



Brussels, 30.11.2020  
SWD(2020) 294 final

PART 1/2

**COMMISSION STAFF WORKING DOCUMENT**

**First short-term review of the Geo-blocking Regulation**

*Accompanying the document*

**Report**

**from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the first short-term review of the Geo-blocking Regulation**

{COM(2020) 766 final}

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## 1. INTRODUCTION

### 1.1. Context

The Geo-blocking Regulation (EU) 302/2018 (hereinafter “the Regulation”) is one of 28 measures of the Digital Single Market strategy<sup>1</sup> adopted during the last Commission mandate with a view to ensure better access conditions to goods and services for individuals and businesses. The Regulation was adopted by the European Parliament and Council on 28 February 2018 and became applicable on 3 December 2018.

This Regulation has been part of a comprehensive package of measures to realise the potential for the digital economy and society in Europe through the removal of regulatory and other obstacles between Member States, in order to deliver the positive effects of a true Digital Single Market (DSM). The main aim of the package was to break down barriers to cross-border online activity in order to: (i) ensure better access to goods and services offered online; (ii) build trust for consumers and greater certainty for businesses; and (iii) reduce transaction costs and administrative burdens for businesses when trading online across borders. The package constitutes an inter-linked set of measures, which are intended to reinforce each other so that the whole is greater than the sum of its parts. Many of the measures adopted have already entered into force; others will become applicable in the forthcoming months or years.

Within this context, the Geo-blocking Regulation addresses the specific problem of geo-blocking and unjustified discrimination of customers purely based on their nationality, place of residence or place of establishment, in order to facilitate access to cross-border offers within the internal market. At the same time, this Regulation does not require traders to actively sell and deliver across borders. Any restriction affecting cross-border sales may, however, still need to be assessed on a case-by-case basis under Treaty provisions and existing EU law.

Alongside the Regulation other measures have been adopted to facilitate cross-border e-commerce by both consumers and traders, including in particular by improving transparency of delivery prices for consumers and by facilitating compliance with consumer protection requirements when directing activities cross-borders (see in particular Section 2.3.2), as well as measures facilitating cross-border access to content.

In particular:

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<sup>1</sup> Communication “A Digital Single Market Strategy for Europe” COM(2015) 192 final

- new rules for the reduction of VAT-related administrative burden of cross-border transactions.<sup>2</sup> These rules introduce major simplifications for cross-border sales and will be applicable as from 1 July 2021.
- the Consumer Protection Cooperation (CPC) Regulation 2017/2394<sup>3</sup> has replaced the old 2006/2004<sup>4</sup> CPC Regulation as from 17 January 2020, providing national authorities with stronger powers to detect irregularities and to reinforce cooperation.
- a new Regulation<sup>5</sup> in the area of cross-border parcel delivery services has been applicable as from 2018. This Regulation aims to make prices for cross-border parcel delivery services more transparent and affordable. It further aims to increase regulatory oversight of the European parcel market.
- in the framework of the digital contracts rules<sup>6</sup>, two Directives<sup>7</sup> have been adopted in 2019, harmonising the main mandatory consumer rights applicable to the supply of digital content and sales of goods. These Directives will need to be transposed by Member States by 1 January 2022. In addition, in the framework of the “New Deal for Consumers” initiative, the Commission proposed, in April 2018, a package of measures<sup>8</sup> aiming in particular at improving compliance with EU consumer protection legislation. The Directive on better enforcement and modernisation of Union consumer law will be applicable as from 28 May 2022. The adoption of the Directive on Representative actions is being finalised.

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<sup>2</sup> [https://ec.europa.eu/taxation\\_customs/business/vat/digital-single-market-modernising-vat-cross-border-ecommerce\\_en](https://ec.europa.eu/taxation_customs/business/vat/digital-single-market-modernising-vat-cross-border-ecommerce_en)

<sup>3</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance) OJ L 345, 27.12.2017, p. 1–26.

<sup>4</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) Text with EEA relevance, OJ L 364, 9.12.2004, p. 1–11.

<sup>5</sup> Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services.

<sup>6</sup> [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en)

<sup>7</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

<sup>8</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. Regarding the Directive on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC ('Representative Actions Directive'), the co-legislators reached a political agreement on 22 June 2020 in view of its formal adoption by the end of 2020. For more information: [https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers\\_en](https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en).

- as part of the ongoing modernisation of the EU copyright framework, new rules have been adopted in 2017<sup>9</sup> on portability of online content services. These rules, which have been applicable since 1 April 2018, allow Europeans to travel with digital content that they have subscribed to at home. This includes for instance, downloading of films or streaming of sports events. In addition, measures have been adopted that facilitate the licensing of ancillary on-line services provided by broadcasters<sup>10</sup> in order to enhance the cross-border distribution of television and radio programmes. The new rules have to be transposed by 7 June 2021.
- moreover, in 2019 rules for audiovisual media have been adopted<sup>11</sup>, to be transposed by 19 September 2020.

The Geo-blocking Regulation attracted significant attention of consumers as part of this package, not least since it is one of the measures directly empowering consumers with specific rights against cross-border traders. In order to increase awareness of the rights and obligations under the Regulation, the Commission has published an extensive Q&A document ahead of the date application in 2018. This Q&A includes examples aimed help consumers, traders and Member States alike to implement the Regulation<sup>12</sup> effectively.

As a result, in February 2019, only a few months after its start date for application, 50% of consumers were already aware of the measures, and more than half of these considered themselves to be sufficiently informed on the content of the Regulation<sup>13</sup>.

## 1.2. Specific provisions and objectives of the Regulation

Overall, the Regulation aims to improve access to goods and services for customers and preventing unjustified discrimination of customers in the Single Market. It does so by pursuing four specific objectives<sup>14</sup>, namely:

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<sup>9</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market,

<sup>10</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

<sup>11</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

<sup>12</sup> A first version of the Q&A document was released in March 2018, subsequently incorporated in a wider version published on 27 September 2018, which also included additional information about the wider context of most relevant DSM measures related to cross-border commerce, available at <https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers>

<sup>13</sup> Flash Eurobarometer 477b (2019).

- improving transparency for customers by enabling access to websites or apps throughout the Single Market;
- preventing unjustified differences of treatment in access to goods and services for customers throughout the Single Market;
- improving public enforcement in relation to unjustified geo-blocking and any other discrimination based on the place of residence, establishment or nationality;
- increasing legal certainty for business for cross-border transactions.

In particular, Article 3 of the Regulation bans the blocking of access to websites and the re-routing of user without the customer's prior consent. This increases price transparency by allowing customers to access different national websites.

Moreover, Article 4 of the Regulation defines specific situations when there can be no justified reason for geo-blocking or other forms of discrimination based on nationality, residence or establishment. In these situations, customers from another Member State should be granted access to goods and services under the same conditions, as those applied to local customers (known as "shop-like-a-local"), including price and delivery limitations. These situations are: the sale of goods with delivery or pick-up in area already served by the trader; the sale of electronically supplied services and the sale of services provided by the trader in a specific physical location, including when booked on-line (such as accommodation or car rental services). However, those electronically supplied services, the main feature of which is the provision of access to, and use of, copyright protected works are excluded from Article 4 of the Regulation.

Finally, while traders remain free to accept whatever kind of payment means they prefer, Article 5 of the Regulation includes a specific provision on non-discrimination as regards the range of means of payment they accept, provided that these payments are made through electronic transactions, in a currency accepted by the trader and pursuant to applicable authentication requirements. It therefore covers situations where different treatment is the result of a customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment services provider or the place of issue of the payment instrument.

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<sup>14</sup> See SWD(2016)173 final Impact assessment accompanying the document proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market, page 24 on the specific policy objectives.

These directly applicable rights and obligations are complemented by specific provisions meant to facilitate their application by traders and ensure their effective enforcement.

First, Article 6 of the Regulation ensures that traders cannot be bound by vertical contractual agreements imposing practices concerning passive sales in contradiction with the prohibitions laid down in the Regulation. Such agreements are to be considered void without the need to proceed with an assessment pursuant to competition law.

Moreover, in order to ensure effective enforcement of the prohibitions, and assistance to consumers, the Regulation requires Member States to designate a body or bodies responsible for enforcement of the Regulation and to define measures applicable to infringements. In particular, consumers are to benefit from strengthened support in the enforcement of the Regulation, as Member States are required to set up assistance bodies to provide practical assistance. Furthermore, the Regulation is among the instruments covered by the Consumer Protection Cooperation (CPC) Regulation<sup>15</sup> (applicable from 17 January 2020), as well as by the Injunction Directive<sup>16</sup> (whose revision has been subject to a political agreement on 22 June 2020).

### **1.3. Scope of the Regulation**

The scope of the Regulation is aligned to the the scope of the Services Directive, including the exclusions from scope laid down in its Article 2(2). This basic choice thus mirrors the broad horizontal scope of the Services Directive, which ensures the freedom to provide services across borders in a broad range of sectors. It also mimicks the scope of Article 20(2) of the Services Directive, which first implemented the general non-discrimination principle enshrined in the Treaty in the field of services.

In view of the above, the Regulation does not apply to the following sectors:

- Audiovisual services, as defined in the Audio Visual Media Services Directive (AVMSD)<sup>17</sup>, whatever their manner of production, distribution and transmission, and radio broadcasting;

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<sup>15</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance) OJ L 345, 27.12.2017, p. 1–26

<sup>16</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009.

<sup>17</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 95, 15.4.2010, p. 1–24

- Retail financial services (although unjustified differential treatment relating to certain methods of payment is covered);
- Services in the field of transport;
- Non-economic services of general interest;
- Electronic communication services and networks, and associated facilities and services;
- Services of temporary work agencies;
- Healthcare services, regardless of whether or not they are provided via healthcare facilities or the ways in which they are organised and financed at national level or whether they are public or private;
- Gambling activities, including lotteries, gambling in casinos, and betting transactions;
- Activities connected with the exercise of official authority as set out in Article 45 of the Treaty;
- Social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;
- Private security services;
- Services provided by notaries and bailiffs, who are appointed by an official act of government.

In addition, Article 4 of the Regulation prohibiting discrimination of customers in the provision of the services or sale of goods does not apply to non audiovisual electronically supplied services, whose main feature is the provision of access to and use of copyright protected works. This includes, for instance e-books, music, games and software provided on-line. However, non-audiovisual electronically supplied services remain subject to all other provisions in the Regulation, including the prohibition to block or limit access to online interfaces on the basis of the nationality, residence or establishment of the customer and the discrimination of some electronic payment means only on the basis of their "nationality".

Moreover, the Regulation applies to specific situations, such as those defined in Article 4, where no possible justification for a differential treatment based on residence or nationality can be found, so that other situations not falling within the hypothesis regulated by the Regulation (or partially excluded) are not concerned by the respective rights and obligations. In situations not covered by this Regulation but still concerning sectors and services covered by the Services Directive, however, the more general non-



discrimination principle enshrined in Article 20(2) of the Services Directive will continue to apply<sup>18</sup>.

Finally, pursuant to Article 1(4) and (5), the Regulation is without prejudice to the field of taxation, as well as to the field of copyright and neighbouring rights.

#### **1.4. Scope of the first short-term review of the Regulation**

The Regulation addresses specific situations where traders cannot objectively justify blocking access or applying different conditions to customers. As such, the Regulation is naturally subject to evolution, taking into account the evolution of the internal market framework, and periodic review as provided for in Article 9 of the Regulation.

Regarding the first review, the co-legislators set a specific timeframe as well as a primary focus of the exercise. Article 9 clarifies that a first review should be carried out 2 years from the entry into force of the Regulation. Article 9(2) of the Regulation specifies that the *“first evaluation referred to in paragraph 1 shall be carried out, in particular, with a view to assessing the scope of this Regulation, as well as the extent of the prohibition laid down in point (b) of Article 4(1) and whether this Regulation should also apply to electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form, provided that the trader has the requisite rights for the relevant territories”*.

In this context, the Commission declared that it will look into:

- the way in which the Regulation has been implemented and has contributed to the effective functioning of the internal market
- the feasibility and potential costs and benefits arising from any changes to the scope of the Regulation

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<sup>18</sup> According to this article, the general conditions of access to a service, which are made available to the public at large by the provider, shall not contain discriminatory provisions relating to the nationality or place of residence of the recipient, without however precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria. Unlike the specific unconditional cases regulated by the Regulation, the application of the non-discrimination principle as specified in Article 20(2) depends on a case-by-case assessment of the trader's practices and the existence of objective justifications for differential treatment. An explicative list of potential justifications for different treatment is included in Recital 95 of Directive 2006/123/EC. Additional indications on the application of Article 20(2) are included in the Commission Staff Working Document "With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive')", SWD(2012)146, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2012:0146:FIN>.

- whether in other sectors, including those not covered by Directive 2006/123/EC [...], such as services in the field of transport and audiovisual services, any remaining unjustified restrictions based on nationality, place of residence or place of establishment should be eliminated

The Commission declaration also refers to the criteria to be followed in this assessment, e.g. the expectations of consumers and the likely impacts any extension of the scope of the Regulation would have on consumers and businesses, and on the sectors concerned, across the European Union.

The analysis that follows is part of the Commission's assessment of the experience of the first months of the implementation of the Regulation in its current form. In view of the short timeframe, the analysis can provide first insights in its implementation, as well as indications of possible synergies with other digital single market measures.

The second part of the analysis considers the possible effects of an extension of the scope of the Regulation, first with regard to electronically supplied services excluded from the scope of application of Article 4. It then further looks at other services outside the scope of the entire Regulation, *in primis* audiovisual services. The analysis is based on the specific indications provided by the co-legislators in the review clause as regards copyright. Moreover, the analysis also considers the existence of unjustified restrictions in the transport sector. Finally, it looks into other services not covered by the Regulation including financial, telecommunications, or health services, in order to analyse whether remaining unjustified restrictions based on nationality, place of residence or place of establishment should be addressed by any extension of the Regulation<sup>19</sup>.

Finally, on both aspects, the timing of the review coincided with the COVID-19 crisis outbreak. The data and analysis undertaken therefore could not take into account any possible unexpected effects of the crisis, including those on the general macroeconomic

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<sup>19</sup> The range of services excluded from the scope of the Regulation includes a variety of different activities of different nature. Some of the services excluded, however, may have a lower potential to be subjected to an EU horizontal regime on the basis of current characteristics of the Regulation, i.e. they are not provided under general terms and conditions (mass market/no individual negotiation), without a relevant B2C element (or at least purchase for end-use), with limited on-line and cross-border potential. Moreover, some of the excluded activities may not be fully open to competition and/or free cross-border provision, as they may be subject to extensive national regulation and/or national funding, they entail the exercise of public authority or legal monopolies are assigned, cross-border provision may be restricted and/or the margin of manoeuvre for the trader to set the terms and conditions is very limited if not existent. These cases need to be dealt with the general instruments (non-discrimination principle of Article 56, if a service is at stake, and/or 18 TFEU) or, where applicable, sector-specific rules, which may tackle also (and in particular) conditions imposed by Member States (the regulation only focusing on discriminatory requirements of traders).

framework as well as those specifically affecting the provision of specific services and/or goods online.

## **2. IMPLEMENTATION OF THE REGULATION**

### **2.1. Implementation by Member States**

While the Regulation defines directly applicable rights and obligations, it also aims to improve their enforcement. It does so by establishing explicit obligations on Member States to designate bodies for enforcement and assistance to consumers, as well as by establishing measures applicable to infringements. Member States should have put in place these measures and communicated them to the Commission by 3 December 2018.

In particular, Article 7 of the Regulation requires Member States to “*designate a body or bodies responsible for adequate and effective enforcement of this Regulation*” (paragraph 1), to “*lay down the rules setting out the measures applicable to infringements*”, which “*shall be effective, proportionate and dissuasive*”, and finally to “*ensure that they are implemented*” (paragraph 2).

Moreover, pursuant to Article 7(3), Member States shall communicate to the Commission the measures applicable to infringements of the provisions of the Regulation. Recital 35 also clarifies that “*Member States should designate one or more bodies to be responsible for taking effective action to ensure compliance with this Regulation. Those bodies, which could include courts or administrative authorities, should have the necessary powers to order the trader to comply with this Regulation. Member States should also ensure that effective, proportionate and dissuasive measures can be taken against traders in the event of any breach of this Regulation.*”

In addition to these basic enforcement requirements, the Regulation contains more specific obligations regarding practices affecting consumers. First, Article 8 of the Regulation requires the Member States to designate a body or bodies responsible for providing practical assistance to consumers in the case of a dispute with a trader. This is without prejudice to the possibility to provide assistance to other customers covered by the Regulation (i.e. undertakings acquiring goods or services in the pursuit of their business trade, but only for end-use).

In addition, the Regulation is covered by the Consumer Protection Cooperation (CPC) Regulations. Accordingly, the obligations stemming from the CPC Regulations are applicable to the competent authorities enforcing the Regulation. This includes

notification obligations as well as minimum substantive requirements and cooperation obligations<sup>20</sup>.

Finally, Article 10(3) of the Regulation also amended the Annex to the Injunction Directive so as to include that Regulation within the scope of EU instruments covered by the Directive. Accordingly, Member States have to ensure that qualified entities can seek injunction measures for the protection of the collective interests of consumers aiming to stop or prevent traders' breaches of the Regulation for the protection of the collective interests of consumers<sup>21</sup>.

### **2.1.1. Implementation process and role of the Commission**

The Commission started early discussions with Member States in the context of the Expert Group on the Services Directive, the Consumer Protection Cooperation (CPC) network, and the European Consumer Centres (ECC) network in order to raise awareness and clarify issues on the implementation, ahead of the deadline provided by the Regulation. The Q&A document published in September 2018 included a specific section dealing with implementation by Member States, including issues that emerged in the context of bilateral and multilateral discussions with Member States, including at Council level. Next to this assistance prior to the date of application, the Commission additionally reminded Member States to take the appropriate measures ahead of the implementation deadline.

Despite these efforts, by December 2018 only six Member States had lived up to their obligations under the Regulation to adopt bodies designated for the enforcement of the

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<sup>20</sup> Pursuant to Regulation (EC) 2004/2006, each Member State shall designate and communicate a competent authority responsible for the enforcement of the laws that protect consumers' interests, which shall have a minimum set of powers (such as investigative powers, injunction to order cessations, actions against failure to comply) and provide mutual assistance (exchange of information or adoption of enforcement measures) to other CPC authorities. Regulation (EU) 2017/2394 improved that framework as from 17 January 2020: by extending its scope, *inter alia*, to the general non-discrimination provisions of Article 20 of the Services Directive, hence completing the enforcement system of the Regulation as regards discriminatory practices still subject to a case-by-case assessment; by strengthening of the minimum powers of the competent authorities to cooperate in the cross-border context, and especially to tackle bad online practices faster (such as the power to carry out test purchases and mystery shopping, to suspend and take down websites, to impose interim measures, to impose penalties proportionate to the cross-border dimension of the imputed practice); by putting in place stronger coordinated mechanisms to investigate and tackle widespread infringements; by allowing authorities to accept commitments from traders to provide remedies to affected consumers in cases of widespread illegal commercial practices, by allowing external bodies such as consumer and trade associations (invited to do so by Member States) and European Consumer Centres to post alerts and signal issues to authorities and the Commission.

<sup>21</sup> Depending on the choice made by each MS the qualified entities may be in particular consumer organisations or public bodies. Injunctions may be sought in judicial or administrative procedures.

Regulation and notify the measures. Delays affected the adoption of the necessary legislative and administrative acts, and prompted close monitoring and scrutiny by Commission services.

Letters co-signed by the Director Generals from DG CONNECT and DG GROW were sent to the Member States in advance of the implementation deadline as well as after the deadline. These letters urged non-compliant Member State to complete the notification of measures. Further political letters were sent to raise political awareness and urge Member States to notify measures without delay. In parallel the Commission had on-going contacts at bilateral and multilateral level in the Expert Groups dedicated to cross-border service provision and consumer protection. These activities facilitated the compliance of most Member States by spring 2019. However, in July 2019, 8 months after the date for application, 6 Member States (CY, FR, PL, RO) still had not notified any, or only some measures (SK and ES), prompting the Commission to begin infringement procedures.

The Commission therefore adopted 6 Letters of Formal Notice against these Member States on 27 July 2019, asking them to notify the measures applicable and/or to provide substantiated evidence to prove that the notified measures fully implement the obligations in the Regulation. Following the launch of these infringement proceedings, SK, PL, RO and CY finally adopted specific measures, while ES provided additional elements related to the national legal framework confirming that the notified sanctioning powers in the context of consumer protection would be applicable to all hypotheses provided for in the Regulation. Furthermore, ES clarified that pending legislation would strengthen the ordinary civil law remedies in case of B2B transactions. At the point of adoption of this document, FR has not yet notified national measures applicable to infringements of the Regulation<sup>22</sup>. Thus, the Commission is closely monitoring the adoption process of the national legislation and further measures are being considered by the Commission.

The steps taken by the Commission to ensure compliance with the notification obligations are meant to ensure that customers can have access to effective, proportionate and dissuasive measures, which would end any infringement of the Regulation. The notified measures have been made available to the public on the Commission's website<sup>23</sup>, in line with Article 7(3) of the Regulation, including the specific contact points for enforcement and assistance bodies appointed in each Member State. On the other hand, these infringement actions related to the notification of the

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<sup>22</sup> At the same time, the competent authority has been notified in the CPC network, so that it can informally cooperate within the network with other enforcement authorities.

<sup>23</sup> <https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market>

measures do not exhaust the assessment and monitoring activities of the Commission, as the effectiveness of these enforcement and assistance tools is subject to on-going monitoring, in order to check whether they ensure adequate and effective enforcement of the Regulation “on the ground” as well as to verify compliance with the additional requirements laid down in the European consumer protection legislation applicable as from 2020.

### **2.1.2. National measures adopted and designated bodies**

A general overview of the measures notified to the Commission, as well as contacts of enforcement and assistance bodies are available online and constantly updated on the Commission website<sup>24</sup>. The following paragraphs provide a more detailed overview of the implementation in the Member States.

#### *Enforcement bodies*

Administrative authorities are generally competent to apply the Regulation vis à vis consumers. In a large majority (23) of Member States<sup>25</sup> the consumer protection authorities are responsible for implementing the Regulation. In some Member States (such as in IT, PL) those authorities have parallel responsibility for competition law enforcement. In the remaining 4 Member States sectoral regulatory authorities have been appointed<sup>26</sup>. Accordingly, institutional arrangements and powers applicable to the enforcement of the Regulation are often the same or very similar to those applicable to infringement of consumer protection legislation.

In a large majority of Member States (BE, BG, CY, DE, DK, EE, EL, ES, FI, HR, HU, IE, IT, LU, LV, MT, PL, RO, SE, SI, SK) only one enforcement body has been appointed. In the remaining Member States (AT, CZ, LT, NL, PT), other authorities can be involved in enforcing the provisions, in particular with regard to supervision in some specific sectors and/or issues (such as with regard to breaches of obligations related to the use of payment means, for which authorities in the financial sectors are also empowered).

While general trends appear quite homogenous as regards enforcement in B2C transactions (widespread involvement of consumer protection authorities), two different enforcement systems emerge with regard to the application of the Regulation to B2B

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<sup>24</sup> See footnote 23.

<sup>25</sup> AT, BE, BG, CZ, DK, EE, EL, ES, FI, HR, HU, IE, IT, LT, LU, LV, NL, PL, RO, SE, SI, SK.

<sup>26</sup> In DE the authority responsible for electricity, gas, telecommunications and post; in MT the authority responsible for telecommunications; in PT the authority responsible for health safety of products; in CY the Ministry of Energy, Commerce and Industry, Industry and Technology Service.



transactions, i.e. in those cases where the customer is an undertaking acting in the context of its trade/business, but only to make purchases of goods or services for its end-use, thus excluding purchases made for resale and processing.

Member States are split among those (AT, BE, CY, DE, DK, HR, HU, IT<sup>27</sup>, MT, PL, PT, RO, SI, SK) where an administrative authority is designated for the enforcement of the Regulation in B2C and B2B relationships (usually the same authority)<sup>28</sup> and those remaining Member States (BG, CZ, EE, EL, ES, FI, IE, LT, LU, LV, NL, SE) that empowered administrative authorities only with the powers to deal with B2C relationships. In these latter cases, the enforcement of the Regulation in B2B transaction is left in principle to private litigation<sup>29</sup>. Some Member States, however, noted that B2B cases which also involve B2C may be subject to investigation by the consumer protection authority. Finally, while some Member States envisage specific measures for private litigation of B2B cases<sup>30</sup>, other Member States leave this to ordinary civil court procedures.

The existence of different enforcement systems applicable for infringements affecting consumers on the one hand and (only) undertakings on the other hand is not prevented by the Regulation in view of the specific (and more stringent) enforcement requirements applicable vis à vis infringements against consumers. It also reflects differences in national approaches regarding the degree of protection for undertakings acting as customers, which is by and large not harmonised at EU level<sup>31</sup>.

In order to comply with the basic requirements of the Regulation, however, any designated body, including courts or administrative authorities, should ensure adequate and effective enforcement of the Regulation. Further, the measures provided by the Member States applicable to infringements should be effective, proportionate and dissuasive. Recital 35 clarifies that Member States should provide the “*necessary power to order the trader to comply with this Regulation*”. Within this context, the effectiveness of the overall system of remedies available in the case of infringement through civil litigation should be taken into account, including in particular the possibility to put the infringement to an end. In this regard, different legal traditions and available remedies may play a role. This includes judicial remedies to order an end to an

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<sup>27</sup> Although in this case the public enforcement in pure B2B situations usually plays a secondary role.

<sup>28</sup> This adds to the possibility to also refer the cases to courts under ordinary civil remedies.

<sup>29</sup> This approach was already announced during the negotiations by some Member States, and is partially reflected in the wording of the Regulation.

<sup>30</sup> Like standing for representative trade associations in LU, explicit/specific injunction powers and sanctions imposed by courts for LU and CZ

<sup>31</sup> For example, in some Member States undertakings acting as end-users or SME are generally entitled to a broader protection akin to consumer protection rules.

infringement through – for instance – interim and/or final injunction orders, as well as the possible consequences in case of lack of compliance with court’s orders, such as penalty payments and/or criminal sanctions. For instance, on the basis of the ordinary civil remedies potentially applicable to these claims<sup>32</sup>, injunctions orders (interim and/or as final decision) appear available in a number of countries where only private enforcement is available for B2B transaction, such as CZ, DK, EL, LV, IE, ES, EE, SE, LT, BG<sup>33</sup> while fines or criminal law sanctions for lack of compliance with court’s orders are explicitly mentioned, for instance for DK, EL, FI<sup>34</sup>, LU, SE, IE, SI. Whether these different measures are effective, proportionate and dissuasive in practice, however, will still need to be verified on the ground, in view of the very limited implementation experience in the first months of application.

In a large majority of Member States the administrative authorities are authorised to impose fines in case of breaches of the Regulation, either directly (AT, BE, BG, CY, CZ; DE, EE, EL, ES, HR, HU, IE, IT, LT, LV, MT, NL, PL, PT, RO, SE, SI, SK) or through referral to a court (DK, FI, LU, as well as IE in case of prosecution in alternative to fixed payment notice). Further, in a number of Member States the authorities rely on a “step-by-step” enforcement procedure. In those countries, the respective authority may, before imposing a sanction, rely on ‘light touch’ measures to achieve compliance such as issuing warnings (BE) or obtaining commitments from the trader (DK). In one Member States (DE) a “step-by step enforcement procedure” is planned to be adopted as part of the transposition of the European electronic communications code<sup>35</sup>. This would include asking the trader for comments, issuing a binding decision, and then imposing fines only upon a violation of this decision.

The range of fines applicable in different Member States can vary considerably. Moreover, Member States often provide for large variations between minimum and maximum applicable amount of the fines, allowing to take into account various elements<sup>36</sup>. For instance, the amount of a fine could depend on the size of the market and/or the specific features of the violation. Finally, in some Member States (DK and IE) criminal liability may be applicable for violations.

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<sup>32</sup> Data from surveys from Member States in the context of the Expert Working Group on the Services Directive and general information available on e-justice portal.

<sup>33</sup> As well as IT, where private enforcement is in any case reported as the main enforcement remedy for B2B.

<sup>34</sup> Through conditional fines

<sup>35</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

<sup>36</sup> Including fines related to the turnover of the trader.



Overall, Member States can be divided into countries having their maximum fine established relative to turnover or with high maximum fines above 100,000€<sup>37</sup> and those with relatively smaller and/or narrower thresholds<sup>38</sup>. It remains to be seen whether and to what extent the large variation of fines available in different Member States and also within a Member State (for instance where a large margin of discretion is left to the enforcement body) ensures the effectiveness of measures applicable to infringements. At the same time, the large variety of infringements potentially at stake (from individual small off-line shops, to large multinational groups) may require the possibility to take into account different considerations on a case-by-case basis when setting appropriate fines. The range of alternative remedies, such as the publication of the enforcement measures, may also provide some dissuasive effect. Finally, given the widespread involvement of consumer protection authorities in the implementation of the Regulation, it remains to be seen to what extent changes to be adopted when transposing the new measures for better enforcement of consumer protection legislation of the “New Deal for Consumers” package will have indirect impacts on the enforcement systems for the Regulation. Overall, the implementation of the Regulation needs to be followed closely in the future, in order to verify effectiveness of the measures in practice.

Finally, because the Regulation has been included within the scope of the Injunction Directive, adaptation to the corresponding national framework has in some cases been necessary. Pursuant to the Directive, Member States need to ensure that qualified entities can seek injunction measures to stop or prevent breaches of the Regulation by traders. This is to ensure that the collective interests of consumers are protected<sup>39</sup>. Given the direct application of the Regulation in national legal orders, qualified entities designated in other Member States should have the possibility to bring actions for injunction in these cases. In a few instances this triggered changes of rules transposing the Injunction Directive or the specific empowerment of qualified entities<sup>40</sup>. In the majority of cases, however, the general rules on consumer injunctions are directly

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<sup>37</sup> Such as CZ: 3 mio Czech Koruna = approx.. 111,000€; CY up to 5% turnover or 150,000€, ES: from 3005 to 601 000 €, HU up to 5% of turnover, IT: from 5000 to 5 mio €, LU: 251 to 120000€, MT: 350 000€, NL: 900 000€ or 1% of turnover, PL up to 10% of turnover, SE: 5000 to 5 mio SEK, i.e about 474,415€ and 10% of turnover

<sup>38</sup> Such as AT: up to 2900 €, BE from 26 to 10,000€, BG from 250€ to 5000€, EE: 1200/32 000 €, EL: 1000 to 10 000€, HR: from 1352 to 13500€, LV from 50 to 10,000€: LT from 144 to 1448€, PT from 250 to 25,000€, RO from 5,000 to 50,000 lei (approx.. 1,000 to 10,000€) SI from 500 to 20 000€; SK: from 100 to 50 000 €

<sup>39</sup> Depending on the choice made by each MS, the qualified entities may be in particular consumer organisations or public bodies. Injunctions may be sought in judicial or administrative procedures.

<sup>40</sup> HR, IT, LU.

applicable also to breaches of the Regulation without need of national legislative changes<sup>41</sup>.

Finally, 26 Member States (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LV LU, LV, MT, NL, PL, PT, SL, SK) have appointed European Consumer Centres (ECC), or contact points in close cooperation with the national ECC<sup>42</sup>, as assistance bodies.

### **2.1.3. Experience of first months of application by national bodies**

In view of the limited time passed after the date of application of the Regulation and from the largely delayed empowerment of responsible bodies in several Member States, it is not yet possible to form a clear assessment of the effectiveness of the enforcement systems on the ground. Having said that, no complaint from consumers has been received so far by the Commission, concerning any issues of appointed national authorities not pursuing infringements, or doing so too slowly. The previous analysis therefore focused on the formal powers provided to the enforcement authorities.

In order to gather a first feedback on the implementation of the Regulation by the competent national bodies, the Commission services have launched surveys of the relevant competent national authorities and bodies. This qualitative and more granular information adds to the more general statistics generated by the Consumer Protection Cooperation Network and the ECC Network, dealing with these issues.

#### *European Consumer Centres (ECC) Network*

Pursuant to Article 8 of the Regulation, consumers (i.e. natural persons acting for purposes which are outside their trade, business, craft or profession) are entitled to get practical assistance in case of a dispute with a trader arising from the application of the Regulation. This assistance includes, at least, providing information on the rules applicable, on the available remedies, as well as ensuring mutual assistance with other bodies in other Member States. Often these bodies support consumers in their preliminary contacts with the trader, with a view to achieve a common understanding, and an amicable solution of the dispute. These bodies are often the first contact for consumers and provide awareness about the rights in the Regulation, as well as its limits.

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<sup>41</sup> On the basis of the information reported in Civic Consulting (2017) *Study for the Fitness Check of EU consumer and marketing law*, the large majority of Member States did not transpose the ID through a closed list, but either adopted an automatic cross-reference system or extended the possibility to launch injunction procedures to consumer protection legislation in general.

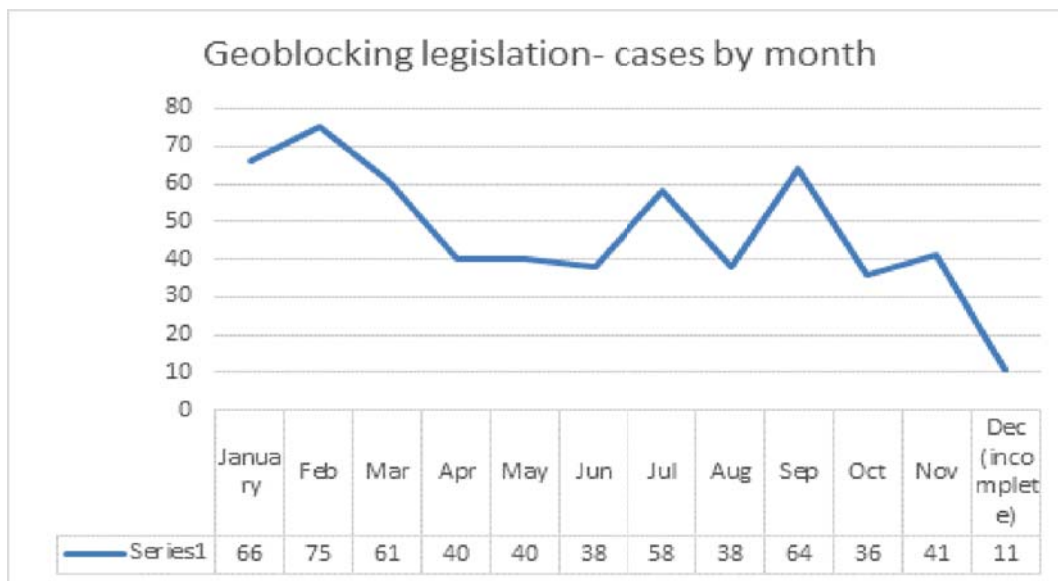
<sup>42</sup> Such as in PL, where the contact point for Alternative Disputes Resolution/Online Disputes Resolution procedure is a service provided by the consumer protection authority, also hosting the PL ECC.

Overall, in the initial period of application ECCs received 562 questions related to the Regulation<sup>43</sup>, and 99 complaints. In approximately 40% of these real cases, an amicable solution with the trader was found.

The majority of complaints and questions come from Austrian and, to a lesser extent, Belgian centres, which together account for approximately 1/3 of overall issues. In general ECCs in medium sized countries (in addition to AT and BE, PL, DK, NL, IE, CZ) appear to be contacted more often in comparison to larger countries (FR ranks third, DE ranks 7<sup>th</sup>, IT 9<sup>th</sup>). Even more concentrated is the country of the traders concerned, which in almost 1/3 of cases is from Germany. Luxembourg features prominently, as the second trader's country concerned (when a specific country is identified).

With regard to the trend of cases referred to ECC up to December 2019, a peak appeared immediately after the date of application, with a resurgence during the summer months; otherwise an average of around 40 cases per month is reported.

Figure 1 - Geo-blocking legislation, ECC cases per month



In October 2019, the ECC network published a paper with general qualitative findings about the first months of application of the Regulation<sup>44</sup>. In the main conclusions of the paper, a mismatch between the expectations of consumers and the objectives and scope of the Regulation is identified. This would be due to a misunderstanding of consumers

<sup>43</sup> In general it may be noted that these represent a very small fraction of issues referred to ECCs generally. For instance, in 2019 they received overall approx. 17000 complaints and 114000 questions.

<sup>44</sup> <https://www.ecc.fi/globalassets/ecc/ajankohtaista/raportit/2019-geoblocking-position-paper-en.pdf>.

about the scope of application, in particular regarding the services excluded from the scope. Moreover, consumers seem to expect that access to offers should also trigger a right to get goods delivered in their Member State, even if subject to additional costs and, with regard to different national websites of the same trader, seamlessly across different versions. Even if the possibility to differentiate offers is explicitly provided for in the Regulation, yet the limitations of delivery options in different national websites of the same trader, including of larger retailers and/or marketplaces, may create frustration. Indeed, to the extent that innovative delivery services, receiving or picking up the goods in one country on behalf of consumers located in another, have not yet developed widely, the main impact of the “shopping-like-a-local” as regards actual access to the goods is materialising primarily in cross-border regions. In this regard, it is reported that traders do not always envisage the possibility to self-arrange the delivery, or – more problematic from the point of view of the Regulation – do not allow for self-organisation of the delivery by the consumer in their terms and conditions, and/or refuse to ship to professional forwarding services. Finally, in spite of rules laid down in the SEPA Regulation preventing discrimination of SEPA payments (credit transfer and direct debit) on the basis of the “nationality” of the bank account, some traders still refuse, as a general rule, such payments from “foreign” banks<sup>45</sup>. Overall, therefore, the ECC-net report shows that not all traders have still implemented the Regulation, but at the same time they report a more general tension between the expectations of consumers and the development of certain business practices, including by multinational traders, limiting the scope of delivery options provided for in different versions of their websites.

In September 2019, the Commission services also carried out a survey amongst the designated bodies. The aim of this survey was to gather their views on their first experience with the Regulation. The feedback from this exercise is the following, based on 16 ECCs who replied to the questionnaire<sup>46</sup>.

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<sup>45</sup> The European Court of Justice recently confirmed that a general obligation to have a residence in the Member State of the payee (i.e. the trader), would amount to a circumvention of Article 9 of the SEPA Regulation, if it is not justified and proportionate to the aim it serves (Case C-28/18). So, while companies continue to have a choice as to whether or not they will allow customers to use SEPA direct debits as a means of payment, if they do allow such payments, they cannot restrict this payment option to customers resident in a particular Member State as a general rule; in this regard, SEPA Regulation (Regulation No 260/2012) and the regulation complement each other, as clearly stated also in Article 5(1) of the latter, also preventing such restrictions as a general rule. Accordingly, the possibility to request alternative means of payment and/or security on the basis of Article 5(2) of the Regulation, is based on an assessment on a case by case basis about the existence of objective (additional) risk of default of payment in case of foreign payers, such that the application of Article 5(2) does not mean that traders are entitled to including as a rule the condition that a payer should have its residence in the payee's country.

<sup>46</sup> PT, NL, CY, CZ, HU, LU, EL, AT, BG, SE, DK, IT, LV, PL, MT, GR.

- Among these ECCs, the date of designation and possibility to process assistance requests lies between September 2018 and September 2019. However, only the ECC in DK, CY, HU, AT and LV were already designated in December 2018, when the Regulation became applicable. Seven more ECC's were designated as competent authority only after, during 2019<sup>47</sup>.
- Most ECCs report that they are only empowered to provide assistance to consumers. In a few cases, however, the ECCs are also empowered to formally request enforcement actions in front of the competent national authority (CZ, HU, PL, IT, AT and LV).
- Overall a total number of 318 queries related to Geo-blocking issues have been filed with the ECCs that responded to this questionnaire.
- The number of queries seems to vary significantly between countries. The ECC in EL and LU did not receive any queries, while the ECC in Austria received a total of 157 queries. Between these two extremes, the majority of ECC's (8) received between 1 and 10 queries, four other ECC's received between 10 and 30 queries and one (PL, in addition to AT) more than 30. Most of these queries concern on-line services, with less than 10% related to services provided off-line.
- The overwhelming majority of the queries were from customers against on-line traders from the EU, Norway, Liechtenstein or Iceland. Just in a handful number of cases (AT, BG, IT) queries concerned third country traders.
- As regards grounds of geo-blocking queries, less than 5% of queries (13) concerned lack of access to the on-line interface of the trader or automatic rerouting. In this regard, it was also noted by one ECC that the number of queries concerning lack of access to on-line interface significantly decreased following the date of application of the Regulation. A similar ratio is reported with regard to queries reporting discrimination of payment means (16), for which an ECC also noted that traders usually adjusted their practice once contacted.
- Overall alleged discrimination pursuant to Article 4, and in particular in the sale of goods, appears the most common ground for complaint in all Member States concerned. At least 215 queries were received which related to discriminatory conditions under the situations covered by Article 4. Out of these, 176 were related to the sale of goods, 16 were related to electronically supplied services and 23 concerned services provided at a trader's premises. In this regard, it was noted by a few ECCs that the large majority of queries related to sale of goods refer to the lack of delivery options. In addition to these, a few number of cases were received that were not covered by the grounds in the geo-blocking

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<sup>47</sup> To be more specific, the ECC in SE was designated in April, the ECC's in IT and MT were designated in May, the ECC's in PT, CZ and LU were designated in June and the ECC in PL was designated in September. Finally, the ECC's in NL, GR and BG did not provide an answer to this question.

Regulation, in particular, related to financial services (4) and copyright protected services (6), which were either dismissed or treated under article 20 SD, as some ECC indeed also act as assistance bodies under Article 20 SD, and provided assistance in this regard in 7 cases.

- The most common follow-up to the queries by ECCs is the provision of information to the consumer, which helps clarify the extent and boundaries of obligations and rights conferred by the Regulation. In 226 out of the total of 318 queries, information was provided to the consumers and no further action was required. A total of 71 queries have been shared by ECC's within the ECC-Net, in order to involve or refer assistance bodies in other countries. An amicable solution was found for 30 of those queries. Finally, 16 queries were referred to other bodies.
- The majority of ECC's reported that the inquiries were in large part related to e-commerce, and within this clothes/shoes/accessories and electronics retail sectors featured most prominently. Many of the ECC's also reported that inquiries concerning services mostly related to online services such as transport and tourism.

As regards most recent data on the queries to ECC network in the first (Q1) and second (Q2) quarters of 2020, the number of consumers contacting ECC about geo-blocking fell in Q1 and Q2 of 2020 compared to the same period in 2019, (from 287 to 184). However, the proportion of geo-blocking queries that resulted in ECC contacting the trader increased slightly in 2020 (1.2% of geo-blocking queries resulted in trader interventions in Q1 and Q2 of 2019, while 1.5% of geo-blocking queries resulted in trader interventions in Q1 and Q2 2020). The outcome of trader interventions concerning geo-blocking was marginally better in Q1 and Q2 of 2020 compared with the same period the previous year with a small increase in the percentage of amicable resolutions (from 59% to 61%).

#### *Consumer Protection Cooperation (CPC) network*

The involvement of enforcement authorities may be triggered by consumer complaints directly filed to the competent authorities as well as a follow-up to earlier (unsuccessful) attempt to settle the issues with the trader (including through assistance of ECC). Furthermore, own initiative investigations are also possible in several Member States. Finally, given that the Regulation only applies to cross-border situations (Article 2), most infringement are almost certainly “intra-EU infringements”<sup>48</sup> under the CPC

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<sup>48</sup> I.e. an act or omission that harms, or is likely to harm, the collective interests of consumers residing in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found



regulation and may thus trigger cooperation within the CPC network through the notified competent authorities.

As of today, all Member States have notified a competent authority within the CPC network<sup>49</sup>.

According to the old CPC Regulation still applicable in 2019 (Regulation (EC) No 2006/2004), different forms of cooperation among competent authorities were possible within the network of national authorities with regard to individual cases. First, pursuant to Article 6, a national authority can request information from other authorities in order to establish whether an intra-Community infringement has occurred. Similarly, a national authority can alert another authority about the suspicion of a possible intra-EU infringement, providing all the necessary information (Article 7). Moreover, in accordance with Article 8, any national authority can request other authorities in the networks to take necessary enforcement measures to bring about the cessation or prohibition of the intra-Community infringement without delays. Finally, in the event of a possible intra-EU infringement involving the interest of consumers in more than two Member States, a coordinated action can be arranged pursuant to Article 9.

