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POLICY DEPARTMENT **A**
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Consumer Protection**

Combating Consumer Discrimination in the Digital Single Market: Preventing Geo-Blocking and Other Forms of Geo-Discrimination

STUDY for the IMCO Committee



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

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STUDY

Abstract

The paper conducts a stocktaking exercise of the state of play in the DSM and offers a critical assessment of the most relevant initiatives to combat consumer discrimination. It gives an overview of discriminatory practices in the online environment and assesses the magnitude of the problem. Differences between justified and unjustified geo-blocking are discussed. An in-depth analysis of the EC proposals on geo-blocking, portability and parcel delivery and the DG COMP investigation into the distribution of audiovisual content is then performed.

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LIST OF ABBREVIATIONS

DG COMP	Directorate-General for Competition
DSM	Digital Single Market
EC	European Commission
EP	European Parliament
EU	European Union
GDP	Gross Domestic Product
IP	Internet Protocol
MS	Member State
NPO	National Post Operator
TFEU	Treaty on the Functioning of the European Union
TV	Television
UK	United Kingdom
VAT	Value Added Tax

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EXECUTIVE SUMMARY

A fully integrated DSM is expected to **generate GDP gains of more than €415 billion each year**, including **total welfare gains for EU consumers worth €154 billion**. However, the EU DSM is still far from complete and the potential of an EU DSM remains largely untapped, especially when it comes to cross-border e-commerce. In fact, **only 16% of EU consumers buy online from traders based in other MS** and **no more than 10% of online sales for EU companies come from other EU countries**. In this context, a large share of potential cross-border demand is hindered by commercial practices that discriminate against consumers on the grounds of nationality or place of residence (e.g. geo-blocking and geo-filtering). **More than 60% of EU e-commerce websites do not allow for cross-border purchases** and geo-discrimination affects customers from small and peripheral MS the most.

The EC and the EP agreed a strategy to complete the EU DSM that entails, *inter alia*, better access of consumers and business to online goods and services across the EU and **equal treatment for all EU consumers by online sellers, irrespective of the consumer's location**. Yet, in the current EU framework, some types of discrimination may be justified on legal grounds. A distinction therefore needs to be made between justified and unjustified geo-blocking practices. Allowing for **justified geo-blocking could lead to a slippery slope that limits the impact of any initiative in the field of the DSM** and reduces the expected benefits of a well-functioning DSM. In this respect, the non-functioning of the DSM in the field of copyright, which is one of the largest e-commerce sector in the EU and the most geo-discriminated, is emblematic of missed opportunities on the grounds of justified geo-blocking.

Recently, **the EC has presented various initiatives to implement the EU DSM Strategy**. The initiatives that are expected to have the most immediate impact on combatting consumer discrimination in the DSM are without doubt the Geo-blocking Proposal and the Portability Proposal. An important contribution to cross-border e-commerce of goods may also result from the Parcel Delivery Proposal. In addition, actions put forward by DG COMP to apply EU competition law in the online environment can play a role in removing artificial obstacles to the functioning of the DSM, especially when such obstacles are based on either horizontal or vertical agreements between companies. All these initiatives are **important steps towards a DSM for Europe**; yet, **their actual potential seems to be more limited than required**. The scope of application of the **Geo-blocking proposal** is very narrow as a large share of online sales will not be covered by the specific cases cited in the proposal. Furthermore, discrimination against customers on the basis of their language still appears to occur. The role played by the **Parcel Delivery Proposal** to increase the affordability and availability of cross-border delivery services is still uncertain as in this sector increased competition is not necessarily the best (or sole) driver to ensure territorial and social cohesion or a level playing field between large companies and SME. The **Portability Proposal**, which still requires some clarifications to be fit for purpose, is expected to solve the important but limited issue of cross-border portability of digital creative content. In the same vein, the **ongoing antitrust case assessing the compliance with EU competition law of vertical agreements in the distribution of audiovisual content** will most probably not fully remove barriers to cross-border accessibility. Hence, the DSM for copyrighted content is still the 'elephant in the room'.

Against this background, the future of the EU DSM largely relies on the first review of the Geo-blocking proposal, the long-awaited reform of the EU copyright framework and, most importantly, the work of the Council and EP on the current legislative files.

In fact, **the piecemeal and cautious approach so far followed by the EC can capture only a narrow share of the expected gains for consumers and businesses from the EU DSM.** In a context of slow economic growth and lost trust in the EU, **Europe needs a well-functioning DSM where consumers can access and purchase goods and services across borders via the internet**, irrespective of their nationality or place of residence.

1. INTRODUCTION

A fully integrated DSM will deliver undoubted benefits to EU businesses and consumers. The EU DSM is still far from complete, however, and **EU consumers are frequently discriminated against on grounds of nationality or place of residence** when they try to purchase across borders. Territorial discrimination appears to conflict with the four freedoms enshrined in the TFEU, which leads to missed opportunities for consumers in terms of available choice and prices. In this context, EU institutions have agreed upon a strategic pathway towards a DSM and put forward various initiatives aiming, *inter alia*, to ensure **better cross-border access to online goods and services**. This paper performs a stocktaking exercise of the state of play in the DSM and provides, for the first time, a critical assessment of the most relevant initiatives to **combat consumer discrimination**. More specifically, the paper is structured as follows:

- **Chapter 2** touches upon the definition of the EU DSM, the strategy devised by EU institutions and the state of play. It then provides an overview of the **various discriminatory practices in the online environment**, the extent to which territorial discrimination affects the functioning of the DSM, the existing differences between justified and unjustified geo-blocking and the role of justified barriers in fragmenting the DSM for copyrighted content. Finally, the chapter summarises **the most recent initiatives to improve the access to digital goods and services**.
- **Chapter 3** focuses on the main initiatives put forward to **prevent geo-blocking and other forms of geo-discrimination in the DSM**, namely the **Geo-blocking Proposal** and the **Portability Proposal**. For both proposals, it identifies the main unresolved issues on which the EP and Council will have to focus efforts. In addition, the chapter discusses the pros and cons of the **Parcel Delivery Proposal**, as reducing shipping costs is crucial to bridge the gap generated by geographical distances within the DSM, and provides a summary of the **ongoing antitrust case involving Sky UK and six US major film studios**, which is key to understanding the potential role of EU competition law in fighting consumer discrimination and market fragmentation.
- **Chapter 4** concludes by recapping on the main findings of the report and calling for more ambitious policy actions to complete the EU DSM in a timely fashion.

2. A DIGITAL SINGLE MARKET FOR EUROPE

KEY FINDINGS

- A fully integrated EU DSM would deliver potential GDP gains of between €415 and €500 billion per year (3% to 3.6% of EU GDP), including total welfare gains for EU consumers of more than €154 billion per year (1.3% of EU GDP).
- The EC and the EP agreed a strategy to complete the EU DSM that entails, *inter alia*, better access of consumers and business to online goods and services across the EU and equal treatment for all EU consumers by online sellers, irrespective of the consumer nationality or country of residence.
- The completion of the EU DSM is still far from being achieved and the EU is generally characterised by 28 different national digital markets; this is reflected in very limited online sales generated across borders.
- The functioning of the EU DSM is hampered by geo-blocking practices aiming to prevent customers from accessing goods or services offered via the internet on the grounds of customer location.
- More than 60% of EU e-commerce websites do not allow for cross-border purchases; geo-discrimination affects customers from small and peripheral MS the most.
- Delivery costs are a major obstacle to cross-border e-commerce of goods and industry-led initiatives have so far had limited impact in making cross-border parcel delivery more affordable.
- In the current EU regulatory framework, some types of geo-blocking may be justified on legal grounds and a distinction needs to be made between justified and unjustified geo-blocking practices.
- Allowing for justified geo-blocking may hinder the seamless functioning of the EU DSM and, as shown by the failed implementation of Article 20(2) of the Services Directive, could lead to a slippery slope that limits the impact of any initiative in the field of the DSM.
- The non-functioning of the DSM in the field of copyright, which is one of the biggest e-commerce sectors in the EU and the most geo-blocked segment of the DSM, represents a lost opportunity due to legal justifications to geo-blocking practices.
- To ensure better online access to goods and services, the EC has recently put forward several initiatives to build trust and reduce costs for cross-border e-commerce and to prevent geo-discrimination in the DSM.
- In parallel with any targeted initiative, the application of EU competition law in the online environment can play a major role in removing artificial obstacles to the functioning of the DSM, especially when such obstacles are based on either horizontal or vertical agreements between companies.

2.1. Creating the Digital Single Market

2.1.1. One territory, one market

The Communication “**A Digital Single Market Strategy for Europe**”¹ (hereinafter the EC DSM Strategy) provides a very clear definition of DSM:

“A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.”

This definition can be summarised in the slogan ‘**one territory, one market**’ and reflects the ambitious priority #2 of the Juncker’s political guidelines on a connected DSM. In fact, the creation of a DSM is one of the key objectives of the EC, which promised to “*make much better use of the great opportunities offered by digital technologies, which know no borders*” and to find “*the courage to break down national silos*”.²

A fully integrated DSM represents a great opportunity for both EU business, which would have a potential consumer base of more than 500 million people, and citizens, who would benefit from wider choices and better prices.³ **Potential efficiency gains** from the completion of the DSM are estimated to be in the region of **€415 billion to €500 billion** per year at current prices (3% to 3.6% of EU GDP)⁴ and would create more than 223,000 additional jobs by 2020.⁵ More specifically, a DSM in the field of e-commerce of goods would lead to lower online prices and increased online choice and generate **total welfare gains for EU consumers equal to €154 billion** per year (1.3% of EU GDP).⁶ Needless to say, such estimates are based on a DSM comprising 28 MS and further research is required to gauge the magnitude and nature of the impact of Brexit on the functioning of the EU DSM.

¹ European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, “A Digital Single Market Strategy for Europe”, COM(2015) 192 final.

² Juncker, J.C. (2014), “A new start for Europe: my agenda for jobs, growth, fairness and democratic change”, Political Guidelines for the next European Commission, available at https://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf (last accessed 20 July 2016).

³ William, A.D. (2016), “Boosting E-Commerce in the Digital Single Market: A Foundation of European Growth and Competitiveness”, European Parliament.

⁴ The lower bound (€415 billion) represents a more conservative but reliable estimate as the complete removal of existing barriers to the functioning of the DSM appears to be rather difficult to achieve (European Parliament (2015), “Mapping the Cost of Non-Europe, 2014-19”, edited by Dunne J.); for a review of the main literature that quantifies expected benefits generated by the completion of the DSM see Civic Consulting (2014), “Contribution of the Internal Market and Consumer Protection to Growth”, European Parliament.

⁵ GHK (2014), “The Cost of Non-Europe in the Single Market; III – Digital Single Market”, European Parliament.

⁶ Interestingly, total welfare gains for EU consumers from e-commerce are expected to amount to €204.5 billion; yet a portion of such gains (€50.5 billion) would at any rate materialise as a result of the growing share of retailing activities performed via the internet at the national level, irrespective of the DSM fragmentation. Therefore, additional gains generated by removing barriers to the functioning of the DSM are worth €154 billion per year. Two-thirds of such gains would stem from better choice, which is substantially greater when consumers can purchase cross-border; one-third would result from lower prices (Civic Consulting (2011), “Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retail of goods”, Executive Agency for Health and Consumers).

