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THE EUROPEAN COMMISSION'S GEO-BLOCKING PROPOSALS AND THE FUTURE OF EU E-COMMERCE REGULATION

by

PIETER VAN CLEYNENBREUGEL*

As part of its Digital Single Market strategy, the European Commission envisages to take action aimed at eradicating the practice of blocking one's website to persons established or residing in a particular EU Member State. To that extent, a 2015 proposal for a regulation on the portability of online streaming services and a 2016 proposal for a regulation on geo-blocking outside the audio-visual context have been presented, the scope of which will be analysed in this paper.

Although the proposed Regulations would tackle topical problems in EU e-commerce and thus offer a necessary step forward in enhancing cross-border trade in the European Union, their envisaged regulatory approach raises important concerns from enforcement and rules' circumvention points of view.

Taking stock of those two concerns, the paper will reflect upon ways to mitigate their detrimental effects. Arguing that the geo-blocking proposals already contain the basic tools for such mitigation, the paper advocates the adoption of a more streamlined EU competition law and e-commerce regulation enforcement strategy, complemented by a "technologically more pro-active" EU law interpretation stance to e-commerce at the EU level.

KEY WORDS

Digital Single Market, E-commerce Regulation, Geo-blocking, Online Content Portability, Enforcement, Competition Law

* pieter.vancleynenbreugel@ulg.ac.be, Professor (chargé de cours) of European economic law, Liège Competition and Innovation Institute, Ph.D (KU Leuven), LL.M. (Harvard), Liège Competition and Innovation Institute Université de Liège, Université de Liège, Belgium.

1. INTRODUCTION

In May 2015, the European Commission set itself the ambitious goal to establish a Digital Single Market (DSM). Focused primarily on better access for consumers and businesses to online goods and services across Europe,¹ the Commission has proposed new legislation aimed at removing obstacles to free online cross-border trade. Key targets in this regard have been instances of geo-blocking, where access to goods or services is blocked for reasons of residence or nationality of (potential) customers. Seeking to eradicate such instances, the EU proposed two Regulations, one relating to audio-visual media and another more generally to most other goods and services. Although both proposed regulations differ in scope and ambition, they allow to understand how the EU envisages the Regulation of technology in the context of its DSM agenda.

In proposing both Regulations, the European Commission opted to proceed with a piecemeal approach to e-commerce regulation. Section 2 of this paper analyses and frames that approach. Following this analysis, section 3 will argue that, to the extent the Commission deems more regulation of e-commerce necessary, the envisaged piecemeal approach raises important concerns from an enforcement and a rules' circumvention point of view. Taking stock of those two concerns, section 4 will subsequently reflect upon ways to mitigate their detrimental effects. In doing so, it advocates the adoption of a more streamlined EU competition law – e-commerce regulation enforcement strategy, complemented more generally by a “*technologically more pro-active*” EU law interpretation strategy in the realm of e-commerce.

Before developing this argument, it is important to stress that the paper should not be understood as implicitly approving the Commission's regulatory approach as the only right one. The approach towards, and even the need for, EU e-commerce regulation can be contested in their own right indeed. Preferring not to enter into those debates here, all the more given that the EU institutions clearly prefer to move forward on this strategy, this paper's aim is rather to look for ways that can turn the Commission's preferred regulatory approach in a stronger and more sustainable one.

¹ European Commission (2015) a *Digital Single Market Strategy for Europe*. COM/2015/192 final, section 2. Available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN> [Accessed 11 June 2017] (hereafter DSM Strategy).

2. THE COMMISSION'S GEO-BLOCKING PROPOSALS

Geo-blocking refers to a set of traders' practices consisting in the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another.² Those practices can take place in relation to both consumer goods and – most obviously – to digital content available in one Member State to which a customer residing in another Member State wants to gain access. In the latter case, digital content will be made unavailable to customers having their IP-address located outside the Member State concerned.³ The prevalence this practice is problematic from the point of view of a European Union wanting to create and maintain an internal market characterised by the free flow of goods and services.⁴

Although existing EU law would already prohibit certain of those practices,⁵ more tailored regulation was felt necessary to oblige traders to stop blocking access to their websites or online ordering systems. The European Union presented two specific proposals in that regard. Firstly, the Commission in December 2015 proposed a Regulation enabling subscribers to audio-visual streaming services to keep their subscription when temporarily residing in another Member State (2.1). Secondly, a May 2016 proposal would prohibit traders more generally to continue geo-blocking customers (2.2).

² European Commission (2016) *Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*. SWD(2016) 70 final, recital 32 Available from: http://ec.europa.eu/competition/antitrust/e-commerce_sw_d_en.pdf [Accessed 11 June 2017] (hereafter referred to as geo-blocking initial findings report).

³ European Commission (2016) *Antitrust e-commerce sector inquiry finds geo-blocking is widespread throughout EU*. [press release] 18 March. Available from: http://europa.eu/rapid/press-release_IP-16-922_en.htm [Accessed 11 June 2017]. A final report, published on 10 May 2017, confirmed those findings. For that report, see European Commission (2017) *Final Report on the E-commerce Sector Inquiry*. COM(2017) 229 final. Available from: http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf [Accessed 11 June 2017].