During the first year of application of the Regulation, the number of requests based on the Regulation has represented slightly less than 10% of overall requests for information channelled through the CPC network (4 out of 48), while in 8 cases out of 197, a request to take enforcement actions has been introduced pursuant to the Regulation (approx. 4% of overall requests). However, no alert or coordination requests were launched. The activity within the network therefore is still relatively low, but these numbers should be assessed against the fact that the CPC network handles requests for some 22 different EU instruments and that by spring 2019 a majority of Member States had not yet designated the competent authority in the network. More general interpretative issues, not specifically related to a single case and/or procedure, are also discussed within the network through collaborative tools and in the regular meetings of the national authorities and with the Commission services.

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<sup>49</sup> The notification within the CPC network as such does not necessarily imply that the authority at stake has been already empowered to adopt measures according to applicable legislation, but it allows that cooperation and enforcement requests may be channelled towards a contact point in the Member State. In this regard it can be noted that the necessary rules for the empowerment of the competent authority in France has not yet been adopted (see above). However, pending the adoption of the draft law on various provisions for adaptation to EU economic and financial law ("PJJ DDADUE") implementing the Regulation in France, the DGCCRF has already informally started to monitor the implementation of the Regulation and has been notified in the CPC network. In this way it has dealt with two requests within the network and the territorially competent investigation services have been seized, reaching to put an end to the practice in an amicable manner.

In addition to the general figures on the requests for cooperation within the network, the Commission services also carried out a survey among the designated authorities in September 2019, with a view towards gathering their views on the first experience with the application of the Regulation, even when it did not lead to the launch of specific cooperation or alert requests within the network. The main highlights from this survey are the following, based on 13 CPCs that responded to the questionnaire.<sup>50</sup>

- With regard to the powers of competent authorities, most of them responded that they are not empowered to investigate and sanction infringements in B2B transactions. The majority, however, reported that they are also empowered to investigate and sanction violations of Article 20 of the Services Directive and only a few (DE, NL, MT) do not have this additional power.
- Regarding the date of designation as a competent authority within the CPC network, the situation varies across Member States. The date of designation as a CPC authority is between December 2018 and July 2019, with one authority (SK) responding that it will have been designated in November 2019. The authorities from DK, DE, NL, BE and EE all started to accept and process complaints in December 2018, when the Regulation became applicable. The authority in LT followed in January 2019, MT followed in May 2019 and CZ followed in July 2019. With regard to enforcement actions, the dates from which they were empowered to launch enforcement proceedings is between December 2018 and November 2019, and only a few (DK, DE, EE, and EL) already had some powers to adopt measures at the application start date in December 2018.
- A total of 145 complaints related to Geo-blocking issues were filed with the competent authorities; the number of complaints varying significantly between different Member States. The authority in DE received the most complaints (75), followed by IE (30), NL (11) and DK (10). The authorities in BE, LT, EE and SE received between 0 and 10 complaints. No complaints were received in CZ, RO and SK. The majority of these complaints were from domestic customers (110), while the number of complaints from foreign customers was significantly lower (37).
- The majority of complaints are against cross-border European providers (89), followed by complaints against domestic providers (48). Finally, only the DE authority received complaints (4) against third country providers. All reported complaints concerned on-line providers (137) but one reported by the DK authority.

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<sup>50</sup> RO, SK, DK, DE, NL, BE, LT, EE, SE, CZ, GR, MT, IE.



- As regards the grounds of geo-blocking complaints, overall, more than 1/3 (53) of complaints received was considered not covered by the Regulation. The majority of these complaints were related to refusal to deliver outside the area served by the trader (36), with a considerably smaller number of complaints related to copyright protected services (8) or complaints treated under Article 20 SD (1).
- Denied access to on-line interfaces/automated rerouting to other websites pursuant to article 3 (40) and alleged discrimination pursuant to article 4 (42) were the most common grounds for complaints in most Member States concerned. Out of the 42 complaints related to discriminatory conditions under the situations covered by Article 4, 32 complaints were related to the sale of goods, 8 complaints were related to electronically supplied services and 2 complaints concerned services provided at a trader's premises. A minority of complaints were received regarding discrimination of payment means (12). In a few cases, DE and IE authorities reported that the reasons for the practice could actually be allowed pursuant to the Regulation in view of the explanations from the traders.
- As far as investigation and enforcement activities are concerned, following the start of an investigation a total of 55 cases were closed. Most of them were closed because they were not covered by the current Regulation (39), but several were closed due to the trader's compliance after the start of an investigation (12). On 3 September 2019, when the questionnaire was circulated, 28 enforcement proceedings were still open. As of October 2019, no enforcement measures have yet been adopted against traders, neither have any sanctions been imposed.
- Cross-border cooperation between authorities is still relatively modest, with only 10 cooperation requests reported. DE (3) was the only authority that received information requests and only the authorities in DE (4), LT (1) and SE (2) received enforcement requests<sup>51</sup>. To date, no alerts have yet been reported. Of these cooperation requests, 6 were related to a refusal of access/automated rerouting to other sites pursuant to Article 3, 1 was related to discriminatory conditions under the situations covered by Article 4, more specifically goods, and 1 was related to discrimination of payment means pursuant to Article 5. The cooperation requests were, for a large part, related to e-commerce, clothing, telecommunications, digital services and recreational services.

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<sup>51</sup> Two additional (informal) cooperation requests also involved FR, although the authority is not yet empowered.

- Some authorities elaborated further on experiences that were relevant for the evaluation on the implementation and enforcement of the Regulation. One noted that it sometimes struggles to decide whether a situation constitutes unauthorised geo-blocking or not. Another noted that no detailed assessment of investigations has been initiated regarding the Regulation yet, since many of the issues raised either relate to foreign companies or are not in breach of the Regulation. Finally, another competent authority provided a more detailed qualitative feedback concerning the current scope of the Regulation, pointing out that, in general, consumers expect the right to cross-border delivery, although this is not provided by the Regulation; ensuring transparency of delivery areas is important to avoid disappointing consumers; and this detailed feedback also mentioned the possibility that some payment instruments providers (including credit card providers) could offer differentiated services to traders, with additional charges in case of credit-worthiness checks extending to other EU countries. When consumers use these cross-border payment means, they may have to enter into additional contractual arrangements with the payment service provider, incurring possible cost differences.

The new Consumer Protection Cooperation (CPC) Regulation [2017/2394](#), which is applicable from 17 January 2020, further strengthens the cooperation between national consumer enforcement authorities to ensure more rapid and consistent enforcement of EU consumer rules, especially in the digital environment. The new Regulation provides for new procedures, and for reinforced mutual assistance and alerts mechanisms, to tackle infringements that affect several Member States – i.e. coordinated investigation and enforcement mechanisms for widespread infringements and widespread infringements with a Union dimension. The latter concerns infringements that affect at least 2/3 of Member States, accounting together for 2/3 of the Union’s population. In such cases, the Commission’s role is strengthened as it can activate the network and ask authorities to take at least preliminary investigation measures. The Commission also coordinates such actions to ensure a uniform response to infringements with a Union dimension. This cooperation mechanism is supported by a modern IT tool facilitating the exchanges between Member States. Since January 2020 CPC authorities have sent three enforcement requests concerning the Geo-blocking Regulation and also an alert was issued. These numbers are higher compared to the enforcement requests under the old CPC Regulation.

#### **2.1.4. Sweeps**

In the context of the CPC network, regular coordinated and EU-wide screening of websites (known as “sweeps”) are carried out by the national authority, to check whether a given sector is complying with consumer rules. The 2019 Sweep focused on

the issues faced by consumers regarding delivery of goods purchased online. Under EU law, every consumer has the right to receive clear, correct and comprehensible key information from a trader about goods before making an online purchase. The Sweep aimed at exploring whether clear information is provided by the trader. It also included some questions concerning compliance with the Regulation, in particular as regards access to websites and on conditions applicable to cross-border consumers when selling goods and delivering it in a country where the trader already offers delivery.

In total, 481 e-shop websites were screened by the EU/EEA competent authorities. The vast majority of the websites screened were EU/EEA websites. The scope of the sweep was limited to 3 categories of products (clothing and/or footwear, furnishings and household items, electric appliances).

Within this context, the sweepers checked 204 websites for compliance with the Regulation. In 28 cases, access was blocked, in 3 cases access was limited, and in 14 cases consumers were redirected, without having been asked for their explicit consent.

Regarding the possibility of foreign consumers to purchase goods and pick up or get them delivered to a Member State where the trader already offers delivery under the same conditions applied to local customers, the authorities found 58 cases which do not appear to be in line with the shop-like-a-local principle enshrined in the Regulation.

These cases have therefore been flagged for further investigation by the authorities (amounting to approx. 1/5 of all websites flagged for further investigation due to compliance issues with consumer protection rules).

## **2.2. Application by traders**

The Regulation imposes non-discrimination obligations on “traders”, defined in the Regulation as “*any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in the name or on behalf of the trader, for purposes relating to the trade, business, craft or profession of the trader*” (Article 2(18)). The Regulation applies to all traders offering their goods or services to consumers in the EU, regardless of whether they are established in the EU or in a non-EU country. Therefore, traders established in non-EU countries that operate in the EU are subject to the Regulation as well. The rules of the Regulation apply in principle to both business-to-consumer (B2C) and to business-to-business (B2B) transactions, to the extent that the latter take place on the basis of general conditions of access (i.e. they are not individually negotiated) and the

transaction is for the sole purpose of end use (i.e. made without the intention to re-sell, transform, process, rent or subcontract).

As to the particular obligations of traders under the Regulation, Article 3 bans the blocking of access to the traders' websites and re-routing without the customer's prior consent, Article 4 prohibits different conditions of access to goods or services offered by traders on the basis of nationality, place of residence and place of establishment of the customer, while Article 5, at the payment stage, provides for non-discrimination for reasons related to payments, and thus covers situations where differential treatment applied by traders is a result of the customer's nationality, place of residence or place of establishment, the location of the payment account, the place of establishment of the payment services provider or the place of issue of the payment instrument.

In 2015, before submitting the proposal for the regulation, the Commission carried out an EU-wide Mystery Shopping Survey of various traders, which analysed approximately 10,500 websites in the EU and modelled typical cross-border shopping situations<sup>52</sup>. The 2015 survey examined the various types of geo-blocking practices consumers face at each stage of the online shopping process and their prevalence by region, country, sector, product, and type of retailer. The websites were visited, first by mystery shoppers as domestic users, and subsequently as cross-border users from another Member State. This survey found that, overall, geo-blocking practices or limitations to cross-border delivery were identified in approximately 63% of all websites assessed. It found that only 37% of websites actually allowed cross-border EU visitors to reach the stage of successfully entering payment card details, i.e. the final step before completing the purchase.

Following the adoption of the Regulation, for the purposes of feeding into the assessment of first months of implementation of the current Regulation, the Commission launched another Mystery Shopping Survey during the last quarter of 2019 (carried out by a consortium led by *Ipsos*), aimed at collecting a representative dataset on the remaining incidence and characteristics of obstacles to cross-border on-line trade for goods and services in the EU following adoption of the Regulation. The survey covered a large sample of 9000 websites.

The following aspects of the scope and methodology of the 2019 Survey should be noted:

- The survey covered several sectors falling under the scope of the Regulation but also looked into potential geo-blocking practices in the

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<sup>52</sup> [https://ec.europa.eu/info/sites/info/files/geoblocking-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/geoblocking-final-report_en.pdf).

**transport services** field (passenger air, rail, bus/coach and maritime) currently excluded from the scope of the Regulation (on the results as to the former, see Section 3.2.2 below). Note that the 2019 Survey did not look at on-line games and software sectors which were covered by a different exercise (the mystery shopping exercise carried out in the context of the VVA et al (2020) Study).

- The survey looked into **geo-blocking practices** within each shopping stage – access, registration, payment, reflecting potential problematic issues of geo-blocking practices (such as blocking of access or automatic re-routing, non-acceptance of the foreign payment means though within the range of the means accepted by the trader). Moreover, the survey (as in 2015) also looked at other **limitations to cross-border offers** applied by traders, in particular, regarding delivery (see under point 2.2.4 below).
- The survey also covered a small sample of **third country websites** by traders established in non-EU countries that operate in the EU.

The methodology of the survey was designed to ensure **comparability with the geo-blocking situation in 2015** as reflected in the 2015 Mystery Shopping Survey<sup>53</sup>.

Finally, in the context of possible limitations applied by the traders to cross-border access, the survey also looked into the business **practices of “multinational” traders** operating various national versions of the websites (accessed by mystery shoppers from the one and same Member State), and gathered data on any differences (not the geo-blocking practices *in stricto sensu* under the Regulation) between those different national websites of the same trader, like different prices or product availability or delivery zones. This enabled a snapshot of trends by the “multinational” traders in different national markets. The results on the **“multinational” analysis** are reported separately to the main results based on the traditional analysis, i.e. where a website from one country was visited from two locations (in country and cross-border).

The key findings of the 2019 Mystery Shopping Survey as regards geo-blocking practices and limitations are presented below.

### ***2.2.1. Geo-blocking related to website access***

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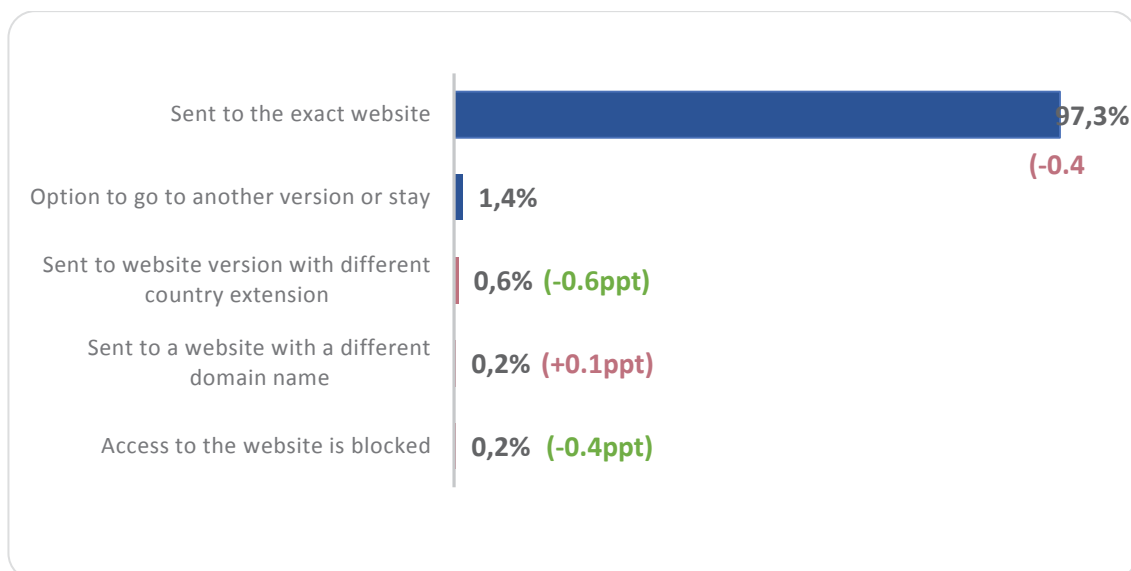
<sup>53</sup> This included the adoption of a similar methodology to identify the country pairs and gather the data as in 2015, although not full overlap of the website sample, that needed to be adjusted to take into account changes happening overtime. The exercise could not look into the overall differences of catalogues, items and conditions applied, although it did check random examples that may provide some indications. Comparison of trends was not possible for national versions of multi-territorial websites, for transport websites other than those offering airline services, or for third-country trader websites, which were not part of the 2015 exercise.

In the 2019 Mystery Shopping Survey, “access” to a website in the strict sense was considered granted if a) the exact website immediately opens, or b) if the customer is given the option to either go to another version or stay on the requested one.

The 2019 survey results reveal that, like in 2015, only very rarely did shoppers fail to access the exact website they wanted (without taking into account the website’s language). The percentage of cases where access was denied declined to **1.3%** (EU 28 data) from an already relatively small figure of 2.1% in 2015. **Thus, for 98.7% of the evaluated websites in the EU28, the exact website that was sought access to could be accessed by cross-border shoppers.**

Outright blocking of cross-border visitors is no longer an issue, and dropped from 0.6% to 0.2% in 2019.

Figure 2 - Website access restrictions (EU28)

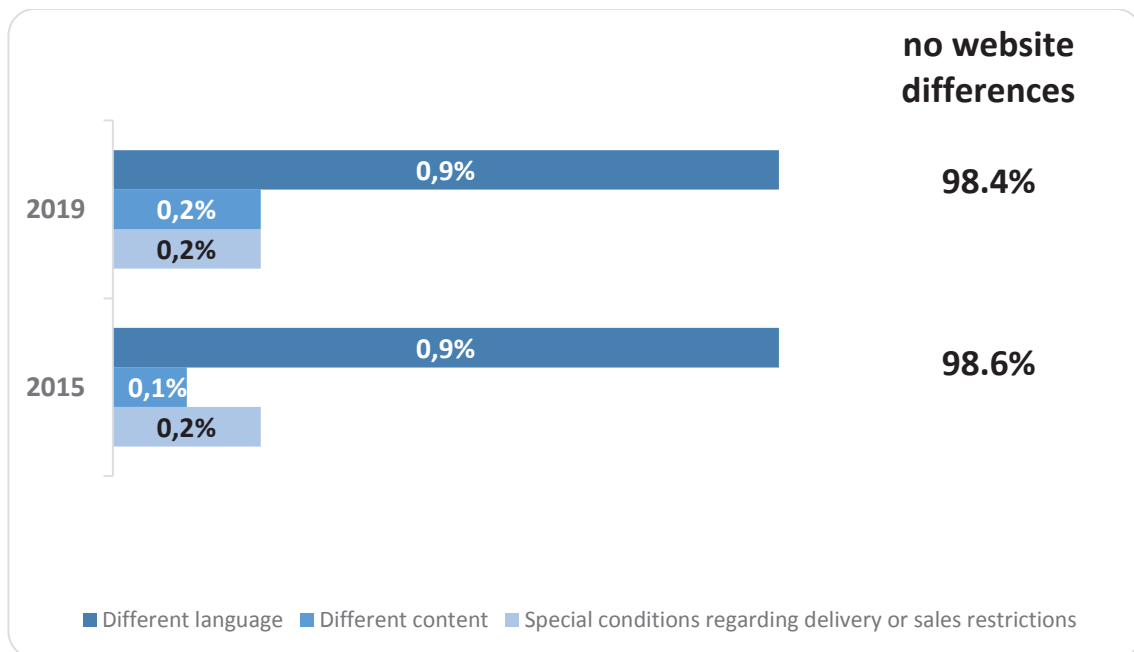


Source: Ipsos et al (2020)

Even if traders allow cross-border shoppers to visit their website, they can still restrict access by adjusting the content of their website depending on the shopper’s location. While changes in the formal aspect of the website do not necessarily affect its content (and vice versa), it nevertheless can provide a first indication on whether such changes may take place. Therefore, in the 2019 Survey the shoppers were requested to indicate first sight differences with the outline of the website. The survey found this to be an uncommon practice as well. Overall, for 98.4% of the websites that could be accessed, the website appeared to be exactly the same, including the same default language as

offered to domestic shoppers. This is almost identical (-0.2ppt) to the result in 2015. The difference could be attributed to the increase in websites where the content appeared different for cross-border shoppers than to domestic shoppers (from 0.1% to 0.2%).<sup>54</sup> The practice of offering a different default language to cross-border shoppers, on the other hand, remained at the same level compared to 2015 (0.9%).

Figure 3. Website differences (EU28)<sup>55</sup>



Source: Ipsos et al (2020)

The survey also shows that changes are more likely happening in the case of large retailers: an absence of website language or content differences is indeed less common among **large retailers** (97.2%) compared to medium-sized (98.1%) and small (99.6%) retailers.

When it comes to access to a specific part of the website, overall, across all sectors surveyed, it remains rare that cross-border shoppers are not able to find the **same products** as domestic shoppers. However, in the 2019 Mystery Shopping Survey, geo-

<sup>54</sup> Specifically, it was assessed whether, when opening the website for the first time from a cross-border location, “the content appears different”. Such differences could include for instance a different introduction page, specific sales promotions, different products highlighted, etc. Since this practice was evaluated on the home page of the website only, any reported content differences do not mean that the website offers different or less products/services to cross-border shoppers. Availability of products/services was evaluated separately in the Survey.

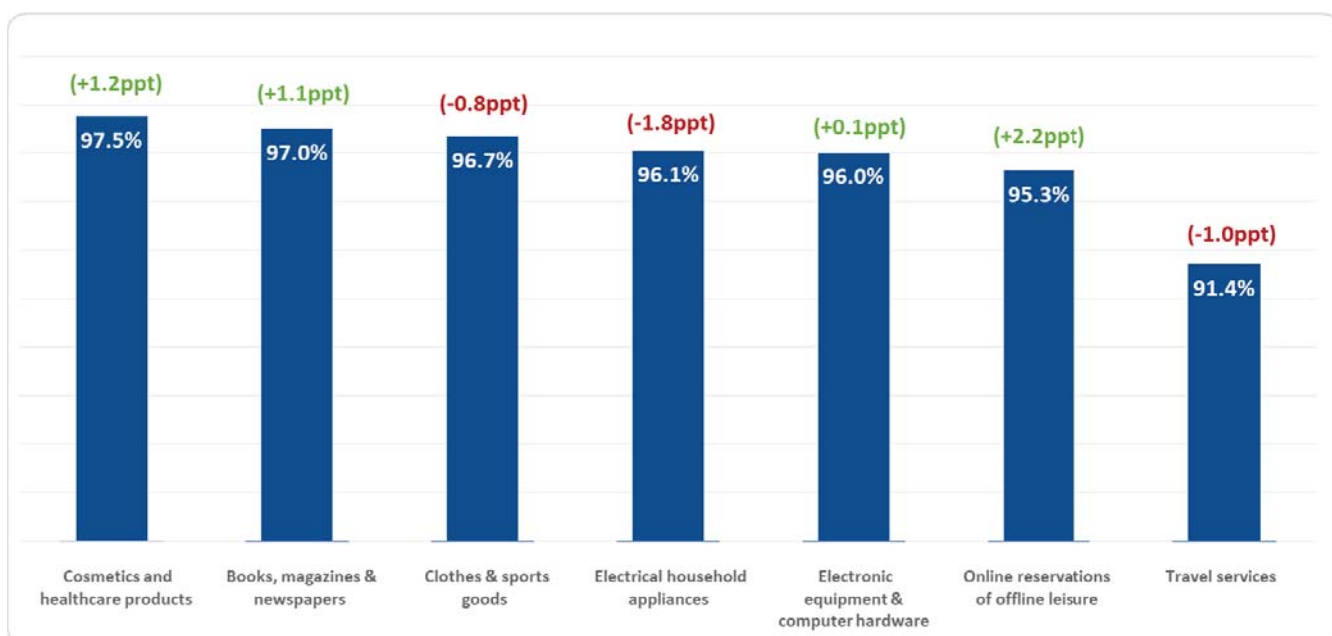
<sup>55</sup> Website differences that were categorized as “other” (i.e., not related to content or language) are not shown in the figures in this section. As a consequence, percentages in the figures can sum to slightly less than 100%.



blocking in relation to product availability (specifically the ability to find the product with the exact same properties during a cross-border visit compared to a domestic visit; a variant of the product, such as a different colour, size or an older model was not allowed) decreased slightly from 2015 to 2019, by 0,1pp and is rather minor issue - only in **4,1%** of cases the shoppers could not find exact same product in 2019). This may suggest that some access obstacles may still affect some parts of the websites and/or presentation of products.

Looking at **sectors**, the travel services sector remains the sector where restrictions in service availability to cross-border shoppers are the highest. Exact service availability is seen in 91.4% of the travel service websites, a further decrease of 1.0ppts.

Figure 4 - Website offering the same goods/services to cross-border shoppers (sectors)



Source: Ipsos et al (2020)

When it comes to **price differences**, the survey reports a slight decrease of automatic changes of prices displayed to cross-border customers (27.2% of websites in the EU28 price their products differently for domestic and cross-border shoppers, a decrease of



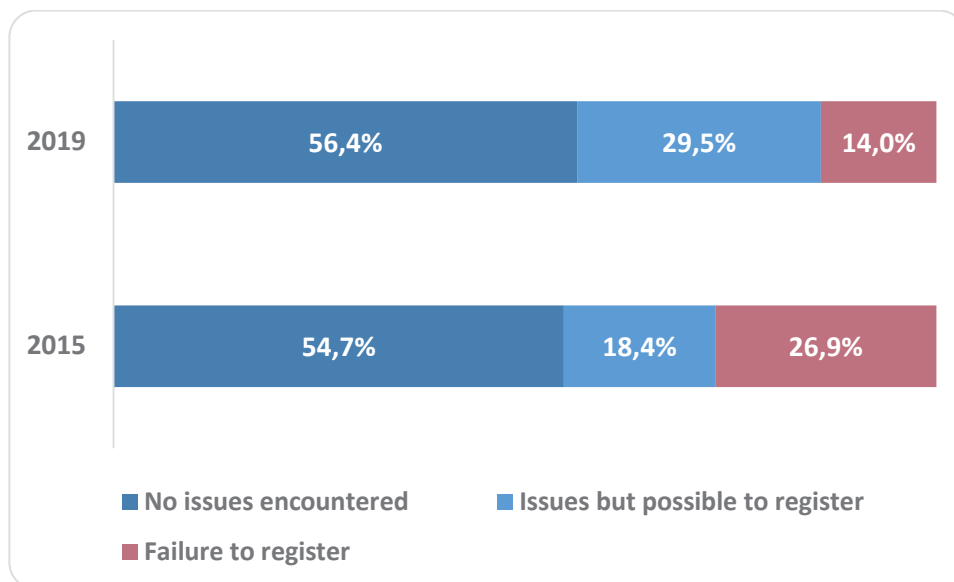
2.3ppts compared to 2015, -2.2 if referred to EU27 only), although with large variations depending on the localisation of the website<sup>56</sup>.

### 2.2.2. Geo-blocking linked to registration

The 2019 Mystery Shopping Survey reveals positive developments as there is a clear decline in Geo-blocking linked to registration compared to 2015 (halved to **14,0%** from 26,9% in 2015), even though registration is the stage in the shopping process where Geo-blocking is most common in 2019 as well.

This indicates that while in the large majority of cases it is possible for cross-border shoppers to access the given website and find the product they are looking for, a failure to register can still prevent them from actually purchasing the product/service.

Figure 5 - Failure to register (the registration failures do not account for those cases only due to email addresses)



Source: Ipsos et al (2020)

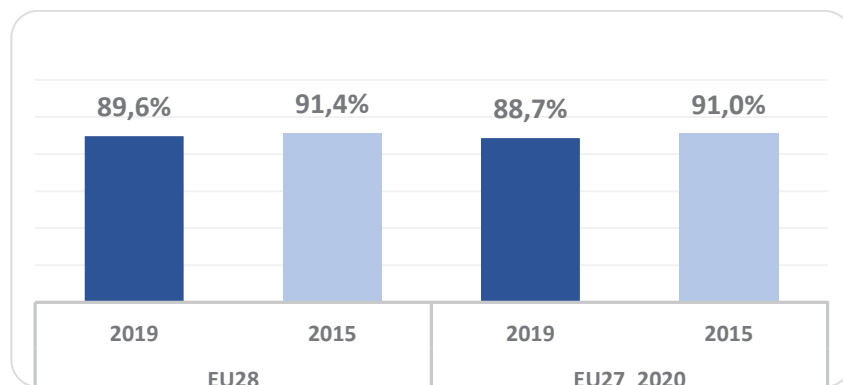
<sup>56</sup> For example automatic change of prices is more common for websites from non-Eurozone countries. It should be noted that (final) price differences linked to location do not necessarily reflect discriminatory practices as regards net prices, as they could also reflect changes in applicable VAT rates and/or other difference (such as cross-border delivery or change of accepted currency) triggered by the location of the customer (used as a proxy of the delivery). The comparison with 2015 data however can give a proxy of the reduction of practices automatically adapting prices also for other reasons.

### 2.2.3. Geo-blocking linked to payment

The 2019 Mystery Shopping Survey further reveals that there may still be issues with geo-blocking practices at the payment stage. The survey looked at cases where entering payment details of a foreign issued card was not possible even if international payment methods (such as credit cards of international circuits like Visa and Mastercard) were accepted as well as cases where it was explicitly mentioned that foreign credit cards or foreign direct debit, were not accepted<sup>57</sup>. It should be noted that refusal of foreign direct debits is a breach of Regulation (EU) N°260/2012 (SEPA Regulation) and each such case must be addressed by the designated national competent authority.

Furthermore, in this case, the fraction of unsuccessful attempts has remained stable, at **10.4%** of the evaluated websites, actually slightly increasing, compared to 2015. These findings may also be connected to some delays in the implementation of Strong Customer Authentication requirements by certain payment service providers<sup>58</sup>, as well as some practices reported in enforcement cases where geographical limitations of ancillary services provided for by payment services providers would apply, hence processing of certain cross-border payments would require modification of the current agreements with the payment service providers.

Figure 6 - Absence of payment restrictions



Source: Ipsos et al (2020)

<sup>57</sup> This of course does not cover all possible issues at the payment stage, but only a subset. Refusal happening after the submission of the payment or with regard to IBAN details could not be reported within the methodology of the 2015 and, consequently, 2019 exercise.

<sup>58</sup> During the first year of application of the Regulation more specific rules laid down on the delegated act supplementing the PSD2 became applicable as from 14 September 2019 (Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication). Some payment service providers (in particular credit card providers) are still in the process of migrating towards SCAs under the supervision of the competent authorities, following the Opinion released by EBA on 16 October 2019.

#### 2.2.4. Other limitations to cross-border sales

In the context of the activities related to the review, the Commission services have also looked more broadly at developments of access to cross-border offers, including an analysis of limitations to cross-border access not directly tackled by the Regulation, in particular with regard to the scope of delivery options provided by traders. This is often reported as a key issue and expectation of consumers in the context of the enforcement. It was therefore subject to specific screening in the context of the abovementioned 2019 Mystery Shopping Survey that looked into the scope of delivery limitations applied by traders. The survey also carried out a specific evaluation of multi-national traders' websites, looking into limitations (in particular as regards delivery) affecting each national website version.

##### 2.2.4.1. Delivery limitations

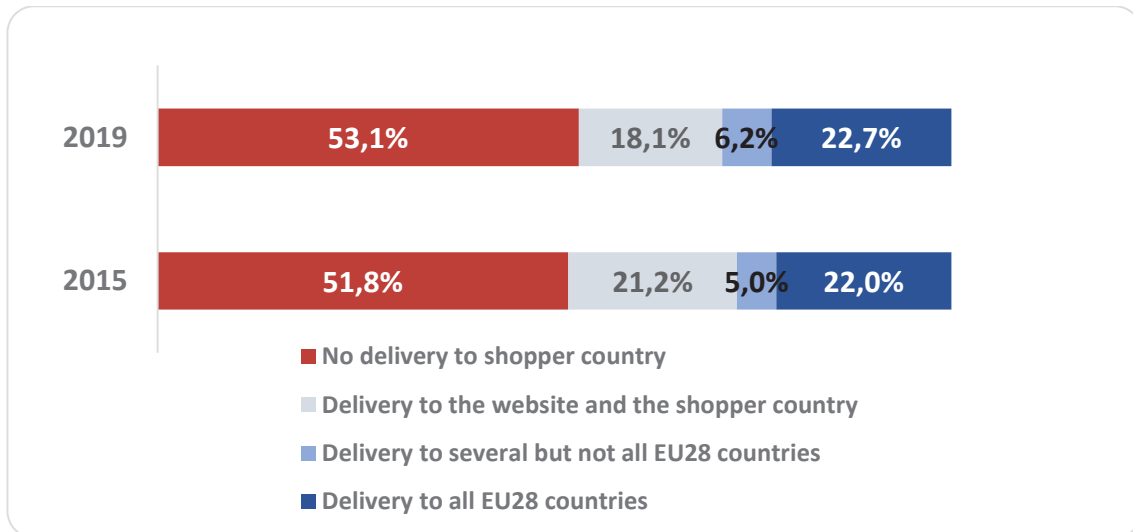
The Regulation does not in itself impose any obligation on traders to deliver goods across borders. The choice of whether to offer customers cross-border delivery in some or all Member States remains, in principle, a free marketing choice of the trader. However, this should be clearly spelled out in the terms and conditions applicable to the purchase at hand. Against this backdrop, the 2019 Survey looked into the scope of delivery options provided by traders, to assess to what extent this may still represent a limitation to cross-border access for consumers. The 2019 Survey assessed each evaluated website from the perspective of the shopper and their location, as to whether delivery to the shopper's home country is possible or not. If delivery is possible, it was additionally assessed whether delivery was offered to all EU countries, or to a subgroup of EU countries, or only to the website's country and the shopper's country. Data on the delivery limitations applied by the multinational traders on different national websites are presented separately below, under point 2.2.4.2.

Delivery limitations remain an important reason as to why cross-border shoppers are unable to order a product/service with an online trader of their choice in another country. Contrary to actual geo-blocking practices, which, as shown above, generally decreased since 2015, limitations in delivery options (i.e. whether a website delivers to the shopper's country) increased slightly between 2015 and 2019, from 51.8% to **53.1%**<sup>59</sup>. On the other hand, the share of websites that offered delivery to all EU 28 countries increased slightly by 0.7 pp to **22.7%** in 2019.

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<sup>59</sup> The percentage of 'no delivery to shopper country' includes all evaluations where either a delivery address was not accepted in the registration phase, or a restriction of delivery became clear after the registration phase. A rejection of a delivery address in the registration phase was always assumed to reflect impossibility to deliver to the shopper, regardless of whether the actual registration failed or not.

Figure 7 - Delivery restrictions (EU28)



Source: Ipsos et al (2020)

#### 2.2.4.2. “Multi-national” traders

The 2019 Mystery Shopping Survey also looked separately into EU multi-national traders’ websites, i.e. different national websites operated by the same multi-national trader targeting different markets (i.e. through websites with different country extensions, languages, layouts, etc...) <sup>60</sup>. This allowed comparing the results/differences

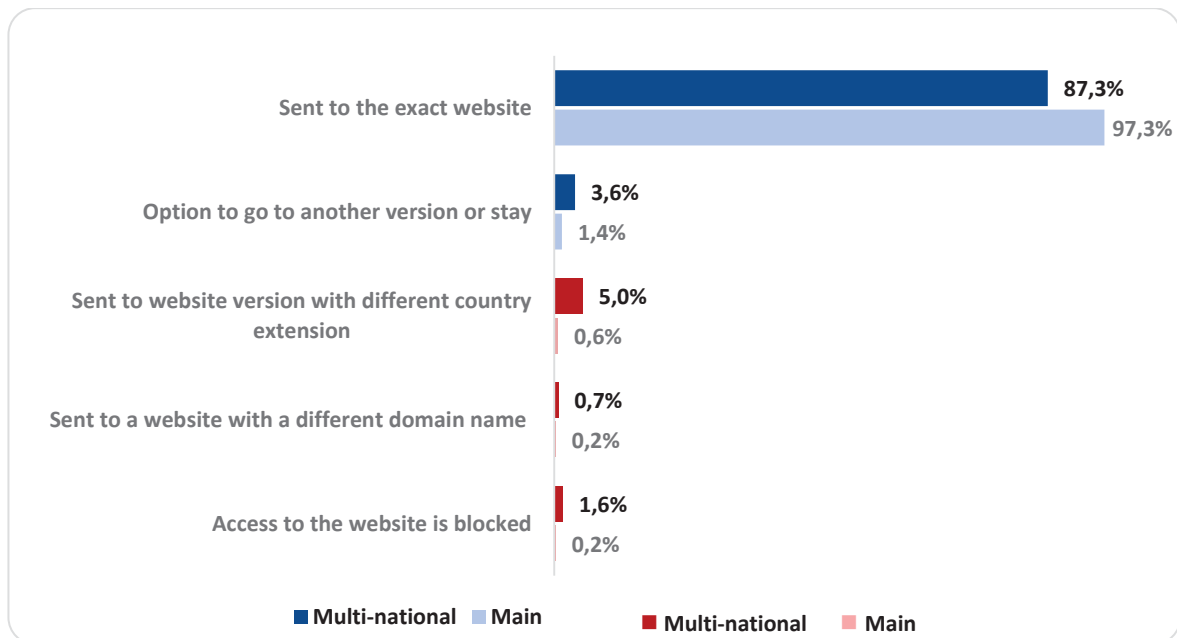
<sup>60</sup> In addition to the EU multi-national traders reported in this section, the 2019 Survey also included a small sample of the **third country traders** websites (10 websites from 2 third country traders), i.e. the traders having no legal entity within the EU but still found to offer their services/goods in the Union (e.g., by offering a website in a European language or providing prices in EUR and offering delivery to one or more EU countries), and thus subject to the obligations under the Regulation. The small sample did not allow to provide quantitative conclusions nor comparison with 2015 (as third country websites were not included in 2015 survey), but it allowed to make some qualitative observations on the geo-blocking practises in this sample of the traders. The research did not reveal that geo-blocking in these websites would be more common than among EU traders. In cases when the third country traders operate in the EU via multiple websites with an EU Member State extension (as opposed to cases where the third country website operates non EU-website), there seems to be some similarities with the conduct of the EU “multi-national” traders, notably as far as delivery options are concerned: EU websites of the third country trader applied restrictions on the delivery and offered delivery only to the website’s country or possibly some neighbouring countries. As concerns registration on the website, the research reports that one of the observed traders with multiple EU sites required an address during registration, but only allowed registration with a billing address from the website’s country and a few neighbouring countries. This indicates that these websites are designed to specifically serve a set of national markets, and only these markets, rather than the whole of the EU.

of domestic visit to one national website to a cross-border visit from the same country to another national website of the same trader.

The results on multi-national traders have to be looked at against the background that the Regulation does not affect the right of traders to freely design their prices and different national websites across the EU and carry out their marketing activities. In the situations covered, the Regulation essentially obliges traders to treat EU customers in the same way when they are in the same situation (i.e. where they are willing to accept the general conditions of access, including delivery options, provided for on a given website or point of sale), regardless of their nationality, place of residence or place of establishment.

As regards access to a different national version of the website of a multi-national trader (other than that of the shopper's location), the 2019 Survey shows that **87.3%** of shoppers were able to access that target website. This figure is substantially lower than the 97.3% success rate in accessing the same website from a different country observed for the main sample. The most likely reason for not being able to access the target website was redirection to the same subdomain with a different country code top-level domain (5%).

Figure 7 - Website access (multinational traders)



Source: Ipsos et al (2020)

As regards **differences of national website versions** of the multi-national trader, these cannot be viewed as geo-blocking practices *in stricto sensu* or limitations to cross-border shoppers applied by these e-commerce traders; these differences (like different language or different offers on the website) may be valid and aimed at helping domestic customers. On the other hand, in practice, the absolute impossibility to get access to certain offers provided in different national version of websites of multinational traders already active in the domestic market may frustrate customers' expectations about the internal market.

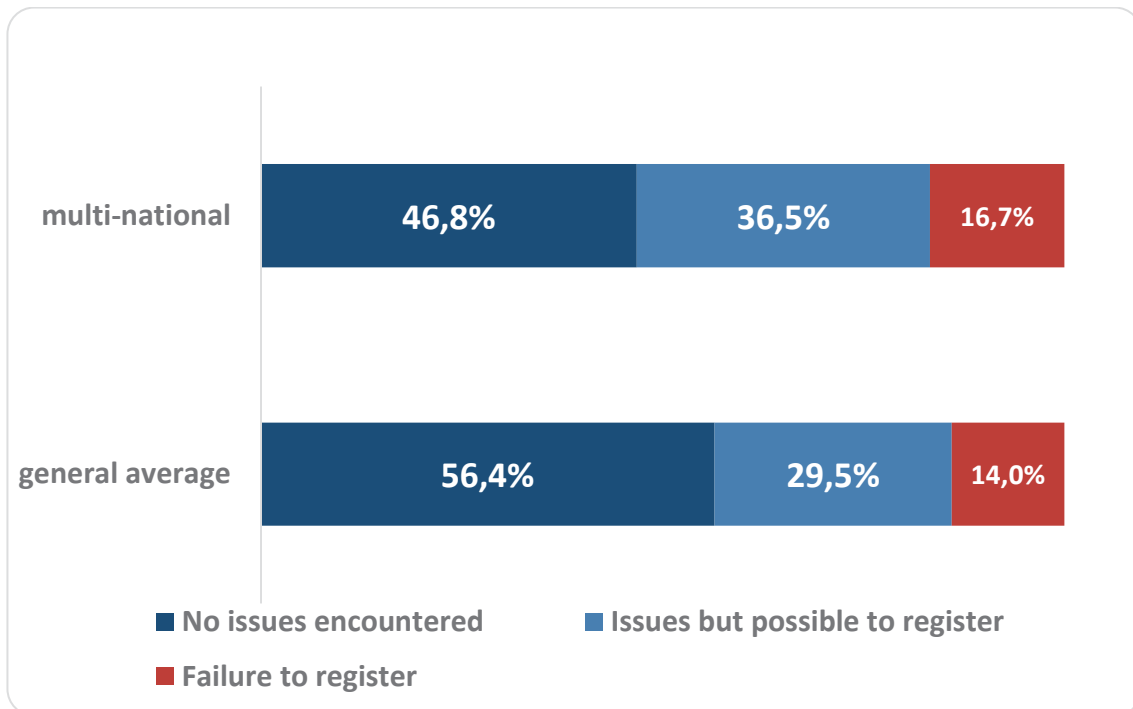
As regards **product availability**, shoppers were able to find the exact same version of a given product in less than two thirds of the cases (58.2%), while this was true for the great majority of cases in the general sample (95.9%). These differences are not surprising, but also not directly comparable, given that in the general analysis shoppers accessed the exact same website from a domestic and a cross-border perspective, while here two different websites were compared. Unsurprisingly multi-national traders are likely to vary their active offering and catalogues in different countries, likely based on variability in demand in the national markets they target.

With regard to **registration** differences on the different national websites of the multi-national trader, these national websites may well have different registration characteristics which are not problematic as such. However, if a shopper cannot complete the registration process on a particular national website due to the absence of a delivery address in the trader's Member State, and is thus prevented from seeing the offers on the particular national version of the trader, this would fall under the prohibition of geo-blocking under the Regulation. On the other hand, if, during the purchase, a shopper is asked to provide a delivery address and can only provide a delivery address accepted in the national version of the website, though this is not geo-blocking practice as such, it can be viewed as a limitation to the cross-border shopper imposed by the multi-national trader.

The 2019 Survey shows that in **46.8%** of the cases no registration issues were encountered with multinational traders, which is a lower figure compared to the main sample (56.4%). This is a first indication that registration issues are more common for multi-national traders when national versions of their websites are accessed cross-border. Most of the issues experienced were linked to the shopper's address details not being accepted. Restrictions to cross-border shopping in the form of failure to register on the website (due to any type of issue) were only slightly higher for the multi-national (16.7%) compared to the main sample (14.0%).

In conclusion, multi-national traders may be stricter when it comes to cross-border shoppers accessing national versions of their websites but this does not seem to translate in a correspondingly significantly higher overall failure rate, compared to the overall failure rate reported in the general analysis.