2.1.2. A strategy for the Digital Single Market

To tap the full potential of the DSM, the EC has devised a strategy based on a set of interdependent actions revolving around three main pillars:

- **Better access of consumers and business to online goods and services across the EU;**
- Creating the right conditions to develop digital networks and services; and
- Maximising the growth potential of the EU Digital Economy.⁷

The first pillar appears to be the most relevant to fight consumer discrimination in the DSM as it entails specific actions to remove barriers to cross-border online activities. In this respect, the EC aims to:

- Ascertain that e-commerce rules will not discourage companies from operating on a cross-border basis;
- Improve the functioning of the market for cross-border delivery services;
- Prevent unjustified geo-blocking practices segmenting the market along national borders;
- Modernise and harmonise the EU copyright framework to ensure better access to digital content across borders; and
- Minimise the burdens stemming from compliance with different national VAT regimes.

The EC DSM Strategy has been echoed and complemented by the Resolution of the EP "**Towards a Digital Single Market Act**"⁸ (hereinafter the EP DSM Resolution) which stresses the urgent need to create a well-functioning DSM to foster EU competitiveness, with positive impacts on jobs and growth. In particular, with regard to better access for consumers and businesses to the DSM, the EP DSM Resolution calls for, *inter alia*, dismantling barriers affecting e-commerce, reducing the differences between the online and offline worlds and **ensuring that all EU consumers are treated equally by online sellers, irrespective of their nationality or country of residence**. Yet the EP introduces some important caveats that may have a big impact on the future of the DSM; namely that no business should be forced to sell its products outside a certain MS or to license copyright-protected content on a pan-European basis.

2.1.3. A long way to go

Against this very promising background, **the completion of the DSM is still far from being achieved**. As things stand now, **the EU is characterised by 28 different national digital markets** and substantial barriers still hamper the free flow of goods purchased online and online services across national borders.⁹ For instance, looking at EU business behaviour, in 2014 online sales represented an average of 26% of total sales for EU companies selling online. Yet the vast majority of revenues were generated in the MS where the company was located; **only 10% of online sales came from other EU countries**, a figure not unlike the revenues generated outside the EU (4%). Interestingly, only one company out of five was actually considering selling goods and/or services in other EU countries.¹⁰ In the same year, while 41% of EU retailers conducted online sales activities, only 12% sold to consumers in other EU countries via the internet, a lower share than retailers selling to consumers in third countries (14%).¹¹ The picture

⁷ "A Digital Single Market Strategy for Europe" op.cit.

⁸ European Parliament (2016), Resolution on "Towards a Digital Single Market Act" (2015/2147(INI)), PB_TA(2016)0009.

⁹ "Mapping the Cost of Non-Europe, 2014-19" op.cit.

¹⁰ Eurobarometer 413 (2015), "Companies engaged in online activities", Flash Eurobarometer.

¹¹ Eurobarometer 396 (2015), "Retailers' attitudes towards cross-border trade and consumer protection", Flash Eurobarometer.

is no better when it comes to consumer behaviour. While 53% of EU consumers ordered goods or services over the internet in 2015, **only 16% did so from traders based in another MS**, a share that is only slightly higher than Europeans ordering goods or services from traders based in third countries (9%).¹² On a more general note, the fact that e-commerce transactions with third countries are in the same order of magnitude as intra-EU transactions is a sign of the non-functioning of the EU DSM.

2.2. Consumers' geo-discrimination in the Digital Single Market

2.2.1. Geo-blocking

The existing fragmentation of the DSM can only partially be explained by the so-called 'home bias'.¹³ In fact, almost 40% of EU consumers feel confident purchasing goods or services via the internet from sellers located in a different EU country.¹⁴ A large share of potential cross-border demand is hindered by **companies limiting their activities to a certain country or group of countries** and putting in place commercial practices that discriminate among consumers on the basis of nationality or place of residence.¹⁵

In EU jargon, **commercial practices aiming to prevent customers from accessing and/or purchasing goods or services offered via an online interface** (e.g. website, app, and marketplace) **on the grounds of customer location is referred to as 'geo-blocking'.**¹⁶ According to the "Issues paper presenting initial findings of the e-commerce sector inquiry conducted by DG COMP"¹⁷ (hereinafter "the E-Commerce Issues Paper"), geo-blocking may occur at different stages of the online purchasing process and encompasses the following practices:

- **Blocking access** to an online interface or to specific content of the interface (this is geo-blocking *stricto sensu*);
- **Re-routing customers** seeking access to an online interface or to specific content of the interface to a different interface;
- **Preventing registration** to the online interface, when registration is necessary to complete the purchase;
- **Refusing delivery** to a certain MS;
- **Refusing payment** from a means of payment issued in a certain MS.

¹² Eurostat (2015), "Individuals having ordered/bought goods or services for private use over the internet in the last 12 months", available at: <http://ec.europa.eu/eurostat/web/information-society/data/main-tables> (last accessed 04 July 2016).

¹³ Consumers are generally more inclined to buy from domestic sellers rather than cross-border as they have more trust in shopping online nationally (European Commission (2015), Commission staff working document, "A Digital Single Market Strategy for Europe – Analysis and Evidence", Accompanying the document COM(2015) 192 final, SWD(2015) 100 final).

¹⁴ Eurobarometer 397 (2015), "Consumer attitudes towards cross-border trade and consumer protection", Flash Eurobarometer.

¹⁵ For an in-depth analysis of the various aspects of and grounds for consumer discrimination in the Digital Single Market see Schulte-Nolke, H. et al. (2013), "Discrimination of Consumers in the Digital Single Market", Study for the IMCO Committee, European Parliament; this study pointed out for the first time the detrimental effects of consumer discrimination on the functioning of the DSM.

¹⁶ Madiega T. (2015), "Digital Single Market And Geo-Blocking, European Parliament Research Service Blog", available at: <https://epthinktank.eu/2015/05/13/digital-single-market-and-geo-blocking/> (last accessed 05 July 2016).

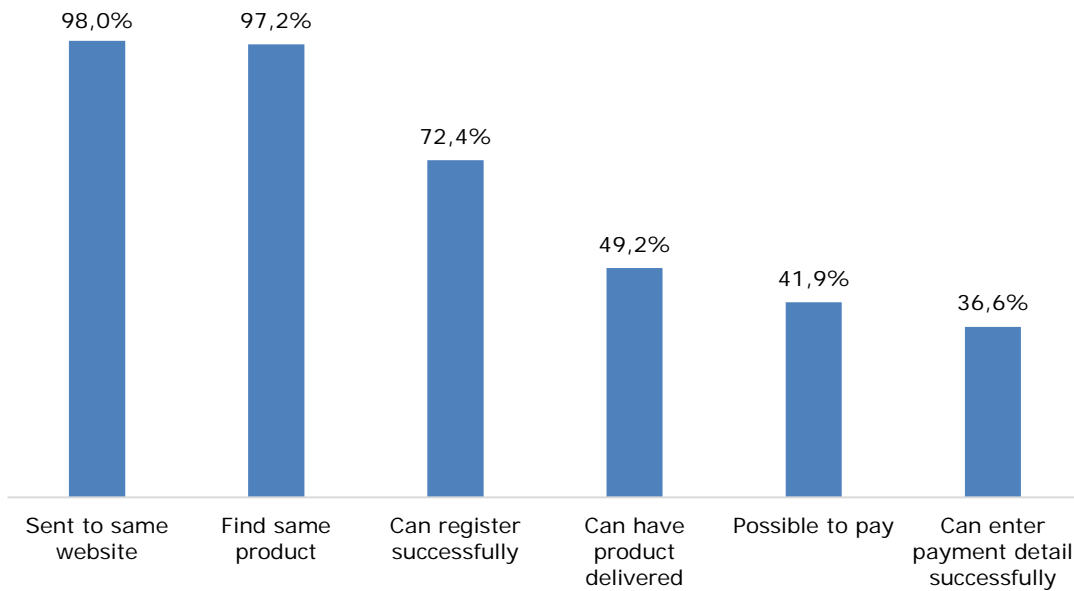
¹⁷ European Commission (2016), Commission staff working document, "Geo-blocking practices in e-commerce - Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition", SWD(2016) 70 final

Geo-blocking has to be distinguished from '**geo-filtering**', which includes commercial practices aiming to offer dissimilar terms and conditions (e.g. price, payment options, delivery options and costs) to customers on the basis of their location. Nonetheless, re-routing is often a prerequisite for geo-filtering as customers may be diverted to an online interface offering similar products e.g. at a different price or of a different quality.¹⁸ Both geo-blocking and geo-filtering require the 'geo-identification' of customers and may rely upon various information sources e.g. the IP address, data from browsers or operating systems, a delivery or billing address, phone numbers and credit cards or other payment means.

2.2.2. The magnitude of the problem

A recent "Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market"¹⁹ (hereinafter "the Geo-blocking Mystery Shopping"), which focused on goods and services purchased online and provided offline (e.g. hotels, transport services, leisure events), showed that while only 2% of surveyed websites apply re-routing or full blocking technologies, **less than 37% of such websites allow for cross-border purchases**. Interestingly, consumers are usually prevented from purchasing goods and services across borders via limitations to website registration (needed to complete the purchase), refusal to deliver in a certain MS or refusal to accept means of payment issued in a certain MS (Figure 1).

Figure 1: Success rate for cross-border purchases



Source: Geo-blocking Mystery Shopping (2016).

These figures have been largely confirmed by the recent public consultation on "Geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU",²⁰ which covers both goods and services (with the exception of restrictions related to copyright). On the one hand, some **90% of responding consumers and consumer organisations, as well as 63% of responding companies, have experienced some types of geo-blocking** when seeking to purchase across borders. The most common restrictions they

¹⁸ "Discrimination of Consumers in the Digital Single Market" op.cit.

¹⁹ European Commission (2016), "Mystery Shopping Survey on Territorial Restrictions and Geo-Blocking in the European Digital Single Market", Preview of key findings

²⁰ European Commission (2015), Summary of Responses to the Public Consultation on "Geo-Blocking and Other Geographically-Based Restrictions when Shopping and Accessing Information in the EU".

faced were refusal to sell and refusal to deliver, followed by geo-filtering practices. On the other hand, **45% of responding companies and business associations confirmed that they put in place geo-blocking practices** in the course of their business, but they generally identify specific reasons to geo-block, such as copyright and licensing restrictions, VAT rules, national consumer protection law, other divergent national rules, and delivery costs. More importantly, they consider such reasons as “objective justifications” to apply geo-blocking measures. **Geo-discrimination affects consumers from smaller and peripheral MS to a greater extent**; in fact, they usually have less choice in their own country and the limited internal demand makes such countries less attractive for providers based in other MS.²¹ It is no surprise that in 2014 the list of countries most affected by geo-blocking practices included Austria, Belgium, Croatia, Cyprus, Greece, Hungary, Ireland, Luxembourg and Malta.²² In the same vein, according to the Geo-blocking Mystery Shopping, on average consumers from Central Eastern European countries appear to be more geo-blocked than others.

Box 1: DSM fragmentation beyond geo-blocking: parcel delivery

Irrespective of geo-blocking measures, the free flow of goods purchased in the DSM has to cope with geographical distances. In this respect, **delivery costs represent a significant barrier to cross-border e-commerce of goods**. The relevance of parcel delivery for e-commerce in Europe was already recognised by the 2012 Commission Green Paper on “An integrated parcel delivery market for growth of e-commerce in the EU”²³ and the related public consultation.²⁴ At that time, great emphasis was placed on **the impact of well-functioning delivery operations across Europe on EU social and territorial cohesion**. Consumers and retailers based in remote and peripheral areas are particularly concerned by delivery issues and would benefit more from e-commerce to access a wider range of goods and market opportunities than those available locally.²⁵ Nonetheless, some retailers and delivery operators levy surcharges to cover additional costs to serve remote areas,²⁶ which might be in stark contrast to the goal of an inclusive growth for Europe.²⁷

To encourage online sales, the 2013 “Roadmap for completing the single market for parcel delivery”²⁸ (hereinafter “the 2013 Parcel Delivery Roadmap”) identified three main targets: i) increased transparency and information for all actors along the e-commerce value chain; ii) improved availability, quality and affordability of delivery solutions; iii) enhanced complaint handling and redress mechanisms for consumers.

