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Regulation Complementing EU Competition Law in the Digital Economy: Impact of the Digital Single Market Rules on Online Distribution Practices

Juha Vesala*

1. INTRODUCTION

As part of its Digital Single Market (DSM) agenda, the European Commission (Commission) has pursued legislation that seeks to promote cross-border supply of goods and services taking place online within the European Union (EU). These include a regulation that prohibits discrimination against end-customers on location-based factors (geo-blocking regulation),¹ a regulation that ensures access to online content services during temporary residence in other EU countries (portability regulation),² and a regulation that would enable broadcasters to provide ancillary online services in other EU Member States without infringing copyright (broadcast transmissions regulation).³

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¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC' COM (2016) 289 final (Commission proposal for a geo-blocking regulation). The regulation has now been adopted and become applicable. Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 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 [2018] OJ 2 601/1 (Geo-Blocking regulation).

² Commission, 'Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market' COM (2015) 627 final (Commission proposal for a portability regulation). The regulation has now been adopted and become applicable. Council and Parliament Regulation 2017/1128 on cross-border portability of online content services in the internal market [2017] OJ L 168/1 (Portability regulation).

³ Commission, '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

These regulations (below “DSM Regulations” or “rules”) cover practices by undertakings that are already addressed in EU competition rules (Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU)). In particular, both the DSM and competition rules address territorial restraints and differentiation in distribution of products. However, the rules extend further than the competition rules, and thus complement EU competition law in regulating online distribution. For example, the proposed geo-blocking regulation would preclude refusals to deal as well as price discrimination and passive sales restraints in some situations where they are permitted under EU competition law. Whether the partly stricter rules would succeed in attaining their objective — namely to create an integrated, EU-wide market for the online economy — raises difficult questions.

This chapter examines how the DSM Regulations would affect online distribution of goods and services within the EU especially as regards the possibility to maintain territorial exclusivity and differentiation in online distribution. The analysis proceeds as follows. First, the main mechanisms in the DSM Regulations designed to promote cross-border distribution are laid out. The DSM Regulations ban certain practices in which a consumer’s location is used as a basis to deny sales of products, block access to services, or differentiate conditions and remove contractual and copyright obstacles to distributors providing cross-border services (Section 2). This limits the possibility of undertakings to unilaterally and contractually use territorially limited online distribution. Second, the impact of the rules on cross-border access and competition in online distribution is scrutinized. While the rules are stricter than EU competition law in certain aspects, cross-border supply and competition are not facilitated comprehensively since the rules only apply to designated situations, certain aspects of online supply, and some types of goods and services offered — not to online distribution generally. Another concern is that even when the rules do apply, it is not clear that these will be applied in a way that ultimately promotes competition and consumer welfare by accounting for the expected effects of distribution practices (Section 3). Finally, conclusions are presented (Section 4).

programmes’ COM (2016) 594 final (Commission proposal for a broadcast transmissions regulation).

2. DSM REGULATIONS COMPLEMENTING EU COMPETITION LAW REGULATION OF ONLINE DISTRIBUTION PRACTICES

2.1 Actions under EU competition law against cross-border restraints in online distribution

Territorial restraints in online distribution are currently attracting the attention of the Commission, as part of its DSM efforts, in its role as a competition law enforcer and policy-maker. In the digital economy, technology would permit EU-wide sales of products across Member State borders, especially of services supplied entirely online. However, the reality in the EU remains that distribution is often limited territorially so that products are not supplied to all EU Member States. This can result, for example, from the choices that undertakings make on how they set up distribution of their products. The possibilities of undertakings to do so, though, are determined and limited by various areas of law, such as intellectual property, contract and competition law.

Under EU competition law (Articles 101 and 102 TFEU), territorial restraints are particularly problematic as they may not only restrict cross-border competition but can also run counter to efforts to establish a Single Market by partitioning the market along national borders.⁴ Although certain distribution arrangements, such as territorially exclusive distribution systems involving active sales restrictions, may be unproblematic under Article 101 TFEU,⁵ restraints that limit passive sales by exclusive distributors or create absolute territorial protection⁶ or impose territorially differentiated pricing, typically infringe Article 101 TFEU.⁷

⁴ See e.g. Joined cases 56 and 58/64 *Consten & Grundig v Commission* EU:C:1966:41.

⁵ See e.g. Commission Regulation No. 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 L 102/1 (Vertical block exemption regulation), art 4(b)(b)(i); Commission, *Guidelines on Vertical Restraints*, (Notice) SEC (2010) 411 (Vertical guidelines), paras 50–53.

⁶ See e.g. C-403 and C-429/08 *Football Association Premier League and Others Isv QC Leisure and Others* EU:C:2011:631; Joined cases C 501 , C-513, C-515 and C 519/06 *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610; Joined cases 56 and 58/64, *Consten & Grundig v Commission* EU:C:1966:41.

