



BY **GIORGIO MONTI¹** & **GONÇALO COELHO²**

I. INTRODUCTION

The Digital Agenda is one of the key pillars of the EU's industrial policy. One of its aims is to strengthen the creation of a single market and one of the issues that the Commission proposes to tackle is geo-blocking. This refers to practices by sellers which make it costly or impossible for consumers with residence in one Member State to obtain goods and services from other Member States as well as the rerouting of customers away from websites hosted in other Member States to a website hosted in the Member State from where they are based (e.g. customers in Italy rerouted from a ".pt" version of an online store to its ".it" version) without their consent. Based on the welfare enhancing effects of a single market, the Commission is keen to deepen this integration as consumers move to using the internet to secure services and make purchases using this channel.³ In this paper we outline the Commission's regulatory efforts to enhance cross-border trade through the use of competition law and a rich package of proposals for secondary legislation. We argue that the regulatory framework looks like an important first step, but that it does not go far enough to address this issue and that there must be enforcement capacity to yield meaningful results. By rushing the geo-blocking agenda without adequately addressing these pitfalls, the EU risks undermining another of its flagship projects, adding to the increasing concerns about the end of roaming charges by June 2017 introduced by Regulation 2015/2120.⁴

II. CROSS-BORDER PURCHASES

The problem identified by the Commission is easily stated: "53% of EU citizens buy online, but only 16% do so cross-border."⁵ From the perspective of competition law, certain steps have been taken to facilitate cross-border purchases, reflecting the Commission's longstanding interest in using competition law to challenge industry strategies designed to partition the single market. The most relevant initiative is the control of distribution agreements when the manufacturer tries to prevent distributors from selling in countries other than that where they are based. The Block Exemption Regulation for Vertical Restraints states that agreements which restrict the territories or the customers to whom a distributor may sell are "hardcore restrictions" and their inclusion negates the benefit of exemption and it is highly unlikely that an individual exemption may be tolerated.⁶ Certain exceptions are available, in particular for those who sell through exclusive distribution agreements, where it remains possible for a manufacturer to assign exclusive territories for dealers, but even here each dealer must be free to make passive sales into other territories. The Commission has made great efforts to explain how the passive/active sales distinction works in the Guidelines that accompany the Block Exemption Regulation. The Commission starts from the premise that all distributors should be free to use the internet, and that selling goods on the internet is a passive sale, even if this means that the buyer is able to reach customers in other Member States. The Guidelines suggest that automatic re-routing of customers to another website or blocking a sale when a foreign credit card is issued are actions that may not be tolerated and would constitute prohibitions of passive sales.⁷ However, certain uses of the internet would qualify as active sales, for instance, paying a search engine to advertise when the

1 Giorgio Monti, Professor of Competition Law, European University Institute, Florence, Italy.

2 Gonçalo Coelho, PhD (EU), Consultant with the World Bank, UNCTAD and Luís Morais & Associados.

3 M. Monti, A New Strategy for the Single Market (May 9, 2010) Section 2.3.

4 "Row Over EU Mobile Roaming Rates Threatens to Push Phone Bills Up" The Telegraph December 2, 2016: <https://www.euractiv.com/section/digital/news/eu-considers-concession-to-telecom-firms-to-end-roaming-charges/>.

5 Commission Staff Working Document, Geo-Blocking Regulation Impact Assessment SWD (2016) 173 final, page 8.

6 Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, Article 4.

