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EU FIGHT AGAINST GEOFACTORS. TOWARDS A "CIRCULAR" INTERPLAY BETWEEN REGULATION AND COMPETITION

Valeria Falce

Summary: 1. Introduction; 2. Geoblocking practises and competition policy; 3. Rationale, ambit and scope of the New Reg; 4. Regulatory safe-harbors; 5. Conclusions. Towards a "circular" interplay between regulation and competition

1. Introduction

As an explicit goal of EU competition policy, market integration has been traditionally fostered against business strategies aimed at fragmenting National markets along their borders, as resulting from territorial restrictions [1].

In particular, Art. 101 and Art. 102 TFUE apply both to multilateral and unilateral business conducts leading to market partitioning. As a direct remedy, the Block Exemption Regulation for Vertical Restraints [2] bans agreements restrict-

[1] G. Monti, G Coelho, Geo-blocking between competition law and regulation, CPI, 2017. On the urgency to update the Internal market concept, L, Ioannis, Updating the EU Internal Market Concept, CLES Research Paper No. 1/2018, available at SSRN: https://ssrn.com/abstract=3116384 or http://dx.doi.org/10.2139/ssrn.3116384; in the Internal Market objective, the literature is extensive, among the others Barnard C., The Substantive Law of the EU. The Four Freedoms, 3 ed., Oxford, 2010; Barnard C., Scott J. (eds.), The Law of the European Single Market, Oxford, 2005; Chalmers D., Davies G., Monti G., European Union Law, Cambridge, 2011, 674; Craig P. and de Búrca G. (eds.), The Evolution of EU Law, Oxford, OUP, 1999; Mortelmann K., The Common Market, the Internal Market and the Single Market, What's in a Market?, (1998) 35 Common Market Law Review, 101; McGee A., Weatherill S., The Evolution of the Single Market: Harmonisation or Liberalisation?, in Mar. Law Rev., 1990, 578; Molle W., The Economics of European Integration: Theory, Practice and Policy, 5th ed., Aldershot, Dartmouth, 2006; INTRODUCTION TO EUROPEAN UNION INTERNAL MARKET LAW, R. Torino Ed., 2017.

[2] Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, [2010] OJ L102/1, replacing Regulation

ing the territories or the customers to whom a distributor may sell as "hardcore restrictions" [3], tolerating exclusive distribution agreements in so far as passive sales [4] are allowed. At an indirect level, EU competition law operates as an incentive to enter into cross-border trade, in so far as it facilitates distributors to sell their goods on line [5]. Also, unilateral conducts designed to fragment national markets may fall within the scope of competition law when undertaken by enterprises holding a dominant position in the relevant market [6].

With the emergence of the e-commerce and since more and more goods and services are traded over the internet worldwide, the internal market objective was expected to speed up, having the on-line ecosystem the potential to make simpler for consumers to purchase products from another EU Member State overcoming any possible territorial border.

However, the 2017 sector inquiry [7] prove that cross-border online sales within the EU are growing slower than predicted: traders tend to heavily rely on digital technical measures, such as "geo-blocking" [8] and "geo-filtering" [9] conducts,

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2790/1999 of 22 December 1999. For a comment, see R. Wish and D. Bailey, 'Regulation 330/2010: The Commission's New Block Exemption for Vertical Agreements', (2010) 47 Common Market Law Review 1757. Please note that in line with the Better Regulation Principles, the review of the Regulation is ongoing, the procedure being divided in two steps: (i) an evaluation phase and (ii) an impact assessment phase. The evaluation phase was launched on 3 October 2018 and its progress can be followed on the Website of better regulation. The evaluation roadmap was published on 8/11/2018. The deadline for stakeholders' feedback expired on 6/12/2018 (http://ec.europa.eu/competition/consultations/2018_vber/index_en.html).

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

[4] Consisting in selling goods on the internet without automatic re-routing of customers to another website. See e.g. Case COMP/37975 Yamaha (July 16, 2003) paragraphs 107-109.

[5] Case C-230/16, Coty Germany GmbH v. Parfümerie Akzente GmbH, EU:C:2017:941; Commission, April 2018, competition policy brief – EU competition rules and marketplace bans: Where do we stand after the Coty judgment? http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf ; Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS [2011] I-09419, paragraph 47 where the Court found that a requirement that the buyer may only sell goods through a physical store to be restrictive by object for not affording distributors the chance to use the internet.