Figure 8 - Registration issues (multinational traders)

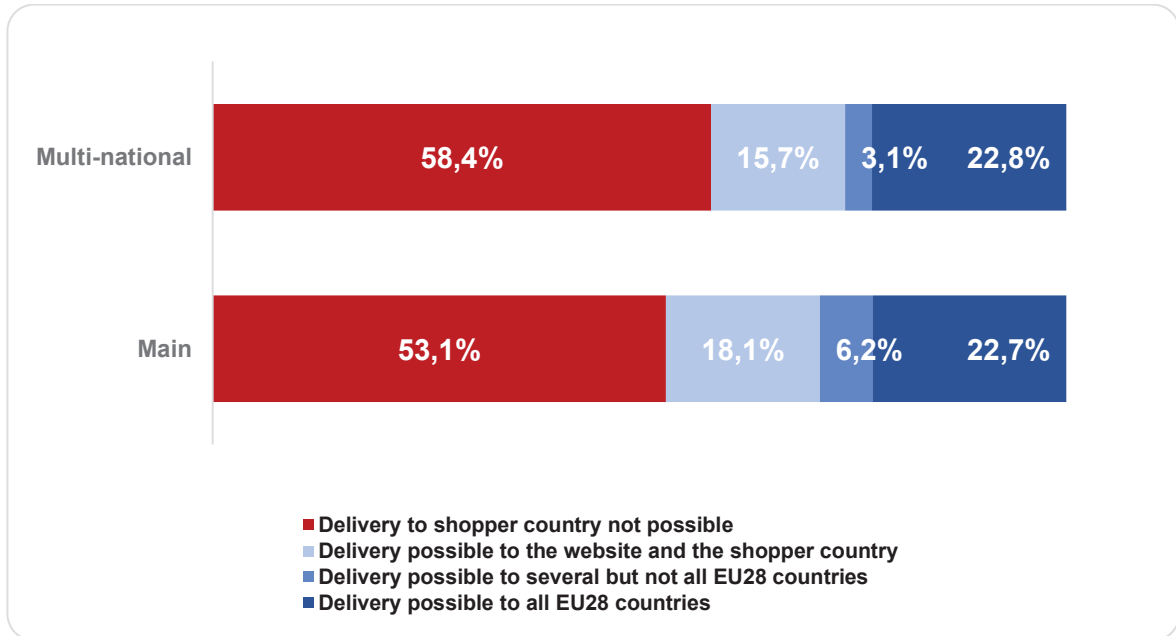


Source: Ipsos et al (2020)

With regard to **delivery**, multi-national traders might apply delivery limitations on their national websites by imposing limitations for a particular website targeting a given country to deliver (according to the applicable general terms and conditions) to another country, even if the trader is active there via another national website. This practice cannot be qualified as geo-blocking under the Regulation (as it does not address cross-border delivery), yet it may not be directly linked to general obstacles of cross-border activities affecting the trader (as the trader is already active in the customer's Member State). This practice may therefore be considered under the legal framework of the Services Directive (2006/123/EC) on a case by case basis, although it is not excluded that some limitations (as objective costs differences) could be objectively justified under the Directive.

In this context, the survey reveals that in **58,4%** of cases, cross-border shoppers were refused delivery of the product to their country and this is slightly higher compared to delivery restrictions observed in the main sample (53.1%); on the other hand in 15,7% of cases, delivery was possible to website and the shopper country.

Figure 9 - Delivery restrictions (multinational traders)



Source: Ipsos et al (2020)

### 2.3. Developments of consumers' cross-border access to offers

As mentioned in Section 1.1., the Regulation is one important element of the wider Digital Single Market strategy addressing traders' barriers in the internal market, one which attracted significant interest and expectations of the public opinion.

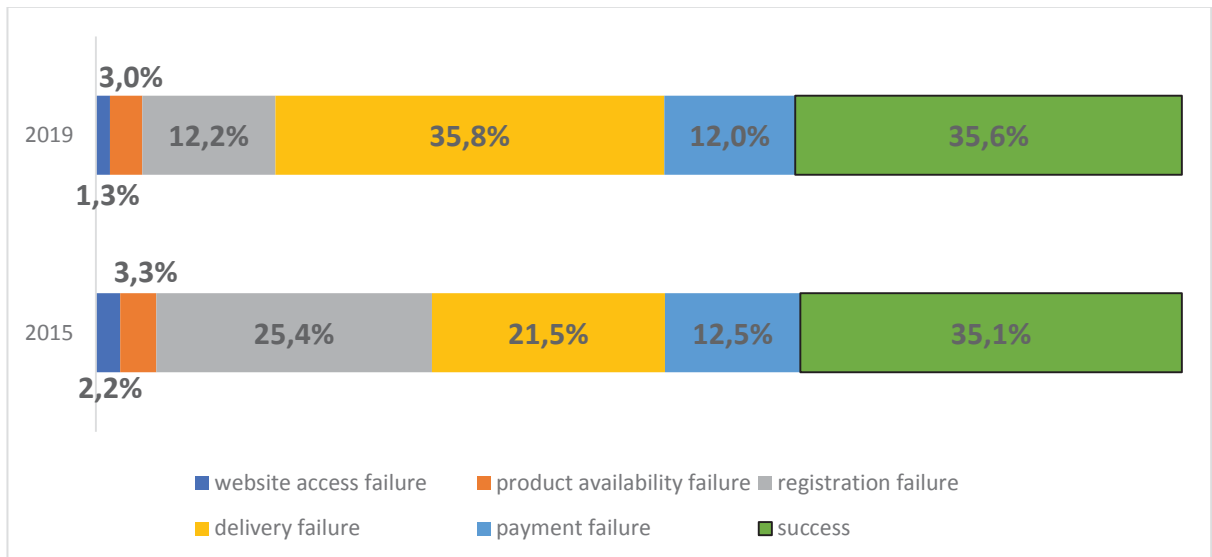
Overall, the 2019 Mystery Shopping Survey reveals that the success rate for a shopper to complete a cross-border purchase slightly increased compared to 2015, and this mostly due to improvements concerning access to websites and registration, and in spite of persisting or even increasing limitations in relation to cross-border delivery options<sup>61</sup>.

<sup>61</sup> It is important to note that this overall success indicator includes also elements not directly addressed by the Regulation (such as cross-border delivery), which however slightly deteriorated and became more visible as other limitations (in particular at the registration stage) have been reduced, hence negatively impacted the overall success rate.



Thus, in the EU28, cross-border shoppers are able to successfully buy products in the same way a domestic shopper can in **around 1 in 3 of cross border shopping attempts, namely, in 35.6%** of the evaluated websites in the Survey. This is a very slight increase compared to 2015 (+0.5ppts). In the EU27, the percentage of successful purchases is 33.9%, with an increase of 1.6ppts compared to 2015.

Figure 10 - Failure and success rate per shopping stage (as percentage of the full sample) (EU28)



Source: Ipsos et al (2020)

However, while the Regulation was meant as an enabler for consumers and business to improve cross-border accessibility, it is obviously not meant to build a single market on its own.

Overall<sup>62</sup>, Eurostat data shows that the (modest) growth of on-line purchases in 2019 from sellers in other Member States is in line with that of earlier years, i.e. +1pp from 21 to 22% of individuals<sup>63</sup>. The percentage of enterprises having made electronic sales to other EU countries, on the other hand, did not change in 2019 as compared to 2017 (9% of all enterprises, 43% of those selling on-line)<sup>64</sup>.

These trends may also be significantly affected by the effect of the pandemic crisis, which had short but possibly also longer term impacts on e-commerce demand and

<sup>62</sup> We recall that this data and analysis pre-dates the COVID-19 crisis and therefore changes in consumer behaviour and enterprises selling online resulting from that crisis are not taken into account here.

<sup>63</sup> Eurostat (2020) isoc\_ec\_ibuy indicator.

<sup>64</sup> Eurostat (2020) isoc\_ec\_eseln2 indicator.

supply, including across borders, which could not be captured by the 2019 Mystery Shopping exercise and existing Eurostat data. This therefore requires further monitoring and research.

Indeed there may still be a significant potential for additional cross-border sales. A 2019 Special Eurobarometer survey<sup>65</sup> indicates that 37% of Europeans using the internet at least sometimes tried to buy goods or services on-line across border, with a large variation amongst age groups (46% for the 15-39 age group). While in the large majority (84%) of cases the purchase can be completed, in the rest of the cases the obstacles due to geo-blocking practices or limitations in delivery remain the most common outcome (Figure 11)<sup>66</sup>. The kind of problems encountered is relatively heterogeneous across Member States, as no issue consistently features as the most frequent in all or a majority of Member States. For example, delivery limitations rank very high (even over 20%) in specific countries, while they are less of a concern in others.

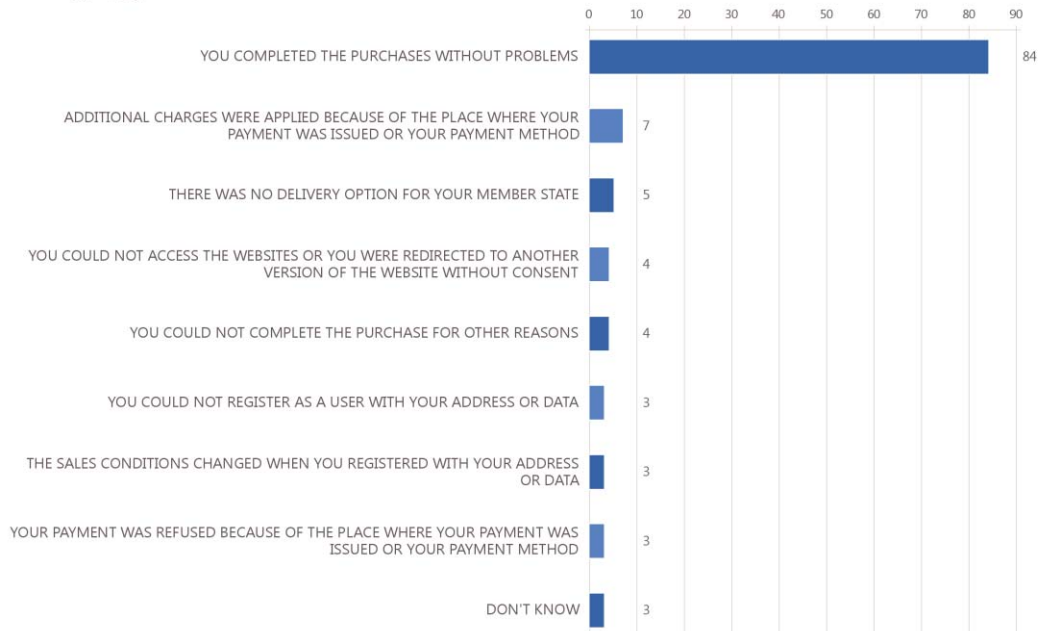
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<sup>65</sup> Special Eurobarometer 503 - Attitudes towards the impact of digitalisation on daily lives, sec. VI available at [https://data.europa.eu/euodp/en/data/dataset/S2228\\_92\\_4\\_503\\_ENG](https://data.europa.eu/euodp/en/data/dataset/S2228_92_4_503_ENG)

<sup>66</sup> In this latter regard, the impact of delivery restrictions in the purchasing choice appears smaller than the extent of delivery restrictions still reported in the 2019 Mystery shopping exercise. This may be due to different methodology (looking at consumer experience, rather than objective evaluation of websites) and different reasons: obstacles do still affect the initial part of the consumer journey (hence the consumer does not realise the existence of these restrictions), the consumers interested to buy cross-border most likely try to buy from the proportion of traders already active across borders and/or the consumer may probably be steered towards versions of the websites that are more likely targeted to its market, not necessarily against its will (for instance by consenting to redirection or, in the context of websearch, access through marketplaces, etc...).

Figure 11 Outcomes when buying from websites in other EU countries

QC17 What were the most common outcomes of your attempts to buy from these websites?  
(% - EU)



Source: Special Eurobarometer 503 (2020)

This would suggest that there are still margins to improve cross-border access, first of all by stepping up in the enforcement of the Regulation, but also through measures addressing the core issue of reluctance of traders in actively engaging in cross-border trade (still the majority of on-line sellers according to Eurostat data).

The findings in the above sections indeed suggest that some barriers to cross-border access to offers are being tackled through the provisions of the Regulation, although there is still the need to ensure full application, so that issues following direct contact with the trader by assistance or enforcement bodies can be effectively resolved.

The synergies with other measures of the DSM are relevant in this regard. The following measures are particularly important in facilitating the provisions of goods and

services across borders and will have an increasing impact on the development of the digital single market<sup>67</sup>.

### *Reducing costs of compliance with VAT requirements*

Cross-border sales of goods to consumers are normally taxed in the Member State where the final consumer is located. According to the rules currently applicable, this implies that the supplier who transports the goods should register for VAT in the country where the transport of the goods to the final consumer ends, if the threshold for distance sales of goods is exceeded in the Member State of the final consumer<sup>68</sup>. This in turn has an impact on the various applicable thresholds in different Member States and, consequently, the possible additional requirements for traders, triggered by cross-border sales. This is one of the reasons why the Regulation did not envisage an obligation for traders to deliver cross-border outside countries already served by the trader, according to the general conditions of access applicable to the purchase.

However, the recent reform of the VAT rules for E-commerce will entail significant changes concerning the administrative compliance with VAT requirements in case of cross-border sales.

Firstly, as of 1 July 2021, the current distance sales thresholds per EU Member State will be abolished. Instead an EU wide threshold of EUR 10,000 will be introduced applying to intra-EU distance sales, hence eliminating different approaches across different Member States. In addition, from the same date, the Mini-one-stop-shop (MOSS), currently available only for TBE services<sup>69</sup>, will be expanded into a VAT One Stop Shop (VAT OSS). It will therefore also be available to suppliers of goods and services other than TBE services selling across borders to final consumers in the EU, as well as for the importation of low value consignments shipped from third countries to consumers in the EU, eliminating the obligation for them to be registered in Member States where they are not established. Moreover, for the latter case, VAT could be prepaid when purchasing online and declared and paid monthly by a supplier or an intermediary established in the EU if such a supplier/intermediary opts to use the Import

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<sup>67</sup> In addition to the DSM measures, an overall review of the Vertical Block Exemption Regulation is also on-going, looking also at vertical contractual obstacles affecting the cross-border provision of services and goods in view of expiry of the that instrument by 31 May 2022.

<sup>68</sup> This threshold is either EUR 100.000 or EUR 35.000, depending on the choice made by the Member State where the transport ends.

<sup>69</sup> Telecom, Broadcasting and Electronically Supplied Services.

One Stop Shop. Following these changes, it is expected that traders will benefit from a substantial reduction in cross-border VAT-related compliance costs<sup>70</sup>.

These reforms are meant to reduce the administrative obstacles related to VAT compliance affecting cross-border delivery, currently not directly targeted by the Regulation.

#### *Increased transparency of cross-border parcel delivery prices*

Regulation (EU) 2018/644 on cross-border parcel delivery services<sup>71</sup>, which entered into force on 22 May 2018, has three key objectives:

- to enhance the regulatory oversight of parcel delivery services
- to increase the transparency of certain single-piece tariffs
- to assess tariffs for certain cross-border parcel delivery services

Furthermore, the Regulation confirms that consumers should be given information at the pre-contractual stage on the different options for cross-border parcel delivery, the charges payable and the complaints handling policies of the trader.

The Regulation stems from the Digital Single Market Strategy and is meant to facilitate and stimulate cross-border e-commerce, and complement the Postal Services Directive<sup>72</sup>, by improving regulatory oversight of parcel delivery services and the transparency of cross-border tariffs, thus contributing to more affordable services. It essentially gives national regulators enhanced instruments for better monitoring and regulatory oversight of the parcel delivery market and provides for an affordability assessment of certain cross-border single-piece parcel tariffs.

As required by the Regulation, each year, the Commission publishes on a website the public lists of tariffs of those key single-piece postal items that are most frequently used in shipping cross-border e-commerce goods. For 2019, it lists more than 46.000 prices of more than 400 providers from all over Europe, and new tariffs will be included each year by the end of March. Thanks to these reporting obligations and the online transparency tool created by the Commission, European consumers can now compare cross-border parcel delivery services and tariffs offered by the cross-border delivery

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<sup>70</sup> A move to the single EU VAT portal is estimated to be up to 95% less costly for these businesses.

<sup>71</sup> Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services, OJ L 112, 2.5.2018, p. 19–28.

<sup>72</sup> Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service amended by Directives 2002/39/EC with regard to the further opening to competition of Community postal services and 2008/6/EC with regard to the full accomplishment of the internal market of Community postal services.

operators in their countries (see: [https://ec.europa.eu/growth/sectors/postal-services/parcel-delivery/public-tariffs-cross-border\\_en](https://ec.europa.eu/growth/sectors/postal-services/parcel-delivery/public-tariffs-cross-border_en)). It is important to note that this website is non-commercial and neutral in character, and is therefore not a product comparison tool (that would, for example, redirect the user to a provider's website).

The Commission has in the meantime commissioned studies, including on development of Cross-border E-commerce through Parcel Delivery, and on users' needs in the postal sector<sup>73</sup>.

The Commission will adopt a report on the implementation of the Regulation on cross-border parcel delivery services, as required by this Regulation, to assess, amongst other things, its contribution to the improvement of cross-border parcel delivery services and its impact on e-commerce.

In addition, as required by article 23 of the Postal Services Directive<sup>74</sup>, the European Commission will submit a report on the application of the Directive to the European Parliament and Council. Considering the substantive changes in the market brought about by digitalisation and ecommerce the next application report will be combined with an evaluation of the Postal Services Directive, in line with the better regulation requirements. This does not imply a commitment at this stage to revise the Directive. A public consultation has been launched recently on this<sup>75</sup>.

*Increasing harmonisation of consumer protection rules, including in the field of guarantees*

The Regulation does not modify the EU rules on applicable law and on jurisdiction, even if it does provide some *ex lege* clarifications<sup>76</sup>. The identification of the consumer protection rules applicable to the contract therefore remain subject to a case by case

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<sup>73</sup> [https://ec.europa.eu/growth/content/delivering-future-iii-workshop-developments-postal-sector\\_en](https://ec.europa.eu/growth/content/delivering-future-iii-workshop-developments-postal-sector_en).

<sup>74</sup> Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14), as amended by Directives 2002/39/EC with regard to the further opening to competition of Community postal services and 2008/6/EC with regard to the full accomplishment of the internal market of Community postal services.

<sup>75</sup> The European Commission has launched a targeted consultation on cross-border parcel delivery to gather respondents' views on the application of Regulation (EU) 2018/644 on cross-border parcel delivery services running until 30 September 2020, link available at <https://ec.europa.eu/eusurvey/runner/b8d39156-2b7b-6b0e-4de7-f472886c1b33>.

<sup>76</sup> Article 1(6) of the regulation stipulates that mere compliance with its obligations does not of itself mean that a trader is directing his activities to a particular Member State (see also Recital 13). Therefore the mere conclusion of a contract (online or off-line), resulting from compliance with the obligations laid down in the Regulation cannot imply that the trader directs activities to the consumer's Member State. Similarly, a trader cannot be considered to be directing activities exclusively on the basis of the fact that the trader provides information and assistance to the consumer after conclusion of such a contract.

assessment on the basis of the rules laid down in the Rome I Regulation (2008/593) based on whether the trader pursues his activities in the consumer residence's Member State or is directing activities to the Member State of the consumer, and the corresponding CJEU case law<sup>77</sup>. The Regulation however clarifies that activities merely implementing the obligations of the Regulation cannot be included in any such assessment.

Possible divergences of national consumer protection rules applicable to the contract (such as mandatory provisions) are therefore often mentioned as possible justifications for refusal to sell abroad and/or for the application of different conditions<sup>78</sup>. Measures recently adopted in the framework of the DSM, however, may bring about changes in the near future.

First of all, in the framework of the digital contracts rules<sup>79</sup>, two Directives<sup>80</sup> have been adopted in 2019 aiming at harmonising the main mandatory consumer rights applicable to the supply of digital content and sales of goods. These Directives will need to be transposed by Member States by 1/1/2022, and will reduce the costs resulting from differences in contract law, create more legal certainty for businesses and help consumers make the most of shopping across the EU.

Thanks to the harmonised rules, businesses will be able to supply digital content and sell goods online to consumers throughout the EU, based on the same set of contract law rules, in particular as regards remedies in case of faulty products. With regard to goods, the strengthened harmonisation will ensure a common two years timeframe to report defective goods to the seller and a common range of applicable remedies including repairing, replacement and contract termination/reduction of price, including where goods are located in a place that is different from where they were originally delivered<sup>81</sup>.

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<sup>77</sup> For an overview of the case law in particular on the interpretation of the notion of “directing activities” relevant in case of sales to consumers, see Sec. 4.2. of the Q&A document on the Geo-blocking Regulation published in 2018.

<sup>78</sup> Differences in national contract laws are reported as a significant obstacle for cross-border sales for four out of ten EU retailers (39%) currently selling online.

<sup>79</sup> [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en).

<sup>80</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

<sup>81</sup> In this regard see, for instance, Article 13(3) and (4)a of Directive (EU) 2019/771 as also clarified by Recital 49 (“The seller should be allowed to refuse to bring the goods into conformity if both repair and



In addition, two directives<sup>82</sup> that the Commission proposed under the “New Deal for Consumers” package of April 2018 aim, *inter alia*, at improving compliance with EU consumer protection legislation, in particular through the introduction of collective redress mechanisms and strengthening public enforcement. The first Directive on Better enforcement and modernisation of EU consumer protection rules was adopted on 27 November and will be applicable as from 28 May 2022. It amends the existing Directives on unfair contract terms (93/13/EEC), price indication (98/6/EC), unfair commercial practices (2005/29/EC) and consumer rights (2011/83/EU). Moreover, revised rules on procedural mechanisms for consumer collective redress were agreed by the parliament and the Council at political level on 22 June 2020.

*Strengthened and synergetic enforcement of the wider non-discrimination acquis (Article 20 Services Directive and the Regulation) within the CPC network*

The Regulation is *lex specialis* to the Services Directive (2006/123/EC) and will prevail over it in the situations covered by the Regulation.

As far as the provision of services in the scope of the Services Directive is concerned, the general principle of non-discrimination of the service recipients is specified by Article 20(2) of the Directive, according to which Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria. Application of the non-discrimination principle, as specified in this Article, depends on a case-by-case assessment of the trader's practices. Objective justification for differential treatment may relate, for instance, to the lack of the required intellectual property rights in a particular territory, additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or

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replacement are impossible, or they would impose disproportionate costs on the seller. The same should apply if either repair or replacement is impossible and the alternative remedy would impose disproportionate costs on the seller. For instance, if goods are located in a place that is different from where they were originally delivered, the costs of postage and carriage could become disproportionate for the seller”).

<sup>82</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules in OJ L 328, 18.12.2019, p. 7; proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC ('Representative Actions Directive'), whose formal adoption by the parliament and the Council should occur by the end of 2020. For more information: [https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers\\_en](https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en).

different market conditions, such as higher or lower demand influenced by seasonality, different holidays periods in the Member States and pricing by different competitors. In comparison with the Regulation, the Services Directive establishes a broader case-by-case approach as to the justifications of the differences in access applied by the traders. The Commission services have however provided guidance on how to apply that Article in the SWD(2012)146, including the extent to which differential treatment and/or outright refusal to provide the service may be objectively justified<sup>83</sup>.

Article 20 of the Services Directive remains applicable to situations not covered by the Regulation. For example, while delivery limitations are not addressed by the Regulation, under Article 20(2) of the Directive these may be subject to scrutiny and this scrutiny should take into account the fact that at least one delivery option in a cross-border context should be available in all Member States and could eventually justify higher costs charged<sup>84</sup>. Further reflection may be necessary on whether and to what extent marketing strategies of multi-territorial traders, deliberately excluding delivery options available in different versions of their websites where they are nevertheless active, may also have a discriminatory character, in particular where this makes in practice impossible access to some products, even taking into account some possible objective costs differences. Also refusal to supply services included in the scope because of intellectual property rights concerned, while not covered by Article 4 of the Regulation, can be subject to scrutiny under Article 20(2) of the Services Directive, including with regard to the existence of required rights<sup>85</sup>. Of course in all these cases the case by case assessment needs to be carried out in order to assess whether an objective justification exists. Moreover, it should be taken into account that some other issues originally covered by the Services Directive are now superseded by specific provisions of the Regulation. The issue of relationship of the Regulation and the Directive has indeed also been raised in the context of bilateral contacts with enforcement and assistance authorities, and may require further clarifications in the future. Also, the evolving legal framework related to the provision of services across borders, in particular in the context of the Digital Single Market, may need to be taken into account when implementing Article 20(2) of the Directive, and in particular the existence of objective justifications to outright refusal to sell.

In this regard, moreover, it should be noted that the new Consumer Protection Cooperation (CPC) Regulation (Regulation (EU) No 2017/2394) applicable as from 17 January 2020 extends the scope of the CPC Regulation to allow for cooperation

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<sup>83</sup> While some of the indications provided therein are now superseded by the application of the Regulation, others however are still valid with regard to issues not covered by the Regulation.

<sup>84</sup> See SWD(2012) 146 page 16.

<sup>85</sup> See SWD(2012) 146 page 18.

between the CPC authorities in new areas, and, notably, on the claims caught by Article 20 of the Services Directive. This requires the identification within the network of a competent authority for its enforcement and allows cooperation between the authorities in the cross border context in the situations not covered by the Regulation but caught by the Directive.

#### ***2.4. Findings***

The preliminary assessment on the first months of implementation of the Regulation by Member States and application by traders suggests the following conclusions in this regard:

- The implementation of the Regulation **by the Member States** has been affected by delays. While this did not affect the applicability of the rights and obligation thanks to its direct applicability, it has however affected the possibility to trigger in particular public enforcement and supervision in the majority of Member States, at least during the first half of 2019.
- While in most Member States the consumer protection authorities are responsible for the enforcement of the Regulation in B2C situations, there are large variations as regards applicable sanctions across Member States in case of the infringements of the Regulation. Also, the range of maximum and minimum fines often varies considerably within a Member State. Moreover, enforcement systems for B2B typically follow two different approaches (only private enforcement; private and public enforcement), both almost equally widespread. The effectiveness of the enforcement systems, including measures in case of infringements, in particular for B2B, will therefore need to be assessed further, also on the basis of the practical application and taking into account the overall system of remedies available to the victims of infringements.
- Some national bodies are confronted with a non-negligible amount of queries and complaints, although this is not equally spread across the EU. Sometimes these are due to delays in implementation or lack of awareness by traders, often corrected upon entering in contact with the operator. A sample of websites (491) was also subject to coordinated EU-wide screening by consumer protection authorities in the context of the CPC network (“sweeps”), leading to more in-depth investigation in a number of cases, including with regard to the Regulation. However, it is also quite common that these complaints are based on wider expectations on the scope of the Regulation, in particular as regards the right to have delivery at home, as this instrument is thought to be creating the single market dimension itself, rather than simplifying the application of the general non-discrimination principle in selected cases.

- As regards application of the Regulation **by traders**, the Commission has also commissioned a large sample survey (approx. 9000) of traders' websites in 2019, in order to check cross-border accessibility. The exercise reveals that after application of the Regulation for a short time of, some limited progress is emerging as regards conditions of access to websites, compared to a similar exercise carried out in 2015.
- In particular, reductions in obstacles to cross-border access to websites (-0,8ppt compared to 2015; with access ensured in 98.7% of cases in 2019) and above all to registration by foreign customers (-12,9ppt, halved from 26,9% in 2015) can be reported.
- At the same time, it should be noted that possible obstacles to access may still affect individual items or parts of the website (geo-blocking in relation to the same product availability decreased slightly from 2015 to 2019, by 0,1ppt). Moreover, the range of registration and payment issues still remain significant for a wide range of sampled websites (for 14,0% and 10,4% of the websites accessed during these respective stages of an online shopping process), meaning that even if the consumer can access the website cross-border and find a same product, he or she may often still not be able to place the order and pay.
- Overall, this led to a slight increase in the overall success rate of cross-border shopping attempts compared to 2015 (+0,5ppt), in spite of the fact that cross-border delivery limitations (not mandated by the Regulation) slightly deteriorated. Still this success purchase indicator, which includes cross-border delivery, shows that approximately 1 in 3 of cross-border shopping attempts was successful (namely, 35.6%).
- In conclusion, there still seems to exist a margin for improvements in ensuring the elimination of access obstacles through application of the Regulation.
- This, however, is not the only means of ensuring more active cross-border engagement of traders beyond the aspects directly regulated by the Regulation. Indeed the Survey also shows that limitations of delivery options offered by traders remain high, and even slightly increased compared to 2015, thus meaning that even if the consumer can access website cross-border and find a same product, he or she may still not be able to have it delivered to his/her country. Similarly, the Survey also shows that the **multi-national traders** operating via different national website versions also often apply delivery limitations on their national websites, so that offers/products available in one version cannot be delivered according to the applicable general terms and conditions in another Member State where the trader is nevertheless active via another national website (The Survey reveals that in 58.4 % of cases, cross-border shoppers were refused delivery to their country).

- The application in the near future of several other measures addressing obstacles encountered by traders in cross-border trade may be important in fostering active engagement of traders.
- The remaining potential discriminatory issues not directly addressed by the Regulation may still be subject to case by case assessment under Article 20(2) of the Services Directive, and the synergies between these two instruments may need to be looked into, also in view of the evolving regulatory framework following the entry into force of the DSM measures.



Brussels, 30.11.2020  
SWD(2020) 294 final

PART 2/2

**COMMISSION STAFF WORKING DOCUMENT**

**First short-term review of the Geo-blocking Regulation**

*Accompanying the document*

**Report**

**from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the first short-term review of the Geo-blocking Regulation**

{COM(2020) 766 final}

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### 3. ANALYSIS OF FEASIBILITY AND IMPACTS OF CHANGES TO THE SCOPE OF THE REGULATION

#### 3.1. Electronically supplied services giving access to copyright-protected content

##### 3.1.1. Introduction and common methodological elements

The Regulation applies to electronically supplied services included in its general scope. The concept of electronically supplied services is defined in Article 2(1) of the Regulation<sup>1</sup> and derives from the definition laid down in Implementing Regulation (EU) No 282/2011<sup>2</sup>.

However, some non-audiovisual electronically supplied services are excluded from the main non-discrimination obligation laid down in Article 4 of the Regulation (i.e. the prohibition of different conditions on the basis of nationality, place of residence and place of establishment). The services concerned by this exclusion are those whose main feature is the access to and use of copyright protected works (including access to and/or downloading of e-books, software, including updates as well as streaming and downloading of music and of online video games). Moreover, electronically supplied audiovisual services are not included in the general scope of the Regulation, as they are excluded from the scope of the Services Directive in the first place<sup>3</sup>.

Article 9(2) of the Regulation requires for the first evaluation of the Regulation to contain an assessment the scope of the Regulation. This assessment shall determine if the Regulation should also apply to electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form, provided that the trader has the requisite rights for the relevant territories.

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<sup>1</sup> "Services which are delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology".

<sup>2</sup> Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax. As clarified by Recital 14 of the Regulation, therefore, due account should be taken of the further specifications included in the Implementing Regulation, as well as in VAT Directive 2006/112/EC

<sup>3</sup> Non-electronically supplied audiovisual services, i.e. services not provided through the open-internet, such as traditional broadcasting through cable, digital terrestrial, IPTV or satellite means are also excluded from the analysis, as their cross-border provision would require the extension of the existing infrastructure in another Member State and/or the establishment of a distribution system for the provision of set-top-box, which under the intervention logic of the Regulation would already represent possible admissible justifications for lack of provision cross-borders.

Electronically supplied content services that are currently either excluded partially (i.e. non-audiovisual) or fully (audiovisual) require clearing intellectual property rights for their provision. In addition, audiovisual media services are also subject to a specific regulatory framework in EU legislation<sup>4</sup>. Taking all this into account, and in light of the different economic features of the services involved, this Staff Working Document provides a separate assessment for different kinds of electronically supplied content services in the sections that follow.

At the same time, the assessment is based on certain common elements contained in the Commission declaration attached to the Regulation. It therefore looks “*at the increasing expectations of consumers, especially of those with no access to copyright-protected services*”, at “*the feasibility and potential costs and benefits arising from any changes to the scope of the Regulation*”, “*taking due account of the likely impacts any extension of the scope of the Regulation would have on consumers and business, and on the sectors concerned, across the European Union*” as well as considering any extension “*provided that the trader has the requisite rights for the relevant territories*”. In the following sectoral analysis, these indications are reflected within a common analytical framework.

In particular, in the first place the assessment takes into account the current characteristics of the concerned sectors, and the possible changes prompted by any potential extension of the Regulation, including:

- the demand (“expectations”) of consumers for specific content;
- the current cross-border accessibility but also more generally availability<sup>5</sup> of content within the Union, in order to verify if and to what extent consumers lack access to services offering copyright protected content;
- the possible impact of any extension on consumers, businesses and the sector as a whole, hence including effects on price and variety available to consumers, but also on revenue and administrative costs of providers/distributors, as well as on investment and licensing practices upstream in the value chain of content creation.

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<sup>4</sup> The basic framework concerning the provision of audiovisual media services is included in the AVMSD, whose recent revision shall be transposed by 19/09/2020. In addition to that, specific rules concerning in particular the copyright-relevant aspects of certain audiovisual media services provided on-line are included in the On-line Broadcasting Directive, to be transposed by 7/06/21.

<sup>5</sup> Availability is defined as content that is made available (not necessarily produced) in one country but is also available in other countries (by the same provider, or by other providers active in these countries); in this case, the content is available to consumers in different countries, although through different providers and/or conditions. Accessibility is defined as a user in one country having access to content offered in another country; in this case the user (virtually) crosses the border from his country of residence to the country where the content is offered. See JRC (2017) p. 5.

For their assessment, the Commission's services relied on different sources of evidence. A 2019 Flash Eurobarometer provided a general overview of current demand for cross-border access to different content across all Member States, as well as perceived geo-blocking experience and broader interest to access content cross-border. The *Study on the impacts of the extension of the scope of the Regulation to audiovisual and non-audiovisual services giving access to copyright protected content* prepared by VVA/WIK/IPSOS/BRUEGEL ("VVA et al. (2020) Study" thereafter) provided the following elements:

- a more in-depth analysis of demand (including through primary data from a consumer survey carried out in a sample of Member States, also looking at willingness to pay and switching drivers for cross-border content);
- an overview of main access obstacles (through mystery shopping on a sample of providers across the sampled Member States);
- an analysis of availability and prices of services across different Member States; an analysis of input from different stakeholders on possible effects of an extension of the Regulation;
- a basic quantitative model of static effects and some qualitative considerations on changes brought about by modification of the scope.

This study sought to complement earlier macro-assessments of the sectors at stake<sup>6</sup>, with a more refined and articulated analysis of possible effects to the extent possible, on the basis of new primary and real market data sources. Overall, however, due to the complexity of the sectors and the multiplicity of effects and variables along the value chain, the model of the VVA et al (2020) Study is subject to some limitations and assumptions and could not therefore assess all possible implications of a potential extension. In particular, the quantitative analysis in the study could not realistically take into account the whole range of possible providers and/or business models available in all Member States, but rather focused on a limited range of providers (often with a pan-EU or multi-territorial reach) and a sample of countries representing different geographical areas in Europe, with potentially different demands for digital services<sup>7</sup>. It also took into existing literature in the field and related research carried out by the European Commission's Joint Research Centre<sup>8</sup>, as well as inputs and studies carried out by different stakeholders.

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<sup>6</sup> For an overview of literature and studies taken into account, as well as the different approaches, see VVA et al. (2020), sec. 2.4.

<sup>7</sup> As set out in Sec. 2.3 of the Study and in its methodology.

<sup>8</sup> Broocks, A., N. Duch-Brown, E. Gomez-Herrera, and B. Martens (2020), *Geo-blocking: A literature review and new evidence in online audiovisual services*, JRC Digital Economy Working paper 2020-1.

In addition, in order to identify the possible effects of the extension, the impact analysis had to rely on certain assumptions stemming from the overall intervention logic of the Regulation, including the review clause.

Firstly, Article 1(5) of the Regulation stipulates that “*it shall not affect the rules applicable in the field of copyright and neighbouring rights, notably the rules provided for in Directive 2001/29/EC of the European Parliament and of the Council*”. Article 4 mandates that no different general conditions of access, including net prices, for reasons related to customers’ nationality, place of residence or place of establishment can be applied, all other conditions being equal. This thus excludes the possibility to price-differentiate a given service and/or piece of content solely because of the customers’ nationality, place of residence or place of establishment, all other conditions of access to the service being the same for domestic and foreign (EU) consumers. In addition, the hypothesis identified in Article 4 of the Regulation concerns cases where cross-border delivery of goods or extension of the trader premises/network is not required. As a result, those non-electronically supplied content services whose cross-border provision would require to expand the network of the provider (such as by acquiring new frequencies, by signing transmission agreements for cable or IPTV services and/or distribution of set-top-boxes) are excluded. Finally, and in line with Article 9(2) of the Regulation, the analysis assumes that the provider, in order to be subject to the prohibition to discriminate (hence to refuse the service to) foreign customers, should hold “*the requisite rights in the relevant territories*”.

In this latter regard, it should be noted that EU law does not define, except in very specific situations<sup>9</sup>, the criteria for determining the “relevant territories” for which the service providers need to obtain the requisite rights in order to make content available to customers. Further, CJEU case law has not yet provided an unequivocal criterion for the localisation of the copyright-relevant acts. Incidentally, in different judgements touching on this aspect, the Court has adopted different criteria, ranging from where the material act of broadcasting reception took place<sup>10</sup> to the place where the public is targeted<sup>11</sup> (regardless of the mere accessibility from other Member States). This leaves a margin of ambiguity as to the identification of the relevant territory where the

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<sup>9</sup> I.e. in the context of the Portability Regulation, where the copyright-relevant acts are presumed to take place in the country of residence of the consumers, regardless of the actual consumption of the service, in the SatCab Directive (with regard to the non-electronically supplied services) and, in the Online television and radio programmes Directive, where the copyright-relevant acts are presumed to take place in the country of establishment of the broadcasting organisations for the specific services and programmes identified therein.

<sup>10</sup> CJEU 14 July 2005, Case C-192/04, *Lagardere*.

<sup>11</sup> CJEU 21 June 2012, case C-5/11, *Donner*, CJEU 18 October 2012, case C-173/11 *Sportradar*.

copyright-relevant acts may take place<sup>12</sup>, in particular as regards cross-border passive sales (i.e. services provided in response to unsolicited requests from customers located in other Member States).

From the point of view of competition law, absolute territorial exclusivity, which partitions national markets and eliminates competition between distributors, constitutes a violation of Article 101(1) TFEU.<sup>13</sup> In the pay-tv case<sup>14</sup>, the European Commission has taken issue with licensing terms that ruled out passive sales by prohibiting broadcasters from providing content via satellite or online streaming outside the specific Member State for which they obtained the licence<sup>15</sup>. In the follow-up case law (‘Canal+ Ruling’<sup>16</sup>), the General Court also confirmed that contractual clauses preventing a broadcaster from responding to unsolicited requests from consumers outside the licensed territory, as well as clauses requiring a film studio to prohibit broadcasters outside the territories for which a broadcaster has exclusive rights from responding to unsolicited requests from consumers residing in those territories, constituted restrictions of competition by object. Importantly, the court specifically outlawed contractual provisions that provide for an absolute territorial exclusivity. That judgment has been appealed by Canal+ before the European Court of Justice.

In view of the above, besides specific cases already regulated by EU copyright law<sup>17</sup>, it is assumed that such legal uncertainty cannot be addressed within the intervention logic of the Regulation, as this may trigger much wider consequences in terms of copyright policy requiring an assessment *ad hoc*.

The sectoral analysis below therefore took into account two scenarios. Scenario 1 is based on existing industry licensing practices, which generally assume that service providers need to have the rights for the different countries where the content is made available, including those where “passive sales” are solicited (i.e. in the country where the service is actively provided, as well as in countries where unsolicited customers

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<sup>12</sup> De Wolf (2014) p. 63 and CRA (2014) p. 4.

<sup>13</sup> CJEU 4 October 2011, joined cases C-403/08 and C-429/08, Football Association Premier League (FAPL) Ltd, paras 137, 139-146.

<sup>14</sup> Case AT.40023 – Cross-border access to pay-TV.

<sup>15</sup> In a different context, the European Commission is currently investigating bilateral geo-blocking practices between a PC gaming platform and 5 PC videogame publishers (Cases AT.40413, AT.40414, AT.40420, AT.40422 and AT.40424). These practices, if confirmed, would infringe Article 101 TFEU.

<sup>16</sup> GC 12 December 2018, Case T-873/16, Canal+.

<sup>17</sup> Where EU rules clearly identify the localisation criteria, such as Article 3 of Directive (EU) 2019/789, establishing the country of origin principle for ancillary online services of broadcasting organisations including radio programmes and television programmes which are news and current affairs programmes or fully financed own productions of the broadcasting organisation, applicable as from 7 June 2021, or the Member State of residence of the subscriber in case of temporary access from another Member States pursuant to Regulation (EU) 2017/1128.

seeking access are located). Under this scenario, only the service providers having the rights in these different territories would be subject to the prohibition to discriminate laid down in the Regulation<sup>18</sup>. Taking into account the current legal uncertainty, an alternative scenario has also been developed under a different assumption, based on the targeted audience of the service/activity (scenario 2)<sup>19</sup>. Under this scenario, service providers would not be required to hold the rights in the territories where the customers seeking access through passive sales are located. This alternative reading may, in certain circumstances, result in very different effects as a result of a potential extension of the Regulation. In this scenario, these effects may require an assessment within a wider copyright/media policy.

Depending on the business model of the service provider, the meaning of the trader “*holding of requisite rights in the relevant territories*”, when considered under scenario 1, can also have different implications. This concerns in particular the case of subscription-based business models (where the consumer acquires access to a catalogue within a given timeframe - increasingly relevant in particular in music and AV sectors) as opposed to transaction-based business models (where the customer acquires access to an individual content item). In both cases, indeed, the provider can hold the requisite rights for a number of items in its catalogue with different territorial scope. However in transaction-based business models, the compliance with copyright requirements only concerns the specific item at stake in the individual transaction, while in a subscription-based model, it involves a potentially very large number of items included in the overall catalogue to which the subscription normally gives unrestrained access.

The analysis should also take into account the extent to which the approach under scenario 1 may actually incentivise further fragmentation of the rights held for different territories across different traders/distributors and/or within groups. This way providers could indeed reduce as much as possible the extent of the obligation to provide cross-border access stemming from the Regulation, given that they would not hold the requisite rights in other countries.

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<sup>18</sup> Conversely, where the trader does not hold the requisite rights in the Member State where the customer is located, it cannot be obliged to provide the service.

<sup>19</sup> See CRA (2014) p. 4 and the targeting a given territory approach defined therein. In this scenario country-by-country clearance of rights is required for the territories “targeted” by licensees. However, no clearance of rights is required in this scenario for non-targeted territories where the content might still be accessed. A licensee might for instance be considered as targeting a given territory when localising content to that territory or when advertising its availability there. In this scenario, enforcement for unlicensed making-available acts is only possible in those Member States that are actively targeted by the service provider, as the act of making available only takes place in targeted countries.



These practical issues also underpin some of the considerations included in the VVA et al. (2020) Study supporting the assessment of the Commission services in the sectoral analysis. Since these issues also depend on the actual allocation of licenses among rightholders and distributors/traders and possible future adaptation strategies in view of the applicable regulatory choices, the full extent of their impact cannot be predicted in the models alone.

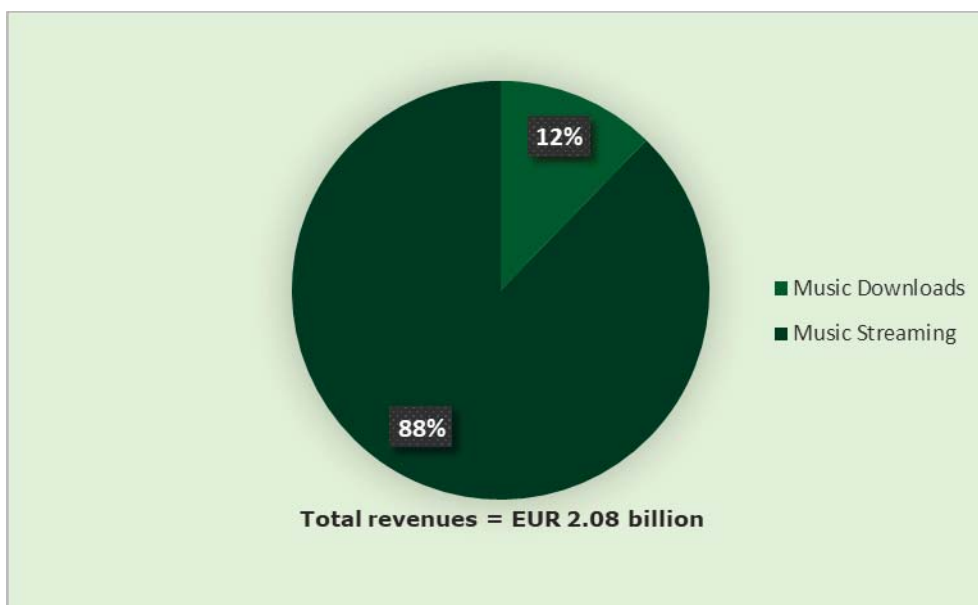
### 3.1.2. Impact analysis for on-line music (streaming and on-demand)

#### 3.1.2.1. General description of sector

The VVA et al. (2020) Study highlights some clear trends of the music industry in Europe resulting from different sources, with an overall moderate growth of revenues in the past years pushed by the constant and steady growth of streaming services, replacing the decline of physical sales and reaching 58.9% of total sales in the European recorded music market<sup>20</sup>.