⁷ Imposing fixed or minimum prices in vertical agreements is generally prohibited by Article 101 TFEU. Case C-243/83 *SA Binon & Cie v SA Agence et messageries de la presse* EU:C:1985:284; Vertical block exemption regulation (n 5), art 4(a). Imposing territorially differentiated sales prices has also been subject to Commission investigations closed without an infringement decision. See e.g. Commission, 'Antitrust: European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe' (Press

Similarly, practices by dominant undertakings that curb cross-border competition or discriminate between consumers geographically or on the basis of their nationality can be problematic under Article 102 TFEU.⁸ On a very general level, it could be said that territorially limited (and even exclusive) distribution can be created, but additional practices limiting sales from one Member State to another may raise concerns particularly when seeking to limit cross-border competition or to exploit lack of such competition.

In order to determine to what extent practices by undertakings are to blame for problems in online distribution, the Commission has carried out a sector inquiry into e-commerce. In its final report, the Commission highlights certain restraints that may improperly restrict competition online, such as those relating to geo-blocking.⁹ The Commission has also launched several investigations relating to suspected restraints on cross-border sales or discriminatory treatment of customers in different Member States in online distribution. These concern, for example, agreements that limit cross-border access to pay-tv content,¹⁰ or that limit cross-border sales of video games,¹¹ fashion products and electronics,¹² and

release) IP/08/22. See also Commission, 'Commission closes inquiry into CD prices after changes to business practices' (Press release) IP/01/1212 (17 August 2001).

⁸ See on abuses related to territorial and nationality based discrimination e.g. Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* EU:C:1978:22; Case C-468/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEE Farmakeftikon Proionton* EU:C:2008:504. Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission* EU:C:1983:52, para. 56; Case 155/73 *Giuseppe Sacchi* EU:C:1974:40, para. 17; *Romanian Power Exchange/OPCOM* (Case COMP/39984) Commission Decision 2014/C 314/07 [2014] OJ C 71, paras 130–131, 161; 1998 Football World Cup (Case IV/36.888) Commission Decision 2000/12/EC [1999] OJ 2000 L 5/55, paras 88–97; Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013), 589–595 and 814–821.

⁹ Commission, 'Final report on the E-commerce Sector Inquiry' COM(2017) 229 final, paras 50–52. See also Lars Kjølbye, Alessio Aresu and Sophia Stephanou, 'The Commission's E-Commerce Sector Inquiry – Analysis of Legal Issues and Suggested Practical Approach' (2015) 6 *Journal of European Competition Law and Practice* 465.

¹⁰ Commission, 'Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services' (Press release) IP/14/15 (13 January 2014). In this case, the Commission has already rendered a commitment decision in which territorial restraints in online distribution of pay-tv content are problematized. Cross-border access to pay-TV (Case AT:40023) Commission Decision 2016/C 437/04 [2016] OJ C 437/25.

¹¹ Commission, 'Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce' (Press release) IP/17/201 (2 February 2017).

¹² Commission, 'Antitrust: Commission opens formal investigation into distribution of clothing company Guess' (Press release) IP/17/1549 (6 June 2017); Commission, 'Antitrust:

impose different prices on customers in different Member States.¹³ Restraints on online sales that affect territorial availability, such as bans on online and platform sales, have also been an issue in numerous disputes in the EU Member States and have in a few cases also been addressed by the Court of Justice of the European Union (CJEU) on preliminary rulings.¹⁴

These efforts by the Commission and other ongoing proceedings have the potential to clarify how EU competition rules are to be applied to territorial restraints in online distribution, especially once the cases are decided by the CJEU. The heightened scrutiny is also putting undertakings on notice that their online distribution practices may attract action by the competition authorities. These matters may in themselves prompt undertakings to refrain from problematic territorial restraints and thus promote competition in online distribution within the EU. However, as explained below, measures outside EU competition law have also been taken by the Commission to address obstacles created by undertakings that EU competition law may not be able to remedy effectively.

2.2 Features of the rules designed to promote cross-border supply and competition in online distribution

As part of its pursuit of a Digital Single Market, the Commission has proposed pieces of legislation that seek to promote cross-border provision of goods and services online, in order

Commission opens formal investigations into Nike's, Sanrio's and Universal Studios' licensing and distribution practices' (Press release) IP/17/1646 (14 June 2017). Recently, distribution practices were found to unlawfully restrict cross-border sales taking place online.

Commission, 'Antitrust: Commission fines Guess €40 million for anticompetitive agreements to block cross-border sales' IP/18/6844 (17 December 2018). Moreover, certain electronics manufacturers were found to have unlawfully fixed online resale prices and in one case also restricting cross-border sales. Commission, 'Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices' IP/18/4601 (24 July 2018).

¹³ Commission, 'Antitrust: Commission opens three investigations into suspected anticompetitive practices in e-commerce' (Press release) IP/17/201 (2 February 2017).