⁴ At the same time, however, geo-blocking often also serves as a tool to ensure compliance with nationally-structured copyright laws. See for that perspective already Trimble, M. (2012) the Future of Cybertravel. Legal implications of the evasion of geolocation. *Fordham Intellectual Property, Media and Entertainment Law Journal*, 22(3), p. 570. See also Trimble, M. (2016) Geoblocking, Technical Standards and the Law. In: R. Lobata and J. Meese (eds.) *Geoblocking and digital video culture*. Amsterdam: Institute of Network Cultures, p. 55.

⁵ Especially when the State obliges or enables directly traders to do so; in that case, the State would restrict the freedom to deliver goods or to provide services, prohibited by Articles 34 and 56 of the Treaty on the functioning of the European Union (TFEU). Article 101 TFEU would prohibit contracts between businesses containing geo-blocking clauses. In the same way, Article 102 TFEU would prohibit dominant business from engaging in such an abusive practice.

2.1 THE 2015 ONLINE CONTENT PORTABILITY PROPOSAL

In an attempt to avoid situations where consumers are confronted with inaccessible audio-visual content when travelling abroad within the European Union, the European Commission proposed an online content portability Regulation in December 2015.⁶

To that extent the proposed Regulation would require that online service providers enable their subscribers to use the service in the Member State of their temporary presence by providing them 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 as those offered in their Member State of residence. This obligation is mandatory and therefore the parties may not exclude it, derogate from it or vary its effect. Any action by a service provider which would prevent the subscriber from accessing or using the service while temporarily present in a Member State, for example restrictions to the functionalities of the service, would amount to an illegal circumvention of the portability rights guaranteed by the proposed Regulation.⁷

In very general terms, the proposed Regulation obliges a provider of an online content service to enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same way as made possible in the home Member State.⁸ More specifically, providers have to offer subscribers 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 as those offered in their Member State of residence.⁹ The only exception to this obligation relates to the quality of the service offered. The services provider is not obliged to deliver the same quality of online deliveries as was the case in the home Member State, at least on condition that the subscriber is informed about

⁶ European Commission (2015) *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. Available from: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-627-EN-F1-1.PDF> [Accessed 11 June 2017] (hereafter portability proposal). See also Peifer, K.-N. (2016) *the Proposal of the EU Commission for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market*. In: A. De Franceschi (ed.) *European Contract Law and the Digital Single Market. the Implications of the Digital Revolution*. Antwerp: Intersentia, p. 164.

⁷ Recital 18 portability proposal.

⁸ Article 3(1) portability proposal.

⁹ Recital 18 portability proposal.

this quality difference.¹⁰ In order to overcome copyright difficulties disputes, the proposed Regulation would establish that the provision, the access to and the use of such online content service should be deemed to occur in The Member State of the subscriber's residence.¹¹

An online content service is defined more specifically as a service legally provided in a Member State qualifying as an audio-visual media service, i.e. a service which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks or an audio-visual commercial communication.¹² According the European Commission, the proposal envisages above all

*“video-on-demand platforms (Netflix, HBO Go, Amazon Prime, Mubi, Chili TV), online TV services (Viasat's Viaplay, Sky's Now TV, Voyo), music streaming services (Spotify, Deezer, Google Music) or game online marketplaces (Steam, Origin).”*¹³

Temporarily residing in that regard implies the presence of a subscriber in a Member State other than the Member State of residence, without that subscriber relinquishing his residence in the home Member State.¹⁴

The proposed Regulation would also cover any other service the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner, which is provided to a subscriber on agreed terms either against payment or money or without payment or money yet after verification of the subscriber's residence.¹⁵ An example of the latter could be a free YouTube-user profile upon completion of a registration form requiring the user to provide details about his location. Online content services which are provided without the payment of money and whose providers do not verify the Member State

¹⁰ Article 3(2) portability proposal.

¹¹ Article 4 portability proposal.

¹² Article 2(e) portability proposal.

¹³ European Commission (2017) *Digital Single Market: EU negotiators agree on new rules allowing Europeans to travel and enjoy online content services across borders*. [press release] 7 February. Available from: http://europa.eu/rapid/press-release_IP-17-225_en.htm [Accessed 11 June 2017].

¹⁴ Article 2(d) portability proposal.

¹⁵ Article 2(e) portability proposal.

of residence of their subscribers remains outside the scope of this Regulation.

The Regulation would not impose specific enforcement obligations on Member States' authorities in this regard. It nevertheless firmly states that any contractual provisions including those between holders of copyright and related rights, those holding any other rights relevant for the use of content in online content services and service providers, as well as between service providers and subscribers which do not guarantee such portability shall be deemed unenforceable.¹⁶ The Regulation proposal adds to this that holders of copyright and related rights or those holding any other rights in the content of online content services may ask for verifications that the online content is used only by subscribers residing temporarily in another Member State.¹⁷

On 26 May 2016, the Council agreed on the principled approach taken in the Commission's proposal.¹⁸ The European Parliament having taken a similar position on 29 November 2016,¹⁹ the European Commission managed to reach an agreement on 7 February 2017 with the Council and The European Parliament to move forward the proposal on online content portability, transforming it in a directly applicable EU Regulation.²⁰ If and when adopted, the Regulation would be applicable to contracts concluded and rights acquired before the date of its application if they are relevant for the provision, the access to and the use of an online content service after that date.²¹

2.2 THE 2016 GENERAL GEO-BLOCKING PROPOSAL

In an attempt to remove existing barriers to cross-border online trading activities²², the 2016 proposal envisages to capture all traders engaging

¹⁶ Article 5(1) portability proposal.

