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**Refusal to Serve Consumers because of their
Nationality or Residence - Distortions in the
Internal Market for E-commerce Transactions?**

Briefing Note

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Executive Summary

Technological progress and the internet bring the promise of an Internal Market for electronic services closer than ever into the reach of Europe's citizens. Yet, while European and national policies are committed to removing government-made obstacles to the free movement of services, some e-commerce businesses use technology to actually re-introduce territorial barriers. These businesses either refuse residents or citizens from other member states access to their services, or subject them to dissimilar conditions or prices. The motives for so doing can be roughly distinguished in:

- *Objective conditions of the market:* e.g. local preferences, language, costs of transport, non-existing market for transborder services;
- *Legal reasons:* e.g. flowing from territorial licensing agreements or divergent national regulations;
- *Strategic economic reasons:* e.g. price discrimination, reducing competition, preventing free-riding.

The consequences of territorial differentiation for the Internal Market for e-commerce transactions are ambiguous. On the one hand, territorial differentiation can lead to a reduction of choice and competitively priced products and services for Europe's consumers. It can have a negative impact on consumers' perception of the Internal Market and the building of a European identity, as well as on the exchange of culture, knowledge and information. The effect is likely to be felt most severely by consumers from smaller European member states or member states where e-commerce is still less developed. On the other hand, territorial differentiation can also be the result of the normal functioning of the market, and, under some conditions, even promote and intensify market entry and competition.

The study concludes that Article 49 of the EC Treaty, the competition rules in Articles 81 and 82 of the EC Treaty and the existing European directives on consumer protection are only to a limited extent helpful in defending the interests of consumers who are refused access to a service because of their nationality and/or residence. Neither the rules of the EC Treaty nor the case law of the European Court of Justice provide much guidance on how to strike the balance between the economic interests of service providers, the interests of consumers and public interests, such as the realisation of an Internal Market for all. The recently adopted Article 20 of the Services Directive is probably the most relevant existing provision when it comes to dealing with cases of service providers who refuse consumers access to their services because of the consumer's nationality or residence. It remains to be seen how effective and adequate the provision will be in practice, once it has been implemented. The effect of Article 20 of the Services Directive on the free movement of services is limited insofar as it does not address one of the probably most important motives for territorial differentiation: territorial differentiation that results from restrictive distribution agreements in the upstream relationship (e.g. licensing agreements for content) between producers and distributors.

The study recommends

- To closely monitor the effectiveness of Article 20 of the Services Directive once it has been implemented into national laws.
- To consider whether a similar solution is needed in respect of products sold via the internet, and if so, which form it could take.
- To put forward the issue of consumers' right to receive services within the Internal Market and the conditions under which business-initiated restrictions to the free movement of services are acceptable and justifiable. At present, there is a considerable lack of awareness, experience and legal certainty.
- To put forward the issue of territorial differentiation as a result of restrictive distribution agreements in the relationship between producers and distributors, and their impact on the realisation of the Internal Market.
- To do more research in a number of crucial, yet unsolved questions, including the actual size of the problem; the compatibility of territorial restrictions in the relationship between producers and distributors with the Internal Market program and EC law; the optimal balance between the economic interests of service providers, consumers and public interest objectives, such as the realisation of the Internal Market; and the rights of recipients of goods and services.

1. Introduction¹

"A Single European Market - Fewer barriers, more opportunities" - that is Europe's promise to its citizens. The "single market is all about bringing down barriers and simplifying existing rules to enable everyone in the EU - individuals, consumers and businesses - to make the most of the opportunities offered to them by having direct access to 25 countries and 450 million people".² The internet brings the accomplishment of this promise closer than ever into the reach of Europe's consumers. The internet is principally borderless, it connects consumers and businesses across Europe, it decreases transaction costs and the costs for delivery, and it facilitates the comparison of a wide range of services throughout Europe. Thanks to the internet, consumers can shop for the most attractive services and goods within Europe without ever having to leave their room. Yet, when surfing for attractive services throughout Europe, consumers also have the frustrating experience that the internet is not as borderless as they thought. Notwithstanding the principally borderless character of the internet, they find that some e-commerce businesses have actually re-introduced territorial barriers through technology. Strategies range from the plain refusal of access for residents or citizens from other member states to the application of different prices and conditions.

The goal of this briefing paper is to provide a first overview of the motives of e-commerce businesses to engage in territorial differentiation, to examine whether territorial differentiation can result in a serious distortion of the Internal Market and to make recommendations what measures should be taken to remove barriers that prevent consumers from buying goods and services on-line throughout the Internal Market. This briefing paper concentrates on obstacles to the availability of e-commerce transactions throughout Europe that arise in the relationship between the providers of such services and consumers. It should be noted that territorial differentiation among consumers can also have its origin in the upstream relationship between producers (e.g. EMI Music, Universal Music, Sony Music Entertainment, etc.) and distributors (e.g. iTunes). Conform to the question posed by the European Parliament to the contractor, however, government-made obstacles and obstacles that are the result of vertical agreements between producers and distributors are not the main subject of this paper. For the purpose of this paper, e-commerce transactions are understood broadly as the selling of services and physical goods by electronic means.³ The analysis concentrates on services;⁴ where necessary, it will point to differences in regard to goods. For demonstration purposes, occasional reference will be made to the situation of audiovisual services.

¹ The author would like to thank Professor Marco Loos and Wouter Gekiere for their valuable comments on this briefing paper.

² See the website of the European Commission, Division Internal Market, http://ec.europa.eu/internal_market/top_layer/index_1_en.htm (last visited on 15.01.2007).

³ See the definition in European Parliament, Report on the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a European Initiative in Electronic Commerce (COM(97)0157 - C4-0297/97), 4.05.1998, A4-0173/98, Letter B: "Whereas electronic commerce covers services (both transport and telecommunications services as well as content services, such as legal services, financial services, music and audiovisual etc.) and physical goods, whose sale is conducted by electronic means".

