

«Access denied» : How some e-commerce businesses re-errect national borders for online consumers, and what European law has to say about this

*Dr. Natali Helberger*¹

I. INTRODUCTION

Until the year 2008, UK consumers had to pay on average 20% more to download a song from iTunes than their fellow music lover in France, Belgium or Germany. iTunes also refused UK consumers access to the French and German versions of the iTunes store, forcing UK consumers to pay the higher prices in the UK². In September 2004, the UK consumer organisation Which? made a formal complaint to the UK Office for Fair Trade (OFT) about the marketing and pricing strategy of iTunes in the UK. Which? claimed that «the practice of residency based price discrimination frustrates consumer benefits possible under the single market and that the iTunes system allows market abuse, going against the principles of the single market»³. The OFT referred the case to the European Commission, which opened formal investigations against iTunes in early 2005. Only in January 2008, and upon Apple's announcement that it would reduce download prices in the UK within 6 months and equalise its prices within Europe, the Commission stopped the investigation⁴.

¹ This article is based on a briefing paper that was prepared on behalf of the European Parliament : N. HELBERGER, «Refusal to Serve Consumers because of their Nationality or Residence – Distortions in the Internal Market for E-commerce Transactions?», Briefing Note on behalf of the European Parliament's Committee on Internal Market and Consumer Protection, January 2007, PE 382.180. The European Parliament is the holder of the copyrights to the briefing paper. The paper is online available at : <http://www.ivir.nl/medewerkers/helberger.html>. The author would like to thank Professor Bernt Hugenholtz, Professor Marco Loos, Wouter Gekiere and Balazs Mellar for their valuable comments on the briefing paper.

² In order to purchase songs in, for example, France, customers had to have a France credit card and an address in France.

³ See Which?, «iTunes referred to OFT», Press release, 15 September 2004, online available at : http://www.which.co.uk/press/press_topics/campaign_news/other_issues/iTunes_referred_to_OFT_571_56113.jsp (last visited on 14.10.2008).

⁴ European Commission, «Antitrust : European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe», Press Release IP/08/22, 9 January 2008, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 14.10.2008).

iTunes's decision is most certainly «music to Which?'s ears»⁵ and good news for UK customers. UK's iTunes customers experienced that the reality of the Internal Market is not exactly what the EU promised to them : «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»⁶. It is true that 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. iTunes is just one out of many examples of situations in which private undertakings re-install national borders the European Union and Member States sought to abolish.

Territorial differentiation in the form of refusing access to customers from other Member States or treating them differently, obviously sits at odds with the idea of a single market with fewer borders and more opportunities for consumers. A sector particularly affected by this problem is the delivery of digital content via the internet, and more generally e-commerce services⁷. Consequently, the realisation of the Internal Market for digital content services and other e-commerce services is high on the political agenda of the European Parliament and of various Directorate Generals in Brussels. The European Parliament stressed in its resolution on consumer confidence in the digital environment that «it is unacceptable that certain entrepreneurs who supply goods or provide services and content via the internet in several Member States deny consumers access to their website in certain Member States and force consumer to use their websites in the State in which the

⁵ Which!, «iTunes announcement is music to Which?'s ears», Press release, 9 January 2008, online available at : http://www.which.co.uk/press/press_topics/campaign_news/other_issues/itunes090108_571_129012.jsp (last visited on 14.10.2008).

⁶ 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 14.10.2008).

⁷ See e.g. F. ALLEWELDT, A. FIELDER, M. ACHTEN, *et al.*, «Consumer Confidence in the Digital Environment», Briefing Note on behalf of the European Parliament, DG Internal Policies of the European Union, January 2007, PE382.173. Civic Consulting Alleweldt & Kara GbR.

consumer is resident or whose nationality he or she holds»⁸. In its resolution, the parliament called on the Commission to stop the fragmentation of the internal market in the digital environment⁹. The European Commission takes the calls seriously. The European Commissioner for EC competition policy, Neelie Kroes, recently organised a roundtable discussion on «Making online commerce a reality»¹⁰. And in response to the publication of the second report on the implementation of the Conditional Access Directive¹¹, the European Commission «bemoans the sluggish growth of cross-border conditional-access services on offer»¹² and intends to investigate that matter further¹³.

The present article will outline general motives for businesses to engage in territorial differentiation, and how they relate to primary and secondary EC law. The article is based on a briefing paper that has been commissioned by the European Parliament¹⁴. The article concentrates on e-commerce service and digital content services¹⁵; where necessary, it will point to differences in regard to goods. The article will pay particular attention to the problem of territorial licensing, which appears to be one of the most prominent reasons for treating customers of digital

⁸ European Parliament, Resolution of 21 June 2007 on consumer confidence in the digital environment, Strasbourg, 21 June 2007, A6-0191/2007, sec. 30.

⁹ European Parliament 2007, *op. cit.*, sec. 29.

¹⁰ Neelie KROES, «Making online commerce a reality», closing remarks at Online Commerce Roundtable, Brussels, 17 September 2008, Speech/08/437, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/437&format=HTML&aged=0&language=EN&guiLanguage=en>; MEMO/07/126, 3 April 2007, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 14.10.2008).

¹¹ European Commission, «Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions», «Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access», Brussels, 30 September 2008, COM(2008) 593 final.

¹² Note by the author : conditional access services on offer can be, *e.g.*, pay-TV services.

¹³ European Commission, «Protection of pay-TV services : Europe-wide protection against conditional-access piracy still indispensable, says Commission report», Brussels, 6 October 2008, press release IP/08/1462, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1462&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 14.10.2008).

¹⁴ See footnote 1.

¹⁵ 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», 12 *Columbia Journal of European Law* 2005, p. 1, 42-47.

content services (music but also video and games) from different countries differently¹⁶. Differences in the way publishers, collecting societies and record companies license content to online retailers have also been advanced as a reason for differences in iTunes marketing strategy throughout Europe. It is because of this that the antitrust investigations of the EC against iTunes were directed at the licensing and distribution agreements between Apple and major record companies, rather than iTunes itself¹⁷.

This article is organised as follows : after a brief introduction into the problem (section 2), section 3 will examine the different motives for engaging in territorial differentiation, with a special focus on territorial licensing. Section 4 will describe the impact of territorial fragmentation on the European Internal Market. It follows in section 5 the legal analysis of existing practices of territorial differentiation under European primary law (Art. 49 and 81, 82 of the EC Treaty) and secondary law (notably the initiatives in the field of consumer protection). Again, a special focus is on the practice of territorial licensing. Finally, section 6 draws a number of conclusions.

II. THE PROBLEM : BUSINESSES EXCLUDE CONSUMERS FROM ACCESS TO E-COMMERCE SERVICES BECAUSE OF THEIR NATIONALITY OR RESIDENCE

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 borders¹⁸. 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.

¹⁶ See also European Parliament 2007, *op. cit.*, sec. 33.

¹⁷ European Commission, «European Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple», press release, Brussels, 3 April 2007, MEMO/07/126, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126> (last visited on 16.10.2008).