¹⁷ Article 5(2) portability proposal.

¹⁸ See Council of the European Union (2016) *Portability of digital content: Council agreement on main principles*. [press release 26 May]. Available from: <http://www.consilium.europa.eu/en/press/press-releases/2016/05/26-portability-digital-content/> [Accessed 11 June 2017].

¹⁹ European Parliament (2016) *Watch your online films anywhere in the EU: MEPs back cross-border portability*. [press release] 29 November. Available from: <http://www.europarl.europa.eu/news/en/news-room/20161128IPR53511> [Accessed 11 June 2017].

²⁰ European Commission (2017) *Digital Single Market: EU negotiators agree on new rules allowing Europeans to travel and enjoy online content services across borders*. [press release] 7 February. Available from: http://europa.eu/rapid/press-release_IP-17-225_en.htm [Accessed 11 June 2017].

²¹ Article 7 portability proposal.

²² DSM Strategy, p. 5.

in cross-border geo-blocking practices. More particularly, it is meant to provide more opportunities for customers not being able to buy products and services from traders located in a different Member State or those being discriminated in accessing the best prices or sales conditions compared to nationals or residents of that Member State.²³ Remarkably, however, the proposal would exclude access to audio-visual content available in another Member State from its scope.²⁴ As a result, traders could still geo-block customers seeking to access an online content service in another Member State, based on their location or on their IP-address.

For geo-blocking practices falling within its scope, the proposed Regulation would not of itself oblige traders to engage in cross-border commerce. The proposal only seeks to enable or facilitate envisaged cross-border commercial transactions taking place by means of an online interface, i.e. any software, including a website and applications, operated by or on behalf of a trader, which serves to give customers access to the traders' goods or services with a view to engaging in a commercial transaction with respect to those goods and services.²⁵ Consumers or businesses established outside the European Union but being geo-blocked by an EU business would not be able to benefit from the scope of this Regulation.²⁶ As such, the prohibitions outlined in it only apply to situations in which a trader established in a Member State or a third country offering goods or services in a Member State to customers temporarily residing in that same state, customers established in another Member State, or residing in the same Member State yet having the nationality of another Member State.²⁷

²³ Mazziotti, G. (2015), Is geo-blocking a real cause for concern in Europe? *EUI Law Working Papers*, (2015)43, pp. 8-11. Available from: <http://cadmus.eui.eu/handle/1814/3808> [Accessed 11 June 2017].

²⁴ See Article 2(g) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. *Official Journal of the European Union* (2006/L376/36) 27 December. Available from: <http://eur-lex.europa.eu/legal-content/En/TXT/?uri=celex%3A32006L0123> [Accessed 11 June 2017].

²⁵ Article 2(f), European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) no 2006/2004 and Directive 2009/22/EC*. COM (2016) 289 final. Available from: <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-geo-blocking> [Accessed 11 June 2017] (hereafter geo-blocking proposal).

²⁶ For an interesting comparison regarding geo-location as a jurisdictional starting point in EU cyberspace regulation, Svantesson, D.J.B. (2016) Nostradamus Lite – Selected speculations as to the future of internet jurisdiction, *Masaryk Journal of Law and Technology*, 10(1), p. 59.

²⁷ Article 1(2) geo-blocking proposal.

When using an online interface, traders shall not, through the use of technological measures or otherwise, block or limit customers' access to that interface for reasons related to the nationality, place of residence or place of establishment of the customer. Nor should they redirect customers to a version of their interface that is different, by virtue of its layout, use of language other characteristics that make it specific to customers with a particular nationality, place of residence or establishment, from the one which the customer originally wanted to access.²⁸ Such redirection can only take place with the customer's explicit consent; in that case, the original version of the interface has to remain easily accessible for that customer as well.²⁹ The obligation to refrain from geo-blocking would apply even when traders do not explicitly direct their activities to the territory where the customer concerned is located. However, Article 1, paragraph 5 of the proposed Regulation confirms that

"The mere fact that a trader acts in accordance with the provisions of this Regulation should not be construed as implying that he directs his activities to the consumer's Member State for the purpose of such application."

This confirmation is important, as EU choice of law instruments generally determine that the law of the consumer's state of residence will be applicable in cross-border consumer contracts. As a result, the law of the seller would be applicable in transactions subject to this regulation but not specifically directed towards the Member State of the customer's residence.³⁰

In the same vein, the trader cannot apply different conditions of payment where payments are made by means of electronic transfer

²⁸ Article 3(1) and (2) geo-blocking proposal.

²⁹ Article 3(2), second sentence geo-blocking proposal.