⁴ Note that in many instances the offering and selling of a good via the internet can also be regarded as service. It would exceed the scope of this study to explore the sometimes controversial distinction in depth, see instead the article by F. Smith and L. Woods, A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in The World Trade Organization and The European Union, Columbia Journal of European Law, 2005, Vol. 12, ps. 1, 42-47.

Taking into account the restricted time and scope of the assignment, it cannot be the task of this briefing paper to provide a complete survey of the different reasons for territorial differentiation, or of the underlying economic motives, nor to provide a complete analysis of the legal questions involved. Also, a more complete analysis would require a more thorough examination of the existing examples and businesses practices, contractual conditions, etc. This analysis is based on desk research and will use some examples for illustration purposes.

2. The reality: Consumers are excluded from access to e-commerce transactions because of their nationality or residence

2.1 Business-created obstacles to access to services from other member states

While European and national policies are committed to removing government-made obstacles to the free movement of services, an integrated European market does not necessarily find favour with all private businesses, and some of them re-enforce or re-establish national borders.⁵ A distinction can be made between two forms of territorial differentiation: refusal of access to services and the application of dissimilar conditions/prices to consumers from different member states.

Refusal of access to services: One example of the plain refusal to serve nationals from other member states can be found in the Terms of Services of iTunes UK: "The Service is currently available only in the United Kingdom and is not available in any other location. You agree not to use or attempt to use the Service from outside of the available territory, and that iTunes may use technologies to verify your compliance."⁶ Moreover, British users of iTunes cannot download the cheaper-priced songs from iTunes Germany or iTunes France, unless they possess a German, respectively French credit card or debit card.⁷ Apparently, consumers from the new member states, such as Poland, Hungary, Czech Republic, Bulgaria, Rumania, etc. cannot yet purchase from iTunes.⁸ The leading Web payment processing service PayPal is another example. PayPal is only being offered to consumers from a selected number of European countries; most of the new member states are not being served.⁹ A different form of territorial differentiation is the bundling of one service with another service that is only available to residents of a particular country. For example, in order to be able to download videos from T-Online in Germany, a consumer would have to be connected to T-Online's broadband network, which again is only available to consumers with their residence in Germany. Often, businesses use technology in order to engage in territorial differentiation. One example is the ticket reservation service of KLM that immediately refers consumers using internet service providers (ISPs) based in the Netherlands to the Dutch site of KLM, without giving them the possibility to access the UK site, which often has more advantageous offers.

⁵ European Commission, Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services, presented under the first stage of the Internal Market Strategy for Services, COM(2002)441 final, Brussels, 30.7.2002 [hereinafter 'Report on the State of the Internal Market'], p. 51. Copenhagen Economics, Economic Assessment of the Barriers to the Internal Market for Services, Final Report, Copenhagen, January 2005, report for the European Commission, online available at: <http://www.copenhageneconomics.com/publications/trade4.pdf> (last visited on 15.1.2007), ps. 7, 34 subsq.

⁶ See the iTunes UK website: <http://www.apple.com/legal/itunes/uk/service.html> (last visited on 15.1.2007).

⁷ BBC, iTunes under fire over UK pricing, BBC online, 15.9.2004, online available at <http://news.bbc.co.uk/2/hi/business/3658200.stm> (last visited on 15.1.2007). The behaviour of iTunes UK case was a reason for the UK consumer organisation Which? to file a complaint with the British Competition Authority, which again referred the case to the European Commission. To the knowledge of the author, the case is still pending. See also the complaint of the Consumer Council of Norway to the Norwegian Consumer Ombudsman against iTunes Norway, online available at <http://forbrukerportalen.no/filearchive/Complaint%20against%20iTunes%20Music%20Store.pdf> (last visited on 15.1.2007).

⁸ See <http://www.apple.com/uk/itunes/download/> (last visited on 15.1.2007): "Purchases from the iTunes Store are available only in Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States."

⁹ <http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/terms-outside> (last visited on 15.1.2007).

Another example is Google.com that determines the location of the user (e.g. by using the computer's internet protocol (IP) address or by using the language settings), and automatically redirects the user to the local portal, often generating different, local search results.¹⁰ Probably the best-known example of exclusion by technical design comes from the world of pay-TV (note that many pay-TV platforms also offer e-commerce transactions). Pay-TV platforms encrypt their services so that only paying customers can receive the services. Some platforms, such as BSkyB in the UK, refuse to serve consumers from other member states than the UK.

Application of dissimilar conditions/prices: Then there are the cases in which consumers are not principally excluded from access, but they experience different conditions or prices, depending on the member state they live in or are resident in. For example, Apple's iTunes UK tariff for pieces of music is with 79p per song above the price that it requires consumers in other member states to pay (0.99€). When buying plane tickets online, many online reservation systems will charge additional costs for those who do not pay with a national bank pass. In a similar vain goes the strategy by amazon.uk: purchasers from outside the UK do not qualify for the "free Super Saver Delivery" and have to pay a considerably higher price. PayPal determines that users in some countries may not use the service to receive payments, while users in other countries may only use the service to send payments.

2.2 Reasons why e-commerce businesses engage in territorial differentiation

There are different reasons why businesses may wish to differentiate between consumers from different member states. It is not task of this section to evaluate the different reasons, but to provide a first systematic overview. The demarcation between the different reasons is not always clear-cut.

2.2.1 Objective conditions of the market

There can be objective reasons that would prevent any undertaking from providing services to consumers from other member states. Some services may be bound by their very nature to a particular country. They are simply not intended for consumers in other countries, respectively there is no demand for such services outside a particular region. Reasons can have to do with language, local, regional or national tastes, conditions or preferences (home bias).¹¹ Examples could be online ticket reservation systems for the local theatre or e-government services.

More relevant for the given case are probably situations where a service is not offered abroad because it is not economically feasible to do so. The most obvious reason would be the costs of delivery, marketing, advertising, servicing and support, etc. involved. Such costs could be disproportional high if the service was to be offered in other regions. Other reasons could be the technical characteristics of services, the limited durability of products or the lack of a local distribution or services and support infrastructure. For example, while some magazines offer an online-ordering service, not all of them deliver copies into other member states.