7 See e.g. Case COMP/37975 *Yamaha* (July 16, 2003) paragraphs 107-109.

user is based in another Member State.⁸

EU competition law also acts to favor cross-border sales in an indirect way: allowing distributors to use the internet. In *Pierre Fabre*, the Court found that a requirement that the buyer may only sell goods through a physical store to be restrictive by object for not affording distributors the chance to use the internet.⁹ This was followed by a spate of decisions by the French National Competition Authority curtailing similar restrictions in a number of economic sectors. There is a delicate balance to strike here: on the one hand the manufacturer is keen to have a bricks and mortar store that enhances the aura of luxury or the perception of quality of the goods it sells, while on the other the Commission favors the use of on-line sales, which may run against the commercial strategy of businesses. In the Guidelines the tension is resolved by allowing the manufacture to request certain quality standards to be applied by on-line sales platform that mimic the quality standards that manufacturers require for physical shops.¹⁰ However, the German competition authority has gone further, challenging also those manufacturers who, under the cloak of a selective distribution system, tried to ban online marketplaces like Amazon or eBay from distributing their goods. The approach in Germany has been uneven and we expect the Court of Justice to shed some light now that a case concerning a luxury cosmetics manufacturer's bans on sales via third-party online platforms has been referred from the Frankfurt Court of Appeals.¹¹

While the judgment of the court will shed more light on the way that distribution agreements may be controlled to facilitate cross-border sales, it is harder to use competition law to request an unwilling merchant to make sales in other Member States when this is their individual choice and not the result of an agreement. Only dominant players may find their unilateral choice to engage in geo-blocking challenged under the competition rules.¹² This is where the Commission's recent proposals fit in. The most important of which is the proposed geo-blocking Regulation.¹³ In a nutshell, the Regulation targets certain forms of unilateral conduct that make it difficult for consumers to obtain goods offered for sale in other Member States. Article 3 regulates access to websites: it forbids a trader from refusing to make a sale based on the nationality or place of residence of the purchaser and it forbids automatic re-routing on the basis of nationality or place of residence (e.g. a customer in Portugal wanting to access a website like amazon.co.uk cannot be redirected to amazon.pt). Article 4 identifies three scenarios where a trader cannot discriminate between customers on the basis of their residence: (i) sale of physical goods when the trader is not involved in delivering the product to the Member State of the customer; (ii) the provision of electronic services (other than copyright protected works, which are excluded); (iii) services provided by a trader in a member State different from that of the customer's residence. The latter could include car hire services, where the Commission found that there was discrimination when a consumer ordered a car from another Member State. It isn't particularly clear how valuable the first two prohibitions are. In the first the buyer still must arrange for delivery separately, so its success depends, *inter alia*, on the lowering of the costs of cross-border parcel delivery;¹⁴ while in the second, excluding copyrighted works appears to limit the scope of application significantly. Article 5 appears to be more valuable in that it forbids discrimination on the basis of the payment method selected by the buyer.

Those familiar with the Services Directive might comment that there is not much more in this Regulation, and they would be right: the justification for adding this Regulation is the finding that the exceptions available under the Services Directive have dented its market integration potential. One might wonder whether a revision of that Directive might not be a more coherent way of legislating.

8 Vertical guidelines, paragraph 53.

9 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS* [2011] I-09419, paragraph 47.

10 Vertical guidelines, paragraph 54.

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

12 Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE* [2008] I-07139; Commission Decision from 14.4.2010 in Case 39351 – *Swedish Interconnectors*.

13 Proposal for a Regulation 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.

14 The Commission has tackled this issue through the proposed Regulation on cross-border parcel delivery, released on May 25, 2016. This is designed to increase price transparency and thus stimulate competition in this market.

In addition, other proposals are designed to accompany this one: a proposal on cross-border parcel delivery tries to generate more transparency so that the better deal may be found, and some other Directives on consumer protection try to harmonize rules governing the sale of digital content and distance sales.

The package of reforms as a whole tries, on the one hand to prevent suppliers from geo-blocking and on the other to encourage consumers to buy abroad. However, it is not clear if these measures will suffice. First of all, the scope of coverage of the geo-blocking Regulation excludes many of the copyrighted works that consumers are most likely to buy online and for which comparing offerings across Member States would be beneficial.