³⁰ Article 1(5) geo-blocking proposal. See also a newly proposed recital 10(a) by the European Parliament. On the notion of directing, see Article 6(1)(b) of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). *Official Journal of the European Union*(2008/L177/6) 4 July. Available from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593> [Accessed 11 June 2017]. See also Article 17(1)(c) of Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *Official Journal of the European Union* (2012/L 351/1) 20 December. Available from: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> [Accessed 11 June 2017]. According to the Court of Justice, directing activities towards a Member State implies that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them, see CJEU, Joined Cases C-585/08 and C-144/09, *Pammer and Alpenhof*, para 92.

within the same payment brand.³¹ The obligation to give access to the original interface is not absolute, however. Indeed, the proposed Regulation highlights that the trader is not obliged to grant access to its interface whenever this is necessary to ensure compliance with a legal requirement in EU law or in the laws of the Member States, in accordance with Union law.³² In that case, the trader has to provide a clear justification for doing so in the language of the online interface that the customer originally sought to access.³³

In addition to the generally applicable obligation to grant access to the online interface, the proposal also prohibits traders to apply different general conditions of access to their goods or services, for reasons related to the nationality or place of residence or establishment of the customer where the trader sells goods and those goods are not delivered cross-border directly to the Member State of the customer by the trader or on his behalf, where the trader provides electronically supplied services or where the services provided are supplied to the customer in the premises of the trader situated in a Member State other than that of the customer's nationality or place of residence.³⁴ In those circumstances, traders cannot justify a refusal to trade with a customer on the same terms and conditions as the ones applicable to those having the nationality of or residing in the same Member State.³⁵

The Regulation also confirms that agreements imposing on traders obligations to act in violation of it in terms of passive sales (i.e. transactions initiated by the customer, the trader not actively recruiting its customers in another Member State) are considered to be automatically void.³⁶

On 28 November 2016, the Council adopted a Common position regarding the Commission's proposal. According to the Council, the Regulation should prohibit only *unjustified* geo-blocking.³⁷ In its common position, the Council proposed more or less marginal

³¹ Article 5 geo-blocking proposal.

³² Article 3(3) geo-blocking proposal.

³³ Article 3(4) geo-blocking proposal.

³⁴ Article 4(1) geo-blocking proposal. The Regulation in this regard envisages hotel accommodation, sport events, car rental, and entry tickets to music festivals or leisure parks, see recital 20.

³⁵ Article 4(3) geo-blocking proposal nevertheless permits Member States to maintain fixed book prices as long as they are in compliance with EU law, as well as to maintain restrictions explicitly permitted as a matter of EU law. Beyond those restrictions, traders cannot justify themselves.

³⁶ Article 6 geo-blocking proposal.

modifications, without directly changing the ambit of the Commission's proposal. The European Parliament Internal Market and Consumer Protection Committee on 25 April 2017 adopted a common position, following which negotiations on a final text between the three institutions can take place.³⁸ The Parliament's Committee position above all seeks to stress the need to protect consumers, replaces the word 'nationality' by 'country of origin' and aims to make even clearer that traders respecting this obligation are not necessarily directing their activities to any part of the EU internal market for the purposes of determining the applicable Member State's consumer protection law.³⁹

3. HEADING IN THE WRONG DIRECTION, PIECE BY PIECE?

Both sets of geo-blocking proposals reflect a prohibition-focused approach: to the extent that certain commercial practices limit or render more difficult cross-border trade in goods or services, EU law will take steps to prohibit it. Given that mere prohibitions do not as such result in more e-commerce, flanking policies are meant to encourage consumers to actually engage in more such transactions. That approach, also already reflected in the e-commerce Directive 2000/31⁴⁰, seemingly remains the preferable way forward in the realm of e-commerce regulation, contributing to enhanced European private law standards.⁴¹

³⁷ Council of the European Union (2016) *Proposal for a Regulation of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) no 2006/2004 and Directive 2009/22/EC – general approach*. 2016/0152 (COD). Available from: <http://data.consilium.europa.eu/doc/document/ST-14663-2016-INIT/en/pdf> [Accessed 11 June 2017]. This document contains the modifications proposed by the Council.

³⁸ See European Parliament (2016) *Geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market*. 2016/0152(COD). Available from: [http://www.europarl.europa.eu/oeil/popups/fiche_procedure.do?lang=&reference=2016/0152\(COD\)](http://www.europarl.europa.eu/oeil/popups/fiche_procedure.do?lang=&reference=2016/0152(COD)) [Accessed 11 June 2017].

³⁹ See to that extent, modifications proposed to Articles 1(1), 1(5) and 2(2)(c) of the Commission's proposal.

⁴⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. *Official Journal of the European Union* (2000/L178/1). Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML> [Accessed 11 June 2017]. Waelde, C. (2005), Article 3, ECD: Internal Market Clause. *International Private Law, Consumers and the Net: a Confusing Maze or a Smooth Path Towards a Single European Market?* In: L. Edwards (ed.) *the New Legal Framework for E-Commerce in Europe*. Oxford: Hart Publishing, pp. 3-30.

Although the need for more specific EU regulation of e-commerce deserves to be questioned as such⁴², this paper would like to argue that, even when one assumes that some kind of regulatory intervention is needed indeed in this field, the approach chosen by the European Commission can be criticised from two angles. Those angles relate to the enforcement limits (3.1) and seemingly increased circumvention risks (3.2) exacerbated by the proposed e-commerce regulations in general and the geo-blocking proposals in particular.