¹⁰ For more details visit <http://www.google.com/support/bin/answer.py?answer=873&topic=8995> (last visited on 19.1.2007).

¹¹ See Keith Head and Thierry Mayer, Non-Europe: The Magnitude and Causes of Market Fragmentation in the EU, *Weltwirtschaftliches Archiv*, 2000, Vol. 136, p. 284 subsq. European Commission, Report on the State of the Internal Market, *aa*, p. 42 subsq.

2.2.2 Legal reasons

Within the category "legal reasons", probably the most important two categories are the lack of harmonisation of public law in different member states, and restrictions that flow from legally binding agreements between private parties. The third case, public law that explicitly prohibits service providers to serve consumers from other member states (e.g. in the fields of online gambling, medical services and drugs), falls outside the scope of this study.

Lack of harmonisation: Online services are subject to different sets of public rules. Even though some degree of harmonisation has already been achieved, probably a number of important differences still remains, e.g. in the field of copyright, protection of minors, consumer protection, taxing, advertising, gambling, etc.¹² Where differences in national legislation throughout Europe exist, service providers that offer their services outside their own country can be confronted with additional legal obligations, such as additional information requirements, stricter formal requirements, different benchmarks when reviewing contractual terms, the need to formulate different contractual clauses for each member states, etc.¹³ This can be a reason for them to restrict their service to consumers from their own country. For example, online pharmacies may have to refuse their services to consumers from some member states because of different public regulations that apply there.

Restrictive distribution agreements: Although not directly covered by the assignment, some words on restrictions as a result of contractual obligations are in place. This is because, in practice, exclusive distribution agreements in the upstream relationship between producers and distributors are probably one of the most influential legal reason for territorial differentiation. In this context, particularly the practice of territorial licensing of intellectual property rights (e.g. in music or video content) or other exclusive rights in content, for example for the transmission of organised events, must be mentioned. Often, rightholders or collecting societies license the right to distribute e.g. music or video content on a territorial or language basis. The consequence is that a service provider would be required to purchase the rights for all twenty-seven member states if he planned to offer services for the whole of Europe. Particularly smaller providers can find the acquisition of the necessary rights prohibitively expensive, if not impossible in practice. This can force providers to offer their services, eventually in combination with encryption techniques or other forms of content control, only to consumers from countries for which they did acquire the rights.¹⁴ The practice of territorial licensing can only in parts be explained with the territorial nature of copyright law. Arguably, a more important motive for imposing territorial restrictions on distributors are strategic economic reasons (see below).

¹² Copenhagen Economics 2005, *ao*, p. 33 subsq.

¹³ For a detailed analysis, see Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers, EC Consumer Law Compendium, Comparative analysis, Study prepared for the European Commission, Bielefeld, 12 December 2006, online available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf (last visited on 15.1.2007), see in particular ps. 167, 205, 330, 479. More general on legal barriers, European Commission, Report on the State of the Internal Market, *ao*, p. 14 subsq. Copenhagen Economics 2005, *ao*, p. 32 subsq.

¹⁴ The situation even gave rise to a Recommendation from the European Commission on collective cross-border management of copyright and related rights for online services, because, so the European Commission, new Internet-based services such as webcasting or on-demand music downloads need a license that covers their activities throughout the EU, see European Commission, Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54, 21.10.2005 [hereinafter 'Recommendation on collective cross-border management of copyright'].

2.2.3 Strategic economic reasons

Finally, there can be various strategic economic reasons why businesses discriminate on grounds of nationality or residency.¹⁵ In the given context, probably the two most relevant strategic economic reasons are price discrimination and the reduction of competition.

Engaging in price discrimination: In case the willingness to pay for a product a certain price varies between member states (price elasticities), it can be attractive for a service provider to offer the same product in different countries at different prices, and so to maximise profits.¹⁶ Price discrimination can also be a response to other economic factors that can relate to a particular geographic territory: differences in market conditions, taxation, currency conversion, income differences, different consumption patterns, etc.¹⁷ In order to be able to engage in price discrimination, a service provider must have means to sort consumers according to their differing demand elasticities, and to prevent consumers from one country to access that service in another country at a cheaper price. Advances in control technologies, such as electronic access control, Digital Rights Management (DRM), etc. allow to re-install territorial borders even in a principally borderless environment, such as the internet. One example is the aforementioned iTunes case where the processing of a request requires the feeding of the system with a credit card or debit card number from the “correct” country. Another example is that of airlines that re-direct consumers automatically to the site of the airline where the consumer is resident, respectively where his ISP is located.

Influencing competition: Market segmentation, including territorial segmentation, can be a way to influence competition.¹⁸ By restricting the provision of goods or services to the territory of one country, providers can avoid competition with services or goods outside the country. Territorial differentiation can also be a means to facilitate coordination to raise prices or restrict output between distributors that operate in different member states. Market segmentation along national borders as a means to influence competition plays a particularly important role in the upstream relationship, e.g. between rightholders and those seeking a licence. Here, it can be a means to e.g. foreclose access to resources, reduce intra-brand competition and/or to raise entrance costs for competitors.

2.3 Distortion of the Internal Market?

The purposeful exclusion of consumers from one member state to have access to services from another member state clearly does not sit easy with the idea of an integrated European market where "services can move across national borders in the EU as easily as within a single Member State".

¹⁵ For a more general assessment, see Copenhagen Economics 2005, *aa*, p. 34 subseq.

¹⁶ See extensively B. Osler, Rip-off USA: The North American car market, Consumer Policy Review, 2002, Vol. 12, p. 198. N.T. Gallini and A. Hollis, A contractual approach to the gray market, International Review of Law and Economics 1999, Vol. 19, ps. 1, 4, online available at: <http://www.sciencedirect.com/science/article/B6V7M-3W3NK23-1/2/0398a0f43fc2350d2489cb5632fabe2> (last visited on 15.1.2007).

¹⁷ European Commission, Report on the functioning of Community product and capital markets, *aa*, p. 6.

