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Territorial Restrictions in EU Competition Law and the Geo-blocking Regulation

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ABSTRACT

Territorial restrictions are at the centre of European discussions, particularly in an era where the European Union prioritises enhancing its competitiveness in an increasingly globalised world. Such restrictions remain a thorn in the side of the Single Market, creating artificial barriers that severely fragment its functioning.

The EU competition law framework addresses territorial restrictions in business-to-business (B2B) relations, primarily through Article 101 of the Treaty on the Functioning of the European Union and, to a lesser extent, Article 102. However, these provisions only cover territorial restrictions arising from agreements or conduct by dominant undertakings, leaving unilateral practices by non-dominant undertakings largely beyond their scope.

In 2018, the Geo-blocking Regulation was introduced to address discrimination based on consumers' nationality, place of residence, or establishment in online business-to-consumer (B2C) transactions. This Regulation specifically targets practices such as the denial of access to online interfaces and the refusal to sell goods or services across borders without objective justification.

While the Geo-blocking Regulation represents a significant step forward in combating territorial restrictions, certain barriers persist, particularly within the B2B context and in relation to copyright-protected content.

The objective of this dissertation is to analyse how territorial restrictions are addressed, primarily through EU competition law and the Geo-blocking Regulation. It will further evaluate the interaction between these legal instruments and consider whether reforms or supplementary legislative measures are necessary to effectively remove territorial barriers and safeguard the proper functioning of the Internal Market.

To answer these questions, a detailed analysis of the legislative framework has been conducted, alongside a review of the case law of the Court of Justice of the European Union and relevant decisions of the European Commission

Keywords: territorial restrictions, EU competition law, Geo-blocking Regulation, supply chain, copyright.

ZUSAMMENFASSUNG

Territoriale Beschränkungen stehen im Zentrum europäischer Diskussionen, insbesondere in einer Zeit, in der die Europäische Union bestrebt ist, ihre Wettbewerbsfähigkeit in einer zunehmend globalisierten Welt zu stärken. Solche Beschränkungen stellen nach wie vor ein Hindernis für den Binnenmarkt dar, da sie künstliche Barrieren schaffen, die dessen Funktionsweise erheblich fragmentieren.

Das Wettbewerbsrecht der EU befasst sich mit territorialen Beschränkungen in Geschäftsbeziehungen zwischen Unternehmen (B2B), vor allem durch Artikel 101 des Vertrags über die Arbeitsweise der Europäischen Union und in geringerem Maße durch Artikel 102. Diese Bestimmungen decken jedoch lediglich territoriale Beschränkungen ab, die sich aus Vereinbarungen oder dem Verhalten marktbeherrschender Unternehmen ergeben, wodurch einseitige Praktiken nicht marktbeherrschender Unternehmen weitgehend außerhalb ihres Anwendungsbereichs bleiben.

Im Jahr 2018 wurde die Geoblocking-Verordnung eingeführt, um Diskriminierungen aufgrund der Staatsangehörigkeit, des Wohnsitzes oder des Niederlassungsorts von Verbrauchern im Bereich des Online-Handels zwischen Unternehmen und Verbrauchern (B2C) entgegenzuwirken. Diese Verordnung richtet sich gezielt gegen Praktiken wie die Verweigerung des Zugangs zu Online-Schnittstellen und die Weigerung, Waren oder Dienstleistungen grenzüberschreitend ohne objektive Rechtfertigung anzubieten.

Auch wenn die Geoblocking-Verordnung einen bedeutenden Fortschritt im Kampf gegen territoriale Beschränkungen darstellt, bestehen bestimmte Hindernisse weiterhin fort – insbesondere im B2B-Kontext und im Hinblick auf urheberrechtlich geschützte Inhalte.

Ziel dieser Dissertation ist es, zu analysieren, wie territoriale Beschränkungen insbesondere durch das Wettbewerbsrecht der EU und die Geoblocking-Verordnung geregelt werden. Darüber hinaus wird das Zusammenspiel dieser Rechtsinstrumente bewertet und geprüft, ob Reformen oder ergänzende gesetzgeberische Maßnahmen erforderlich sind, um territoriale Barrieren wirksam zu beseitigen und das ordnungsgemäße Funktionieren des Binnenmarkts zu gewährleisten.

Zur Beantwortung dieser Fragen wurde eine eingehende Analyse des Rechtsrahmens durchgeführt, begleitet von einer Überprüfung der Rechtsprechung des Gerichtshofs der Europäischen Union sowie relevanter Entscheidungen der Europäischen Kommission.

Schlüsselwörter: territoriale Beschränkungen, EU-Wettbewerbsrecht, Geoblocking-Verordnung, Lieferkette, Urheberrecht.

LIST OF ABBREVIATIONS

B2B	Business-to-business.
B2C	Business-to-consumer.
CJEU	Court of Justice of the European Union
ECA	European Court of Auditors
EEA	European Economic Area
EU	European Union
GEOBR	Geo-blocking Regulation
GSK	GlaxoSmithKline.
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VBER	Vertical Block Exemption Regulation.
VGL	Guidelines on Vertical Restraints

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1. INTRODUCTION

Territorial restrictions, also referred to as territorial constraints, are limitations imposed by businesses and/or private operators on distributors and/or consumers, with the purpose of controlling where products or services can be bought and sold, often hindering cross-border trade. These restrictions are frequently implemented in supply chain agreements and in contexts involving copyright-protected content.

In the supply chain, territorial restrictions occur when the distribution network imposes limitations that prevent retailers and wholesalers from sourcing goods from other Member States, outside their country of establishment. These restrictions may also obstruct their ability to distribute or resell goods across borders within the European Union (hereinafter referred to as the "EU"). In most cases, affected retailers or wholesalers are instructed to procure products exclusively from a designated national subsidiary[1].

In the field of copyright, territorial restrictions are embedded in the current EU legal framework, which provides that copyright is granted by national law and is geographically limited to the jurisdiction of the granting state. Despite significant harmonisation efforts at EU level, and due to the specificities of the sector, key aspects of copyright remain defined and enforced differently at national level[2].

1.1. IMPACTS OF TERRITORIAL RESTRICTIONS

On the one hand, territorial restrictions are generally viewed negatively within the EU due to their detrimental effects. Firstly, they limit consumer choice, leading to higher prices compared to neighbouring countries. The European Commission (hereinafter referred to as the "Commission") has estimated that the cost of territorial restrictions in the supply chain for consumers amounts to €14 billion[3]. Secondly, these barriers obstruct distributors from sourcing products in one Member State and reselling them in others

[1] European Commission, *Study on Territorial Supply Constraints in the EU Retail Sector* (Final Report, 2020), p. 19-20.
[2] Giuseppe Mazziotti, "Is Geo-Blocking a Real Cause for Concern in Europe?" (SSRN Electronic Journal 2015) < http://dx.doi.org/10.2139/ssrn.2728675> accessed 13 April 2025, p. 3.
[3] European Commission (n 1), p. 87.

within the EU[4]. Thirdly, they restrict competition and disrupt the functioning of the EU's internal market.

On the other hand, territorial restrictions may also yield positive outcomes. When appropriately structured, they can enhance consumer welfare by improving services, fostering innovation, and offering customised products. Furthermore, they may strengthen inter-brand competition through increased sales efforts within exclusive territories. Additionally, they can also facilitate market entry for new firms, since successful product launches often rely more heavily on robust promotional strategies than on price competition[5], thus supporting product differentiation and consumer trust.

1.2. LEGAL FRAMEWORK IN THE EU

The principal legal instrument addressing territorial restrictions in the EU is Article 101 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU")[6], which prohibits agreements between undertakings that restrict competition within the internal market. This provision is further elaborated by the Vertical Block Exemption Regulation (hereinafter referred to as the "VBER")[7] and the accompanying Guidelines on Vertical Restraints (hereinafter referred to as the "VGL")[8], which provide specific rules regarding the legality of territorial restrictions in vertical agreements.

In addition, the Geo-blocking Regulation (hereinafter referred to as "GeoBR")[9] addresses unjustified geographic discrimination in online sales, guaranteeing that consumers can access products and services across the internal market, regardless of nationality, place of residence, or establishment.

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[4] European Commission, *A Transition Pathway for a More Resilient, Digital and Green Retail Ecosystem* (First Edition 2024), p. 10.
[5] Alberto Heimler and Kirtikumar Mehta, "Absolute Territorial Protection and Competition in the EU: An Economic Approach" (SSRN Electronic Journal 2014) <https://ssrn.com/abstract=2425185> accessed 6 March 2025, p. 5.
[6] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).
[7] Commission Regulation (EU) 2022/720 of 10 May 2022 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 [2022] OJ L134/4 (VBER).
[8] Commission Guidelines on Vertical Restraints (2022/C 248/01) [2022] OJ C 248/1 (VGL).
[9] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified Geo-blocking and other forms of discrimination based on customer's nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L 60 I/1 (GeoBR).

1.3. CURRENT DEVELOPMENTS AND POLICY DEBATE

Given the current prominence of territorial restrictions within the EU, the Commission's Single Market Enforcement Taskforce has recently launched a fact-finding initiative to collect insights into stakeholders' experiences with such restrictions in the supply chain and to understand how Member States are addressing them[10]. In its findings, 17 Member States reported the existence of territorial limitations.[11].

Moreover, Enrico Letta, in his noteworthy report on the Single Market[12], recommended that the EU enhance the capacity of national authorities to address territorial restrictions in supply chains by introducing formal procedures for managing cross-border cases. On top of that, with regard to the GeoBR, he urged the EU to take swift action to eliminate the remaining barriers that prevent consumers from purchasing and accessing services remotely from other Member State[13].

In like manner, on 24th May 2024, the Competitiveness Council of the Council of the EU held a discussion on territorial restrictions in the supply chain, following concerns raised by 7 Member States. These restrictions were identified as contributing to the fragmentation of the single market. In response, the Council called on the Commission to prohibit unfair business-to-business (hereinafter referred to as "B2B") practices through new or existing regulatory tools[14].

1.4. RESEARCH QUESTIONS AND STRUCTURE OF THE THESIS

In the light of the growing importance of territorial restrictions and their implications for EU competition policy, the European consumers, EU supply chain and copyright works, this dissertation seeks to answer the following core questions:

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[10] European Commission, *Single Market Enforcement Taskforce* (Report 2023-2024), p. 17.
[11] European Commission *Territorial Supply Constraints. Results of the fact-finding exercise in SMET* (Internal Document, 2025), slide 4.
[12] Enrico Letta, "Much More than a Market, Speed, Security and Solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU citizens" (2024) <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> accessed 6 March 2025.
[13] Ibid, pp. 113-115.
[14] Council of the European Union, *Information by the delegations on the need to eliminate territorial supply constraints on the Single Market* (COMPET 536 9757/24, 2024), Annex.

- What is the role of EU competition law and the GeoBR in addressing territorial restrictions?
- How do these regulatory frameworks interact with each other?
- Is there a need for further legislative intervention or amendments to the current legal system to effectively combat territorial constraints?

This dissertation is divided into five chapters:

Chapter Two examines territorial restrictions under EU competition law, with particular focus on Article 101 TFEU, the VBER and the VGL. This analysis is supported by relevant case law from the Court of Justice of the European Union (hereinafter referred to as the "CJEU" or the "Court") and relevant decisions by the Commission.

Chapter Three analyses the GeoBR and its approach to addressing specific territorial restrictions in online sales, particularly those based on consumer's nationality, place of residence, or place of establishment within the internal market.

Chapter Four delves into territorial restrictions in the context of copyright, exploring how the particularities of this sector interact with both EU competition law and the GeoBR.

Last but not least, Chapter Five assesses the interplay between the existing legal instruments and considers whether further regulatory intervention at the EU level is necessary to effectively address the challenges posed by territorial constraints.

2. TERRITORIAL RESTRICTIONS IN EU COMPETITION LAW

2.1. ANALYSIS OF TERRITORIAL RESTRICTIONS UNDER ARTICLE 101 TFEU: A CASE LAW APPROACH

Article 101 TFEU aims to prevent anti-competitive agreements to safeguard the integrity of the European Single Market. This provision is structured into three paragraphs, each covering a distinct aspect of competition regulation.

2.1.1. <u>Article 101(1) TFEU</u>

Article 101(1) TFEU provides that:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

Thus, Article 101(1) TFEU comprises three cumulative elements that must be satisfied for the prohibition to apply. It also enumerates a non-exhaustive list of anti-competitive behaviours deemed incompatible with the internal market.

Firstly, the term "agreement" under Article 101 TFEU is interpreted broadly. It is not limited to written contracts, but also includes verbal agreements or implicit "alignment of wills"[15]. In the absence of an express agreement, the Commission must demonstrate that one party's unilateral policy was met with the other party's acquiescence, indicating a *de facto* understanding[16].

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[15] In Case C-74/04 P *Commission of the European Communities v Volkswagen AG* [2006] ECLI:EU:C:2006:460, para 39, the CJEU determined: *"The will of the parties may result from both the clauses of the dealership agreement in question and from the conduct of the parties, and in particular from the possibility of there being tacit acquiescence by the dealers in a call from the manufacturer"*.