¹⁸ 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», Brussels, 30 July 2002, COM(2002)441 final [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 commissioned by the European Commission, online available at : http://ec.europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf (last visited on 20.10.2008), pp. 7, 34 subsq.

A. Refusal of access to services

The most rigid form of territorial differentiation is the outright refusal of access for customers from other Member States. One example of the refusal to serve nationals from other member states was already discussed in the introduction. Note that the Terms of Services of iTunes UK still state that : «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»¹⁹. Apparently, consumers from the new member states, such as Poland, Hungary, Czech Republic, Bulgaria, Rumania, etc. cannot yet purchase from iTunes at all²⁰. 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 served²¹. A different form of territorial differentiation is the bundling of one service with another service that, then, 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. Many providers on Amazon will not deliver books or DVDs to customers in other countries. A less visible but not less problematic form of territorial differentiation is exclusion by technical design. One example is the ticket reservation service of KLM that immediately refers consumers using internet service providers 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. Another example is Google.com that locates the IP address of the user and automatically redirects him to its national portal. 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 services). Pay-TV platforms encrypt their services so that only paying customers can receive the services. Some plat-

¹⁹ See at iTunes website : <http://www.apple.com/legal/itunes/uk/service.html> (last visited on 14.10.2008).

²⁰ See <http://www.apple.com/uk/itunes/download/> (last visited on 6.10.2008) : «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».

²¹ [Http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/terms-outside](http://www.paypal.com/cgi-bin/webscr?cmd=p/gen/terms-outside) (last visited on 6.10.2008).

forms, such as BSkyB in the UK, refuse to serve consumers from other member states than the UK.

B. Application of dissimilar conditions/prices

There are also 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. Reportedly, it is possible to buy online Scottish smoked salmon in Germany and have it delivered for less than any Scottish website would offer²². 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.

III. WHY RE-ERECT OBSTACLES THAT GOVERNMENTS SOUGHT TO REMOVE?

Technological progress and especially the internet favour the provision of services across national borders. Yet some e-commerce businesses use technology to actually re-introduce territorial barriers. Their motives for doing so can be roughly distinguished in objective conditions for the market, legal reasons and strategic reasons. Note, the demarcation between the different reasons is not always clear-cut.

A. 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

²² Murdo MACLEOD, «Webbargains abroad expose rip-off Brittain», *Scotland on Sunday*, 10 December 2006, online available at : <http://scotlandonsunday.scotsman.com/index.cfm?id=1833902006> (last visited on 15.1.2007).

national taste, conditions or preferences (home bias)²³. An example could be local radio services. But also pan-European services opt for cultural versioning. MTV, for example, after having initially tried providing a pan-European service, decided in the end to segment its offers along national borders to target local tastes and preferences²⁴.

Then there are 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 the services, the limited durability of the product or the lack of a wider distribution or support infrastructure. For example, while some magazines offer an online-ordering service, not all of them deliver copies into other member states. Another example is that some sellers on the national Amazon sites refuse to distribute books or services outside the national territory.

B. Legal reasons

Within the category «legal reasons», probably the most important two categories are the lack of harmonisation of public and private 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 field of online gambling, medical services and products, drugs), falls outside the scope of this article.

1. Lack of harmonisation

Online services are subject to different sets of rules. Even though some degree of harmonisation has been achieved here as well, a number of important differences

²³ See Keith HEAD and Thierry MAYER, «Non-Europe : The Magnitude and Causes of Market Fragmentation in the EU», 136 *Weltwirtschaftliches Archiv* 2000, p. 284 subseq. European Commission, «Report on the State of the Internal Market», *op.cit.*, pp. 42 subseq.

²⁴ For a more in-depth discussion of the MTV example, see KEA and CERNA, «Study on the impact of the Conditional Access Directive», study prepared on behalf of the European Commission, Director General for Internal Market & Services, December 2007, online available at : http://ec.europa.eu/internal_market/media/docs/elecpay/study_en.pdf (last visited on 14.10.2008). According to the authors of the study : «the multiplicity of languages and cultures creates a specific distribution of individual preferences that require expensive versioning and brings high discrimination costs», KEA and CERNA, 2007, p. 30.

still remain, *e.g.* in the field of copyright, protection of minors, consumer protection, taxing, advertising, data protection, gambling, etc.²⁵. For example, despite intensive harmonisation efforts in the field of copyright law, a study for the European Commission about the implementation of the Information Society Directive concluded that actual harmonisation of the exceptions and limitations in national copyright law has hardly been achieved²⁶. Where differences in national legislation throughout Europe exist, service providers that offer their services outside their own country can be confronted with additional or diverging 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.²⁷. This can be a reason for them to restrict their service to consumers from abroad. For example, online pharmacies may have to refuse their services to consumers from some countries because of different public regulations that apply there.

In order to alleviate the problems that arise from differences between national laws, European law has introduced for some sector so called «country of origin» rules or internal market clauses. For example, Art. 2 of the Audiovisual Media Service Directive requires each Member State to «ensure that all audiovisual media services... under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State»²⁸.

²⁵ Copenhagen Economics, 2005, *op. cit.*, pp. 33 subsq.

²⁶ L. GUIBAULT, G. WESTKAMP, T. RIEBER-MOHN, P.B. HUGENHOLTZ, *et al.*, «Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society», study prepared on behalf of the European Commission, Director General for Internal Market & Services, February 2007, online available at : http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm.

²⁷ For a detailed analysis, see Hans SCHULTE-NÖLKE, Christian TWIGG-FLESNER and Martin EBERS, «EC Consumer Law Compendium, Comparative analysis», Study prepared on behalf of the European Commission, December 2006, online available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf (last visited on 20.10.2008), see in particular pages 167, 205, 330, 479. More general on legal barriers, European Commission, «Report on the State of the Internal Market», *op. cit.*, pp. 14 subsq. Copenhagen Economics, 2005, *op. cit.*, pp. 32 subsq.

²⁸ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [hereinafter «Audiovisual Media Service Directive»], *O.J.*, L 332/27 (18.12.2007).

Article 3 of the E-Commerce Directive²⁹ provides for a similar rule for information society services.

2. Territorial licensing agreements

In practice, probably one of the most influential legal reason for territorial differentiation in the digital service sector are exclusive distribution agreements in the upstream relationship, and here particularly the practice of territorial licensing of intellectual property rights (*e.g.* in music or video content) or contractual exclusive rights, for example for the transmission of organised sport events.

A core principle of copyright and related rights is the territoriality of these rights. The exclusive rights of a rightholder are strictly limited to the territorial boundaries of the Member State where the right is granted. With other words : exclusive rights are granted per country. Works or other protected subject matters are, accordingly, protected in Europe by a bundle of twenty-seven parallel (sets of) exclusive rights. For each right, the national copyright laws will determine its existence and scope³⁰. The territoriality of intellectual property rights flows from international copyright law, and here in particular the Berne Convention³¹, and has been confirmed in European Community law³². Having said this, also exclusive rights in not copyright protected works, such as sport events, are often being granted on a territorial basis³³. For example, the UEFA sells the rights to transmit the Champions League through multiple individual licenses to national broadcasters.