¹⁸ For a discussion of the various possible effects of territorial restrictions on competition see E.S. Dunt, J.S. Gans and S.P. King, The Economic Consequences of DVD Regional Restrictions, Report No MBS 2001-14, Melbourne Business School, Melbourne, Australia, 2001, online available at: <http://www.mbs.edu/home/jgans/papers/dvd.pdf> (last visited on 15.1.2007), p. 6 subseq. C. Crampes, D. Encaoua, A. Hollander, Competition and Intellectual Property in the European Union, No 332, IDEI Working Papers, February 2005, online available at: <http://idei.fr/doc/wp/2005/crampes.pdf> (last visited on 15.1.2007), p. 5 subseq. Copenhagen Economics, *aa*, p. 38 subseq. P. Rey and J. Stiglitz, The Role of Exclusive Territories, European Economic Review, 1988, Vol. 32, p. 561 subseq.

As the European Commission observed in its report on the State of the Internal Market: "services users, and in particular consumers, ultimately pay the price for the existence of Internal Market barriers in the services field".¹⁹ Consumers will have to pay the price quite literally in situations where price discrimination, in combination with access restrictions, makes it impossible for consumers to benefit from price competition. Also, consumers from some member states will miss out on the benefits of the internet to make more services available to them. This will be particularly the case where no substitute services are available to them from elsewhere. The consequences will be felt most severely by consumers from smaller countries that have less choice in their own country, respectively whose countries are not attractive enough for providers from other countries to invest in serving consumers in those countries. Exclusion of consumers from other member states also stands in the way of the free exchange of culture, knowledge and information throughout Europe. The adverse effect of territorial differentiation on the perception of Europe's citizens of an integrated European Internal Market has been highlighted in the report about the application of the Satellite and Cable Directive. The reasoning holds truth also for the online sector: "This is a problem which affects the European citizen's direct perception of the reality of the Internal Market in his daily life and which thus has an appreciable negative impact in terms of cultural, linguistic, social and economic interpenetration at the intra-Community level."²⁰ The credibility of the Internal Market is at stake, not only for the broadcasting sector: one third of European consumers (with regional differences) believe that sellers/providers of services or products in Europe at general (i.e. not restricted to e-commerce transactions) refuse to sell goods or services because of nationality or residence,²¹ another third doubts at least.

The experience with the Satellite and Cable Directive²² has clearly demonstrated that even where harmonisation measures are in place, private acting of commercial entities can oppose market integration and the realisation of an Internal Market for consumers.²³ The broadcasting example, furthermore, demonstrates that the effect of territorial differentiation on the Internal Market can be even more disturbing where technical means, such as encryption technologies, are employed to re-establish territorial borders.²⁴

Although all cases of territorial differentiation restrict in some form or other the freedom of consumers to receive services from other member states, some instances of territorial differentiation are more acceptable than others. No one should be forced to offer services outside a particular territory if objective reasons oppose this.

¹⁹ European Commission, Communication on the State of the Internal Market, *aa*, p. 66, see also p. 51.

²⁰ European Commission, Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM(2002)430 final, Brussels, 26.07.2002 [hereinafter "Report on the application of the Satellite and Cable Directive"], ps. 7-8.

²¹ Eurobarometer, Consumer protection in the Internal Market, Special Report 252, online available at http://ec.europa.eu/consumers/topics/eurobarometer_09-2006_en.pdf (last visited on 15.1.2007), p. 61 subsq.

²² Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.93.

²³ See P.B. Hugenholz, 'Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?' in: Die Zukunft der Fernsehrichtlinie / The Future of the 'Television without Frontiers' Directive, Proceedings of the conference organised by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29, Baden-Baden, Nomos Verlag 2005, ps. 65-73.

²⁴ N. Helberger, Controlling access to content – Regulating conditional access in digital broadcasting, Kluwer International, Den Haag, 2005, p. 39 subsq.

On the other hand, the adverse effect of territorial licensing on the Internal Market has been the target for much criticism from stakeholders, policy makers and academics alike.²⁵ An important and complex question is the extent to which strategic economic reasons for not offering services to consumers from other member states are acceptable from the perspective of the Internal Market program. The central question in this context is the impact of territorial differentiation on competition within the Internal Market, and, consequently, on all benefits and expectations that are linked to such competition. Territorial differentiation has no per se negative effect on competition within the Internal Market. For the *supply side*, by eliminating the scope of free-riding for independent distributors, and by tailoring offers to fit regional preferences, territorial differentiation could actually encourage market entry, including the entry into foreign markets.²⁶ Price discrimination could raise social welfare in situations where, as a result, groups of customers were served who otherwise would not be served. On the other hand, there is the use of territorial restrictions as strategic means to reduce competition and to increase prices to the disadvantage of consumers. For the *demand side*, territorial differentiation in form of e.g. price discrimination might actually help to intensify competition, namely where it invites consumers to shop in Europe for the best offer with the most attractive conditions.²⁷ Having said that, whether the overall effect for the Internal Market is positive or negative will depend on whether consumers have a choice and remain free to shop in Europe. In so far, there is a need to differentiate between a) offering services to consumers from different regions at different conditions and b) excluding consumer from one territory from access to services/products that are offered in another territory. While the former must not per se inhibit competition and can even promote it, the later is likely to distort competition within the Internal Market. This is another reason to be wary of forms of exclusion by technical design that do not leave consumers any choice.

In order to make any meaningful predictions about the seriousness of a distortion, empirical research is needed in order to assess the actual size of the problem, to what extent there is demand for cross-border e-commerce transactions, and to what extent demand is being frustrated by refusals to supply customers outside a particular geographic territory. The practical relevancy of some objective reasons for not offering services across the border is likely to diminish due to factors such as increasing demand from consumers from new member states, improved access of European consumers to high speed transmission technologies, and the influence of the internet on search costs, transport costs and the ease with which language obstacles can be overcome.²⁸ Where territorial differentiation is the result of legal reasons, much will depend on the success of existing and future harmonisation measures. As opposed, there is little reason to believe that the relevancy of strategic reasons not to serve consumers from other member states is to diminish in the near to medium term future.