¹⁴ See in particular Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941 and Case C-439/09 *Pierre Fabre Dermo-Cosmétique v Président de l'Aurité de la concurrence* EU:C:2011:649.

to improve the functioning of the internal market.¹⁵ The legislative proposals include a geo-blocking regulation that would ban discrimination among consumers in certain cross-border situations based on nationality or place of residence and establishment,¹⁶ a portability regulation that requires that access to online content services be granted to subscribers during temporary residence in other EU Member States,¹⁷ and a broadcast transmissions regulation that would allow broadcasters to offer certain ancillary online services in other Member States without infringing copyright.¹⁸ The portability and geo-blocking regulations have now been adopted, but the legislative process for the broadcast transmissions regulation is ongoing.¹⁹ However, it is possible to examine — at least on a preliminary basis — the general features of these rules, as the European Parliament and the Council have formulated their positions on the broadcast transmissions regulation.²⁰

¹⁵ See on the objectives of the rules e.g. Commission proposal for a geo-blocking regulation (n 1), art 1(1) ('This Regulation seeks to contribute to the proper functioning of the internal market by preventing discrimination based, directly or indirectly, on the nationality, place of residence or place of establishment of customers'; Commission proposal for a portability regulation (n 2), 2 ('This proposal aims to remove barriers to cross-border portability so that the needs of users can be met more effectively as well as promoting innovation for the benefit of consumers, service providers and right holders. The proposal introduces a common approach in the Union while maintaining a high level of protection for right holders. In doing so, it contributes to the functioning of the internal market as an area without internal borders, where the freedom to provide and to receive services shall be ensured'; Commission proposal for a broadcast transmissions regulation (n 3), recital 17 ('objective of promoting the cross-border provision of ancillary online services'). For a broader review of the Commission initiatives see e.g. Katri Havu 'The EU Digital Single Market from a Consumer Standpoint: How Do Promises Meet Means?' (2017) 9 Contemporary Readings in Law and Social Justice 146.

¹⁶ Commission proposal for a geo-blocking regulation (n 1).

¹⁷ Commission proposal for a portability regulation (n 2).

¹⁸ Commission proposal for a broadcast transmissions regulation (n 3).

¹⁹ Portability regulation (n 2) has become applicable on 20 March 2018 and the Geo-blocking regulation (n 1) on 3 December 2018.

²⁰ Report on the proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (COM(2016)0594 – C8-0384/2016 – 2016/0284(COD)) (1st reading) A8-0378/2017 (27 November 2017); European Council Presidency, '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 – Presidency compromise proposal with a view to agreeing on a General Approach' ST 15479 2017 INIT (8 December 2017).

Essentially, these three regulations seek to promote cross-border competition, transactions and access in three principal ways: (1) by imposing a duty on undertakings to provide unhindered access to goods or services in certain cross-border activities, (2) by rendering contractual restraints on cross-border distribution of goods or services ineffective, and (3) limiting the ability of copyright holders to oppose cross-border provision of services in certain situations. These aspects of the rules are detailed below.

2.2.1 Duty to engage in cross-border supply

The rules impose bans and obligations on practices by undertakings, not unlike Articles 101 and 102 TFEU, applying to online distribution of goods and services. First, the geo-blocking regulation prohibits the use of a consumer's or other end-customer's nationality, place of residence or place of establishment as a factor to block or limit access to a catalogue of products offered (referred to as an "online interface") or to redirect customers to another online interface without consent.²¹ This concerns, for instance, access to web shops tailored for specific Member States: consumers cannot without consent be directed to a specific version of a store or have their access to other versions of the store blocked. In addition, the geo-blocking regulation prohibits discrimination based on location-related factors (i.e., nationality, place of residence or establishment) in "general conditions of access" in designated cross-border situations where goods are sold or services offered online.²² The situations covered by the ban are those in which a customer is seeking to purchase (1) goods

²¹ Geo-blocking regulation, art 3(1) ('A trader shall not, through the use of technological measures or otherwise, block or limit a customer's access to the trader's online interface for reasons related to the customer's nationality, place of residence or place of establishment.'). The bans are directed at 'traders': essentially, any undertaking involved in distribution. Article 2(18) of the proposal defines a trader as 'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in the name or on behalf of the trader, for purposes relating to the trade, business, craft or profession of the trader'.

²² Geo-blocking regulation (n 1), art 4(1) ('A trader shall not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, where the customer seeks to'). In this respect, the geo-blocking regulation seeks to clarify and build on the Services Directive, which also condemns discrimination by private services. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36, art 20(2) (Services Directive).

that are already offered by the distributor for delivery to or pickup at a location desired by the customer (e.g. appliances picked up at the distributor's store), (2) electronically supplied services whose main feature is other than provision of access to copyright-protected content (e.g. web hosting services), and (3) non-electronically supplied services that are fulfilled at a physical location (e.g. hotel accommodation or concerts).²³

These bans on limiting access to online interfaces and against discrimination between customers in general access conditions preclude certain practices by undertakings in which sales to customers are denied or differentiated, directly or indirectly, on the basis of the location-based factors noted above, such as place of residence. For instance, sale of goods or provision of services cannot be refused or higher prices applied in certain cross-border situations where a customer is resident in or a national of another Member State.²⁴ As a result, a corresponding duty is created for undertakings involved in distribution to make goods and services available in certain cross-border situations and to do so under non-discriminatory conditions.²⁵ However, as noted above, the ban on discrimination in general access conditions only applies in designated situations where, for instance, goods are already offered for delivery to another Member State or are available for pickup, or involving electronically supplied services whose main purpose is other than providing access to copyright-protected content. No duty, for instance, applies to starting delivery of goods to a new Member State based on the ban on discrimination in general access conditions.²⁶

Second, the portability regulation obliges providers of online content services to enable subscribers of online content services to access and use the services while temporarily away

²³ Geo-blocking regulation, art 4(1) (n 1).