3.1 ENFORCEMENT LIMITS

The mere adoption of portability rights or online trade restrictions' prohibitions does not in itself guarantee the removal of obstacles to a DSM and the concomitant increase in cross-border trade. Effective e-commerce regulation also requires targeted supervision and enforcement actions, guaranteeing that the EU law provisions adopted are implemented in a coherent fashion across the different Member States. In that respect, both geo-blocking proposals, although showing concern for such enforcement, are too limited in scope and scale for them to be able to fulfil the ambitions of a streamlined common DSM agenda set at the European Union level.

The 2015 portability proposal only explains that contractual limitations to subscription portability are prohibited, leaving it to the Member States to enforce that provision. The 2016 geo-blocking proposal requires more oversight in terms of compliance. Designated Member State enforcement bodies will have to ensure compliance with the Regulation.⁴³ In that respect, the European Commission obliges Member States' competent consumer protection authorities to have minimum enforcement powers to tackle intra-Union consumer law violations. Those powers should include the possibility to request information regarding traders from online platforms, to close down a website, domain or similar digital site, service

⁴¹ Micklitz, H. W. (2016) The economic efficiency rationale and European private law. In: G. Comparato, H. W. Micklitz and Y. Svetiev (eds.) *European regulatory private law – Autonomy, competition and regulation in European private law*. Florence: EUI Law Working Papers 2016(6), p. 59. Available from: <http://cadmus.eui.eu/handle/1814/40376> [Accessed 11 June 2017].

⁴² Brotman, S.N. (2016) the European Union's Digital Single Market Strategy: A conflict between government's desire for certainty and rapid marketplace innovation? *Centre for Technology Innovation at Brookings Working Papers*, pp. 1-7. Available from: <https://www.brookings.edu/wp-content/uploads/2016/07/digital-single-market.pdf> [Last accessed 11 June 2017].

⁴³ Article 7(1) geo-blocking proposal.

or account or a part of it, including by requesting a third party or other public authority to implement such measures or the possibility to impose penalties on traders.⁴⁴ The authorities should be able either directly to impose those sanctions or apply to competent Member State courts to do so.⁴⁵ The European Parliament proposes to add that the sanctions are to be communicated to the Commission, which is to make them publically available on its website.⁴⁶ as a result, the existing consumer protection authorities in Member States would receive specific powers aimed at preventing and penalising geo-blocking practices prohibited by the envisaged Regulation.

Despite those modest enforcement initiatives, the scope for uniform or coordinated enforcement of EU geo-blocking regulation, and more generally DSM regulation, is likely to remain limited in two ways.

Firstly, the particular nature of the EU legal order implies that Member States remain responsible for the enforcement of EU legal provisions, even when covered by a directly applicable Regulation. The fact that different authorities will have to interpret and apply the same provisions, gives rise to diverging interpretations and enforcement strategies. As those authorities are independent from direct oversight by EU institutions, they may determine, to the extent permitted by Member States' law, their own enforcement priorities.⁴⁷ As a result, the enforcement of DSM provisions may not be ranked as high as their adoption has been among EU policymakers. On top of that, the differentiated structure of different Member States' authorities may have an impact on the resources devoted in different Member States to implement and enforce the EU DSM provisions. As a result, the application and enforcement of EU law provisions cannot be guaranteed in a consistent way. In order to tackle those defects, the establishment of a consumer protection coordination network offers a step towards some convergence in enforcement practices. However, this network does not in itself guarantee that more coherence

⁴⁴ Article 8(2), European Commission (2016) *Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws*. COM/2016/283 final. Available from: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf [Accessed 11 June 2017] (hereafter consumer enforcement proposal).

⁴⁵ Article 9(1) consumer enforcement proposal.

⁴⁶ Article 7, paragraph 2a, geo-blocking proposal, amendment proposed by the European Parliament.

⁴⁷ Wils, W. (2011) Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement, *World Competition*, 34(3), pp. 357-360.

in enforcement priorities can be attained, all the more since the European Commission is not directly injecting enforcement priorities in this network, in contrast with a similar network in EU competition law enforcement.⁴⁸

Secondly, enforcement at Member State level does not necessarily take place by one single enforcement body or authority. As a result, different actors may be involved at the enforcement level, even within one and the same Member State. The EU regulatory framework does not impede this phenomenon, but rather confirms it. In the context of the 2016 geo-blocking proposal, it has to be reminded that consumer protection authorities taking sanctions against unjustified geo-blocking practices only have powers in relation to trader-consumer relationships. Member States' authorities will not be able to target those practices. Either the courts or specific authorities, set up in accordance with Member States' own rules and practices, will be tasked to enforce the EU law provisions in that context.

It can therefore be concluded that both the geo-blocking proposals in particular and the DSM agenda more generally fail to pay sufficient attention to the need for a coordinated enforcement system. In order to guarantee that the EU law provisions covered in the geo-blocking Regulations would be enforced truly, attention to such enforcement venues is more than necessary. In just subscribing to the existing weak coordinated consumer protection coordination framework, the geo-blocking proposals fail to take into account the need for a truly EU enforcement approach in this domain. Given that other sectors are characterised by such a coordinated enforcement approach, its absence is a consequence of political unwillingness rather than a lack of competence to set up a more coordinated enforcement mechanism.