On the basis of Statista 2019 data, overall digital music revenues reached 2.79 billion € and are predominantly based on music streaming (mostly based on paid or freemium<sup>21</sup> subscriptions) as opposed to music downloads (mostly based on a transaction-based business model).

Figure 1 - Digital music revenues in the EU27\_2020: market shares of the different business models



<sup>20</sup> VVA et al (2020).

<sup>21</sup> Where two or more different service versions are available: the most basic version is free, whilst the more advanced version is offered on a subscription basis



Distribution of music involves different players and contractual arrangements. Typically speaking, the artists (i.e. authors and performers of music content, who may be represented by their agents) assign their copyrights to music publishers or publishing companies, based on a publishing contract. These publishers are entitled by the artists to license their content and to promote their content with distributors and broadcasters. The publishers then license the rights to distributors, such as (digital) service providers and (online) streaming platforms, based on license agreements, usually on a non-exclusive but territorial basis permitting distribution throughout the EU (often even permitting worldwide distribution). Publishers are often also in charge of assisting the artists in monitoring where their content is being used, collecting royalties and distributing these to the artists.<sup>22</sup>

Frequently publishers pay Collective Management Organisations (CMOs) or other aggregators/collection organisations to perform (parts of) these monitoring, collection and disbursement tasks. The publishers share with the CMOs the metadata of the content created by the artists they represent; CMOs are then tasked with matching these metadata with the data from distributors, in order to calculate the exact royalty fees that distributors have to pay based on the number of times each individual song has been played. The CMOs then collect these royalty fees and distribute the money to authors, publishers and record labels. In certain cases, artists (e.g. the ones who have not transferred their rights to publishers) might deal directly with CMOs, cutting out the music publishers or publishing companies, although this is usually the case for less popular artists who may appear not profitable enough to be signed by music publishers or publishing companies. It is important to note that the role of CMOs typically differs for Anglo-American and continental repertoires.<sup>23</sup>

Regarding the contractual arrangements, and specifically the licensing of rights, the recent Sector Inquiry by DG Competition<sup>24</sup> shows that music is amongst the content

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<sup>22</sup> Europe Economics, IViR (2015), Remuneration of authors and performers for the use of their works and the fixations of their performances.

<sup>23</sup> For instance, online services are required to obtain authors' rights from various stakeholders in the case of Anglo-American repertoire in order to legitimately use music content, because recently Right Management Organisations (RMOs) have appeared (formed by major publishers in order to manage and license the Anglo-American repertoire in the European market). However, not all rights, have been transferred to these newly formed RMOs, with the performing rights still remaining with the traditional CMOs. Furthermore, publishers forming these RMOs have only transferred mechanical rights to RMOs from the traditional CMOs in cases of multi-territorial usage (which is, however, often the case).

Source: Europe Economics, IViR (2015), Remuneration of authors and performers for the use of their works and the fixations of their performances.

<sup>24</sup> European Commission (2017), Commission staff working document, Report on the E-commerce Sector Inquiry.

categories for which rights are most often licensed to a large share of EU countries (38% of agreements scrutinised). This may be due to the scope of the commercial activities of certain digital content providers in these sectors. However, the feedback from the industry also pointed out that digital content providers (e.g. Spotify and Deezer), holding rights for a wide set of Member States, obtained these through national-specific licenses or licensing hubs rather than through a unique contract of pan-EU scope. This may suggest that the current geographical scope of licenses held by these distributors for music content in different Member States may be actually higher than the share of multi/pan-EU licensing agreements reported in the Sector Inquiry, as in their catalogue digital content providers bring together music licensed through national-specific licenses in different territories, often on the basis of contracts covering the entire repertoire of a given national right-holder (such as a CMO or aggregator).

#### *3.1.2.2. Availability, Accessibility, Price differences*

Several sources indicate that availability of music content in different Member States, i.e. the possibility to get access to a given catalogue item in a given Member State through one or several providers active in that Member State, is usually quite high for both transaction-based and subscription-based models.

Gomez-Herrera and Martens (2018)<sup>25</sup> show that cross-border availability of music content on Apple iTunes was in the 73-82 per cent range in 2015. A similar study (Alaveras, Gomez and Martens, 2017)<sup>26</sup> indicated that iTunes had reached close to 90% cross-catalogue overlap. These results pertain to transaction-based business models for music downloads.

With regard to the most fast-growing and popular subscription-based models, the VVA et al. (2020) Study provides an overview of available subscription services in different Member States, showing that most of the major music streaming services are available in all Member States (Table 1) and that no Member State is served by less than three streaming service providers. A more in-depth analysis of selected markets also shows that large pan-EU providers are also those with a more important market position in most markets, with the role of purely national providers usually less relevant (see Table 2).

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<sup>25</sup> Estrella Gomez Herrera and Bertin Martens (2018) Language, Copyright and Geographic Segmentation in the EU Digital, Single Market for Music and Film, Review of Economic Research on Copyright Issues, 2018, 15(1), 20-37.

<sup>26</sup> Alaveras, Gomez-Herrera and Martens (2017) Geo-blocking of Non Audiovisual Digital Media Content in the EU Digital Single Market, JRC Digital Economy working paper nr 2017-02.

Table 1 - Availability and prices of music streaming services across the EU

Country	Currency	Service										Avg. price for one streaming service in each country
		Tidal (Standard)	Apple Music (Basic)	Spotify (Premium)	Deezer (Premium)	YouTube (Premium)	SoundCloud Go+	Play Music (Premium)	TuneIn	Amazon Music (unlimited)	Napster	
AT	EUR	9.99	9.99	9.99	9.99	9.99	s. u.**	9.99	8.69	9.99	9.95	<b>9.84</b>
BE	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	s. u.**	<b>9.85</b>
BG	EUR	8.99	8.99	4.99	0.00	8.99	s. u.**	8.99	s. u.**	4.99	s. u.**	<b>7.66</b>
CY	EUR	5.17*	s. u.**	6.99	6.99	6.99	s. u.**	6.99	8.69	6.99	s. u.**	<b>6.97</b>
CZ	EUR	5.81*	5.81*	5.99	6.44*	5.81*	s. u.**	5.81*	s. u.**	5.99	s. u.**	<b>5.95</b>
DE	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	9.95	<b>9.86</b>
DK	EUR	12.87*	12.87*	12.87*	12.87*	12.87*	s. u.**	12.87*	s. u.**	s. u.**	12.87*	<b>12.87</b>
EE	EUR	6.99	6.99	6.99	6.99	6.99	s. u.**	6.99	8.69	6.99	s. u.**	<b>7.20</b>
EL	EUR	6.99	6.99	s. u.**	s. u.**	6.99	s. u.**	6.99	8.69	6.99	s. u.**	<b>7.27</b>
ES	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	9.95	<b>9.86</b>
FI	EUR	9.99	9.99	9.99	9.99	9.21*	s. u.**	9.21*	8.69	9.99	9.95	<b>9.67</b>
FR	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	9.95	<b>9.86</b>
HR	EUR	s. u.**	s. u.**	s. u.**	6.99	7.80	s. u.**	8.99	s. u.**	s. u.**	s. u.**	<b>7.93</b>
HU	EUR	4.50*	4.47*	4.99	4.50	4.47*	s. u.**	4.47*	s. u.**	4.99	s. u.**	<b>4.63</b>
IE	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	9.95	<b>9.86</b>
IT	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	9.95	<b>9.86</b>
LT	EUR	s. u.**	6.99	6.99	s. u.**	s. u.**	s. u.**	s. u.**	s. u.**	6.99	s. u.**	<b>6.99</b>
LU	EUR	9.99	9.99	9.99	9.99	9.99	s. u.**	9.99	8.69	9.99	9.95	<b>9.84</b>
LV	EUR	6.99	6.99	6.99	6.99	6.99	s. u.**	6.99	8.69	6.99	s. u.**	<b>7.20</b>
MT	EUR	s. u.**	6.99	6.99	s. u.**	s. u.**	s. u.**	s. u.**	s. u.**	6.99	s. u.**	<b>6.99</b>
NL	EUR	9.99	9.99	9.99	9.99	9.99	9.99	9.99	8.69	9.99	9.95	<b>9.86</b>
PL	EUR	s. u.**	4.60	4.60	4.60	4.60	s. u.**	4.60	0.00	3.99	s. u.**	<b>4.50</b>
PT	EUR	6.99	6.99	6.99	6.99	6.99	s. u.**	6.99	8.69	6.99	6.95	<b>7.17</b>
RO	EUR	4.20	4.20	4.99	4.99	4.62*	s. u.**	4.62*	s. u.**	s. u.**	s. u.**	<b>4.60</b>
SE	EUR	9.21*	9.21*	9.21*	9.21*	9.21*	s. u.**	9.21*	s. u.**	9.99	9.21*	<b>9.30</b>
SI	EUR	5.99	5.99	5.99	6.99	5.99	s. u.**	5.99	8.69	s. u.**	s. u.**	<b>6.52</b>
SK	EUR	5.99	5.99	5.99	5.99	5.99	s. u.**	5.49	8.69	5.99	s. u.**	<b>6.27</b>
UK	EUR	11.59*	11.59*	11.59*	11.59*	11.59*	11.59*	11.59*	9.09*	11.59*	11.60*	<b>11.34*</b>
Average price per service		<b>8.42</b>	<b>8.29</b>	<b>8.19</b>	<b>8.42</b>	<b>8.31</b>	<b>10.19</b>	<b>8.33</b>	<b>8.71</b>	<b>8.18</b>	<b>10.01</b>	

Source: VVA et al (2020)

Table 2 - Shares of digital music purchases in selected MS

<b>Italy</b>	<b>Market Positions</b>	<b>France</b>	<b>Market Positions</b>
Spotify	51%	Deezer	41%
Amazon Music	36%	Spotify	34%
YouTube Music	28%	YouTube Music	25%
iTunes	24%	Amazon Music	22%
Google Play Store	22%	Apple Music	19%
Apple Music	17%	iTunes	18%
Deezer	8%	Google Play Store	14%
SoundCloud	7%	Napster	7%
Tidal	6%	SoundCloud	7%
Other	5%	Fnac Jukebox	5%
Napster	4%	Other	5%
Grooveshark	3%	Qobuz	2%
Rdio	2%	Tidal	1%
<b>Germany</b>	<b>Market Positions</b>	<b>Poland</b>	<b>Market Positions</b>
Amazon Music	52%	Spotify	54%
Spotify	37%	Empik	25%
iTunes	14%	Google Play Store	21%
Apple Music	13%	Tidal	21%
YouTube Music	13%	iTunes	18%
Google Play Store	11%	Apple Music	15%
Deezer	9%	Deezer	13%
Napster	5%	Amazon Music	10%
SoundCloud	5%	Other	4%
Other	3%		
Juke	2%		
Qobuz	2%		
Tidal	2%		

Source: Statista, based on a sample of n=2832 Digital music purchasers for France, n=3547 Digital music purchasers for Italy, n=4011 Digital music purchasers for Germany and n=1883 Digital music purchasers for Poland

As regards catalogue availability of streaming services, Alaveras, Gomez and Martens (2017) found very high overlap ratio for their sample concerning Spotify (approx. 96% overlap of catalogues across different national versions), confirming similar findings reported by the industry<sup>27</sup>. The VVA et al (2020) Study also reports the range of catalogue size advertised by a large range of large, and smaller streaming service providers, many featuring catalogues well above several millions of songs available in different Member States, although no detailed data is available for the overlap of catalogue in different Member States where the providers are active.

Table 3 - Overview size of music catalogue for music streaming services

Service (alphabetically)	Advertised size of the catalogue (no. of songs in
8tracks	6.5
Anghami	30
Apple Music	> 45
Deezer	> 53
Earbits	0.1
Hoopla	5
iHeartRadio	30
Jango	30
Joox	Not available
Line Music	1.5
LiveXLive Powered by Slacker	13
MOOV	1.5
Music Choice	55
Music Unlimited (Amazon)	> 50
MyTuner Radio	30
Napster	> 40
NetEase cloud music	36
Pandora	30-40
Patari.pk	0,02
Play Music (Google)	> 40
Qobuz	40

<sup>27</sup> NERA (2019) *The possible extension of the EU Geo-Blocking Regulation: Likely impact on the creation, promotion and digital distribution of music in the EU - Report prepared for IFPI*, reports Spotify's claim of 99% overlap of catalogues available in each national version.

radical.fm	25
Saavn	30
SiriusXM Essential / SiriusXM Premier	33
SoundCloud Go	> 135
Spotify	> 35
Stingray Music	Not available
Tidal	> 60
TuneIn	Not available
YouTube Music	30 <sup>28</sup> /Not available

Source: VVA et al (2020)

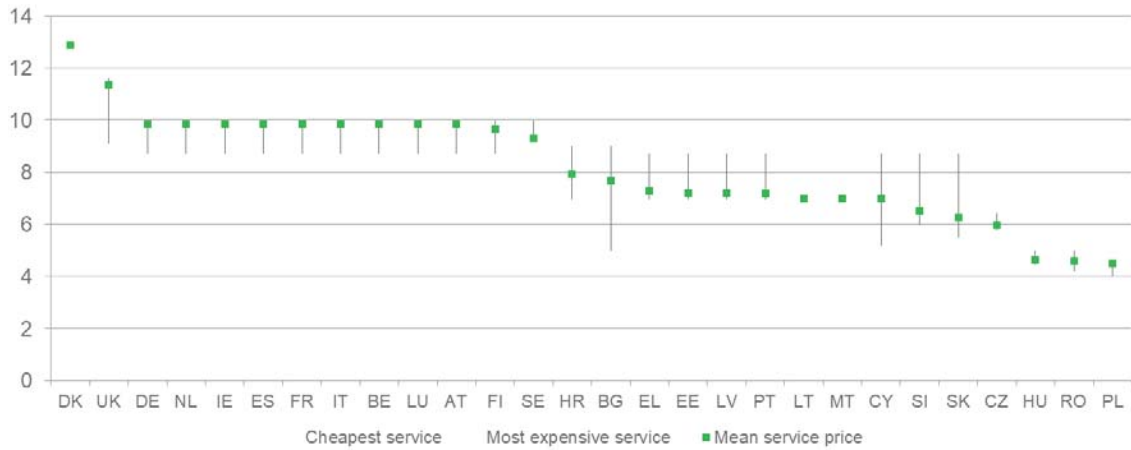
With regard to cross-border accessibility, i.e. the possibility to access services from another Member State, the mystery shopping exercise carried out in the context of the VVA et al (2020) Study reports that the main issue concerning cross-border access for these services appears to be the automatic change of applicable conditions, rather than fully fledged blockage of access. This could also explain the more limited consumers' perception of geo-blocking practices, with music resulting in the sector with the lowest proportion of geo-blocking experienced by consumers (38% of those trying to access content cross-border, i.e. 9% of overall consumers)<sup>29</sup>.

The importance of geo-blocking practices focusing on price differences, rather than on access as such, is indeed in line with findings from different sources as regards the price strategies of music providers (in particular subscription models). The analysis of prices reported in Table 1 carried out in the VVA et al (2020) Study highlights how music providers follow a mostly territory-driven price differentiation strategy, with quite a common pattern showing consistent price differences between Western and Eastern European countries (see Figure 2 - Monthly prices of music streaming services across Member States (EUR)). This is in line with similar analysis carried out by JRC (Alaveras et al, 2017) and the findings of the industry-financed report from NERA (2019).

<sup>28</sup> As part of the premium subscription. The number of songs available through the advertising-based YouTube platform are likely more than on any platform, but there is no specific data available.

<sup>29</sup> Flash EB 477b shows slightly different results as regards the frequency of geo-blocking practices, with music featuring third behind general AV content and sport content where geo-blocking is reported commonly by consumers seeking access cross-border. However the figures also in this case are very close to games and e-books, with significant differences compared to AV content (in particular with regard to consumers reporting being blocked "often").

Figure 2 – Monthly prices of music streaming services across Member States (EUR)



Source: VVA et al (2020)

### 3.1.2.3. Demand of consumers

While domestic consumption remains predominant, music is among the most demanded cross-border among the content services analysed. In the Eurobarometer survey carried out in 2019, music is the second digital content service for which cross-border access has been sought (8% of internet users), with the largest increase compared to 2015 (+5pp). Similarly, the consumer survey carried out in the context of the VVA et al. (2020) Study<sup>30</sup> shows that access to services not meant for users in their country is sought by 23% of consumers accessing content on-line in the countries surveyed - the highest proportion amongst all on-line content surveyed<sup>31</sup>. Finally, potential interest to access music cross-border is also amongst the highest (29% of internet users that did not directly try access).

An analysis of switching behaviour and willingness to pay shows that language, while still important for 84% of users, is the least important factor for cross-border access, compared to price (92%) and content availability (95%). This is overall the lowest importance amongst the content services analysed. This finding is also consistent with results on price sensitivity vis-à-vis foreign services for these services resulting from the

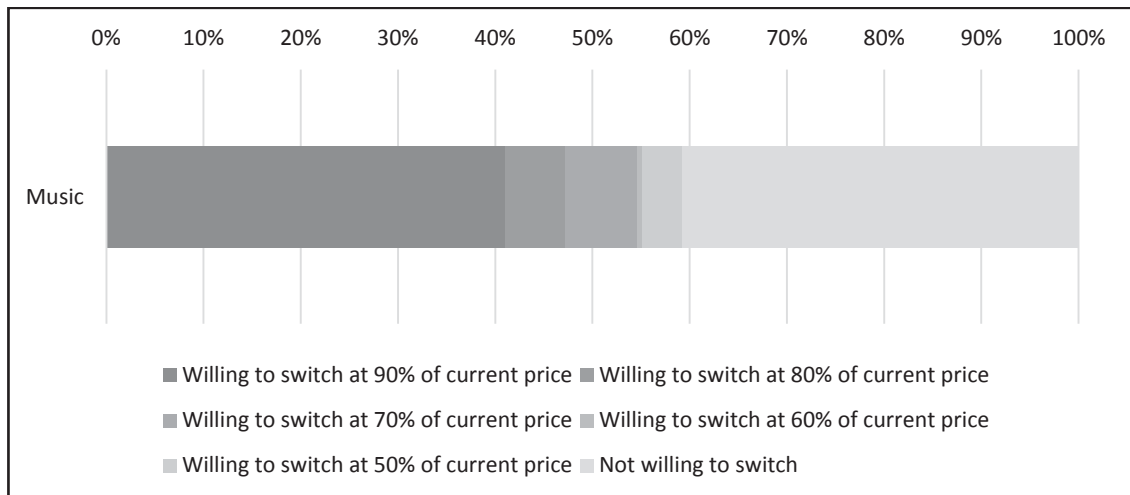
<sup>30</sup> Unlike the EB477b pan-EU survey, the VVA et al (2020) Study is a smaller scale survey limited to 8 Member States, focusing also on other variables, such as willingness to pay.

<sup>31</sup> The survey looked at all kind of services accessed by the consumer, i.e. both subscription and transaction-based services.



consumers' survey. After live sport events and video games, music is the digital service with the highest proportion of consumers willing to switch to a service not meant for their country, even for a small price reduction and where the service provides no or limited national content/catalogue (more than 40%) (Figure 3 - Consumers' willingness to switch providers or service if it is not meant for users in their country of residence and offers no or limited local (national) content/catalogue)<sup>32</sup>.

Figure 3 - Consumers' willingness to switch providers or service if it is not meant for users in their country of residence and offers no or limited local (national) content/catalogue



Source: VVA et al (2020)

#### 3.1.2.4. Possible effects

The VVA et al (2020) study suggests some possible quantitative impacts stemming from an extension of the Regulation to a sample of music services, with a focus on the dominant subscription-based business model and subject to the general limitations of the model highlighted therein<sup>33</sup>.

In view of the general broad coverage of countries by different providers and overlap of catalogues, in particular for the most popular titles, the VVA et al (2020) Study finds that most cross-border switching following an extension of the Regulation would be

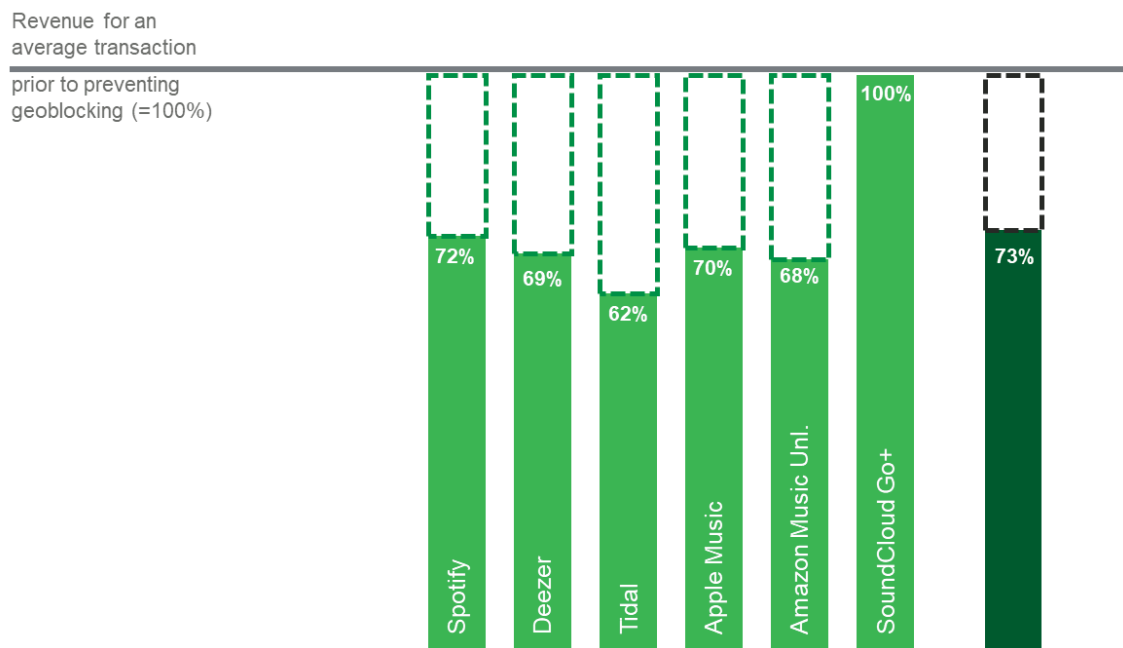
<sup>32</sup> Similarly, music ranks third in the event of foreign services offering similar content/catalogue; in this case the main difference is that the range of consumers not willing to switch at any price would actually decrease by approx. 5pp.

<sup>33</sup> The focus was not on catalogue overlaps since this information is usually impossible to come by and earlier research focusing on effective catalogue overlaps by JRC (2017, 2018) revealed that, in opposite to the audio visual sector, there is not much catalogue difference between countries inside the same service with respect to the overall size, which is usually in the millions. Moreover, the model is based on data limited to a sample of 8 countries (BE, BG, EE, FR, DE, IE, IT, PL) representing different socio-economic variables representative of the broader European markets.

driven by price rather than variety differences. Indeed, the consumer survey confirms that price differences, possibly resulting from a potential extension of the Geo-blocking Regulation, could significantly influence consumer behaviour in this sector. Although language accessibility has an impact, it is not as strong as in other sectors (e.g. audiovisual content excl. sport). In turn, local content availability appears to have a rather limited impact on consumers' switching behaviour. In case the Regulation were to be extended to this sector, consumers' reactions would be highly dependent on the potential changes in available price offers, as well as, to a lesser extent, changes in the language interface.

On the basis of the static model and the data gathered by the contractor, it is considered that migration towards existing cheaper versions of the same service could have a substantial impact on revenues for an average subscription across different services, amounting to a 27% average reduction (Figure 4 - Price impact on revenues - selected services across MS).

Figure 4 - Price impact on revenues - selected services across MS

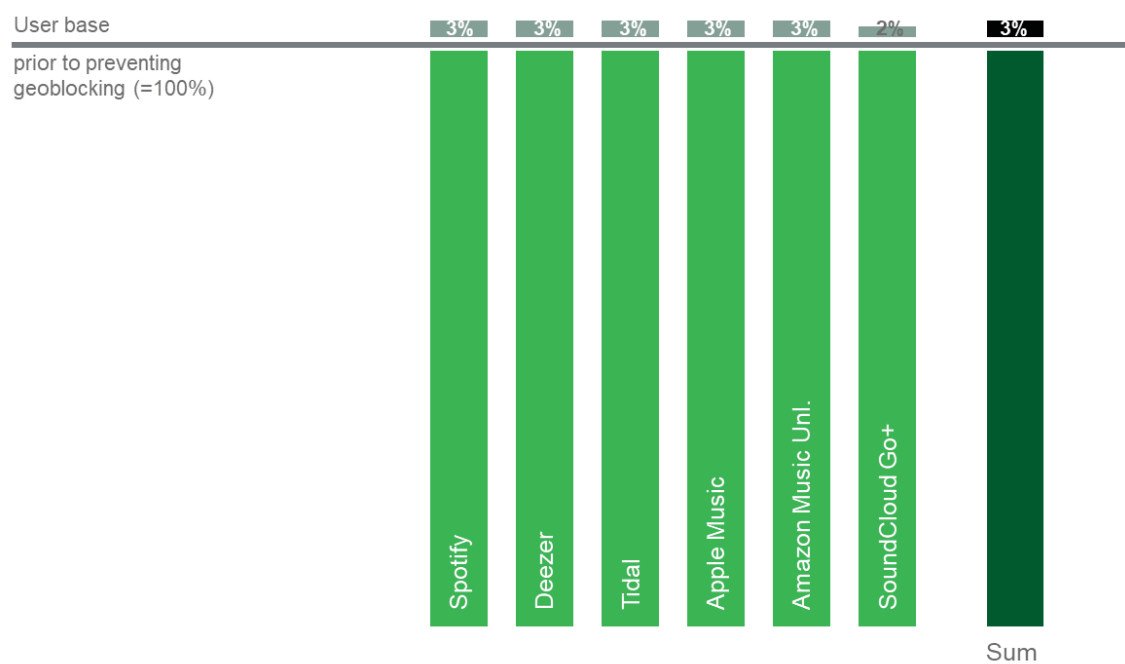


Source: VVA et al (2020)

While such a reduction of average revenues per transaction could extend the customer base by approx. 3% (Figure 5 - Price-impact on user base - selected services across MS), the overall effect on revenues for providers in case of mass migration towards a cheaper version of the platform would in any case be significantly negative, with a potential 25% reduction of revenues for the selected sample of providers in the

concerned Member States (Figure 6 - Overall impact on revenues - selected services across MS). While this revenue reduction could indeed benefit (some) consumers accessing cheaper services, the magnitude of the potential impact needs to take into account the likelihood of mitigation strategies adopted by providers. Indeed, the abovementioned results<sup>34</sup> do not take into account this possible (and likely) price response, which could change significantly the overall effects.

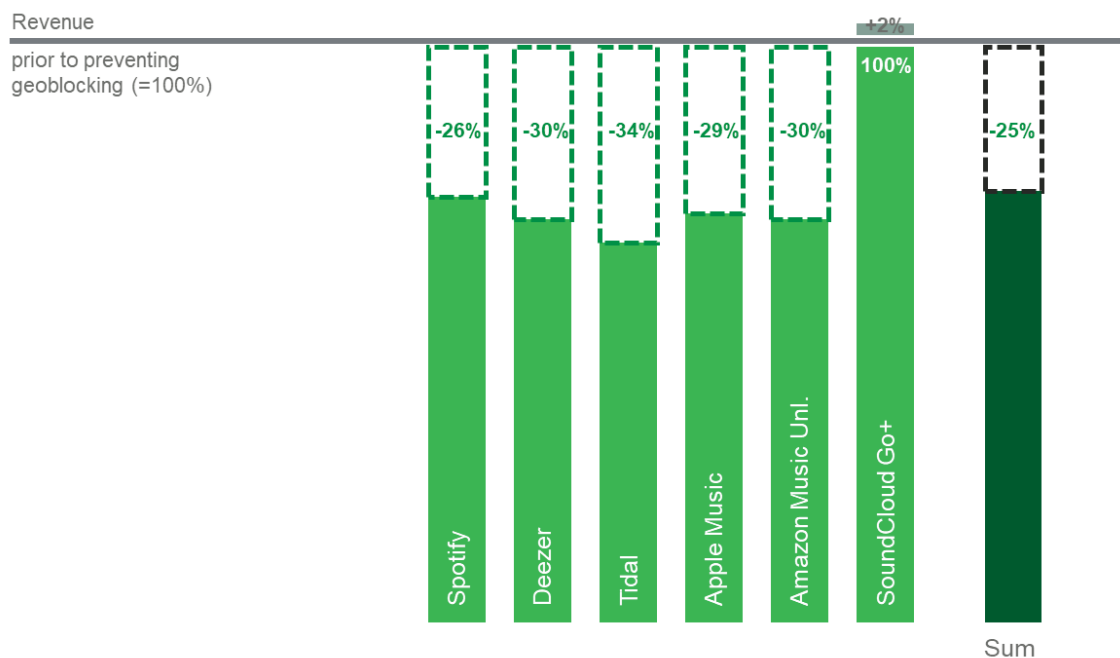
Figure 5 - Price-impact on user base - selected services across MS



Source: VVA et al (2020)

<sup>34</sup> As well as the overall welfare static effects modelled in the VVA et al (2020) Study, which are indicated as possibly positive, but do not take into account the likelihood of price harmonisation.

Figure 6 - Overall impact on revenues - selected services across MS



Source: VVA et al (2020)

Given the potential significant static impact on revenues and imbalance of different markets’ weight, from a dynamic point of view, the VVA et al. (2020) Study considers it very likely and rational that the adoption of mitigation strategies by providers would consist in a price increase in the low-price Member States of up to 70% of the cheapest price (hence a margin for price differentiation could still remain in view of some inherent switching costs for part of consumers for which, for instance, language preferences are still important).

These latest findings are consistent with the indications from other studies, pointing out possible positive overall welfare effects of the current price differentiation in the music industry.

NERA (2019) suggests that on the basis of the imbalance of revenues and demand in “old” and “new” markets (mostly Western and Eastern markets), a uniform price would emerge in case of extension and it would likely be much closer to the (already largely uniform) price for the old markets.

Aguiar and Waldfogel (2014)<sup>35</sup> are the first to report on consumer as well as producer welfare effects. They estimate welfare gains due to increase in variety of accessible individual titles for both groups from lifting geo-blocking restrictions in a transaction-based business model for music downloads at approx. 1,8% for consumers and 1,1% for producers. These welfare gains however relate only to an increase in the variety of music that becomes available after lifting geo-blocking (using iTunes music catalogue data). This study does not estimate the welfare effects due to price effects stemming from price arbitrage and possible industry reaction to that phenomenon (including versioning and differentiation of services available in different countries, which however could reduce the actual availability of content across different versions of the services).

Price effects of switching between music streaming services in different countries are analysed in a more recent paper (Waldfogel, 2018)<sup>36</sup>. This paper uses an empirical model of consumer demand for music streaming as a function of income and subscription prices – using available data on Spotify monthly prices and streaming volumes by country to create measures of the numbers of users<sup>37</sup>. The author finds that country-specific pricing within Europe raises Spotify revenue in Europe by 1.1 percent and increases total consumer surplus in Europe by 0.3 percent, compared to uniform pricing. This consumer welfare gain comes from consumers in lower-income European countries who enjoy lower prices while consumers in higher-income countries pay more and consequently buy fewer subscriptions. If lifting geo-blocking restrictions were to lead to harmonisation of subscription prices across countries, lower-income consumers would face welfare losses.

These negative welfare effects reflect also structural gaps underlying the development of music markets across Europe, as the study A European Music Export Strategy (2019)<sup>38</sup> suggests. The study defines the background, the scope, and proposes a set of measures for a European music export strategy. Following the analysis of the main characteristics of the music sector in the European Union, this report takes stock of the main obstacles, challenges and opportunities faced by European music when crossing

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<sup>35</sup> Aguiar and Waldfogel, 2014. "Digitization, Copyright, and the Welfare Effects of Music Trade," JRC Digital Economy Working Papers 2014-05, Joint Research Centre.

<sup>36</sup> Waldfogel (2019) The Welfare Effects of Spotify's Cross-Country Price Discrimination, mimeo, university of Minnesota, forthcoming in the Review of Industrial Organisation (2020).

<sup>37</sup> The model looks at paying subscribers only, not free subscriptions supported by advertising revenue. Moreover, it does not consider the possibility of product differentiation, for example by means of language and local play lists, to maintain some degree of price differentiation when geo-blocking restrictions are lifted.

<sup>38</sup> <https://op.europa.eu/en/publication-detail/-/publication/4be2f11d-216c-11ea-95ab-01aa75ed71a1/language-en/format-PDF/source-111483830>

borders. It highlights the importance of various structural factors (talent, knowledge, networks and investment capacity of particular artists and professionals and music companies, support structures, availability of training and capacity building and the existence of an export strategy to coordinate the activity between the sector organisations and the government) for the sector players within the EU to foster the circulation of music across national borders, especially in those Member States where the local sector ecosystem is smaller or less developed. This may also account for the finding that an increased availability of different music repertoires across national borders through digital services doesn't necessarily increase the consumption of such music<sup>39</sup>, and may warrant further tools and actions to support the development of promotion strategies. In this regard, as an implementing step to develop and promote European music export based on the conclusions of the report, the Commission has published an open call for tenders to generate knowledge and spread understanding about as well as explore new approaches for the export of European music by piloting some actions of the strategy. The results will inform possible future actions to implement the sectorial support for music and international dimension of the future Creative Europe Programme 2021-2027<sup>40</sup>. Moreover, to implement the 2020 Preparatory action "Music Moves Europe: Boosting European music diversity and talent" (with a budget of €2.5 million), the Commission has published a call for proposals addressing the need to support the green, digital, just and resilient recovery and post-Covid-19-crisis development of the European music ecosystem to help it become more sustainable<sup>41</sup>.

In view of the current large catalogue overlaps across countries and the large coverage by pan-EU/multi-territorial services, as well as the characteristics of licensing practices in the music sector, the VVA et al. (2020) Study does not forecast substantial differences in the static model between scenario 1 and scenario 2 (where an alternative reading of the criteria for the localisation of the copyright relevant act was envisaged).

Indeed demand changes remain mostly driven by price rather than the variety effect of switching catalogues, because they are already largely overlapping. On the other hand,

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<sup>39</sup> For the streaming market, for example, the data reported show the modest performance, within the EU, of European music (excluding music originating from the United Kingdom) compared to local repertoires, American music and British music. The "EU-27" group only represents, on average, 15% of the listening share in the EU, while music from the United States account for 42% of the total analysed data. British music's share alone surpasses the performance of E-27. Local repertoires represent a significant share of the total in Europe, especially in larger national markets.

<sup>40</sup> The implementation of the activities of this tender is expected to take place in a post-Covid-19 environment and therefore take into consideration the feasible options and potential limitations related to it (<https://etendering.ted.europa.eu/cft/cft-display.html?cftId=6526>).

<sup>41</sup> [https://ec.europa.eu/culture/calls/music-moves-europe-preparatory-action-2020-innovative-support-scheme-sustainable-music\\_en](https://ec.europa.eu/culture/calls/music-moves-europe-preparatory-action-2020-innovative-support-scheme-sustainable-music_en).

in such a scenario, licensing practices in particular for smaller/start-ups/national providers could be affected, as the price for licenses of national repertoires (in particular the fixed component) could change in order to reflect the expanded potential audience.

The industry also indicates the risk that more tailored versions or purely national services of cheaper countries may have lower incentives to promote distribution of national repertoires, as access to music content from other countries would increase demand for “mainstream” content and could reduce interest in promotion of local content. A possible mitigation strategy based on increasing product differentiation (including for instance more targeted playlists and recommendations) could actually have opposite effects. While the VVA et al. (2020) study did not indicate specific elements that could substantiate these claims, it cannot be excluded that the prohibition to discriminate or refuse consumers from other Member States coupled with scenario 2 could have wider repercussions along the value chain, e.g. on the licensing practices, as well as on the transaction and administrative costs related to the cross-border enforcement of national licenses in case of passive sales. This effect was also highlighted in the CRA (2014) study with regard to the targeting approach defined therein<sup>42</sup>, which may need to be investigated in more detail.

#### 3.1.2.5. Findings

The main findings on the possible effects of an extension of the Regulation to the music sector are the following:

- There is increasing interest for cross-border access to music content by consumers (8% of internet users according to the EB477b, 23% of consumers seeking access to digital content across-borders in sampled Member States), although domestic consumption remains dominant.
- Subscription-based (including freemium and paid) business models, largely dominant in the digital music sector, are already widely available in the Union, with evidence showing a large share (above 90%) of overlapping catalogues across different versions of the same provider, as well as large catalogues (in the order of millions) available in different Member States through different providers.
- Geo-blocking practices in the sector are mainly meant to implement price differentiation strategies across different Member States, which follow a

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<sup>42</sup> CRA(2014), in particular page 110 and 115.



consistent pattern mirroring large price differences between higher income/demand and lower income/demand countries.

- The relatively low importance of language as a switching factor when it comes to music, together with relatively high price sensitivity vis-à-vis foreign services, (even if these feature less local content), supports the finding that price would be the main driver of consumer switching in case of extension of the scope of the Regulation.
- In view of the potential significant impact on revenues due to price-arbitrage across different countries (up to a 25% loss across the streaming services according to the VVA et al. (2020) Study), mitigation strategies based on increased price harmonisation across different countries appear likely, with possible increases of prices in low-demand countries (estimated by the VVA et al (2020) Study to reach 70% of the cheapest price). Other mitigation strategies leading to increasing differentiation of services (such as limitation of language interfaces, adaptation of playlists, more limited catalogues) across different countries could also limit switching behaviour towards cheaper versions. It is thus not excluded that some degree of price differentiation, and more limited price increases, could be maintained.
- The overall welfare effects of increasing price harmonisation are ambiguous and may well be negative<sup>43</sup>, given that the possible decrease of prices in high-demand countries (and slight increase in consumption therein) may be more than compensated by likely increases of prices in low-demand countries. The extent of this effect will also depend on the effectiveness of other mitigation strategies based on increasing product differentiation.

### 3.1.3. *Impact analysis for e-books*

#### 3.1.3.1. *General description of sector*

After a more pronounced dynamic in the early years of the last decade driven by widespread uptake of digital technologies, the evolution of the e-book market reported in the VVA et al (2020) Study suggests that the growth has been relatively modest afterwards. Turnover in 2016 was of EUR 827.9 million, not significantly higher compared to 2012, when turnover was EUR 788.2 million<sup>44</sup>.

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<sup>43</sup> See Waldfogel (2018). The positive overall welfare effect identified in VVA et al (2020) (approx. 2%) on the other hand does not take into account possible price harmonisation mitigation strategies.

<sup>44</sup> The limited size of the e-books market within the overall publishing industry is also emphasised by the industry, which suggests that apart few exceptions/editorial sectors, e-books sales generally represent less than 10% of turnover of the publishing industry in most European countries, and less than 5% in trade sectors, FEP position paper on geo-blocking (2020).

In addition to e-books, other e-publishing revenues also should be taken into account as similar copyright-protected content provided on-line. More recent data from different dataset in this regard would indicate a larger market size, reaching in 2019 the size of EUR 3.98 billion, of which approx. 53% is represented by e-books.

Subscription and transaction-based models are both present in the market and often offered by the same company, although the subscription based model appears less extensively present in all Member States<sup>45</sup>, and seemingly less common than transaction based model, on which the VVA et al (2020) Study focused its analysis.

Table 4 - EU country availability of two selected e-book subscription services

Amazon Kindle Unlimited	Kobo Plus
France	Belgium
Germany	The Netherlands
Italy	
Spain	
United Kingdom	

Source: Amazon, Kobo

Unlike music, where a number of large providers are present in different Member States with similar geographical extension and a balanced position in the market<sup>46</sup>, a more in-depth analysis for a sample of countries carried out by VVA et al (2020) Study shows that in the e-books market the position of purely national providers stands alongside

<sup>45</sup> See example of smaller country availability of subscription-based services provided by two major pan-EU or multi-territorial providers operating different reading format, EPUB and .azw Kindle file format, ( Table 4 - EU country availability of two selected e-book subscription services). Also, according to the consumer survey carried out in VVA et al (2020) Study, only 15% of consumers pay for subscriptions to e-books. It should be considered, however, that this business model may be more present in other segments of the market (e-magazines/papers). Also, increased accessibility could possibly enhance access to these subscription models.

<sup>46</sup> see above Table 1 - Availability and prices of music streaming services across the EU and

Table 2 - Shares of digital music purchases in selected MS

major pan-European/global providers, with Amazon usually representing by far the main market leader<sup>47</sup>.

Table 5 - Shares of e-books purchases in selected MS

Italy	Market Positions	France	Market Positions
Amazon	78%	Amazon	61%
laFeltrinelli	21%	fnac	28%
Google Play Store	20%	Google Play Store	19%
Mondadori Store	18%	Cultura	19%
ibs.it	17%	Apple iBooks	17%
Apple iBooks	7%	Espace Culturel E. Leclerc	11%
Other	7%	Chapitre	11%
Libreria Rizzoli	6%	RakutenKobo	9%
RakutenKobo	6%	other	8%
BookRepublic	5%	Decitre	7%
Il giardino dei libri	5%	Feedbooks	6%
Ebooksitalia	4%	Bookeen	6%
Hoepi.it	3%	Nolim	5%
macro librarsi	3%	7switch	5%
Street Lib	2%		
Germany	Market Positions	Poland	Market Positions
Amazon	68%	Empik	67%
Thalia	25%	Świat Książki	34%
Apple iBooks	15%	Tania Książka	23%
ebook.de	14%	Legimi	17%
Google Play Store	14%	Gandalf	14%
Bücher.de	13%	Publio	14%
Hugendubel	12%	Ebookpoint	12%
Weltbild	9%	Nexto	11%
Other	8%	Helion	10%
Beam	7%	Raudiovisualelo	10%
RakutenKobo	6%	Muza	9%
		Woblink	9%
		other	9%
		Virtualo	8%
		Bezdroża	7%
		Muve	5%

Source: Statista, based on a sample of n=2038 E-publishing purchasers for France, n=3547 E-publishing purchasers for Italy, n=2521 E-publishing purchasers for Germany and n=1883 E-publishing purchasers for Poland.

<sup>47</sup> In other e-publishing services, such as newspapers and e-magazines, the position of national providers completely dominates the market see VVA et al (2020) Study.

Generally speaking, in the e-books sector publishing houses acquire world-wide rights for each specific language version from an author and then make commercial agreements with distributors/retailers granting non-exclusive licences on a territory-by-territory basis<sup>48</sup>.

The contractual relationships between the publishing houses and online platforms to sell e-books is based on distribution agreements that allow the sale of e-books, usually provided on a non-exclusive but territorial basis<sup>49</sup>. The global trend is that when these platforms first started to emerge in the 2000s, the price for the e-books was usually decided by the platform, under a wholesale pricing model where the retailer negotiates a wholesale price paid to the publisher per copy sold, but autonomously decides the final retail price<sup>50</sup>. When Apple began to sell e-books, they developed a new contractual relationship with the publishing houses in order to compete with Amazon. Under this relationship, it was the publishing house that decided on the price, while the platform received a set percentage of the gross revenues (usually around 30%); this model is referred to as “agency pricing” as opposed to the “wholesale pricing” model. There are also instances where the authors are dealing directly with the e-book platforms (i.e. self-publishing authors) cutting out the publishing houses. However, authors may not be in a good position to do all their marketing and advertising themselves, which is why this option is usually taken up by less popular, non-mainstream authors. In many cases, these authors may end up in a more traditional relationship with publishers after the self-publication of their works has been used as a sort of market testing tool<sup>51</sup>. From a quantitative point of view however, the Sector Enquiry carried out by DG Competition did not include the analysis of licensing arrangement for the e-books sector, and the VVA et al (2020) Study did not manage to fill this data gap, hence more detailed information on the extent of licensing agreement with publishing houses is not available at present.