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

[7] Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, for a complete overview see http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html. See also https://publications.europa.eu/en/publication-detail/-/publication/8bde2f8d-0251-11e7-8a35-01aa75ed71a1/l anguage-en/format-PDF.

[8] Blocking access to websites, re-routing customers to websites targeting other Member States or refusing to deliver cross-border or to accept cross-border payments.

to erect different types of borders in order to limit the ability of consumers to make cross-border online purchases.

To respond to these new challenges and in order to advance the Digital Single Market, the EU adopted a comprehensive e-commerce framework [10] with the view to ensure better access to goods and services offered online, building trust for consumers and greater certainty for businesses, and reducing transaction costs and administrative burden for businesses when trading online across borders [11]. [12].

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[9] Commercial practices whereby online retailers allow consumers to access and purchase goods or services cross-border, but offer different terms and/or conditions if the customer is in a different Member State. More extensively, DG Internal Policies, The Geo-Blocking proposal: Internal Market, Competition Law and Regulatory Aspects (January 2017).

[10] N. Duch-Brown, B. Martens, The European Digital Single Market: its Role in Economic Activity in the EU, Joint Research Centre of the European Commission, Institute for Prospective Technological Studies, Digital Economy Working Paper 2015/17, https://ec.europa.eu/jrc/sites/default/files/JRC98723.pdf.

[11] New rules to reduce of the VAT-related administrative burden of cross-border transactions were adopted in December 2017; The Consumer Protection Cooperation (CPC) Regulation has been revised and will be replaced by the new CPC Regulation (EU) 2017/2394 from 17 January 2020; A new Regulation (Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018) was adopted on cross-border parcel delivery services that aims to make prices for these services more transparent and affordable and to increase regulatory oversight of the EU parcel market; As part of the ongoing modernisation of the EU copyright framework (P. Ibáñez Colomo "Copyright Licensing and the EU Digital Single Market Strategy" LSE Law, Society and Economy Working Papers 19/2015), new rules have been adopted (Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017) on portability of online content services. Besides, under the digital contract rules the Commission has adopted legislative proposals to harmonise the main mandatory consumer rights applicable to the supply of digital content and sales of goods (https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en); two proposals for directives in the area of consumer protection (https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en); a Regulation to promote fairness and transparency for business users of online intermediation services has also been proposed (Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (COM(2018) 238 final)); a proposal for updated EU rules for audiovisual media on which the political agreement had been found (http://europa.eu/rapid/press-release_IP-18-3567_en.htm).

[12] Commission, 26.4.2018, COM(2018) 238 final, proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services; Commission Decision of 26.4.2018 on setting up the group of experts for the Observatory on the Online Platform Economy, C(2018) 2393 final: In order to increase transparency, the proposed rules oblige providers of online intermediation services to ensure that their terms and conditions for professional users are easily understandable and easily available. This includes setting out in advance the possible reasons why a professional user may be delisted or suspended from a platform. Providers also have to respect a reasonable minimum notice period for implementing changes to the terms and conditions. If a provider of online intermediation ser-

As part of it, on 3 December 2018 the EU Geoblocking Regulation entered into force [13], introducing a new veto against relevant forms of commercial practices based on geo-factors such as the nationality or place of residence of the demand side at intra-community level [14].

Since the New Regulation is centered on the obligation imposed on each trader [15] to treat EU customers (including consumers and other end-users) [16] in

vices suspends or terminates all or part of what a business user offers, this provider will need to state the reasons for this. In addition, the providers of these services must formulate and publish general policies on (i) what data generated through their services can be accessed, by whom and under what conditions; (ii) how they treat their own goods or services compared to those offered by their professional users; and (iii) how they use contract clauses to demand the most favourable range or price of products and services offered by their professional users. Finally, both online intermediation services as well as online search engines must set out the general criteria that determine how goods and services are ranked in search results. Additionally, providers of online intermediation services are required to set up an internal complaint-handling system. All providers of online intermediation services will have to list in their terms and conditions the independent and qualified mediators they are willing to work with in good faith to resolve disputes. Moreover, associations representing businesses will be granted the right to bring court proceedings on behalf of businesses to enforce the new transparency and dispute settlement rules. Finally, to monitor the impact of the new rules an EU Observatory will be set up to monitor current as well as emerging issues and opportunities in the digital economy and to enable the Commission to improve the legislative framework.

