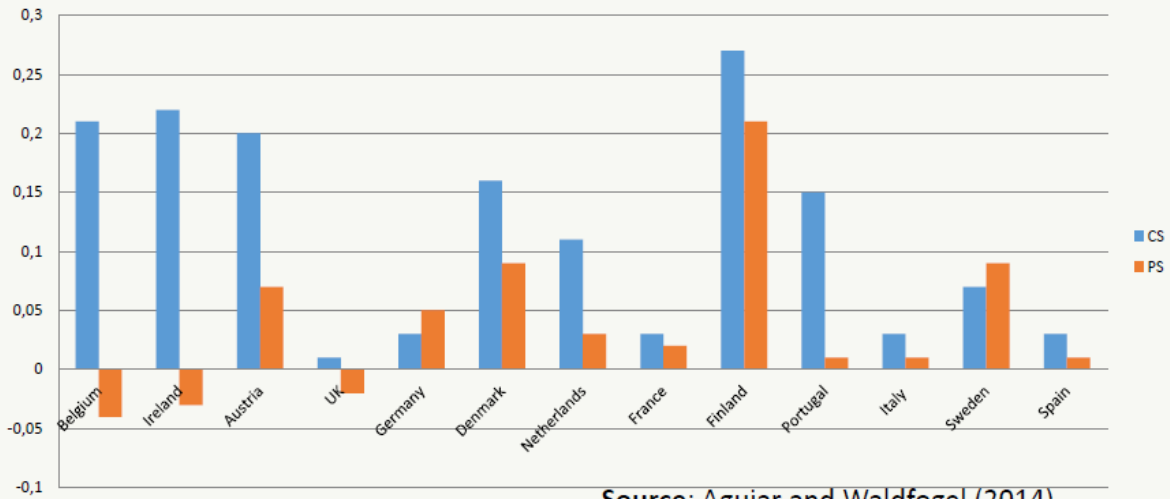


Source: PWC & IF

Lifting geo-blocking restrictions in music

Annual gains of €19 Mln for consumers and €10Mln for producers (EU 13+Norway+Switzerland)

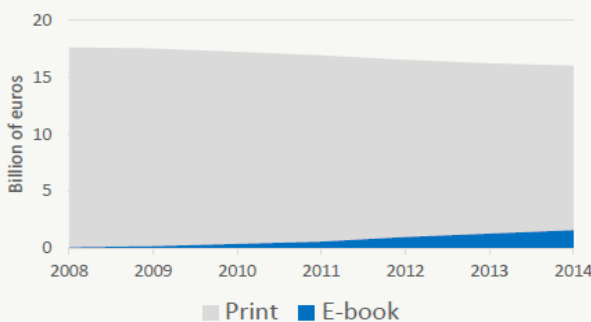
Annual revenue per capita, in euros



Source: Aguiar and Waldfogel (2014)

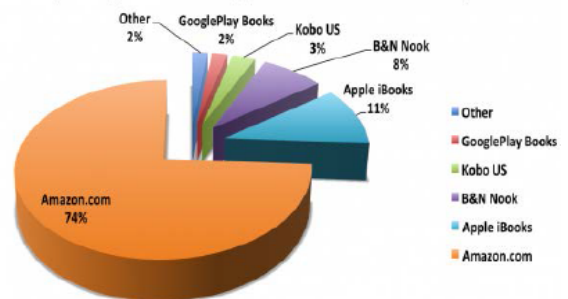
The market of E-books

Book and E-book markets in 5 EU largest countries, 2008-2014



Countries: Germany, France, UK, Italy and Spain. Source: EPRS (2016)

Market share of overall US eBook unit sales held by each retailer (including non-traditionally published ebooks without ISBNs)



Source: goodreader.com

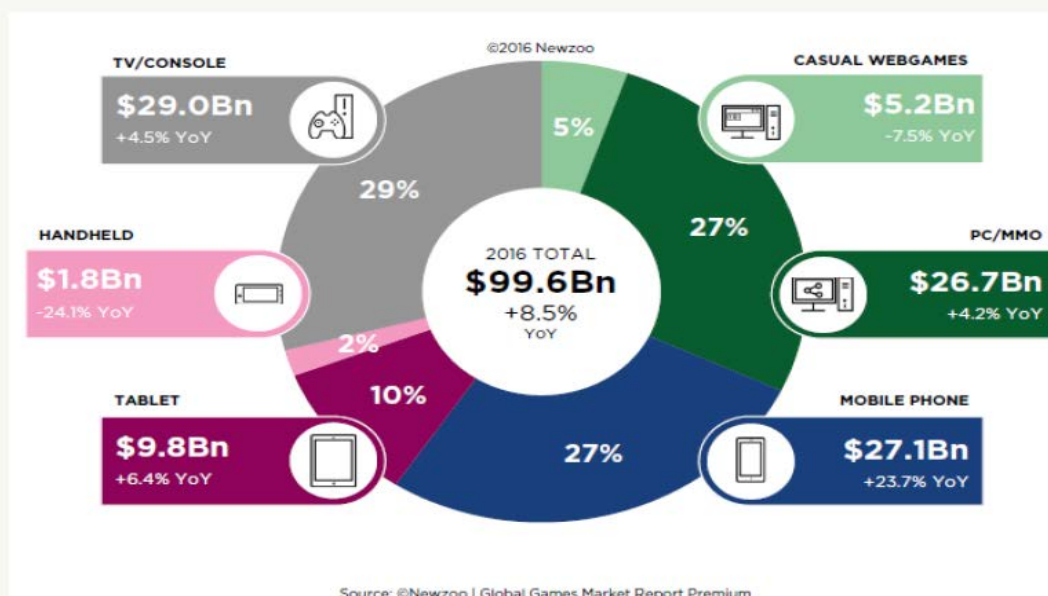
- High price elasticity of demand (-1.7)
- Brynjolfsson (2003): Increase in product variety boosts consumer welfare
- Chevalier and Goolsbee (2003): Pricing below profit maximizing level
- Impact of lifting geo-blocking restrictions?

The Batikas et. al. (2015) study on Amazon

	Access to stores in	EU6+US book titles	% Availability	EU6 book titles only	% Availability
BE	FR, NL, US	693	99.6%	595	99.8%
NL*	NL, US	690	99.1%	592	99.3%
LU	DE, FR, US	682	98.0%	584	98.0%
GB*	GB, US	679	97.6%	581	97.5%
IE	GB, US	679	97.6%	581	97.5%
IT*	IT, US	679	97.6%	581	97.5%
AT	DE, US	678	97.4%	580	97.3%
DE*	DE, US	678	97.4%	580	97.3%
ES*	ES, US	678	97.4%	580	97.3%
FR*	FR, CN	657	94.4%	574	96.3%
Other EU	US	663	95.3%	565	94.8%
US	US	663	95.3%	565	94.8%
Distinct titles		696		596	

Source: Amazon stores and authors' calculations

Computer games



Discussion

Copyright and legal issues

*Other initiatives and justified geo-blocking:
Parcel delivery, online payments, MOSS (VAT)*

*Digital content consumption is growing and
geo-blocking restrictions should be addressed*

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