[16] Richard Blewett and Maarten Kenis, "EU Vertical Agreements" (2023) Clifford Chance, Practical Law <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/06/eu_vertical_agreements_June_2023.pdf> accessed 13 March 2025, p. 4.

According to text of Article 101(1) TFEU, territorial constraints are generally prohibited under EU law and are considered among the most serious infringements of EU competition rules. The rationale for this strict stance was articulated by the CJEU in ***Consten v Grundig***[17], a landmark case in which both the object and effect of territorial restriction were examined in the context of the Single Market.

Grundig, a German manufacturer of electronic products, granted Consten, a French distributor, exclusive rights to distribute its products in France. The objective was to protect Consten's territory by preventing imports of Grundig products from other markets into France. The effect of this arrangement was the establishment of territorial exclusivity, which isolated the French market and prevented consumers and businesses from accessing Grundig products sold elsewhere in the EU.

The CJEU held that the agreement infringed Article 101(1) TFEU as it is sought to reinstate national barriers to intra-EU trade, undermining the fundamental principles of the Single Market[18]. It constituted a restriction of competition by impeding market access entry opportunities for other traders and suppressing price competition[19].

Nevertheless, certain exceptions to the general prohibition established in *Consten and Grundig* are recognised. An agreement that falls within the scope of Article 101(1) TFEU may not constitute a violation in the following circumstances:

A) The Agreement Does Not Have a Significant Effect on Competition or on Trade Between Member States.

If a practice does not appreciably affect competition, it falls outside the scope of the prohibition under Article 101 TFEU[20]. To determine whether an agreement affects "trade between Member States", it is necessary to apply the "effect on trade criterion", which

[17] Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41.
[18] Ibid, pp. 339-340.
[19] Ibid, pp. 342-343.
[20] Pablo Ibañez, "Territorial Restrictions in EU Competition Law: From Consten-Grundig to Ping and Pay-TV" in Denis Waelbroeck and Adina Claici (eds), *Vertical Restraints in the Digital Economy* (Wolters Kluwer Law International, 2021), p. 82.

restricts the application of Article 101 TFEU to agreements capable of producing at least minimal cross-border impact within the EU[21]. Three key elements are to be considered:

- **<u>The concept of "trade between Member States"</u>:** This term extends beyond traditional cross-border transactions involving goods and services and encompasses a broad spectrum of cross-border economic activities, including the right of establishment[22].

Besides, the requirement that trade be affected "between Member States" implies that the conduct must influence cross-border economic activity involving at least two Member States[23]. This condition may also be fulfilled even when the relevant market is confined to a single Member State or a specific region, provided that the agreement is capable of impacting trade across national borders within the EU[24].

- **<u>The notion of "may affect"</u>:** This means that, based on objective legal or factual considerations, it must be reasonably foreseeable that the agreement or practice could have a direct or indirect, actual, or potential impact on trade flows between Member States[25].

- **<u>The concept of appreciability</u>:** Only agreements and practices with significant market impact are restricted under Article 101 TFEU. If the effect on the market is negligible, for instance, due to the limited market share of the parties concerned, the agreement may fall outside the Article's scope[26].

The assessment of appreciability is conducted on a case-by-case basis[27]. Nevertheless, certain general thresholds provide guidance in determining whether an agreement is likely to have a significant impact on trade between Member States. In particular, agreements are typically not considered appreciable where the parties market share within the EU is

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[21] European Commission Notice*, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07), para 13.
[22] Ibid, para 19.
[23] Ibid, para 21.
[24] Ibid, para 22.
[25] Ibid, para 23.
[26] Ibid, para 44.
[27] Ibid, para 45.

below 5%, or where their annual turnover remains below certain limits[28]. For example, with respect to vertical agreements, the supplier's annual EU turnover in the relevant product market should not exceed EUR 40 million[29].

In ***Völk v Vervaecke***[30], Völk, a German manufacturer of washing machines with a minor market share, granted Vervaecke exclusive rights to distribute its products in Belgium and Luxembourg, including full protection against parallel imports.

The CJEU concluded that the prohibition of Article 101(1) TFEU only applies if the agreement has the object or effect of preventing, restricting, or distorting competition within the internal market. On that basis, an exclusive distribution agreement that provides absolute territorial protection may be exempt from the scope of Article 101(1) TFEU where parties hold a minor market share in the protected area[31].

B) The Agreement Has Both Anti-Competitive and Pro-Competitive Elements.

EU courts may rule that an agreement does not infringe Article 101(1) TFEU if it is established that its pro-competitive effects outweigh its anti-competitive elements[32].

This principle that territorial restrictions may not be prohibited if they are objectively necessary to achieve a legitimate, pro-competitive objective was established in ***Société Technique Minière v Maschinenbau Ulm GmbH***[33]. This case concerns a contract under which Société Technique Minière was granted the exclusive right to sell heavy machinery in France.

The CJEU held that it is questionable whether an agreement interferes with competition where it appears genuinely necessary to enable a company to access a new market[34]. Had the contract in question been deemed to infringe Article 101(1) TFEU, the machinery might not have been made available for sale in France. Hence, the pro-competitive effects

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[28] Ibid, para 46.
[29] Richard Blewett and Maarten Kenis (n 16), p. 8.
[30] Case 5-69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECLI:EU:C:1969:35.
[31] Ibid, p. 302.
[32] Gleen Robinson, *Optimize European Union Law* (2nd ed., Routledge 2016), p. 218.
[33] Case 56-65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECLI:EU:C:1966:38.
[34] Ibid, p. 249.

namely, the development of a new market, were considered to outweigh the anti-competitive consequences[35].

C) The Agreement Has a "Precise Purpose".

The determination of an infringement under Article 101(1) TFEU also depends on the precise purpose of the conduct. Where the conduct has a plausible pro-competitive justification or produces ambiguous effects on competition, it is not automatically considered restrictive. Nonetheless, if the sole purpose of the conduct is to restrict competition, it will be prohibited regardless of its actual market impact[36].

This was illustrated in ***Delimitis v Henninger***[37], a case indirectly related to territorial restrictions through its examination of exclusive purchasing agreements. The dispute involved Stergios Delimitis, a former publican, and Henninger, a German brewery. Both signed a contract which required Delimitis to purchase beer exclusively from Henninger, and to meet a minimum purchase obligation. Delimitis challenged the agreement as a violation of EU competition law.

The CJEU applied the "precise purpose" criterion in order to assess whether such exclusive purchasing agreements constituted legitimate commercial arrangements or, contrarily, restricted competition.

The Court found that such agreements should not be regarded as inherently anticompetitive unless two conditions are met: First, the agreement must create significant obstacles for other competitors wishing to enter or expand within the national beer distribution market. Second, the agreement in question must play a substantial role in the market foreclosure resulting from similar agreements[38].

As these conditions were not satisfied, the agreement was not considered to have a precise purpose of restricting competition.

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[35] Gleen Robinson (n 32), p. 219.
[36] Pablo Ibañez (n 20), pp. 78-79.
[37] Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECLI:EU:C:1991:91.
[38] Ibid, para. 27.

2.1.2. <u>Article 101(2) TFEU</u>

Article 101(2) TFEU states that agreements or decisions prohibited under Article 101(1) TFEU shall be automatically void.

In ***Société Technique Minière v Maschinenbau Ulm GmbH***, the CJEU clarified that the nullity provision must be interpreted strictly within the framework of EU law. The automatic nullity applies solely to the clauses of the agreement that infringe the Treaty. If those clauses cannot be separated from the rest of the agreement, the entire agreement becomes void[39].

2.1.3. <u>Article 101(3) TFEU</u>

Article 101(3) TFEU establishes conditions under which the prohibition in Article 101(1) does not apply. It provides that:

"The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

Territorial restrictions may, under certain conditions, qualify for an exemption under Article 101(3) TFEU[40]. In ***GlaxoSmithKline v Commission***[41], both the General Court and the CJEU acknowledged that arguments in favour of territorial restrictions deserve careful

[39] *Société Technique Minière* (n 33), p. 250.
[40] Pablo Ibañez (n 20), pp. 99-100.
[41] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECLI:EU:C:2009:610.

analysis and should not be summarily dismissed[42], thereby leaving open the possibility for the application of Article 101(3) TFEU[43].

In this case, the dispute arose GlaxoSmithKline (hereinafter referred to as "GSK"), one of the world's leading pharmaceutical companies, introduced a new pricing policy in Spain. This policy offered lower prices to wholesalers who sold medicines within the Spanish market and higher prices to those who exported the products to other EU Member States, with the sole objective of discouraging parallel trade.

GSK sought an exemption under Article 101(3) TFEU. The CJEU clarified the requirements for the successful application of this exemption: Firstly, the burden of proof rests on the undertaking requesting the exemption[44]. Secondly, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress[45]. Thirdly, there must be a direct and demonstrable link between the restriction of competition and innovation related investment, simply earning more profits does not automatically prove that innovation will be enhanced [46].

2.2. TERRITORIAL RESTRICTIONS IN THE VBER AND THE VGL

On 10th May 2022, the Commission adopted and published the revised VBER accompanied by the VGL, thereby amending the previous legislation in this area[47].

As previously mentioned, territorial restrictions are generally prohibited. However, the VBER outlines the conditions under which Article 101 TFEU applies to vertical agreements[48]. If such agreements meet the criteria set out in the VBER, they automatically benefit from an exemption from the prohibitions laid down in Article

[42] Ibid, para 81.
[43] Pablo Ibañez (n 20), p. 101.
[44] *GlaxoSmithKline* (n 41), paras. 82-83.
[45] Ibid, paras. 92 and 102.
[46] Ibid, paras. 112-121.
[47] Previous legislation: Commission Regulation (EC) 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 [2010] OJ L 102/1.
[48] VBER (n 7), Art. 1(1)(a). *"Vertical agreement means an agreement or concerted practice between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"*.

101(1) TFEU. Meanwhile, the VGL serve as a detailed interpretative guide, assisting stakeholders in the application of the VBER and offering methodologies for the assessment of vertical agreements that do not meet the criteria for the exemption.

Article 4 VBER identified "hardcore restrictions", which are considered severe constraints on competition and are presumed to have a negative impact on consumers. As a result, any agreement containing such restrictions falls outside the protection afforded by the VBER.

Hardcore restrictions may stem from direct obligations, for instance, a requirement not to sell to specific territories or customer groups, or an obligation to refer orders from such customers to other distributors. They may also arise indirectly, through supplier actions intended to discourage the buyer from selling to those customers, such as[49]:

- Withholding incentives or compensating the buyer to deter sales to specific customers.
- Limiting supply volumes.
- Requiring the buyer to seek prior approval from the supplier before selling to certain customers.
- Threatening to terminate or not renew the agreement if the buyer sells to restricted customers.
- Imposing a higher price on the distributor for products sold to such customers.
- Prohibiting the use of additional languages on packaging or promotional materials.
- Offering another product, or compensation, in exchange for the buyer ceasing sales to specific customers.
- Requiring the buyer to transfer profits obtained from those customers to the supplier.
- Excluding from the supplier-funded Union-wide guarantee service those products resold outside the buyer's designated territory or sold within that territory by unauthorised buyers.

[49] VGL (n 8), para 204.

An agreement containing hardcore restrictions can only avoid the application of Article 101(1) TFEU if it qualifies for an individual exemption under Article 101(3) TFEU[50]. To obtain such an exemption, the undertaking must demonstrate that the restriction produces pro-competitive effects, and that the efficiencies are likely to result from including hardcore restrictions in the agreement[51].

Furthermore, Article 4 VBER provides a comprehensive framework defining the permissible and prohibited territorial and customer restrictions across exclusive, selective, and free distribution systems, as well as in relation to online sale. Restrictions may only be included in vertical agreement if the market shares of the parties involved do not exceed 30%, a threshold commonly referred to as the "safe harbour"[52].

2.2.1. <u>Exclusive Distribution System</u>

An "exclusive distribution system" is defined as:

"A system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group"[53].

Article 4(b) VBER introduces the concept of "shared exclusivity", allowing a supplier to appoint up to five distributors per exclusive territory or customer group. It also permits the supplier to restrict active sales into that territory or group by distributors who are not assigned to it, or who operate outside its designated boundaries[54].

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[50] Benedikt Rohrßen, *VBER 2022: EU Competition Law for Vertical Agreements: Digital, Dual, Exclusive and Selective Distribution Plus Franchising* (Springer 2023), p. 88.
[51] VGL (n 8), para 181.
[52] VBER (n 7), Art. 3(1).
[53] Ibid, Art. 1(1)(h).
[54] Van Bael & Bellis, "The European Commission adopts the new Vertical Block Exemption Regulation (VBER) alongside new Guidelines on Vertical Restraints (VGL)" (2022) <https://www.vbb.com/media/Insights_News/20220620_EC_adopts_new_VBER_alongside_new_VGL.pdf> accessed on 25 February 2025, p. 10.

The supplier may require its distributors to pass on restrictions concerning active sales[55] into exclusive territories or customer groups to their immediate customers[56]. However, it cannot oblige those customers to pass the restrictions further down the distribution chain[57]. Thus, restrictions on active sales for exclusive territories can only be imposed one level down the distribution chain[58]. Notably, these restrictions do not apply neither to passive sales[59] nor to online sales.