Second, the Regulation has no public enforcement structure of its own to secure compliance. This could reveal problematic since it is unlikely that a single consumer denied the benefit of a cross-border shopping experience will use the legal system to obtain a marginally cheaper product. Indeed, in the transport sector, similar obligations to avoid geo-blocking or price discrimination have been in the books for some time without any real impact. However, the Regulation is supposed to be read in conjunction with the proposal for a revised Regulation on Consumer Protection Cooperation that seeks to strengthen the cross-border enforcement mechanism for consumer claims. This proposal goes as far as establishing a mechanism of attributing the competent authorities the right of ordering the trader responsible for the infringement to provide the consumers with monetary compensation, a function that is normally a prerogative of the judiciary (Article 8(2) (n)). Competent authorities will also have the powers to request information from domain registrars, internet service providers and banks to track financial flows and identify infringers more easily (Article 8(2)(b) and (c)); carry-out dawn raids (Article 8(2)(d)); and suspend or shutdown a website (Article 8(2)(g) and (l)).

III. COPYRIGHTED WORKS AND GEO-BLOCKING

The reason why the proposed geo-blocking Regulation excludes copyrighted works is that handling these is a hot potato.¹⁵ Again, let's start with competition law. Readers may recall the *Murphy* case.¹⁶ Here, the Football Association Premier League ("FAPL") complained about publicans buying decoders in Greece and using these to show premier league football matches in British pubs, thereby avoiding Sky's high fees for the same service sold to UK customers. In a nutshell, the FAPL argued that allowing for the resale of the card decoders marketed in Greece would undermine the geographical exclusivity of its licenses and consequently the value of its rights. This would result in a race to the bottom whereby the broadcaster with the cheapest decoders could become the pan-European broadcaster, *de facto*, creating EU-wide licenses.¹⁷ The Court was not receptive to this policy argument and ruled in a manner that generally favored publicans, finding infringements of Articles 56 and 101 TFEU, confirming that agreements forbidding passive sales restrictive of competition. However, this was a pyrrhic victory for publicans since the Court concluded that the retransmission of the broadcast in the UK had a profit-making nature and amounted to a transmission to a new public, i.e. to a group of potential viewers that had not been taken into consideration when the right holders authorized the communication in Greece. Hence, the publican was still in breach of Article 3(1) of the Copyright Directive and could not get away with showing the FAPL matches using the imported decoders.¹⁸ Ms. Murphy's only victory was to escape criminal charges since Article 56 was found to preclude national legislation that makes it unlawful (and even a crime) to import foreign decoders giving access to a broadcasting service from another Member State (even if the publican used for commercial purposes and under false identity and address to circumvent the territorial restrictions at stake). It is therefore unsurprising that the FAPL merely amended its licensing contracts in ways that makes it able to continue to restrict cross border sales and it is fighting and winning cases against other publicans.¹⁹ One way of doing so is including certain FAPL copyright logos on the broadcast image so that anyone

15 For an excellent discussion of the issues discussed here see P. Ibáñez Colomo "Copyright Licensing and the EU Digital Single Market Strategy" LSE Law, Society and Economy Working Papers 19/2015.

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

17 *Ibid*, paragraph 43.

18 *Ibid*, 195-198 and 205-206.

19 For an informative overview, see: <http://www.twobirds.com/en/news/articles/2014/global/broadcasting-post-murphy-the-territorial-tv-sports-licens->

showing such a video is breaching that copyright.²⁰ Moreover, according to one report, FAPL is even reducing the services available to foreign buyers of football matches to deter passive sales of foreign broadcasts into the UK market, leaving consumers in these countries worse off.²¹

More recently, the Commission issued statements of objection about the agreements between the Hollywood majors on one side and Sky UK on the other. The concerns arose from two aspects of these contracts: (a) a broadcaster obligation, by which Sky UK undertook not to respond to requests from consumers outside the UK and Ireland (the territories for which Sky UK holds a license) and (b) a Hollywood major obligation, by which the owner of the copyright undertook to prohibit other EEA broadcasters from responding to unsolicited requests coming from consumers in the UK and Ireland. The result of these clauses is of concern to the Commission for it partitions the internal market, preventing for example a UK consumer from buying pay TV services from another jurisdiction. One of the majors (Paramount) has secured a commitment decision, which has two dimensions: (i) in new licensing agreements the two offending obligations are removed; (ii) for existing licensing agreements Paramount agreed not to act on or enforce those obligations.²² It isn't particularly clear what beneficial effect this commitment can have. Under copyright law, the holder of an exclusive license in the UK (e.g. Sky UK) is free to rely upon its copyright to forbid the broadcasting of the film in question from another source. Thus, the passive sale cannot be made into the territory assigned to Sky UK, unless Sky UK decided to forego enforcement action, which is unlikely. Likewise, if a buyer in France wants to secure a pay TV contract from Sky UK, nothing stops the copyright holder in France from challenging that conduct; matters would differ if there were no copyright holder in France, in which case the passive sale would not be in breach of any other licensee's interests, and this may be the consumers the Commission wishes to protect.