Tensions between the territoriality of exclusive rights in the exploitation of protected subject matter and the Internal Market have been signalled already very early. This tension, for example, finally led to the implementation of the principle

²⁹ 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 [hereinafter «E-Commerce Directive»], *O.J.*, L 178/1 (17.07.2000).

³⁰ M. M.M. VAN EECHOU, P.B. HUGENHOLTZ, S.J. VAN GOMPEL, N. HELBERGER *et al.*, «The Recasting of Copyright & Related Rights for the Knowledge Economy», study prepared on behalf of the European Commission, Director General for Internal Market & Services, November 2006, online available at : http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm (last visited on 14.20.2008), p. 23.

³¹ J.H. SPOOR, D.W.F. VERKADE and D.J.G. VISSER, *Auteursrecht*, third print, Kluwer, Deventer, 2005, sec. 18.6.

³² See *e.g.* European Court of Justice, *Lagardère Active Broadcast*, Case C-192/04, *European Court Reports*, 2005, p. 7199 [hereinafter «*Lagardère*»].

³³ KEA and CERNA, 2007, *op. cit.*, p. 29.

of Community exhaustion in European copyright law. To give but one example, Art. 4 (2) of the European Copyright Directive³⁴ stipulates that if a work has been sold by the rightholder or with his consent for the first time, he cannot prevent that this copy of the work is being re-sold (also not across national borders). The exhaustion rule is based on early case law of the European Court of Justice in which the court had to decide about the potential conflict between the exercise of exclusive rights in protected works and the Internal Market provisions in the EC Treaty (for a more detailed discussion, see V.A.2)³⁵.

Until now, a corresponding rule of exhaustion is missing for the communication or making available of protected works e.g. in the context of download or other digital content services. This is also the reason why once exclusive rights to e.g. make available online a video or piece of music have been assigned to one licensee this act does not prevent the rightholder to license the making available rights for the same video or piece of music to another operator in another country (see also Article 3 (3) of the Information Society Directive). The consequence is that a service provider who is planning to distribute a service European-wide would be required to acquire the rights for all twenty-seven member states. Particularly smaller providers can find the acquisition of the necessary rights prohibitively expensive, if not impossible in practice. This is particularly true if the rights for the different Member States are in different hands³⁶. The present legal situation can force providers to offer their services, eventually in combination with encryption techniques or other forms of electronic content control, only to consumers from countries for which they did acquire the rights.

The problematic situation with regard to digital content services gave rise to a recommendation from the European Commission on collective cross-border management of copyright and related rights for online services. In its recommenda-

³⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [hereinafter «European Copyright Directive»], *O.J.*, L 167/10 (22.06.2001).

³⁵ E.g. European Court of Justice, *Deutsche Grammophon Gesellschaft mbh v. Metro-SB Grossmärkte GmbH & Co.*, Case 78-70, *European Court Reports*, 1971, p. 487 [hereinafter «Deutsche Grammophon»]. See also European Court of Justice, *Coditel v. Ciné Vog Films*, Case 62/79, *European Court Reports*, 1980, p. 881 [hereinafter «Coditel I»], paragraph 11 : «Cinematographique films belong to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connection with e.g. books or records».

³⁶ VAN EECLOUD, HUGENHOLTZ, VAN GOMPEL and HELBERGER, 2007, *op. cit.*, p. 24.

tion, the European Commission argued that new Internet-based services such as webcasting or on on-demand music downloads needed a license that covers their activities throughout the EU³⁷. The recommendation puts forward measures for improving the EU-wide licensing of copyright for online services. According to the European Commission, the absence of EU-wide copyright licenses had been one factor that has made it difficult for new internet-based music services to develop their full potential.

Having said this, even if a pan-European licensing mechanism was in place, this is still no guarantee that rightholders give up the practice of licensing rights on a territorial basis. This is the lesson from the experiences with the European Satellite and Cable Directive³⁸. The Satellite and Cable Directive sought to introduce the concept of «country of origin» or «home country control» (see III.B.1) also for satellite broadcasting. Satellite as a transmission technology is transborder in character and the directive wanted to overcome the legal uncertainty that arose with regards to the rights that would need to be acquired by a cross-border satellite service³⁹. Art. 1 (2)(b) of the Satellite and Cable Directive determined that in the event of a pan-European satellite transmission, the act of communication to the public by satellite would occur only once, namely in the Member State where programme-carrying signals were fed into the satellite network. Consequently, a provider of a pan-European satellite service would need to acquire only one license, namely a transmission license for the territory of the member state in which the uplink occurred (and not, as was the situation before the directive, licenses for all Member State that were located in the footprint of that satellite). Having said this, in its report about the application of the Satellite and Cable Directive, the European Commission had to conclude that rightholders continued selling transmission rights on a territorial basis, despite the provisions of the directive. Instead of adhering to the home country rule, rightholders required broadcasters to encrypt satellite services so as to ensure that consumers from other countries not covered by the license could not access the service. In its report on the application of the

³⁷ European Commission, Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, *O.J.*, L 276/54, 21.10.2005 [hereinafter «Recommendation on collective cross-border management of copyright»].

³⁸ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [hereinafter «Satellite and Cable Directive»], *O.J.*, L 248/15 (06.10.1993).

³⁹ Recitals 14 and 15 of the Satellite and Cable Directive.

directive, the EC made clear that «a transfer on a national basis has the effect of fragmenting the market and runs counter to the principle of the Directive»⁴⁰. It also stressed that encryption technologies allowed determining very accurately the actual size of the audience, which in fact would make the need for territorial licensing redundant (to the extent that territorial licensing reflects the need to establish parameters for the calculation of license fees). The EC encouraged in its report the Member States to see to the complete adherence to the provisions of the directive, and announced further studies in this field.

The experiences with the Satellite and Cable Directive, but also the mixed responses to the Commission's Recommendation on cross-border licensing⁴¹ are indicators that territorial differentiation can only in parts be ascribed to the territorial nature of copyrights and related rights. Arguably, an equally or even more important motive for territorial restrictions are strategic economic reasons.

C. Strategic economic reasons

There can be various strategic economic reasons why businesses discriminate on grounds of nationality or residency⁴². 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 profits⁴³. In order to be able to engage in price discrimina-

⁴⁰ European Commission, «Report from the 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», 26 July 2002, COM/2002/0430 final.

⁴¹ See European Commission, «Monitoring of the 2005 Music Online Recommendation», summary report, Brussels, 7 February 2008, online available at : http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf (last visited on 20.10.2008). See also the responses to the consultation at : http://circa.europa.eu/Public/irc/market/market_consultations/library?l=/copyright_neighbouring/collective_cross-border&vm=detailed&sb=Title (last visited on 20.10.2008).

⁴² For a more general assessment, see Copenhagen Economics 2005, *op. cit.*, pp. 34 subseq.

⁴³ See extensively on this mechanism, B. OSLER, «Rip-off USA : The North American car market», 12 *Consumer Policy Review* 2002, p. 198. Nancy T. GALLINI and Aidan HOLLIS, «A contractual approach to the gray market», 19 *International Review of Law and Economics*, 1999, pp. 1, 4, online available at : <http://www.sciencedirect.com/science/article/B6V7M-3W3NK23-1/2/0398a0f43fc2350d2489cb5632fabeb2> (last visited on 20.10.2008).

tion, 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, DRM, geo-filtering, 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 internet service provider is located.