Additional exceptions include restrictions of the exclusive distributor's place of establishment[60], as well as limitations on both active and passive sales to end users when the exclusive distributor operates at the wholesale level[61]. Furthermore, it is permissible to restrict the exclusive distributor from selling components, whether actively or passively, to customers who use those components to manufacture goods that compete with the supplier's own products[62].

2.2.2. Selective Distribution System

A "Selective Distribution System" is defined as:

"*A system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system*"[63].

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[55] VBER (n 7), Art. 1(1)(l). "*Active sales means actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established*".
[56] Silvia Bortolotti, "The new Block Exemption Regulation on Vertical Restraints (Reg. 720/2022)" [2023] Internationales Handelsrecht, Vol. 23 (1), para. 23.
[57] VGL (n 8), para 220.
[58] Benedikt Rohrßen (n 50), p. 104.
[59] VBER (n 7), Art. 1(1)(m). *"Passive sales mean sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender"*.
[60] Ibid, Art. 4(b)(iii).
[61] Ibid, Art. 4(b)(iv).
[62] Ibid, Art. 4(b)(v).
[63] Ibid, Art. 1(1)(g).

Both selective and exclusive distribution systems serve to limit the number of authorised distributors and the scope of resale. Yet, they differ in terms of the protection they offer: exclusive distribution protects the distributor from active sales into its allocated territory by others, while selective distribution prohibits both active and passive sales by unauthorised distributors within the designated territory[64].

Focusing on selective distribution, its definition encompasses both quantitative and qualitative selection. The former involves limiting the number of distributors, whereas the latter refers to the imposition of certain conditions, such as sustainability objectives, that not all the distributors may be able to meet[65].

In the context of selective distribution, the supplier is allowed to impose both active and passive sales restrictions throughout the entire distribution chain, thereby preserving the closed nature of the system[66]. Additionally, the supplier may also apply different selection criteria for online and offline sales channels[67].

Selective distribution systems fall outside the scope of Article 101(1) TFEU when the three conditions established in the ***Metro***[68] case are fulfilled. This is because it is presumed that any reduction in intra-brand competition is offset by increased inter-brand competition based on quality[69].

These conditions are as follows: First, the nature of the goods or services must necessitate such a system to preserve their quality and ensure their proper use, this is particularly relevant for high-tech, premium-quality, or luxury products, where the value is linked not only to physical attributed but also to brand prestige. A selective distribution system may therefore be essential to maintaining a luxury brand image. Second, the selection of distributors must be based on objective, qualitative, and non-discriminatory criteria. Last, the conditions imposed must not exceed what is necessary to achieve the intended objective[70].

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[64] VGL (n 8), para 145.
[65] Ibid, para 144.
[66] Ibid, para 223.
[67] Benedikt Rohrßen (n 50), p. 110.
[68] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1977] ECLI:EU:C:1977:167.
[69] VGL (n 8), para 148.
[70] Ibid, para 149.

Furthermore, Article 4(c)(i) VBER permits suppliers to impose the following restrictions: (a) restricting active sales by members of a selective distribution system and their direct customers into territories or customer group reserved for the supplier or exclusively allocated to up to five distributors; (b) preventing buyers and their customers from making active or passive sales to unauthorised distributors territories where the supplier operates a selective distribution system; (c) limiting the buyer's place of establishment; (d) restricting sales by wholesalers to end users; and, (e) prohibiting the sale components for incorporation to customers producing goods identical to those of the supplier.

Nevertheless, under Article 4(c)(ii) and (iii) VBER, restrictions on cross-supplies between authorised members of a selective distribution system, whether at the same or different levels of trade, as well as restrictions on active or passive sales to end users by retail-level distributors, are regarded as hardcore restrictions and thus fall outside the protection of the regulation.

2.2.3. <u>Free Distribution System</u>

Pursuant to Article 4(d) VBER a "Free Distribution System" is define as one that is: *"neither an exclusive distribution system nor a selective distribution system"*. As a general rule, territorial restrictions are prohibited in such systems. Nonetheless, in a manner consistent with other distributions models, the VBER permits certain exceptions. These includes the ability to restrict the buyer's place of establishment, the possibility of preventing wholesalers from engaging in active or passive sales to end users, and the right to limit the buyer's ability to sell components intended for use as spare parts[71].

Additionally, suppliers may restrict a free distributor from actively or passively selling to unauthorised distributors, thus preventing resale into protected territories[72]. Nonetheless, enforcing such restrictions can be difficult in practice, particularly when dealing with multi-brand retailers who may be unwilling to comply with limitations imposed by smaller suppliers. Enforcement becomes even more challenging in the absence of a written contract[73].

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[71] VBER (n 7), Art. 4(d)(iii), (iv) and (v).
[72] Ibid, Art. 4(d)(ii).
[73] Silvia Bortolotti (n 56), para 25.

Finally, the supplier may also restrict the buyer and its direct customers from making active sales into a territory or customer group that is either reserved for the supplier itself or exclusively allocated to a maximum of five distributors[74].

2.2.4. Online Restrictions

Pursuant to Article 4(e) of the VBER, any restriction that hinders "the effective use of the internet" by the buyer or its customers for the sale of the contract goods or services constitutes a hardcore territorial restriction. This is because it effectively limits the territories in which, or the customers to whom, the contract goods or services can be sold. Such hardcore restrictions apply across exclusive, selective, and free distribution systems.

Prohibited restrictions include both direct bans on online sales and indirect measures intended to discourage or obstruct internet sales to certain territories or customers. Examples include agreements that significantly reduce the total volume of online sales or that prevent end users from purchasing contract goods or services online[75]. The VGL provide a non-exhaustive list of such indirect restraints, including[76]:

- As established in the GeoBR, requiring the buyer to block access to its website or online store for customers in other territories, or redirect them to the manufacturer's or another seller's website, including the restriction on payment transactions.
- Following ***Pierre Fabre***[77] case, obligating the buyer to sell the contract goods or services only through a physical store or with the assistance of specialised personnel.
- Requiring the buyer to obtain the supplier's approval for each individual online sale.
- Prohibiting the buyer from displaying the supplier's trademarks or brand names on their website or online store.
- Banning the buyer from using an entire online advertising channel.

[74] VBER (n 7), Art. 4(d)(i).
[75] VGL (n 8), para 203.
[76] Ibid, para 206.
[77] Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECLI:EU:C:2011:649, para 12.

Nevertheless, Article 4(e) of the VBER sets out two exceptions where online restrictions are permitted: one concerning online sales and, the other related to online advertising.

A) Restrictions on Online Sales

Suppliers may impose certain conditions on online sales without infringing Article 4(e), provided such conditions do not prevent the effective use of the internet for selling. According to the VGL, restrictions on the manner in which goods are sold online are generally allowed if the buyer remains free to operate its own online store and to engage in online advertising[78].

Furthermore, suppliers are also permitted to set quality standards for online sales, such as those relating to design and layout of the online store, or the presentation of the contract goods or services[79].

Additionally, suppliers may require the buyer to operate one or more brick and mortar shops or showrooms as well as the obligation to sell a minimum fixed quantity, (expressed in absolute value or volume, but not as a percentage of total sales) of the contract goods or services through offline channels[80].

Furthermore, in line with the CJEU's ruling in the ***Coty***[81] case, suppliers are allowed to ban the use of online marketplaces. Such restriction may be justified on several grounds, including the protection of brand image, the prevention of counterfeit sales, the assurance of adequate customer services, and the preservation of a direct relationship between the buyer and the customer[82].

Notwithstanding, for a restriction on marketplaces to benefit from exemption, buyers must still be able to utilise other online sales channels. This includes offering goods or services via their own online store, employing search engine optimisation techniques, or using online advertising, including on third-party platforms, to increase visibility[83].

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[78] VGL (n 8), para 208.
[79] Ibid, para 208 (a) and (b).
[80] Ibid, para 208 (d) and (e).
[81] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* [2017] ECLI:EU:C:2017:941.
[82] VGL (n 8), para 334.
[83] Ibid, para 336.

B) Restrictions of Online Advertising

Under Article 4(e)(ii) VBER, certain online advertising restrictions may qualify for exemption if they do not have the objective of preventing the use of an online advertising channel. Minor and permissible restrictions include the supplier setting quality standards for online advertising, limiting the choice of advertising providers, forbidding the use of the supplier's brand name in the domain name of the buyer's online store's[84].

On the contrary, prohibiting the buyer from using an entire online advertising channel, such as search engines or price comparison tools, when the purpose is to limit the buyer's ability to attract customers and expand beyond their physical market, as well as banning the use of the most popular advertising services within a specific channel, constitutes a hardcore restriction[85].

In summary, the greater the number of advertising providers restricted or the larger their market share, the more likely such a restriction is to constitute a hardcore restriction. In extreme cases, where a single provider dominates the market, the line will arguably be crossed when the supplier prohibits the use of that provider[86].

2.3. EUROPEAN COMMISSION CASES: REVIEW

Over the past few years, the Commission has actively addressed territorial restrictions through various decisions, such as ***Guess***[87] and ***Nike***[88], which predate the adoption of the current VBER and VGL. The Guess ruling, in particular, was criticised for being excessively rigid, raising the question of whether the new regulatory framework would have led to a different outcome[89].

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[84] Ibid, para 210.
[85] Ibid, para 206 (g).
[86] Benedikt Rohrßen (n 50), p. 125.
[87] *Guess* (Case AT.40428) Commission Decision C (2018) 8455 final [2018] OJ C 47/5 (Guess).
[88] *Ancillary Sports Merchandise* (Case AT. 40436) Commission Decision C (2019) 2172 final [2019] C 216/7 (Nike).
[89] Silvia Bortolotti (n 56), para 18.

Another important case is that of ***AB Inbev***[90], which specially focused on the abuse of a dominant position in accordance with Article 102 TFEU. This case is particularly significant as it helps clarify the relationship between Article 102 and 101TFEU.

In the more recent ***Mondelez***[91] case, fines were imposed for restricting cross-border trade, highlighting the ongoing enforcement of competition rules within the internal market.

The Commissions' decisions underscore the ongoing importance of the single market principle in the enforcement of competition law, affirming that cross-border restrictions will not be tolerated without valid justification[92].

2.3.1. Guess

On 17th December 2018, the Commission issued the its decision concerning Guess?, Inc., Guess? Europe, B.V. and Guess Europe Sagl ("Guess"), for engaging in anti-competitive practices in breach of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (hereinafter referred to as "EEA Agreement").

Guess is a United States-based company that specialises in designing, marketing, and distributing clothing and accessories for men, women, and children. In Europe, it operates a selective distribution system.

The Commission found that, between 1st January 2014 and 3rd October 2017, Guess engaged in a series of restrictive practices designed to redirect online sales of Guess products to the company's official website and to limit competition among authorised distributors within its selective distribution system. These practices included:

- **Online search advertising restrictions:** Guess prohibited authorised retailers from using Guess brand names and trademarks for online search advertising, particularly,

[90] *AB InBev beer Trade Restrictions* (Case AT. 40134) Commission Decision C (2019) 3465 final (AB InBev).
[91] *Mondelez Trade Restrictions* (Case AT. 40632) Commission Decision C (2024) 3313 final [2024] C Series (Mondelez).
[92] Sophie Lawrance, Edwin Bond, Aimee Brookes, Francion Brooks, Matthew Hunt, and Helena Connors "Servier, Film Copyright Territorial Restrictions, Android, Guess, Nike and Sanrio: A Survey of Developments at the Intersection between Competition Law and IP Law in the Past Year" [2020] Journal of European Competition Law & Practice, Vol. 11 (3-4), p. 222.

through Google AdWords. This restriction diminished the "findability" of authorised online retailers, conferring a competitive advantage on Guess's own e-commerce platform[93].

- **Online sales restrictions:** Guess required specific authorisation for online sales, which it could grant or withhold at its sole discretion. The objective was to limit the number of independent sellers offering Guess products online[94].

- **Restrictions on cross-selling:** Several provisions in Guess Europe's distribution agreements restricted wholesalers and authorised retailers from promoting or selling products to others within its selective distribution network[95].

- **Restrictions on cross-border sales:** The agreements included clauses prohibiting both advertising and sales outside allocated territories. This was aimed at preventing retailers from selling Guess products to end users beyond their designated geographic areas[96].

- **Resale price maintenance:** Guess monitored pricing and exerted pressure on retailers to ensure alignment with its pricing strategy[97].

In its legal assessment, the Commission concluded that Guess's practices restricted competition by object[98], and also had an appreciable effect on trade between Member States[99], hence, violating Article 101 TFEU and Article 53 EEA. Moreover, the Commission determined that the restrictions did not qualify for an exemption under Article 101(3) TFEU, as they failed to generate efficiency gains or consumer benefits sufficient to justify their application[100].

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[93] Guess (n 87), paras 40-52.
[94] Ibid, paras 53-63.
[95] Ibid, paras 64-78.
[96] Ibid, paras 79-83.
[97] Ibid, paras 84-88.
[98] Ibid, para 148.
[99] Ibid, para 145.
[100] Ibid, paras 163-164.

Ultimately, the Commission imposed a fine of 39.821.000€ on Guess after granting a 50% in light of the company's effective cooperation, which went beyond its legal obligation.