²¹ Helberger, N. (2007), “Refusal to Serve Consumers because of their Nationality or Residence – Distortions in the Internal Market for E-commerce Transactions?”, European Parliament.

²² Countries where no less than 30% of consumers have been exposed to geo-blocking practices in the last 12 months (“Eurobarometer 397” op.cit.)

²³ European Commission (2012), Green Paper, “An integrated parcel delivery market for the growth of e-commerce in the EU”, COM (2012) 698 final.

²⁴ European Commission (2012), Summary report, “Replies to the Green Paper on e-commerce parcel delivery in the EU”.

²⁵ Some 30% of the EU population live in regions classified as being predominantly rural (Eurostat (2015), “Eurostat regional yearbook 2015”, European Union, 2015.).

²⁶ European Commission (2016), “Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market. European Commission”, SWD (2016) 173 final.

²⁷ European Commission (2010), Communication from the Commission, “Europe 2020: A strategy for smart, sustainable and inclusive growth. European Commission”, COM (2010) 2020 final.

²⁸ European Commission (2013), Communication from the Commission, “A roadmap for completing the single market for parcel delivery. Build trust in delivery services and encourage online sales. European Commission”, COM (2013) 886 final.

The 2013 Parcel Delivery Roadmap pointed out that consumers are affected by a **lack of transparency** and are not aware of delivery options or of how they can return items. This comes along with **high prices, difficulties in parcel delivery to rural or remote areas and poor quality delivery services** (e.g. delayed and damaged goods). Moreover, **retailers (especially SMEs) reportedly have limited information on available services**, limited choice of delivery options and services (e.g. track-and-trace) and **little (or no) bargaining power vis-à-vis delivery service operators**. In this context, the 2013 Parcel Delivery Roadmap set an 18-month timeframe (up to June 2015) to achieve the abovementioned targets via industry-led solutions (e.g. new/enhanced information tool, common standards, information requirements, trust labels).

With hindsight, industry-led initiatives have had a marginal impact on the affordability and availability of cross-border offers. Evidence suggests that **there are considerable differences in terms of availability of delivery services between different EU MS, and even across different regions within the same MS**.²⁹ Cross-border delivery prices charged by NPOs are two- to six-times higher than comparable prices for domestic delivery³⁰ and appear to be unreasonably high, especially for infrequent senders (either consumers or SMEs) who face higher prices and limited alternatives to NPO.³¹ The 2015 public consultation on “Cross-border parcel delivery”³² confirmed that **delivery problems are the most common reason for not selling online to other EU countries**. In 2015, delivery costs constituted the main problem encountered by companies that sell online to other EU countries.³³ **More than 75% of consumers responding to the consultation abandoned their online purchase due to concerns about delivery**, such as high delivery prices, too-slow delivery and no free return option. Cheaper prices, traceable parcel delivery, an easier return process and the option to choose a delivery day and time are indeed the main improvements to foster cross-border e-commerce.³⁴

2.2.3. Justified vs. unjustified geo-blocking

Although geo-blocking is by its very nature at odds with the objective of establishing a full functioning DSM and most probably contravenes Article 18 TFEU prohibiting discrimination based on nationality,³⁵ **some types of geo-blocking may be justified on legal grounds** in the current EU framework.

Differences between justified and unjustified geo-blocking can be summarised as follows:

- **Unjustified geo-blocking practices** are based on purely commercial reasons and mainly aim to engage in price discrimination strategies or influence competition. Such practices can result from either unilateral decisions by online traders or contractual obligations (e.g. vertical agreements between suppliers and distributors) forbidding traders to sell cross-border.

²⁹ European Parliament (2014), Report on “An integrated parcel delivery market for the growth of e-commerce in the EU, European Parliament”, (2013/2043(INI))

³⁰ “A Digital Single Market Strategy for Europe – Analysis and Evidence” op.cit.

³¹ European Commission (2016), “Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services”, SWD (2016) 166 final.

³² European Commission (2015), Summary of Responses to the Public Consultation on “Cross-border Parcel Delivery”.

³³ “Eurobarometer 413” op.cit.

³⁴ Eurobarometer 398 (2013), “Internal Market”, Special Eurobarometer

³⁵ Article 18(1) TFEU directly prohibits discrimination on the grounds of nationality. According to some commentators, this article would indirectly prohibit discrimination on the grounds of residence and be applicable to discrimination imposed by businesses (“Discrimination of Consumers in the Digital Single Market” op.cit.).

- **Justified geo-blocking practices** are the cases whereby traders do not sell cross border: i) as a result of legal obligations descending from EU and (most likely) national rules (e.g. copyright law, rules on advertising, rules on certain prohibited products/services such as tobacco, alcohol and gambling, protection of minors); or ii) when they would incur disproportionate adaptation costs due to regulatory constraints³⁶ (e.g. VAT rules, tax systems, consumer law, contract law, labelling requirements) and other obstacles to cross-border sales (e.g. quality and costs of delivery services).³⁷

Reportedly, the five **major obstacles experienced by companies selling (or trying to sell) cross-border** are: i) high delivery costs (see Box 1, above); ii) costs to resolve complaints and cross-border disputes; iii) costs for guarantees and returns; iv) difficulties dealing with foreign taxation; and more generally v) difficulties understanding the applicable legal framework.³⁸ As things stand, companies wishing to sell goods or services in a different MS are estimated to face one-off adaptation costs of up to €9,000 per targeted country.³⁹ In this context, the justification of geo-blocking practices appears to seek a **balance between the objective of completing the DSM and the freedom to conduct a business** enshrined in Article 16 of the EU Charter of Fundamental Rights,⁴⁰ which includes a right to 'stay small'.

Nonetheless, leaving the door open for **justified geo-blocking may impinge on the functioning of the DSM** and substantially curtail the expected benefits of a fully integrated DSM. More specifically, accepting that discrimination among EU consumers on the grounds of their nationality or place of residence is lawful in presence of objective justifications might result in a **slippery slope that narrows the scope of any initiative in the field of the DSM** and preserves market fragmentation along national borders. In this respect, it is worth recalling the **lesson learnt from the implementation of the Services Directive**.⁴¹ Article 20(2) of this Directive contains a non-discrimination provision in favour of recipients of services within the EU. Nonetheless, service providers are free to set different conditions of access on the grounds of nationality or place of residence, if justified by objective criteria. Almost seven years after the transposition of this piece of legislation and in spite of a guidance document issued by the EC in 2012,⁴² **the opportunity to rely upon objective justifications made Article 20(2) ineffective** and largely inadequate to ensure equal treatment for recipients of services across the EU.⁴³

³⁶ Godel, M.I. et al. (2016), "Reducing Costs and Barriers for Businesses in the Single Market", Study for the IMCO Committee.

³⁷ "Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.

³⁸ "Eurobarometer 413" op.cit.

³⁹ "A Digital Single Market Strategy for Europe – Analysis and Evidence" op.cit.

⁴⁰ "Discrimination of Consumers in the Digital Single Market" op.cit.

⁴¹ Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006.

⁴² European Commission (2012), 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')", Accompanying the document COM(2012) 261 final, SWD(2012) 146 final.

⁴³ "Discrimination of Consumers in the Digital Single Market" op.cit.; Annex 8 to "Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.

2.2.4. Justified geo-blocking and the DSM for copyrighted content

The fragmentation of the DSM for copyright-protected content is emblematic of opportunities that can be missed on the grounds of justified geo-blocking.⁴⁴ The online provision of copyrighted digital content such as music, games, films, TV series, sporting events, e-books, and TV programmes represents one of **the largest e-commerce sectors in the EU**, accounting for about 33% of online trade by individuals in 2014.⁴⁵ In 2015, some 60% of internet users used the internet to access music and audiovisual content; 35% to access sport content and video-games.⁴⁶ This is **the most promising segment of the DSM** as the provision of digital creative content entails no (or few)⁴⁷ delivery costs, and does not encounter the natural barriers imposed by geographical distances to the DSM for goods and for services purchased online and delivered offline.⁴⁸

Notwithstanding several harmonisation measures enacted in the EU in the last three decades, each MS maintains a distinct copyright system that applies within its own borders and relies on **the principle of copyright territoriality**. More specifically, the scope of copyright and related rights conferred by national laws is limited to the territory of the MS where such rights are granted and protected. EU right-holders are therefore entitled to 28 different national rights, which can be exploited on country-by-country basis.

Copyright territoriality does not affect the functioning of the Single Market for copyrighted-protected content embodied in tangible media (e.g. books, CD, and DVD). In fact, **the principle of exhaustion** enshrined in Article 4(2) of Directive 2001/29/EC⁴⁹ (hereinafter “the InfoSoc Directive”) allows for parallel imports of **tangible copyrighted works**, provided that the work has been put on the market by the relevant right-holder or with his/her consent.⁵⁰

Conversely, the principle of exhaustion does not apply to **intangible copyrighted works**.⁵¹ As a result, **the online distribution of creative content in the EU is dominated by territorial**

⁴⁴ For a comprehensive overview of the benefits of streaming and cross-border online access to copyright protected content see Maciejewski, M. et al. (2014), “Streaming and online access to content and services”, European Parliament.

⁴⁵ “Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition” op.cit.

⁴⁶ More specifically, in 2015 60% of European internet users used the internet to access (via streaming or download) music (i.e. only audio content); 59% to access audiovisual content such as films, series, video-clips or TV content (excluding sports); 37% to access games; 35% to access sport events; 27% to access e-books or digital books. Interestingly, internet users represent 82% of EU population (Eurobarometer 411 (2015), “Cross-Border Access to Online Content”, Flash Eurobarometer).

⁴⁷ Providers of online service content have to invest in technologies aiming to ensure the quality of their services. In this respect, Content Delivery Networks represent the main technology adopted to deliver online content services; they comprise a series of interconnected servers at different locations which replicate the content and deliver it to consumers in a faster and more efficient way. Providing high quality services across borders requires additional investment in each targeted MS.

⁴⁸ In addition, this DSM segment has a high potential to grow as the largest share of internet users accessing digital creative content is concentrated in the younger generations (“Eurobarometer 411” op.cit.).

⁴⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001.

⁵⁰ The principle of exhaustion was for the first time formulated by the ECJ in the *Deutsche Grammophon* case (C-78/70, *Deutsche Grammophon v. Metro-SB-Grossmärkte*, 1971). Article 4(2) of the InfoSoc Directive confines the application of the principle of exhaustion to ‘the right of distribution’, which covers only physical media embodying copyrighted content (see Recital 28 of the InfoSoc Directive). For further details, see Renda, A. et al (2015), “The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society”, European Parliament.