Price discrimination can also be a response to economic factors that relate to a particular geographic territory : differences in market conditions, taxation, currency conversion, income differences, different consumption patterns, etc.⁴⁴. For example, Apple explained the different prices for its songs in the UK and France with the differing market influences and differences in the prices Apple had to pay to acquire rights to the songs in different European countries. Another example may be that the delivery of goods that citizens from other member states ordered online is more expensive, which is also why the final price charged to these customers is higher. The case of delivery costs is less relevant, of course, for services. Here one could think of *e.g.* the need to charge higher costs for films that are dubbed or translated into another language in order to accommodate the language preferences of customers from different regions.

Influencing competition : market segmentation, including territorial segmentation, can be a way to influence competition. 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. So far, cases discussed in literature concern in the first place territorial restrictions that are the result of exclusive distribution agreements in the upstream relationship. The non-availability of certain services for consumers is then a consequence from the conditions that apply in the upstream relationship between producer and distributor. Influencing competition through market segmentation is, for example, an important motive behind

⁴⁴ European Commission, «Report on the functioning of Community product and capital markets», aao, p. 6. In its report, however, the European Commission also emphasises that country specific factors are very likely the lesser reason to justify price differences, as compared to economic reasons such as industry specific differences.

strategic territorial licensing of copyrights or neighbouring rights⁴⁵. Exclusive licensing as a means to fight parallel imports has already been the subject of much controversy⁴⁶. Likewise, selling rights per country can be more profitable than selling the rights once for the whole territory of the European Union. Territorial licensing can also have the effect of preventing newcomers from entering the market. The European Commission, in its role as competition authority, has demonstrated in various decisions that it closely scrutinises how, in particular, rights into audiovisual content and sport events are sold on a territorial basis and what the effect on competition is⁴⁷. Another question in which the European Commission saw competition potentially distorted by territorial licensing is the way in which collecting societies administer rights on a territorial basis⁴⁸. As the European Commission noted when opening formal proceedings against the so-called «Santiago Agreement»: «The lack of competition between national collecting societies in Europe hampers the achievement of a genuine single market in the field of copyright management services and may result in unjustified inef-

⁴⁵ 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 20.10.2008), pp. 6 subseq. C. CRAMPES, D. ENCAOUA and 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 20.10.2008), pp. 5 subseq.

⁴⁶ More extensively on the use of intellectual property rights to prohibit parallel imports : H. COHEN JEHORAM, «Prohibition of parallel imports through intellectual property rights», 30 *International Review of Industrial Property and Copyright Law*, 1999, 0. 495 subseq; A. OHLY, «Trade marks and parallel importation – Recent developments in European law», 30 *International Review of Industrial Property and Copyright Law*, 1999, pp. 512 subseq.; B. DUTOIT, «Parallel imports v. trademark and unfair competition law – A comparative approach», 188 *Revue internationale de la concurrence internationale Review of Competition Law*, 1999, pp. 5 subseq.

⁴⁷ European Commission, decision 89/467/EEC of 12 July 1989 (UIP), *O.J.*, L 226, 3 August 1989, p. 25; European Commission, decision 89/536/EEC of 15 September 1989 (*Film purchase by German television stations*) *O.J.* L 284, 3 October 1989, p. 36; European Commission, decision 91/130/EEC of 19 February 1991 (*Screensport/Members of the EBU*), *O.J.*, L 63, 9 March 1991, p. 32; European Commission, decision 93/403/EEC of 11 June 1993 (*EBU/Eurovision System*) *O.J.*, L 179, 22 July 1993, p. 23; European Commission, decision 2003/778/EC of 23 July 2003 (*UEFA Champions League*) *O.J.*, L 291, 8 November 2003, p. 25.

⁴⁸ European Commission, decision 2003/300/EEC of 8 October 2002 relating to a proceeding under Art. 81 of the EC Treaty and Article 53 of the EEA Agreement, Case No. COMP/C2/38.014 (*IFPI Simulcasting*). See also, European Commission, Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 (BUMA) and COMP/C2/39151 (Sabam) (*Santiago Agreement*, COMP/C2/38126), *O.J.*, C 200/11.

iciencies as regards the offer of online music services, to the ultimate detriment of consumers»⁴⁹.

IV. IMPACT OF TERRITORIAL DIFFERENTIATION ON 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». The European Parliament has said explicitly : «the fragmentation of part[s] of the electronic market within the EU endangers the rights laid down in the *acquis communautaire*»⁵⁰.

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»⁵¹. 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 aforementioned 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

⁴⁹ For more details see European Commission, «Commission opens proceedings into collective licensing of music copyrights for online use», IP/04/586, 3 May 2004, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 14.10.2008).

⁵⁰ European Parliament 2007, *op. cit.*, sec. G.

⁵¹ European Commission, «Communication on the State of the Internal Market», *op. cit.*, p. 66, see also p. 51.

thus has an appreciable negative impact in terms of cultural, linguistic, social and economic interpenetration at the intra-Community level»⁵². 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 residence⁵³, another third doubts at least.

The experience with the Satellite and Cable Directive 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 consumers⁵⁴. 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 borders⁵⁵. Consumers are excluded by design from access to the service, leaving them little choice to seek access to alternative services from other member states. This is particularly true where the circumvention of technological «borders» is declared unlawful by existing law. For example, the Conditional Access Directive⁵⁶ prohibits the decoding of, or preparatory activities for decoding, pay-TV services. Consequently, a decoder legally obtained in one member state could be illegal when brought into another member state. The Danish citizen living in France, for example, may thus be prevented from access-

⁵² 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», Brussels, 26 July 2002, COM(2002)430 final [hereinafter «*Report on the application of the Satellite and Cable Directive*»], pp. 7-8.

⁵³ Eurobarometer, «Consumer protection in the Internal Market», Special Report 252, September 2006, online available at http://ec.europa.eu/consumers/topics/eurobarometer_09-2006_en.pdf (last visited on 20.10.2008), pp. 61 subseq.

⁵⁴ See P.B. HUGENHOLTZ, «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, pp. 65-73.

⁵⁵ N. HELBERGER, *Controlling access to content – Regulating conditional access in digital broadcasting*, Kluwer Law International, Den Haag, 2005, pp. 39 subseq.

⁵⁶ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [hereinafter «*Conditional Access Directive*»], *O.J.*, L 320/54 (28.11.1998).

ing the encrypted broadcasts of DR1 and 2, and thereby from accessing his/her cultural heritage⁵⁷.

Although all cases of territorial differentiation or discrimination on the basis of nationality 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.