²⁴ Geo-blocking regulation (n 1), recital 22 (noting that 'any differences in the treatment of customers through the application of general conditions of access, *including outright refusals* to sell goods or to provide services, for reasons related to the customers' nationality, place of residence or place of establishment cannot be objectively justified.', emphasis added)

²⁵ See Geo-blocking regulation (n 1), recital 22 ('customers should consequently be entitled, under the specific conditions laid down in this Regulation, to engage in commercial transactions under the same conditions as a local customer and have full and equal access to any of the different goods or services offered').

²⁶ Neither does the ban on limiting access to online interfaces create such a duty to deal. Geo-blocking regulation (n 1), recital 18 (noting that the 'prohibition of discrimination with respect to access to online interfaces should not be understood as creating an obligation for the trader to engage in transactions with customers.')

from their habitual residence in another EU Member State.²⁷ This obligation, along with certain ancillary duties, applies to undertakings providing access to services that offer consumers of paid subscriptions access to audiovisual or copyright-protected content.²⁸ Consequently, copyright holders or distributors will not be able to limit supply of online content services, such as those providing access to movies, television series, e-books or music, strictly to a certain Member State or to require additional fees for using these services outside of that Member State.

2.2.2 Ineffectiveness of contractual provisions undermining duties

The rules would render unenforceable or void certain contractual restraints that undermine the bans or duties mentioned above. First, passive sales restraints imposed on a distributor are void where they require the distributor to violate bans in the geo-blocking regulation, even when permitted under Article 101 TFEU.²⁹ For example, agreements requiring a distributor to refrain from all sales to another Member State that could exceptionally be allowed under Article 101 TFEU in order to establish a new brand in a market would still be void if they result in the distributor discriminating in situations where it is banned (e.g. in prices of non-electronically supplied services consumed at location or blocking access to an online interface such as a nationally-customized online shop). As a result, a distributor would be allowed to sell a service — such as hotel accommodation — to customers in Member States to which the passive sales restraint would otherwise prevent sales without breaching an agreement, and in the example given could even be required to do so.

²⁷ Portability regulation (n 2), art 3(1) ('The provider of an online content service provided against payment of money shall enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence, including by providing access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities.')

²⁸ Portability regulation (n 2), arts 2 and 3(1).

²⁹ Geo-blocking regulation (n 1), art 6(2) ('Provisions of agreements imposing obligations on traders, in respect of passive sales within the meaning of Regulation (EU) No 330/2010, to act in violation of the prohibitions laid down in Articles 3, 4 and 5 of this Regulation shall be automatically void.')

According to recital 34, this is because 'there is a risk that they could be used to circumvent the provisions of this Regulation.'

Second, contractual restraints in any relationship, including that between a content supplier and a distributor or between a distributor and a consumer, that undermine distributors' ability and obligation to provide portability of online content services are unenforceable.³⁰ For example, limitations imposed in licensing agreements between copyright holders and online content services providers on accessibility of content are unenforceable when they undermine the portability required under the regulation.

2.2.3 Limitations on exercise of copyright limiting cross-border distribution

The rules also limit possibilities to exercise copyright in certain ways that limit cross-border supply of services. Under the rules, provision of online services ancillary to broadcasting (e.g. catch-up and simulcast services featuring certain broadcast content) would under copyright law take place exclusively at the broadcasting organization's place of establishment³¹ and portability of online content services — e.g. online streaming services providing access to movies and television series — where a subscriber of an online content service is residing.³² A distributor who holds a licence covering those regions — as is normally required in order

³⁰ Portability regulation (n 2), art 7. Art 5(1) provides that '[a]ny contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable.'

³¹ Commission proposal for a broadcast transmissions regulation (n 3), art 2(1) ('The acts of communication to the public and of making available occurring when providing an ancillary online service by or under the control and responsibility of a broadcasting organisation as well as the acts of reproduction which are necessary for the provision of, the access to or the use of the ancillary online service shall, for the purposes of exercising copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.')

³² Portability regulation (n 2), art 4 ('The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence.')

This would mean, according to recital 21 of the proposal, that '[t]he provision of an online content service by providers to subscribers temporarily present in a Member State other than their Member State of residence and the access to and use of the service by such subscribers in accordance with this Regulation should not constitute a breach of copyright or related rights or any other rights relevant for the provision of, access to and use of the online content service.'

to offer services lawfully — would not need an additional or broader licence covering other territories in the EU to which services are offered. Nor would a copyright holder, due to localisation of activities under copyright law solely in a single Member State, be able to assert copyright against activities taking place in those other territories or to limit the scope of licences to a smaller territory than the rules provide for.