⁵¹ In the *Coditel* case (C-62/79, *Coditel and others v. Ciné Vog Films and others*, 1980), the ECJ explained that the principle of exhaustion does not apply to the right of making copyrighted content available in an interactive manner, which includes the dissemination of intangible copies of copyright-protected content via the internet. This decision is reflected by the structure of the InfoSoc Directive, which makes a distinction between ‘the right of distribution’ and

licensing agreements between right-holders and service providers, which partition the DSM along national borders and prevent parallel imports on the grounds of copyright territoriality.⁵² In this context, **compliance with copyright law represents an objective justification for the introduction of geo-blocking practices**. In fact, service providers have to resort to technical measures preventing customers located in other MS from accessing digital copyrighted content in order to avoid copyright infringement and breach of territorial licensing agreements.⁵³

Territorial licensing agreements and related geo-blocking measures have a twofold impact on the functioning of the DSM for copyrighted content ():⁵⁴

- **First, they limit cross-border accessibility.** In a nutshell, consumers based in a certain MS cannot access online content services available in a different MS. This generates two main forms of discrimination: i) some EU consumers are **not able to access digital copyrighted works otherwise available to other EU consumers**; ii) even when the same copyrighted works are available in several MS, EU consumers are **bound by local offers in terms of quality, price and other conditions**. Cross-border demand for copyrighted content largely depends on consumers' taste and availability of content at the national level. As regards the audiovisual sector, where versioning still matters,⁵⁵ limitation to cross-border accessibility may affect consumers wishing to watch content in a different language, e.g. Europeans who are permanently away from their country of origin (14 million in 2014),⁵⁶ linguistic minorities speaking another EU official language (four million in 2012)⁵⁷ and, to some extent, consumers with adequate foreign language skills (between 90 and 220 million in 2012).⁵⁸
- **Second, they limit cross-border portability.** This means that EU consumers who lawfully subscribe to online services providing copyright-protected content in a certain

'the making available right' and applies the principle of exhaustion only to the former (see "The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society" op.cit.). Interestingly, the ECJ has recently applied the principle of exhaustion to computer software downloaded from the internet in the *UsedSoft* case (C-128/11, *UsedSoft GmbH v. Oracle International Corp.*, 2012); yet, two caveats are required: i) in the EU copyright framework, software is covered by Directive 2009/24/EC (Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009), which is *lex specialis* and does not include a distinction between 'the making available right' and 'the right of distribution'; ii) the effects of the *UsedSoft* case appear to be relevant only to downloaded software with a perpetual licence (which is a 'functional' equivalent to physical goods), and does not affect the provision of software as a service with a fixed term licence (Cooley (2012), *What Effect Will the UsedSoft v. Oracle Decision Have on U.S. Software Companies?*, available at <https://www.cooley.com/what-effect-will-the-usedsoft-v-oracle-decision-have-on-us-software-companies> (last accessed 01 August 2016).

⁵² Territorial licensing agreements are very common in the online distribution of audiovisual content and play a minor role in the music sector, where multi-territorial licenses are more frequent.

⁵³ "The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society" op.cit.; see also Trimble, M. (2016), "Geoblocking and Evasion of Geoblocking – Technical Standards and the Law", in *Geoblocking and Global Video Culture*, edited by Lobato, R. and Meese, J.

⁵⁴ Renda, A. et al. (2015), "Policy Options for Improving the Functioning and Efficiency of the Digital Single Market in the Field of Copyright", European Parliament; and "Streaming and online access to content and services" op.cit.

⁵⁵ Dubbing is still required to release films in four out of the five largest EU markets (i.e. France, Germany, Italy and Spain; "The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society" op.cit.).

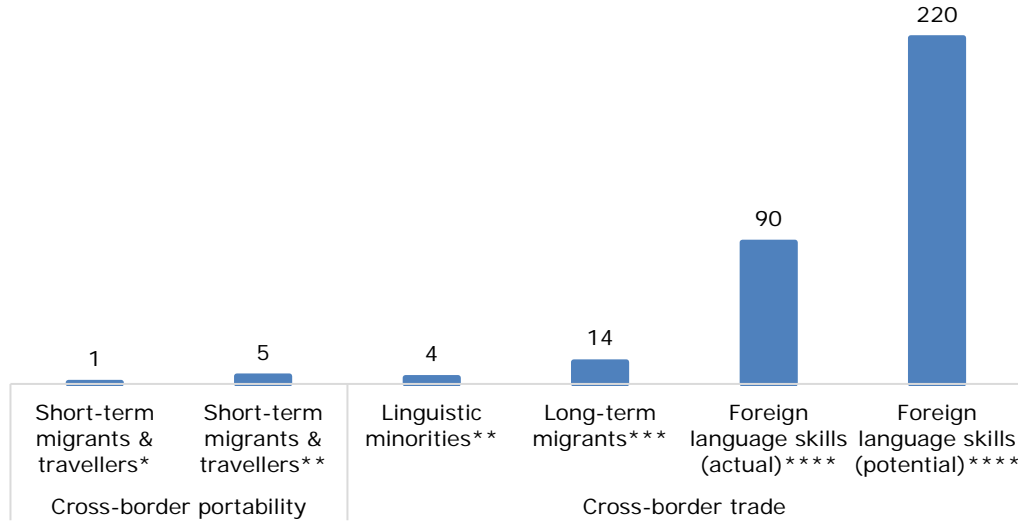
⁵⁶ Eurostat Database - Population on 1 January by five year age group, sex and citizenship, available at http://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR_POP1CTZ (last accessed 01 July 2016).

⁵⁷ Plum Consulting (2012), "The economic potential of cross-border pay-to-view and listen audiovisual media services", European Commission.

⁵⁸ In 2012, 44% of Europeans (about 223 million) were able to follow radio or television news in a language other than their mother tongue. While 54% (about 274 million) were able to hold a conversation in at least one additional foreign language, 34% of them (about 93 million) regularly used their first 'other' language to watch films and television and to listen to the radio (Eurobarometer 386 (2013), "Europeans and their languages", Special Eurobarometer).

MS are not able to access the same service and content when they are temporarily present in another MS. This problem may affect between one⁵⁹ and five million Europeans per day, including short-term migrants and travellers.⁶⁰

Figure 2: Potential cross-border demand for audiovisual content (million Europeans)



Source: Author’s own elaboration based on: *Impact Assessment accompanying the Portability Proposal; **Plum Consulting 2012; *** Eurostat; and ****Special Eurobarometer 386.

The E-Commerce Issues Paper reveals that some **70% of providers of digital copyrighted content put in place geo-blocking practices**. More importantly, geo-blocking measures are required by the vast majority of contractual agreements between right-holders and service providers in the field of audiovisual content (e.g. fiction TV, films, children’s TV, non-fiction TV) and sport events and still play an important role in distribution agreements for music (44% of such agreements require providers to geo-block consumers from other MS). Interestingly, a small share of geo-blocking measures (less than 10%) are based on unilateral decisions by service providers. **Content portability is limited by 72% of providers**, and 40% of those providing services in more than one MS offer different catalogues in different countries. While only 8% of internet users have actually tried to access online content services meant for users in another MS, some 50% of those who never tried would be interested in accessing audiovisual content and music available abroad. Interestingly, **the lion’s share of users trying to access services across borders were searching for content not available in their MS of residence**; and only a small portion (17%) was driven by pricing considerations; 56% of such users experienced geo-blocking issues.⁶¹

⁵⁹ The Impact Assessment accompanying the Portability Proposal points out that 29 million Europeans would benefit from portability when travelling abroad. The IA also reveals that Europeans travelling at least once per year abroad spend on average 11.6 days in another MS. This means that the proposed Regulation would apply to about 900,000 Europeans per day in 2015 (0.2% of the EU population) (European Commission (2015), Impact Assessment Accompanying the document “Proposal for a Regulation of the European Parliament and of the Council to ensure the cross-border portability of online content services in the internal market”, SWD(2015) 270 final).

⁶⁰ These are Europeans spending less than 12 months in a different MS (“The economic potential of cross-border pay-to-view and listen audiovisual media services” op.cit.).

⁶¹ “Eurobarometer 411” op.cit.

2.2.5. Recent initiatives to improve the online access to digital goods and services

In this context and in line with the EC DSM strategy, the EC has recently put forward several initiatives to ensure better online access to digital goods and services. Such initiatives can be categorised in two broad groups:

- **Initiatives to build trust and reduce costs for cross-border e-commerce.**

The EC has recently launched various legislative initiatives to build consumer trust in cross-border online sales and reduce transaction costs and other administrative burdens incurred by companies trading online across borders. More specifically, in December 2015, the EC released two proposals on harmonised rules for the supply of digital content and the online sales of goods: i) a proposal for a **Directive on contracts for the online and other distance sales of goods**⁶² setting out common rules on conformity of goods, remedies in case of non-conformity and modalities to exercise such remedies; and ii) a proposal for a **Directive on contracts for the supply of digital content to consumers**⁶³ covering conformity, remedies, exercise of remedies as well as modification and termination of such contracts. The two proposals intend to remove barriers to cross-border trade imposed by differences in national contract legislation applying to online sales and to guarantee key contractual rights for EU consumers. Later on, in April 2016, the Commission adopted **an action plan on VAT**, which defines a pathway for the creation of a single EU VAT area and aims, *inter alia*, to make the VAT system more efficient and simpler for businesses to use, especially in light of the digital transformation.⁶⁴ Finally, in May 2016, in the context of the so-called ‘e-commerce package’⁶⁵ the EC presented an additional set of initiatives that have the potential to reduce costs borne by both businesses and consumers when operating/purchasing cross-border: i) a proposal for a **Regulation on consumer protection cooperation**,⁶⁶ replacing Regulation 2006/2004⁶⁷ and aiming to improve cooperation between national authorities in charge of the enforcement of EU consumer law and to enable more effective consumer protection, in light of new challenges posed by the digital economy and cross-border e-commerce; ii) a document providing **guidance on the implementation/application of the Unfair Commercial Practices Directive**⁶⁸ with specific regard to the online environment and new business models in the digital sector; and iii) a **proposal for a Regulation on cross-border parcel delivery services**⁶⁹ (hereinafter “the Parcel Delivery Proposal”) to ensure affordable parcel delivery solutions.

⁶² European Commission (2015), “Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods”, COM (2015) 635 final.

⁶³ European Commission (2015), “Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content”, COM (2015) 634 final.

⁶⁴ European Commission (2016), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee on “an action plan on VAT. Towards a single EU VAT area – Time to decide”, COM (2016) 148 final.

⁶⁵ European Commission (2016), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses”, COM(2016) 320 final.

⁶⁶ 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.

⁶⁷ Regulation (EC) No 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004.

⁶⁸ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005.

⁶⁹ European Commission (2016), “Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services”, COM(2016) 285 final.

- **Initiatives aiming to prevent discrimination in the DSM.**

In parallel, the EC has put forward initiatives to prohibit consumer discrimination in specific circumstances. In particular, two legislative proposals aim to prevent geo-blocking: i) a **Proposal for a Regulation on addressing geo-blocking and other forms of discrimination**⁷⁰ (hereinafter ‘the Geo-blocking Proposal’), aiming to abolish unjustified discrimination among customers based on nationality, place or residence or place of establishment; iii) a **Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market**⁷¹ (hereinafter ‘the Portability Proposal’), introducing a legal mechanism to allow the portability of copyright-protected digital content. In addition, the EC, in its capacity of antitrust authority, has sent a **Statement of Objections to Sky UK and six major US film studios** (hereinafter the ‘Sky UK Case’) to put in place contractual restrictions to prevent cross-border access to satellite and online pay-TV services.⁷² More generally, the EC is performing a broad **antitrust competition inquiry into the EU e-commerce sector** to identify any artificial barrier to cross-border sales erected by companies that does not comply with EU competition law.⁷³ While initial results of this inquiry were disclosed in the E-Commerce Issues Paper (see sub-section 2.2.1, above), additional findings are expected in October 2016.

Box 2: EU competition law and the DSM

Creating a Single Market is one of the main objectives of EU competition law, other than economic welfare.⁷⁴ In particular, **Article 101 TFEU** prohibits both horizontal (i.e. concluded by parties operating at the same link of the value chain, such as two competitors) and vertical agreements (i.e. concluded by parties operating at different links of the value chain, such as suppliers and distributors) between companies aiming to partition the internal market along national borders by restricting parallel trade. More specifically, **contractual limitations to ‘passive sales’**, i.e. sales made in response to unsolicited requests⁷⁵ coming from individual customers, are included in the list of so-called **‘hard-core’ restrictions**, i.e. restrictions that are **anticompetitive ‘by object’**.⁷⁶ In other words, vertical agreements preventing passive sales do not benefit from *de minimis* rules (i.e. exemption applying to agreements of minor importance), are excluded from block exemptions and are unlikely to fulfil the conditions to apply the efficiency-enhancing exception provided for in Article 101(3) TFEU.⁷⁷

⁷⁰ 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.