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 alike⁵⁸. 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 freeriding for independent distributors, and by tailoring offers to fit regional preferences, territorial differentiation could actually encourage market entry, including the entry into foreign markets⁵⁹. Price discrimination could raise social welfare in situations where, as a result, groups of customers

⁵⁷ More extensively in N. HELBERGER, N.A.N.M VAN EIJK and P.B. HUGENHOLTZ, «Study on the use of conditional access systems for reasons other than the protection of remuneration, to examine the legal and the economic implications within the Internal Market and the need of introducing specific legal protection», Report presented to the European Commission, 1999, online available at : http://ec.europa.eu/internal_market/media/elecplay/background_en.htm (last visited on 20.10.2008).

⁵⁸ P.B. HUGENHOLTZ, M.M.M. VAN EECHOU, S.G. VAN GOMPEL and N. HELBERGER, 2007, *op. cit.* DUNT, GANS and KING, 2001, *op. cit.*, pp. 12 subseq. J. GASTER, «Das urheberrechtliche Territorialitätsprinzip aus der Sicht des Europäischen Gemeinschaftsrechts», 1 *Zeitschrift für Urheber- und Medienrecht*, 2006, pp. 8 subseq.; Herbert UNGERER, «Competition law and rights management. Recent developments», speech, Regulatory Forum European Cable Communication Association (ECCA), Brussels, 23 June 2004COMP/C2/HU23. European Commission, Recommendation on collective cross-border management of copyright, *op. cit.* 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 20.10.2008).

⁵⁹ Copenhagen Economics makes this point and gives a more detailed explanation, Copenhagen Economics, *op. cit.*, 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 20.10.2008).

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 conditions⁶⁰. 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 overcome⁶¹. 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 territorial licensing as reason not to serve consumers from other member states is to diminish in the near to medium term future. Accordingly, the European Commission has announced further action for the case that the music industry does not

⁶⁰ This point is also made in *e.g.* D. GERADIN and 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 20.10.2008), p. 44.

⁶¹ In this sense also Copenhagen Economics, *op. cit.*, p. 31.

find a solution to the problem of territorial differentiation as a result of the way intellectual property rights to music are licensed⁶².

V. TERRITORIAL DIFFERENTIATION AND EUROPEAN LAW

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. The legal analysis is written primarily from the perspective of consumers that are disadvantaged by territorial differentiation. What is the legal standing of consumers under European law when confronted with refusals of access or dissimilar conditions because of their nationality or residence? Where necessary, the analysis will distinguish between the different reasons (see II) to differentiate among nationals or residents of other countries.

A. *Territorial differentiation and the free movement of services*

The realization of an Internal Market for goods and services is one of the key objectives of the European Community, and high on the Lisbon agenda to make Europe the «largest knowledge economy in the world». A corner stone in the realization of Europe's ambitions is the freedom to provide services across national borders, as enshrined in Art. 49 of the EC Treaty.

1. *Freedom for whom?*

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 Treaty⁶³. 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 serv-

⁶² Neelie KROES, 2008, *op. cit.*

⁶³ P.J.G. KAPTEYN and P. VERLOREN VAN THEMAAT, *Inleiding tot het recht van de Europese Gemeenschappen*, 4th edition, Kluwer, Deventer, 1987, p. 294, with further references and particular attention to electronic services. C. ZACKER, «Kompendium Europarecht», Springer Berlin Heidelberg, 1997, p. 106.

ices). 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 recipients⁶⁴. Citizens could thus invoke Art. 49 of the EC Treaty against a law or other government act which prevented them from receiving services from other Member States.

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. Can UK consumers force iTunes on the basis of Art. 49 of the EC Treaty to grant them access to iTunes France or iTunes Germany? 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 businesses⁶⁵. 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 (see more detailed below)⁶⁶. The court held here repeatedly that the rules of the Treaty can prevent private parties from relying on their exclusive

⁶⁴ 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*»], §16, and European Court of Justice, *Cowan v. Trésor public*, Case 186/87, *European Court reports*, 1989, p. 195 [hereinafter «*Cowan*»], §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*»], §34.

⁶⁵ European Court of Justice, *Walrave and Koch*, Case 36/74, *European Court reports*, 1974, p. 1405 [hereinafter «*Walrave*»], §§17 and 18 (for collective employment rules). European Court of Justice, *Union royale belge des sociétés de football association a.s.b.l. v. Jean-Marc Bosman, Royal club liégeois s.a. v. Jean-Marc Bosman and others and Union des associations européennes de football association (U.E.F.A.A.) v. Jean-Marc Bosman*, Case C-415/93, *European Court reports*, 1995, p. I-04921 [hereinafter «*Bosman*»], §83. European Court of Justice, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Case C-281/98, *European Court reports*, 2000, p. I-4139 [hereinafter «*Angonese*»], §§34, 36 (for individual working contracts).

⁶⁶ European Court of Justice, *Centrafarm BV and Adriaan de Peijper v. Sterling Drug Inc.*, Case 15-74, *European Court reports*, 1974, p. 1147 [hereinafter «*Centrafarm*»], §§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*»], §§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*»], §§24 and 25.

rights in their relation to other private parties⁶⁷. Having said this, even if the court came to a similar conclusion in a (hypothetic) iTunes case, this would in itself not yet say anything about the ability of consumers to invoke a possible conflict between territorial licensing and Art. 49 of the EC Treaty in the relationship to the online retailer.

2. The acceptability of legal reasons to restrict the free movement of services under EC law

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. To the extent that objective conditions of the market place require different treatment of nationals from different member states, such behaviour will probably already not constitute «discrimination» in the sense of the treaty⁶⁸. In a situation where legal provisions 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.

3. In particular : the case of territorial licensing

Regarding the later situation, the European Court of Justice ruled in the *Coditel I* 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 borders⁶⁹ : «whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in

⁶⁷ See *e.g.* European Court of Justice, *Centrafarm*, §15. European Court of Justice, *Merck*, §14. European Court of Justice, *Nancy Kean*, §§24 and 25.

⁶⁸ See European Court of Justice, *Angonese*, §42.

⁶⁹ European Court of Justice, *Coditel I*, §§15, 16.

principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the member states largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable»⁷⁰.

Coditel I concerned the cable retransmission of a German broadcasting of the French film «Le Boucher» through a Belgium cable broadcaster, Coditel. Cinevogt, the cable operator who had originally secured the rights to transmit «Le Boucher» in Belgium invoked its exclusive rights to stop Coditel from transmitting the German version. Considering the specific circumstances of the case, the *Coditel I* decision cannot be understood as a general pardon for all instances of market fragmentation that are result from territorial licensing⁷¹. This is also what the court said when observing that territorial licensing agreements can be in conflict with Art. 49 of the EC Treaty «where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between member states»⁷². Unfortunately, the court did not further specify under which circumstances a territorial licensing agreement could constitute an unlawful disguised restriction on trade. The court judged that Cinevogt was acting in accordance with the EC Treaty. In *Coditel I* it only stated rather vaguely : «Such [an undisguised restriction of trade] would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between member states»⁷³. Considering that any act of territorially restricted licensing of content is somewhat artificial in situations where the transmission medium that is used can cross borders, the judgement is little enlightening on this point.

The European Court of Justice has been far more explicit and critical when it came to the use of intellectual property rights to prevent the free movement of goods. This became apparent *e.g.* in the *Deutsche Grammophon* case. Here, the court

⁷⁰ European Court of Justice, *Coditel I*, § 16.