Additionally, where copyright holders are subject to the bans and contractual effects discussed above, their ability to exercise and license copyright can be correspondingly limited. Certain licensing strategies, for instance, may be prohibited or contractually indefensible. To illustrate: where online services covered by the geo-blocking regulation are concerned — for example, those whose main purpose is other than provision of access to copyright protected content, which might include social media services — discriminatory treatment such as preventing access to content from certain Member States could not be validly required in licensing agreements because distributors would be required by law to offer access without discrimination and might not be bound by such passive sales restraints.

2.3 Constraints on distribution practices extending beyond EU competition law

The DSM Regulations would give rise to new requirements and other constraints affecting how online distribution of goods and services can be arranged, as illustrated above. In particular, in certain cross-border situations distributors are not permitted even by unilateral decision to refuse sales or service or to apply different prices, nor limit access to online interfaces (e.g. web shops tailored for specific Member States) on the basis of an end-customer's location. Nor can contracts and copyright be used to prevent distributors from engaging in cross-border sales and supply in certain situations reflecting mostly the above bans.

These legal effects of the DSM Regulations overlap with those already arising from Articles 101 and 102 TFEU, which also give rise to duties to deal, not to discriminate as well as to limit the validity of agreements and exercise of copyright. However, the rules extend significantly further in several respects by precluding practices permitted under the competition rules. A major reason is that that the rules also apply to unilateral practices by non-dominant undertakings, whereas EU competition law only regulates unilateral conduct

by undertakings in a dominant position in a relevant market. As a consequence, a slew of additional online distributors would become subject to requirements not to discriminate — for example by refusing sales or by applying different sales conditions — that currently only apply to dominant undertakings.

The rules also expand on the requirements of EU competition law by condemning practices that might not amount to restrictions of competition under Article 101 TFEU at all — or at least do not do so unequivocally — or abuses under Article 102 TFEU. For instance, EU competition law does not as a general rule require that undertakings make goods and services available across the EU — as do the geo-blocking and portability regulations in certain situations — or to do so under uniform prices and other conditions.³³ Nor does EU competition law limit the exercise of copyright in ways that the portability and broadcast transmissions regulations would do,³⁴ or preclude passive sales restraints in certain situations in which geo-blocking does so.³⁵

Finally, the rules would have knock-on effects on the application of EU competition law. In particular, where an agreement limits possibilities created under the DSM Regulations for

³³ See cases cited above in footnotes 6, 7 and 8 for situations where competition law condemns limitations of sales or differentiated pricing based on customer location or nationality. As noted above, in cases referred to in n 10, 11, 12, and 13, ongoing Commission investigations also relate to these questions specifically in the online realm. See generally on differences between the proposed geo-blocking regulation and EU competition law and other relevant EU legislation, Miguel Maduro, Giorgio Monti and Gonçalo Coelho, *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects* (IP/A/IMCO/2016-14), available at <[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/595362/IPOL_STU\(2017\)595362_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/595362/IPOL_STU(2017)595362_EN.pdf)> (accessed 12 February 2018); Inge Graef, 'Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination Towards End Consumers?' (2017) 24(3) *Columbia Journal of European Law* available at <<https://ssrn.com/abstract=3090360>> (accessed 14 February 2018).

³⁴ On limitations imposed by EU competition law on exercise of IPRs see e.g. Case C-418/01 *IMS Health v NDC Health* EU:C:2004:257 (refusals to deal); Case 170/13 *Huawei Technologies v ZTE* [2015] EU:C:2015:477 (enforcement of IPRs); Case T-198/98 *Micro Leader Business v Commission* ECLI:EU:T:1999:341 (enforcement of IPRs and other abuse); Case 262/81 *Coditel v Ciné-Vog Films* EU:C:1982:334 (exclusive licensing of IPRs); Joined cases C-403 and 429/08 *Football Association Premier League v QC Leisure* EU:C:2011:631 (additional restraints in exclusive licensing).

³⁵ Vertical guidelines (n 5), paras 61–62 (circumstances in which passive sales restraints may exceptionally be permitted).

distributors to engage in certain cross-border sales and supply — for example, offering portability and access to ancillary online services or products for sale in situations covered by the geo-blocking regulation — even a hard-core restriction of competition under Article 101(1) TFEU may be involved.³⁶ This interplay between the rules would mean that EU competition law treatment would become stricter in those types of situation than is currently the case.

3. POTENTIAL OF THE DSM REGULATIONS TO PROMOTE CROSS-BORDER AVAILABILITY AND COMPETITION AND ITS MAIN LIMITATIONS

3.1 Consequences of the rules potentially stimulating EU-wide online distribution

The DSM Regulations would enable — indeed often mandate — undertakings to engage in cross-border provision of goods and services, as discussed above. In some situations, distributors cannot unilaterally decide or effectively be required by agreements or copyright to refrain from selling to a certain territory; they would be able to and have to sell and supply products to customers anywhere in the EU. As noted above, this goes well beyond the standards applicable to distribution practices under EU competition law, which does not set such wide-ranging duties to deal or to apply non-discriminatory conditions. In particular, the degree of territorial exclusivity and the possibility of differentiating sales territorially would be considerably reduced.