²⁵ P.B. Hugenholtz, M.M.M. van Eechoud, S.G. van Gompel, et al., The Recasting of Copyright & Related Rights for the Knowledge Economy, Institute for Information Law (IViR), University of Amsterdam, Report to the European Commission, DG Internal Market, November 2006, online available at: <http://www.ivir.nl/index-english.html> (last visited on 15.1.2007). Dunt, Gans and King 2001, *aa*, p. 12 subseq. See also the comments from stakeholders made in the course of the online consultation about the collective management of copyrights, http://ec.europa.eu/internal_market/copyright/management/management_en.htm (last visited on 15.1.2007), and European Commission, Recommendation on collective cross-border management of copyright, *aa*.

²⁶ Copenhagen Economics makes this point and gives a more detailed explanation, Copenhagen Economics, *aa*, p. 41. See also the paper from M.E. Levine, Price discrimination without market power, Discussion Paper No. 276, Harvard Law School, Cambridge, 2000, online available at: http://www.law.harvard.edu/programs/olin_center/papers/pdf/276.pdf (last visited on 15.1.2007).

²⁷ This point is also made in e.g. D. Geradin, N. Petit, Price Discrimination under EC Competition Law: Another Antitrust Theory in Search of Limiting Principles, Global Competition Law Centre Working Paper Series No. 07/05, 2005, online available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=763484 (last visited on 15.1.2007), p. 44.

²⁸ In this sense also Copenhagen Economics, *aa*, p. 31.

3. Legal assessment: is there a need for action?

In the following, a preliminary analysis of existing primary and secondary EC law will give a first indication of whether existing rules in the European Union are adequate and sufficient in addressing the problem or whether there is a need for additional initiatives. Where necessary, the analysis will distinguish between the different reasons (see section 2.2) to differentiate among nationals or residents of other countries.

3.1 Territorial differentiation and the free movement of services

Although the analysis will concentrate in the first place on the free movement of services, arguably the most fundamental principles will also hold some truth for the free movement of goods, as laid down in Articles 28 and 30 of the EC Treaty.²⁹ Article 49 of the EC Treaty protects the free movement of services within the territory of the European Union. Article 49 of the EC Treaty prohibits, in the first place, any discriminatory restrictions on the *providers of services* (specifying the general non-discrimination prohibition in Article 12 EC of the EC Treaty for services). The Treaty wording is not explicit about the *recipients of services* across the border. The European Court of Justice has consistently held that Article 49 of the EC Treaty confers rights not only on the providers of services but also on the recipients.³⁰ Less clear is the question to what extent Article 49 of the EC Treaty is also effective among private parties, notably in the relationship between e-commerce providers and consumers. To the knowledge of the author, no relevant case law for the e-commerce sector exists yet. The European Court of Justice has declared on several occasions and in different contexts that the prohibition of discrimination on grounds of nationality can apply to rules of a private nature, too. Otherwise, so the court, the abolition of government-made obstacles to the free movement of services could be neutralised by barriers made by businesses.³¹ The European Court of Justice elaborated more in depth on the direct effect of the provisions of the EC Treaty between private parties in cases relating to the free movement of goods, notably the cases on parallel importing where the court had to decide on the tension between the economic freedom of commercial operators to determine how they market their products and the free movement of goods (see more detailed below).³²

²⁹ Kapteyn and VerLoren van Themaat 1987, *aa.o.*, p. 294, with further references and particular attention to electronic services. C. Zacker, *Kompendium Europarecht*, Springer Berlin Heidelberg, 1997, p. 106.

³⁰ European Court of Justice, *Luisi and Carbone v Ministero del Tesoro*, Joined Cases 286/82 and 26/83, *European Court reports* 1984, p. 377 [hereinafter 'Luisi and Carbone'], paragraph 16, and *European Court of Justice, Cowan v Trésor Public*, Case 186/87, *European Court reports* 1989, p. 195 [hereinafter 'Cowan'], paragraph 15. And a more recent decision: *European Court of Justice, Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna*, Case C-294/97, *European Court reports* 1999 p. I-07447 [hereinafter 'Eurowings'], paragraph 34.

³¹ *European Court of Justice, Walrave*, paragraphs 17 and 18 (for collective employment rules). *European Court of Justice, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFAA) v Jean-Marc Bosman*, Case C-415/93, *European Court reports* 1995, p. I-04921 [hereinafter "Bosman"], paragraph 83. *European Court of Justice, Judgement of the Court of 6 June 2000, Roman Angonese v Cassa di Risparmio di Bolzano SpA*, Case C-281/98 [hereinafter "Angonese"], paragraphs 34, 36 (for individual working contracts).

³² *European Court of Justice, Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.*, Case 15-74, *European Court reports* 1974 p. 1147 [hereinafter 'Centrafarm'], paragraphs 7, 12. *European Court of Justice, Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler*, Case 187/80, *European Court reports* 1981, p. 2063 [hereinafter 'Merck'], paragraphs 11 and 13. *European Court of Justice, Keurkoop BV v Nancy Kean Gifts BV*, Case 144/81, *European Court reports* 1982 p. 2853 [hereinafter 'Nancy Kean'], paragraphs 24 and 25.