⁷¹ 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. European Commission”, COM(2015) 627 final.

⁷² European Commission (2015), Press release, “Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland”, Brussels, 23 July 2015, available at: http://europa.eu/rapid/press-release_IP-15-5432_en.htm (last accessed 20 July 2015).

⁷³ European Commission (2015), Press release, “Antitrust: Commission launches e-commerce sector inquiry”, Brussels, 6 May 2015, available at: http://europa.eu/rapid/press-release_IP-15-4921_en.htm (last accessed 19 July 2016).

⁷⁴ Lianos, I. (2013), “Some Reflections on the question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013

⁷⁵ Requests are ‘unsolicited’ when they come from consumers based in a territory where the trader does not perform marketing activities. In this respect, passive sales are different from active sales as the latter entails marketing activities in a certain territory.

⁷⁶ Article 4 of the Commission Regulation (EU) No 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, OJ L 102, 23.4.2010.

⁷⁷ “Discrimination of Consumers in the Digital Single Market” op.cit.

EU competition law may also play a **pivotal role when it comes to the creation of a DSM**. In this respect, the Commission Notice providing “**Guidelines on vertical restraints**”⁷⁸ recognises that the internet is a powerful tool to reach more and different customers and to boost competition and, for the first time, clarifies the application of EU competition law in the online environment. First, **no vertical agreement can lawfully prevent traders from using the internet to sell** their products and/or services. Second, **online sales are generally considered as passive sales** and this applies also when: i) the trader translates its online interfaces in several languages; ii) the trader shares automatic updates with customers requesting to be kept informed on products and services; and iii) the online interface is automatically indexed on search engines or comparison websites targeting customers, even outside the licensed territory. In addition, the Guidelines on Vertical Restraints provide a **list of hard-core restrictions to passive sales in the online environment**, which comprises, *inter alia*, agreements:

- Preventing customers from accessing a certain online interface (i.e. geo-blocking *stricto sensu*);
- Redirecting customers to another online interface (i.e. re-routing);
- Terminating transactions when the means of payment reveals that the customer is located in another territory;
- Requiring forms of discrimination between the online and offline worlds (e.g. capping the amount of online sales and/or charging the distributor a higher price for goods or services sold online).⁷⁹

However, Article 101 TFEU applies only to agreements between companies and does not cover unilateral business decisions. Such decisions are not compliant with EU competition law (Article 102 TFEU) only when taken by companies that hold a dominant position and affect trade between MS.

Against this background, the Geo-blocking Proposal, the Portability Proposal and the Sky UK Case appear to be the most promising initiatives to combat consumer discrimination in the short term. In addition, when it comes to e-commerce of goods, the Parcel Delivery Proposal is key to the completion of the DSM because affordable and high quality cross-border parcel delivery services are crucial to allow online sales across borders, irrespective of customers’ and companies’ location. In what follows (see chapter 3, below), these four initiatives will be carefully assessed vis-à-vis the objective of creating a fully integrated DSM.

⁷⁸ European Commission (2010), Commission Notice, “Guidelines on Vertical Restraints”, SEC(2010) 411.

⁷⁹ Paragraph 52, “Guidelines on Vertical Restraints” op.cit.

3. PREVENTING GEO-BLOCKING AND OTHER FORMS OF GEO-DISCRIMINATION

KEY FINDINGS

- The proposal for a Regulation on addressing geo-blocking and other forms of geo-discrimination prevents unjustified geo-blocking practices; it does not apply to online services providing copyright-protected content.
- In some cases, the Geo-blocking Proposal may generate ‘hassle costs’ and increase customers’ frustration. In addition, the scope of application of the non-discriminatory provisions set out in the proposal is expected to be very narrow as a large share of online sales will not be covered by the specific cases identified in the relevant articles.
- Discrimination among customers on the basis of their language seems to be still entirely lawful and this may further curtail the expected impact of the Geo-blocking Proposal.
- The proposal for a Regulation on cross-border parcel delivery aims to enhance competition in the EU parcel delivery service market; the role played by this proposal to increase affordability and availability of cross-border delivery services is still uncertain as in this sector increased competition is not necessarily the best (or sole) driver to complete the DSM.
- The DSM for copyright-protected content represents the ‘elephant in the room’; the proposal for a Regulation to ensure the cross-border portability of online content services in the internal market will most probably solve the important but very limited issue of portability of digital copyrighted works in the DSM.
- Many issues need to be settled to make the Portability Proposal fit for purpose. These include the definition of: i) country of residence of subscribers of online content services; and ii) temporary presence abroad; identification of appropriate verification mechanisms is also required.
- The ongoing antitrust investigation assessing compliance with EU competition law of vertical agreements between production and distribution companies and pay-TV broadcasters has the potential to remove the main obstacles to cross-border accessibility of copyright-protected audiovisual content. The expected outcome of the Sky UK case will *de facto* leave untouched copyright territoriality and the fragmentation of the market for copyrighted digital works along national borders.

3.1. Preventing unjustified geo-blocking

As stated, geo-blocking and any other form of geo-discrimination are generally at odds with the seamless functioning of the EU DSM. However, as some forms of geo-discrimination can be justified on legal grounds, the EC has decided to focus efforts on **prohibiting geo-blocking in those specific cases when it is always unjustified**. In parallel, the EC recognised that an effective removal of artificial barriers to cross-border trade for online purchased goods needs to be complemented by a **substantial reduction of costs for shipping goods across borders**.⁸⁰ The rest of this section will discuss the main content and unsettled issues of the Geo-blocking Proposal and give an overview of the pros and cons of the Parcel Delivery Proposal in Box 3.

⁸⁰ “A comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses” op.cit.

3.1.1. Geo-blocking Proposal: an overview

The Geo-blocking Proposal aims to prevent discrimination among customers on the grounds of nationality (i.e. direct discrimination), place of residence or place of establishment (i.e. indirect discrimination). This proposal intends to address both geo-blocking and geo-filtering practices (see chapter 2, above), as long as such practices are unjustified (i.e. adopted for 'purely' commercial reasons).

The Geo-blocking Proposal applies to both EU traders and traders based in third countries and selling in the EU market. In addition, it applies to both B2C and B2B transactions, provided that the buyer is not purchasing goods or services for resale. Interestingly, the proposal **does not apply to non-economic services of general interest, transport services, audio-visual services, retail financial services, electronic communications services and networks, gambling, healthcare and certain social services**. Small traders benefiting from VAT exemptions in the MS where they operate are also exempted from the application of the non-discrimination provisions included in the proposed Regulation.

According to Article 3 of the Geo-blocking Proposal, **blocking access to online interfaces** (e.g. websites, apps, and marketplace) and **re-routing customers on the grounds of nationality, place of residence or place of establishment are generally forbidden**, unless such practices are put in place to comply with legal requirements imposed by EU or national rules. Nonetheless, **re-routing is still possible with the explicit consent** of the customer. Article 4 **outlaws any form of geo-discrimination in three specific cases**:

- When the trader sells goods and is not (directly or indirectly) involved in the delivery of such goods to the MS where the customer is based;
- When the trader provides electronically supplied services other than those protected by copyright (e.g. cloud services, firewall, web hosting);⁸¹
- When the trader provides services that are supplied offline in a MS other than where the customer is based (e.g. hotels, car rental, and leisure events).

Again, such geo-discrimination is lawful when limitations to cross-border sales are compliant with the relevant national or Union law. Article 5 ensures that traders **shall not rely upon payment means to refuse certain commercial transactions** or applying different payment conditions, thus *de facto* circumventing the non-discrimination provisions under article 4. Finally, Article 6 aims to **annul any contractual restriction in vertical agreements** that would limit the application of the proposed Regulation.

3.1.2. Geo-blocking Proposal: the mountain in labour?

After promising to boost cross-border e-commerce and raising the expectations of EU consumers,⁸² **the proverbial mountain gave birth to a mouse** and, as will be further discussed below, the Geo-blocking Proposal will most likely fall short of the target of *"contributing to the proper functioning of the internal market by preventing discrimination based, directly or indirectly, on the nationality, place of residence or place of establishment of customers"*.⁸³ The Council and the EP, which appointed Ms Rosa Thun as rapporteur for this

⁸¹ "Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.

⁸² European Commission (2016), Press release, "Commission proposes new e-commerce rules to help consumers and companies reap full benefit of Single Market", Brussels, 25 May 2016, available at: http://europa.eu/rapid/press-release_IP-16-1887_en.htm (last accessed 15 July 2016).

⁸³ "Article 1 Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.

legislative file, do not have an easy task to meet the *"the need for all consumers within the Union to be treated equally by online merchants selling in one or more Member States"*.⁸⁴

Article 3 of the Geo-blocking Proposal, while granting customers the right to access any online interface they wish, does not oblige traders to sell goods or services to customers from any online interface they may access, or to offer the same prices, terms and conditions on the different online interfaces available to customers. This is equivalent to saying that **customers will now be able to consider all offers available within the territory of the EU, even if they are not entitled to benefit from such offers** as the relevant goods and services are not covered by the non-discrimination provisions under Article 4 of the proposed Regulation. **The provision under Article 3 entails two main side effects:**

- It **generates hassle costs**⁸⁵ as customers may only realise that they are not able to complete the online purchase of a certain good or service at the very final stages of the purchasing process (e.g. when trying to pay);
- It **increases customers' frustration** as they will feel excluded from the internal market, especially when they become aware that they cannot purchase goods or services otherwise available to other EU customers, or have to pay more than other EU customers for the very same goods or service.

When traders are not obliged to sell cross-border, hassle and frustration seem to be more efficiently contained by automatic re-routing than by re-routing with consent, which generates costs to companies (to adapt their websites) and customers (to select the right website and give consent to be re-routed). Of course, this comes with a trade-off between efficiency and transparency, which needs to be carefully assessed.

On a more general note, **Article 3 appears to address forms of geo-blocking that have a rather limited application in the EU**. In fact, according to the Geo-blocking Mystery Shopping, less than 2% of EU traders selling online goods or services (then provided offline) rely upon websites blocking and re-routing techniques.⁸⁶ On the contrary, according to the E-commerce Issues Paper, such techniques are applied by the large majority of traders providing copyrighted digital content (65% put in place measures aiming to limit user access and 23% measure aiming to reroute users). Yet, the Geo-blocking Proposal does not apply to audiovisual services; in addition, while Article 3 in principle applies to traders providing other types of digital copyrighted content (music, pictures, e-books), such traders can still rely upon geo-blocking practices insofar as such practices are required to abide by the territorial licensing agreements.⁸⁷

Article 4 aims to ensure that customers are granted the same conditions of access to goods and services they want to purchase, irrespective of their nationality, place of residence or place of establishment. Yet, **the scope of application of this article seems to be very narrow**.

⁸⁴ Paragraph 33, "Towards a Digital Single Market Act" op.cit.

⁸⁵ Hassle costs or irritation costs include costs associated with waiting time, delays, redundancies, etc. (Renda, A. et al. (2013), "Assessing the costs and benefits of regulation", European Commission).

⁸⁶ "Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.

⁸⁷ As mentioned, according to the E-commerce Issues Paper, 44% of traders selling digital music are required to geo-block their content on the basis of vertical agreements that probably reflect licensing schemes based on copyright territoriality.