Aside from these immediate legal consequences of compelling and empowering distributors to engage in EU-wide and cross-border supply, the feasibility and attractiveness of territorially exclusive and differentiated distribution arrangements may also more generally be reduced. As distributors would be required and enabled to engage in cross-border competition, the value of territorial exclusivity to suppliers and distributors would be diminished as more intra-brand competition would be involved. This could steer undertakings to increasingly switch to non-exclusive distribution models or EU-wide

³⁶ See e.g. Joined cases C-403 and 429/08 *Football Association Premier League v QC Leisure* [2011] EU:C:2011:631; Cross-border access to pay-TV (Case AT:40023) Commission Decision (n 10); Juha Vesala, 'Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on Application of EU Antitrust Law' (2017) 25 *Michigan State International Law Review* 595.

exclusivity in distribution. In addition, the rules could prompt undertakings to engage in EU-wide distribution even when not strictly required to do so, for instance, in order to avoid costs and risks created by the rules³⁷ or to avoid consumer dissatisfaction.³⁸

The rules, in other words, would render distribution arrangements featuring territorial limitations or differentiation unlawful, less viable or less attractive. In principle, cross-border and EU-wide supply and competition could be increased because any distributor could become active EU-wide, thus resulting in a greater number of distributors that customers can turn to. This could improve product availability and selection, lower prices and otherwise benefit consumers. For instance, the geo-blocking regulation enables consumers to purchase online file storage services from any online store offering them in the EU — allowing consumers to potentially benefit from more advantageous prices and product variety than when such products can be purchased from, for instance, a single web site in the consumer's Member State of residence, as currently may often be the case. However, the impact is not straightforward since undertakings may alter their distribution arrangements as a counter-reaction to the rules so as to maintain the benefits of exclusivity and differentiation by other means. Moreover, as discussed below, the impact of the rules on consumer welfare is not necessarily unambiguously positive since distribution practices potentially facing bans may also have benign and desirable aspects that are well-known in competition policy.³⁹ Moreover, as considered next, the rules only affect certain significantly limited situations and types of products, not all circumstances where goods and services are offered online.

³⁷ For instance, meeting the requirements of the portability regulation might be achieved with less technical, administrative and user effort by allowing subscribers or other users to access the service anywhere within the EU, without determining the residence of the customer to the extent provided by art 5 of the Portability regulation (n 2). The regulation provides a mechanism for doing so. Copyright holders can waive requirements normally applied to verifying the residence of consumers. Portability regulation (n 2), art 5(4). In addition, online content services that do not charge for subscriptions can opt in to the portability regime (by default applicable only to paid subscription services), art 6.

³⁸ Geo-blocking regulation art 3(1), banning blocking of access to online interfaces, may exert pressure on suppliers and distributors to make products available more broadly in the EU by exposing consumers to products available and prices charged to consumers elsewhere in the EU. Since the provision also applies where consumers may not be able to avail themselves of those offerings on the basis of art 4, it may give rise to consumer dissatisfaction and backlash when consumers notice products or prices they are not able to obtain.

³⁹ See below Section 3.2.

3.2 Coverage of the rules limited to specific situations, types of services and products

The chief limitation on the above-noted potential benefits of the DSM Regulations on cross-border supply and competition is that the rules are considerably limited in their scope of application. That is, their general scope of application is limited, while certain provisions are confined to narrow situations and otherwise affect only certain kinds of distributed product. As a result, the rules do not enable, promote or require cross-border supply and distribution across the board, but only do so in limited sets of circumstances.

To begin with, different requirements apply to services supplied entirely electronically online and goods and services requiring physical delivery or fulfilment. Of these, some electronically fulfilled services offered online are subject to the most demanding requirements, whereas goods and services fulfilled at location are only in part affected. In particular, as noted above, online sales of goods would only be subject to the ban on discrimination, where the distributor is already offering a product for delivery to the Member State or for pickup at a location desired by the consumer.

Additionally, the applicability of the rules to services offered and fulfilled online is qualified in various aspects depending on their nature and subject-matter. First, the rules apply only to certain kinds or aspects of services provided online. The portability regulation would require and enable portability of “online content services”,⁴⁰ the broadcasting transmission regulation would enable provision of “ancillary online services”,⁴¹ and the ban on discrimination in the geo-blocking regulation only applies to electronically supplied services whose main feature is other than providing access to copyright-protected content and non-electronically supplied services fulfilled on location.⁴² As audiovisual services (among others) are entirely excluded from the scope of application of the geo-blocking regulation, the key geo-blocking ban on discrimination in general access conditions would only apply to online services that are non-audiovisual and not copyright-dominated.⁴³

⁴⁰ Portability regulation (n 2), art 2(5).

⁴¹ Commission proposal for a broadcast transmissions regulation (n 3), art 2.

⁴² Geo-blocking regulation (n 1), arts 4(1)(b) and (c).

⁴³ Geo-blocking regulation (n 1), arts 1(3) and 4(1)(b).