2.3.2. <u>Nike</u>

On 25th March 2019, the Commission published a decision addressing Nike and its subsidiaries (hereinafter referred to as "Nike") for infringing Article 101 TFEU and Article 53 EEA Agreement.

The decision focused on Nike's licensing activities for football clubs and federations, covering a variety of licensed merchandise such as mugs, bedsheets, stationery, and toys that bear the branding of football clubs but not the Nike logo.

Nike granted manufacturing and distribution licences for intellectual property rights, acquired directly from the clubs, either directly to distributors (licensees) or indirectly via master licensees, who would then sub-license these rights in exchange for a commission. These licensing agreements were generally non-exclusive, applied to specific territories, and involved royalty payments calculated as a percentage of net sales.

Upon analysing these agreements, the Commission concluded that, between 1st July 2004 and 27th October 2017, Nike engaged in a series of practices aimed at restricting both active and passive cross-border sales of licensed merchandise:

- **<u>Direct measures restricting out-of-territory sales by licensees,</u>** including:
    - Contractual provisions banning active and passive sales outside the assigned territory[101].
    - Restrictions on online sales with contracts often prohibiting licensees from operating websites accessible from outside their designated territory[102].
    - Requirements for licensees to report any sales inquiries from outside their territory to Nike, thereby enabling the company to block such sales[103].

[101] Nike (n 88), paras 45-51.
[102] Ibid, paras 52-53.
[103] Ibid, paras 54-56.

- Financial penalties for unauthorised out-of-territory sales: on the one hand, Nike imposed clawback clauses on all incomes derived from licensees who failed to comply with the restrictions on out-of-territory sales[104]. On the other hand, the company also required licensees to pay double royalties on sales made outside their assigned territories[105].

- **Indirect measures restricting out-of-territory sales by licensees**, such as:

    - Threats to terminate contracts with licensees engaging in cross-border sales[106].
    - Limiting access to official security labels to authenticate licensed merchandise[107].
    - Conducting audits to monitor and enforce compliance with territorial restrictions[108].

- **Restrictive practices implemented in relation to master licensees:** Master licensees were required to adhere to Nike's territorial limitations and pass them on to sub-licensees. Moreover, to reinforce compliance, Nike included contractual clauses in master licence agreements prohibiting sub-licensees from engaging in out-of-territory sales[109].

- **Obligations to pass on the restrictions to resellers:** On some occasions, Nike included clauses prohibiting licensees from selling products to third parties who intended to make the products available outside the stipulated territory[110].

In its legal findings, the Commission concluded that these restrictions constituted a breach of Article 101(1) TFEU and Article 53(1) EEA Agreement. The infringement was deemed to span the entire EU territory and aimed at limiting cross-border trade of licensed merchandise, in both physical stores and online platforms[111].

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[104] Ibid, para 57.
[105] Ibid, paras 58-59.
[106] Ibid, paras 65-68.
[107] Ibid, paras 69-70.
[108] Ibid, paras 71-72.
[109] Ibid, paras 73-83.
[110] Ibid, paras 84-88.
[111] Ibid, paras 115-116.

Furthermore, the Commission also ruled that Nike's conduct did not meet the conditions for exemption under Article 101(3) TFEU, as there was no evidence that the restrictions were necessary to incentivise retailer investment or prevent free riding. Rather, the practices restricted competition, reduced consumer choice, and contributed to higher prices[112].

As a result, Nike was fined with 12.555.000€, a sum reduced by 40% in recognition of the company's effective and timely cooperation with the investigation.

2.3.3. AB InBev

On 13th May 2019, the Commission issued a decision concerning proceedings under Article 102 TFEU, addressed to Anheuser-Busch InBev NV/SA, and two of its subsidiaries (hereinafter referred to as "AB InBev"). AB InBev is the world's largest beer brewer, with its brands sold in over 100 countries and a workforce of approximately 180.000 employees worldwide.

AB InBev held a dominant position in the Belgian beer market, based on four factors: (a) AB InBev's market share, both in absolute terms and in comparison with its competitors in Belgium; (b) its ability to influence prices; (c) the presence of substantial barriers to entry and expansion within the market; and (d) the limited countervailing buyer power of its off-trade customers[113].

The Commission found that, between 9th February 2009 and 31st October 2016, AB InBev engaged in a single and continuous infringement, which involved the implementation of four abusive practices. By deliberately restricting the import of its beer products into Belgium, AB InBev maintained higher prices and maximise profits in the Belgian market.

- **AB InBev restricted the quantity of products made available to customers in order to prevent exports to other Member States:** Off-trade customers in Belgium and the Netherlands attempted to purchase larger volumes during promotional periods in the Netherlands to benefit from lower prices and import the products into Belgium. AB InBev

[112] Ibid, paras 131-132.
[113] AB InBev (n 90), para 68.

perceived these imports as a threat to its Belgian revenues. In response to complaints from Belgian customers about competitors offering lower prices due to such imports, AB InBev deliberately limited the volumes supplied to a Dutch wholesaler during promotions, restricting supply to volumes required for the Dutch market only[114].

- **AB InBev intentionally altered product packaging and language to prevent beer products sold in the Netherlands from being imported into Belgium:** As AB InBev was unable to further raise prices in the Dutch market, hence, the company introduced different packaging volumes to create a barrier to imports and maintain separate pricing strategies. Specifically, it replaced 50cl cans with 44cl cans in the Netherlands, aware that Belgian consumers preferred the 50cl format, thereby reducing demand for imported 44cl cans[115].

- **AB InBev made its promotional offers to a Dutch retailer conditional on the retailer not extending the same promotions to customers in Belgium:** AB InBev Netherlands offered Albert Heijn a promotion for two Jupiler 33cl cans at a recommended retail price of 99 cents, explicitly on the condition that it be limited to the Dutch market. When Albert Heijn declined to accept this territorial restriction, the promotion was withheld[116].

- **AB InBev refused to supply certain products to a retailer unless the retailer agreed to restrict its imports of lower-priced beer from the Netherlands into Belgium:** AB InBev sought to prevent Albert Heijn from "cherry-picking" by sourcing cheaper products from the Dutch market. It made the sale of Belgium-specific products conditional on the retailer also purchasing other AB InBev products in Belgium that could otherwise have been sourced from the Netherlands at a lower cost[117].

The Commission concluded that AB InBev had abused its dominant position in the Belgian market, thus infringing Article 102 TFEU. While this Article does not explicitly list territorial restrictions as a form of abuse, the Commission noted that the list is not

[114] Ibid, paras 116-129.
[115] Ibid, paras 136-146.
[116] Ibid, paras 169-173.
[117] Ibid, paras 158-168.

exhaustive[118]. Therefore, territorial restrictions, regulated under Article 101 TFEU, including resale limitations or restrictions on the territories into which goods may be resold may fall under the scope of Article 102 TFEU when imposed unilaterally by a dominant undertaking[119].

Accordingly, it was concluded, that Article 101 TFEU applies to agreements, decisions, and concerted practices that may significantly affect trade between Member States, irrespective of the market position of the undertakings involved, whereas Article 102 TFEU applies to unilateral territorial restrictions carry out by dominant operators[120].

As a consequence, AB InBev was fined 200.409.000€, following a 15% reduction granted in recognition of its effective cooperation and its proposal of a remedy aimed at preventing the recurrence of the practice involving changes to its beer packaging.

2.3.4. Mondelez

On 23rd May 2024, the Commission issued a decision pursuant to Articles 101 and 102 TFEU, directed at Mondelez International, Inc., Mondelez Europe GmbH, and Mondelez Middle East & Africa FZE (hereinafter referred to as "Mondelez").

Mondelez is a United States based multinational company specialising in snack foods and beverages. Operating in over 150 countries, it holds a diverse portfolio of chocolate brands including Milka, Côte d'Or, Toblerone, Cadbury, and Suchard. The company also produces a variety of biscuits under well-known brands such as Oreo, Belvita, LU, Prince, Ritz, and Mikado. Prior to 2015, Mondelez was also active in the coffee sector, owning brands such as HAG, Jacobs, and Velours Noir.

Following an investigation, the Commission found that, between 18th December 2006 and 7th March 2020, Mondelez implemented a range of anti-competitive practices that restricted parallel trade and amounted to abuse of a dominant position:

[118] Ibid, para 91.
[119] Ibid, para 89.
[120] Ibid, para 88.

- **Agreements and concerted practices restricting parallel trade in Mondelez products**, including[121]:

  - Prohibitions on exclusive distributors and traders (also known as “brokers”) from making passive sales outside their designated territories without prior approval from Mondelez.
  - Restrictions on the territories or customers to whom certain brokers could resell Mondelez products. In at least one case, Mondelez and a customer agreed that products intended for export would be sold at higher prices than those sold domestically.

- **Unilateral market- partitioning conduct**, including:

  - In some cases, Mondelez actively prevented the resale of products across borders in order to maintain higher prices in specific national markets such as Austria, Belgium, Bulgaria, and Romania.
  - Mondelez withdrew certain Côte d’Or chocolate products from the Dutch market to prevent a retailer from reselling them in Belgium, where consumer prices were higher[122].

In its legal assessment, the Commission concluded that Mondelez violated Article 101(1) TFEU by participating in 22 anti-competitive agreements and concerted practices that aimed re-establish national barriers within the internal market[123]. These actions were deemed part of a single and continuous infringement designed to distort competition[124].

Mondelez did not qualify for an exemption under Article 101(3) TFEU, as there was no evidence that the restrictions produced efficiency gains. Instead, they hindered competition, reduced consumer choice, and prevented potential price reductions[125].

[121] Mondelez (n 91), para 32.
[122] Ibid, para 86.
[123] Ibid, para 112.
[124] Ibid, para 120.
[125] Ibid, para 139.

Meanwhile, Mondelez was also found to have infringed Article 102 TFEU by abusing its dominant position in certain national chocolate tablet markets[126].

In the end, Mondelez received a fine of 337.522.800€ after a 15% reduction. This limited reduction was granted not only because Mondelez began cooperating only after the Commission had largely concluded its investigation, but also because the company failed to provide any additional evidence that significantly contributed to the inquiry.

3. TERRITORIAL RESTRICTIONS IN THE GEO-BLOCKING REGULATION

3.1. BACKGROUND AND POLITICAL MOTIVATIONS

Geo-blocking was frequently used by companies to segment markets along national borders, effectively imposing territorial limitations that undermine the integrity of the EU Internal Market.

Specifically, geo-blocking refers to discriminatory practices that prevent online consumers from accessing or purchasing products and services from websites based in other Member States. These practices include automatically redirecting users to a local version of the website or denying delivery or payment options based on the user's location or place of residence. As result, consumers encounter varying purchasing conditions for goods or services online, determined by factors such as their IP address, postal address, or the country of origin of their credit card[127].

3.1.1. Political Reasons Behind the Adoption of the Geo-blocking Regulation

The political motivations behind the adoption of GeoBR were deeply rooted in the EU's commitment to integration, fairness, and the realisation of a unified digital economy. The EU sought to demonstrate its capacity to respond to modern challenges in the digital age. The reasons outlined below explore the rationale behind this political will.

[126] Ibid, para 238.
[127] European Parliamentary Research Service, *Geo-Blocking and Discrimination among Customers in the EU* (European Union, 2018), p. 2.

A) Digital Single Market Strategy

In May 2015, the Commission launched the "Digital Single Market Strategy" a comprehensive proposal aimed at ensuring that individuals and businesses could seamlessly engage in online activities under conditions of fair competition, with robust consumer and personal data protection, irrespective of their nationality or place of residence. The Strategy structured around three pillars: (a) granting better access for consumers and businesses to online goods and services across Europe; (b) optimising the conditions under which digital networks and services can thrive; (c) boosting the growth of the European digital economy[128].

For the first time, the Commission explicitly named geo-blocking practices, recognised them as a barrier to achieving the Digital Single Market[129], and announced its intention to propose legislation to address unjustified geo-blocking.

It was not until a year later, in May 2016, that the Commission presented its e-commerce package, which included, among other measures, the long-awaited proposal for the GeoBR. Following the completion of the legislative process, the GeoBR was adopted on 28th February 2018[130].

B) Combating Discrimination

The EU's commitment to combating discrimination is enshrined in its foundational treaties. Article 18 TFEU explicitly prohibits discrimination on the basis of nationality and empowers the EU to adopt measures to prevent such discrimination. In alignment with this, Articles 34 and 56 TFEU ensure the free movement of goods and the freedom to provide services, respectively.

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[128] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *A Digital Single Market Strategy for Europe* (COM (192) final, 2015), pp. 3-4. (Digital Single Market Strategy).
[129] Jacklyn Hoffman, "Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union" (2017), 49 (1) The George Washington International Law Review 143, p. 162.
[130] GeoBR came into force on 3th December 2018.

Secondary legislation also addressed this issue. For example, Article 20(2) of the Services Directive[131] contains a non-discrimination principle, intended to guarantee that service recipients can fully benefit from the opportunities of the Single Market without being treated less favourably solely because of their origin from another Member State[132].

However, this article has been widely criticised for its ambiguous wording and unclear scope of application[133]. It ultimately failed to achieve its objectives and came to be seen as more symbolic affirmation of the internal market principles than a functional legal provision[134].