⁷¹ VAN EECHOU, HUGENHOLTZ, VAN GOMPEL, HELBERGER *et al.*, 2006, p. 24. Note also that the decision of the European Court of Justice was restricted to territorial licenses as the result of national copyright laws, and did not include exclusive contractual rights, *e.g.* for the transmission of sport events.

⁷² European Court of Justice, *Coditel I*, § 15.

⁷³ *Ibidem*.

held : «it would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a member state solely because such distribution did not occur within the territory of the first member state»⁷⁴. In other words, using copyrights for strategic reasons, here : to prevent the free circulation of goods within the Internal Market in order to be able to control the marketing strategy, was considered in conflict with the Internal Market : «Art. 36 (now : 28) of the EC Treaty only admits derogations from the freedom to provide goods to the extent that justified for the purpose of safeguarding rights which constitute the specific subject matter of such property»⁷⁵. The case was among the cases that led later to the codification of the principle of Community exhaustion in European copyright law (see also III.B.2).

As already mentioned, similar guidelines for services do not (yet) exist. The European Court of Justice held that the showing of a film or the performance of a piece of music involved very different problems in relation to the EC Treaty than the physical distribution of *e.g.* books or records⁷⁶. While a rightholder could repeat the former infinitely, the circulation of books or records was inseparably linked to placing it at the disposal of the public, and hence losing control over its distribution. Having said this, as the European Parliament observed correctly, in modern information markets the boundaries between products and services is increasingly becoming blurred⁷⁷. It is somewhat difficult to see why the circulation of down-

⁷⁴ European Court of Justice, *Deutsche Grammophon*, §13. The case concerned a record producer, *Deutsche Grammophon*, who sold records in Germany and France. After having distributed certain records already in France, and not yet in Germany, *Deutsche Grammophon* sought to prohibit the French retailer from re-importing the records into Germany. See *e.g.* European Court of Justice, *Centrafarm*, §§7-12. European Court of Justice, *Merck*, §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*, 1966, p. 429 [hereinafter «*Consten/Grundig*»]. European Court of Justice, *Terrapin v. Terranova*, Case 119/75, *European Court reports*, 1976, p. 1039 [hereinafter «*Terrapin*»], §6. European Court of Justice, *Parke, Davis and Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm*, Case 24-67, *European Court reports*, 1968, p. 81 [hereinafter «*Probel*»], §5. European Court of Justice, *Nancy Kean*, §§24 and 25.

⁷⁵ European Court of Justice, *Deutsche Grammophon*, §11. In *Coditel I*, the court counted as an essential feature of copyright law to require fees for the showing of *e.g.* a film, European Court of Justice, *Coditel*, §14.

⁷⁶ European Court of Justice, *Coditel I*, §12; European Court of Justice, *Ministère public v. Jean-Louis Tournier*, Case 395/87, *European Court reports* 1989, p. 2521 [hereinafter «*Tournier*»], §12.

⁷⁷ European Parliament 2007, *op. cit.*, §A.

loaded songs or e-books can be restricted to a certain territory, whereas tangible copies of the same song or books⁷⁸ can move freely within the internal market⁷⁸. Arguably, the fact that intangible distribution models are getting increasingly popular and widespread is another reason to look more critically at the existing differentiation and its compliance with Internal Market principles.

Another question is whether the court would decide *Coditel I* today in the same way as it decided the case in 1980. In *Coditel I*, the court stressed that the licensing of exclusive rights along a national territory can be necessary in order to be able to calculate the fees on the basis of the actual or potential number of performances (which can *e.g.* correspond to size of the population of a certain territory)⁷⁹. As already the European Commission observed in its report on the application of the Cable and Satellite Directive, with modern content control technologies, however, rightholders can calculate the actual number of viewers or subscribers similarly if not more accurately, and irrespective of a certain territory. The *Coditel I* decision also concerned a very specific market, the television market. As the court observed, television was organized in the Member States largely on the basis of legal broadcasting monopolies⁸⁰. One may already wonder to what extent this finding still holds true for modern broadcasting markets, which are often dominated by a number of internationally organized major players.

Unlike broadcasting markets, online markets are principally pan-European, that is borderless. 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 counterintuitive⁸¹. Note that the court conceded that a right-holder 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 states⁸² or where such barriers are artificial and unjustifiable in terms of the needs of a particular industry⁸³. While it is difficult to make any predictions of how the court would decide if confronted with a case of a consumer of e-commerce services who is excluded from access to services from other member state, arguably, there is a chance that the

⁷⁸ VAN EËCHOUD, HUGENHOLTZ, VAN GOMPEL, HELBERGER *et al.*, 2006, *op. cit.*, p. 27.

⁷⁹ European Court of Justice, *Coditel I*, § 13.

⁸⁰ European Commission, *Coditel I*, § 16.

⁸¹ VAN EËCHOUD, HUGENHOLTZ, VAN GOMPEL, HELBERGER *et al.*, 2006, *op. cit.*, p. 25.

⁸² European Court of Justice, *Coditel v. Ciné Vog Films*, Case 262/81, *European Court reports* 1982, p. 3381 [hereinafter «*Coditel II*»], § 19. European Court of Justice, *Coditel I*, § 15.

⁸³ European Court of Justice, *Coditel II*, § 19 (with reference to the cinematographic industry).

court would consider territorial licensing less favourable in the online context than it did in the case of *Coditel I*.

4. Strategic territorial differentiation and the free movement of services

Other cases of strategic territorial differentiation by e-commerce businesses cannot call upon existing legal provisions (e.g. copyright law) 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 pursued⁸⁴. 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 for each individual case 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.

Taking into account the strict requirements that apply for government-initiated acts of territorial discrimination, the threshold for justifying private restrictions on the free movement of services should be high as well⁸⁵. 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 services⁸⁶, or even rights of individual consumers against private undertakings⁸⁷.

⁸⁴ European Court of Justice, *Angonese*, §42.

⁸⁵ In this sense apparently also *Goyder*, 2003, *op. cit.*, p. 317.

⁸⁶ European Court of Justice, *Commission of the European Communities v French Republic*, Case C-265/95, *European Court reports*, 1997, p. I-06959, §30; European Court of Justice, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00, *European Court reports*, 2003, p. I-5659 [hereinafter «*Schmidberger*»], §§57-62.

⁸⁷ In favour of the ability of privates to invoke the rules of the Treaty against other private players probably European Court of Justice, *Walrave*, §34; critical: European Court of Justice, *Van Binsbergen*, Case 33/74, *European Court reports*, 1974, p. 1299, §27.

B. Territorial differentiation and EC competition law

Excluding access to services to customers from other member states can also be of relevance in context with European competition law⁸⁸. 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 Market⁸⁹. 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.

1. Anti-competitive agreements and concerted actions

So far, typical cases for the application of Article 81 of the EC Treaty⁹⁰ to instances of territorial differentiation have been territorial resale restrictions, exclusive distribution agreements and exclusive customer allocation agreements⁹¹. 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 industry⁹². In case of *Coditel*, this was the cinematographic industry, and the special needs of the industry arised, so the court, from language obstacles and differences in the national systems of funding.