3.2 INCREASED CIRCUMVENTION RISKS?

The geo-blocking proposals, and the regulatory approach they reflect, are presented as consistent with earlier legislation and therefore justified and desirable as a way forward.⁴⁹ Nearly exclusive attention to consistency with other legal instruments has the perverse effect of increasing risks

⁴⁸ Betlem, G. (2007), Public and private transnational enforcement of EU consumer law. In: W. van Boom and M. Loos (eds.) *Collective enforcement of Consumer Law. Securing compliance in Europe through private group action and public authority intervention*, Groningen: Europa Law Publishing, pp. 37-62.

⁴⁹ Portability proposal, pp. 2-3 and geo-blocking proposal, pp. 2-3.

for rules' circumvention. DSM regulation appears to be especially prone to those risks.

In confirming that proposed geo-blocking regulations are consistent with other existing regulatory instruments, the European Commission seems to be convinced sufficiently that the regulation will work in practice as well. Somewhat paradoxically, however, despite or maybe because of the quasi-exclusive attention to macro-level consistency with the general objectives of the establishment of the EU internal market, the EU legislator runs the risk of neglecting fundamental circumvention risks associated with this type of regulation.

The geo-blocking proposals vividly illustrate those risks, as they tackle only a few situations, leaving all non-covered types of geo-blocking like practices outside the scope of EU law. It should be remembered in this respect, that EU internal market law prohibits in principle all state-imposed restrictions, but leaves untouched private actions limiting access to a market in another Member State. Absent regulatory intervention, those private actions remain unaffected by EU law. This is most clear in the geo-blocking proposals. Firstly, the data portability proposal would only permit subscribers to take their content with them. Any non-subscribed content could still be blocked since it would not be covered by the Regulation. Secondly, the proposed Regulation would target online sales of goods and services except for those exempted from the scope of application of the services Directive. In doing so, the proposal envisages a specific situation where obstacles created by private traders are prohibited as a matter of EU secondary legislation, yet also threatens to introduce a distinction between situations where customers can rely on those provisions and all situations (such as access to audio-visual media in the absence of a subscription) not covered by the Regulation. In the same way, the simple refusal to use certain payment brands may result in the exclusion of certain traders' practices from the scope of the same Regulation. In not wishing to cover the entire spectrum of e-commerce transactions that could be subjected to geo-blocking, the EU does facilitate circumvention, inviting traders to reflect about practices not technically falling within the scope of the envisaged Regulations, yet having the same effects in practice. The chosen regulatory approach in tackling geo-blocking is therefore, by its very nature, selective and prone to keep certain obstacles to e-commerce in place.

It can therefore be concluded that justifying the proposed Regulations as being consistent with other legal rules detracts attention from the actual circumvention risks they harbour and that remain unaddressed in this respect. To the extent that EU legislation intervenes to prohibit certain actions or to remove certain obstacles maintained by private actors, albeit in a consistent way, only those actions covered by legislation will be prohibited. Other types of private actions will remain legal, even though their effects may be very similar to the ones prohibited. In that understanding, it would pay off more than ever for traders to make sure they fall outside the narrow scope of the envisaged Regulations in order to continue their geo-blocking practices. Not offering payments through certain brands already suffices in that respect and would be perfectly legal.

4. TOWARDS MORE SUSTAINABLE EU E-COMMERCE REGULATION?

The enforcement limits and rules' circumvention risks outlined in the previous section showcase the principal defects associate with the EU's regulatory approach implementing the DSM agenda. Despite those shortcomings, however, the geo-blocking proposals also reflect the nucleus of two legal-political strategies which, whilst not overcoming them, could at least mitigate the detrimental effects of a lack of coordinated enforcement and a narrow focus. Taking those strategies more seriously, it will be submitted, will allow those effects to be less prominently present in the application and implementation of those legal instruments.

This section identifies where elements of those legal-political strategies can be detected in the geo-blocking proposals' context and how more explicit attention to them can alleviate limited enforcement and narrow focus concerns. In that regard, this section particularly argues that a more streamlined EU competition and e-commerce regulation enforcement strategy (4.1), complemented by a more technologically more pro-active EU law interpretation stance (4.2) could in themselves already partly address the concerns voiced in the previous section. Given the presence – albeit somewhat implicit – of both strategies in the geo-blocking proposals, it would be rather easy to give a more prominent place to them when continuing to design and implement the DSM regulatory framework.

4.1 STREAMLINING EU COMPETITION LAW AND E-COMMERCE REGULATION ENFORCEMENT STRATEGIES

In addressing geo-blocking practices, the Commission's proposals demonstrate how EU internal market regulation and EU competition law can interact and complement each other. That possibility of complementarity could be elaborated further in order to address some of the enforcement concerns underlying the EU's DSM regulatory approach.