Assuming that Article 49 of the EC Treaty also confers rights to recipients, and that these rights can also be enforced in the relationship between service provider and consumer, which so far has not yet been confirmed by the court for cases as those discussed here, the next question would be under which conditions private restrictions could be justified. In this respect, it is probably necessary to distinguish between the different reasons for such restrictions. In a situation where public laws prohibited service providers to serve consumers from other member states, such rules would have to be justified by overriding public interests (Articles 49, 55, 46 (1) of the EC Treaty). In cases where restrictions are the result of legally binding private agreements, e.g. licensing contracts, such might also be justified insofar as the practice of territorial licensing itself was in compliance with the EC Treaty. For example, the European Court of Justice ruled in the Coditel case that Article 49 of the EC Treaty does not encompass "limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property" even in situations where exclusive licensing agreements restrict transmission, and therewith access for consumers from other member states, to a particular territory and where such restrictions coincide with national borders.³³ A different question altogether is whether the ruling would also hold true in the present situation where electronic content control technologies allow far more precise control over content, despite of national borders. One could argue that in the case of electronic services that are provided via e.g. the internet, the need for limitations alongside geographical borders is far less evident if not counterintuitive. Note that the court conceded that a rightholder cannot rely on national intellectual property regulation and its territorial nature to justify the exercise of exclusive rights where the exercise of such rights creates artificial barriers to trade between member states³⁴ or where such barriers are artificial and unjustifiable in terms of the needs of a particular industry.³⁵ Similar principles have been developed earlier and more elaborately in relation to intellectual property rights and the free movement of goods.³⁶

Other cases of strategic territorial differentiation by e-commerce businesses cannot call upon existing legal provisions to justify such restrictions. There is still little clarity about the circumstances that could justify privately erected obstacles to the free movement of services. In a different context, the European Court of Justice judged on one occasion that privately initiated differentiation on grounds of nationality could be justified only if it was based *on objective factors* unrelated to the nationality of the persons concerned and if it was in proportion to the aim legitimately pursued.³⁷ For the given case, one could argue that differences in local preferences, language, etc. could qualify as objective reason. More difficult is the case of territorial differentiation as a result of strategic behaviour. Insofar, it would be necessary to carefully balance the interests involved, that is the economic freedom of service providers, the legitimate interests of consumers, the effect on trade within the Internal Market, and other public interests involved.

³³ European Court of Justice, *Coditel v Ciné Vog Films*, ECJ 19 March 1980, Case 62/79, European Court reports 1980, p. 881 [hereinafter 'Coditel I'], paragraph 16.

³⁴ European Court of Justice, *Coditel v Ciné Vog Films*, ECJ 6 October 1982, Case 262/81, European Court reports 1982, p. 3381 [hereinafter 'Coditel II'], paragraph 19. European Court of Justice, *Coditel I*, paragraph 15.

³⁵ European Court of Justice, *Coditel II*, paragraph 19 (with reference to the cinematographique industry).

³⁶ See e.g. European Court of Justice, *Centrafarm*, paragraphs 7-12. European Court of Justice, *Merck*, paragraph 12. European Court of Justice, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, Joined cases 56 and 58-64, European Court reports, English special edition, p. 299 [hereinafter 'Consten/Grundig']. European Court of Justice, *Terrapin v. Terranova*, Case 119/75, European Court reports 1976, p. 1039 [hereinafter 'Terrapin'], paragraph 6. European Court of Justice, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, Case 24-67, European Court reports, English special edition p. 55 [hereinafter 'Probel'], paragraph 5. European Court of Justice, *Nancy Kean*, paragraphs 24 and 25.

³⁷ European Court of Justice, *Angonese*, paragraph 42.

Taking into account the strict requirements that apply for government-initiated acts of discrimination, the threshold for justifying private restrictions on the free movement of services should be high as well.³⁸

In situations where private acting is in conflict with Article 49 EC Treaty, this can trigger a positive obligation for member states to undertake adequate steps to ensure the realisation of the free movement of services.³⁹ Far more questionable is whether Article 49 of the EC Treaty could be directly invoked against private parties,⁴⁰ or only against states.⁴¹ Again, the court was more explicit in cases that concerned the free movement of goods. In the aforementioned cases on parallel importing of goods, the court held repeatedly that the rules of the Treaty can prevent private parties from relying on their exclusive rights in their relation to other private parties.⁴²

3.2 Territorial differentiation and EC competition law

At present, there is a tendency to address the issue of private territorial differentiation primarily in the context of competition law.⁴³ The goal of Articles 81 and 82 of the EC Treaty is to prevent that businesses create artificial obstacles to trade between member states, and, more generally, to create the conditions for a functioning, competitive Internal Market.⁴⁴ Both, Articles 81 and 82 of the EC Treaty ban, among others, anti-competitive behaviour that has the effect to artificially partition the Internal Market.

So far, typical cases for the application of *Article 81 of the EC Treaty* to instances of territorial differentiation have been territorial resale restrictions, exclusive distribution agreements and exclusive customer allocation agreements.⁴⁵ Also territorial licensing agreements have been scrutinised upon their compatibility with Article 81 of the EC Treaty. The European Court of Justice found that territorial licensing agreements can be in conflict with Article 81 of the EC Treaty where they create "barriers which are artificial and unjustifiable in terms of the needs" of the industry.⁴⁶ Insofar, EC competition law might be an effective tool to address territorial differentiation where it is the result of restrictive agreements in the upstream relationship.

³⁸ In this sense apparently also D.G. Goyder, *EC Competition Law*, 4th edition, Oxford, p. 317.

³⁹ European Court of Justice, *Commission of the European Communities v French Republic*, Case C-265/95, *European Court reports* 1997, p. I-06959, paragraph 30; *European Court of Justice, Schmidberger*, paragraphs 57-62.

⁴⁰ In this sense possibly *European Court of Justice, Walrave*, paragraph 34.

⁴¹ *European Court of Justice, Van Binsbergen*, paragraph 27.

⁴² See e.g. *European Court of Justice, Centrafarm*, paragraph 15. *European Court of Justice, Merck*, paragraph 14. *European Court of Justice, Nancy Kean*, paragraphs 24 and 25.

⁴³ *European Commission, Communication on the State of the Internal Market, aao*, p. 51

⁴⁴ See only *Kapteyn and VerLoren van Themaat, aao*, p. 329 subsq. with numerous references. Goyder, *EC Competition Law*, 4th edition, Oxford, 2003, p. 316.

⁴⁵ *European Court of First Instance, Judgment of the Court of First Instance (Fourth Chamber) of 6 July 2000, Volkswagen AG v Commission of the European Communities*, Case T-62/98, *European Court reports* 2000, p. II-02707 [hereinafter 'Volkswagen'], paragraph 179. *European Court of First Instance, Judgment of the Court of First Instance (First Chamber) of 13 January 2004, JCB Service v Commission of the European Communities*, Case T-67/01, *European Court reports* 2004, p. 0 [hereinafter 'JCB'], paragraph 182.