#### *3.1.3.2. Availability, Accessibility, Price differences*

Unlike the music sector, where subscription-based models are clearly predominant, in the e-books sector the analysis of availability, accessibility and price differences carried out by VVA et al (2020) Study and earlier by JRC (2015) studies<sup>52</sup>, focused on

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<sup>48</sup> PricewaterhouseCoopers (2016). Turning the Page: the Future of eBooks.

<sup>49</sup> VVA et al (2020). This finding, however, may depend also on the distributor. For instance, in the 2017 Commission decision on MFN clauses adopted by Amazon, it is reported that “a number of agreements for the distribution of e-books cover several territories (including the whole of the EEA).”

<sup>50</sup> Without prejudice to possible limitations stemming from applicable price fixing legislation.

<sup>51</sup> PricewaterhouseCoopers (2016). Turning the Page: the Future of eBooks.

<sup>52</sup> Georgios Alaveras & Estrella Gomez Herrera & Bertin Martens, 2015. "Geographic Fragmentation in the EU Market for e-Books: The case of Amazon," JRC Working Papers on Digital Economy 2015-13, Joint Research Centre.

transaction-based distribution models. In order to establish the state of play of availability, accessibility and price differences across the Union, the analysis of the abovementioned studies focused on two pan-EU/global platforms that cover a large part of the markets across the Union. Moreover, the Apple store (unlike Amazon) gives access also to non-proprietary publishing format (such as EPUB and PDF), which can be displayed on different e-book readers. This focus makes it possible to analyse the catalogues' availability and accessibility of selected distributors with large catalogues and geographical scope, and to assess to what extent European consumers can already have access to a large variety of content from at least one of these providers, and at which conditions. However, this overview does not give a full picture of current availability over all possible publishers (i.e. those not distributing through these platforms).

The JRC's analysis from 2015 covered a sample of Top-100s best-selling titles in different EU Amazon e-books stores and found a very high overlap of catalogues available in different versions of the store (98,6% of the samples used) as well as full accessibility through the US store<sup>53</sup>. The VVA et al (2020) Study, on the other hand, focused on the Apple Store for e-books, aiming at covering comprehensively three selected national catalogues (ranging from 1,6 to 2,2 million titles for the three relevant languages, although not all titles potentially available) as well as a large random (hence not necessarily biased towards most common titles) 1000 sample in all countries to measure accessibility. The analysis of "whole" catalogues overlap in the three selected countries (UK, PL, IT) would show that most e-books are available in both Italy and UK (>95%), while roughly 40% of each catalogue is missing in Poland. This could suggest a more limited "availability/overlap" of titles among the different catalogues compared to Amazon. When analysing a smaller random sample (n=1000) across different countries<sup>54</sup>, however, it appears that availability reaches approx. 90% in most Member States, with another group of 4 countries (including PL) ranging between 75 and 59% availability and a clear outlier (HR) with very limited catalogue available (5%).

*Table 6 - Number of available e-books out of a random sample of 1000 titles in 16 EU Member States*

Austria	935	Italy	940
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<sup>53</sup> The results is consistent with earlier analysis from Alaveras et al (2015), reporting 93% availability ratio.

<sup>54</sup> Which however is based on the UK catalogue and can therefore have a somehow linguistic bias.

Belgium	931	Latvia	915
Bulgaria	597	Lithuania	911
Croatia	5	Luxemburg	933
Cyprus	926	Malta	931
Czech Republic	606	Netherlands	935
Denmark	785	Poland	606
Estonia	931	Portugal	926

Source: VVA et al (2020)

While this data cannot be conclusive about the effective availability within the Union, it can nevertheless be concluded that, taken together, the market leader Amazon and a similar large pan-EU distributor, such as Apple, make a large number of their titles (above 90%) available to the majority of EU citizens, although in the case of Apple the variety available in a number of countries (and HR in particular as an outlier) may be substantially lower<sup>55</sup>. This data however does not allow the identification of the reason for the more limited availability in certain countries (whether for instance this is due to the extent of rights held).

With regard to accessibility, JRC (2015) found the lack of cross-border accessibility for purchase across different versions of the Amazon national shop, but full accessibility of titles through the US shop<sup>56</sup>.

For other, smaller or national booksellers the table included in JRC (2017)<sup>57</sup> – on the basis of EIBF data – can provide an overview for selected countries of cross-border activities of booksellers, even though an analysis of individual items in the catalogue accessible cross-border is not available. It shows that a majority of booksellers in DE, FR, ES, NL, do sell cross-border (hence are accessible), although the precise scope of countries covered, as well as the extent of catalogue, is usually not identified<sup>58</sup>. Furthermore, the mystery shopping exercise carried out in the context of the VVA et al

<sup>55</sup> VVA et al (2020) also points out the more limited catalogue overlap in PL may also be due to the more limited market position of Apple therein.

<sup>56</sup> Georgios Alaveras & Estrella Gomez Herrera & Bertin Martens, (2015) "Geographic Fragmentation in the EU Market for e-Books: The case of Amazon," JRC Working Papers on Digital Economy 2015-13, Joint Research Centre, Table 10.

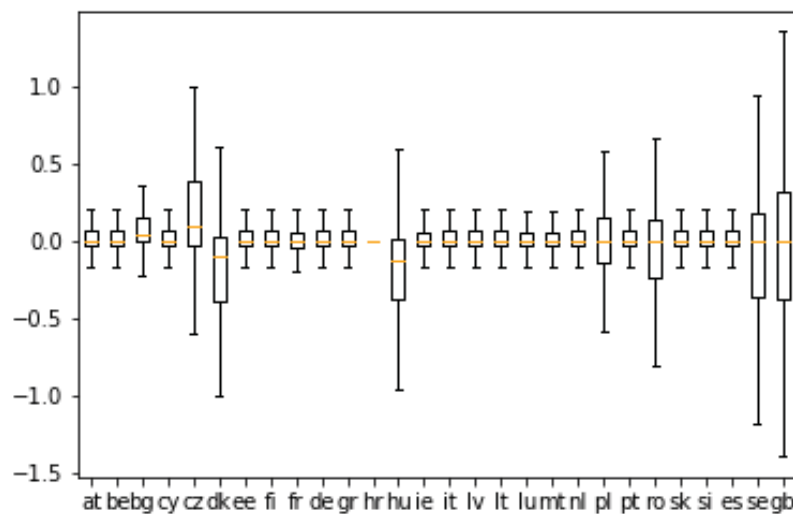
<sup>57</sup> Alaveras, Georgios; Gomez-Herrera, Estrella; Martens, Bertin, (2017) "Geo-blocking of Non Audiovisual Digital Media Content in the EU Digital Single Market", JRC Digital Economy Working Paper 2017-02.

<sup>58</sup> JRC (2017) Table 19.

(2020) Study indicates a low level of geo-blocking restrictions, although this exercise also could not look into the accessibility of individual titles. However, the experience of consumers when accessing content cross-border indicates the existence of obstacles<sup>59</sup>.

When it comes to price differences, the analysis of Amazon’s catalogue by JRC (2017) points out a non-negligible amount of titles are subject to price variation (approximately 2/3 of the sampled titles), although this could also be linked to VAT/exchange differences and/or compliance with fixed-price e-book national rules in countries where they are applicable. The price-variation analysis carried out by VVA et al (2020) Study for iTunes also finds a small but constant margin of variation in prices applied in different catalogues analysed comprehensively, with titles in the IT catalogue on average slightly more expensive than PL and UK<sup>60</sup>. Overall, however, the average prices of titles do not tend to differ on average too much across different Member States, as the smaller sample checked across all MS shows. Besides, unlike music, no clear pricing patterns seem to emerge across countries.

Figure 7 - Price difference for a sample of 1,000 e-books across European Member States in 2019 (EU28)



Source: VVA et al (2020)

<sup>59</sup> 24% of consumer surveyed in VVA et al (2020) Study, corresponding to the highest percentage of all, although based on the lowest sample size due the more limited interest to cross-border access

<sup>60</sup> E-books in Italy are on average roughly EUR 1 more expensive than in UK (exchange rate from 01.08.2019) and 12 cents more expensive than in Poland. Poland on the other hand is roughly 19 cents more expensive than UK for the average e-book, VVA et al (2020) Study page 196; these can only to a limited extent be explained with VAT and currency exchange adjustments, taking also into account the lower VAT rates applied to e-books in IT and PL as compared to UK.

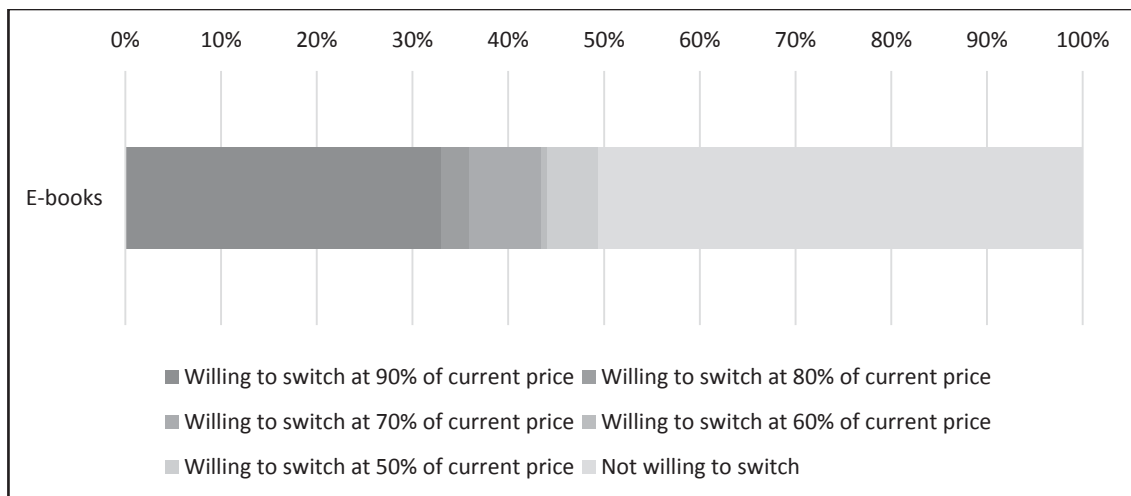


### 3.1.3.3. Demand of consumers

According to the 2019 Flash Eurobarometer, demand for cross-border access to e-books is amongst the lowest of all the digital content services analysed. Only 3% of internet users tried to get access to this content cross-border (similar to video games), and 12% of those that did not try would still be interested (slightly more than video games)<sup>61</sup>.

This should be read in conjunction with the relatively high importance of (local) content availability and language accessibility as compared to price as main drivers of switching behaviour. This is confirmed by the large share of consumers not willing to switch their service at any price discount with a foreign one without local content and language preferences (Figure 8 - Consumers' willingness to switch providers or service if it is not meant to users in their country of residence and offers no or limited local (national) content/catalogue). E-books indeed feature as the digital service with the highest proportion of consumers not willing to switch at any price (approx. 50%), after AV content.

Figure 8 - Consumers' willingness to switch providers or service if it is not meant to users in their country of residence and offers no or limited local (national) content/catalogue



Source: VVA et al (2020)

<sup>61</sup> With a different methodology, also the consumer survey in VVA et al (2020) Study identifies e-books as the least accessed content service across-borders. Potential interest to access is higher in absolute terms (12% according to FlashEB 2019) but still featuring among the lowest, slight above video-games.

#### 3.1.3.4. Possible effects

The VVA et al (2020) Study modelled the possible effects of an increased access to the iTunes store due to extension of the Regulation. In spite of the limited information available concerning the scope of licences held by publishers<sup>62</sup>, it is often reported that publishers usually hold global, pan-EU, or at least regional licenses for their content<sup>63</sup>. Within this context, therefore, the differences between scenario 1 (more conservative reading of the localisation criteria of copyright relevant act) and scenario 2 (alternative reading based on targeted territories) may be limited. The effects can, in any case, proportionally be reduced in scenario 1 depending on the percentage of titles for which publishers/distributors do not actually hold licenses for the entire EU. Scenario 2 therefore can also be considered as an upper bound of possible effects, also in case of Scenario 1, assuming that pan-EU licenses would be the standard in the sector.

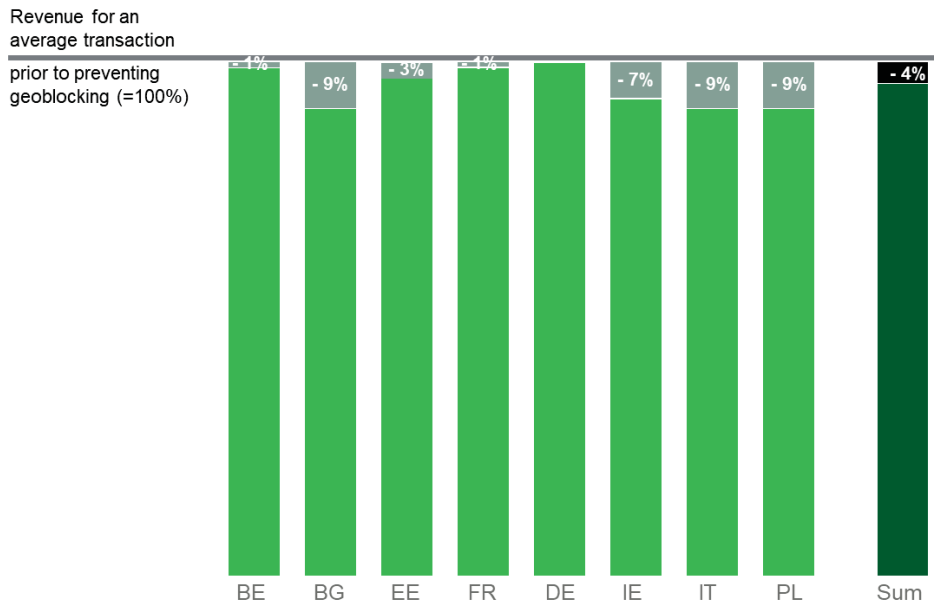
Given that consumers can choose freely from e-book stores across all Member States, it is likely that price-sensitive consumers would tend to choose, for each item, the store where it is offered at the cheapest price. This price-driven optimisation would result in a reduction of the average transaction revenue for an e-book sold in iTunes of 4%. This is somewhat compensated by new users purchasing e-books for the first time as they find e-books matching their willingness-to-pay. The VVA et al (2020) Study estimates that 4% more users would enter the market as compared to the current situation. The combined price-driven effect is a reduction of 2% of the overall revenues across the eight Member States included in the study.

*Figure 9 - Price impact on revenues for iTunes*

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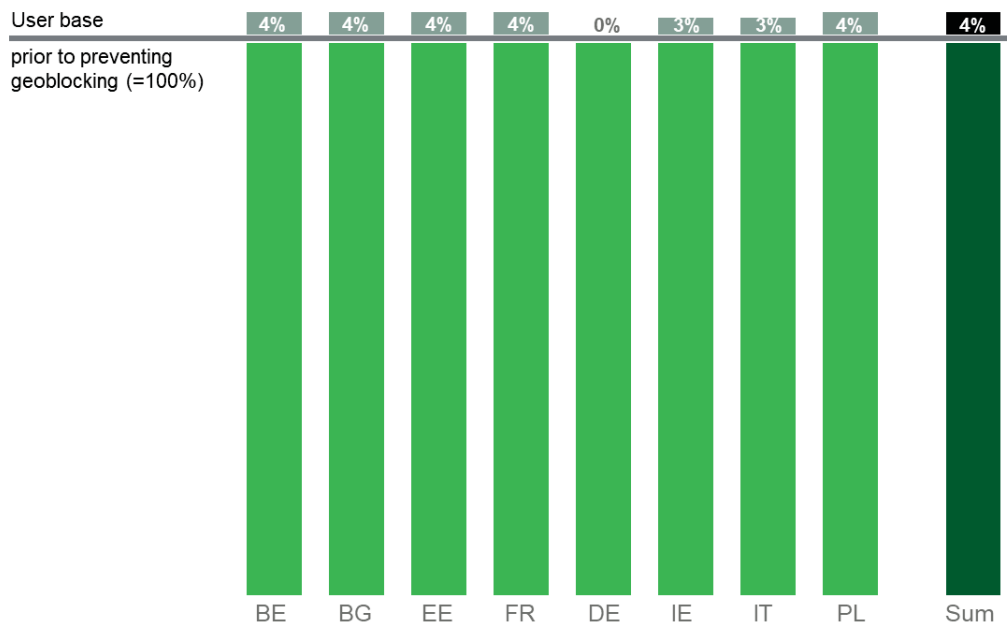
<sup>62</sup> Apple applies the agency model of distribution.

<sup>63</sup> Cfr fn 51 above.



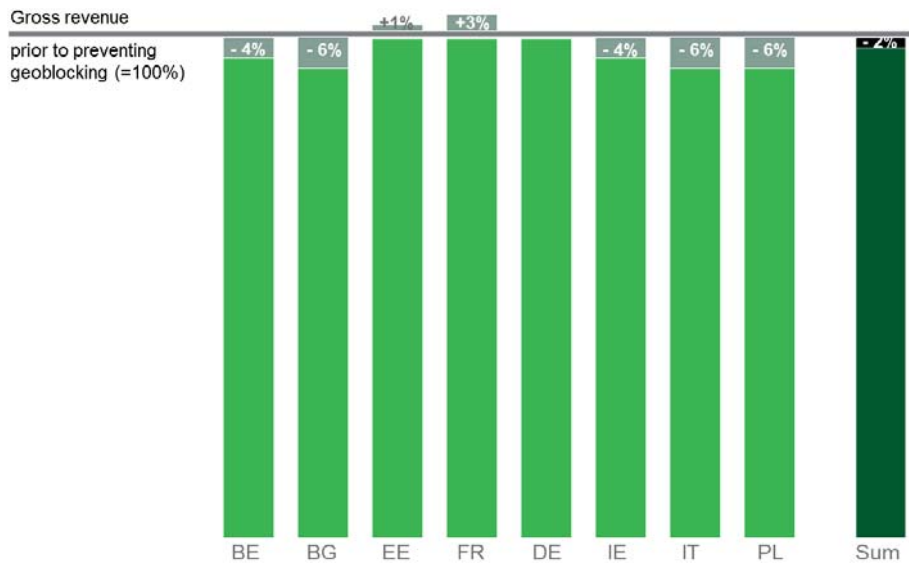
Source: VVA et al (2020)

Figure 10: accessibility-impact on user base for iTunes



Source: VVA et al (2020)

Figure 11: overall impact on revenues for iTunes



Source: VVA et al (2020)

These possible effects mainly reflect price-effects, as the VVA et al (2020) Study assumes that the increase in accessible items, no matter its size, would likely have a limited effect on the average number of e-books read by a specific consumer (taking also into account the relative importance of more localised content in this sector). It is therefore concluded that these changes would probably not have a dramatic impact in the market as such, both in positive (for consumers facing lower prices) and negative (for industry) terms, and could possibly lead to some overall welfare gains estimated at around 3,8%. This estimate is based on the distributor analysed (a large pan-EU platform such as iTunes, for which the reallocation of consumers across different versions of the store does not entail additional effects beyond internal price arbitrage). These quantitative findings, however, do not provide indications as regards the impact on other players in the market.

Additional qualitative fieldwork in the VVA et al (2020) Study, however, reports potentially higher costs for smaller/national booksellers, in particular in comparison with the smaller turnover and margins stemming from e-books for these players. In these cases, e-books sales are marginal (compared to physical sales) and even more marginal are cross-border sales and demand in general. Increase of sales in the order of a few percentage points (as envisaged in the abovementioned quantitative model, also based on general demand data and drivers), may have very marginal effects on

revenues, while triggering, in any case, additional compliance costs possibly exceeding the increase of sales<sup>64</sup>.

Moreover, the extension of the Regulation could raise the issue of consistency with fixed-price regimes for e-books applicable in 6 Member States<sup>65</sup>. Depending on possible policy options in case of extension, either the impact on these regimes would need to be verified in case of cross-border sales (if national fixed-price rules were considered not applicable to passive sales from other Member States) or another layer of administrative costs, in case of need to identify and comply with the applicable fixed-price regime, would be added (with corresponding more limited consumers' gains in terms of cheaper access to titles abroad). In both cases, the effects would affect smaller players, as well as publishers, more than bigger platforms, as the former are the primary beneficiaries of these national regimes and/or the ones most affected by increase in administrative compliance costs. Ultimately, this may also have welfare implications for consumers in terms of local availability of and accessibility to a diversified cultural offer<sup>66</sup>.

#### 3.1.3.5. Findings

The main findings on the possible effects of an extension of the Regulation to the e-books sector are the following:

- Demand for cross-border access to e-books appears low, in particular compared to other content services.
- Transaction-based business models, largely dominant in the sector, show a mix of few pan-EU platforms, amongst which Amazon stands out as a prominent player with large market position in several national markets, besides many smaller national/regional booksellers/distributors.
- Following a hypothetical extension of Regulation, a potential increase of accessible items of individual catalogues across borders might be not negligible in particular for services featuring some catalogue's limitations in selected countries (such as for the iTunes store analysed in the VVA et al (2020) Study). However, it is not clear whether this would actually increase the effective variety of individual titles available to consumers, in view of the already

<sup>64</sup> Estimates in VVA et al (2020) Study in the range of 100,000 per year were provided by different stakeholders, although not subject to a specific modelling/verification.

<sup>65</sup> Representing however a substantial part of European markets, as they include France, Germany and Spain, in addition to Belgium, Slovenia and Greece.

<sup>66</sup> As recalled by VVA et al (2020) Study, the cultural policy objective of book fixed price policies is the preservation of smaller booksellers as an important outlet for smaller publishers and hence for a more diversified title offer.

extensive availability of titles through different providers/versions of bookstores (including the global coverage of the catalogue accessible through the US Amazon store) and reported use of non-exclusive copyright licenses.

- Price variations reported for pan-EU platforms (Apple and Amazon) are, on average, limited.
- The relatively high importance of language, together with relatively lower price sensitivity vis-à-vis foreign services, more limited price differentials and non-exclusivity of catalogues (available through different providers already at national level), supports the finding that price and quantity effects could be limited in case of extension of the Regulation (for the pan-EU platform analysed in the VVA et al (2020) Study this would amount to a 4% decrease of prices and 2% increase of quantities sold, and overall negative revenues effect up to 2%). Depending on policy options as regards fixed-price legislation at national level, these effects could be even more limited.
- Possible increases in quantity sold may be even lower for smaller national booksellers with much smaller market shares and margin from sales of e-books, but higher relative operating costs for cross-border sales.
- Given the coexistence of very different market players (pan-EU players alongside national booksellers), the compliance costs triggered by cross-border sales could actually have very different effects on these market players.
- The general welfare effects of extension appear ambiguous and in any case limited. The possible impact of compliance costs in case of cross-border sales however may be more skewed against smaller/national booksellers.

#### *3.1.4. Impact analysis for games/software*

##### *3.1.4.1. General description of sector*

Under the broad definition of software and games, two main business models are adopted by developers, publishers and digital distributors to make content available across the EU. Either they directly sell via an online store on the website of the publisher / or on portals or digital distribution platforms which aggregate software and/or games (e.g. Softpedia or Softonic for desktop applications, Steam for PC games, Microsoft Store or PlayStation Store for console games, and Google Play or Apple AppStore for applications dedicated to smartphones and tablets).

In the software industry, there are different types of business models, with corresponding different revenues sources that characterise the relationships between the provider and the consumer<sup>67</sup>:

- For free, as in the case of freeware<sup>68</sup> or open source<sup>69</sup> software;
- Upon an individual purchase which, in general, gives permission to authorise a certain number of devices on which the customer can install and use the software;
- Upon a monthly or annual fee (e.g. this is the case of software like antivirus tools and VPNs); and
- Upon a “freemium” solution (or in-app purchase): similar to the freemium business model mentioned above regarding music. Software developers often offer such software (either for desktop or for mobile) in a free version that has limited features and can be upgraded via future purchases.

In the gaming industry, which presents similar business models to the ones described above for software, digitalisation is the most important driver of growth. After smartphones became more widely available on the market, the gaming industry experienced another revolution, which completely changed the way people played games. Mobile technology has rapidly developed since and led to an explosion of mobile gaming, which, since 2017, has overtaken gaming revenues from PC and consoles, as demonstrated in the Statista 2019 data on revenues shares in the video games industry (Figure 12).

*Figure 12 - Digital video games revenues in the EU27\_2020: market shares of the different categories of contents*

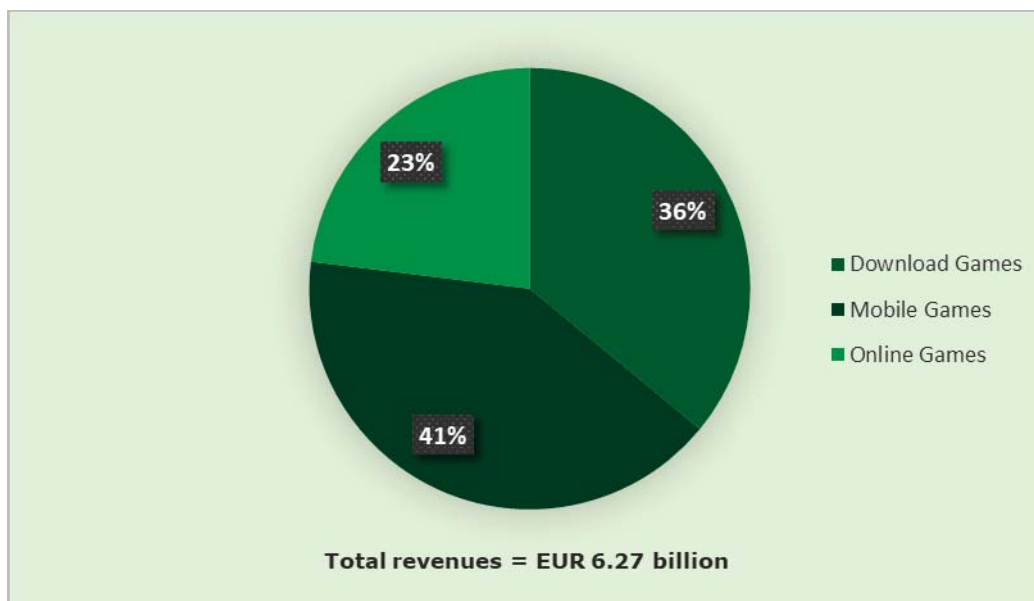
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<sup>67</sup> See for instance 2014 GigaOM’s study commissioned by the European Commission on the EU market for mobile apps, summarises the main commercial strategies adopted by independent game developers in Europe.

<sup>68</sup> Generally, freeware refers to software that is available without demanding a fee for usage and it can be distributed as a fully operational program for an unlimited period. The rights of owning such a software usually belongs wholly to its developer.

<sup>69</sup> Open source refers to a piece of software with a publicly accessible source code under a license that gives users the right to use the software as they please, including studying, changing and distributing it.





Source: VVA et al (2020) based on Statista data

If a game is available as an app for smartphones and tablets, the content is usually made available through app stores such as the Google Play Store or the App Store. Digital titles for PC are made available via online stores and digital distribution platforms such as Steam, Uplay, GOG.COM or Epic Games Store, set up originally by game companies (predominantly the biggest industry players) to distribute their own games, but also often allowing third-parties to sell their games for a percentage in revenues<sup>70</sup>. Video games for consoles are available online through the stores run by the console manufacturers (e.g. PlayStation Store). Moreover, both free games and freemium versions can be played on social media. Traditional game companies (e.g. Electronic Arts with its “EA Access” or Microsoft with its XBOX Live and XBOX Game Pass) are also experimenting with subscription services, including offering access to older titles in their back catalogues. Several start-ups and more established firms active in the games sector also offer game subscription services, including services based on streaming technology, where pre-installation is no longer required to play games. In general, however, the transaction-based business models appear dominant.

With regard to the licensing practices, the key contractual relationship in these sectors exists between the developers and distributors. This agreement can be characterised in the same way as the agreement between artists and music publishers described above. In

<sup>70</sup> E.g. large companies like Ubisoft, the French developer of successful franchises like Assassin’s Creed, run their own online store. In 2013 Ubisoft announced that they would also open the platform to other publishers. Source: <https://www.polygon.com/2013/2/19/4001836/ubisoft-uplay-shop-third-party-games-ea-origin-chris-early-interview>. To date, they also sell video games from third-party companies.

other words, the development of games/software is done in-house by the publisher (i.e. via internal staff of developers) or by external independent developers who then assign their copyrights to software/game publishers. There is no set formula on what rights the developer will grant which will vary depending on a number of factors, including which party provides the financing and game concept.<sup>71</sup> In the majority of cases, licensing agreements are based on lump sum payments where the publishers buy all the rights from the developer. Publishers may also combine software and games from many developers in their portfolios. The publishers then make deals with online distributors on a non-exclusive and usually global basis.

Online software and digital games were not covered by DG Competition's Sector Inquiry<sup>72</sup>, so no quantitative information is available on the territorial scope of licensing agreements in this sector.

#### *3.1.4.2. Availability, Accessibility, Price differences*

The VVA et al. (2020) Study analysed the cross-border overlap of catalogues (indicating the availability of piece of content) through different platforms representative of the abovementioned different distribution models and segmentation of markets (in particular for video games, articulated according to different devices used). In this context the video games platforms Steam (for PC games) and PSN (for console games) have been analysed, as well as PlayStore app store for mobile apps (not limited to games) in general<sup>73</sup>. Moreover, given the still dominant transaction-based business model and in view of the analysis of the impacts on demand and supply, the analysis of overlap of catalogues was primarily based on the relative importance of the items based on their ratings and/or the number of downloads. This adds to the earlier focus of JRC (2017)<sup>74</sup> on the PSN platform specifically.

The data analysis carried out in the VVA et al (2020) Study indicates that cross-catalogue unavailability is, in general, low for this type of content across all Member States, although with some variations across the different platforms and in view of the different importance of individual item. In particular, with regard to pure overlap of items in the catalogue (regardless of their importance in terms of effective

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<sup>71</sup> World Intellectual Property Organization (2013), *Mastering the Game, Business and Legal Issues for Video Game Developers*, Creative industries – No. 8, p. 33, WIPO publication No 959E.

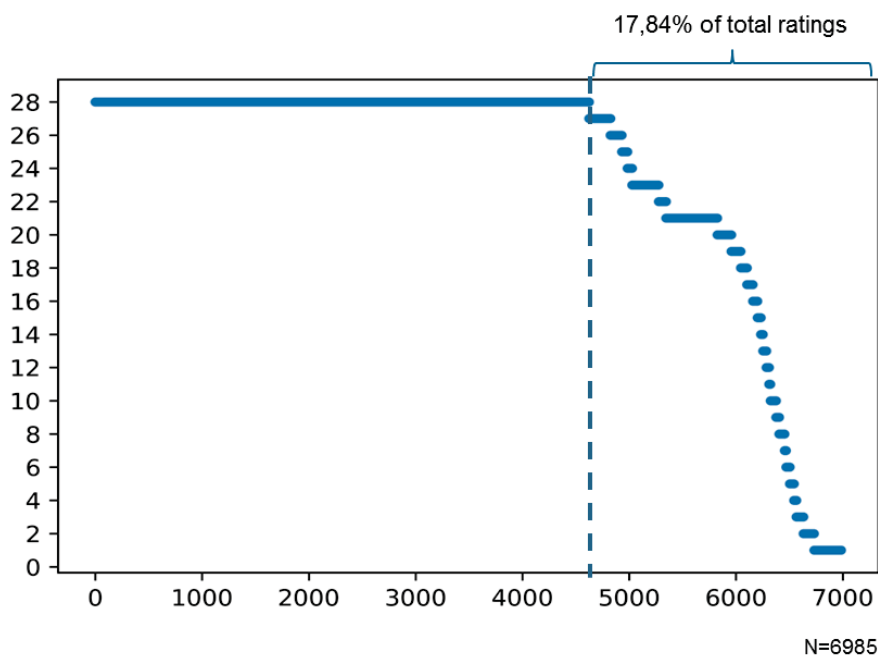
<sup>72</sup> The Sector Inquiry dealt with games in the part concerning "consumer goods" (i.e., copies of video games contained in CD/DVDs).

<sup>73</sup> These platforms also featured as among the most popular across different markets according to Statista findings reported in VVA et al (2020) Study, although not always the most popular (Amazon being the most popular in IT and DE).

<sup>74</sup> Georgios Alaveras & Estrella Gomez-Herrera & Bertin Martens, 2017. "Geo-blocking of Non Audiovisual Digital Media Content in the EU Digital Single Market," JRC Working Papers on Digital Economy 2017-02, Joint Research Centre.

downloads/rating), the degree of unavailability of titles across all Member States ranges between 34% (PSN)<sup>75</sup> to approx. 7% (Steam)<sup>76</sup>. When weighting the result for measures of importance of items, the catalogue gap gets further narrowed ranging from for 18% (PSN) to 3% (Steam) of ratings or downloads. This indicates that lack of availability in all Member States mainly affects the high (or very high, in case of very large catalogue with millions of titles and a large concentration of downloads as in Playstore) end of the tail, i.e. items with generally low demand<sup>77</sup>.

Figure 13: Availability of the PSN catalogue



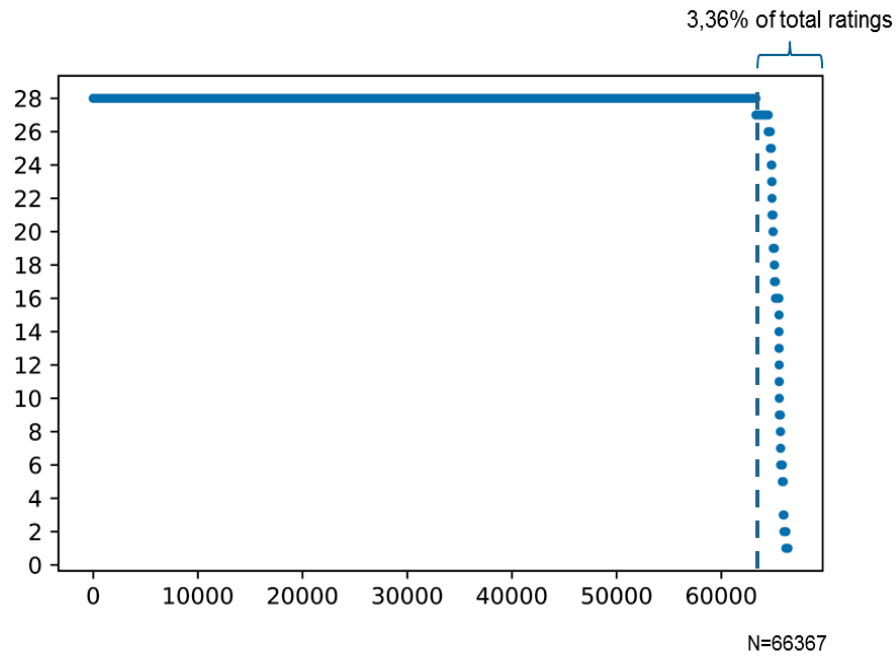
Source: VVA et al (2020)

Figure 14: Availability of the Steam catalogue

<sup>75</sup> With a significant interval of common availability between 20 and 21 countries, i.e. catalogue gaps with 20 MS is halved.

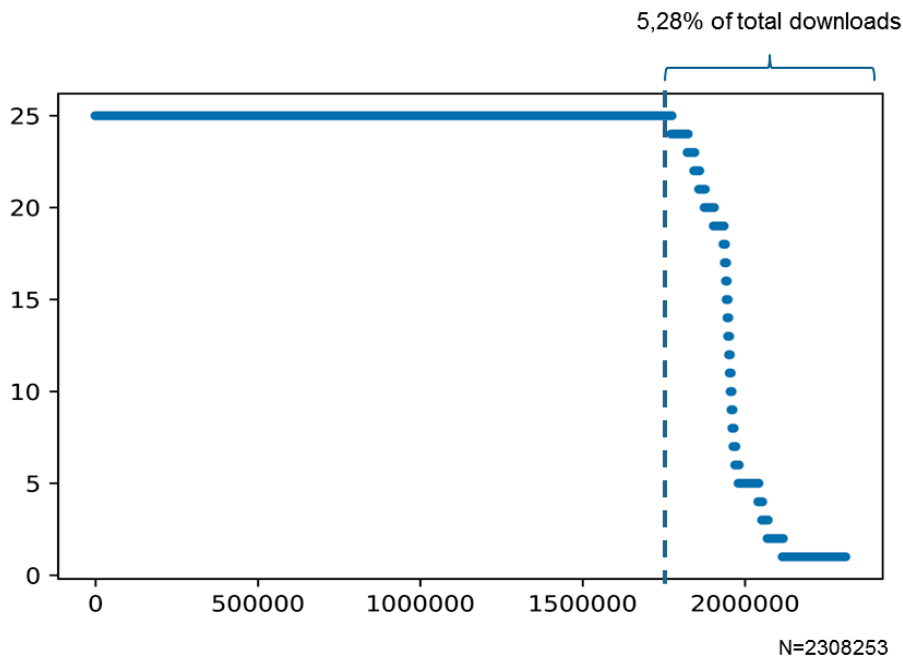
<sup>76</sup> JRC(2017) identified a slightly higher availability ratio, between 80 and 90% of titles, across a (smaller) sample of PS3 and PS4 games. Taking into account the time and also the size of the sample, the results seem consistent (taking also into account that lack of availability actually seem to affect more items in the very long end of the distribution tail).

<sup>77</sup> This seems also in line with the markedly lower perception of lack of availability of titles on the basis of existing subscriptions, in particular for software, as compared to other digital content and games in particular.



Source: VVA et al (2020)

Figure 15: Availability of the Google Playstore catalogue



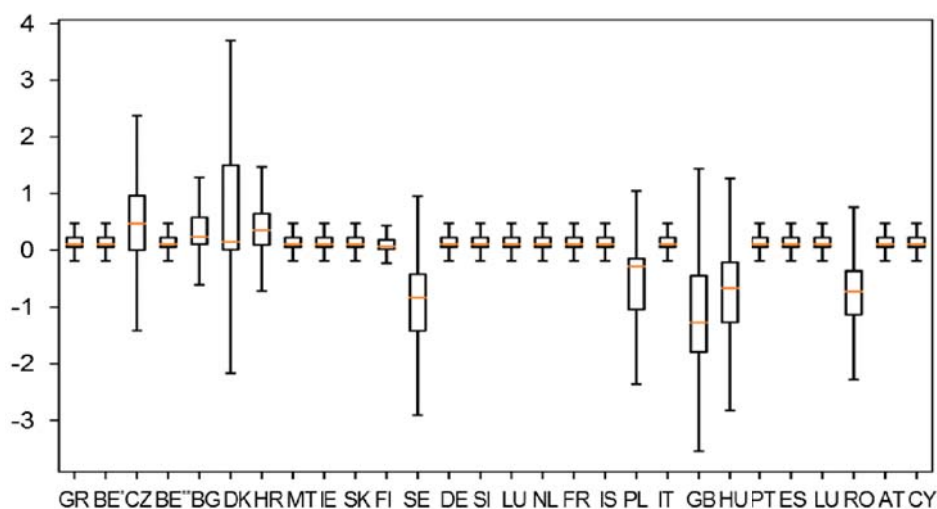
Source: VVA et al (2020)

As regards accessibility, in general app stores allow users to access (even if temporarily abroad) the version of the store of their own country of residence chosen at the time of registration. However, obstacles in switching to a different catalogue available only on

foreign versions of the catalogues are reported<sup>78</sup>. A larger mystery shopping exercise concerning a sample of distributors of software and games carried out in the context of the VVA et al (2020) Study confirms that barriers to cross-border access mainly affect the registration phase, triggering changes in availability of catalogues and eventually prices, in 1/3 of the sample<sup>79</sup>.

With regard to price differences, the analysis of the three platforms shows different price patterns, with very limited price variations for Steam (apart from larger variations in countries whose currency is not the Euro), slightly higher for PSN, but still apparently anchored to the currency accepted (as Euro-countries show same prices) and a more random distribution across countries for Playstore (accepting all national non-Euro currencies). Overall, however, the price differences appear limited in absolute terms, supporting also earlier findings from JRC (2017) suggesting that exchange rates and rounding-off prices in other currencies are the main drivers for these price differences.

Figure 16: Descriptive statistics for PSN



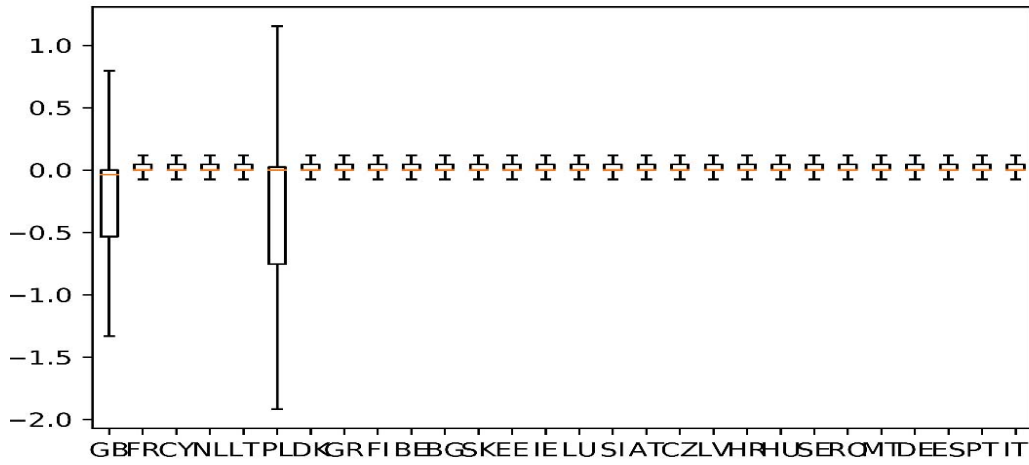
∅ price = EUR 22.14

Source: VVA et al (2020)

<sup>78</sup> For instance, as stated on Google Play’s website: ‘you can only change your Play country once per year. So, if you change your country, you won’t be able to change it back for 1 year.’ <https://support.google.com/googleplay/answer/7431675?hl=en>. Similar restrictions are also reported for Apple Appstore. This is indeed a more general issue that may affect also the mere accessibility of the interface, which may be subject to further scrutiny already under current applicable geo-blocking rules.

<sup>79</sup> At the same time the perception of these obstacles appears lower than in other sectors: the Flash EB (2019) indicates games, together with e-books, as the sector where geo-blocking is experienced less often; in particular the lowest number of people trying to access content cross-border reported to be blocked “often” (8%).