The relationship between internal market regulation and competition law has been considered traditionally as one of complementarity and separateness; Articles 101 and 102 TFEU in principle only target private action, whereas internal market law regulates public authorities' action.⁵⁰ At the same time, EU competition law only envisages an *ex post* intervention in the assessment of anticompetitive practices engaged in by or between private actors.⁵¹ Agreements have to have been concluded or abusive behaviour has to be engaged in prior to the European Commission or national competition authorities taking action in those domains. In addition, those authorities only intervene. Given the *ex post* and case-by-case focus of EU competition law, it would not be surprising that the EU legislature would like to intervene by prohibiting certain practices deemed anticompetitive in an *ex ante* fashion. *Ex ante* regulatory intervention in those circumstances is seen as a way to complement the existing Treaty competition law prohibitions, covering situations not directly covered by them, or to directly target the behaviour of non-dominant undertakings. In addition, the EU institutions could further clarify the competition law provisions by means of EU internal market secondary legislation in a particular economic sector, such as e-commerce.⁵²

It will not be surprising that both geo-blocking proposals reflect this complementarity relationship. Both proposals have been made in the light of a competition law inquiry into the e-commerce sector, which has permitted to detect the prevalence of geo-blocking practices, both relating

⁵⁰ Mataija, M. (2016) *Private Regulation and the Internal Market. Sports, Legal Services, and Standard Setting in EU Economic Law*. Oxford: Oxford University Press, p. 119.

⁵¹ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. *Official Journal of the European Union* (2003/L 1/1). Available from: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R0001> [Accessed 11 June 2017].

⁵² Ackermann, T. (2010), Vodafone: Price Regulation as a Substitute for Intervention under Article 102 TFEU. *Journal of European Competition Law & Practice*, 1(5), p. 428.

to audio-visual contents and to the sales of goods and services.⁵³ Directly addressing those concerns, the 2015 data portability proposal envisages the non-enforceability of contractual clauses between copyright holders and online service providers restricting data portability. In doing so, this Regulation would confirm that any such contractual clause is to be considered contrary to Article 101 TFEU. In the same way, unilateral business practices escaping from competition law scrutiny are prohibited by the 2016 geo-blocking proposal. In addition, Article 6 of that proposal declares void all geo-blocking agreements restricting passive sales. Whilst the Commission proposed an absolute prohibition of such clauses, the Council and Parliament propose to amend this provision by stating that only those clauses that could not be justified by Article 101(3) TFEU or by Regulation 330/2010 exempting vertical agreements from the Article 101(1) TFEU prohibition would be considered void.⁵⁴ In being formulated in this way, both proposals clearly clarify or complement the application of competition law provisions in specific contexts.

The implicit acknowledgement of the complementarity of competition law and internal market regulation in both proposals constitutes a starting point for a more developed and focused enforcement strategy capable of mitigating enforcement limits identified in this respect. As EU competition law's attention clearly also goes to e-commerce practices, it can be expected that both the European Commission and the Member States' competition authorities will consider contractual and abusive geo-blocking practices as an enforcement priority. To the extent that this is the case, e-commerce cases will likely be brought before those authorities in the years to come. In this setting, it would not be entirely unimaginable to entrust, at Member States' level, national competition authorities also with the enforcement of geo-blocking practices which escape strictly from the scope of application of EU competition law. In some Member States such as the Netherlands, the United Kingdom or Poland,⁵⁵ competition and consumer protection law are already being enforced by one and the same authority. In the alternative, it would seem relatively

⁵³ Geo-blocking initial findings report, note 4.

⁵⁴ Newly proposed Article 6(2) geo-blocking proposal. Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. *Official Journal of the European Union* (2010/L102/1). Available from: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0330> [Accessed 11 June 2017].

easy to propose, through the intermediary of the European Competition Network (ECN) chaired by the European Commission⁵⁶, the prioritisation and coordination, at Member States' level, of geo-blocking cases not technically falling within the scope of EU competition law. From that point of view, the European Commission could indirectly yet effectively offer guidelines to those national authorities on how to prioritise and set up coordination memoranda with other authorities tasked with the enforcement of EU competition law. Whilst not resolving all enforcement limits accompanying the EU's DSM regulatory approach, streamlining by intermediary of the ECN would permit to at least bring to the forefront the need for coordinated enforcement and to streamline the Regulation's application above and beyond the specific context of anticompetitive behaviour at the level of the Member States.

The suggestions outlined here would require no direct legislative intervention. Quite on the contrary, relying on the existing coordinated enforcement structure accompanying EU competition law enforcement, the European Union could nudge Member States' competition authorities in either taking the lead in or coordinating with other enforcement agencies. Whilst imperfect, implementing such cooperation mechanisms would at the very least ensure that some of the limited enforcement concerns can be overcome by putting in place enhanced Member State cooperation mechanisms. Given the potential anticompetitive effects of copyright, it could even be envisaged that this streamlining strategy could also take place in relation to the enforcement of other future DSM regulation instruments.

4.2 TOWARDS "TECHNOLOGICALLY MORE PRO-ACTIVE" EU LAW INTERPRETATIONS?

One of the major issues with regulating digital transactions and commercial practices is that technological developments generally precede legislative responses. Legal rules are generally adopted in response to technological

⁵⁵ The Dutch Consumer and Markets authority (ACM), <https://www.acm.nl> [Accessed 11 June 2017], the U.K. Competition and Markets Authority (CMA), <https://www.gov.uk/government/organisations/competition-and-markets-authority> [Accessed 11 June 2017] and the Polish Office of Competition and Consumer Protection (UOKIK), <https://uokik.gov.pl/home.php> [Accessed 11 June 2017].