As regards goods, the non-discrimination provision applies only to those traders who do not arrange cross-border delivery to the MS where the customer is based.⁸⁸ This is equivalent to saying that EU customers will not be geo-discriminated if: i) they go and pick up the goods in an MS where the trader delivers;⁸⁹ or ii) they find an intermediary willing to forward the goods to them from an MS where the trader delivers.⁹⁰ In all cases in which the goods are delivered cross-border by the trader or on his/her behalf, different conditions for reasons related to the nationality, place of residence or place of establishment of the customer can be lawfully applied. In other words, **while traders that do not sell cross-border are not entitled to geo-discriminate, traders selling cross-border can geo-discriminate.**⁹¹

As regards electronically supplied services, as a consequence of the combined effect of articles 3 and 4, traders are obliged to sell cross-border applying the same terms and conditions, irrespective of a customer's location, but the application of this provision is postponed to July 2018 to allow traders to prepare for the changes. However, since the devil is in the detail, a share of traders who will in principle be covered by this obligation may find the right way to circumvent it. From a technical standpoint, the electronically supplied services listed in recital 19 of the Geo-blocking Proposal (cloud services, data warehousing services, web-hosting and firewalls) are generally provided in the form of software, especially to consumers who are seeking friendly-user solutions.⁹² According to the EU copyright framework, **software is copyrighted content and can be licensed on a territorial basis;**⁹³ hence, it is not covered by the provisions under Article 4 of the proposed Regulation. In conclusion, **Article 4 will most likely not apply to any of the electronically supplied services listed above.** In this respect, the envisaged review of the Regulation after two years of its entry into force (Article 9) represents a potential game changer as the scope of application of Article 4 might be extended to cover copyright-protected works, other than audiovisual content.

Against this discouraging background, the **Geo-blocking Proposal is expected to be quite effective when it comes to services sold online and provided offline;** nonetheless, according to the findings of the Geo-blocking Mystery Shopping, travel services (e.g. hotels) and

⁸⁸ Reportedly, this provision might apply also to traders that have physical branches or subsidiaries in more than one MS, including the MS of the customer, yet each branch/subsidiary does not arrange cross-border delivery. This aspect needs to be clarified.

⁸⁹ The Impact Assessment accompanying the Geo-blocking Proposal makes clear that this option is limited by substantial travel costs ("Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.).

⁹⁰ Customers may rely upon the so-called 'parcel forwarding services', which allow goods to be shipped to an address in the MS where the trader operates and then forwards the item to the customer address. Such services are already equipped to circumvent any geo-blocking or geo-filtering practice as they can take care of the entire online purchasing process on behalf of the customer. At any rate, the Impact Assessment accompanying the Geo-blocking Proposal explains that this option is limited by additional costs (shipping costs plus handling fees for the forwarding service) and complications (finding an intermediary in a different MS, without the trader's assistance) ("Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.).

⁹¹ A full lifting of geo-blocking restrictions on online sales of goods is expected to have a very positive impact on both EU consumer surplus (+1.2%) and producer surplus (+1.4%); effects on smaller MS would be particularly strong. The partial lifting devised in the Geo-blocking Proposal is expected to generate a positive but more modest increase in consumer and producer surplus (Duch-Brown, N. and Martens, B. (2016), "The Economic Impact of Removing Geo-blocking Restriction sin the EU Digital Single Market", JRC Technical Reports).

⁹² For instance, Dropbox, OneDrive and Google Drive include software in their cloud services; in the same vein, the largest web hosting companies such as 1&1 or HostGator provide software in combination with their services.

⁹³ Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009. For further details on territorial licensing of copyrighted software, see note 51, above.

online reservations of leisure events are the segments of e-commerce where traders geo-block the least.⁹⁴

Another detail may weaken the impact of the proposed Regulation, however. **Traders providing goods and services covered by Article 4 might still be able to discriminate against customers on the basis of their language.** This issue requires urgent clarification by the Council and EP. In fact, recital 5 of the Geo-blocking Proposal appears to ban forms of discrimination on the basis of 'distinguishing criteria' leading to the same results as the application of criteria based on nationality, place of residence and place of establishment; in principle, such criteria should also include language. Nonetheless, recital 15 acknowledges that some traders operate different versions of their online interfaces targeting customers from different MS; and recital 17 leaves room for traders to direct their activities at different MS with targeted offers and differing terms and conditions, including by setting up country-specific interfaces. Recitals 15 and 17, in line with the policy options described in the Impact Assessment accompanying the proposal⁹⁵ and the Communication accompanying the "e-commerce package"⁹⁶ seem to allow for discrimination based on language. **This issue is key to determining the actual contribution of the Geo-blocking Proposal to fight consumer discrimination in the DSM.** In fact, while the scope of the application of the proposed Regulation already seems narrow, allowing for language discrimination would further frustrate the purpose of this proposal. For instance, car rental companies may still offer different terms and conditions on different language versions of their websites. Whereas EU linguistic diversity has to be protected and EU businesses should not be obliged to translate their online interfaces in different EU languages, it needs to be clarified whether (and to what extent) traders offering various language versions of their website are entitled to apply different terms and conditions for the very same goods or service on each version of their website.⁹⁷

Box 3: Proposal for a regulation on cross-border parcel delivery

The Parcel Delivery Proposal aims to set out specific rules concerning: i) the regulatory oversight of parcel delivery services;⁹⁸ ii) the transparency of tariffs⁹⁹ and terminal rates¹⁰⁰ for cross-border parcel delivery services and the assessment of their affordability; and iii) the transparent and non-discriminatory access to cross-border parcel delivery services and/or infrastructures by newcomers. **The ultimate objective of this piece of legislation appears to be the enhancement of competition in the cross-border parcel delivery service market.**

⁹⁴ On the contrary, car rental services seem to be dominated by geo-discrimination practices and European consumers keep facing price discrimination based on geo-filtering of IP addresses ("Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.).

⁹⁵ See option 3A, letter d of the "Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination" op.cit.

⁹⁶ COM(2016) 320 final.

⁹⁷ Paradoxically, allowing for language discrimination would favour traders that are able to manage online interfaces in several languages as they would still be able to rely on language as a 'distinguishing criterion' to discriminate against EU consumers.

⁹⁸ The regulation applies to delivery of postal items other than items of correspondence. It does not apply to items exceeding 31.5kg (logistic services requiring mechanical aids) or to transport services not involving the delivery of a parcel.

⁹⁹ Tariff is the full price paid for the service.

¹⁰⁰ Terminal rate is the remuneration paid to the universal service providers for transport, sorting and distribution of incoming cross-border parcels in the destination MS. In this context, terminal rates include both terminal dues (for letters mail items) and inward land rates (for parcels).

Regulatory oversight is strengthened by Article 3 of the proposed Regulation **obliging all parcel delivery service providers to provide the national regulatory authority of the MS where they are established with a set of information** including, *inter alia*, a description of the providers' general conditions of sale and complaints procedures, the annual turnover in parcel delivery services, the number of employees involved in the service and the number of parcels handled per year (both incoming and outgoing).¹⁰¹ Transparency of tariffs and terminal rates is ensured by Article 4, which requires **the universal service providers**¹⁰² **offering parcel delivery services to share with the national authority on a yearly basis the public list of tariffs and terminal rates** applied for national and cross-border parcel delivery.¹⁰³ While tariffs will be shared with the Commission and published on a dedicated web-page (available to all EU consumers and businesses),¹⁰⁴ terminal rates will be shared with both the Commission and the authorities of the originating MS. In this context, **national authorities are in charge of assessing the affordability of such tariffs** on the basis of certain elements (e.g. domestic tariffs and other terminal rates applied in another MS) and ask for additional information and/or justifications in case tariffs are deemed unaffordable (Article 5). Finally, **universal service providers delivering parcels have to meet all reasonable requests of access to their network, facilities and services** necessary for the provision of cross-border parcel delivery services (Article 6).

Unaffordability and unavailability of cross-border delivery services still represent major obstacles to the creation of a DSM for e-commerce of tangible goods¹⁰⁵ (see Box 1, above). Lack of data on the functioning of the cross-border parcel market and more specifically on existing wholesale and retail arrangements make it difficult to understand the underlying drivers of the problem, let alone to find appropriate solutions.¹⁰⁶ In this respect, **the Parcel Delivery Proposal is an important step forward to empowering national regulatory authorities and EU policy-makers**. All things considered, the proposed Regulation appears to be quite effective in achieving the three specific targets listed in Article 1, i.e. regulatory oversight, transparency and access to the networks of incumbent operators.

Nonetheless, there are still **concerns about the actual role that this Proposal will play in meeting the ultimate needs of a well-functioning DSM**, which requires delivery services that: i) are accessible, affordable, efficient and high quality; ii) are available in the

¹⁰¹ Such obligations do not apply to parcel delivery service providers employing less than 50 persons, unless they are established in more than one MS.

¹⁰² All MS have designated the incumbent national postal service provider as the 'universal service providers'. Germany is an exception as the incumbent operator act as the 'universal service provider' without formal designation (European Commission (2015), Report from the Commission to the European Parliament and the Council on "the application of the Postal Services Directive (Directive 97/67/EC as amended by Directive 2002/39/EC and 2008/6/EC)", COM(2015) 568 final).

¹⁰³ Limited to 15 postal items, including standard parcel up to 5kg and track-and-trace parcel up to 5kg. Such items are deemed the most relevant for individual customers and small businesses. In fact, it is estimated that 80% of addressed postal items generated by e-commerce weigh less than 2kg (Recital 7 of the "Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services" op.cit.).

¹⁰⁴ Parcel delivery service providers other than universal service providers may ask to publish their tariffs for comparable services (Recital 12 of the "Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services" op.cit.).

¹⁰⁵ "Report from the Commission to the European Parliament and the Council on the application of the Postal Services Directive" op.cit.

¹⁰⁶ Marcus, J.S. and Petropoulos G. (2016), "E-Commerce in Europe: Parcel Delivery Prices in a Digital Single Market", Bruegel Policy Contribution, Issue 2016/09.

entire EU territory, including rural and remote regions; and iii) ensure a level playing field between large players and SMEs.¹⁰⁷ Such concerns can be summarised as follows:

- The approach suggested by the Proposal and based on more transparency and better regulatory oversight **might take some time to deliver significant results**; this is likely to further delay the completion of a DSM for tangible goods, which has already been slowed down by unsuccessful attempts to solve the parcel delivery issue via industry-led solutions.
- The Postal Services Directive,¹⁰⁸ which sets out rules for the so-called 'universal service'¹⁰⁹ and covers, in the vast majority of MS, ordinary parcels up to 20kg,¹¹⁰ already ensures a greater degree of transparency (e.g. special accounting obligations are imposed on universal service providers) and regulatory oversight (covering also quality aspects) compared to the Parcel Delivery Proposal. Achievements in terms of better quality and lower prices of parcel delivery appear to be limited.¹¹¹ **The new tasks now assigned to national regulatory authorities seem almost impossible** as these authorities are called to assess the affordability of tariffs without relying on regulatory accounting data and with no control over the quality of the service, geographical coverage or international contractual arrangements with universal service providers in other MS.
- Even if competition has developed more in the parcel delivery market than in the letter market,¹¹² cross-border delivery is still an issue.¹¹³ **Increased competition is not necessarily the best (or sole) driver to meet the need of a DSM.** In fact, competition forces, services meeting market demand and tariffs oriented to costs are expected to lead to low prices and high quality services for: i) densely populated and better interconnected areas characterised by high demand; and ii) senders generating large volumes of traffic. Conversely, i) sparsely populated and peripheral regions with limited demand and ii) small-volume senders will naturally face high price and limited (or no) options, besides those ensured by universal service obligations.
- Although all relevant parties seem to dislike any legislative intervention aiming to regulate cross-border parcel prices, **boosting e-commerce in the DSM and ensuring social and territorial cohesion might require more ambitious policy actions** than the proposed Regulation. In particular, two options should be more carefully assessed: i) **the extension of universal service obligations to**

¹⁰⁷ "An integrated parcel delivery market for the growth of e-commerce in the EU" op.cit.