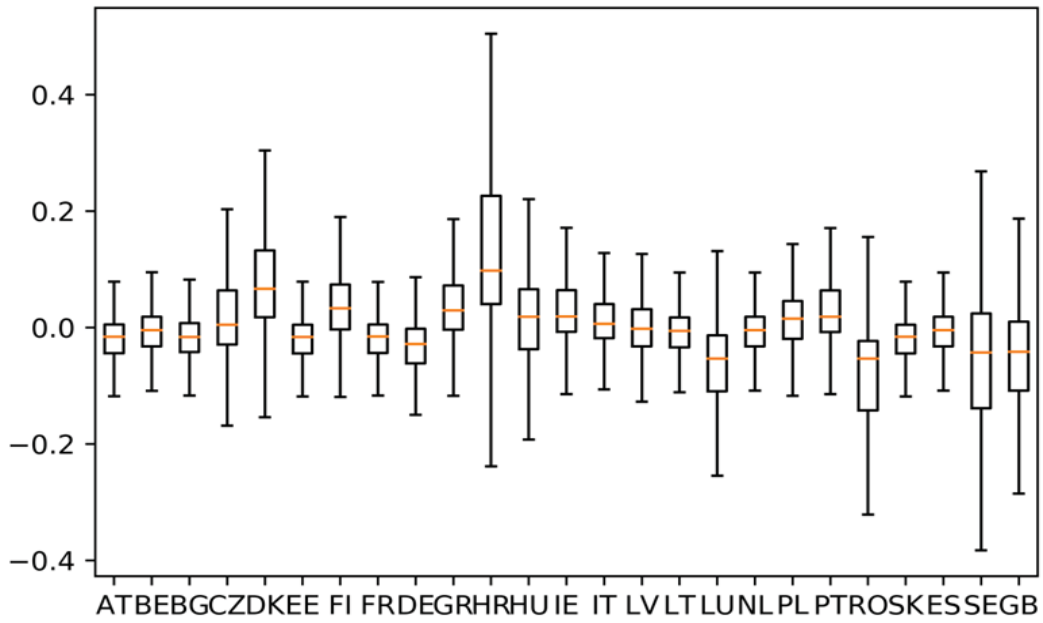
Figure 17: Descriptive statistics for Steam



Ø price = EUR 5.58

Source: VVA et al (2020)

Figure 18: Descriptive statistics for Google Play Store



Ø price = EUR 6.85

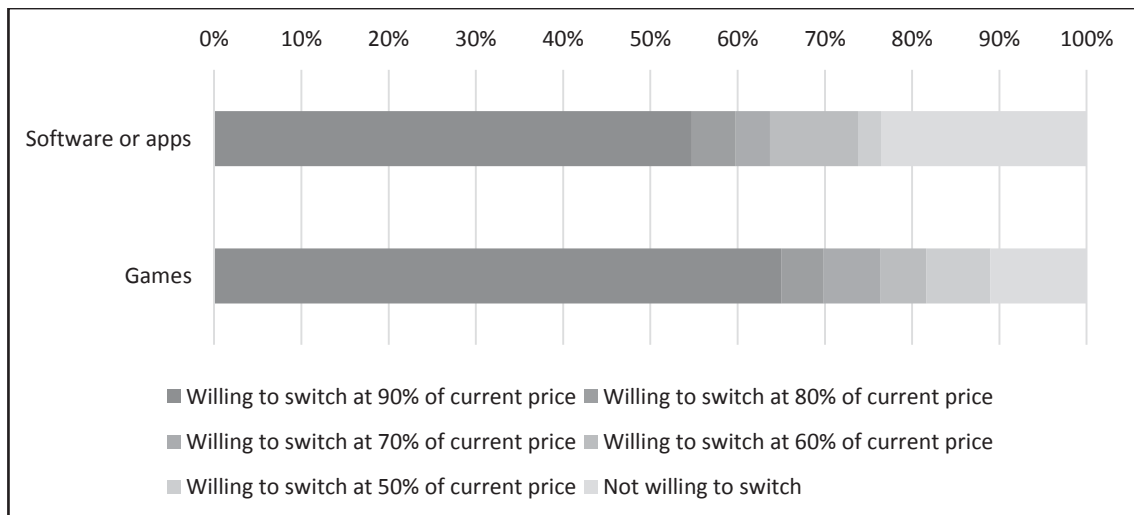
Source: VVA et al (2020)

### 3.1.4.3. Demand of consumers

Cross-border demand for video games and, even more, software is among the lowest across different digital content categories. This is confirmed both in the large survey carried out in the (2019) Flash EB (4% of internet users tried to access games cross-border; only demand for e-books and sport content is lower<sup>80</sup>) and in the consumer survey in VVA et al (2020) Study, although differences exist between software and games. Software ranks last but one, with 17% of surveyed respondents having tried to access cross-border content, although interest for cross-border access to games is higher at 21%.

Differences between games and software demand is also reported with regard to price sensitivity and switching behaviour. Demand for software appears less price sensitive, is more linked to the availability of localised content<sup>81</sup> and with higher importance of language accessibility than games, possibly showing that software products offer very specific benefits, unlike games that provide a more general entertainment value.

Figure 19 - Consumers' willingness to switch providers or service if the content and language options are broadly the same as for their current subscription(s)



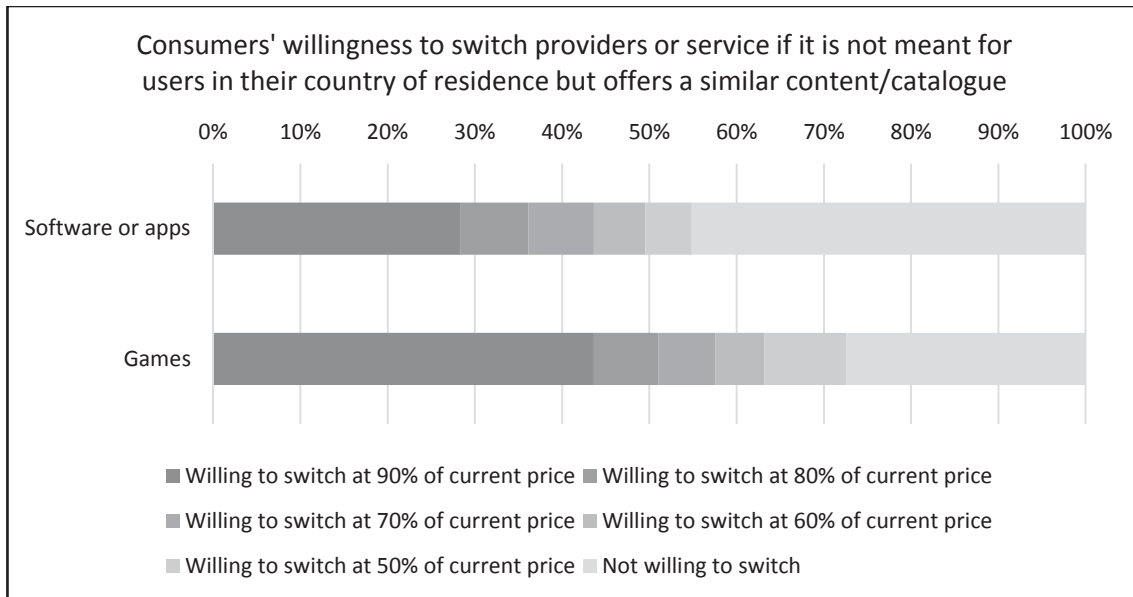
Source: Q20 Would you switch to another service provider or service, offering you broadly the same content and same language options as your current subscription?

Figure 20- Consumers' willingness to switch providers or service if it is not meant for users in their country of residence but offers a similar content/catalogue

<sup>80</sup> Potential interest to access is signalled by 9% of those that did not try to access and did not mention they are not interested, last among digital content services.

<sup>81</sup> Not necessarily local content, as willingness to switch in this case does not change, but rather content suited for a specific local market.





Source: Q29 Would you switch to another service provider or service NOT meant for users in your country of residence BUT offering you similar content/catalogue?

On the basis of these findings, therefore, the VVA et al (2020) Study assumes that for the software sector price and language accessibility are both important factors. However, for the gaming sector price appears to play a key role in driving switching behaviour whereas language accessibility, while important, is less important. Local content is important to a limited proportion of consumers in both sectors (4% for software and 7% for games)

#### 3.1.4.4. Possible effects

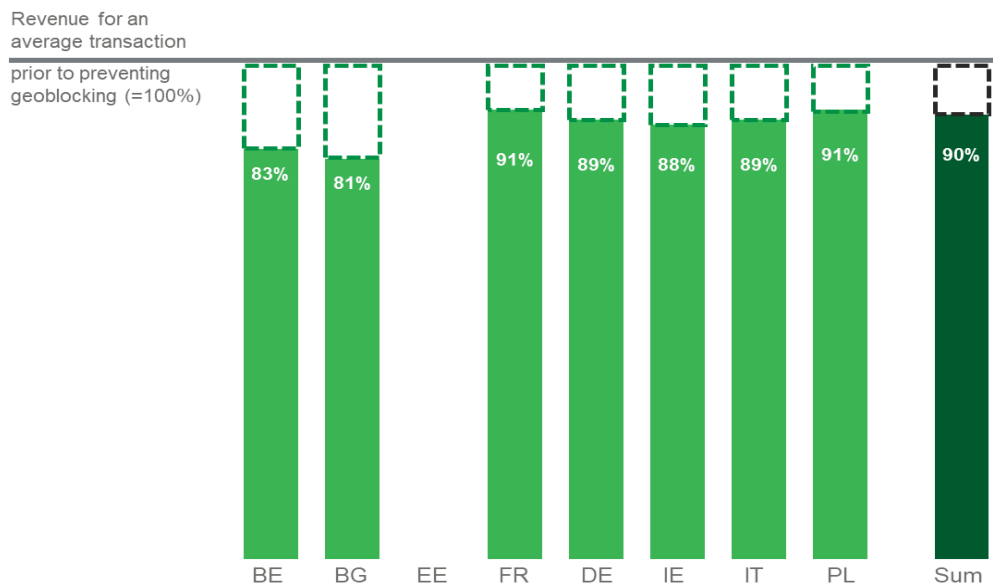
The VVA et al (2020) Study modelled possible effects of extension on some transaction-based business models for games specifically (Steam and PSN) as well as for Android mobile apps more generally (including games as well as software in general). The analysis focused on price-driven effects, as the large cross-country availability (in particular if weighted for importance) would suggest limited gains in terms of variety, in particular for Steam and, to a higher extent, PlayStore and above all PSN platforms<sup>82</sup>. Overall, the VVA et al (2020) Study identifies a 7% reduction of revenues for the PSN platform, taking into account possible price arbitrage but also new consumers. For Steam, there is no measurable impact on revenues nor on overall welfare due to price arbitrage<sup>83</sup>. For Google Play Store, the reduction is around 2%.

<sup>82</sup> This is in line also with results reported by JRC(2017) as regards PSN cross-country availability.

<sup>83</sup> As reported by VVA et al, since the Steam store already does not differentiate between Member States and geo-blocking has been voluntarily lifted in the past, it is not expected any effect from an extension of the Geo-blocking Regulation in this case, including with regard to transfer or reduction in deadweight loss.

Taking into account the lack of availability of detailed information on the scope of licensing rights, these results are not differentiated in Scenario 1 and 2. These results can thus be considered as upper bounds assuming platforms and/or publishers active on it actually hold pan-EU wide rights for the games/software distributed. This could be in line with more general findings about general licensing practices reported above (based on non-exclusive and usually global basis).

Figure 21: Price-impact on revenues – PlayStation Network



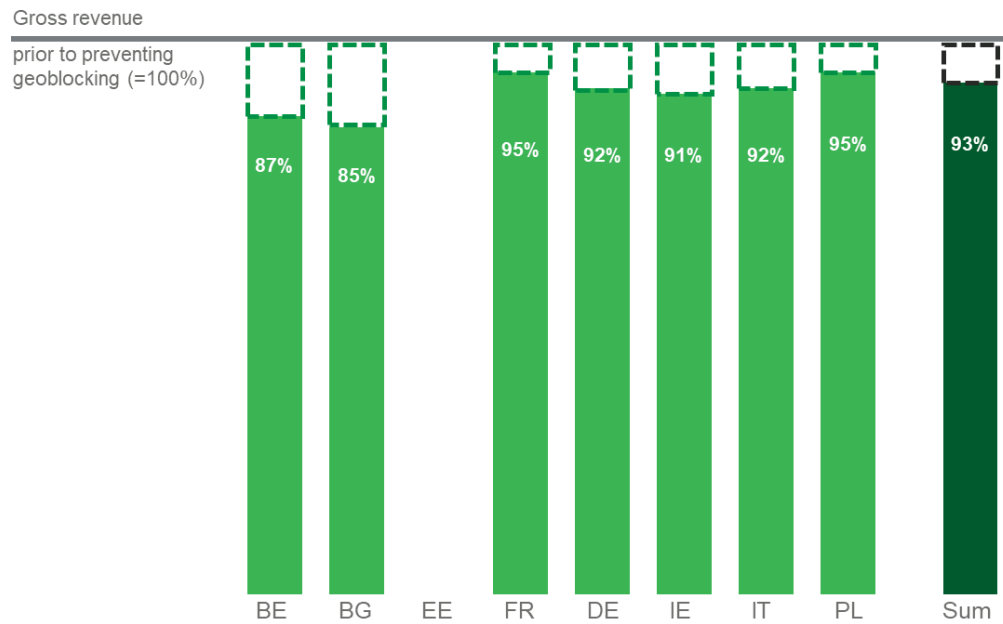
Source: VVA et al (2020)

Figure 22: Accessibility-impact on user base – PlayStation Network



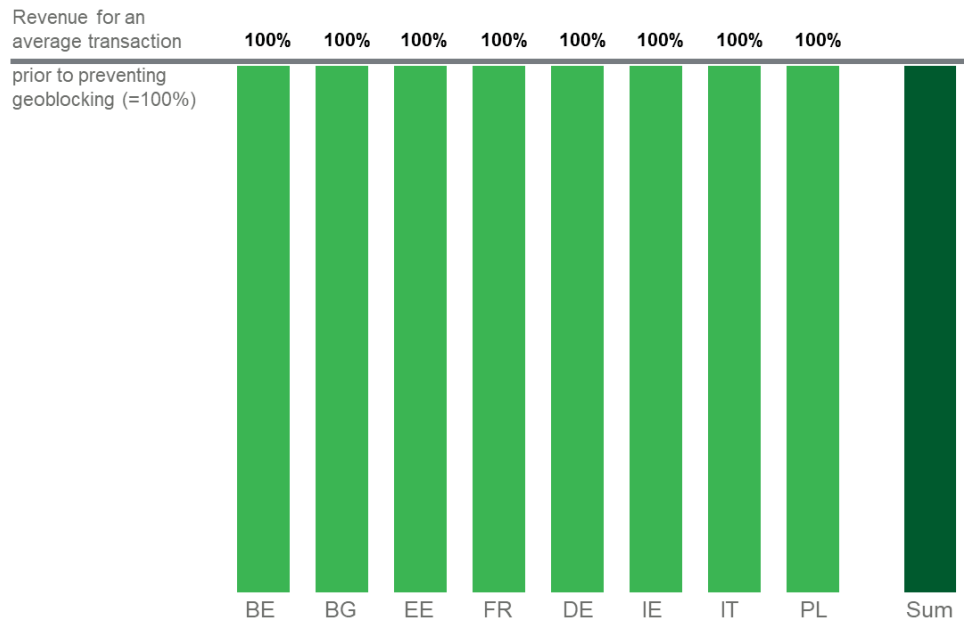
Source: VVA et al (2020)

Figure 23: Overall impact on revenues – PlayStation Network



Source: VVA et al (2020)

Figure 24: Price-impact on revenues – Steam Store



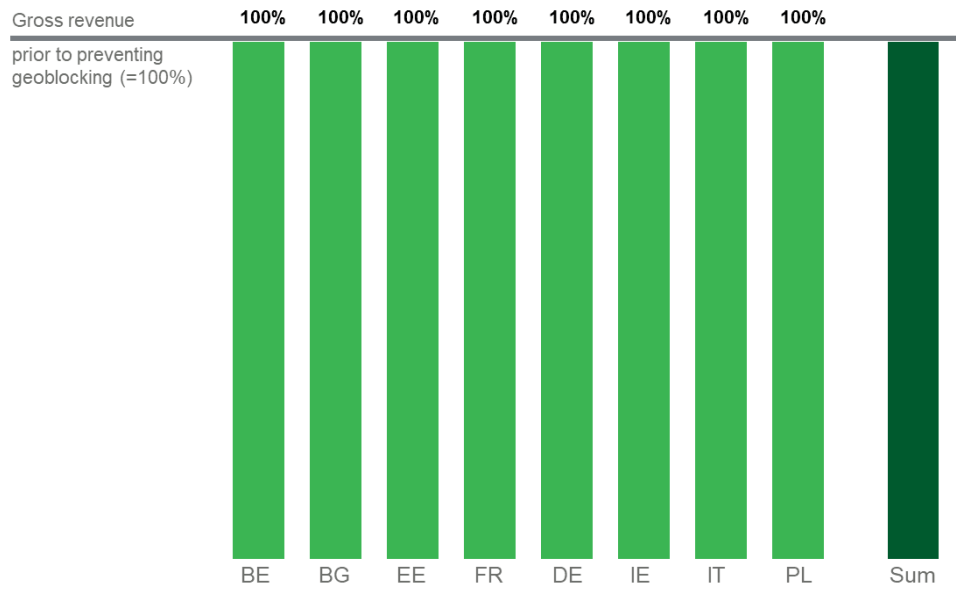
Source: VVA et al (2020)

Figure 25: Accessibility-impact on user base – Steam Store



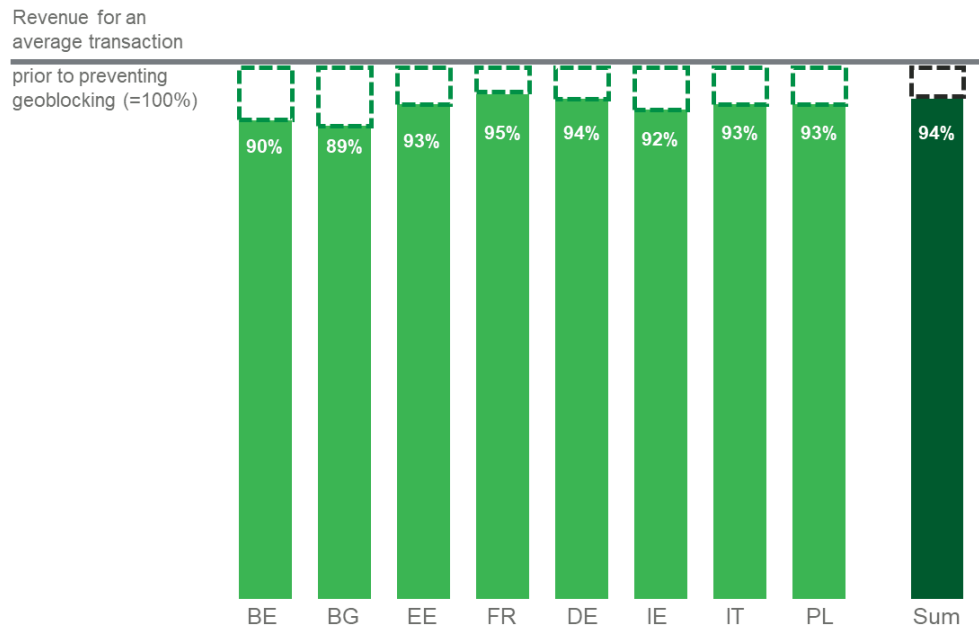
Source: VVA et al (2020)

Figure 26: Overall impact on revenues – Steam Store



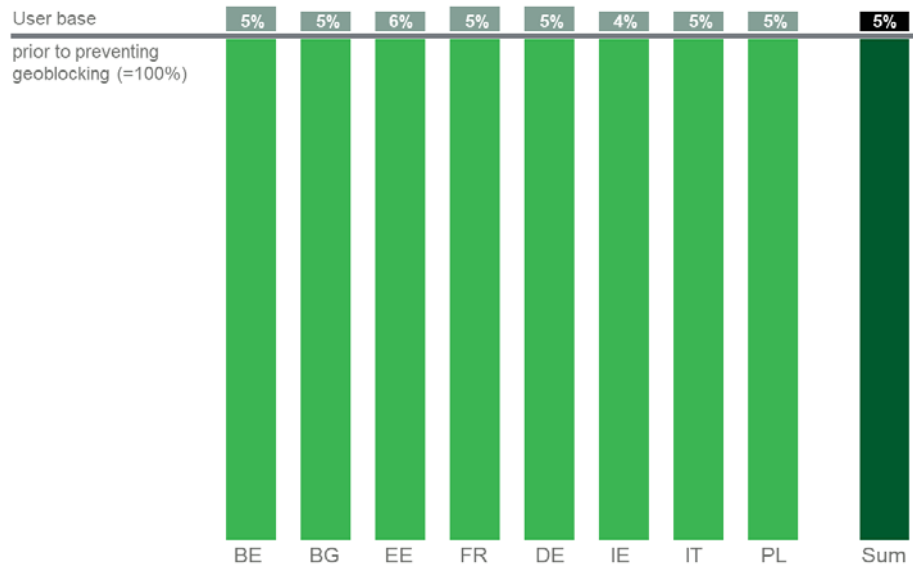
Source: VVA et al (2020)

Figure 27: Price-impact on revenues – Google Play store



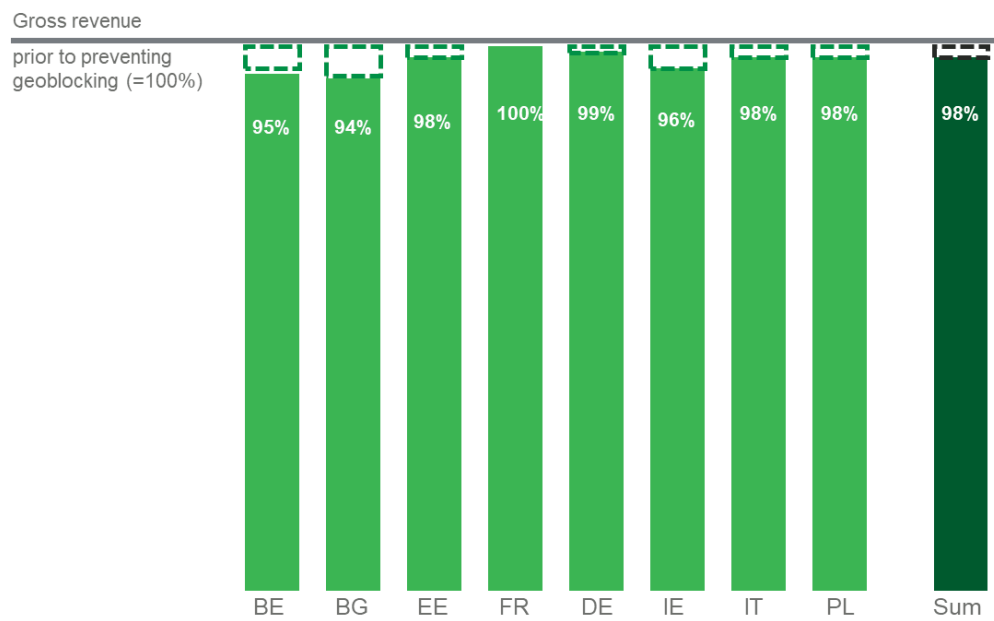
Source: VVA et al (2020)

Figure 28: Accessibility-impact on user base – Google Play store



Source: VVA et al (2020)

Figure 29: Overall impact on revenues – Google Play store



Source: VVA et al (2020)

The reduction in prices and the slight increase in quantities sold modelled in VVA et al (2020) Study would also suggest slight positive overall welfare impacts in terms of reduction of deadweight loss (-3,6 and -4,7% for PSN and PlayStore respectively), coupled with a corresponding welfare transfer from providers to consumers ranging between 10 and 6% for these platforms. These upper bounds however may also need to take into account the non-negligible differences in demand drivers for software and games (the former being less price sensitive and more localised, such that broader cross-border access may have lower price-driven impacts), both provided through PlayStore.

When coming to possible administrative costs, feedback from stakeholders surveyed in the VVA et al (2020) Study highlighted some possible higher compliance costs (in particular for smaller publisher/distributors not selling exclusively through larger platforms) in order to address currency variations, transparency of prices and possible sector-specific information requirements (e.g. on age rating limitations) applicable in different countries<sup>84</sup>.

#### 3.1.4.5. Findings

The main findings on the possible effects of an extension of the Regulation to the games and software sectors are the following:

- Demand for cross-border access to games and, above all, software appears low, in particular compared to other content services.
- On-line distribution takes place both through platforms or via direct sales through publishers' websites, with different degree of choice also depending on the kind of device at stake (e.g. distribution of PC games has different features than distribution for mobile apps and for consoles' games).
- Focusing on specific platforms, representative of different products/devices, following any potential extension of the Regulation the potential increase of accessible items of individual catalogues across all Member States may be non-negligible in particular for the PSN platform in view of some higher catalogue gaps reported by both JRC (2017) and the VVA et al (2020) Study, (approx. 34% of items, 18% of ratings). However for all platforms considered in the VVA et al (2020) Study, it should be noted that availability gaps mainly affect titles with low demand or rating.

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<sup>84</sup> For example, Germany has a specific Regulation for information that has to be available on traders' websites ("Imprint Regulation"), in France epilepsy warnings are required, while the age rating system for video games (Pan European Game Information - PEGI<sup>84</sup>) does not apply in Germany where a different age rating system (*Unterhaltungssoftware Selbstkontrolle* - USK<sup>84</sup>) is used for the protection of minors.

- Price variations reported for pan-EU platforms (PSN, Steam and PlayStore) are, on average, limited (almost absent for Steam) and often driven by currency changes/round-up of prices.
- Overall, price driven effects for these platforms would show potential reduction on revenues for developers/publishers ranging from 7 to 2% for PSN and PlayStore and corresponding possible increase of quantities sold (between 4 and 5%), which could eventually trigger some limited but positive general welfare effects in the range of 3/4%. Overall differences in scenario 1 and 2 are probably limited in view of the general licensing practices (with publishers holding often global and non-exclusive rights).
- Demand for software shows a relatively higher importance of language/localised (although not local) content, together with relatively lower price sensitivity vis-à-vis foreign services. While the analysis in VVA et al (2020) Study does not account for such a difference, this may suggest that price impacts for software may be generally lower than for games.
- These effects, moreover, do not take into account the possible wider impacts on other smaller and/or national distributors (in particular active for distribution to PC and some consoles), with smaller market position, but higher relative operating costs for cross-border sales. Also, the impact on some games-specific transparency requirements (such as age ratings) may need to be further assessed. Finally, these effects do not take into account possible dynamic effects on investments in production due to reduction of revenues.
- The overall static welfare effects of extension appear potentially positive. The possible impact of compliance costs in case of cross-border sales however may be more skewed against smaller/national distributors.

### 3.1.5. *Impact analysis for AV*

#### 3.1.5.1. *General description of sector*

The audiovisual market is the largest sector among the copyright-protected digital content analysed in the review, experiencing an average growth of 1.7% in the past years for which data is available<sup>85</sup>.

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<sup>85</sup> According to data from the European Audiovisual Observatory, the total audiovisual market in the European Union grew by 1.5% in 2017, to EUR 111.6 billion., and by further 1,7% in 2018. The annual average growth rate (in nominal terms) between 2012 and 2018 was 1.9(1,2% excluding all on-demand revenues) European Audiovisual Observatory (2019) and (2020): Yearbook 2018/2019 and 2019/2020. Key Trends. Available respectively at: <https://rm.coe.int/yearbook-keytrends-2018-2019-en/1680938f8e>.



Within the overall sector, and with specific focus on electronically supplied services, paid Video on Demand (VoD, including both pay-per-item and Subscription VoD services) has grown faster than the total market, with a growth rate of 34% between 2016 and 2017, and 44% on average since 2012. In 2017, on-demand services and programmes accounted for 77% of total market revenue growth, with SVoD services accounting for the largest share (67%)<sup>86</sup>.

Considering the various business models, audiovisual content available online in the European market can be categorised into four main business models:

1. *Free-to-air and pay-TV catch up services*: several public and commercial broadcasters, which air for free or on an FTA or pay-TV basis have their own online service accessible from laptops, tablets and smartphones (either via web browsers or specific apps). These platforms may show live channels and on-demand content (i.e. a catch-up service which includes replays of programmes aired live in the previous days);
2. *TVoD – Transactional Video on Demand or pay-per-view*: represents rentals as a single transaction which usually allows time-limited access to premium video content (e.g. films, series, sports events, etc.). TVoD services act as a digital store where consumers can pay for their purchase or rental. TVoD services are widely used by many pay-TV operators, broadcasters, telecommunication's operators, retail chains, online retailers and others, mostly to offer premium content such as films, series or sports events<sup>87</sup>.
3. *SVoD – Subscription Video on Demand or streaming*: these services offer unlimited access to a broad selection of different titles from various genres on a

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and [https://www.obs.coe.int/en/web/observatoire/home/-/asset\\_publisher/9iKCxBYgiO6S/content/understand-the-audiovisual-sector-and-trends-at-work-before-covid-19-to-better-anticipate-its-impact-?inheritRedirect=false](https://www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/9iKCxBYgiO6S/content/understand-the-audiovisual-sector-and-trends-at-work-before-covid-19-to-better-anticipate-its-impact-?inheritRedirect=false). The total audiovisual market includes audiovisual services (e.g. free television, linear television, pay-TV and on-demand subscription services such as SVoD) and the direct sale or renting to the consumer of audiovisual programmes (e.g. cinema, box-office, physical and digital home videos). This broader definition of the audiovisual market explains the larger numbers compared to Eurostat data. As noted by the European Audiovisual Observatory, however, the COVID-19 crisis had both an immediate severe impact but also a likely deferred effect and it may be the source of a more profound systemic crisis requiring structural support measures, currently being monitored by EAO tracker tool, see <https://rm.coe.int/the-european-audiovisual-industry-in-the-time-of-covid-19/16809ec9cb>.

<sup>86</sup> European Audiovisual Observatory (2019): Yearbook 2018/2019. Key Trends. Available at: <https://rm.coe.int/yearbook-keytrends-2018-2019-en/1680938f8e>. The 2018 data confirms this accelerating trend, with SVOD accounting for more than 82% of annual growth of the entire sector.

<sup>87</sup> European Audiovisual Observatory (2016d) “VoD, platforms and OTT: which promotion obligations for European works?”. pp. 17-18. Available at: <http://www.obs.coe.int/documents/205595/8351541/IRIS+plus+2016-3+VOD%2C%20platforms+and+OTT+which+promotion+obligations+for+European+works.pdf/417220bb-eed3-4d82-94ce-da818a447ae7>

subscription-fee basis. Through this method, premium content such as films, series and sports events can be streamed on various devices. There are several large global SVoD platforms, but there are many other players as well, including initiatives on a smaller scale active on one or a few national markets.

4. *Electronic-Sell-Through (EST) or download to own*: allows users to purchase unlimited usage rights to a specific video file, accessible through both cloud-based and offline storage. Through EST, the video content can be purchased in a one-time transaction and remains permanently accessible after the purchase.

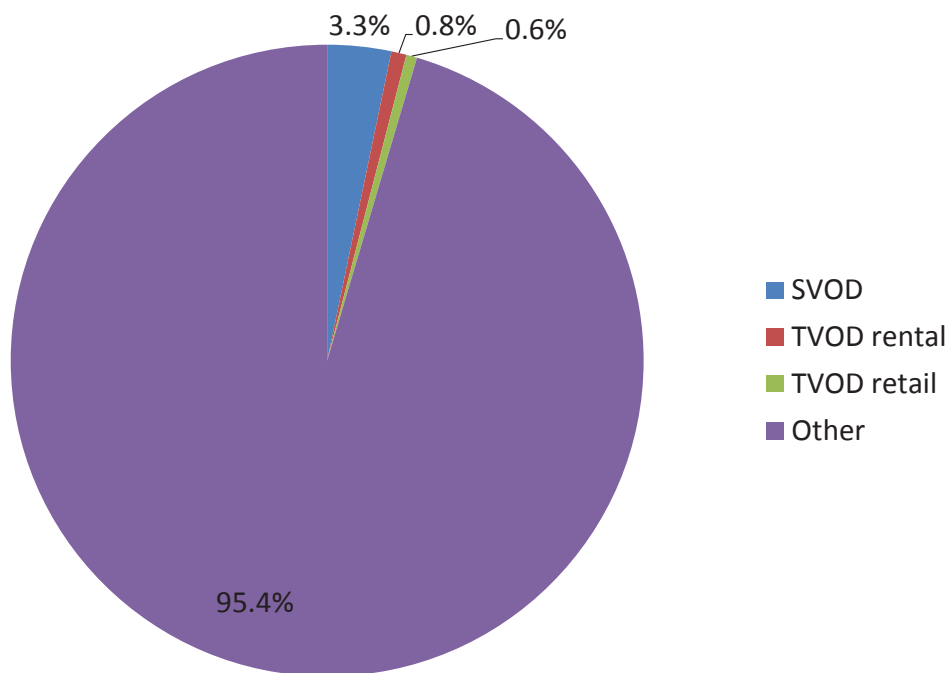
However, paid on-line AV services overall still represent only a fraction of the overall AV market. For instance, the 2017<sup>88</sup> European revenues from end-users for audiovisual services is estimated to have been some EUR 112 billion, of which EUR 3,649 million was SVoD, EUR 866 million was TVoD rental, and EUR 617 million was TVoD retail. Within on-line services, however, the role of SVoD is predominant, as shown by the elaboration carried out by VVA et al (2020) Study, see Figure 30<sup>89</sup>.

*Figure 30: SVoD and TVoD revenues as a percentage of European audiovisual sector revenues from end-users (EU28), 2017*

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<sup>88</sup> The 2018 figures are aligned, including with extrapolations included in the following paragraphs: over overall EUR 114 bn for the entire AV market, approx. 5bil are represented by SVOD revenues, European Audiovisual Observatory (2020), “Yearbook 2019/2020: Key Trends”, page 37.

<sup>89</sup> European Audiovisual Observatory (2019), “Yearbook 2018/2019: Key Trends”, pp. 6 and 51. The European Audiovisual Observatory defines sector revenues as comprising audiovisual services (e.g. free television, linear television, pay-TV and on-demand subscription services such as SVoD) and the direct sale or renting to the consumer of audiovisual programmes (e.g. cinema, box-office, physical and digital home videos).



Source: European Audiovisual Laboratory (2019), "Yearbook 2018/2019: Key Trends", Bruegel calculations.

The weight of on-line services on AV distribution (and paid services in particular) is however more relevant, with a fast past and projected future growth. This is shown by the share of end-user market revenues by the European Audiovisual Observatory (EAO) Figure 31) and the further growth extrapolation carried out in the VVA et al (2020) Study (Figure 32).

Figure 31 - The AV end market in the EU28, by segment (2014-2018)

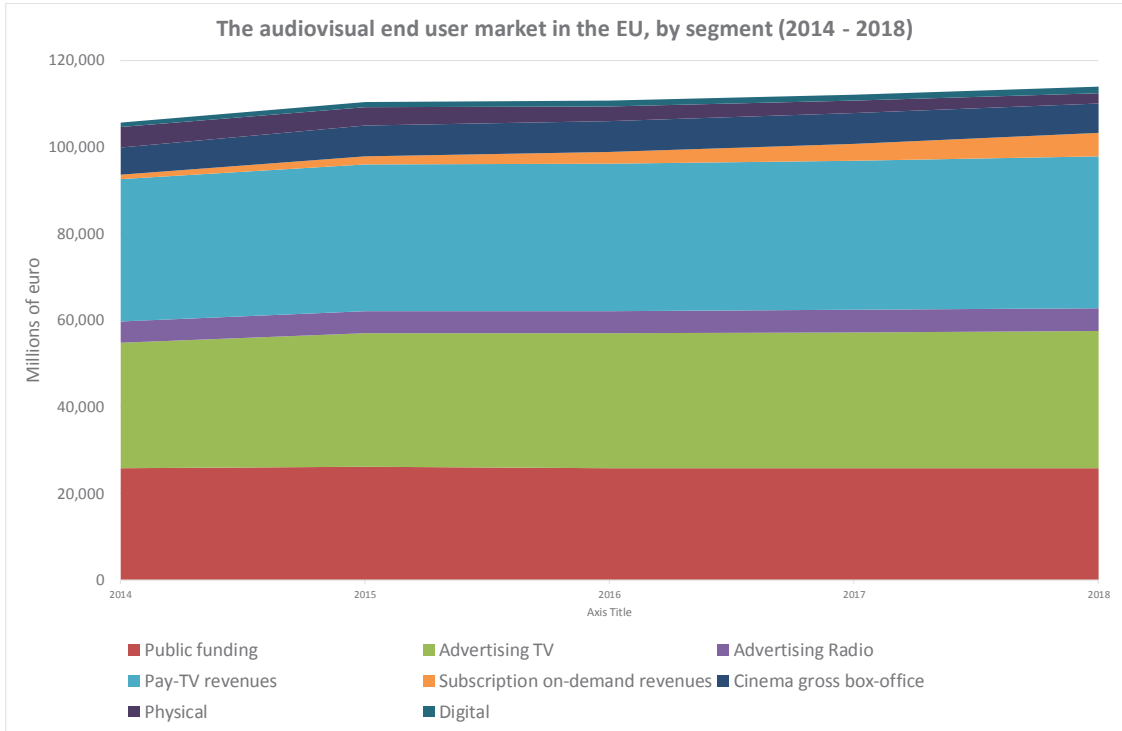
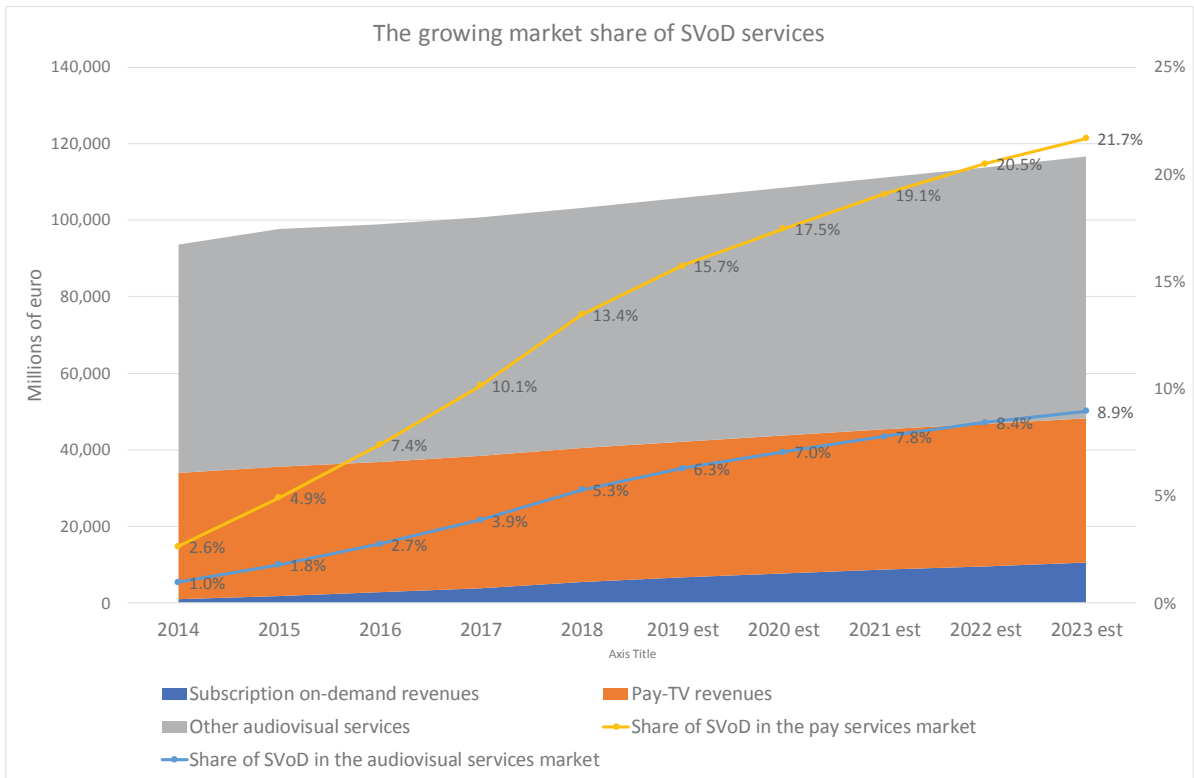


Figure 32 - Market share of SVoD services in EU28 2014-2023 (growth estimates)



Regulatory and licensing characteristics

Compared to other copyright-protected services, the AV sector shows significant regulatory specificities.

First of all, the provision of AV services is subject to sector-specific Regulation at EU level, excluding that its provision may be subject to the general principles of the Services Directive, as well as at national level. In particular at EU level the Audiovisual Media Services Directive 2010/13/EU (AVMSD) applies, which has been recently amended by Directive (EU) 2018/1808 of 14 November 2018 and which must be transposed by 19 September 2020. The AVMSD is based on the country of origin principle as regards Regulation of AV services and introduces minimum harmonisation in areas of general public interest, which is implemented through national regulatory systems<sup>90</sup>. The regulatory framework covers both linear (television) and non-linear (on demand) services such as VoD as well as, from 19 September 2020 onwards, also video-sharing platforms (VSP)<sup>91</sup>. The AVMSD (as amended) defines the rules for promotion of European works, by requiring in particular VoD services to reserve to European works a share of at least 30% of their catalogue and to ensure their prominence. The AVMSD recognises also the option for Member States to impose, in line with cultural policy objectives, proportionate and non-discriminatory financial contribution obligations to cross-border VoDs and broadcasters targeting audiences in their territory<sup>92</sup>. The AVMSD further includes measures recognising that Member States may ensure that broadcasters under their jurisdiction do not exercise exclusive rights in such a way that a substantial proportion of the public is deprived of the possibility to follow events designated by that Member State as being of major importance to society. Under Article 14 of the AVMSD, the Member State that makes use of this possibility needs to draw up a list of such designated events that should be available on free television (by whole or partial live coverage or whole or partial deferred coverage, where appropriate)<sup>93</sup>. The AVMSD, which regulates the functioning of online content services, leaves however standards of copyright and related rights protection unaffected.

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<sup>90</sup> In addition, national-based regulatory systems are also often operating in the AV sector to protect other objective of general interest, such as pluralism of media and child protection.

<sup>91</sup> Considering their lack of editorial control, the AVSMD requires platforms to put in place measures to protect users from certain illegal and harmful audiovisual content, as well as to comply with certain rules concerning audiovisual communications.

<sup>92</sup> Criteria to determine if a service is targeting audiences in a specific Member State are also suggested in Recital 38 of AVMSD, which proposes, as indicators, advertisement or other promotional activities aimed at customers in that territory, the main language of the services, or the existence of content or commercial communications aimed specifically at the audience in the Member State of reception.

<sup>93</sup> Recital 52 of AVMSD states that '[E]vents of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights

Copyright-related aspects are on the other hand the subject matter of other recent measures adopted in the context of the DSM. Of particular interest for AV services, the Online Television and Radio Programmes Directive (Directive (EU) 2019/789 of 17 April 2019, to be transposed in Member States by 7 June 2021) covers ancillary online services offered by a broadcasting organisation that have a clear and subordinate relationship with the broadcasting organisation's broadcasts (e.g. simulcasting and catch-up services). In order to facilitate the clearance of rights for the provision of such online services cross-border, the directive provides for the establishment of the country of origin principle regarding the exercise of copyright and related rights for all radio programmes and for television news and current affairs programmes as well as broadcasters' fully financed own productions. Moreover, although not only limited to AV electronically supplied services but of particular relevance for SVoD, the Portability Regulation (EU) 2017/1128 allows subscribers residing in one Member State to access their paid-for subscriptions to online content services when temporarily present in another Member State.

Another feature characterising in particular (although not exclusively) AV services is the copyright licensing used to raise production financing ahead of actual production. Future distribution rights are often sold on pre-sale basis (before production starts) and often consist of a minimum guarantee in the form of an advance as well as paying the technical and promotional costs (prints and advertisement, s.c. P&A, including, for example, prints, subtitling/dubbing, posters, trailers, marketing campaign, events, etc.). In addition to distribution pre-sales, the rights in other territories are often sold by an international sales agent (so-called world sales) either during the production process (especially for well-known screen-writers, directors, performers, producers) or, more often, after the film is complete (e.g. after a screening during a major festival).

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pertaining to those events. Some relevant indicators were developed with the Contact Committee and refer in particular to:

- A special general resonance within the Member State, and not simply a significance to those who ordinarily follow the sport or activity concerned;
- A generally recognised, distinct cultural importance for the population in the Member State, in particular as a catalyst of cultural identity;
- Involvement of the national team in the event concerned in the context of a competition or tournament of international importance; or
- The event has traditionally been broadcast on free television and has commanded large television audiences.

Following approval by the Commission, which verifies that the measures comply with EU law, the other Member States need to ensure that broadcasters under their jurisdiction do not exercise the exclusive rights in such a way that a substantial proportion of the public in the Member State that designated the events is deprived of the possibility to follow those events. This is a derogation from the fundamental EU Treaty freedom to provide services based on an overriding reason of public interest, which is intended to ensure wide public access to broadcasts of events of major importance for society and to safeguard the right to information.

As reported in the VVA et al (2020) Study (based on input from stakeholders as well as the findings of the 2017 COMP Sector Inquiry on E-Commerce<sup>94</sup>), distribution and showcasing of audiovisual content are largely carried out by local operators, which seek licenses to content on a territory-by-territory basis. Because of this, the ability to sell the rights on a territorial basis plays a very important role in the audiovisual sector within its current set-up.