⁵⁶ On that network, see Gerard D. (2011) the ECN – Network antitrust enforcement in the European Union. In: I. Lianos and D. Gerard (eds.) *Research Handbook on EU competition law.*, Cheltenham: Edward Elgarpp. 181-226.

challenges and the DSM regulatory approach is not different in this regard. Both geo-blocking Regulation proposals directly respond to concerns voiced in market and competition law studies, permitting to conclude that geo-blocking was still very prevalent across the European Union. At the same time, however, the geo-blocking proposals not only respond to certain technological challenges recognised, but also seek to establish a regulatory framework that would be fit for future e-commerce transactions. With this in mind, both proposals define online content service or online interfaces in a very general and broad fashion, permitting not only traditional websites or subscription services to be taken into account, but also cloud services and other online or digital venues in relation to which commercial transactions can take place.⁵⁷ On top of that, the 2016 proposal envisages a review four years after its entry into force and every five years thereafter.⁵⁸ The first review will especially have as its goal to evaluate whether access to audio-visual services at large should be granted in this respect.⁵⁹ As such, it is clear that the Commission shows to care about pro-actively regulating a technological field that is in development and that may result in new instances of geo-blocking currently not encountered or envisaged in practice.

Paying attention to future developments when developing market regulation permits to avoid or at least address as quickly as possible the circumvention of legal rules and to guarantee the responsiveness of regulation to challenges posited in a given context.⁶⁰ The Commission's willingness to engage in a review of the geo-blocking legislation envisaged is therefore laudable and would permit to code in certain. At the same time, however, the mere review and re-opening of policy discussions on the aptitude of the envisaged Regulation does not permit truly to set up a framework that responds directly to new challenges posed by technological innovations. Such a framework would require traders to "code in" from the outset an attitude that prevents geo-blocking from being introduced in interfaces that are presently unknown but may

⁵⁷ Article 2(e) portability proposal and Article 2(f) geo-blocking proposal.

⁵⁸ Article 9(1) geo-blocking proposal, and the modification from two to four years proposed by the Council.

⁵⁹ Article 9(2) geo-blocking proposal.

⁶⁰ See Ayres, I. and Braithwaite J. (1995) *Responsive Regulation – Transcending the Deregulation Debate*. Oxford: Oxford University Press.

soon conquer the market.⁶¹ By defining broadly the notion of interface, the Commission can in some way already attain this goal.

However, that in itself is not sufficient. If the Commission, and by extension, the other EU institutions are taking seriously the adoption of digital markets regulation that envisages to apply the same principles of non-discrimination to online interfaces in interfaces that have not been proposed or constructed, more tailored immediate action would be advisable to the extent that the adoption of updated regulations would take too much time. In that respect, it is submitted that it will pay off to ensure that interpretative guidelines are in place informing those new interfaces of their obligations the moment those new interfaces begin to be active on the European market. Even though such guidelines are not binding – and a contrary interpretation of the legislation underlying them can be given indeed by the Court of Justice⁶² – they would at least give some *prima facie* expectations as to the applicability of the geo-blocking or more general DSM regulatory frameworks to those new interfaces. Such a pro-active interpretative guidelines action could in that regard contribute to avoiding rules' circumvention in this particular context. The adoption of such guidelines would not require immediate legislative intervention, but only requires the Commission to be vigilant as to the potential application of its existing regulatory framework to new technological developments. In doing so, the Commission could take into consideration an approach already voiced by the Court of Justice in its *Ker-Optika* judgment, following which any restriction on cross-border ecommerce is almost automatically to be considered a restriction on the free movement of goods rather than a selling arrangement not covered by the Article 34 TFEU prohibition.⁶³ Taking a similar stance and adopting concrete ways forward inspired by such case law could help already in developing this more pro-active stance.

5. CONCLUSION

This paper analysed both geo-blocking proposals and the typical features of the EU's regulatory approach they reflect. Paying attention to the scope

⁶¹ For that perspective, Lessig, L. (1999) *Code and other laws of Cyberspace*. New York: Basic Books, pp. 6-7.

⁶² e.g. CJEU, Case C-360/09, *Pfleiderer*, para 21.

⁶³ CJEU, C-108/09, *Ker-Optika*, para 69.

and limits of both proposals, the paper identified the ways in which the EU seeks to prohibit different geo-blocking practices. Despite being a laudable effort to stimulate e-commerce, it was submitted that the geo-blocking proposals are characterised by a limited enforcement and narrow consistency focus, which would potentially facilitate their circumvention in practice. At the same time, however, they harbour features for a more coordinated enforcement strategy as well as a technologically pro-active regulatory focus. Although imperfect, acknowledging more explicitly those features in practice would serve to alleviate concerns voiced over the limited practical impact of the geo-blocking proposals and, more generally, the EU's DSM regulatory framework. This paper outlined ways to make those features more explicit, without necessarily having to amend the legislative framework in force, in an attempt to downplay the enforcement limits and circumvention risks otherwise associated with the EU's regulatory approach.

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