¹⁰⁸ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, and following amendments.

¹⁰⁹ Universal service is the permanent provision of a postal service of specified quality at all points in a certain territory at affordable prices for all users (Article 3 Directive 97/67/EC).

¹¹⁰ ERGP (2015), "Report on the outcome of the ERGP public consultation on the evolution of the Universal Service Obligation", ERGP PL (15) 14, available at: <http://ec.europa.eu/DocsRoom/documents/17015/attachments/1/translations/en/renditions/native> (last accessed on 18 July 2016).

¹¹¹ In 2012, 30% of EU consumers experienced a delay in the delivery of something purchased from national sellers; 8% did not receive the goods. Surprisingly, figures were better for cross-border purchases, in fact only 19% of EU consumers experienced a delay and in 6% of purchases the item was not delivered (Eurobarometer 358 (2013), "Consumer attitudes towards cross-border trade and consumer protection", Flash Eurobarometer). In 2013, 39% of consumers experienced problems with delivery of goods purchased by national sellers; again, a lower portion (36%) had problems with delivery when purchasing from sellers based in another MS ("Eurobarometer 398" op.cit.).

¹¹² "Report from the Commission to the European Parliament and the Council on the application of the Postal Services Directive" op.cit.

¹¹³ Ibid.

more sophisticated parcel delivery services (track-and-trace, specified delivery date), which would ensure the availability of a better quality service to all EU consumers, irrespective of their location; and ii) **the application of uniform, affordable tariffs for cross-border parcel delivery services across the EU**, which would neutralise natural barriers to e-commerce imposed by geographical distance and differences in population density.

3.2. Combatting geo-blocking in the field of copyright

The DSM for copyright-protected content represents the ‘elephant in the room’. In fact, the online provision of digital copyrighted works is one of the largest and most promising e-commerce segment in the EU, as well as the most geo-blocked and fragmented one (see sub-section 2.2.4, above). The EC has so far ‘kicked the can down the road’, however, and hopes are pinned on the first review of the Geo-blocking Proposal (which so far does not cover copyrighted-protected content) and, most importantly, the reform of the EU copyright framework expected for September 2016. In the meantime, while the EC has tried to tackle **the issue of cross-border portability** directly, a boost to the creation of DSM for digital copyrighted content might come from **the Sky UK Case handled by DG COMP**. Against this background, this section will first discuss the main features and possible outcomes of the Portability Proposal and then provide an overview of the Sky UK case and its expected impact on the functioning of the DSM in Box 4.

3.2.1. Portability Proposal: an overview

The Portability Proposal aims to enable consumers who have lawful access to or have purchased/rented digital copyrighted content in their MS of residence to continue having access to or use of such content when they are temporarily in a different EU country. As mentioned (see sub-section 2.2.4, above), cross-border portability is currently prevented by territorial licensing agreements between right-holders and service providers that fragment the DSM along national borders.¹¹⁴ In this respect, **the proposed Regulation intends to ensure that copyright licensing and market fragmentation allowed by the current EU copyright framework are no longer barriers to cross-border portability of digital creative content in the EU.**

The Portability Proposal applies to **‘online content services’ providing access to music, games, films, sporting events, e-books, radio and TV programmes** in exchange for a payment or without payment of money, as long as the provider verifies the MS of residence of its subscribers. Interestingly, portability is ensured only for those services that are portable also at the national level, i.e. when access by the subscriber is not limited to a specific location (e.g. home address).

Article 3 of the Portability Proposal **obliges providers of copyrighted digital content to enable cross-border portability for subscribers who are temporarily present in a different MS.**¹¹⁵ To make this lawful, Article 4 introduces a legal fiction based on which the supply, access and use of an online content service should be regarded as solely occurring in the MS where the subscriber resides rather than in the MS where the subscriber happens to be

¹¹⁴ In some cases, territorial fragmentation can result from unilateral business decisions of service providers who prefer to apply different terms and conditions in different MS, although they have cleared copyright and related rights on a multi-territorial basis (“Impact Assessment accompanying the document Proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination” op.cit.).

¹¹⁵ Interestingly, there are no quality requirements applicable to the delivery of the online content services in a different MS; hence, the provider has no obligation to invest in additional infrastructure or delivery technologies.

for a limited period of time. This means that service providers do not need to clear copyright and related rights in all the EU countries where their subscribers would travel or temporarily reside. While Article 5 makes unenforceable any contractual provision contrary to the above-mentioned mechanism, Article 7 ensures the application of the proposed Regulation to ongoing contracts. In this context, **right-holders are entitled to request that providers verify the subscriber's MS of residence and the temporary presence in a different MS**; verification means need to be proportionate and not go beyond what is required to achieve the purpose of the proposed Regulation.

3.2.2. Portability Proposal: roaming for Netflix?

The Portability Proposal has the full potential to enable portability; yet some issues remain unsettled and need to be addressed by the EP and the Council. Article 2 of the proposed Regulation defines the 'temporary presence abroad' as a presence in an MS other than the subscriber's country of residence. However, this definition leaves room for much ambiguity. First, **neither the EU treaties nor EU legislation provide a general definition of 'residence' of individuals**.¹¹⁶ In this respect, the amended proposed Regulation drafted by the Council¹¹⁷ (hereinafter 'the Amended Portability Proposal') defines the residence as the place where the subscriber returns on a regular basis. Such a definition may generate further ambiguity as commuters between two MS would technically have two residences.¹¹⁸

Against this background, **verification mechanisms adopted by service providers will be crucial in determining the scope of application of the proposed Regulation**.¹¹⁹ According to recital 17 and in line with the Impact Assessment accompanying the proposal,¹²⁰ while a self-declaration would not suffice, additional information to geo-identify subscribers such as banking details, payment of a licence fee for other services (e.g. electricity bill, telephone bill) in a given MS or the IP address used to access the service are reasonable indicators of the subscriber's MS

¹¹⁶ Wouters, J. (2010), "Residence of individuals in EU law", Institute for International Law, Working Paper No 148.

¹¹⁷ Council of the European Union (2016), "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 - General approach", Interinstitutional File: 2015/0284(COD).

¹¹⁸ On a more general note, in a similar way to current EU rules on roaming (see, for instance, Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union; and Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union), the Portability Proposal makes a distinction between 'domestic market' (the MS market where the consumer is resident) and 'visited markets' (other EU MS where the consumer is temporarily present). Hence, the proposed regulation implicitly acknowledges the possibility to discriminate between 'domestic' and 'visiting' consumers based on their place of residence and may limit the attainment of a more integrated market for creative works via judicial interpretation of the existing law provisions. Yet, room for market integration via case law appears to be very limited in this field as the fragmentation of the DSM for copyright-protected works is already rooted in EU legislation (namely the InfoSoc Directive, which confines the application of the exhaustion principle to copyrighted works embodied in tangible media and allows for territorial fragmentation of the DSM, see note 50 above). Only a well-crafted reform of EU copyright framework can create a DSM for digital creative content and simultaneously remove limitations to both cross-border accessibility and portability ("Policy Options for Improving the Functioning and Efficiency of the Digital Single Market in the Field of Copyright" op.cit.). In this respect, the decision to adopt a piecemeal approach and tackle the issue of portability with an *ad hoc* piece of legislation may portend limited faith in the contribution of the long-awaited copyright reform (expected after the summer) to the DSM integration.

¹¹⁹ Mazziotti, G. and Simonelli, F. (2015), "Regulation on 'cross-border portability' of online content services: Roaming for Netflix or the end of copyright territoriality?", CEPS Commentary available at: <https://www.ceps.eu/publications/regulation-%E2%80%98cross-border-portability%E2%80%99-online-content-services-roaming-netflix-or-end> (last accessed 20 July 2016).

¹²⁰ "Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council to ensure the cross-border portability" op.cit.

of residence. The Council confirms that **the declaration of a subscriber can only be used in combination with one or more other verification means** that are listed in the Amended Portability Proposal. More specifically, the Council refers, *inter alia*, to **sampling or periodic checking of IP address** rather than constant monitoring of the location. This appears to be the most suitable solution to abide by a definition of residence revolving around the place where the subscriber regularly returns.

On the one hand, reliance on the IP address of subscribers would guarantee a **'strict application' of the proposed Regulation**, which applies only to tourists, travellers and most probably short-term migrants. Such an outcome has also been defined as **"roaming for Netflix" in light of the limited share of EU population involved**. In fact, portability would benefit between 900,000 (0.2% of EU population) and five million (1% of EU population) Europeans per day (see sub-section 2.2.4, above), depending upon: i) the definition of the maximum duration of the "temporary presence" abroad (which has to represent a "limited period of time" according to the Council); ii) criteria to compute such a duration (e.g. number of days per year, number of days spent in another MS or number of consecutive days abroad). On the other hand, verification procedures based on proxies such as a licence fee and other service contracts would leave room for a **'loose application' of the Portability Proposal** and also allow long-term migrants (some 14 million Europeans in 2014)¹²¹ or even just subscribers owing e.g. a banking account¹²² or an apartment¹²³ in another MS to piggyback the proposed Regulation for cross-border access to online content services.¹²⁴

In the absence of clarifications from the EP and the Council, these unresolved issues have to be addressed by bilateral contractual agreements between right-holders and online service providers. While this approach would leave some flexibility to find the most proportionate solution on a case-by-case basis, it would certainly lead to **disparities in the way EU consumers are treated**, thus frustrating the main grounds to enact a Regulation, i.e. ensuring a uniform application of portability rules across MS and guarantee that right-holders, providers and consumers are subject to the same rules irrespective of their place of establishment or residence. In fact, as things now stand, **the actual beneficiaries of the Portability Proposal would be identified, for each online content service, on a purely contractual basis**.

Furthermore, as indicated by the Impact Assessment accompanying the proposal,¹²⁵ reaching agreement between right-holders and providers might be challenging due to diverging interests. The majority of **right-holders** have incentives to preserve territoriality in order to benefit from price discrimination strategies; they **would require strict verification mechanisms and limit the duration of the 'temporary presence' in a different MS**. **Service providers** have an interest in increasing the demand for their services by meeting subscribers' needs. They would

¹²¹ Eurostat Database - Population on 1 January by five-year age group, sex and citizenship, available at http://ec.europa.eu/eurostat/en/web/products-datasets/-/MIGR_POP1CTZ (last accessed 01 July 2016).

¹²² While in 2011, only 3% of EU consumers (approximately 15 million) owned a current bank account in another EU country (Eurobarometer 373, "Retail Financial Services", Special Eurobarometer), a recent Green Paper published by the EC argues that digitalisation will play a pivotal role in boosting cross-border access to financial products in the near future (European Commission (2015), Green Paper on retail financial services, "Better products, more choice, and greater opportunities for consumers and businesses", COM(2015) 630 final).

¹²³ According to a survey commissioned by RE/MAX Europe, whereas 15% of Europeans own a secondary residence, 9.2% have such a residence abroad, i.e. that up to 7 million Europeans own a house abroad (authors' own elaboration on data from "At home in Europe", survey performed in January 2015 and available at: <http://www.at-home-in-europe.eu/about>).

¹²⁴ "Regulation on 'cross-border portability' of online content services: Roaming for Netflix or the end of copyright territoriality?" Op.cit.