⁴⁶ *European Court of Justice, Coditel II*, paragraphs 16 and 19 (here: the cinematographic industry, examples given where language obstacles and differences in the national systems of funding). See also *European Court of Justice, Consten/Grundig*. *European Court of Justice, Nancy Kean*, paragraph 26. *European Court of Justice, Probel*, paragraph 71.

Article 82 of the EC Treaty is concerned with dominant market power where it is used to inhibit the activities of competitors and thereby influence the normal working of market mechanisms. Typical cases of territorial restrictions that have already been discussed in context with Article 82 of the EC Treaty are price discrimination⁴⁷, exclusive licensing⁴⁸ or the preventing of parallel imports.⁴⁹

Note that also under EC competition law, treating customers from different countries differently can be justified on grounds of different market conditions in the different national markets.⁵⁰ Most importantly, the refusal to serve consumers from other member states will only fall under the scope of EC competition law if it can be demonstrated that the refusal to serve consumers from other member states has an anti-competitive impact and restricts trade between member states. A negative effect on the interests that consumers attach to the free flow of services alone is not sufficient to trigger the application of EC competition rules. As it was explained previously, the effects of territorial differentiation between service providers and consumers on competition and trade within the Internal Market are far from clear. Not all instances of strategic territorial differentiation will have a negative effect on competition and trade; in some cases the effect might even be a positive one.

3.3 Territorial differentiation and EC consumer protection rules

To the extent that existing European initiatives in the field of consumer protection are aimed at the realisation of the Internal Market, such policies tend to concentrate on removing obstacles for service providers who provide services across Europe,⁵¹ not so much on removing obstacles for consumers who wish to receive services across national borders. This is clearly the goal of the *E-Commerce Directive*.⁵² The objective of the E-Commerce Directive is to coordinate national laws and to remove legal obstacles to the provision of services.⁵³ Although the E-Commerce Directive also includes some obligations for service providers, these obligations do not offer much solace in situations where consumers are being refused access to services or otherwise experience discrimination on grounds of their nationality or residence.

⁴⁷ For example European Court of First Instance, Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, *Irish Sugar plc v Commission of the European Communities*, Case T-228/97, European Court reports 1999, p. II-02969 [hereinafter 'Irish Sugar'], paragraphs 140-141. European Court of Justice, 14 February 1978, *United Brands*, Case 27/76, European Court reports 1978, p. 207, paragraphs 183, 233. European Court of First Instance, Judgment of the Court of First Instance of 6 October 1994, *Tetra Pak International SA v Commission of the European Communities*, Case T-83/91, European Court reports 1994, page II-755 [hereinafter 'Tetra Pak II'], paragraph 170. European Court of Justice, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, Case 78-70, European Court reports 1971 p. 487 [hereinafter 'Deutsche Grammophon'], paragraph 19.

⁴⁸ European Court of Justice, *Deutsche Grammophon*, paragraph 19. European Court of Justice, *G. Basset v Société des auteurs, compositeurs et éditeurs de musique (SACEM)*, Case 402/85, European Court reports 1987 p. 1747 [hereinafter 'Sacem'], paragraph 19 (with regard to collecting societies).

⁴⁹ E.g. European Court of Justice, *Deutsche Grammophon*, paragraph 19. European Court of Justice, *Probel*.

⁵⁰ European Court of Justice, *United Brands*, paragraph 184.

⁵¹ See e.g. Article 3 (1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, 17.07.2000, [hereinafter 'E-Commerce Directive'], Article 4 of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149/22, 11.6.2005 [hereinafter 'Unfair Commercial Practices Directive'].

⁵² Note, the E-Commerce Directive only applies to services.

⁵³ E.g. recitals 5 and 6, Article 3 (2) of the E-Commerce Directive.

Some instances of territorial differentiation might fall under the rules of the *Unfair Terms Directive*.⁵⁴ Note the directive will not apply in cases of plain refusal to serve consumers, as here no contract has been concluded in the first place. Also, pricing issues are probably not covered by the directive (see Article 4 (2) of the Unfair Terms Directive).

Of more practical relevancy are probably the provisions of the *Unfair Commercial Practices Directive*,⁵⁵ and here in particular the general prohibition of unfair commercial practices in Article 5 of the directive. According to Article 5, commercial practices (including pre-contractual behaviour) shall be deemed unfair if they materially distort the economic behaviour of the consumer (Article 5 (2) b of the Unfair Commercial Practices Directive) and are contrary to the requirements of professional diligence (Article 5 (2) a of the Unfair Commercial Practices Directive). While a refusal to serve consumers from other member states or treating consumers from other member states differently is likely to change their economic behaviour, it is less clear whether such behaviour is contrary to professional diligence. To answer this question more research in the practice of territorial differentiation in e-commerce transactions is needed.

3.4 Article 20 of the Services Directive

Probably the most relevant provision to address territorial differentiation for services is Article 20 of the Services Directive.⁵⁶ Curiously, the provision has not yet drawn much attention or discussion.⁵⁷ The directive applies to services only, not to goods.⁵⁸ Goal of the Services Directive is to remove remaining barriers to the free movement of services between member states. Under the heading "Rights of Recipients", Article 20 explicitly bans service providers from discriminating consumers who want to access their services because of their nationality or residence. Whereas former initiatives, e.g. in the field of consumer protection, concentrated mostly on the rights of service providers, Article 20 is explicitly concerned with the rights of recipients⁵⁹ and could respond at least in respect to services to the problem of consumers that are being refused access to a service solely because of their nationality or residence. Depending on the interpretation of "conditions of access to a service", the provision could also cover instances of price discrimination and other conditions in consumer contracts. Less clear is whether exclusion by technical design would also fall under the directive, or whether "general conditions made available to the public" only refers to contractual conditions.