In sum, while the approach found in the CJEU and Commission brings some pleasing symmetry with the competition law rules that apply to non-copyrighted goods & services (active sales may be prohibited, passive sales must be allowed), it does not actually resolve the market failure that the Commission identified, because the commitments are only entered into with Paramount and not with the licensees in the Member States. Matters may differ when the passive sale is denied by a firm holding a dominant position because then it may be possible that reliance on copyright law for exclusionary purposes might constitute an abuse of dominance,²³ but one would be hard pressed to find dominance in these settings.

Given the *Murphy* case's landmark hardline view over absolute territorial protection based on copyright, it was unsurprising that the Commission announced in 2015 that a broader reform of the system of cross-border distribution of audiovisual and media content could be envisaged, and now we have on the table a Proposal for a Regulation "on ensuring the cross-border portability of online content services in the internal market."²⁴

Consumers expect to have ubiquitous access to online content services regardless of national borders. However, the existing copyright framework often frustrates such expectations by permitting Member States and copyright holders to geo-block access to online content services along national lines. Thus, consumers, often cannot access online content services when traveling to a country different from that of their residence. Having considered that there is a market failure in terms of portability, the Commission took the initiative of proposing a Regulation that contributes for the removal of the existing barriers in the Internal Market. The Commission identifies the current hurdles to portability of online content services in the recitals of the Proposal. Firstly, online services often involve content that is copyright-protected and subject to licensing on a territorial basis. Secondly, even when the online content is not copyright protected *per se* (e.g. sporting rights), the transmissions of such content end up involving elements that are copyright-protected such as music or images. The bundling of non-copyright copyright-protected elements (e.g. the European Champions League opening song), therefore results in the geo-blocking of the online content altogether.

ing-landscape.

²⁰ *Football Association Premier League Ltd v. Luxton* [2014] EWHC 253 (Ch).

²¹ http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf page 102.

²² http://europa.eu/rapid/press-release_IP-16-2645_en.htm

²³ However, even here the case law does not yet stretch this far.

²⁴ COM(2015) 627 final.

The Commission analyzed three possible avenues of intervention for addressing the portability issue. The first one consisted in offering guidance to the relevant stakeholders, encouraging online content service providers to allow for cross border portability of those services. The second option consisted in applying the rules of the State of the consumer's residence in terms of provision, access and use of the online content service. Finally, option three, in addition to applying the rules of the country of the consumer's residence, would impose an obligation upon online content service providers to ensure portability of those services and establish that any contractual restrictions limiting portability would be unenforceable. The Proposed Regulation embodies the third option because it is the one that better safeguards the interests of consumers while imposing marginal consequences for the industry since it neither challenges the territoriality of the licenses nor expands the range of users of the service.

Moreover, the Proposal does not set quality requirements for the service in cross-border portability so the industry costs should be limited to the authentication of user's residence. Hence, the quality settings applicable in the country of residence are not subject to cross-border portability, even though the service provider is nonetheless bound to the duty of informing the subscriber on the quality of delivery when the service is accessed in a different Member State.

The Proposal is applicable to all enterprises alike with the Commission arguing that, given the limited costs of the Proposal, there is no need to exempt SMEs from its scope. Furthermore, since many of the online service providers concerned are SMEs, the objective of the portability proposal would be seriously hindered otherwise.