Another significant reason for this failure was the lack of effective enforcement by Member States. On the one hand, certain Member States struggled to identify the appropriate enforcement authority to understand the mechanisms for cooperation with other Member States. On the other hand, some supervisory highlighted difficulties in interpretation[135].

Based on all the factors mentioned, it is clear that one of the central objectives of GeoBR was to improve the functioning of the internal market by facilitating access to, and the free movement of, goods and services across the EU. This was to be achieved without discrimination based on nationality, residence, or place of establishment[136].

C) Consumer Rights Protection

According to the Commission, geo-blocking was a significant source of consumer dissatisfaction: 74% of the complaints received by the European Consumer Centres Network concerning price differences or other forms of geographical discrimination involved online cross-border purchases[137].

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[131] Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market [2006] OJ 376/36 (Services Directive).
[132] Maria Lorena Flórez Rojas, "Are Online Consumers Protected from Geo-Blocking Practices within the European Union" (2018) 26 Int'l JL & Info Tech 119, p. 125-126.
[133] Ibid, p. 126.
[134] European Parliament and Directorate General for Internal Policies, *Discrimination of Consumers in the Digital Single Market* (PE 507.456, 49, 2013), p. 48.
[135] Maria Lorena Flórez Rojas (n 132), p. 129.
[136] GeoBR, Recital 5.
[137] Digital Single Market Strategy (n 128), p. 6.

Furthermore, the Mystery Shopping Survey[138] found that geo-blocking practices were identified in approximately 63% of all websites reviewed. In 32% cases, shoppers were refused delivery to their country of residence, and 26% of online retailers declined transactions due to payment related issues[139].

Acknowledging these challenges and the resulting dissatisfaction among consumers, the protection of consumer rights became a political priority for the EU, an objective clearly reflected in the provisions of the GeoBR.

3.2. REVIEW OF GEO-BLOCKING REGULATION FROM A LEGAL PERSPECTIVE

3.2.1. Objective and Scope of Application

According to the GeoBR, its purpose *"is to contribute to the proper functioning of the internal market by preventing unjustified geo-blocking and other forms of discrimination based, directly or indirectly, on the customers' nationality, place of residence or place of establishment"*[140].

Nevertheless, certain practices may be justified under specific circumstances, such as divergent legal frameworks, legal uncertainty, consumer protection concerns, taxation and fiscal issues, language barriers, and other similar factors. The GeoBR, therefore, aims to bring clarity and legal certainty by defining the circumstances in which such differential treatment is considered unjustified[141].

The GeoBR draws a crucial distinction between direct and indirect discrimination, both of which are explicitly prohibited. From one perspective, direct discrimination arises when a trader differentiates based on the consumer's nationality, residence, or place of establishment. From another perspective, indirect discrimination stems from apparently

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[138] European Commission, *Mystery Shopping Survey on Territorial Restrictions and Geo-Blocking in the European Digital Single Market* (Final Report, 2016).
[139] Ibid, p. 26.
[140] GeoBR (n 9), Art. 1.
[141] Ibid, Recitals 1-2.

neutral practices that result in unequal treatment, such as restrictions based on IP address, language preferences, or the payment method used[142].

A central tenet of the legislation is to maintain a balance between expanding customer choice and improving access to goods and services, while at the same time respecting traders' freedom to structure their commercial strategies in accordance with both EU and national legislation[143].

Nonetheless, the legislation adopts a narrow definition of the term "customer", limiting it to nationals or residents of a Member State, or undertakings established within the EU, provided that they seek or receive goods or services exclusively for end use[144]. According to Picht, this definition is incomplete, as it excludes supra-individual interests. He further argues that the ban on geo-blocking spans across multiple legal domains and serves broader objectives than those currently captured within the structure of the GeoBR[145].

Regarding its scope of application, the GeoBR applies to all traders operating within the EU, regardless of whether the trader is domiciled in a Member State or a third country[146]. That said, it does not extend to purely domestic transactions, where all aspects of the transaction take place within a single Member State[147]. Neither does it with sectors such as access to retail financial services, transport, healthcare and social services, and online services protected by copyright including audiovisual content[148].

3.2.2. <u>Access to Online Interfaces</u>

The GeoBR prohibits traders from using any technological or other methods to prevent customers from accessing their online platforms or from redirecting them to a different version of the website than the one they intended to visit, when such actions are based on

[142] Ibid, Recital 6.
[143] Ibid, Recital 5.
[144] Ibid, Art. 2 (13).
[145] Peter Georg Picht, "The EU Geo-Blocking Regulation from a Competition Law Perspective" (2020) 11 (5-6) Journal of European Competition Law & Practice 244, p. 244.
[146] GeoBR (n 9), Recital 17.
[147] Ibid, Art. 1(2) and Recital 7.
[148] Ibid, Recitals 8-9.

the customer's nationality, place of residence, or place of establishment[149]. Thus, a company may not restrict a customer residing in Italy from accessing its Spanish website.

Nonetheless, redirection is permitted if the customer has explicitly consented to it, provided that the version of the interface initially requested remains easily accessible[150]. Once granted, the consent remains valid for all the future visits to the same online interface, until the customer withdraws it. The trader is obligated to provide the customer with the means to revoke such consent at any time[151]. While the GeoBR does not prescribe a specific method for storing this consent, the Commission suggests that cookies may be used for this purpose, subject to compliance with EU data protection law[152].

Notably, traders may offer their products or services in specific territories or to particular customer groups through tailored offers and distinct access conditions that differ from those in other Member States. To achieve this, they may design separate online interfaces for each territory or group, as long as customers are not treated in a discriminatory manner based on their nationality, place of residence, or place of establishment[153].

All of these provisions are without prejudice to geo-blocking, access restrictions, or redirection that may be justified under EU law or under national laws that are consistent with EU law. In such cases, traders must clearly state the reasons for the restriction, in the language of the interface the customer initially attempted to access[154].

3.2.3. Access to Goods and Services

Traders must not impose differing general conditions for access to goods or services, whether in an online or offline transaction[155], based on customer's nationality, residence, or place of establishment[156]. Nevertheless, this prohibition does not preclude traders from providing general conditions of access that vary across Member States or within a

[149] Ibid, Art. 3(1) and 3(2).
[150] Ibid, Art. 3(2).
[151] Ibid, Recital 20.
[152] European Commission, "Questions & Answers on the Geo-blocking Regulation in the context of e-commerce" (2018) <https://digital-strategy.ec.europa.eu/en/news/geo-blocking-regulation-questions-and-answers> accessed 16 November 2024, p. 19. (Commission Q&A).
[153] GeoBR (n 9), Recital 27.
[154] Ibid, Art. 3(3), Recitals 21 and 31.
[155] Ibid, Recital 1.
[156] Ibid, Art. 4(1).

Member State, provided such conditions are offered on a non-discriminatory basis to customers in a specific territory or to a particular customer group[157].

Furthermore, this provision does not apply where a specific regulation under EU law, or under the laws of Member States aligned with Union law, restricts the trader from supplying goods or offering services to particular customers or within specific territories[158].

The GeoBR ensures equal access without discrimination in the following scenarios:

A) Sale of Goods Without Delivery Beyond the Trader's Service Area.

When a customer purchases goods from a trader, and these are delivered to a location within a Member State where the trader offers delivery under its general conditions of access or are collected at an agreed location within such a Member State, equal access must be granted[159].

This obligation does not require the trader to provide cross-border delivery to another Member State where such service is not offered, nor to bear any postage or transport cost beyond the terms contractually agreed upon in compliance with EU and national law[160]. Instead, foreign customers may collect the goods in another Member State or arrange for cross-border delivery through their own private means[161].

For instance, if a French trader's website does not deliver to Spain but does to France and Portugal, Spanish consumers may order via the French website but must collect the product in France or Portugal[162].

[157] Ibid, Art. 4(2).
[158] Ibid, Art. 4(5).
[159] Ibid, Art. 4(1)(a).
[160] Ibid, Recital 28.
[161] Ibid, Recital 23.
[162] Raúl Lafuente Sánchez, "EU Digital Single Market: Measures Against Unjustified Geo-Blocking, Electronic Consumer Contracts and the Conflicts of Laws" (2019) Vol 11, Nº2 Cuadernos de Derecho Transnacional <https://doi.org/10.20318/cdt.2019.4953> accessed 29 October 2024, p. 125.

B) Electronically Delivered Services Not Involving Physical Delivery.

Customers wishing to purchase electronically provided services, such as cloud services, data storage, or website hosting, from a trader located in another Member State are entitled to access these services under the same terms as local customers[163]. This entitlement excludes services that provide access to or use of copyright-protected works or other protected content[164].

For example, a Bulgarian customer can purchase website hosting services from a Spanish company under the same conditions as Spanish consumers, without incurring a different net price (excluding VAT)[165].

C) Services Delivered in Person and Not Provided Electronically.

When a trader offers services that are physically received at a specific location, whether on the trader's premises or at a designated place within their operating territory, it is unjustified to apply different access conditions based on a customer's nationality, residence, or establishment. This includes services such as hotel accommodation, attendance at sports events, car rentals, or tickets for music festivals and theme parks[166].

As an illustration, an Italian family visiting a French theme park must be eligible for family discount tickets under the same terms as French families[167].

3.2.4. Non-Discrimination Based on Payment Methods

Traders have the autonomy to choose the payment methods they wish to accept. However, once this choice is made, they must not discriminate against customers within the EU by rejecting transactions or applying different payment terms due to the customer's nationality, place of residence or establishment, the location of the payment account, the

[163] Commission Q&A (n 152), p. 8.
[164] GeoBR (n 9), Art. 4(1)(b).
[165] Commission Q&A (n 152), p. 8.
[166] GeoBR (n 9), Art. 4(1)(c) and Recital 25.
[167] Commission Q&A (n 152), p. 8.

place of establishment of the payment service provider, or the place of issue of the payment instrument[168].

Notwithstanding this prohibition, traders are entitled to withhold the delivery of goods or the provision of services until the confirmation is received that the payment transaction has been properly initiated[169]. Additionally, traders may request surcharges for card-based payments under certain legally permissible conditions[170].

3.2.5. Courts with Jurisdiction

The GeoBR implicitly recognises that the existing legal framework in the field of private international law should be sufficient. In particular, it refers to Regulation (EC) No 593/2008[171] (hereinafter referred to as the "Rome I Regulation") and (EU) No 1215/2012[172] (hereinafter referred to as the "Brussels I bis Regulation")[173].

On the one hand, the Rome I Regulation provides that the law applicable to consumer contracts shall be the law of the country where the consumer has his habitual residence, provided that one of the specified condition is met, namely: that the professional either *"(a) pursues his activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country"*[174].

On the other hand, the Brussels I bis Regulation, as an exception to the general rule of the defendant's domicile and to the special jurisdiction in contractual matters[175], establishes a favourable framework for consumers in contracts entered into for purposes that can be considered outside their professional activity. It stipulates that the courts of the

[168] GeoBR (n 9), Art. 5(1) and Recital 32.
[169] Ibid, Art. 5(2).
[170] Ibid, Art 5(3).
[171] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to the contractual obligations [2008] OJ L 177/6 (Rome I Regulation).
[172] Regulation (EC) No 1215/2012 of the European Parliament and of the Council on jurisdiction and recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1. (Brussels I bis Regulation).
[173] GeoBR (n 9), Recital 13.
[174] Rome I Regulation (n 171), Article 6(1).
[175] Brussels I bis Regulation (n 172), Articles 4 and 7(1).

consumer's domicile have jurisdiction voluntarily when the consumer initiates the claim and mandatorily when the claim is initiated by the other contracting party[176].

For this framework to apply, it is mandatory that *"the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities"*[177].

Based on the foregoing, it is essential to analyse the concept of "activities directed towards a Member State or multiple Member States" in order to determine the competent court.

The CJEU has interpreted this concept in relation to Article 17(1)(c) of the Brussels I bis Regulation, with the aim of defining the relevant indications to prove that the seller has directed their activities towards the Member State of the consumer's domicile. The conclusions provided by the CJEU can be extrapolated to the GeoBR.

In ***Pammer v Hotel Alpenhof***[178], the Court stated that the mere fact that a website is accessible in Member States other than that in which the trader concerned is established is not sufficient in itself to be considered as directing activity to other Member States[179]. If the legislator had intended the mere existence or accessibility of a service provider's website to constitute sufficient evidence of directing activities towards a Member State, the provision would have been worded to reflect this intention, which it was not[180].

Neither are considered a "direct activity" the language and currency used[181], nor the mere mention of the trader's email address, physical address, or a telephone number without an international code on a website[182].

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[176] Ibid, Article 18(1) and 18(2).
[177] Ibid, Article 17(1)(c).
[178] Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09)* [2010] ECLI:EU:C:2010:740.
[179] Ibid, para 69.
[180] Ibid, para 70-74.
[181] Ibid, para 84.
[182] Ibid, para 77.

In order to consider that an activity is "directed", the trader must have indicated a clear intention to establish commercial relations with consumers in one or more Member States, including the consumer's place of residence[183].