[13] 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. For more data underpinning the analysis for the Geo-blocking Regulation, see JRC Technical report on The European Digital Single Market, Its Role in Economic Activity in the EU (https://ec.europa.eu/jrc/sites/jrcsh/files/JRC98723.pdf), JRC-IPTS based on Mystery Shopping Survey 2015 (GfK Mystery Shopping (https://ec.europa.eu/info/publications/geo-blocking-consumers-online-findings-mystery-shopping-carried-out-european-commission_en), the European Commission's 2015 public consultation on 'Geo-Blocking and other geographically based restrictions when shopping and accessing information in the EU' (https://ec.europa.eu/digital-single-market/en/news/public-consultation-geo-blocking-and-other-geographically-based-restrictions-when-shopping-and), and the impact assessment accompanying the proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the single market (http://ec.europa.eu/news room/dae/document.cfm?doc_id=15953).

[14] Commission Staff Working Document, Geo-Blocking Regulation Impact Assessment SWD (2016) 173 final.

[15] Trader' means any natural or legal person who is acting for purposes relating to his or her trade, business, craft or profession.

[16] For the purposes of the Geo-blocking Regulation, consumer is any natural person who is acting for purposes which are outside his or her trade, business, craft or profession; customer is a consumer who is a national of, or has his or her place of residence in, a Member State, or an undertaking which has its place of establishment in a Member State, and receives a service or purchases a good, or seeks to do so, within the Union, for the sole purpose of end use.

the same manner when they are in the same situation, regardless of their nationality, place of residence or place of establishment, the aim of this Paper is to analyze it in its interplay with competition law so as to claim that in the digitized ecosystem, both competition policy and regulation are necessary, none of them being sufficient in itself to fully unlock e-commerce in the EU.

While the New Reg. operates despite and beyond competition law, in fact, such peace of regulation results fully complementary to competition law and policy in exploiting the opportunities flowing from the '4th industrial revolution' [17], while contributing ex ante in tackling business strategies pointed at partitioning the Digital Single Market [18].

2. Geoblocking practises and competition policy

Whereas the New Reg. has been adopted with the view to dismantle geoblocking barriers [19], competition law challenges market segmentation as a possible result of territorial restrictions in vertical distribution and license agreements.

In fact, under EU case-law agreements or concerted practices which are aimed at partitioning markets according to national borders or which make the penetration of national markets more difficult, in particular those which are pointed at preventing or restricting parallel exports, have been deemed restrictive per se pursuant to Artic le 101(1) TFEU [20].

Besides and while awaiting the review of the Block Exemption Regulation for Vertical Restraints (hereinafter, also VBER) [21] contractual restrictions of the territory into which a distributor may sell the relevant goods are generally considered a hardcore restriction of competition, with only a limited number of ex-

[17] European Council conclusions, Brussels, 23 June 2017 (OR. en) EUCO 8/17 CO EUR 8 CONCL 3, available at Consilium.europa.eu.

[18] Implications of E-commerce for Competition Policy - Note by the European Union, DAF/COMP/WD(2018)61, 6 june 2018.

[19] In line with Article 2 (2) of the Services Directive, financial retail services, audiovisual services, transport services, electronic communication services and healthcare services are excluded from the scope of the Geo-blocking Regulation. On the intersection with IP, see M. Trible, Geoblocking and 'Legitimate Trade', in INTELLECTUAL PROPERTY AND OBSTACLES TO LEGITIMATE TRADE (Christopher Heath, Anselm Kamperman Sanders & Anke Moerland eds., Wolters Kluwer, 2018 Forthcoming).