Since the decisions of the European Court of Justice but also of the European Commission in its role as a competition law watchdog are only binding on the parties of the individual case, each case of territorial licensing would have to be assessed upon its own merits. As already mentioned, unlike the cinematographic industry, the distribution of audiovisual content or other digital content online is at least technically a principally borderless undertaking. The European Commission

⁸⁸ European Commission, Communication on the State of the Internal Market, *op. cit.*, p. 51.

⁸⁹ See only KAPTEYN and VERLOREN VAN THEMAAT, 1987, *op. cit.*, pp. 329 subseq. with numerous references. D.G. GOYDER, «EC Competition Law», 4th edition, Oxford, 2003, p. 316.

⁹⁰ For Article 81 of the EC Treaty to apply, a number of general conditions must be fulfilled, which will not be discussed here, but which have to be identified on a case-by-case basis. Such conditions are e.g. the finding of a concerted action and restriction of trade between member states.

⁹¹ European Court of First Instance, *Volkswagen AG v. Commission of the European Communities*, Case T-62/98, *European Court reports*, 2000, p. II-02707 [hereinafter «Volkswagen»], §179. European Court of First Instance, *JCB Service v. Commission of the European Communities*, Case T-67/01, *European Court reports*, 2004, p. 0 [hereinafter «JCB»], §182.

⁹² European Court of Justice, *Coditel II*, §§16 and 19. See also European Court of Justice, *Nancy Kean*, §26. European Court of Justice, *Probel*, §71.

has left no doubt that in its opinion, what the online industry needs is not territorial restricted licenses but multi-territorial licenses : «In the era of online exploitation of musical works, however, commercial users need a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial. It is therefore appropriate to provide for multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders»⁹³. The European Court of Justice⁹⁴ as well the European Commission have been for some while now watchful over the practice of collecting societies to administer and licence rights exclusively for their own territory⁹⁵. The European Court, for example, found that the EC Treaty prohibits «any concerted practices by national copyright-management societies having as its object or effect the refusal by each society to grant direct access to its repertoire to users established in another Member State»⁹⁶. And one major objection of the EC against a so-called «Santiago Agreement»⁹⁷ was the fact that the agreement foresaw that each collecting society will retain absolute exclusivity over the issuing of multi-territorial and multi-repertoire licenses for the distribution of online music to content providers that are located in their territory⁹⁸.

More recently, the European Commission adopted a decision against CISAC that prohibited, among others, a territorial exclusivity clause that prevented collecting societies from offering licenses to content providers outside a given territory. Such clauses would not only restrict competition between collecting societies and

⁹³ European Commission, Recommendation on collective cross-border management of copyright, *op. cit.*, recital 8.

⁹⁴ European Court of Justice, *Francois Lucazeau and others v. Société des auteurs, compositeurs et éditeurs de musique (Sacem) and others*, Joined cases 110/88, 241/88 and 242/88, *European Court reports*, 1989, p. 2811 [hereinafter «Lucazeau»], §20; European Court of Justice, *Tournier*, §20.

⁹⁵ European Commission, decision 2003/300/EEC of 8 October 2002 relating to a proceeding under Art. 81 of the EC Treaty and Article 53 of the EEA Agreement, Case No. COMP/C2/38.014 (*IFPI Simulcasting*), § §61, 69 subseq. European Commission, Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 (BUMA) and COMP/C2/39151 (Sabam) (Santiago Agreement, COMP/C2/38126), *O.J.*, C 200/11, § §6 and 7.

⁹⁶ European Court of Justice, *Lucazeau*, § 20.

⁹⁷ The «Santiago Agreement» is a standardized agreement, which concerns the right to license online-music rights. The agreement authorises parties that adhere to it to grant non-exclusive licenses for the online public performance of musical works of the repertoire of the other party on a worldwide basis.

⁹⁸ European Commission, Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 (BUMA) and COMP/C2/39151 (Sabam) (Santiago Agreement, COMP/C2/38126), *O.J.*, C 200/11, § 6.

partition the Internal Market, but also force content providers to deal with monopoly providers in each territory⁹⁹. It is important to remember that ultimately, as discussed earlier, it are consumers who are confronted with the effects of a partitioned Internal Market (see IV) and lack of choice from services from other member states.

2. Abuse of a dominant position

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 discrimination¹⁰⁰, exclusive licensing¹⁰¹ or the preventing of parallel imports¹⁰². 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 markets¹⁰³. Having said this the European Court of Justice also found that the fact that consumers from one member state are forced to pay higher prices for a sound recording that is offered in another country for a lower price can be an indicator of the abuse of a dominant position¹⁰⁴.

Note, the refusal to serve consumers from other member states will only fall under the scope of competition law in a situation where the way in which and the conditions under which this is done can be demonstrated to have an anti-competitive

⁹⁹ European Commission, «Antitrust : Commission prohibits practices which prevent European collecting societies offering choice to music authors and users», press release, IP/08/1165, Brussels, 16 July 2008, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1165&guiLanguage=en> a public (last visited on 20.10.2008). A public version of the decision was at the time of writing not yet available.

¹⁰⁰ For example European Court of First Instance, *Irish Sugar plc v Commission of the European Communities*, Case T-228/97, *European Court reports* 1999, p. II-02969 [hereinafter «*Irish Sugar*»], §§ 140-141. European Court of Justice, 14 February 1978, *United Brands*, §§ 183, 233. European Court of First Instance, 6 October 1994, *Tetra Pak International s.a. v. Commission of the European Communities*, Case T-83/91, *European Court reports*, 1994, p. II-755 [hereinafter «*Tetra Pak II*»], § 170. European Court of Justice, *Deutsche Grammophon*, § 19.

¹⁰¹ European Court of Justice, *Deutsche Grammophon*, § 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*»], § 19 (with regard to collecting societies).

¹⁰² E.g. European Court of Justice, *Deutsche Grammophon*, § 19.

¹⁰³ European Court of Justice, *United Brands*, § 184.

¹⁰⁴ European Court of Justice, *Deutsche Grammophon*, § 19, European Court of Justice, *Lucazeau*, § 25 (concerning fees for services). European Court of Justice, *Tournier*, § 46.

impact and to restrict trade between member states¹⁰⁵. A negative effect on the interests that consumers attach to the Internal Market alone is not sufficient to trigger the application of EC competition rules. As it was explained previously (IV) 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 positive.

C. Territorial differentiation and EC consumer protection rules

Promoting the Internal Market is also an important goal behind European initiatives in the field of consumer protection. The objectives of European activities in this field are two-fold. On the one hand, a set of European harmonization measures are meant to increase transparency and legal certainty, and thereby remove some of the previously addressed legal reasons for service providers to differentiate on grounds of nationality and/or residence. On the other hand, European policies are also explicitly directed at achieving a higher level of protection and trust for consumers in their relationship to service providers. This section will point to some general problems when applying EC consumer protection rules (and here in particular the E-Commerce Directive, the Unfair Contractual Terms Directive¹⁰⁶ and the Unfair Commercial Practices Directive¹⁰⁷) to cases of territorial differentiation. For a more complete analysis, more research is needed to identify and evaluate the various contractual and commercial practices that restrict access to services from other member state. The analysis will concentrate on the relevant provisions in European law, not on the national laws implementing them.