Clear expressions of such intention could be considered (for illustrative purposes but not limited to): (a) the trader advertises goods or services in multiple Member States and uses a search engine referral service to reach consumers[184]; (b) the international nature of the activity at issue; (c) the display of telephone numbers with international dialling codes; (d) the use of a top-level domain different from the trader's Member States or neutral domains such as ".com" or ".eu"; (e) descriptions of travel routes from other Member States to the service location; (f) references to an international clientele, such as customer reviews from various Member States[185].

These initial criteria have been developed through further jurisprudence. In ***Mühlleitner***[186], the CJEU determined that the conclusion of a distance consumer contract and the reservation of goods or services at a distance are indicative of the contract's connection with commercial activity directed towards the Member State of the consumer's domicile[187].

Subsequently, the ***Emrek***[188] case allowed the Court to delve deeper into the topic. The existence of a causal link between the means used to direct the activity and the conclusion of the contract may serve as evidence of the contract's connection to such activity, ultimately indicating that the trader has targeted his activity towards the Member State where the consumer resides[189].

To summarise, the GeoBR only ensures that consumers can access information about the products or services offered by a trader, benefit from uniform conditions for goods or services, and be subject to non-discriminatory payment criteria. However, this fact, by

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[183] Ibid, para 75 and 80.
[184] Ibid, para 81.
[185] Ibid, para 83.
[186] Case C-190/11 *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* [2012] ECLI:EU:C:2012:542.
[187] Ibid, para 44.
[188] Case C-218/12 *Lokman Emrek v Vlado Sabronovic* [2013] ECLI:EU:C:2013:666.
[189] Ibid, para 25-26.

itself, cannot be regarded as “directing the trader’s activities to the consumer’s Member State”[190]. Consequently, consumers should be aware that, in the event of a dispute, they may not be entitled to the more favourable treatment provided by private international law rules for consumer contracts[191].

3.3. ENFORCEMENT AND IMPLEMENTATION OF THE GEO-BLOCKING REGULATION

This section explores the compliance framework of the GeoBR, focusing on the roles of national authorities in ensuring its enforcement, as well as analysing the strengths and weaknesses of the Regulation and the ongoing efforts to ensure uniform protection of consumer rights.

3.3.1. Enforcement

In accordance with Article 7(1) of the GeoBR, each Member State must designate a body or bodies, such as courts or administrative authorities[192], not only for the adequate and effective enforcement of the GeoBR but also for providing practical support to consumers in the event of a dispute between a consumer and a trader[193].

Over and above that, Member States must establish rules outlining the measures applicable to violations of the GeoBR provisions and ensure their enforcement. These measures must be effective, proportionate, and dissuasive[194]. What is feasible and appropriate must be assessed in the light of the specific circumstances of the case and must comply with the detailed rules established by the relevant Member State[195].

In addition, Member States are required to notify the Commission of these measures, and the Commission must subsequently make them publicly available on its website[196].

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[190] GeoBR (n 9), Recital 13.
[191] Raúl Lafuente Sánchez (n 162), p. 138.
[192] GeoBR (n 9), Recital 35.
[193] Ibid, Article 8.
[194] Ibid, Article 7(2).
[195] Commission Q&A (n 152), p. 31-32.
[196] GeoBR (n 9), Article 7(3).

Furthermore, the GeoBR does not explicitly specify which Member State is responsible for addressing a cross-border violation of its provisions. However, the Commission has clarified that, based on the principle of sincere cooperation[197], national authorities may seek assistance from their counterparts in other Member States for both the investigation of a case and the enforcement of a measure[198].

Additionally, the enforcement of the GeoBR is facilitated by its inclusion in the Annex of the Consumer Protection Cooperation Regulation[199], which establishes a cooperative framework enabling national authorities across the European Economic Area to collaborate in addressing violations of consumer protection regulations when the trader and the consumer are located in different countries. Together, these national authorities constitute a European enforcement network known as the Consumer Protection Cooperation Network[200].

3.3.2. <u>Implementation</u>

The implementation of the GeoBR has been analysed by the Commission, the European Parliament (hereinafter referred to as the "Parliament"), and the European Court of Auditors (hereinafter referred to as the "ECA").

A) Commission

Following the review clause established in Article 9 of the GeoBR, the Commission published the first evaluation[201] report containing its findings. On the positive side, the report showed that consumer awareness has improved, with some initial benefits already

[197] Regulated in Article 4.3. TEU establishes: *"the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"*.
[198]Commission Q&A (n 152), p. 33.
[199] Regulation (EU) 2017/2394 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L 345/1.
[200] European Commission, "Consumer Protection Cooperation Regulation" (European Commission, 2024) <https://commission.europa.eu/law/law-topic/consumer-protection-law/consumer-protection-cooperation-regulation_en> accessed on 7 January 2025.
[201] European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the first short-term review of Geo-blocking Regulation* (COM (2020) 766 final).

observable. For instance, practices such as blocking access to or registration on websites, as well as redirecting consumers to alternative sites, have declined[202].

On the negative side, most Member States experienced significant delays in strengthening their enforcement authorities. Additionally, traders demonstrated reluctance to offer cross-border delivery options, as this is not required under the GeoBR[203].

More recently, the Commission published a Staff Working Document[204] that further analyses the impact of the GeoBR. It found that the main obstacles to cross-border trade include high delivery tariffs, particularly for low-cost or heavy items[205], limited use of innovative delivery services due to lack of awareness[206], ongoing VAT-related challenges[207], language barriers which cause consumers to prefer shopping in their native language, and the incomplete harmonisation of product regulations and labelling requirements across the EU[208].

The Commission concluded that geo-blocking based on a consumer's location has significantly decreased. Nonetheless, challenges persist in ensuring proper implementation of the GeoBR. Consumers continue to face practices explicitly prohibited by the Regulation, such as the refusal to accept payment methods issued in another country, highlighting the need for stronger enforcement by national competent authorities[209]. Therefore, further action is required to guarantee full compliance with the GeoBR.

B) Parliament

Meanwhile, the Parliament issued a document in 2023 on the implementation of the GeoBR[210], in which it called on the Commission to continue its review.

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[202] Ibid, p.1.
[203] Ibid.
[204] European Commission, *Commission on the impact of Geo-blocking Regulation and progress in further reducing cross-border barriers* (SWD (2024) 196 final).
[205] Ibid, p. 25.
[206] Ibid, p. 21.
[207] Ibid, p. 39.
[208] Ibid, p. 24
[209] Ibid, p. 38.
[210] European Parliament *Report on the Implementation of the 2018 Geo-blocking Regulation in the digital single market* (Plenary sitting A9-0335/2023).

Firstly, the Parliament called for stronger enforcement measures, improved cooperation between national authorities, and the development of best practices to ensure effective and harmonised application across the EU[211].

Secondly, the Commission was urged to evaluate whether access to affordable cross-border parcel delivery services remains a challenge for online sellers, and to consider introducing a potential mandatory obligation for traders to deliver products to the consumer's country of residence[212].

Thirdly, the Parliament advocated for addressing the anticompetitive impact of territorial constraints in the supply chain in order to establish a fully operational single market that maximises benefits for consumers[213].

Lastly, specific attention was recommended for sectors such as transport, financial services, healthcare, and telecommunications, where geo-blocking practices still persist[214].

To conclude, the implementation of the GeoBR has had some positive effects; nonetheless, there remains room for improvement.

C) European Court of Auditors

The ECA was the most recent institution to release a special report on the GeoBR, published in January 2025[215]. The timing of this publication was strategically chosen, as the Commission is required to issue a new report on the implementation of the Regulation in 2025, in accordance with Article 9 of the GeoBR.

Although the ECA acknowledged that some progress has been made in addressing unjustified geo-blocking within the EU, the institution was highly critical of the GeoBR's

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[211] Ibid, para 4.
[212] Ibid, para 12.
[213] Ibid, para 15.
[214] Ibid, para 28.
[215] European Court of Auditors *Unjustified geo-blocking in e-commerce. The Regulation provides a balanced framework, but challenges remain in implementation* (2025, special report) (ECA Report).

implementation and identified several major challenges, along with corresponding recommendations.

a) Main Challenges

Firstly, the ECA considered the exclusion of certain sectors such as financial services, transport, health, telecommunications, audiovisual services, and copyright protected content from the scope of the GeoBR remains to be one of its key ongoing challenges[216]. The institution also expressed concern about the exclusion of the cross-border delivery of physical goods, which it views as a significant limitation to the GeoBR's overall effectiveness[217].

Secondly, the GeoBR applies not only to business-to-consumer (hereinafter referred to as "B2C") transactions, but also to B2B transactions where a business acquires goods or services exclusively for end use. However, Member States are not required to designate a body responsible for assisting such businesses in the event of disputes with traders, creating and enforcement gap[218].

Thirdly, awareness remains low among both consumers and traders. While consumers are generally aware of the GeoBR, many are unaware of its scope[219], particularly regarding cross-border delivery. In contrast, 37% of traders were unaware of the GeoBR altogether[220].

Fourthly, from the ECA's perspective, uneven enforcement remains the Regulation's most pressing challenge. Many Member States delayed the implementation of enforcement measures; by December 2018, only six had enforcement mechanisms in place[221]. These delays hindered the effective protection of consumer rights during the early stages of the GeoBR's application[222].

[216] Ibid para 31-35.
[217] Ibid, para 27.
[218] Ibid, para 28.
[219] Ibid, para 45.
[220] Ibid, para 51.
[221] Ibid, para 53.
[222] Ibid, para 54.

Moreover, enforcement measures differ significantly among Member States. For instance, minimum fines range from 26€ to 900.000€, and maximum fines from 1.448€ to 5 million Euros[223]. Additionally, while some Member States impose criminal liability, others rely solely on civil penalties.

It is also notable that one coordinated enforcement action has been undertaken since the adoption of the GeoBR[224]. This limited enforcement effort signals a low level of implementation and raises concerns about the risk of an unlevel playing field across the single market[225].

Last but not least, the ECA criticised the Commission's impact assessment for lacking a quantitative evaluation of the Regulation's economic, social, and environmental impacts. The assessment also failed to analyse the sectors excluded from the GeoBR' s scope, did not align with General Data Protection Regulation[226] and the Alternative Dispute Resolution Directive[227], and included insufficient monitoring indicators to measure the effectiveness of the GeoBR[228].

b) Recommendations

The ECA has issued four key recommendations to be implemented by the end of 2026.

- The Commission should conduct a data-driven study to evaluate the benefits, challenges, and risks associated with expanding the GeoBR's scope or amending sector-specific legislation[229].
- It should enhance support and awareness efforts across Member States[230].

[223] Ibid, para 59.
[224] Ibid, para 56.
[225] Ibid, para 65.
[226] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1.
[227] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165/63.
[228] ECA Report (n 215), para 25.
[229] Ibid, paras 94-96.
[230] Ibid, paras 97-99.

- National enforcement should be reinforced through the development of EU-wide enforcement mechanism[231].
- Monitoring tools should be strengthened to more effectively assess the GeoBR's implementation and impact[232].

4. TERRITORIAL RESTRICTIONS IN THE COPYRIGHT LEGAL FRAMEWORK

Since the EU copyright system is based on the principle of territoriality, copyright holders are entitled to license their works on a country-by-country basis. This framework enables them to lawfully prevent non-licensed parties from providing access to their work in unauthorised territories and to limit licensed parties to operating exclusively within their designated regions[233].

As a result, the extensive protection granted by copyright law has led to the imposition of territorial restrictions not only in the audiovisual sector but also across non-audiovisual markets. Both the CJEU and the Commission have scrutinised such territorial constraints under the lens of general competition law as well as sector-specific legislation.

Furthermore, these restrictions have triggered a significant debate regarding whether their scope should fall within the ambit of the GeoBR, and the potential legal and economic implications of such inclusion.

Given the particular characteristics of the copyright sector, this section will provide a focused analysis of these territorial restrictions, exploring their legal foundations, competitive implications, and relevance to ongoing regulatory discussions within the EU framework.

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[231] Ibid, paras 100-102.
[232] Ibid, p. 40.
[233] Guiseppe Mazziotti and Felice Simonelli, "Another breach in the wall: copyright territoriality in Europe and its progressive erosion on the grounds of competition law" [2016] Bradford: Emerald Group Publishing Limited, Vol. 18 (6), p. 57.

4.1. COPYRIGHT RESTRICTIONS IN EU COMPETITION LAW

The copyright business model has been scrutinised by both the CJEU and the Commission. The CJEU' s analysis of copyright restrictions began in ***Coditel I***[234]. In this case, Ciné Vog, a Belgian company, obtained an exclusive distribution licence to screen "Le Boucher" in Belgian cinemas. Simultaneously, Coditel, a Belgian cable television provider, retransmitted the film after intercepting a legitimate broadcast from German television. Under Ciné Vog's agreement with the French rights holders, television broadcasting of the film in Belgium was prohibited until forty months after its initial release. However, at the time of Coditel's retransmission, the film had only been showing in Belgian cinemas for seven months.

The CJEU held that the right of a copyright owner to charge fees for a film's exhibition is a fundamental aspect of copyright[235]. The Court further noted that, the Treaty provisions do not override territorial restrictions agreed in licensing contracts. Since many Member States operated broadcasting monopolies at the time, such geographical limitation, despite aligning with national borders, were often necessary and unavoidable[236]. Consequently, territorial copyright licences for film broadcasts did not infringe upon the EU's provisions on the free movement of goods or service[237].