[20] See for example, Judgment in Établissements Consten S.à.R.L. and Grundig – Verkaufs-GmbH v Commission of the European Economic Community, 56/64 and 58/64 and Judgment of 6 October 2009, GlaxoSmithKline Services v Commission, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610; Judgment of 4 October 2011, Football Association Premier League and Others, Joined cases C-403/08 and C-429/08 C, EU:C:2011:631

[21] For more details, see http://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

ceptions (see Article 4(b) VBER). In this context, active sales restrictions are allowed insofar as they concern sales into an exclusive territory reserved for the supplier or allocated by the supplier to another distributor, whereas passive sales restrictions provide absolute territorial protection and are normally unlawful.

Within a selective distribution system, neither active nor passive sales to end-users may be restricted. As a result, undertakings are generally free to set up the distribution system that best suits them, including selective distribution systems, where the products can only be sold by pre-selected authorised sellers. However, these systems must comply with EU competition rules, with the consequence that consumers must be free to purchase from any retailer authorised by a manufacturer, including across national borders. At the same time, authorised retailers must be free to offer the products included in the distribution contract online, to advertise and sell them across borders, and to set their resale prices [22].

Despite the enforcement of competition law, restrictions on selling on online marketplaces have increased in the digitized world [23].

At the judicial level and with regard to online sales restrictions, in Pierre Fabre case the ECJ held that a contractual provision prohibiting de facto the internet as a method of marketing amounts to a restriction of competition by object within the meaning of Article 101(1) TFEU. It has at the very least as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system [24].

On the same subject, in 2017 the ECJ rendered an important judgment. In the Coty judgment [25] , the ECJ largely confirmed the Commission's position that

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[22] However, according to the E-commerce Sector Inquiry, certain of the reported active sales restrictions are not limited to territories that have been exclusively allocated to other distributors or reserved for the supplier. Moreover, certain suppliers operating a selective distribution system across several Member States are reported to have limited the ability of authorised retailers to sell to all customers within the territory where the selective distribution system is applied: Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, paras. 50-53.

[23] For an excellent analysis, P. Manzini, LE RESTRIZIONI VERTICALI DELLA CONCORRENZA AL TEMPO DI INTERNET, in Diritto del commercio internazionale, 2018, 289; J. HEDERSTROM, L. PEEPERKORN, Vertical Restraints in On-lines Sales: Comments on Some Recent Developments, in Journal of European Competition Law & Practice, 2016, Vol. 7, n. 1, p. 10 ss. With specific reference to the role of platforms, S. WARTINGER & L. SOLEK, Restrictions of Third-Party Platforms within Selective Distribution Systems, in World Comp. 39, n. 2, 2016, p. 291 ss. A. ERZACHI, The Ripple Effects of On-line market Place Bans, in World Comp, 40, n. 1, 2017, p. 47 ss.

[24] Judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique, C-439/09, EU:C:2011:649, paragraph 54.

[25] Judgment of 6 December 2017, Coty Germany GmbH vs Parfümerie Akzente GmbH, C-

(absolute) marketplace bans should not be considered as hardcore restrictions within the meaning of Article 4(b) and Article 4(c) of the VBER [26].

In particular, the ECJ held that a selective distribution system compliant with Article 101 TFEU can also be operated for luxury goods in order to preserve the luxury image of those goods, provided that the so-called "Metro-criteria" [27] are met.

This is an important clarification of the ECJ's 2011 Pierre Fabre judgment, dealing with distribution contracts for cosmetics and personal care products, which stipulated that all sales had to be made exclusively in a physical space. In the reasoning the ECJ deemed that the "aim of maintaining a prestigious image is not a legitimate aim for restricting competition". The Pierre Fabre judgment dealt with distribution contracts.

In other words, in Coty the ECJ clarified that the findings in Pierre Fabre are confined to the goods (cosmetics) and contractual clause (prohibition of all forms of selling by Internet) in question rather than to selective distribution systems in general. The Pierre Fabre reasoning therefore applies to absolute bans of online sales only but not to marketplace bans or selective distribution systems as such.

Second, in Coty the ECJ provided guidance on the application of the Metro-criteria to the scenario in question. According to the Metro-judgment, resellers must be chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, the characteristics of the product in question must necessitate such a network in order to preserve its quality and ensure its proper use and, finally, the criteria laid down must not go beyond what is necessary.