Pursuant to the Portability Regulation, subscribers of online content services delivered on a portable basis will be able to continue receiving those when they are temporarily present in another Member States different from the residence one. The right to cross-border portability is provided both in relation to paid and free online content services. However, in the case of free content, the service provider is only obliged to give cross-border portability to the service once the subscriber's residence is verified after registration on the respective service website.

In a nutshell, the Portability Proposal creates a legal fiction whereby the consumption of the copyright-protected content is deemed to occur in the country of residence of the subscriber. This fiction enables the legislator to circumvent the hurdles posed by copyright legislation since it does not require any exception to the rules of territorial licensing.

It is important to interpret the Portability Proposal considering the *Murphy* case. At first sight, the Portability Proposal seems to be simply restating the *Murphy* ruling: if the online content service is to be enjoyed by a consumer and not being broadcast to a different public, then, cross-border portability cannot be prohibited either by law or by contract. However, it can also be argued that the practical effect of the Portability Proposal is to limit the *Murphy* ruling by applying the consumer's country of residence rules. In this scenario, the Commission would be betraying rather than developing *Murphy*. In fact, in *Murphy*, the Court of Justice did not restrict the universe of potential subscribers to those who could already access it. Quite the contrary; the Court argued that such geographical restriction went beyond what was necessary to protect the content of the intellectual property right. Under this interpretation, consumers already benefitted in theory from the right to access online content services available only in other Member States subject to the limits imposed by the Copyright Directive (that is, provided they view the content themselves and not show it to others for gain). If that were the case, the Portability Proposal represents a victory for the industry, which manages to push-back the potentially most negative consequences stemming from *Murphy* by limiting its duties to only having to offer cross-border portability to its current subscribers. A more charitable reading is that the Portability Proposal is a first step before further legislative measures are introduced. It would not be the first time that opening up a sector to competition is achieved in gradual steps to allow industry to readjust to new market configurations facilitated by EU law.²⁵

25 Recall the gradual opening of telecommunications markets, for example.

IV. CONCLUSIONS

The proposals that have come out certainly try and reduce geo-blocking beyond the results that may be achieved by the application of EU competition law. The regulatory framework builds on competition law and bans unilateral conduct by any dealer even absent market power. This in itself should give us pause for thought: if dealers (without collusion) appear unwilling to facilitate sales outside their borders in spite of the significant gains that they could make, what is holding them back? A diagnosis of this phenomenon is crucial to assess the likely success of the measures discussed here.

If traders enjoy greater profits by keeping markets segmented, then the approach proposed can serve some useful purpose by banning certain practices. However, absent the capacity to deter through public enforcement it is not clear whether any tangible results may be achieved. This is why it is vital that, if the regulatory framework discussed above is implemented, that it is accompanied by the proposals to bolster consumer protection agencies, so that these rules may be enforced appropriately. As we have noted above the proposal for revisiting the Regulation on Consumer Protection Cooperation would give consumer agencies a range of enforcement powers and also facilitate cross-border cooperation. While this seems necessary to ensure that the prohibitions on geo-blocking are enforced, a note of caution is warranted: even in competition law, as we have seen above it is only a limited number of national competition authorities that have taken action against distribution agreements restricting on-line sales. Thus one has to wonder how far public enforcement will serve as a sufficient deterrent across the EU.

However, if traders geo-block because of path dependence or the fear of legal risks that arise from making sales to buyers outside their jurisdiction, then the regulatory framework should work towards providing incentives for traders and minimizing those perceived risks. In this case, prohibitions are less likely to be successful than measures that target the most common fears faced by traders. In this context harmonizing consumer protection laws further may be a preferable pathway to stimulate more cross-border sales.

Looking forward, it looks as if we will see a continuation of a twin-track approach: on the one hand the Commission's preliminary findings in the E-Commerce sector inquiry suggest that antitrust enforcement activity may pick up given that contractual and unilateral geo-blocking initiatives have been found to persist.²⁶ On the other, running such cases will give the EU added leverage to press for regulatory solutions and can bolster the chances of the measures discussed above being agreed.

26 European Commission, Preliminary Report on the E-commerce Sector Inquiry, SWD(2016) 312 final.