Second, even when a specific type of electronically supplied service is covered, the applicability of requirements further depends on the kind of products offered within the service. As noted above, the geo-blocking regulation does not apply at all to audiovisual services (and certain other excluded services)⁴⁴ and its most significant ban on discrimination only applies to electronically supplied services whose main feature is other than provision of access to copyright-protected content. This means that the ban on discrimination does not cover services primarily offering access to movies, television programmes, radio programmes, music or e-books.⁴⁵ In addition, copyright infringement might constitute a defence against bans on discrimination and limiting access to online interfaces by the proposed geo-blocking regulation, thus even further limiting the applicability of bans on distribution of copyright-protected materials.⁴⁶

Additionally, the scope of broadcast materials that would be subject to the broadcast transmissions regulation would be limited. Whereas the Commission initially proposed covering all broadcast content (radio and television programmes), the European Parliament would limit application of the country of origin principle to news and current affairs programmes.⁴⁷ The Council would limit applicability so that television and radio broadcasts of sports events would be entirely excluded from the scope of the principle and so that television programmes would be subject to the rule only when produced and financed exclusively by the broadcasting organization or commissioned by an organization that has all relevant rights or are coproduced by it (except for films and television series).⁴⁸ In other words, radio programmes would be covered but television broadcasts would be covered only to a limited extent depending on how they were produced and financed and what has been agreed as to rights, while broadcasts of sporting events would not be covered at all. By contrast, the portability regulation will apply to online content services carrying a wide variety of content, covering almost all kinds of media and entertainment content, as long as

⁴⁴ Geo-blocking regulation (n 1), art 1(3). Various other types of services, such as transport services, would also be excluded from the scope of the regulation. See Services Directive (n 22), art 2(2), referred to in the exclusion in art 1(3) of Geo-blocking regulation (n 1).

⁴⁵ Geo-blocking regulation (n 1), arts 1(3) and 4(1)(b) and recital 8.

⁴⁶ Geo-blocking regulation (n 1), arts 3(3) and 4(5).

⁴⁷ Parliamentary 1st reading of the broadcast transmissions regulation (n 20), art 2.

⁴⁸ Council presidency compromise proposal on broadcast transmissions regulation (n 20), 3 and art 2(1a).

this involves audiovisual, broadcast transmissions, copyright- or otherwise-protected content.⁴⁹

Consequently, the impact of the rules on cross-border availability and competition varies considerably by the nature of the product and circumstances of its distribution. The consequences of the DSM Regulations for distribution practices appear the most considerable as regards online sales of non-electronic services consumed on the premises (e.g. hotels and concerts) and non-audiovisual online services whose main feature is other than offering access to copyright-protected materials, such as online storage services. In these categories, availability and competition across the EU could be improved significantly because distributors would as a general rule be required to make these services available throughout the EU and to do so in a non-discriminatory manner. By contrast, as noted above, cross-border availability of — and competition in — online media services would not be significantly affected by the rules, apart from the access enabled by a requirement of portability of such services and the possible (but not guaranteed) ability to access certain ancillary online broadcast services.⁵⁰ Similarly, cross-border availability of goods might not be drastically affected as the rules would not require undertakings to start delivering to or arranging pickup in Member States in which goods are not yet offered.

3.3 Uncertainty over standards for identifying objectionable distribution practices

Where the DSM Regulations do apply so as to potentially induce cross-border distribution, the standards applicable for assessing distribution practices still raise concerns about the ability of the rules to promote competition and consumer welfare. In particular, a decisive question under the geo-blocking regulation — what constitutes discrimination as distinguished from unproblematic or justified differentiation — is not resolved by the regulation. Apparently, any differentiation in sales conditions directly or indirectly related to nationality, residence or establishment of customers in comparable situations may

⁴⁹ Portability regulation (n 2), art 2(5) and recitals 5–8.

⁵⁰ See on how cross-border access to and trade in online media services could be expanded Juha Vesala, 'Achieving a Digital Single Market for online distribution of content: when would extending the Geo-blocking Regulation be justified?' in Taina Pihlajarinne, Juha Vesala and Olli Honkkila (eds), *Online Distribution of Content in the EU* (Edward Elgar, forthcoming).

constitute banned discrimination, unless objective reasons justify different treatment.⁵¹ However, the geo-blocking regulation does not determine what the test for prima facie unlawful discrimination is and what kinds of factor can act as justifications.⁵² Nor can it be deduced how assessment is carried out from the choices made in the regulation, such as categorizations of different situations, practices and services.⁵³ It is therefore unclear if, to what extent and how the frequently diverging effects of distribution practices on consumer welfare, competition, and integration of the market and other relevant interests can or should be taken into account when applying the rules. This raises the concern that practices could be prohibited as discriminatory even in situations where, in fact, consumers are likely to benefit from the practice concerned.

In order to apply the ban on discrimination in a way that promotes cross-border supply, competition and the interests of consumers and other goals ascribed to the regulation, it would be useful to consider at least that price discrimination may have ambiguous effects on

⁵¹ This is how discrimination is framed in general terms under the Services Directive, on which the geo-blocking regulation seeks to build. See Commission, '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")' SWD(2012) 146 final, 11. See also Opinion of AG Trstenjak in joined cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* EU:C:2010:273, para. 96. Also under the Services Directive, the concept of discrimination remains unsettled. See e.g. Catherine Barnard, *The Substantive Law of the EU – the Four Freedoms* (Oxford University Press 2016) 443–444.