In Coty the ECJ specified that the marketplace ban at stake was appropriate

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230/16, EU:C:2017:941; Commission, April 2018, competition policy brief – EU competition rules and marketplace bans: Where do we stand after the Coty judgment? http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf. The case concerned a contractual restriction included in a selective distribution agreement between Coty Germany GmbH (Coty), which is one of Germany's leading suppliers of luxury cosmetics, and one of its distributors, Parfümerie Akzente GmbH (Parfümerie Akzente). The contractual clause prohibited the discernible engagement by Parfümerie Akzente of a third-party undertaking which is not an authorised retailer of Coty. Coty sought to prohibit Parfümerie Akzente from distributing its products on Amazon.de through Amazon's marketplace which enables third-party sellers such as Parfümerie Akzente to sell products alongside Amazon's offerings. Based on the diverging interpretations of the applicable EU competition rules in Germany, the Higher Regional Court of Frankfurt am Main decided to stay the proceedings and submit several questions to the ECJ for a preliminary ruling.

[26] Final report on the E-commerce Sector Inquiry, COM(2017) 229 final, para. 42.

[27] Judgment of 25 October 1977, Metro I, Metro SB-Großmärkte v Commission, 26/76, EU:C:1977:167.

for the legitimate objective of preserving the luxury image of the goods concerned, as it allowed the supplier to verify that the goods would be sold in an environment that corresponds to the qualitative criteria that the supplier has agreed with its authorised distributors. The ECJ also considered the marketplace ban to be proportionate as it only limits online sales via discernible third party platforms and does not contain an absolute prohibition to sell online.

Finally, in Coty the ECJ found that marketplace bans do not amount to hard-core restrictions within the meaning of Article 4 VBER, and are therefore block-exempted, provided that the shares of the parties are not above the 30 % market share threshold of Article 3 VBER. The ECJ found that marketplace bans have to be differentiated from a prohibition of the use of the internet as such and therefore neither amount to a restriction of the customers to whom distributors may sell within the meaning of Article 4(b) VBER nor to a restriction of passive sales to end users by authorised distributors within the meaning of Article 4(c) VBER.

The ECJ also emphasised that in the case at hand distributors were allowed to advertise the products via the internet on third party platforms (e.g. price comparison websites) and use online search engines with the result that customers were usually be able to find the online offer of authorised distributors. These findings are consistent with the information obtained in the e-commerce sector inquiry, which indicates that the importance of marketplaces as a sales channel varies significantly depending on the size of the retailers, the EU Member States concerned, and the product categories concerned. On that basis, in the final report on the e-commerce sector inquiry the Commission considered that marketplace bans do not generally amount to a de facto prohibition on selling online or could not be considered to restrict the effective use of the internet as a sales channel irrespective of the markets concerned. This does not mean that absolute marketplace bans are generally compatible with the EU competition rules. The Commission or a national competition authority, in fact, may decide to withdraw the protection of the VBER in particular cases when justified by the market situation

At the Commission level, the European Commission has recently fined four consumer electronics manufacturers for engaging in the so called “fixed or minimum resale price maintenance (RPM)” by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products. The four manufacturers intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms which automatically adapt retail prices to those of competitors. In this way, the pricing

restrictions imposed on low pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases. The price interventions limited effective price competition between retailers and led to higher prices with an immediate effect on consumers [28].

Also, the Commission has fined even more recently Guess, a company which designs, distributes and licenses clothing and accessories, for having restricted authorised retailers from selling online to consumers or to retailers in other Member States [29]. The agreements, in the Commission findings, allowed Guess to partition European markets, thus making retail prices of Guess products in Eastern Europe, on average, 5-10% higher than in Western Europe. On this basis, the Commission concluded that Guess' practices were illegal, depriving European consumers of one of the core the benefits of the European Single Market namely the possibility to shop cross-borders for more choice and a better deal.

Currently, the Commission is investigating two separate sets of agreements to assess if certain online sales practices prevent, in breach of EU antitrust rules, consumers from enjoying cross-border choice and being able to buy video games and hotel accommodation at competitive prices.