¹²⁵ "Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council to ensure the cross-border portability" op.cit.

therefore **prefer a loose definition of ‘temporary presence’ abroad**, especially when they operate in just one MS and cannot rely upon price discrimination strategies on a territorial basis. Finally, **subscribers who frequently travel abroad would certainly prefer contracts subject to less strict verification mechanisms**. As mentioned, such contracts might appeal to some EU consumers willing to pay for content provided in a MS other than their country of residence.¹²⁶

So far, the Council has only partially addressed the unresolved issues included in the original Proposal and key decisions appear to be left to contractual solutions, in spite of the high degree of heterogeneity that can result from contractual freedom. In particular, the Amended Portability Proposal requires right-holders and providers to reach agreement on the use of specific verification means and leaves room to right-holders to enable portability even in the absence of verification measures. Nonetheless, as mentioned by Recital 6 of the proposed Regulation, online content services are generally provided in a package, including copyrighted works licensed by several right-holders. In this respect, **bilateral negotiations of verification mechanisms might also require the introduction of different mechanisms for different content** included in the same package. To avoid such a cumbersome outcome, service providers might decide to go for the strictest verification mechanisms (e.g. monitoring the IP address). At any rate, given that the EP has repeatedly expressed its firm opposition to ending copyright territoriality,¹²⁷ **it is likely that a strict application of the proposed Regulation will eventually prevail**. This would allow for cross-border portability, while leaving untouched existing barriers to cross-border access to digital creative content.

Box 4: The antitrust investigation on the distribution of audiovisual content

in January 2014, DG COMP (in its capacity of antitrust authority) launched an antitrust investigation to scrutinise compliance with Article 101 TFEU (see Box 2, above) of territorial licensing agreements concluded by the largest EU pay-TV broadcasters (i.e. service providers) and some US film production and distribution companies (i.e. right-holders).¹²⁸ More than a year and a half later, in July 2015 this investigation culminated in a **Statement of Objections sent to Sky UK and six US major studios** (Disney, NBC Universal, Paramount Pictures, Sony, 20th Century Fox and Warner Bros).¹²⁹ While the Statement of Objections is entirely confidential, the publication in April 2016 of the commitments made by Paramount in response to the investigation¹³⁰ anticipated that the main anticompetitive concerns relate to contractual restrictions: i) prohibiting Sky UK to provide its pay-TV services (both online and via satellite) to EU consumers based in an MS other than the UK and Ireland; and ii) obliging US studios to prohibit or limit broadcasters based in other EU countries to make their pay-TV services available to consumers based in the UK and Ireland. Such territorial licensing agreements may constitute an infringement of EU competition law

¹²⁶ “Regulation on ‘cross-border portability’ of online content services: Roaming for Netflix or the end of copyright territoriality?” Op.cit.

¹²⁷ European Parliament (2015), “European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society” 2014/2256(INI); and “Towards a Digital Single Market Act” op.cit.

¹²⁸ European Commission (2014), Press release, “Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services”, Brussels, 13 January 2014, available at: http://europa.eu/rapid/press-release_IP-14-15_en.htm (last accessed 20 July 2016).

¹²⁹ “Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland” op.cit.

¹³⁰ European Commission (2016), “Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in case AT40023 – Cross-border access to pay-TV”, (2016/C 141/07).

by object as they appear to **grant absolute territorial protection to national broadcasters** by limiting both cross-border active and passive sales (see Box 2, above).

If the anticompetitive concerns revealed in Paramount's commitments were reflected in the final decision of DG COMP, two possible outcomes can be anticipated:¹³¹

- **In a 'big bang' scenario, contractual restrictions to passive sales as well as any measure having a similar object or effect would be prohibited.** Therefore, right-holders would need to make it possible for service providers to offer their services in response to unsolicited requests from consumers based in a different EU country. **This scenario would lead to a generalised cross-border access to online copyright content and accelerate the end of the copyright territoriality era in the EU**, with the subsequent restriction of the freedom of right-holders to license and enforce their rights on a strictly territorial basis. In this respect, market players should quickly adapt their business models and licensing strategies to allow the free movement of digital creative content. However, whereas partitioning the internal market along national borders would no longer be possible, right-holders would still be allowed to differentiate their licenses based on e.g. content language or other features (subtitles, dubbing, etc.).
- **In a 'much ado about nothing' scenario, while right-holders would not be allowed to explicitly include restrictions to passive sales in their licensing agreements**, copyright-protected content could still be licensed on a country-by-country basis. This would be just a formalistic solution since service providers would not be able to respond to unsolicited request from consumers based outside the territory covered by their licence as they might not have cleared copyright and related rights in the country in which the request originates. **This scenario would therefore not have any immediate impact on the functioning of the DSM.**

As things stand, **the 'much ado about nothing' scenario appears to be the most likely** one for two main reasons. First, the EC has reiterated that service providers always have to take into account the relevant regulatory framework beyond EU competition law when providing their services to consumers based in different MS, and this framework includes copyright law.¹³² Second, the commitments offered by Paramount leave copyright territoriality and territorial licensing agreements untouched. In fact, while Paramount is ready to repeal contractual obligations preventing or limiting passive sales, Paramount's rights to engage licensing and enforcement practices on a strictly territorial basis are fully guaranteed.¹³³ If this is the case, the free movement of digital creative content will still require an ambitious reform of the EU copyright framework.

¹³¹ Mazziotti, G. and Simonelli, F. (2016), "Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law", Info, Emerald Group Publishing.

¹³² "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland" op.cit.

¹³³ See Article 2.5 of Paramount Commitments: "Nothing in the Commitments shall be interpreted as limiting or waiving Paramount's right to engage in licensing or enforcement practices in the EEA that are legally permissible under EU law" (Paramount (2016), "Case At.40023 – Cross-border access to pay-TV content, Paramount Commitments", available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_4638_3.pdf (last accessed 04 July 2016)).

4. CONCLUSIONS

A DSM for Europe in which “the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities” is expected to generate, on a yearly basis, efficiency gains of more than €415 billion and welfare gains for EU consumers equal to €154 billion. Nonetheless, put bluntly, the EU is still characterised by 28 different national digital markets, and **the potential of an EU DSM remains largely untapped, especially when it comes to cross-border e-commerce**. In fact, only 16% of EU consumers buy online from traders based in other MS and no more than 10% of online sales for EU companies come from other EU countries. Interestingly, a large portion of potential cross-border **demand is hampered by commercial practices that discriminate against consumers on the grounds of nationality or place of residence**, such as geo-blocking and geo-filtering. In this respect, fewer than 37% of e-commerce websites allow for cross-border purchases and a large share of consumers have faced certain obstacles when trying to buy online from traders based in other MS. Geo-discrimination in the DSM is more of a **concern for consumers based in smaller and more peripheral MS** as they have less choice in their own countries and the narrow internal demand makes such countries less attractive for foreign traders.

In this context, **the EU institutions have recognised the need to create a fully integrated DSM** and both the EC DSM Strategy and the EP DSM Resolution appear to show the right way forward to remove the barriers to the DSM and, more specifically, to ensure better access of consumers and business to online goods and services across the EU. Yet, both the EC and the EP acknowledge and accept that some forms of consumer geo-discrimination are justified on legal grounds in the current EU framework. **Justified geo-blocking may reduce the expected benefits of a well-functioning DSM** and lead to a slippery slope that weakens the impact of any initiative in the field of the DSM, in the same way as ‘objective justifications’ have limited the effectiveness of non-discrimination provisions included in the Services Directive. In this respect, **the fragmentation of the DSM for copyrighted content**, which is one of the biggest e-commerce sectors in the EU and the most geo-discriminated, offers an interesting example of missed opportunities on the grounds of justified geo-blocking. Territorial licensing agreements and related geo-blocking measures limit both the cross-border accessibility of digital creative works and cross-border portability, thus affecting a substantial share of the EU population and, most likely, further preventing the creation of a European culture.

Recently, the EC has presented **various legislative proposals to implement the EC DSM Strategy** and complete the DSM. The initiatives that are expected to have the most immediate impact on combatting consumer discrimination in the DSM are without doubt the Geo-blocking Proposal and the Portability Proposal. In addition, an important contribution to cross-border e-commerce of goods and the EU territorial and social cohesion may stem from the Parcel Delivery Proposal. In parallel, DG COMP is carrying out two major antitrust investigations, one into the distribution of audiovisual content and the other into the EU e-commerce sector, which may have a crucial impact on the cross-border circulation of goods and services. All these initiatives are important steps towards a DSM for Europe; yet, **their actual potential seems to be more limited than expected, certainly too limited to achieve a fully integrated DSM**. More specifically, the current version of the **Geo-blocking Proposal**, which focuses only on unjustified geo-blocking, has a very limited scope of application, makes ample room for geo-discrimination e.g. on the basis of language or by large companies delivering goods in several MS, and leaves geo-blocking issues in the online distribution of digital copyrighted works entirely untouched. In this respect, the DSM for copyrighted content is the ‘elephant in the room’ and the **Portability Proposal**, which still requires clarifications in order to be effective, represents

a very small step forward, generating benefits for no more than one million Europeans per day (0.2% of the EU population). Whereas it is too early to provide an assessment of the antitrust inquiry into the e-commerce sector, it appears that the **Sky UK case** will confirm (at least for the moment) that territorial fragmentation allowed by the EU copyright framework prevails over the market integration objective of EU competition law. Even the **Parcel Delivery Proposal**, which will certainly increase transparency in the market for cross-border parcel delivery and empower regulatory authorities, may fall short of integrating peripheral and less populated areas and thereby fail to create a level playing field between large companies and SMEs.

Against this background, hopes are pinned:

- On the long-awaited **reform of the EU copyright framework**, which has the full potential to create a DSM for online copyrighted content;
- On EU competition cases and judicial interpretation of existing law provisions, which may find a new balance between EU competition and copyright law and **ban restrictions to passive sales** in the online market for creative content;
- On the first review of the Geo-blocking proposal, which has to consider the **extension of the non-discrimination provisions to online services providing copyrighted works** other than audiovisual; and, most importantly,
- On the work of the Council and EP on current and future legislative files, which (subject to *ad hoc* impact assessments) can still make a difference by e.g. i) **extending the scope of application of the Geo-blocking Proposal**, ii) enlarging the share of beneficiaries of the Portability proposal (in the absence of a fully fledged reform of copyright), iii) ensuring the application of uniform tariffs for high quality cross-border parcel delivery services across the EU, and iv) ascertaining that the envisaged copyright proposal will **remove barriers to cross-border accessibility** (and portability) **of digital copyrighted content**.

In the meantime, the piecemeal and cautious approach to the completion of the EU DSM so far followed by the EC appears to lack ambition. As stated, the current version of the presented proposals can capture only a very limited share of the potential gains for consumers and businesses from the EU DSM. In this respect, **the constant focus on 'harvesting low-hanging fruits' and 'kicking down the road' more challenging interventions has two main side-effects**. First, the so-called 'cost of slow Europe',¹³⁴ i.e. the cumulative 'cost of non-Europe' accrued while waiting to create a fully integrated EU DSM, will inflate year on year. Opportunities foregone due to the non-functioning of the DSM are worth more than €415 billion per year. **The 'cost of slow Europe' is particularly worrisome in a period of slow economic growth** and if one considers that "a vibrant digital single market" was already an objective of the (almost forgotten) Digital Agenda for Europe¹³⁵ presented in 2010. Second, **initiatives that are postponed for being too complex or not politically feasible might never come to fruition**, especially in a context where citizens and, in turn, MS are progressively losing trust in the EU.

Now more than ever **Europe needs a DSM where consumers can access and purchase goods and services across borders via the internet**, irrespective of their nationality or place of residence, and appreciate the real benefits of a marketplace that knows no borders.

¹³⁴ "Reducing Costs and Barriers for Businesses in the Single Market" op.cit.

¹³⁵ European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Digital Agenda for Europe", COM(2010) 245/2 final.

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