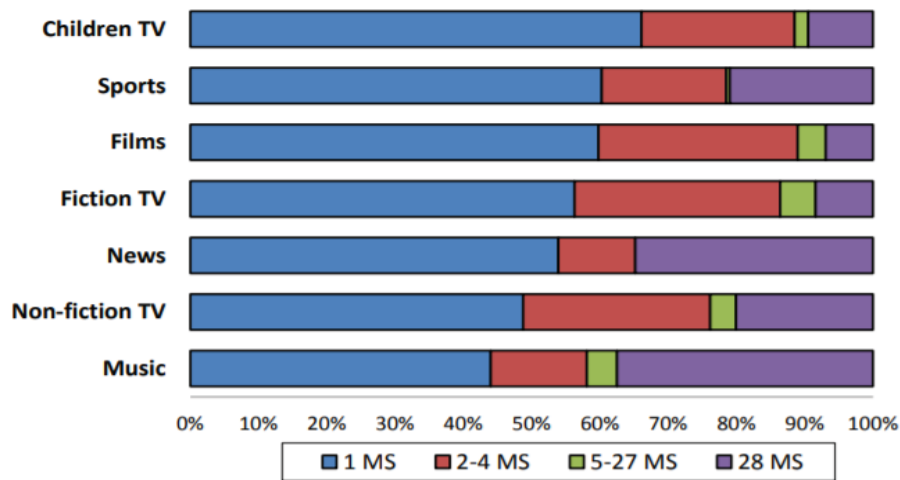
Distributors usually exploit certain rights themselves, such as the theatrical and Home Entertainment (online and offline) rights. They may also choose to sublicense certain other rights (such as VoD and TV) to other operators such as platforms and broadcasters. They may also work with aggregators, especially when dealing with the big platforms. For instance, licensees then sublicense their VoD rights to an aggregator who sub-licenses to the big platforms for a provision fee that is deducted from the distributor's share. In addition, distributors usually only acquire the rights to use the subtitles or dubbing for the geographical territory and particular length of time and form of distribution (different platforms), for which they have acquired the right to distribute the content. Therefore, they do not have the contractual ability to convey the right of use of the subtitles or dubbing to third parties for a use beyond said territory, time period and platform.

This is confirmed by the findings of the 2017 Sector Enquiry, reporting that for all defined content types, 45% or more of the rights covered by the licensing agreements submitted by digital content providers were licensed for the territory of one Member State only and rarely more than for a few countries (often with a similar language).

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<sup>94</sup> European Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry, 2017.

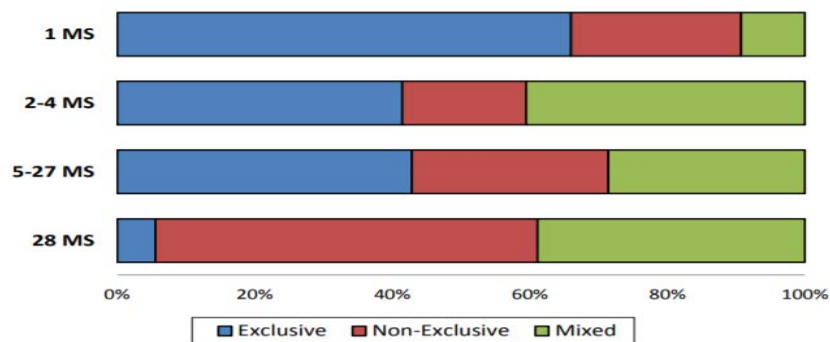
Figure 33: Territorial scope of rights agreements submitted by digital content providers - By product type



Source: DG COMP Sector Inquiry (2017), p. 226.

Moreover (and unlike with music), exclusivity of rights in terms of technology is often used in association with a territorial scope of the licensing agreement. In addition bundling of rights is a widespread practice in the audiovisual sector. The DG COMP Sector Inquiry has found that in 79% of the licensing agreements submitted by digital content providers and in 89% of the agreements submitted by rightholders, online rights are licensed together with rights in other transmission technologies.<sup>95</sup>

Figure 34: Exclusivity in terms of technology and territorial scope of rights agreements submitted by rightholders



Source: DG COMP Sector Inquiry (2017), p. 231.

Within this context, moreover, the peculiarities of sport broadcasting also merit to be mentioned.

<sup>95</sup> European Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament Final report on the E-commerce Sector Inquiry, p. 221.



First of all, sport content (and in particular sport events as such) is not covered by copyright protection under EU law. Moreover, again from a regulatory perspective, the large majority of designated events that should be available on free television pursuant to Article 14 AVMSD are actually sport events. Finally, sport media rights are characterised by short duration, the importance of immediacy, its scarcity and its lack of substitutability.

In practice, therefore, rights to broadcast live sports are negotiated by the organiser of the sports event with media content providers<sup>96</sup>, with a very large share of revenues stemming from rights for live provision. These are also usually sold on a territorially and often exclusive basis to each national operator. The seller usually offers TV rights collectively at a certain minimum price. If several parties are interested in buying these rights, a bidding process (usually blind) is typically started selling the rights to the highest bidder. Rights are often made available to at least two operators, amongst others because of competition reasons. In addition, for major sport competitions and events that also create interest abroad, the rights are sold to operators in other countries on a territorial, and again usually exclusive basis. The rights may be negotiated as a single bundle or may be divided across platforms (e.g. TV, internet, etc.). Key terms in the licensing agreements include the length of the deal, the number of games to be broadcast, the process for selecting particular games for broadcasting, if relevant copyright ownership, and sponsorship rights. Lastly, it should be noted that in addition to live broadcast rights, there is also a market for highlights and bundles of highlights. These highlights are usually sold to the same player(s) who hold the live broadcasting rights and several other players in addition to that.

Finally, the resulting large use of territorial and exclusive distribution for AV content in general has also triggered scrutiny of contractual restrictions between rightholders and distributors *vis-à-vis* competition law, reported above (Sec. 3.1.1.)

### *Funding*

The peculiarities of the licensing practices for AV content is also linked to the specific characteristics of funding of AV productions, which require large sunk investments ahead of the release, with high uncertainty as regards future revenues (success) of the product. This makes early financing sources (both public and private, ahead of the release) very important to green-light the production of the content. At the same time, in order to maximise (private) early financing sources, a certain degree of protection of the investments made by investing distributors is considered necessary by the industry, and

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<sup>96</sup> In most professional team sports, these rights are exploited by the league. For individual sporting competitions, the event organisers usually promote and exploit the audiovisual rights.

this is usually achieved through the allocation of territorially limited and exclusive rights to distributors investing in the production ahead of the release (pre-sales), as well as strict control over release windows through different kinds of distributors<sup>97</sup>.

To provide an accurate snapshot of the role played by the various sources of funding in European audiovisual production, a study published in 2018 by the European Audiovisual Observatory provides valuable insights, although limited to movies released in cinemas (hence not including other AV content not theatrically released, such as TV series).<sup>98</sup>

On a sample of 445 fiction films released in 2016, the two most important financing sources were direct public funding and broadcaster investments, which accounted for 29% and 25% of total financing, respectively. The second-most important pair of financing sources were pre-sales (excluding national broadcasting rights) and producer investments, which both accounted for 15% of total financing, respectively as detailed also in Figure 35.<sup>99</sup>

*Figure 35: Breakdown of cumulative financing volume by source (2016)*

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<sup>97</sup> See Sec. 5.1.3. of the VVA et al (2020) Study for a description of release windows for the AV sector.

<sup>98</sup> European Audiovisual Observatory (2018). Fiction film financing in Europe: A sample analysis of films released in 2016. Available at: <https://rm.coe.int/fiction-film-financing-in-europe-2018/1680902fd9>. Possible different funding features of content not released in cinemas, therefore, cannot be captured by these figures. A second round of sample analysis for films released in 2017 has also been published in the European Audiovisual Observatory (2020), Yearbook 2019/2020: Key Trends, with similar sample size and methodology. While more granular 2016 figures were used for the elaborations, (similar) 2017 aggregated figures are also reported.

<sup>99</sup> Because France represents a large fraction of total film funding in the sample, and is atypical in its funding patterns, Kanzler (2018) provides separate tabulations with and without France. In this section, we include France. When we consider the possible impact of changes in sector profitability on pre-sales funding later in this chapter, we break them out separately. Finally, 2017 data, based on a slightly larger sample (576 action films) confirm this order of magnitude, although with slight changes in percentages (26% public funding, 24% broadcaster investments, 18% producers investments, 15% pre-sales). Large differences of financing sources across different countries are also confirmed (with public funding reaching 54% in smaller markets and pre-sales up to 17% in the five biggest markets), European Audiovisual Observatory (2020) Yearbook 2019/2020: Key Trends, pages 8-9.

Ranked by percentage share. Based on all 445 sample films.

Rank	Financing sources	Amount in MEUR	% share
1	Direct public funding	407.7	29%
2	Broadcaster investments	357.9	25%
3	Pre-sales (excl. broadcasters)	222.4	16%
4	Producer investments (excl. broadcasters)	215.7	15%
5	Fiscal incentives	144.1	10%
6	Debt financing	23.4	2%
7	Other financing sources	18.0	1%
8	Private equity cash investments	16.2	1%
9	In-kind investments	6.3	0%
	<b>Total sample</b>	<b>1 411.7</b>	<b>100%</b>

Source: European Audiovisual Observatory

However, pre-sales have an even higher share compared to the percentages shown in Figure 35. As explained in the methodological notes of the study, broadcaster investments are defined as ‘*the cumulative amount of two different types of broadcaster investments: pre-sales to broadcasters as well as direct producer equity cash investments undertaken by broadcasters both in the main country of origin as well as in minority co-producing/-financing countries.*’ Hence, the amount of pre-sales which are counted as “broadcaster investments” (around EUR 282 million as shown in Figure 36) can be added up to the EUR 222.4 million of pre-sales (excluding broadcasters) in Figure 35. This total figure would make pre-sales the first financing source with a 36% share, largely raised on national markets (91% of the overall volume).

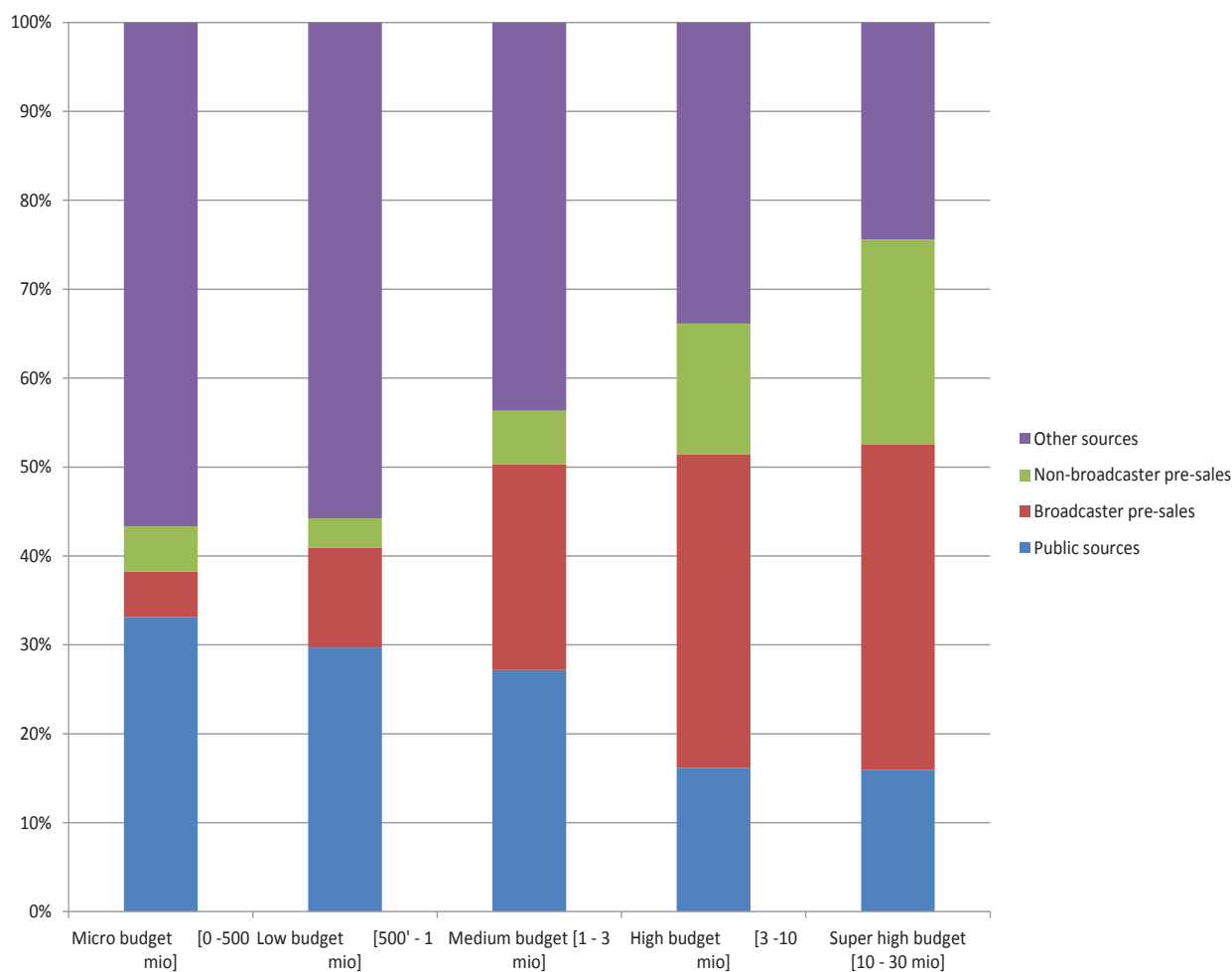
Figure 36: Detailed breakdown of cumulative financing volume by source (2016): broadcaster investments and pre-sales

<b>Σ BROADCASTER INVESTMENTS</b>	<b>357 926 982</b>	<b>25%</b>
- <b>Σ Broadcaster investments from country of origin</b>	<b>354 595 062</b>	<b>25%</b>
- Co-production investments	72 981 795	5%
- Pre-sales	281 613 267	20%
- <b>Σ Broadcaster investments from minority financing countries</b>	<b>3 331 920</b>	<b>0%</b>
- Co-production investments	1 465 676	0%
- Pre-sales	1 866 244	0%
<b>Σ PRE-SALES (excl. broadcasters)</b>	<b>222 352 727</b>	<b>16%</b>
- <b>Σ Pre-sales in country of origin</b>	<b>201 342 547</b>	<b>14%</b>
- Outright sales	29 743 396	2%
- Minimum guarantees	171 599 151	12%
- <b>Σ Pre-sales in minority financing countries</b>	<b>12 326 235</b>	<b>1%</b>
- Outright sales	12 326 235	1%
- Minimum guarantees	6 988 377	0%

Source: European Audiovisual Observatory

According to the sector, this source of financing is of particular importance for productions “at the margins”, i.e. those with lowest prospects of (certain) revenues<sup>100</sup>. On the other hand, the VVA et al (2020) Study also highlights, on the basis of the European Audiovisual Observatory report, that the proportion of pre-sales appear relatively more important for large productions rather than smaller ones, where the weight of public funding is significantly more important<sup>101</sup>.

Figure 37: Contribution of pre-sales and of public funding to cinema production budgets, Europe excluding France, 2016

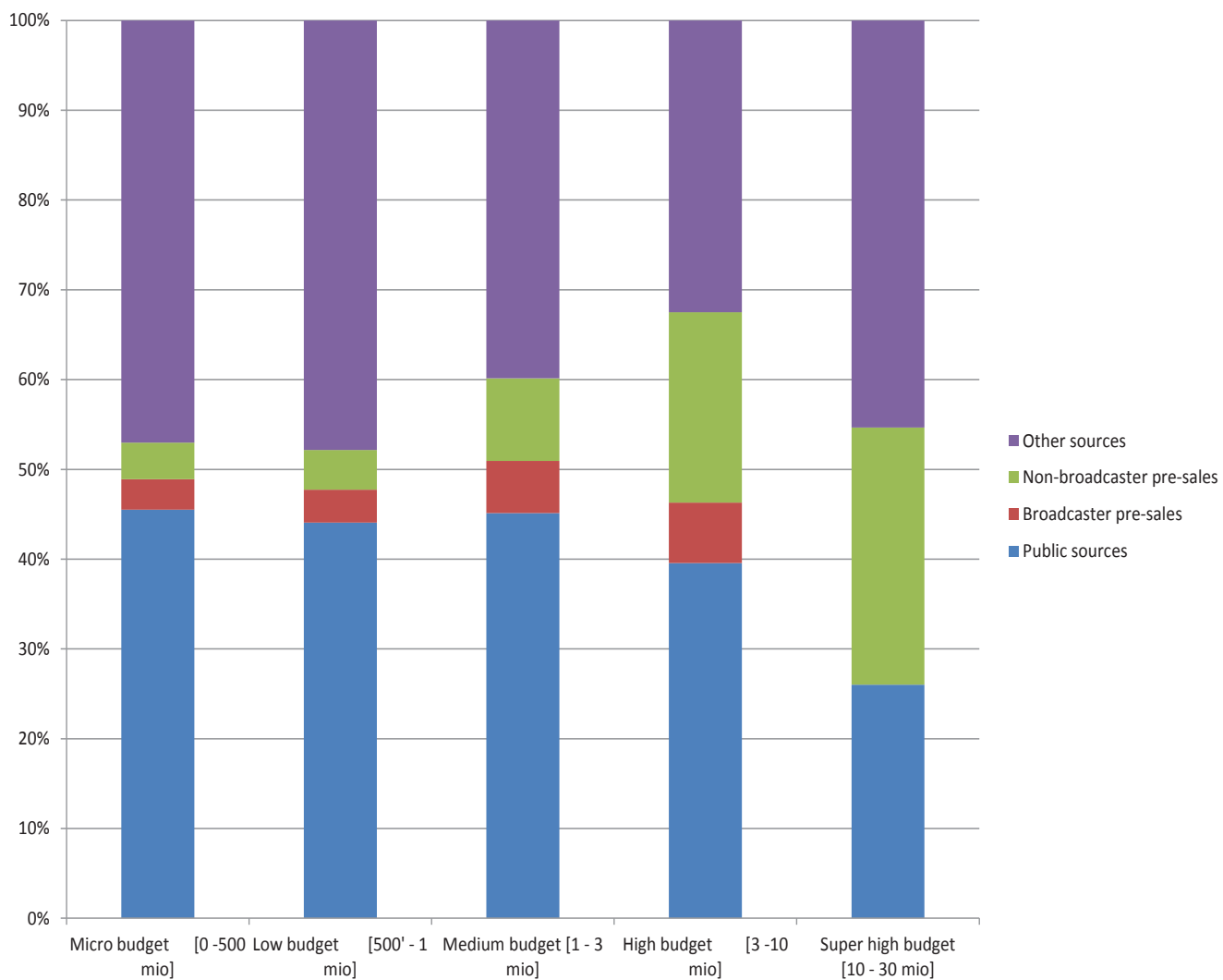


Source: Kanzler, 2018; VVA et al (2020) calculations.

<sup>100</sup> Oxera (2016).

<sup>101</sup> This is also confirmed in the 2017 figures reported in the last Yearbook.

Figure 38: Contribution of pre-sales and of public funding to cinema production budgets, France only, 2016.



Source: Kanzler, 2018; VVA et al (2020) calculations.

Alongside that traditional funding and distribution model, however, the increasing role of large global players active in both distribution and production of AV content over the internet is evident. In this case investments in original productions are directly exploited by a distributor already active over large (global and/or in any case pan-EU) territories, which therefore usually means they hold the rights globally or in any case for a large number of territories (see also Figure 39).

### 3.1.5.2. Availability, Accessibility, Price differences

The abovementioned dynamic results in a mixed picture, where a large number of purely national providers (active both as FTA publicly or advertised-funded as well as TVoD and SVoD) operate alongside few global/pan-EU providers (mostly active as SVoD or TVoD)<sup>102</sup>.

This is illustrated, with specific regard to SVoD services, by the territorial scope of the sample of providers reported in Broocks et al (2020) as well as in the more restricted sample analysed in the VVA et al (2020) Study (see Table 7 and Table 8 respectively).

Table 7 – Overview of scope of activities of different AV platforms

	DE	ES	AT	FR	SE	CZ	SK	IT	PL	IE	NL	BE	DK	FI	PT	HU	LT	EE	LV	RO	GR	BG	CY	HR	LU	MT	SI		
Total x MS	32	30	24	21	21	20	18	16	16	15	14	12	12	12	10	10	9	8	8	7	4	3	3	2	3	3	3		
Amazon Prime	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	27
FilmDoo	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	27
iTunes	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	26
Netflix	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	21
MUBI	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	20
Google Play	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	19
GuideDoc	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	13
RakutenTV	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	12
Microsoft Films	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	10
Viaplay	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	6
YouTube	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	5
HBO GO	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	5
Sky GO	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	4
Chili	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	4
Sony	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	4
Shudder	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
Sky Store	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
Pantaflix	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
HBO Nordic	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
C More	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
UPC My Prime	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
Sky NOW TV	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	3
DaFilms	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Sky Ticket	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Kivido	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Horizon	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Voyo	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Maxdome	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Pleimo	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Amazon TVOD	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Flimmit	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2
Filmbox	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2

<sup>102</sup> See also European Audiovisual Observatory (2020), Supply of audiovisual media services in Europe MAVISE insights –2019, reporting overall 3069 video-on-demand services available in Mavise countries (including EU28 as well Albania, Armenia, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, the Republic of Serbia, the Russian Federation, Switzerland, Turkey and Morocco). As regards pay on-demand services only (hence excluding free and catch-up services), these amount to 923 in the EU28. 47% of these services do indeed target other Member States (although with different catalogues) that those of establishment, with a large concentration in the main international hubs home of major pan-EU providers (UK, IE and ES accounting for 2/3 of these services).







Unlike music, however, the availability of several local and pan-EU service providers in almost all Member States<sup>103</sup> does not give a clear picture of the effective availability of similar catalogues (and above all of different linguistic versions) across Member States. Indeed catalogues of VoD streaming services are highly differentiated across countries, including different linguistic versions of films, with a large share of titles available only in few territories and/or on an exclusive basis.

According to a study by the JRC (2020)<sup>104</sup>, based on the Lumière and Ampère databases, VoD catalogues overlap on average, between all EU27 countries (excluding linguistic differences) by 14%<sup>105</sup>, and only slightly more (21%) when taking into account the larger, but more geographically limited, Ampère database. Moreover, the extent of cross-border availability and catalogue overlaps varies by country size, with smaller countries having fewer titles and lower cross-border availability than larger countries. This trend is shown in Table 9 on the basis of the platforms covered by the Lumière database<sup>106</sup>: e.g. consumers in Greece have access to 1.3% of all the titles available in all EU Member States, while consumers in Germany have access to 43.1% of all film titles available in all Member States. The figures for the Ampère database are somewhat different because it covers less countries and VoD platforms, but unlike Lumière also includes TV shows. Still, the average cross-border availability is similar.

Table 9 - Cross-border film availability in Lumière and Ampère (JRC calculations)

MS	Lumière		Ampère	
	unique	country	unique	country
MT	100	0,3%		
SI	105	0,3%		
BG	112	0,4%		
HR	116	0,4%		
CY	121	0,4%		
LU	336	1,1%		
GR	409	1,3%		
RO	1838	5,8%	6158	12,97%
LV	2995	9,4%		
EE	2995	9,4%		

<sup>103</sup> In any case 6 MS are only served by a couple of providers, according to the elaborations gathered during the review.

<sup>104</sup> Broocks, A., N. Duch-Brown, E. Gomez-Herrera, and B. Martens (2020), Geo-blocking: A literature review and new evidence in online audiovisual services, JRC Digital Economy Working paper 2020-1.

<sup>105</sup> When including in the sample also UK, which has the highest amount of single titles, the percentage decreases to 13,6% (in both Lumière and Ampère samples). Whether and to what extent titles featuring in the UK will remain available in one or some Member States after Brexit, however, cannot be predicted.

<sup>106</sup> For some countries showing very little overlap (MT, SI, BG, HR, CY, LU) the Lumière database does not include Netflix. More generally, the Lumière database only include films.

HU	3139	9,9%			
LT	3238	10,2%			
SK	3635	11,4%			
PT	3914	12,3%		4502	9,49%
NL	4384	13,8%		6287	13,25%
DK	4639	14,6%		15739	33,16%
FI	4720	14,8%		16130	33,99%
SE	4910	15,4%		12435	26,20%
CZ	5196	16,3%		6499	13,69%
PL	5335	16,8%		6232	13,13%
BE	6456	20,3%		6553	13,81%
IT	6941	21,8%		10862	22,89%
ES	8029	25,2%		10292	21,68%
IE	8139	25,6%		16933	35,68%
FR	12689	39,9%		9522	20,06%
AT	12846	40,4%		5327	11,22%
DE	13723	43,1%		15684	33,05%

<b>Overall</b>	31828	14,1%	47462	21,0%
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Note: The above table uses 2019 data, before Brexit, but the UK has been excluded from the table. It assumes that the UK has left the EU and that UK catalogues will no longer be available. At this stage in the Brexit process however, we do not know whether UK catalogues will still be available in the EU after the transition period. The overall cross-border availability figures would be 13,6% (both for Lumière and Ampère) if the UK catalogue was included.

Source: Lumière and Ampère databases. JRC calculations.

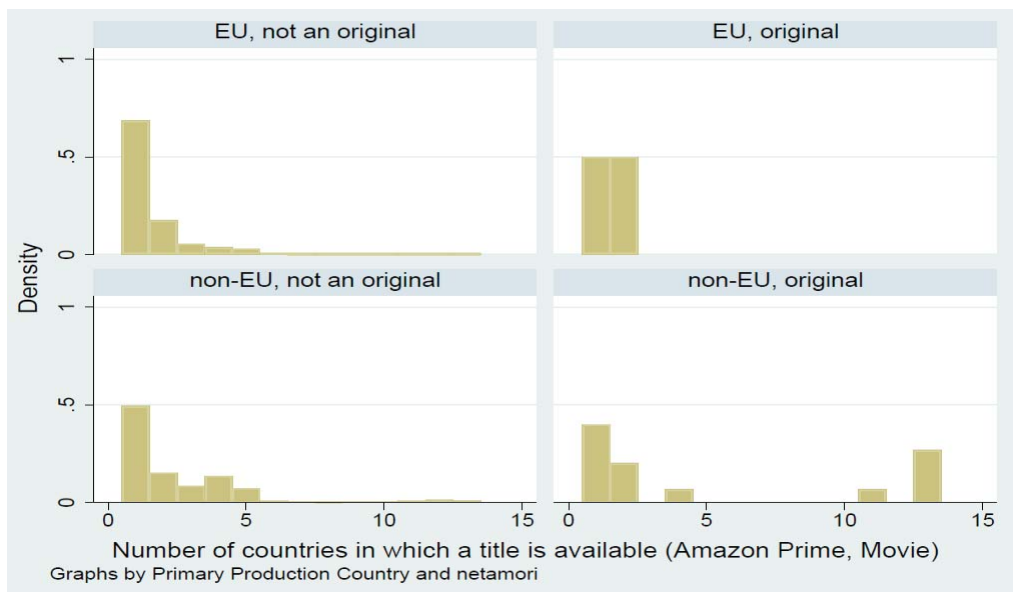
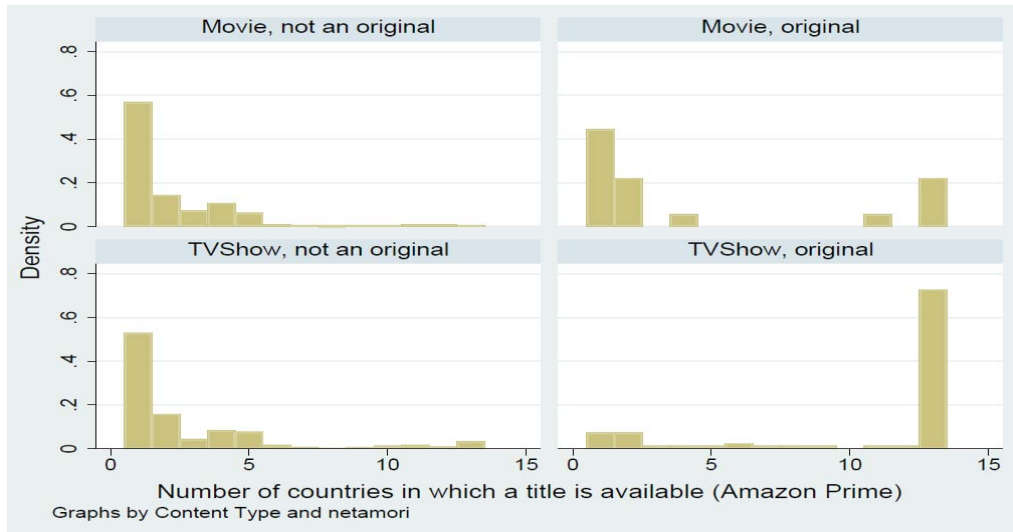
While the extent of cross-border availability and catalogue overlap is low between VoD platforms, it is higher when the same platform provider operates in several countries. This is especially the case for large global VoD platforms such as Netflix, Amazon and HBO. Table 10 shows that cross-border catalogue overlaps within these platforms increases compared to the abovementioned average (ranging from 41% to 80%, depending on the platform<sup>107</sup>) and it is in particular driven by their original productions: these often<sup>108</sup> feature them in several countries where they are active, as shown by the elaboration made by Broocks et al (2020)<sup>109</sup>:

<sup>107</sup> Even within the group of multinational providers, different rights acquisitions strategies are pursued, as also reported by European Audiovisual Observatory (2020) Yearbook 2019/2020 – Key Trends, page 24.

<sup>108</sup> Amazon shows somehow a different path with regard to EU movie productions, which remain indeed available in a more limited number of countries.

<sup>109</sup> Broocks, A., N. Duch-Brown, E. Gomez-Herrera, and B. Martens (2020), Geo-blocking: A literature review and new evidence in online audiovisual services, JRC Digital Economy Working paper 2020-1.

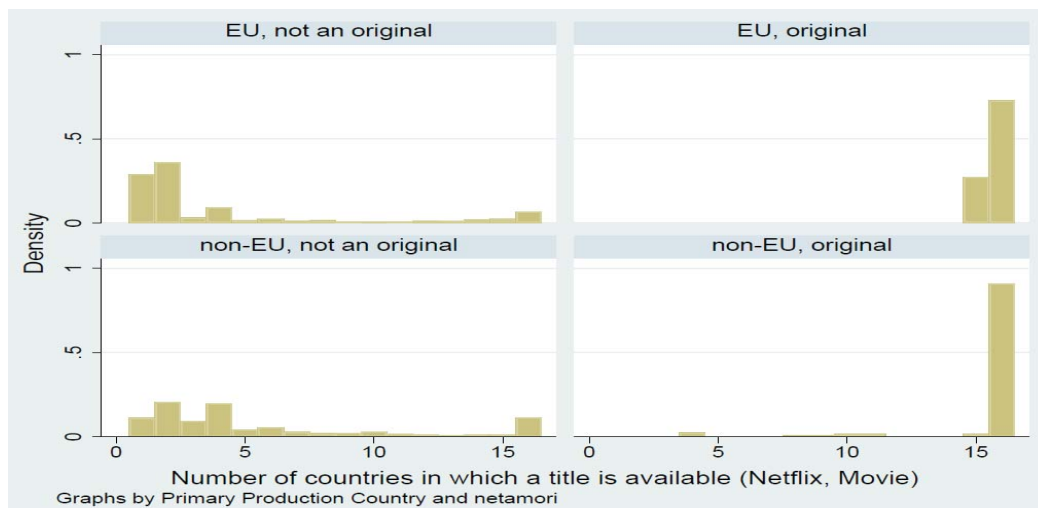
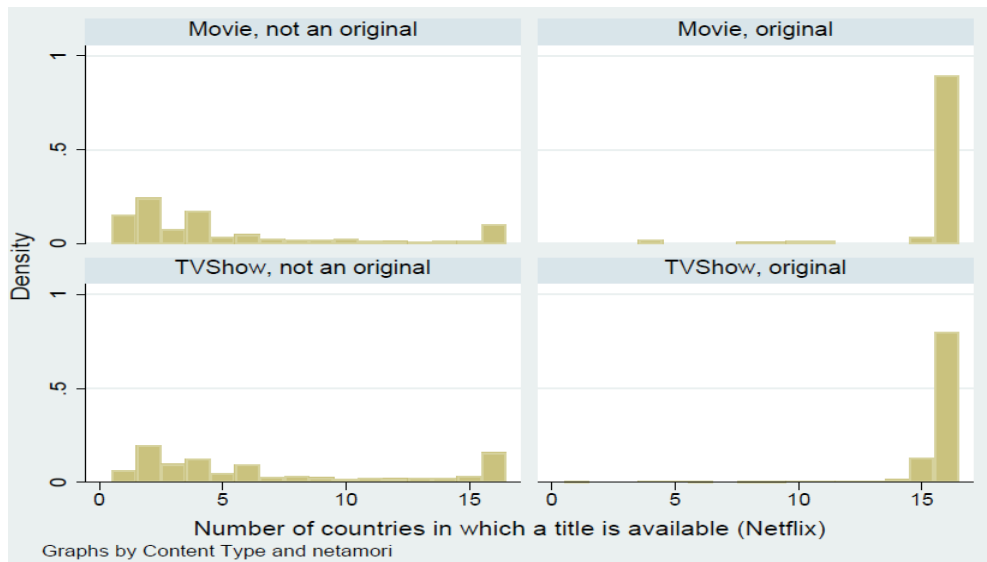
Figure 39 - Country availability of original production of Amazon and Netflix<sup>110</sup>



Source: Ampère data and JRC calculations

Notes: TV shows = series. Original productions are produced by Amazon. Titles are classified as EU productions when the primary producer is located in an EU Member State.

<sup>110</sup> The density indicates the percentage of occurrences with the corresponding number of countries



Source: Ampère data and JRC calculations

Notes: TV shows = series. Original productions are produced by Netflix. Titles are classified as EU productions when the primary producer is located in an EU Member State.

However, the three abovementioned providers (Netflix, Amazon, HBO) do not have much catalogue overlap between them (20%), or with smaller national providers (8%), see Table 10. In other words, due to large use of exclusivity, even if several international and national providers are active in the Union, this does not necessarily entail high availability in all Member States. Moreover, consumers would need to switch between VoD service providers, both inside their country and, where possible, between countries, in order to access a larger variety of film titles.

Table 10 - Cross-country overlaps for selected SVoD services in EU27\_2020<sup>111</sup>

Platforms:	Film title overlaps	TV series title overlaps	Comparison
Netflix	0.63	0.80	Across countries
HBO	0.44	0.59	Across countries
Amazon	0.41	0.62	Across countries
Between the Big 3	0.19	0.12	Across platforms
Between all others	0.07	0.08	Across platforms, simplified
Between Big 3 and others	0.20	0.13	Across countries and platforms
Between others and Big 3	0.22	0.21	Across platforms, simplified

Source: Ampère database on 15 EU countries and JRC calculations.

Note: Overlaps are defined as the percentage of titles from one VoD catalogue that is also available in another VoD catalogue. Catalogues can be defined at platform level or at country level.

These figures are asymmetric: overlap (A/B)  $\neq$  overlap (B/A) because catalogue sizes of A and B are different. The figures in this table are averages of A/B and B/A, across countries and/or platforms. Lower figures imply potentially more gains from variety in switching.

These findings are in line with an observation in the 2019 Yearbook from the European Audiovisual Observatory to the effect that each title is available on SVoD in Europe in an average of 6.2 countries; however, if Netflix is excluded, each title is available on SVoD in Europe in an average of just 3.1 countries. Nearly half of all EU-28 non-national titles are available in only one country. Availability on TVoD is even less: on average, only two countries.<sup>112</sup>

When it comes to accessibility, the mystery shopping exercise carried out in the context of the VVA et al (2020) Study suggests that audiovisual services sectors are characterised by the highest level of geo-blocking compared to the other sectors, at all stages of the consumer journey<sup>113</sup>. This is also confirmed by the perception of consumers according to the Flash EB (2019), which for both AV content in general and sport content in particular report the highest share of reported geo-blocking obstacles (60% and 56% of those trying to access

<sup>111</sup>The results from Table 10 are part of an analysis conducted by JRC (Broocks et al, 2020). In general, the overlap between two catalogues consists of the items that are present in both catalogues individually. If these catalogues happen to be the same size, the fraction of the overlap, as denoted in Table 10, is equal for both catalogues. However, since this is usually not the case, the overlap noted in Table 5 refers to the mean over both catalogues' overlaps. This potential bias gets exaggerated when averaging over groups of more than two services ("Big 3", "others"). Problems can arise especially when comparing small to large catalogues, since the fractal overlap for one is potentially high while it is usually low for the other, resulting in a bias towards values below 50%. Consequently, the data depicted in this table should be interpreted with great caution.

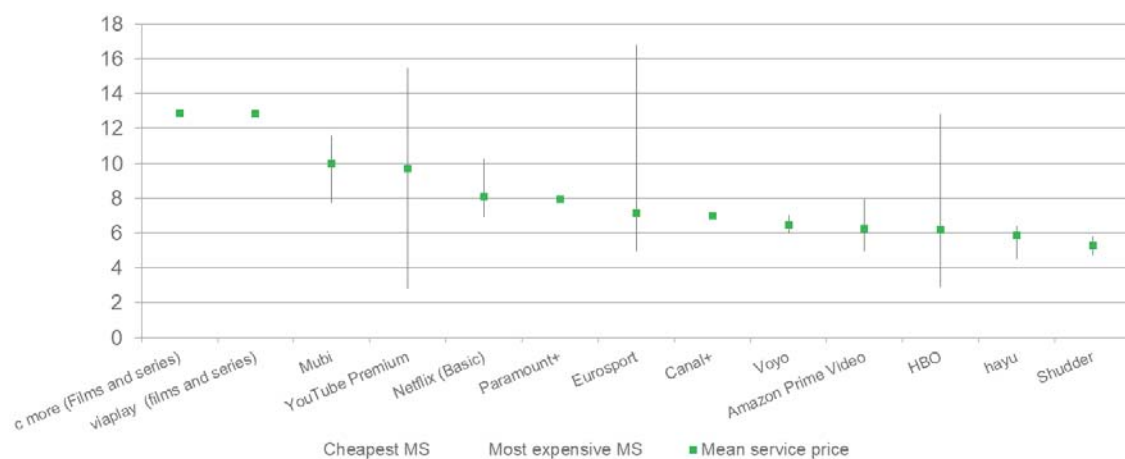
<sup>112</sup> European Audiovisual Library (2019), "Yearbook 2018/2019: Key Trends", p. 26.

<sup>113</sup> Sec. 5.3.3. The sample of the mystery shopping in the study does not look at the accessibility of the entire catalogue, but only at the accessibility of the service. Hence, even when access and/or registration is possible, this does not ensure that the entire catalogue is accessible and/or that changes in conditions/catalogue may take place upon detection of location. Indeed the most common practice identified for subscription-based services was locking-in consumers based on automatically detected location (or provided address) and changing the offer (content and price) accordingly.

cross-border AV and sport respectively)<sup>114</sup>, and in particular the highest share of frequent/constant geo-blocking (22% and 24%<sup>115</sup> of those trying to access cross-border AV and sport respectively).

When it comes to price differences, the VVA et al (2020) Study indicates that prices for SVoD services appear to follow a clear country pattern, where there are relatively cheaper countries clustered in Eastern Europe averaging around a EUR 7 monthly subscription fee and relatively more expensive countries averaging around EUR 8 to EUR 10, with Denmark being the most expensive country with an average monthly subscription of close to EUR 12 (Table 8). Moreover, the analysis as part of the data collection carried out in the study suggested that there is a positive correlation between price and number of titles in a specific catalogue. When it comes to price differentiation within the same service (where the service is provided in more than one Member State), however, the picture is slightly different than in the music sector, given that, apart a couple of exceptions, the price does not differ greatly across Member States (see Figure 40).

Figure 40: Overview of price differentiation of SVoD services offered in Europe by service



Source: VVA et al (2020)

### 3.1.5.3. Demand of consumers

Audiovisual services in general appear to elicit a higher and steadily increasing, cross-border demand and interest compared to other copyright-protected services, even if domestic consumption remains predominant. According to the Flash EB (2019), 9% of internet users actively tried to get cross-border access to AV excl. sport<sup>116</sup>, almost doubling from 2015 to 2019. In addition to that, 31% of those that did not try to get access would be interested to do so (15% for sport). The number of internet users not accessing AV content cross-border

<sup>114</sup> Similar findings reported in the VVA et al (2020) consumer survey.

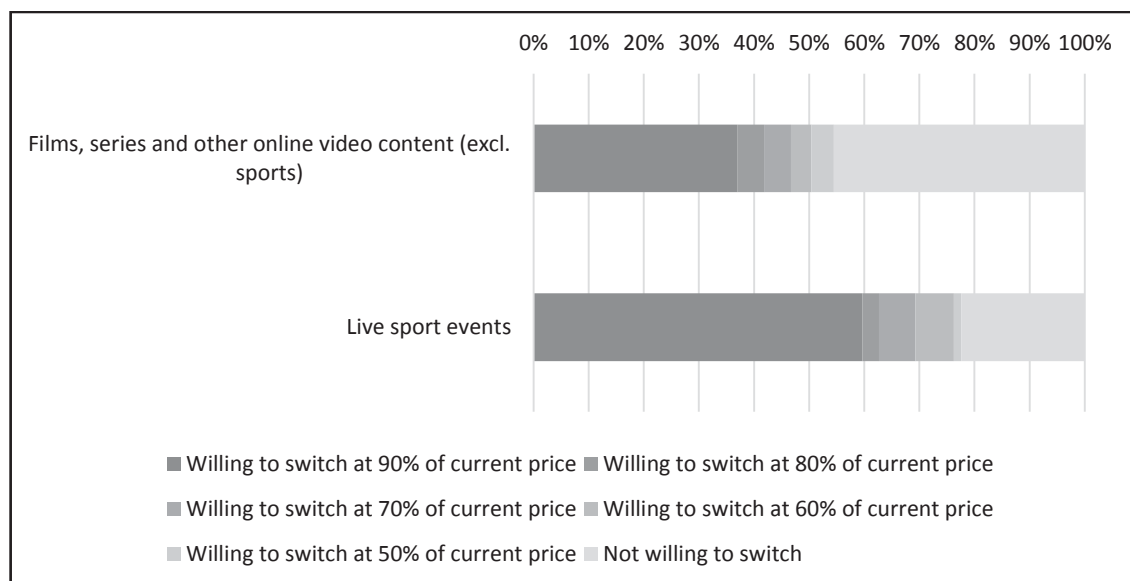
<sup>115</sup> A more frequent experience of geo-blocking for sport rather than AV more generally is also reported in the different sample of the VVA et al (2020) consumer survey.

<sup>116</sup> An additional 3% tried to get access cross-border to sport content.

therefore constitutes a majority, but cross-border access could be increasingly interesting for consumers<sup>117</sup>. It can also be noted that AV services in general, and sport content in particular, are by far the content services where viewers resort most frequently to illegal sources (in both cases above 20% of consumers, reaching 25% for sport). One of the main drivers (in particular for general AV content) is indeed linked to larger choice of illegal offers (40%), together with lower prices/free access (in particular relevant for sport)<sup>118</sup>. Accordingly, AV excluding sport and sport content are, along with e-books (for which however the extent of geo-blocking and therefore the sample is much smaller), the content services which are more likely to be accessed via grey/unknown sources in case of lack of access (10 and 7% of those that did not get access respectively).

Looking more in-depth at the price sensitivity and importance of language and local content resulting from the consumers' survey carried out by the VVA et al (2020) Study, price and language accessibility stand out as the main factors that drive consumer behaviour. In this regard noticeable differences however can be highlighted between sport on the one hand and AV content more generally, the demand for the former being significantly more price sensitive and, moreover, significantly less sensitive to language or local content, as reported by the results showing the different willingness to switch to services meant for users in other Member States.