In connection to agreements regarding hotel accommodation concluded between European tour operators on the one hand and hotels on the other hand, the Commission is investigating whether the agreements contain clauses that discriminate between customers, based on their nationality or country of residence – as a result customers would not be able to see the full hotel availability or book hotel rooms at the best prices [30]. In connection to video games, the Com-

[28] Http://europa.eu/rapid/press-release_IP-18-4601_en.htm

[29] Case COMP/AT.40428 Guess Commission Decision of 17 December 2018, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40428: In particular, the Commission found that Guess' distribution agreements restricted authorised retailers from: 1.using the Guess brand names and trademarks for the purposes of online search advertising; 2.selling online without a prior specific authorisation by Guess. The company had full discretion for this authorisation, which was not based on any specified quality criteria; 3.selling to consumers located outside the authorised retailers' allocated territories; 4.cross-selling among authorised wholesalers and retailers; and 5.independently deciding on the retail price at which they sell Guess products.

[30] Commission, 2.2.2017, press release IP/17/201. Following complaints from customers, the Commission is investigating agreements regarding hotel accommodation concluded between the largest European tour operators on the one hand (Kuoni, REWE, Thomas Cook, TUI) and hotels on the other hand (Meliá Hotels). The Commission welcomes hotels developing and introducing innovative pricing mechanisms to maximise room usage but hotels and tour operators cannot discriminate customers on the basis of their location. The agreements in question may contain claus-

mission is investigating bilateral agreements concluded between Valve Corporation, owner of the Steam game distribution platform, and five PC video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax. The investigation concerns geo-blocking practices, where companies prevent consumers from purchasing digital content, in this case PC video games, because of the consumer's location or country of residence.

Similarly, another set of ongoing investigations deals with licensing and distribution practices of Nike, Sanrio and Universal Studios that may restrict their licensees from selling licensed merchandise cross-border and online within the EU Single Market [31] The Commission is examining whether the licensing and distribution practices of these companies may be denying consumers access to wider choice and better deals in the single market.

3. Rationale, ambit and scope of the New Reg.

Operating beyond competition law, the New Reg. addresses unilateral traders practices where there is no objective justification for different treatment based on nationality, residence or place of establishment, hence discriminating them when they try to avail themselves of best offers, prices or sales conditions compared to nationals or residents of the traders' Member State.

In so doing, the New Reg. implements the principle of no discrimination, which is at the foundation of the European Union. Article 18 TFEU and Article 21(2) of the EU Charter of fundamental rights, as well as the specific provisions of the abovementioned Treaty related to internal market freedom, in fact, are clear in including the prohibition of discrimination on grounds of nationality, which covers also indirect discrimination. Besides, as far as the provision of services is concerned, that general principle is in particular specified by Article 20(2) of the Services Directive [32], according to which Member States shall ensure that the general conditions of access to a service, which are made available

es that discriminate between customers, based on their nationality or country of residence – as a result customers would not be able to see the full hotel availability or book hotel rooms at the best prices. This may breach EU competition rules by preventing consumers from booking hotel accommodation at better conditions offered by tour operators in other Member States simply because of the consumer's nationality or place of residence. This would lead to the partitioning of the Single Market.

[31] Case AT.40432 Licensed merchandise – Sanrio, AT.40433 Licensed merchandise - Universal Studios, AT.40436 Licensed merchandise – Nike, see IP/17/1646 of 14 June 2017, available at http://europa.eu/rapid/ press-release_IP-17-1646_en.htm.

[32] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria [33].

In particular, the Geoblocking Regulation addresses three different and interconnected phases of a transaction: access to sites and interfaces, access to goods and services, means of payments. Where traders are free to design their website, carry their marketing activities and set the prices across the EU and, the pole star to follow at intra-community level shall consist in disconnecting their business choices from the nationality, residence or establishment criteria.

In terms of access to online interfaces, the Regulation bans the blocking of access to websites and the re-routing without the customer's prior consent. In terms of access to goods or services, the Regulation defines specific situations when there can be no justified reason for geo-blocking or other forms of discrimination based on nationality, residence or establishment. In these situations, customers from another EU Member State must have the same access to goods and services as local customers.