Article 20 of the Service Directive stipulates that discrimination on grounds of nationality or residence is prohibited if it is not justified by objective criteria. Recital 95 explains that objective criteria in the sense of this directive can vary from country to country. Examples given are "additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment."

⁵⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34 [hereinafter 'Unfair Terms Directive']. The Unfair Terms Directive applies to contracts with regard to services as well as to products.

⁵⁵ The directive applies to both, cases concerning products and services.

⁵⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68 [hereinafter 'Services Directive'].

⁵⁷ This can already be assessed from the fact that in the course of the process, the provision (formerly: Article 21) has not experienced any major changes or amendments.

⁵⁸ See Recital 76 of the Services Directive.

⁵⁹ Moreover, far-reaching information requirements in Article 22 (Information on providers and their services) might contribute to lowering the search costs for consumers.

Obviously, it is not the intention of the Services Directive to rule out territorial differentiation where it is the result of objective conditions of the market (as e.g. described in section 2.2.2 of this briefing paper).⁶⁰ As far as legal motives for territorial differentiation are concerned (see section 2.2.3.), the makers of the directive saw the need to clarify that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory does not constitute unlawful discrimination.⁶¹ Unfortunately, the rather self-evident clarification that there is no obligation to acquire rights for the entire territory of the European Union does not add much to the more important question under which conditions the practice of territorial licensing must be regarded in conflict with the EC Treaty. Finally, where territorial differentiation is the result of strategic reasons (see section 2.2.4) such acting appears to be banned. Although Article 20 of the Service Directive must be welcomed in principle, there are reasons to doubt whether an outright ban of territorial differentiation on grounds of strategic reasons is necessary and proportionate from the perspective of the objectives of the Internal Market program (see section 2.3).

⁶⁰ European Parliament, Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on services, in: Report, on the proposal for a directive of the European Parliament and of the Council on services in the internal market, Committee on the Internal Market and Consumer Protection, A6-0409/2005, 15.12.2005, Amendment 55 and Justification.

⁶¹ Recital 95 of the Services Directive.

4. Conclusions and recommendations

Territorial differentiation in e-commerce transactions is part of a bigger and potentially serious problem for the realisation of the Internal Market program: government-made obstacles to the free movement of services and products are being replaced by new, business-made obstacles. Territorial differentiation can affect price competition and the availability of services for consumers. The possible effects for the Internal Market are particularly disturbing in situations where territorial differentiation has been translated into the technical design of services or products, by means of electronic access control, redirecting mechanism, divergent technical standards or other technologies that restrict consumers' choice and access to services from other member states, often without the consumer even noticing it or leaving her a choice. As experience in other sectors shows, the exclusion of consumers from other member states can have a particularly serious effect for consumers from smaller member states or member states with yet less developed electronic commerce.

The assessment of the impact of territorial differentiation on the Internal Market is complicated by many difficult economic and legal questions and political choices involved. Another reason why the assessment is so difficult is the sheer diversity of reasons to engage in territorial differentiation, as well as uncertainty about the extent to which those reasons are likely to persist in the future. Some instances of territorial differentiation can be explained by objective conditions of the market and remaining differences in national rules. Two other important motives for businesses to engage in territorial differentiation have to do with the territorial licensing of content, respectively economic strategic thinking behind territorial licensing, and other strategic economic reasons. One conclusion of this study is that strategic territorial differentiation has received too little attention so far.

Most existing legal instruments at hand are only poorly prepared to address strategic territorial differentiation. So far, existing initiatives concentrate primarily on removing government-made restrictions for service providers. Although there seems to be some agreement that the free movement of services must correlate with the freedom to receive such, neither the rules of the EC Treaty nor the case law of the European Court of Justice provide much guidance on how to strike the balance between the economic interests of service providers, the interests of consumers and public interests, such as the realisation of an Internal Market for all. A preliminary analysis has also shown that existing European competition and consumer protection rules are only partly helpful in defending the interests of consumers who are refused access to a service because of their nationality/residence.

For services, Article 20 of the Services Directive might go some way to fill that gap in respect of services (not of products). It remains to be seen how member states will implement this provision, and whether it will be effective in practice. There is not much experience yet that could guide member states when implementing Article 20 of the Services Directive. According to the wording of the directive, territorial differentiation is prohibited unless justified by objective reasons.

The reality might be more complex. In this briefing paper it was argued that it is at least doubtful whether an outright ban on strategic territorial differentiation is justified and necessary. Instead, more clarity is needed about its effects on competition and the transborder availability of services. Also, there might be a need to distinguish between the refusal of access for consumers from other member states and the application of dissimilar conditions for access to services. The former is more likely to conflict with the goals of the Internal Market program than the latter. More clarity is also needed whether exclusion by technical design is covered by Article 20 of the Services Directive. Finally, the effectiveness of the Services Directive to realise the free movement of services is probably limited as it does not address the important case of territorial differentiation as the result of restrictive conditions in the upstream relationship between producers and distributors.

Recommendations

Based on the previous analysis, we make the following recommendations:

- To monitor the effectiveness of Article 20 of the Services Directive once it has been implemented into national laws.
- To consider whether a similar solution is needed in respect of products sold via the internet, and if so, which form it could take.
- To put forward the issue of the rights of recipients of services in the Internal Market and the circumstances under which business-made restrictions to the free movement of services are acceptable and justifiable. At present, there is a considerable lack of awareness, experience and legal certainty.
- To put forward the issue of territorial differentiation as a result of restrictive distribution agreements in the upstream relationship between producers and distributors, and their impact on the realisation of the Internal Market.
- In this context, the briefing paper has highlighted some issues that need further research:
 - Size of the problem and mid- to long-term perspective; and the overall impact on trade and competition within the Internal Market;
 - Exclusion of consumers resulting from vertical/horizontal agreements between producers and distributors, in particular the issue of territorial licensing, and its compatibility with EC law;
 - The right balance between the economic interests of service providers, consumers and public interest objectives, such as the realisation of the Internal Market;
 - The legal standing of recipients of goods and services under EC law.

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