⁵² Some statements suggest a strict stance on what amounts to prima facie banned discrimination. See e.g. Geo-blocking regulation (n 1), recital 22, noting that 'any difference in treatment' is unjustifiable and suggesting that the practices condemned in art 4(1) almost categorically lack objective justification.

⁵³ For example, some statements in the regulation suggest that justifications relate to requirements of EU and EU law-compliant national law. Geo-blocking regulation (n 1), arts 3(3) and 4(5). If the scope for justifications for different treatment is limited to these mandatory legislative reasons, there would not appear to be much room for consideration of how the practice affects consumers and competition. However, the exclusion of copyright-dominant and audiovisual services, in arts 1(3) and 4(1)(b), could be interpreted as a recognition of the need to protect incentives to invest in their production, but no explanation is given as to what reasoning the exclusion is based on. Nor are explanations offered for other determinations in the regulation that could be based on underlying assessment of prima facie or justified discrimination, such as that application of different prices in different Member States is acceptable but discrimination in pricing based on the nationality, residence and establishment of consumers is prohibited. Geo-blocking regulation (n 1 **Error! Bookmark not defined.**), art 4(2) and recital 27.

the interests of consumers⁵⁴ and that territorial restraints could be justified by various types of efficiencies.⁵⁵ Failing to do so could, in a clash with the goals of the geo-blocking regulation, end up harming competition and consumers. For example, if territorially exclusive distribution is banned in situations where it would be justified by efficiency benefits, consumers may end up worse off as those efficiencies cannot be attained. Similarly, mandating a uniform price across the EU could render some or all consumers worse off overall in terms of consumer welfare.

To avoid counter-productive results, these types of effects-based considerations could be needed in assessing whether prima facie discrimination is present and whether it is justified under the geo-blocking regulation. The experiences gained in EU competition policy on distribution practices are valuable because similar questions about economic integration goals, maintenance of competition and achievement of efficiencies have been considered in that context. This would also help avoid unwarranted inconsistencies that could arise between treatment of distribution practices under the geo-blocking regulation and in EU competition law, for example as regards passive sales restraints and price discrimination.⁵⁶ These considerations are also relevant as part of the planned evaluation of whether the scope of application of the geo-blocking regulation should be expanded.⁵⁷

4. CONCLUSIONS

⁵⁴ This was examined during the legislative process in a study that focused on the welfare effects of preventing geo-blocking in certain sectors. J. Scott Marcus and Georgios Petropoulos, 'Extending the scope of the geo-blocking prohibition: An economic assessment' (IP/A/IMCO/2016-15) (February 2017).

⁵⁵ For an overview, see e.g. Vertical guidelines (n 5), para. 107 (listing various kinds of free-riding, hold-up and externality problems that can be solved by vertical restraints).

⁵⁶ Problematic divergence in treatment of distribution practices could arise, especially if general tests do not allow for sufficient economic considerations and the geo-blocking rules are enforced by national authorities other than those responsible for competition law matters — both plausible scenarios. See on such risks e.g. Pieter Van Cleynenbreugel, 'The European Commission's geo-blocking proposals and the future of EU e-commerce regulation' (2017) 11 Masaryk University Journal of Law and Technology 39.

⁵⁷ Geo-blocking regulation (n 1), art 9 (providing for review of the general scope of the regulation and limitation of the ban against discrimination in general conditions of access to services whose main purpose is provision of access to copyright protected content).

The Commission has pursued new legislation — a regulation on geo-blocking, portability and broadcast transmissions — that affects how undertakings can arrange online distribution of goods and services within the EU. These adopted and proposed rules share objectives with EU competition law in seeking to promote cross-border competition and functioning of the internal market and would cover similar practices by undertakings as under EU competition law. However, the rules go beyond EU competition law as they give rise to new duties to deal and not to discriminate, prevent use of certain contractual terms and limit the exercise of copyright in certain cross-border situations. As a result, distributors would, for instance, be obliged to make certain kinds of services available throughout the EU and to do so under non-discriminatory terms. This could increase cross-border availability of certain types of goods and services, to the benefit of competition and consumers.

However, the potential of the rules to realize EU-wide distribution is substantially limited as the rules only cover certain cross-border situations, specific types of services, and some types of distributed products. The rules therefore cannot be expected to spur cross-border distribution of goods and services across the board as they leave important types of online services — for example, media and entertainment — and situations largely unaffected.

Moreover, even where the rules apply to online distribution, unclear criteria for banned conduct raise concerns about the ability of the rules to distinguish practices harmful to consumer welfare from benign ones. For instance, it is unclear whether assessment under the geo-blocking regulation of discrimination permits desirable aspects of distribution practices, such as efficiency benefits, to be taken into account. Insights from EU competition policy could be valuable in aiding application of the DSM Regulations as well as for evaluating whether the scope of the rules could be broadened.