As regards non-discrimination for reasons related to payment, while traders remain free to accept whatever payment means they wish, the Regulation includes a specific provision on non-discrimination within the range of means of payment the traders accept [34]. Article 5 of the Regulation applies to payment transactions made by means of an electronic transaction by credit transfer, direct debit or a card-based payment instrument of the same brand and category of card, where the authentication requirements are met and the payment transactions are in a currency that the trader accepts. However, once this choice has been made traders should not discriminate against customers within the EU by refusing transactions or applying different conditions of payment based on the customers' nationality, place of residence or establishment or in relation to the location of the payment account, the establishment of the payment service provider or the place of issue of the payment instrument.

Traders can therefore decide to offer different conditions on several of their

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[33] See Recital 95 of Directive 2006/123/EC. Additional indications on the application of Article 20(2) are included in the Commission Staff Working Document "With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive')", SWD(2012)146, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2012:0146:FIN.

[34] The provision of (non-audiovisual) copyright protected content services (e.g. e-books, online music or videogames) is not covered by the Regulation. These services, however, remain subject to the Regulation's prohibition to block or limit access to on-line interfaces on the basis of the nationality, residence or establishment of the customer. Audiovisual services are also not covered Regulation.

websites. However, if they accept a specific payment means on a specific website, they should also accept that payment means from consumers from outside the Member State that the specific website is targeting.

In practice, this means that if a trader accepts debit cards of a particular brand, he or she does not need to accept credit cards of that same brand or debit cards of other brands. It also means that the trader does not have to accept commercial credit cards of a given brand when he or she only accepts consumer credit cards of that brand. However, it means that if a trader accepts credit cards of a given brand issued in one Member Sate, it needs to accept the same type of credit card of the same brand issued in another Member State.

Because of this limited scope, services linked to copyright-protected content or works in an intangible form - such as music streaming services and e-books – fall outside the ambit of the regulation, as well as other services such as financial, audio-visual, transport, healthcare and social services.

4. Regulatory safe-harbors

Unlike price discrimination, price differentiation is not prohibited by the New Reg. Therefore traders are free to offer different general conditions, including prices, and to target certain groups of customers in specific territories. Moreover, traders are not obliged to deliver goods to customers outside the Member state to which they offer delivery.

Also, the Reg. does not impose to "unbundle" offers for nationals or residents of another Member State where the trader provides goods or services combined with services that do not fall within the scope of the Regulation. What the Reg. requires in fact is that, if products or services are bundled and only one product falls within the Reg, then whole bundle will be subject to the rules of the Regulation if one particular aspect of it is covered. If on the other hand the trader decides to unbundle the package, then price and conditions for such goods or services can be set free, provided that nondiscriminatory conditions based on nationality, residence or establishment are applied.

Also the Regulation does not oblige to sell or deliver products or services in Europe. Its scope is prohibiting traders from selling across Europe, discriminating on the basis of the customer's nationality, residence or establishment.

Nor the Regulation prohibits "tailored offers". Traders can propose different versions of online interfaces in order to target different customers from different Member States. The different version of the website might have a different layout, another language or other characteristics that make it, or part of it, specific to customers with a specific nationality, place of residence or place of establishment. Of course, in line with art. 3 of the Regulation, redirecting customers

from one version of the online interface to another version is banned if carried out on a discriminatory basis and without their explicit consent. For the same reason, such a website or parts of it need to be accessible for customers from different Member States.

As a natural consequence, the Regulation does not address "dynamic pricing" as such, where traders adapt the their offers over time. However, to comply with the Regulation dynamic pricing shall be dependent on factors unrelated to nationality, residence or establishment (such as offers for young people or for consumers as opposed to professionals).

Also "seasonal promotions" are not specifically considered by the Regulation, meaning that such promotions should be accessible for consumers/end users from other Member States in non-discriminatory manner.

What is more important is that the Regulation does not question traders policy pricing, being beyond of its scope the regulation or harmonization of price levels as such. Traders therefore remain free to set different prices for instance on websites targeting different customer groups. However, these websites should be accessible to all EU customers and - in the specific situations described above – EU customers should be able to purchase goods or services under the same conditions as nationals of the Member State of the trader, including net prices.

For the same reason the Regulation also does not preclude the freedom of traders to offer, on a non-discriminatory basis, different conditions, including different net sale prices, in different points of sale, such as shops and websites, or to target specific offers only to a specific territory within a Member State. However, under the Regulation these offers need to be accessible for consumers from other Member States on non-discriminatory basis.