Coditel II[238] followed the initial ruling and raised the question of whether granting exclusive territorial licences to film distributors infringed EU competition law. The CJEU ruled that an agreement granting absolute territorial protection does not inherently violate Article 101 TFEU. The specific nature of the cinematographic justifies such exclusivity, and such agreements only contravene Article 101 TFEU when they significantly limit distribution or distort competition[239].

[234] Case 62/79 SA *Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECLI:EU:C:1980:84.
[235] Ibid, para 14.
[236] Ibid, para 16.
[237] Ibid, para 18.
[238] Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* [1982] ECLI:EU:C:1982:334.
[239] Ibid, paras 16-17.

In the ***Murphy***[240] case, Karen Murphy, a British pub owner, was prosecuted for using a Greek satellite decoder card to screen live Premier League football matches in her establishment, thus, bypassing the official United Kingdom (hereinafter referred to as the "UK") broadcaster. The Premier League had entered into exclusive territorial licensing agreements with various broadcasters across EU Member States, obliging them to geo-block access from outside their designated countries.

The CJEU held that exclusive licensing agreements which prohibit the provision of decoding devices enabling access to a right holder's protected content for use outside the territory defined in the licence agreement may be contrary to EU law[241]. No justification was presented to warrant an exception based on the agreement's economic and legal context[242].

Furthermore, the Court reaffirmed the validity of *Coditel II*, maintaining that restrictions on broadcasters from operating in other territories do not violate Article 101(1) TFEU[243]. However, it clarified that the *Murphy* case dealt with additional obligations, such as the prohibition on decoder exports, rather than the legality of exclusive territorial licences *per se*[244].

In relation to Article 56 TFEU, which prohibits restrictions on the freedom to provide services across Member States, the CJEU held that national laws prohibiting the import, sale, or use of foreign decoding devices were unlawful. These devices enabled access to encrypted satellite broadcasting services from another Member State, even when the content was protected under domestic copyright[245].

Separately, in the ***Paramount***[246] case, the Commission has pursued antitrust proceeding concerning licensing contracts between major Hollywood studios and Sky UK. The agreements in question included three main components: (a) granting Sky exclusive

[240] Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)* [2011] ECLI:EU:C:2011:631.
[241] Ibid, para 146.
[242] Ibis, para 143.
[243] Ibid, para 137.
[244] Ibid, para 141.
[245] Ibid, para 125.
[246] *Cross-boder access to pay-TV* (Case AT.40023) Commission Decision C (2019) 1772 final [2019] OJ C 184/7.

broadcasting rights for content in the UK and Ireland; (b) clauses restricting passive sales to consumers outside these territories; (c) requirements for studios to restrict pay TV broadcasters in other Member States from responding unsolicited requests from UK or Irish consumers.

The Commission concluded that theses clauses violated Article 101(1) TFEU and 53(1) EEA Agreement[247]. These clauses were found to have an anticompetitive object, as they aimed to restrict or prevent cross-border passive sales of pay-TV services, effectively conferring absolute territorial exclusivity[248], and impacting trade between Member States[249].

Moreover, the studios and Sky advanced several justifications for these restrictions: (a) increased efficiency; (b) reduced legal uncertainty and costs; (c) avoidance of unnecessary litigation; (d) provision of culturally and linguistically tailored content; (e) promotion of investment incentives; (f) consumers benefits; (g) ensured pro-competitive advantages; and (h) preservation of competition among EEA pay-TV broadcasters[250]. Ultimately, the parties agreed to resolve the investigation through commitments.

Nevertheless, this decision was challenged before the CJEU in the ***Canal+*** case[251], which raised four main pleas: (a) a manifest error in assessing the compatibility of the contractual clauses with Article 101 TFEU and the effect of the imposed commitments; (b) a violation of Article 9 of Regulation No 1/2003[252] concerning the identification of the concerns addressed by the commitments; (c) a breach of the principle of proportionality; and (d), misuse of powers[253].

The CJEU upheld the previous decisions of the General Court, confirming that licensing agreements imposing mutual obligations to block cross-border broadcasting and granting

[247] Ibid, para 74.
[248] Ibid, para 76.
[249] Ibid, para 83.
[250] Ibid, para 81
[251] Case T-873/16 *Groupe Canal + v European Commission* [2018] ECLI:EU:T:2018:904 (Canal +).
[252] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[253] Canal + (n 251), p. 5.

absolute territorial protection may be deemed anti-competitive under Article 101(1) TFEU[254].

To sum up, the ruling reinforces the position that EU competition law prohibits absolute geo-blocking practices in pay-TV licensing agreements.

4.2. COPYRIGHTED WORKS AND THE GEO-BLOCKING REGULATION

In the digital era, the territorial nature of copyright presents additional challenges, as the Internet was designed to be borderless and universally accessible. Distributing territorially copyrighted content online necessitates the creation of artificial borders, primarily enforced through geo-blocking practices[255].

From the perspective of copyright law, geo-blocking involves the use of technological tools to restrict access to digital content based on the user's geographic location. These restrictions are implemented to ensure that content is only accessible within the country or Member State where copyright holders have authorised its distribution. This authorisation is typically defined by national or linguistic boundaries[256].

Geo-blocking represents of the most significant barriers to the choice and availability of online services[257]. For instance, such restrictions can hinder cross-border access to copyrighted content for short-term migrants and travellers, preventing them from using their subscribed online services while in another Member State. Likewise, it prevents some EU consumers from accessing content available in other Member States[258].

Both the Parliament and the Commission have undertaken studies to assess the actual impact of geo-blocking on access to copyright-protected content. According to the

[254] Ibid, para 54.
[255] Jacklyn Hoffman (n 129), p. 145.
[256] Giuseppe Mazziotti (n 2), p. 1.
[257] Pablo Ibañez Colomo, "Copyright Licensing and the EU Digital Single Market Strategy" in Roger D. Blair and Daniel Sokol (eds) *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech* (Cambridge Law Handbooks. Cambridge University Press, 2017), pp. 339-340.
[258] Giuseppe Mazziotti (n 2), p.6.

Parliament's findings, 70% of digital content providers apply geo-blocking measures to restrict cross-border access[259].

In parallel, the Commission's study[260] revealed that a substantial share of consumers has encountered geo-blocking barriers when attempting to access digital content. Specifically, 53% of users reported issues when accessing audiovisual content[261], 46% in the case of music[262], 67% for e-books[263], and between 48% and 51% for games and software, respectively[264].

In light of these findings, the EU legislator has made efforts to address territorial restrictions in copyright. However, such restrictions persist due to sector-specific factors. Europe's linguistic diversity necessitates local adaptations through subtitles, dubbing, and content versioning. Furthermore, commercial offers must be tailored to culturally diverse audiences. Additionally, differences in purchasing power across Member States lead to variations in pricing and available content[265].

The GeoBR presented an opportunity to address discriminatory practices related to copyright, yet the issue was deliberately left outside its scope, as copyright remains a legal and political "hot potato"[266]. Although Article 4(1) prohibits traders from applying different conditions of access to goods or services based on a customer's nationality, residence, or establishment, Article 4(1)(b) explicitly excludes electronically supplied services involving access to copyright-protected content.

Nevertheless, Article 9(2) of the GeoBR stipulated that the first evaluation should be conducted with a specific focus on assessing the potential extension of its scope to electronically supplied services involving access to and use of copyright-protected works.

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[259] European Parliament, *Extending the Scope of the Geo-Blocking Prohibition: An Economic Assessment* (IP/A/IMCO/2016-15, 2017), p. 24.
[260] European Commission, *Study on the Impacts of the Extension of the Scope of the Geo-Blocking Regulation to Audiovisual and Non-Audiovisual Services Giving Access to Copyright Protected Content* (Final Report, 2020).
[261] Ibid, p. 104, table 18.
[262] Ibid, p. 196, table 31.
[263] Ibid, p. 231, table 46.
[264] Ibis, p. 262, table 58.
[265] Giuseppe Mazziotti (n 2), p.7.
[266] Giorgio Monti and Gonçalo Coelho, "Geo-blocking between Competition Law and Regulation" (European University Institute, 2017) <https://cadmus.eui.eu/bitstream/handle/1814/50264/CPI-Monti-Coelho%20FINAL.pdf?sequence=2&isAllowed=y> accessed 8th March 2025.

This highlighted that the protection of copyright remains a matter of paramount importance for the EU legislator[267].

Accordingly, the Commission has carried out two studies to examine the possibility of extending the scope of the GeoBR to copyright-protected content online. In its 2020 report, the Commission affirmed that the impact of such an extension would vary depending on the type of content, the intensity of consumer demand, and the extent to which content is accessible across the EU[268].

For instance, expanding the scope of the GeoBR to include the music sector could adversely affect existing pricing strategies, potentially leading to higher prices in lower-cost markets and thereby limiting consumer access[269].

Conversely, in the audiovisual sector, while an extension of the Regulation might yield short-term benefits for consumers, such as improved access to content and opportunities for price arbitrage, it could, in the medium to long term, negatively affect the sector's sustainability. These potential impacts include reduced incentives for content investment, diminished financing opportunities for production, and a possible erosion of cultural diversity across the European audiovisual landscape[270].

In this initial report, the Commission acknowledged improvements in access to goods and services but did not recommend extending the scope to copyright-protected content at that time. Instead, it emphasised the need for continued monitoring of market trends and consumer access[271].

In its 2024 review, the Commission maintained its cautious position, reaffirming that further monitoring is necessary, and that any potential extension would require a careful balance between consumer access and industry investment models[272].

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[267] Michele Mesina, "Geo-blocking and EU Competition Law in the Digital Era" in Ana Mercedes López Rodríguez, María Lubomira Kubica and Michael D. Green (eds), *Legal Challenges in the New Digital Age* (Brill-Nijhoff, 2021), p. 26.
[268] European Commission (n 201), p. 1.
[269] Ibid, pp. 8-9.
[270] Ibid, pp. 10-12.
[271] Ibid, p. 13.
[272] European Commission (n 204), pp. 37-39.

The Parliament has also launched a report examining the feasibility of including copyright content within the scope of the GeoBR and its results have showed internal debate within the institution[273].

On one side, the Parliament advocates for expanding access to copyright-protected digital content across the EU. It highlights that access to audiovisual services without requiring new licenses could foster cross-border demand and enhance cultural diversity. It also notes that consumers increasingly use tools to bypass geo-blocking, sometimes resorting to illegal means, and suggests that adapting business models to meet consumer expectations may be more effective than maintaining restrictive practices[274].

Conversely, the Parliament's Committee on Culture and Education firmly opposes extending the scope of the GeoBR to include audiovisual services. It emphasises that territorial exclusivity is fundamental to the economic viability of the creative sector, underpinning the financing, distribution, and diversity of European content. The Committee underscores that this exclusivity supports a wide range of business models, particularly for small and medium-sized enterprises[275].

The Committee warns that removing territorial licensing could reduce investment in new productions, limit cultural diversity, undermine contractual freedom, and potentially lead to higher prices for consumers, without delivering meaningful benefits in terms of content choice[276].

Adopting a neutral stance, the Parliament's Committee on Legal Affairs acknowledges the cultural and economic significance of territorial licensing. Nonetheless, it supports the creation of targeted exceptions to better serve linguistic minorities and citizens residing in border regions. It calls on the Commission to ensure that EU citizens who move between Member States can continue to access public media and digital content they have lawfully purchased, thus promoting cultural inclusion and fair access across the Single Market[277].

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[273] European Parliament (n 210).
[274] Ibid, pp 13-15, paras 17-27.
[275] Ibid, pp.17-18, paras 2-10.
[276] Ibid, p.18, para 13.
[277] Ibid, p. 27, paras 2-5.

To sum up, the potential extension of the GeoBR to encompass copyright-related content remains a highly complex matter. The Commission has thus far adhered to an evidence-based approach, refraining from taking a definitive stance. Meanwhile, the policy debate remains polarised, with compelling arguments presented on both sides.

5. THE RELATIONSHIP BETWEEN EU COMPETITION LAW AND THE GEO-BLOCKING REGULATION ON TERRITORIAL RESTRICTIONS

The interplay between EU competition law and the GeoBR is essential in shaping the legal framework surrounding territorial restrictions within the EU's Single Market. This interaction significantly influences both cross-border business operations and consumer access to goods and services.

On the one hand, territorial restrictions in B2B transactions generally fall within the scope of EU competition rules. As confirmed by the Commission in the *AB InBev* case, EU competition law applies to territorial restrictions in the supply chain only when they are part of agreements or implemented by dominant firms. The revised VBER and VGL clarify which vertical restrictions may breach competition rules[278].

However, many territorial restrictions result from unilateral actions by non-dominant suppliers, such as instructing subsidiaries not to supply retailers in other Member States. These actions, including refusal to supply and packaging differentiation, typically fall outside the scope of EU competition law[279].

On the other hand, the GeoBR focuses primarily on B2C unilateral territorial restrictions in online cross-border transactions, as well as B2B transactions, but only where businesses act as final consumers. The Regulation addresses a specific gap not covered by EU competition law: the prevention of discrimination based on nationality, place of residence, or place of establishment.