¹⁰⁵ For Article 82 of the EC Treaty to apply, a number of general conditions must be fulfilled, which will not be discussed here, but which have to be identified on a case-by-case basis. Such conditions are the definition of a relevant product market, the finding of dominance and that abuse must have an effect on trade between Member States and take place in a substantial part of the European Internal Market.

¹⁰⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [hereinafter «*Unfair Terms Directive*»], *O.J.*, L 95/29 (21.4.1993). The Unfair Terms Directive applies to contracts with regard to services as well as to products.

¹⁰⁷ 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 [hereinafter «*Unfair Commercial Practices Directive*»], *O.J.*, L 149/22 (11.06.2005). The directive applies to both, cases concerning products and services.

To the extent that existing European initiatives in the field of consumer protection are aimed at the realization of the Internal Market, such policies tend to concentrate on removing obstacles for service providers who provide services across Europe¹⁰⁸, not so much on removing obstacles for consumers who wish to receive services across national borders. Removing obstacles for service providers is clearly the goal of the E-Commerce Directive. The objective of the E-Commerce Directive is to coordinate national laws and to remove legal obstacles to the provision of services¹⁰⁹. Although the E-Commerce Directive also gives consumers some rights in relation to 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. What is more, the Internal Market clause in Art. 3 (1) and (2) of the E-Commerce Directive (see III.B.1) does not apply to copyrights and neighbouring rights¹¹⁰.

Some instances of territorial differentiation might fall under the rules of the *Unfair Contractual Terms Directive*. 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). A clause that could fall under the ambit of the directive is the aforementioned condition in iTunes UK Terms of Service, which restrict consumers from using services outside a particular territory. Article 3 of the Unfair Terms Directive (unfair contracts) prohibits clauses in consumer contracts where the clause would cause «a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer». Questionable is whether the portability of services and products within the Internal Market is a «right» of consumers in the sense of the directive. Neither the clarification in Article 4 of the directive, nor the exemplary list of possible unfair terms in the Annex provide much guidance on this point.

Of more practical relevancy are probably the provisions of the *Unfair Commercial Practices Directive*, and here in particular the general prohibition of unfair commercial practices in Article 5 of the directive. According to Article 5, commercial practices (including precontractual behaviour) shall be deemed unfair if they materially distort the economic behaviour of the consumer (Article 5 (2) *b* of the

¹⁰⁸ See *e.g.* Article 3 (1) and (2) of Directive 2000/31/EC of E-Commerce Directive, Article 4 of Unfair Commercial Practices Directive.

¹⁰⁹ *E.g.* recitals 5 and 6, Article 3 (2) of the E-Commerce Directive.

¹¹⁰ Art. 3 (3), Annex of the E-Commerce Directive.

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.

It remains to be seen if the revision of the consumer law acquis will bring any improvements in the protection of consumers from discrimination on grounds of their nationality or residence. The draft Directive on consumer rights seeks to remove legal obstacles by providing for a higher level of harmonization and consistency¹¹¹. It does not directly address instances of territorial differentiation.

D. Article 20 of the Services Directive

Probably the most relevant provision to address territorial differentiation for services is Article 20 of the Services Directive¹¹². Curiously, the provision has not yet drawn much attention or discussion¹¹³. The directive applies to services only, not to goods¹¹⁴. 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. Article 20 is explicitly concerned with strengthening the rights of recipients¹¹⁵ 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. While Article 20 (1) of the Services Directive prohibits Member States from imposing discriminatory requirements on the basis of a consumer's nationality or residence, Article 20 (2) is aimed at giving consumers concrete rights vis-à-

¹¹¹ European Commission, «Proposal for a Directive of the European Parliament and of the Council on consumer rights», Brussels. 8 October 2008, COM(2008)614/3, recitals 4-8 (with particular focus on Internet sales).

¹¹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [hereinafter «*Services Directive*»], *O.J.*, L 376/36 (27.12.2006).

¹¹³ 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.

¹¹⁴ See Recital 76 of the Services Directive.

¹¹⁵ Moreover, far-reaching information requirements in Article 22 (Information on providers and their services) might contribute to lowering the search costs for consumers.

vis service providers. It requires Member States to ensure that the general conditions of access to a service do not contain discriminatory conditions.

Depending on the interpretation of «conditions of access to a service», Art. 20 (2) of the Service Directive 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. The «Handbook on implementation of Services Directive» does not offer any further guidance on this point¹¹⁶.

Article 20 (2) 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». 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 III.A of this article)¹¹⁷. As far as legal motives for territorial differentiation are concerned (see III.B), 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 discrimination¹¹⁸. Unfortunately, the rather self-evident clarification that there is no obligation to acquire rights for the entire territory of the European Union does not throw more light on the far more important and difficult question under which conditions the practice of territorial licensing must be regarded in conflict with the EC Treaty (see also V.A.1). Again, the Handbook

¹¹⁶ European Commission, «Handbook on implementation of the Services Directive», Luxembourg, 2007, online available at: http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm (last visited on 14.20.2008).

¹¹⁷ 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.

¹¹⁸ Recital 95 of the Services Directive.

on implementation of the Services Directive has missed the chance to further clarify this point.

Finally, where territorial differentiation is the result of strategic reasons (see section III.C) such acting appears to be banned. Although Article 20 (2) 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 IV).

VI. CONCLUSION

Neelie Kroes just recently demanded to know : « Why is it possible to buy a CD from an online retailer and have it shipped to anywhere in Europe, but it is not possible to buy the same music, by the same artist, as an electronic download with similar ease? »¹¹⁹. As the Commissioner also acknowledged, the answer is complex.

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

¹¹⁹ Neelie KROES, « Making online commerce a reality », closing remarks at Online Commerce Roundtable, Brussels 17th September 2008, Speech/08/437, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/437&format=HTML&aged=0&language=EN&guiLanguage=en>. Brussels, 3 April 2007, press release MEMO/07/126, online available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on 20.10.2008).

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 article is that strategic territorial differentiation, and here first and foremost territorial licensing between rightholders and retailers and its effect on consumers in the downstream relation has received too little attention so far. What is missing in particular is guidance on the conditions under which territorial licensing, and the discrimination of consumers as a result of territorial licensing, are in conflict with primary EC law. The article also observed that at present under European law consumers of digital content services, which are subject to exclusive rights, are even at a more disadvantageous position than consumers of goods such as books and CDs.

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 (note : the directive does not apply to 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. The European Parliament

required the Commission to closely monitor Article 20 of the Services Directive, and also consider introducing a corresponding provision for goods¹²⁰. 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 later. 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 realize the free movement of services is probably limited, as it does not address the important case of territorial differentiation as the result of territorial licensing.

¹²⁰ European Parliament 2007, *op. cit.*, §§ 31 and 32.