Under the Regulation, traders are therefore free to have sales, promotions or other types of price campaigns on their selected e-commerce websites, as long as they act in a non-discriminatory way.

The Regulation does not impact consumers' rights in such cases. The Regulation's main concern is to ensure cross-border access to goods and services on a non-discriminatory basis in the situations covered. It does not contain any rules on remedies for instance in case the goods in question later turn out to be defective.

5. Conclusions. Towards a "circular" interplay between regulation and competition

As a follow-up of the e-commerce sector inquiry, in the context of the Digital Single Market strategy and as proven by the very recent Guess case, EU

competition rules and geo-blocking Regulation are alley in preventing business practices that have evolved as a result of the growth of e-commerce and that pose a risk to competition and cross-border trade within the European Single Market.

At a first sight, the ambit of overlap seems very little: apart from applying to traders irrespective of the establishment of their business [35], the Directive addresses unilateral conducts carried out within a business-to-consumer (B2C) [36], whereas the Vertical Block Exemption Regulation applies to multilateral conducts undertaken within business-to-business relations.

At a closer look, instead, both Regulation and competition law contribute a lot in shaping a Single European Digital Ecosystem. In particular, the sound interplay between them can be appreciated in relation to both passive and active sales, as proven by the very recent Guess case.

Under Article 6 of the New Reg. a supplier cannot contractually prohibit a trader from responding to unsolicited customer requests, meaning that it cannot prohibit so-called "passive sales" in the specific situations covered by the Regulation. In such case, the contractual requirement is automatically void, with the result that traders shall be free to serve all customers independently of their nationality or place of residence. That is why if a supplier prohibits traders from delivering products outside their allocated territory, one should verify whether such form of prohibition amounts to a restriction of passive sales under Article 6(2) of the Regulation or whether the legality of such restrictions shall be determined under the competition rules and not under the Regulation.

On the other hand, the Geo-blocking Regulation does not affect agreements restricting active sales, i.e. actively approaching and targeting individual customers, for example through advertising. However, restrictions on active sales need to be compliant with EU competition rules.

Overall, the new Regulation provides legal certainty and improves enforceability in so far its provisions are directly applicable and very clear in defining some black list unilateral conducts that as such do not need a case-by-case assessment in order to verify whether they are justified. Besides, the New Reg. operates ex ante, affecting, on one hand, the potential for cross-border trade, and

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[35] Differently from the E-Commerce Directive, the Regulation endorses a substantial approach, neither containing nor implying an obligation to sign-up to the business register or to electronic waste schemes in each Member State where customers are willing to buy goods/services. Each trader operating in Europe is affected by the new Reg. and of course is subject to EU competition law.

[36] The Directive applies to business-to-business (B2B) transactions the extent that the latter take place on the basis of general conditions of access (i.e. they are not individually negotiated) and the transaction is for the sole purpose of end use (i.e. made without the intention to re-sell, transform, process, rent or subcontract).

encouraging, on the other hand, the full use of the single market, leaving competition law and policy fostering the same objectives at the market level [37].

Considering that in several Member States Competition Authorities are expected to be put in charge of supervision of compliance with the geo-blocking rules (including the imposition of fines), the interplay between competition and regulation is expected to be even more fruitful and successful and the new provisions against geofactors are likely to enrich what has been happily defined a "smart" [38] economic integration through technology, regulation and competition law, thus confirming the need of a "circular" and integrated approach in applying regulation and competition policy [39] in the digital data-sphere.

[37] D. Gerard, Fairness in EU Competition Policy: Significance and Implications, Journal of European Competition Law & Practice, Volume 9, Issue 4, 1 April 2018, Pages 211–212

[38] L. Ioannis, Updating the EU Internal Market Concept, CLES Research Paper No. 1/2018, available at SSRN: https://ssrn.com/abstract=3116384 or http://dx.doi.org/10.2139/ssrn.3116384.

[39] V.Falce, Jean Monnet Chair Project in EU Innovation Policy, February 2018; Le novità del Regolamento Geo-blocking, V. Falce, M. Padellaro, L. Villani, January 2019. More broadly, V. Falce, G. Ghidini, G. Olivieri, Informazione e big data tra innovazione e Concorrenza, 2018.