[278] European Commission, C*ommission Staff Working Document on Co-creation of a Transition Pathway for a more Resilient, Digital and Green Retail Ecosystem* (SWD (2023) 283 final), p.15.
[279] Ibid.

Article 6 and Recital 34 of the GeoBR are key in defining the relationship between the GeoBR and EU competition law: the Regulation does not affect agreements restricting active or passive sales that fall under the scope of the VBER. However, any passive sales restrictions that breach the GeoBR are automatically void[280].

Besides, Recital 34 of the GeoBR provides a broader interpretation by stating that agreements preventing traders from making passive sales to certain customers or regions are generally anti-competitive and not exempted under Article 101(1) TFEU. Even if such restrictions qualify for an exemption under EU competition law or fall outside its scope, they may still contravene the GeoBR if they hinder access to online interfaces, goods or services, or payment options.

The interpretation of Recital 34 has been subject to academic debate. Some legal scholars argue that the provision is sufficiently clear, and that, suppliers and buyers must ensure that vertical agreements restricting passive sales comply with both the VBER but and the GeoBR[281]. In contrast, others contend that the Recital is ambiguous and creates overlap scenarios with EU competition law, potentially undermining legal certainty[282].

Albeit the adoption of new VBER and VGL in 2022 has provided further clarification on the relationship between the two frameworks:

In the first place, in exclusive distribution systems, restrictions on passive sales are generally permitted, except where such sales are made to end users in breach of the GeoBR[283].

In the second place, in exclusive and selective distribution systems, as well as in free distribution models, suppliers may restrict both active and passive sales made by a wholesaler to end users. This allows the wholesaler to supply specific end users, such as large commercial customers, while restricting sales to others, for instance, end consumers covered by the GeoBR[284].

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280 GeoBR (n 9), Article 6.
281 Benedikt Rohrßen (n 50), p. 118.
282 Peter Georg (n 145), p. 250.
283 VGL (n 8), para 222.
284 Ibid, para 225.

In the third place, the VGL also reinforces the GeoBR in the context of online sales. It considers it a hardcore restriction for a buyer to be required to prevent customers from other regions from accessing its website; to redirect them to the manufacturers or another seller's store, or to cancel online transactions based on the customer's billing address being outside the buyer's territory[285].

In conclusion, while the GeoBR has a narrower regulatory scope, focusing on specific types of cross-border discrimination and, EU competition law covers a broader range of restrictive practices, the two frameworks are complementary[286]. Together, they aim to eliminate territorial restrictions, foster competition, and protect the Single Market.

5.1. EVALUATION OF THE NECESSITY FOR FURTHER LEGISLATION ON TERRITORIAL RESTRICTIONS

Despite the existing legislative framework, territorial constraints remain at the forefront of European legal and policy discussions. It is therefore essential to examine whether further legislative action is required to reduce such restrictions in both B2B and B2C contexts.

5.1.1. Strategies to Overcome B2B Territorial Restrictions

Under the current regulatory framework, companies and Member States continue to report challenges associated with territorial restrictions. A range of approaches, both legislative and non-legislative, could be considered.

- **Legislative measures** might include:

  - The introduction of new European legislation specifically designed to regulate territorial restrictions in B2B relationships. This could follow the model of the GeoBR for B2C transactions but be adapted to address the unique features of B2B markets.

[285] Ibid, para 206 (a) and (b).
[286] Peter Georg (n 145), p. 251.

- Amendments to EU competition law to introduce a dedicated tool for identifying, preventing, and addressing territorial constraints more effectively.
- The extension of the scope of the GeoBR to also cover B2B transactions.

- **Non-legislative measures** could involve:

  - Ensure better enforcement by the Commission and national authorities.
  - New guidelines to clarify and harmonise the approach to B2B territorial restrictions across Member States.
  - EU Commission recommendation. While not legally binding, it could guide Member States, businesses, and enforcement authorities to better practices. It may include a rebuttable presumption of territorial constraints and, outline examples of relevant conduct.

From the perspective of this author, a dual approach is warranted. For territorial restrictions implemented through agreements or by dominant undertakings, the most effective strategy would be to reinforce the enforcement of existing competition rules by both the Commission and national authorities. The rationale for this approach is as follows:

Firstly, the current legal framework already provides mechanisms to address territorial restrictions in the mentioned circumstances. It offers a broad scope that encompasses a variety of anti-competitive practices. Furthermore, the revised VBER and VGL have brought additional clarity and legal certainty for businesses.

Secondly, as discussed in Section 2 of this dissertation, both the CJEU and the Commission have successfully applied existing rules to sanction territorial restrictions.

Thirdly, enforcement guarantees case-by-case flexibility, allowing enforcement authorities to take market-specific circumstances into account.

Finally, prioritising enforcement over the introduction of new legislation helps to avoid the risk of overregulation. Additional laws could overlap with the existing framework and potentially introduce legal uncertainty.

In light of the above, it may be concluded that the current EU legal framework provides sufficient tools to address territorial restrictions in B2B transactions when they are based on agreements or imposed by dominant firms. Strengthening enforcement by equipping the Commission and national authorities with greater resources, and improving cooperation mechanisms, would significantly contribute to reducing anti-competitive practices and preventing market fragmentation. Furthermore, such measures would ensure a faster response from the authorities and have a deterrence effect on businesses, discouraging them from engaging in territorial restrictions.

The more pressing issue arises in cases involving unilateral practices by non-dominant undertakings. In such instances, there remains a significant legislative gap under current EU rules. In the view of this author, the most appropriate solution would be the adoption of new legislation inspired by the GeoBR. This new regulatory measure would aim to address a specific and under-regulated aspect of territorial restrictions, thus ensuring a completer and more coherent legal framework.

5.1.2. Solutions for Addressing Remaining B2C Territorial Restrictions

The GeoBR has played a pivotal role in curbing discriminatory territorial restrictions in B2C transactions by prohibiting unjustified disparities based on a customer's nationality, place of residence, or establishment.

However, a significant regulatory gap remains, particularly in relation to copyright-protected content. This issue stems not only from the explicit exclusion of copyright-related practices from the scope of the GeoBR, but also from the inherent territorial nature of copyright law, which continues to fragment the internal digital market and restrict consumer access across borders.

As a result, several approaches could be pursued to address territorial restrictions imposed on consumers in relation to copyright-protected works:

- **Include copyright content within the scope of the GeoBR:** Some legal scholars support this inclusion, arguing that ending geo-blocking would lead to increased profits for EU rights holders and licensees, as it would enhance consumer access to content and reduce internet piracy driven by geo-blocking limitations[287].

Other part of the academia, such as Poiares Maduro, Monti, and Coelho, advocate for prohibiting geo-blocking unless traders can clearly demonstrate the existence of a legal restriction preventing the provision of services in the consumer's Member State. Alternatively, EU legislation could introduce a principle of digital exhaustion, whereby content legally acquired in one Member State could be lawfully made available to consumers in others[288].

- **Reform of EU copyright law:** Establishing a comprehensive, unified copyright regime across the EU would eliminate national intellectual property barriers, thus facilitating the free movement of goods and services[289]. Such reform would effectively remove the vast majority of geo-blocking practices within the EU and significantly improve consumer access to digital products[290].

This reform should be introduced through a regulation to ensure direct applicability and full harmonisation among Member States[291].

The challenge of territorial exclusivity could also be addressed by implementing "the country of origin" principle for the online transmission of audiovisual content. Under this model, a service provider would only need to obtain a licence in the Member State where the content originates in order to distribute it lawfully throughout the EU[292].

- **The adoption of soft law:** A Commission recommendation could offer guidance on the interaction between copyright law and EU competition rules. This would help resolve conflicts between territorial licensing and the principles of free movement and cross-border services. Such guidance could clarify licensing practices, enabling right holders to maintain territorial exclusivity without infringing Article 101 TFEU[293].

[287] Jacklyn Hoffman (n 129), p. 166.
[288] European Parliament, *The Geo-Blocking Proposal: Internal Market, Competition Law and Regulatory Aspects* (IP/A/IMCO/2016-14, 2017), p. 33.
[289] Michele Mesina (n 267), p. 27.
[290] Jacklyn Hoffman (n 129), pp. 166-167.
[291] Ibid, pp. 167-169.
[292] European Parliamentary Research Service (n 127), p. 9.
[293] Giuseppe Mazziotti (n 2) p. 12.

- **New legislative instrument:** It would provide clear *ex ante* guidance on which territorial restrictions are compatible with the Internal Market, drawing on the structure and purpose of existing block exemption regulations that supports the application of Article 101(3) TFEU vertical agreements[294].

- **Jurisprudence from the CJEU:** The CJEU has steadily developed new legal standards and concepts, essential to achieving the harmonisation goals of the EU's copyright directives. Should legislative reform not be pursued, the Court's interpretative role will continue to evolve independently, advancing rapidly and often yielding outcomes that remain largely unpredictable[295].

To summarise, taking all relevant considerations into account, the most appropriate and effective approach to addressing B2C restrictions, particularly those arising from copyright constraints, lies in a comprehensive reform of the EU copyright legal framework at the EU level. This reform should be intrinsically linked to the extension of the scope of the GeoBR to include copyright-protected content. These two initiatives must progress in parallel, as neither can be successfully implemented without the other.

A harmonised EU copyright regime would offer rightsholders and licensees the legal certainty needed to operate consistently across Member States within a unified legal framework. This would encourage cross-border licensing and reduce the legal fragmentation that currently hampers the Digital Single Market.

From the consumer's perspective, such reform would ensure fair and non-discriminatory access to copyrighted content across the EU, dismantling unjustified territorial barriers. In doing so, it would not only enhance consumer experience and choice but also make a substantial contribution to the promotion and preservation of Europe's cultural diversity by facilitating the cross-border circulation of cultural and audiovisual works.

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[294] Ibid.
[295] Ibid, pp. 11-12.

6. CONCLUSIONS

Territorial restrictions are at the centre of political and legal debate in Europe, primarily due to the significant impact they have on the Single Market. They are directly associated with limitations on consumer choice, price increases, reduced innovation, and fragmentation of the internal market, an area that lies at the heart of the EU project. Enhancing competitiveness is one of the EU's key priorities for the current legislative term, and addressing territorial restrictions is inextricably linked to the effective enforcement and integrity of the internal market.

This dissertation primarily focuses on territorial restrictions that affect the supply chain. However, it also acknowledges the significance of territorial constraints related to copyright-protected content, which have become particularly relevant in the digital era. For this reason, Chapter Four is specifically dedicated to examining this topic in detail.

In B2B relationships, territorial restrictions are mainly governed by Article 101(1) TFEU, which prohibits anti-competitive agreements between undertakings that may affect trade between Member States. However, in a recent and pivotal development, the Commission, through the *AB InBev* case, provided a significant clarification: territorial restrictions imposed by a dominant undertaking may also fall within the scope of Article 102 TFEU, which prohibits abuse of a dominant position. This interpretation has marked a turning point in the understanding of the legal treatment of such restrictions.

Although this clarification has brought greater legal certainty to the application of EU competition law in this area, it has simultaneously revealed a critical gap in the current legal framework: territorial restrictions unilaterally imposed by non-dominant undertakings remain largely unregulated. Legislative intervention is necessary to address this issue, as such restrictions still contribute substantially to the fragmentation of the EU Single Market. It is proposed that a new legislative instrument be introduced, possibly modelled on the GeoBR, to fill this regulatory gap.

The GeoBR constitutes another major legislative measure analysed in this dissertation, particularly due to its role in regulating territorial restrictions in B2C relationships. This relatively recent regulation aims to prevent unjustified discrimination by traders based on a costumer's nationality, place of residence, or establishment in online shopping. It functions as a complementary instrument to EU competition law by addressing a highly specific area that falls outside the scope of the existing competition framework.

The GeoBR has been the subject of extensive debate not only among EU institutions but also within academic circles, particularly with respect to whether its scope should be expanded to copyright-protected content.

From the perspective of this author, both EU copyright law and the Geo-blocking Regulation should be revised to establish a harmonised legal framework that eliminates the territoriality of copyright licences. Such reform would enhance legal certainty for rights holders and ensure that consumers across the EU have equal access to all audiovisual and non-audiovisual content.

Nevertheless, this topic remains under intense scrutiny at the EU level. The Commission is currently engaging with stakeholders and Member States to further examine territorial restrictions in the supply chain, collecting data on their actual economic impact and their effects on the functioning of the Single Market. The Commission is expected to present the Horizontal Single Market Strategy in 2025, which is likely to include specific measures and strategic directions regarding territorial restrictions.

In addition, the Commission will publish a new report on the application of the GeoBR later this year, in accordance with Article 9 of the Regulation. This report will provide further insights into the effectiveness of the current framework and offer recommendations on its possible evolution.

In conclusion, while territorial restrictions are addressed to some extent within the current legislative framework and enforcement mechanisms have been put in place, more robust enforcement and legislative expansion are necessary. Furthermore, additional legislation is necessary to comprehensively address the full range of possible restrictions, in order to ensure a level playing field, safeguard consumer interests, and reinforce the integrity of the EU's Single Market.

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