Figure 41: Consumers' willingness to switch providers or service if it is not meant for users in their country of residence but offers a similar content/catalogue

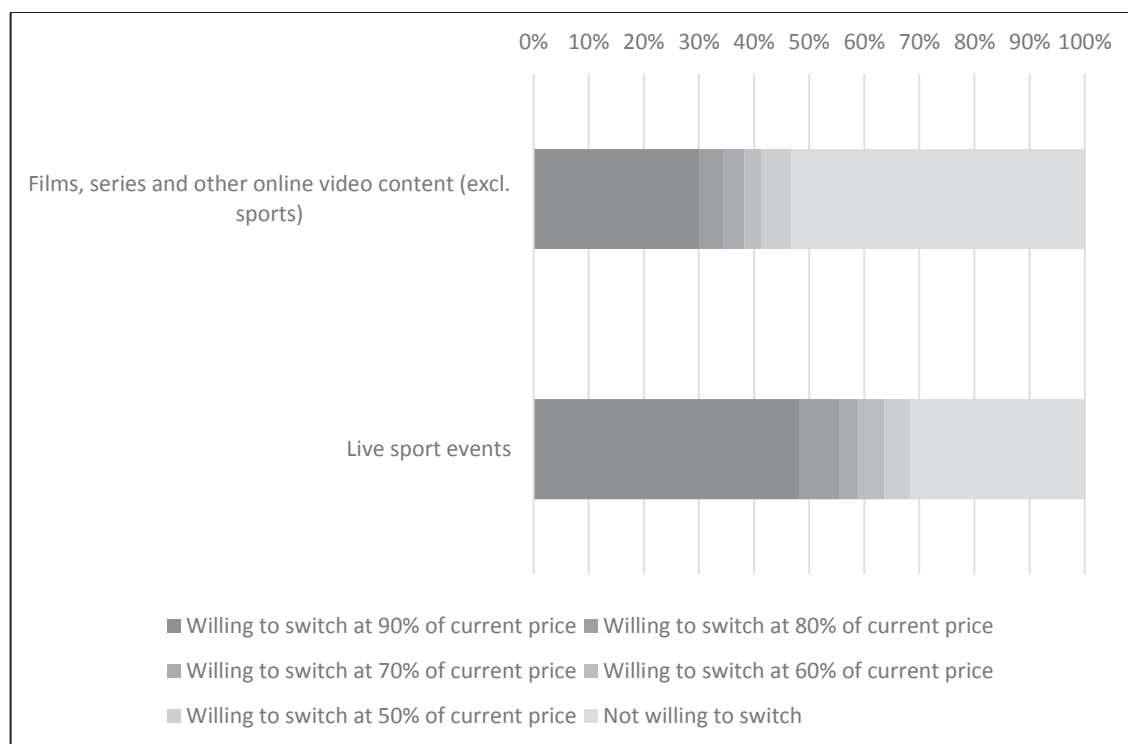


Source: Q29 Would you switch to another service provider or service NOT meant for users in your country of residence BUT offering you similar content/catalogue?

<sup>117</sup> VVA et al (2020) Annex IV full results of the consumer survey, based on a different sample, indicates that 20% of respondents tried to access cross-border sport content and 21% AV in general. Moreover, interest for younger generations is significantly higher than the average, reaching 20% of internet users aged between 15 and 24 that tried to get access cross-border.

<sup>118</sup> VVA et al (2020), Annex IV full results of the consumer survey.

Figure 42: Consumers' willingness to switch providers or service if it is not meant for users in their country of residence and offers no or limited local (national) content/catalogue



Source: Q21 Would you switch to another service provider or service NOT meant for users in your country of residence AND offering you no or limited local (national) content/catalogue?

#### 3.1.5.4. Possible effects

Taking into account the complexity of the sector, including the diversity of content, providers, business models, consumers' preferences, licensing practices and value chain interactions, the identification of all possible effects following a potential extension of the Regulation to the AV sector, and above all their quantification, proves particularly difficult, as shown by the significant limitations usually characterising studies in the sector<sup>119</sup>.

Moreover, in view of the specific licensing practices reported for the sector (see above sec. 3.1.5.1), the different readings of the review clause illustrated in sec. 3.1.1. may have fundamentally different effects.

The VVA et al (2020) Study identifies some potential effects on the basis of a large set of primary data gathered therein, with a specific focus however on effects on some SVoD services (among the most relevant in the paid on-line market<sup>120</sup>) active in a representative, albeit small, sample of countries. There is no quantification of resulting effects on the same content in other distribution channels. The quantitative results of that analysis cannot therefore provide definite indications about the extent of effects on the entire industry, but

<sup>119</sup> See the literature review in Sec 5.2. of VVA et al (2020) Study.

<sup>120</sup> Representing almost 80% of the overall EU28 SVOD market in term of subscribers, see European Audiovisual Observatory, Yearbook 2019/2020. Key Trends, page 55.



can only provide some insights on trends of potential effects in a specific distribution channel.

In substance, under a first reading of the localisation of the copyright relevant act (Scenario 1), it is assumed that the main driver for cross-border access will fundamentally only be price, given that any service becoming accessible across-borders will seemingly provide only a more limited catalogue than that offered domestically or, if only active in one or few Member State(s), will unlikely be accessible at all or only to a very limited extent in countries where it is not active. This is because it may well not hold the requisite rights for all or several items of its catalogue in other countries, given the general use of territorially limited and exclusive licensing practices. In term of variety gains, therefore, the potential extension may produce little or no effect, mainly limited to original productions (which however are often already available cross-border, see Figure 39 - Country availability of original production of Amazon and Netflix) and/or complementing the future effects of the Directive on online television and radio programmes. Consumers benefitting from the Regulation, therefore, would possibly get access in other Member States to smaller catalogues than those available domestically (even with the same provider), although possibly at a cheaper price. This would also raise an issue of transparency of the effectively accessible catalogue.

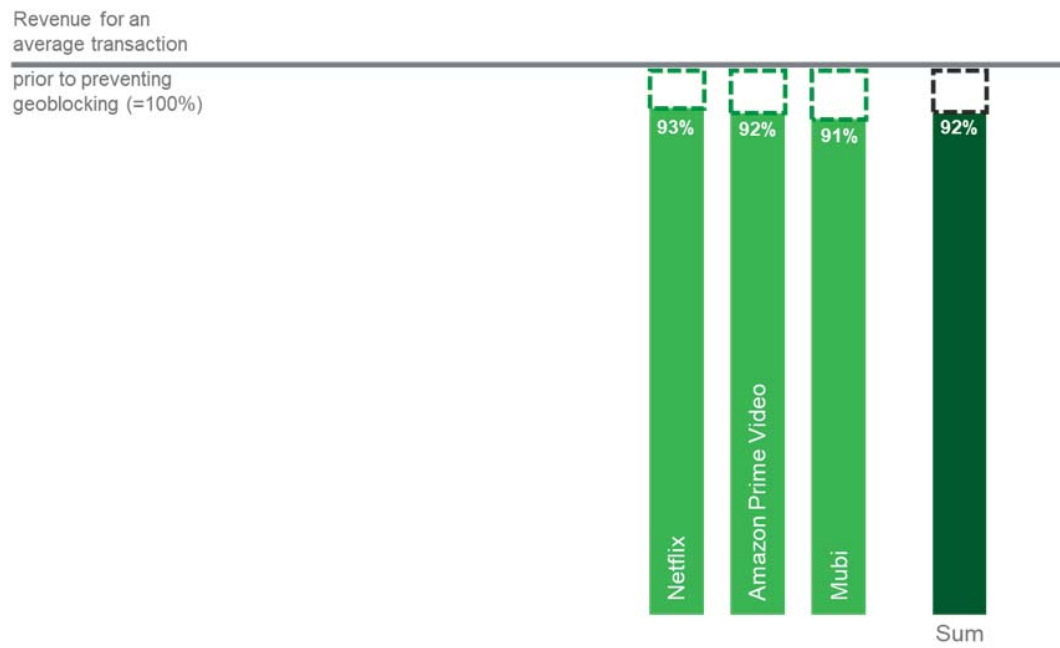
Under this assumption, the VVA et al (2020) Study indicates a possible static reduction of average transaction revenues, possible increases of subscribers<sup>121</sup> and an overall reduction of revenues for 3 pan-EU SVoD services<sup>122</sup> and 8 sample countries, as shown by the following figures. At the same time, this model does not take into account possible impacts on other providers (such as local distributors), in the event that they may still hold the requisite rights for other countries and therefore would be obliged to provide access, nor the possible effects on licensing negotiations for these actors.

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<sup>121</sup> Actually based on conservative estimates about price elasticity of demand for AV services. In case of higher elasticity also reported in other studies, the output expansion could be higher.

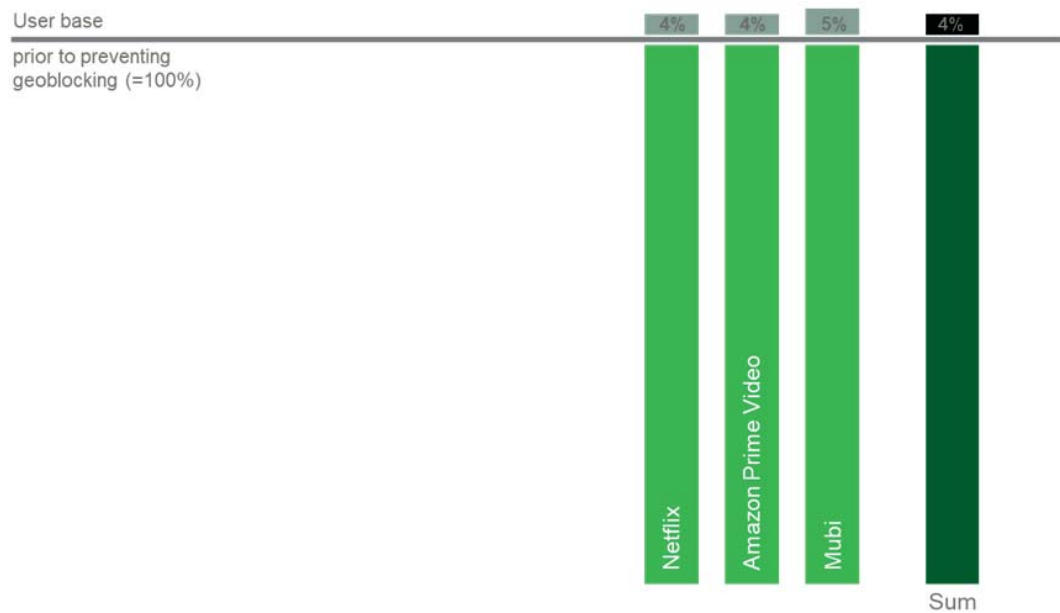
<sup>122</sup> In scenario 1 it is assumed that mostly pan-EU services will be impacted, in view of the assumptions made about limited or no effective accessibility to additional catalogues of purely national providers.

Figure 43: Effect of price-driven switching on the revenue per average subscription under Scenario 1 for selected pan-European SVoD services across eight Member States



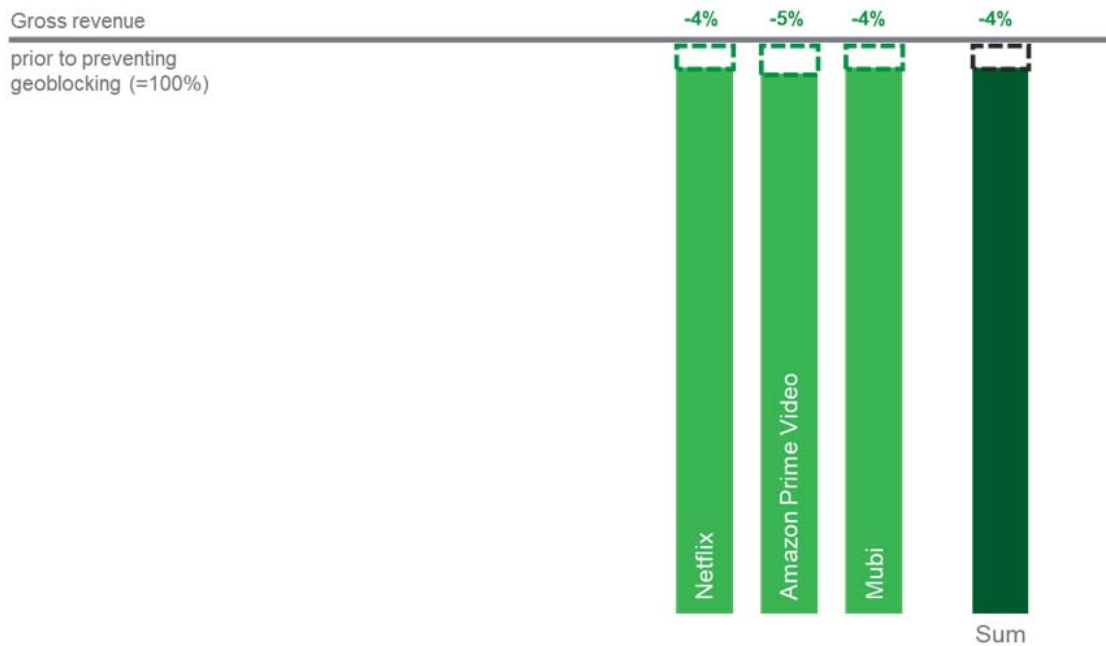
Source: VVA et al (2020)

Figure 44: Effect of price-driven switching on the user base under Scenario 1 for selected pan-European SVoD services across eight Member States



Source: VVA et al (2020)

Figure 45: Combined effect of price-driven switching under Scenario 1 for selected pan-European SVoD services across eight Member States



Source: VVA et al (2020)

Under the alternative reading of the criteria for localisation of the copyright-relevant act (Scenario 2), the effects on variety available to customers cross-border may be much more relevant, although versioning differentiation (by right-holders and/or distributors) may also be a strategy to limit cross-border demand. The VVA et al (2020) Study finds that, unlike price-driven switching, driving customers towards the cheapest service, content-driven switching may other hand lead to increasing the value of the average subscriptions<sup>123</sup>. This would be linked to the fact that consumers would gravitate towards services (and/or national versions of services) with larger catalogues, which turn out to be those with higher prices, often targeting the UK<sup>124</sup>. A similar effect could also derive from a more frequent switching across the larger number of services and content becoming available, as well as reduction in the use of illegal sources. The sole content-driven switching<sup>125</sup> could therefore lead to higher revenues for the online services analysed (estimated by VVA et al up to 14% for series and 10% for movies), potentially offsetting the revenues reduction due to price-shifting.

<sup>123</sup> The model describes the case in which everyone who is willing to switch for content reasons switches to his new best option once. It turns out that by doing so, a user will switch on average to a more costly service.

<sup>124</sup> In view of the relevance of UK services in the gravitation model, Brexit (and the conditions for the future relationships with UK) may also have an impact on the outcome. Recalculating the impact on revenue by simply excluding UK services results in a revenue loss of 2% (considering Ampère data on movies; 4% for series data). It is however hard to speculate whether no UK and/or similar EN-speaking services will be offered in the Union or, on the contrary, they may still be offered in one or more Member States in the Union after Brexit (hence becoming subject to the Regulation), and at which conditions.

<sup>125</sup> Content-driven switching is based on the panel of providers analysed in Source: EAO Lumière and JRC calculations

Table 8 - Availability and prices of audiovisual streaming services across the EU 28.

Combining price and content driven switching, the VVA et al (2020) Study finds that this effect could actually increase revenues overall (up to 5%, see Table 11), although the analysis is subject to important limitations. In particular, it is based on the limited sample of providers analysed<sup>126</sup>; more importantly, it does not capture quantitatively possible impacts on different kind of providers, hence the possibility that some service providers may gain and others may lose, which increases substantially in Scenario 2, when the entire range of European services and catalogues may potentially become accessible. Moreover, it does not assess the dynamic impact on producers or the investment in new content development and production. Finally, in view of different features of demand for sport content (more price sensitive and less sensitive to local content), the impacts as regards this specific sub-sector may be different.

Table 11 - Estimated impact of the scenarios on societal welfare

	Price switching only			With quality switching		Revenue		
	Price	Quantity	Revenue	Quantity	Revenue	Welfare transfer	Reduction DWL	Add'l sales larger catalogue
<b>Netflix</b>	0.925	1.037	0.960	1.133	1.048	0.070	0.030	0.089
<b>Amazon</b>	0.921	1.035	0.953	1.131	1.042	0.074	0.027	0.088
<b>Mubi</b>	0.914	1.054	0.963	1.150	1.051	0.078	0.042	0.088

Source: Contractor's calculations based on survey data and whose estimates of subscriber counters per Member State.

In addition to these static possible effects on SVoD services specifically, the VVA et al (2020) also tries to identify relevant elements to identify other possible effects on other services (not necessarily only those covered by the extension of the Regulation) and elements of the value chain.

First of all, the VVA et al (2020) Study does not quantify possible mitigation strategies: unlike music, a clear univocal price mitigation strategy is not identified, taking also into account the smaller impact on revenues and the importance of catalogue differentiation and importance of local content. As such however this cannot be excluded, in particular for content already accessible in different Member States but under significantly different conditions (this could be the case for those pan-EU SVoD with large price variations and similar catalogues, as well as for premium sport content with value highly skewed towards one domestic market)<sup>127</sup>.

As regards possible impacts on other AV services, the Study points to studies showing that while SVoD clearly acts as a substitute for pay-tv in the US, this tendency seems less

<sup>126</sup> For price-driven switching in Scenario 1, the small sample of those services effectively available across the Union (as purely national providers unlikely hold rights for other territories, if not for the small portion of catalogues of own productions); for the content-driven scenario the wider sample of providers listed in Source: EAO Lumière and JRC calculations

Table 8. The combined results of both effects, therefore, are only available for the former category.

<sup>127</sup> See Oliver and Ohllbaum (2020) cit. above.

pronounced in the EU, where they tend more to complement each other<sup>128</sup> and broadcasters play an important role in local markets. This could therefore suggest that the impact on pay-tv subscription as such may be limited, although not excluded and possibly increasingly relevant in the future<sup>129</sup>. With regard to the possible effects of increased access to on-line FTA on other paid services, on the other hand, the VVA et al (2020) Study does not analyse in detail the degree of substitution, assuming that some features (in particular strong language and content localisation) would hardly make them a serious competition constraint beyond the share of long- and short-term EU migrants (in any case amounting to 21 million in EU). Yet this impact may have higher relevance for some content (such as sport) where localisation and language may be less important (as reported in the consumer survey) and which is subject to some specific national Regulation in a number of Member States as regards its FTA availability as a “major event”<sup>130</sup>. The possible effects of enhanced clearance of rights for some content of broadcasters provided on-line triggered by the 2019 Online Television Programme Directive may also need to be verified in this regard, in terms for instance of increased access of FTA on-line ancillary services vis-à-vis other on-line paid content and/or traditional broadcasting activities more generally.

Another possible impact identified is that of the convergence of release windows, a phenomenon already happening but that could be accelerated by increasing cross-border accessibility. Indeed some exposition windows (theatrical and transactional home video – physical and online) show a significant higher profitability per viewer and contribute more in pre-sales to production budgets<sup>131</sup>, so that availability through SVoD services is usually provided at a later stage in the value chain. At the same time, in view of increasing convergence of release windows across different Member States<sup>132</sup>, it is unclear to what extent increased cross-border accessibility through SVoD can affect the most profitable release windows in theatrical and transactional home entertainment (physical and online), in particular in the most profitable (domestic) markets where the content is released first, or overall when the content is released simultaneously across several Member States.

From a cultural diversity point of view, the Study indicates that at least from a static/short-term perspective, the gains in terms of catalogue availability will be substantial, in view of

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<sup>128</sup> Grece and Fontaine (2017), based on Ampere consumer data.

<sup>129</sup> Although limited to sport, Oliver & Ohlbaum (2020) still reports broadcasting/traditional TV access as the most common mean to access this content, but notes an much higher share of people below 35 accessing this content on-line (23% vs 12% for the older age brackets) and pirated streaming (19% vs 6%).

Figure 32 also shows an increasing weight of SVoD services over pay services.

<sup>130</sup> See Oliver & Ohlbaum (2020), estimating a 1 bn€ loss of revenues (out of 4,1bn€ overall) from those sport rights asymmetrically accessible through FTA and pay-tv across different Member States, where FTA distribution will become the dominant distribution model. While this may also correspond to reducing the costs of access in some Member States where currently pay-tv is the only or dominant distributor of such events, the study overall claim this will add to the overall negative impact on overall financing of the sector.

<sup>131</sup> Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais (2019), “Release windows in Europe: a matter of time”, European Audiovisual Observatory.

<sup>132</sup> As shown by a recent EAO study, the first TVOD window release varies by only few couple of weeks across different sampled countries (UK, DE, FR, NL, BE), see European Audiovisual Observatory (2019): The theatrical – TVOD window: A sample analysis, available at <https://rm.coe.int/the-theatrical-tvod-window-a-sample-analysis/1680951884>

the very low degree of availability of content across Member States highlighted in Section 3.1.5.2. Interestingly, it is suggested that the gains could be higher for EU works, as their distribution across the Union is significantly lower than for other, mainly US, works<sup>133</sup>, and, among the former, the works of smaller Member States may gain more over those of bigger Member States which are more likely to be already distributed across borders and may on the contrary face increasing competition. Also, consumers in smaller Member States may benefit more from increased access to catalogues available in larger Member States. However, this finding does not take into account the possible role of national distributors in developing and creating a market for content in and beyond the home market and promote it among consumers<sup>134</sup>, as well as the longer term impacts on investments in content.

For these gains to materialise in the long term, therefore, the dynamic impacts on funding and investments need to be analysed. The latter have also implications for cultural diversity both in terms of new EU content produced and the range of distributors and channels offered, and thus ultimately for consumer welfare.

The sector indeed highlights that eliminating geographical discrimination would reduce the anticipated revenues from European works, leading to lower pre-sales investment in the development and production of works and consequently to a very substantial decline in the number and diversity of works produced, claimed to be more than proportional than the reduction in revenues itself (hence small revenue losses at the distribution level can result in significantly higher impact on investments)<sup>135</sup>. This is first of all relevant in the case of Scenario 1 (which indeed envisages an overall reduction of revenues). It is however also relevant in Scenario 2, for those providers facing reduced revenues in view of higher competition and switching towards other providers becoming available. The VVA et al (2020) Study does not quantify the possible dynamic effects on investments, in view of the large amount of variables that may affect the analysis. A multiplier effect of loss of revenues on production, while not excluded, is however subject to some observations in the VVA et al (2020) Study. First of all, the relationship between overall end revenues, production revenues (including post-production) and the number of films produced for the EU-28 (based on a UNESCO database) has been investigated. In this regard the VVA et al (2020) Study identifies a certain degree of correlation between overall revenues, production revenues and films production. In particular, each additional €100 million of overall end revenues over the period 2014-2018 corresponded to an additional €170 million of investment in production of audiovisual works, i.e. a factor of 1.7<sup>136 137</sup>.

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<sup>133</sup> Aguiar and Waldfogel (2019) as well as European Audiovisual Observatory (2019), “Yearbook 2018/2019: Key Trends”, p. 26.

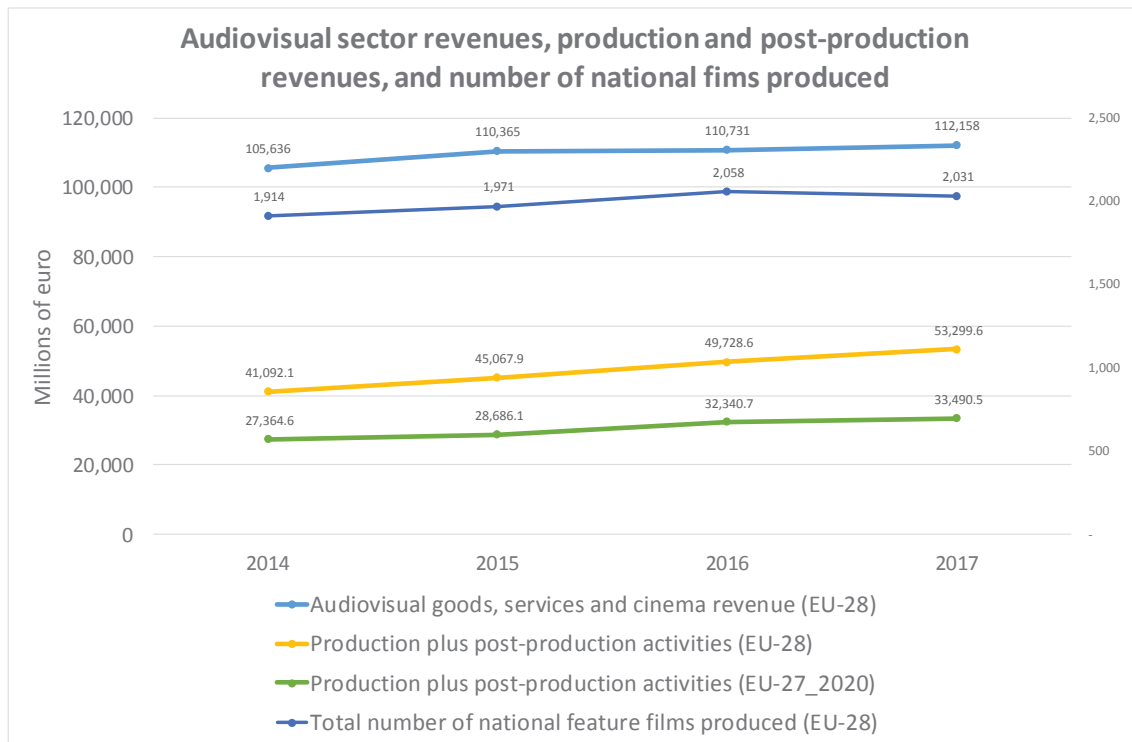
<sup>134</sup> This role is indeed recognised by the Creative Europe MEDIA sub-programme which has been supporting visibility/promotion activities over the past 25 years

<sup>135</sup> Oxera (2016).

<sup>136</sup> This could confirm a similar multiplier effect also in case of reduction of revenues, as envisaged by the Oxera (2016) Study, but to a much lower degree (that study suggesting a factor between 3 to 8).

<sup>137</sup> It can also be noted that UK revenues represented 33.4% to 37.2% of EU-28 revenues over those years, but UK production budgets represent 50.2% of the increase over those years. How that would play out going

Figure 46 - Audiovisual sector revenues, production and post-production revenues, and number of national films produced



Moreover, the prevalence of pre-sales for larger productions (see above Figure 37) would suggest that any such effect may be higher for bigger productions (and in bigger Member States) than for smaller productions, more heavily based on public financing. In addition, the Study suggests that bargaining adaptations in the negotiations between producers and distributors, as well as constant reduction of production costs, could actually limit the extent of the multiplier effect, although it can nevertheless have an impact *ceteris paribus*.

Finally, it remains to be seen whether the possible reaction of producers/right-holders to scenario 2 may be to move towards pan-EU licensing, in order to retain exclusivity (ex-ante) gains over the possible benefits of overall (ex-post) higher consumption, with possible impacts on the structure of the markets. This possible mitigation strategy may actually depend on the differences in demand across different markets, as well as the importance of versioning and localisation of content, which could theoretically limit the volume of passive sales across other territories<sup>138</sup>.

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forward is highly speculative in light of various uncertainties over the future relationship with the UK. Moreover, the balance of production between the EU-27 and the UK might well shift in ways that are not yet predictable once the relationships between the EU-27 and the UK settle into new patterns.

<sup>138</sup> Oliver and Ohllbaum (2020) study prepared for the sport rightsholders would suggest that pan-EU licensing may be more likely in a number of sport (concerning approx. 6,82bil€ of sport rights revenues) where value of rights is highly skewed towards a single domestic market and pay tv dominates the distribution modalities (such as domestic leagues); according to this study, this may actually raise access costs in non-domestic markets (in addition to a 12% reduction of revenues for rights holders). On possible substitution of territorial exclusivity with linguistic/versioning exclusivity, Hugenholtz (2019)



### 3.1.5.5. Findings

The main findings on the possible effects of a potential extension of the Regulation to the AV sectors are the following:

- While domestic consumption remains dominant, demand for cross-border access to AV services appears to be the highest compared to other categories of content (9% of internet users have tried to get access, an additional 31% would be interested). This number is steadily increasing since 2015.
- Demand for AV services in general shows some different features for sport on the one hand and other AV content on the other, the former being more price sensitive and less influenced by language and localised content. At the same time, there is currently also lower demand for cross-border access.
- Accessibility and availability of the same AV content across the Union is very limited (on average estimated at 14% across EU27, and 21% within a smaller sample of countries, with large differences among countries and between pan-EU and national providers).
- SVoD are the fastest-growing services provided over the internet that could be covered by any hypothetical extension and are gaining a growing proportion of distribution revenues (approx. 13% of all paid services, in rapid progression), although they currently still represent a small share (approx. 5%) of the entire AV services market.
- Possible effects on other AV services not included in the scope (pay-tv, cinema admissions) cannot be excluded but are possibly limited in view of the available evidence of complementarity, rather than substitutability, with on-line services, at least in the very short term. There is compelling evidence of the growth of on-line distribution and rapid evolution of the sector, strongly accelerated by the COVID-19 crisis. This should be taken into account in any more future-oriented analysis together with an in-depth analysis of its economic weight in the entire sector ecosystem of content development, financing, production, marketing and distribution. As for possible impact of increased Free-to-air access following a potential extension, this may also require deeper investigation, for instance in the context of sport content. It should also be considered to what extent the possible effect of the Online Television Programme Directive may also be relevant to estimate the effects over other AV services, as well as the future developments of on-line SVoD services vis-à-vis traditional AV services.
- Overall, different scenarios as regards the localisation of the copyright relevant act may produce substantive differences in view of the general licensing practices in the sector, with distributors often holding territorially exclusive rights. In particular, in scenario 1, only price-driven effects will probably be relevant, because passive sales in countries where copyright has not been cleared are not allowed. This would also lead to sub-optimal access to catalogues across borders. In scenario 2, however, allowing for passive cross-border sales, content-driven effects may be substantial.



- From a static point of view, pure price effects linked with switching to cheaper services point towards moderate reduction of revenues for pan-EU providers considered (in the range of – 4/5%), with a possible increase of quantities sold and overall slightly positive general welfare effects (+3/4%). In the case of content-driven effects (as in scenario 2), the possibility of an increase of an average revenues for providers is not excluded (in the order of + 4/5% for the sample at stake<sup>139</sup>), with corresponding higher positive overall welfare effects. However, in these estimations the possible impact across different providers may be different (in view of different price-driven<sup>140</sup> and content-driven<sup>141</sup> effects), hence the impact on the structure of the industry and players with different characteristics is unclear<sup>142</sup>. In addition, the impact of dynamic reaction effects on licensed territories is not taken into consideration in the model. It appears that benefits from increased variety are more likely to accrue for consumers of smaller Member States than bigger ones, on the basis of currently lower accessibility of cultural products. On the other hand some price-mitigation strategies by right holders and/or distributors could also offset this effect, as regards content already available across the EU, but under very different conditions and demand, such as for lower income Member States, although the extent and likelihood of such effects is difficult to predict.
- These static impacts need to be contrasted with possible effects from a dynamic point of view in terms of investments in AV content more generally. The possible negative multiplier effect on investments due to a reduction of revenues is not excluded, but according to VVA et al (2020) may be more limited (in the range of - 1.7x) and less skewed towards smaller productions than what is envisaged in other studies. Also the possible negative impact on international pre-sales (pre-sales outside the country of production) should also take into account the low weight of such international pre-sales for EU films released in cinemas (without however excluding possible different investment patterns for TV series).
- The impact on licensing practices is not set out in detail in the VVA et al (2020) Study. While in scenario 1 it may be limited, in scenario 2 it is not clear whether right-holders would shift towards more pan-EU exclusive licensing in order to exploit more the (ex-ante) gains of exclusivity or possibly adapt licensing regimes exploiting more the potential (ex-post) gains in quantity sold stemming from increasing cross-border access. It is also not clear whether this will impact only on-line services covered by the extension or more broadly AV services, in view of the current practice of bundling licenses over different distribution channels.

<sup>139</sup> This overall outcome refers to the small sample of providers for which both price and content driven effects may be observed in the 8 sample countries, and is also affected by the effective accessibility of UK/English services in the context of the future relationships with UK: in the sample at stake, if these were to be excluded the outcome could be slightly negative.

<sup>140</sup> Benefitting more services in low-price countries.

<sup>141</sup> Benefitting more services with larger catalogues, usually those of larger countries.

<sup>142</sup> The estimates moreover indicate possible general trends of the market, which however may result in different effects for different kind of providers (e.g. pan-EU and national markets).

- Impact on cultural diversity in terms of access to catalogue and regardless of other possible dynamic factors such as concentration of the market, may be positive in the short term in scenario 2, in view of the possible gains in variety and easier accessibility of EU works across borders, currently under-distributed (compared to US works, for instance). In the long term, this may depend on the impact on investments in production (as regards the number and quality/budget of works produced) and licensing practices (as regards the variety of distributors).

## 3.2. Transport services

### 3.2.1. Description of existing sectoral EU legal framework on non-discrimination

The non-discrimination principle in the transport sector, as provided for in the EU sectoral legislation on air, maritime, bus and coach transport, prohibits traders from discriminating passengers in terms of price based on their nationality<sup>143</sup>. Traders may only deviate from this principle if it concerns social tariffs (except air services). It means, in principle, that passengers of different modes of transport (air, maritime, bus and coach) can already under the sectoral EU instruments, in general, purchase tickets without any discrimination based on the customer's nationality or on the place of establishment of carriers or ticket vendors.

The only exception is the rail passenger legislation where a non-discrimination clause does not exist at present but has been included in the legislative proposal for recast of the Rail Passenger Rights Regulation (EU) No 1371/2007. This legislative process is expected to be finalised in 2020. Discrimination cases in the rail sector are currently dealt with on the basis of Article 18 TFEU, which generally prohibits any discrimination on grounds of nationality<sup>144</sup>.

With regard to the scope of the non-discrimination clauses in the air, waterborne and bus sector, they have been introduced with a broadly similar wording but they also differ from each other to a certain degree. The Regulation on air services prohibits any discrimination based on nationality or residence of consumers and on the place of establishment of carriers and ticket vendors. However, it does not foresee that different treatment could be granted, based on social tariffs. The respective Regulations on waterborne and bus transport, in turn, provide for the possibility to introduce social tariffs. However, they do not specifically prohibit a discrimination based on customer's "residence". In addition, the prohibition of

<sup>143</sup> Article 1(a) and Article 4(2) of both Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and Regulation (EU) No 1127/2010 concerning the rights of passengers when travelling by sea and inland waterway regulate the principle of non-discrimination. Article 23(2) and 16(1) of Regulation (EC) No 1008/2008 on common rules for the operation of air services refer to non-discrimination in air transport.

<sup>144</sup> The Commission's proposal for recast of the Rail Passenger Rights Regulation foresees the introduction of an explicit non-discrimination provision: "Without prejudice to social tariffs, railway undertakings or ticket vendors shall offer contract conditions and tariffs to the general public without direct or indirect discrimination on the basis of the final customer's nationality or residence, or the place of establishment of the railway undertaking or ticket vendor within the Union". This wording was kept by the EP in its first reading (15/11/2018) but the reference to "residence" was deleted in the Council's General Approach (02/12/2019).

discrimination laid down in the Regulation on bus transport is explicitly addressed only to carriers, without specifically envisaging ticket vendors.

*Article 23 (2) of **Regulation 1008/2008 (air transport)**: "Without prejudice to Article 16(1), access to air fares and air rates for air services from an airport located in the territory of a Member State to which the Treaty applies, available to the general public shall be granted without any discrimination based on the nationality or the place of residence of the customer or on the place of establishment of the air carrier's agent or other ticket seller within the Community".*

*Article 4 (2) of **Regulation 1177/2010 (maritime transport)**: "Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers or ticket vendors shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of carriers or ticket vendors within the Union".*

*Article 4 (2) of **Regulation 181/2011 (bus transport)**: "Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of the carriers, or ticket vendors within the Union".*

Since the respective Regulations on waterborne and bus transport prohibit any direct and indirect discrimination based on nationality, it can be concluded that they also cover unjustified discriminative treatment based on a customer's residency. According to the CJEU jurisprudence, the requirement for equal treatment between nationals and non-nationals applies not only to overt but also to covert discrimination. This relates to discrimination of "non-residents" who are in most of the cases "non-nationals" and a discrimination against them may constitute an "indirect discrimination based on nationality"<sup>145</sup>.

However, a difference in treatment of residents could be justified in certain cases. To this end, two conditions must be cumulatively fulfilled where the differentiating treatment shall be (i) based on objective considerations in the public interest, that are independent of the nationality of the non-residents; and (ii) the restriction shall be proportionate to the legitimate aim pursued by the measure that introduces the different treatment<sup>146</sup>.

Therefore, the sectorial EU transport legislation prevents the inclusion of discriminatory clauses and tariffs in transport contracts – when those relate to nationality, residence and establishment. However, there is no explicit ban on restrictions for on-line access, as unconditionally prohibited under the Geo-blocking Regulation: (i) blocking of access to webpages in other Member States where such contracts and tariffs are offered; (ii) re-routing to other webpages, imposed on customers in line with their place of residence, and (iii) restrictions related to payment means.

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<sup>145</sup> See case C-103/08, *Gottwald*, § 27.

<sup>146</sup> See case C-103/08, *Gottwald*, § 30.

### 3.2.2. Evidence on geo-blocking practices

The transport sector and transport network are of fundamental importance to our economy and society. They allow the free movement of persons and goods and are closely interlinked with the freedom to provide services and the free movement of capital. Transport is therefore at the foundation of the Single Market and the economic growth. Furthermore, the transport infrastructure, also helps our trade policy and links to third countries flourish.

The needs of society today call for an increase in multi-modal, efficient and sustainable transport and mobility services. A key element in this respect is their digitalisation.

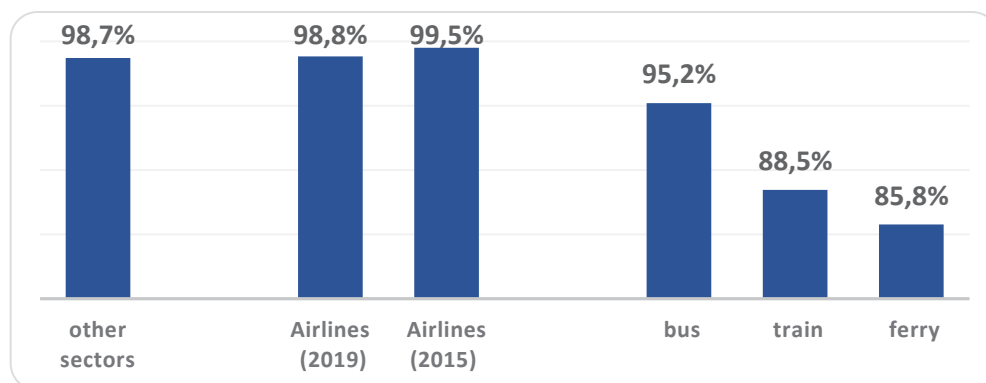
As mentioned, the Mystery Shopping Survey commissioned by the Commission and carried out at the end of 2019 looked into geo-blocking practices in the Member States at different stages of the shopping process in the transport sector (passenger air, rail, bus/coach and maritime services), for services sold on-line. The different stages of the shopping process encompassed e.g., the access to ticket vendors' or carriers' webpages (re-routing), purchase of tickets (price and fees) and possible discrimination based on payment means. A comparison of trends was made with regard to one transport mode, notably, airline service websites as these were covered in the Mystery Shopping Study carried out in 2015, before the submission by the Commission of the proposal for the Regulation.

The 2019 Mystery Shopping Survey revealed the following results, as presented below. The results for the transport sector are broken down into the main transport modes that were included in the survey namely: airlines, bus/coach transport, trains and maritime transport (ferries).

#### Access to websites

Cross-border shoppers were generally able to access the exact transport service website they sought access to. This is especially the case for airline service websites (1.2% failure to access exact website) and bus service websites (4.8% failure to access exact website). For ferry services and train services the share of websites that couldn't be accessed in their exact same form as domestic shopper would see is notably higher - 14.2% and 11.5% respectively.

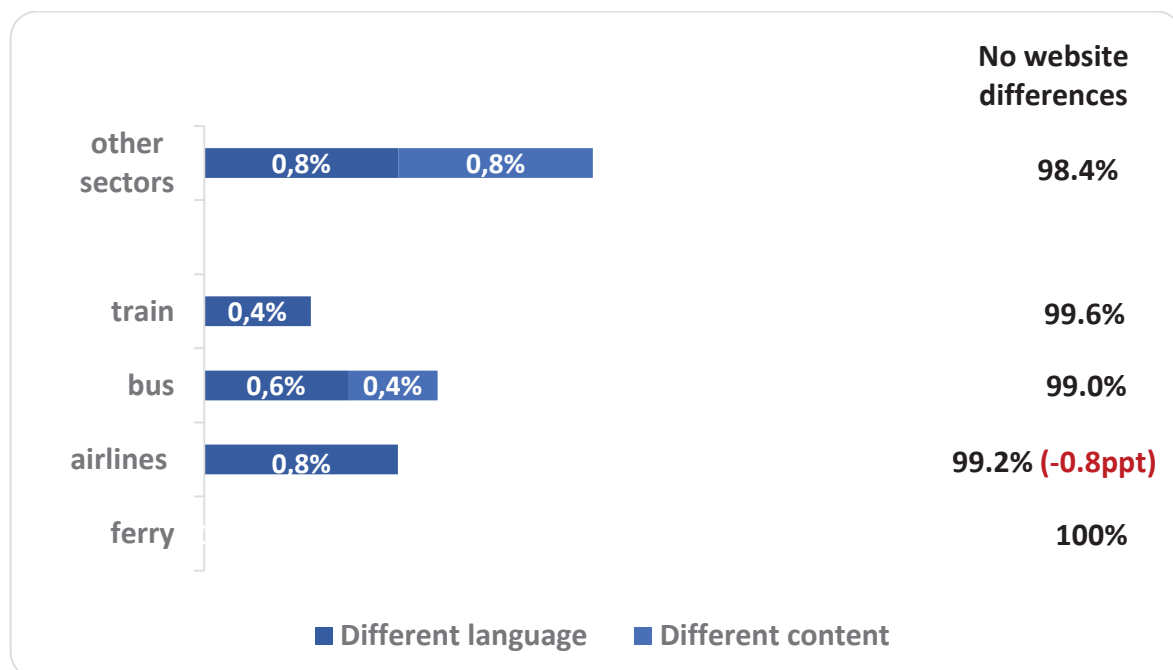
Figure 47 - Website access (transport modes), mystery shopping survey 2019



Source: Ipsos et al (2020)

Even if they allow cross-border shoppers to visit their website, traders can still restrict access by adjusting the content of their website depending on the shopper's location. While changes in the formal aspect of the website do not necessarily affect its content (and vice versa), it nevertheless can provide a first indication on whether such changes may take place, hence the in 2019 Survey shoppers were requested to indicate first sight differences with the outline of the website. While in a main sample, overall, for 98.4% of the websites that could be accessed, the website appeared to be exactly the same, including the same default language as offered to domestic shoppers, in the transport sector, exact same website appearance for cross order shoppers was found in more than 99% of train, bus, ferry and airline websites.

Figure 48 - Website differences (transport modes) mystery shopping survey 2019

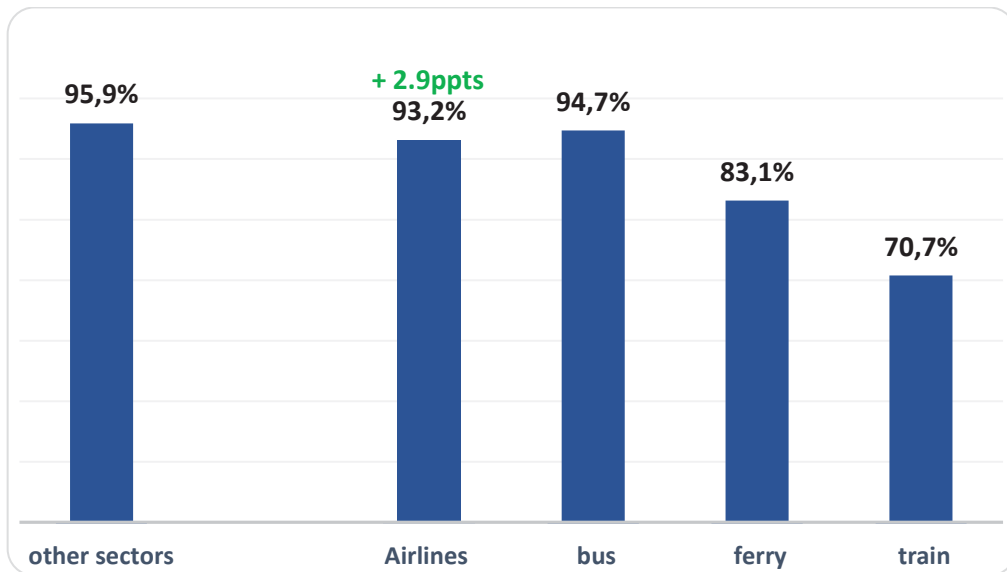


Source: Ipsos et al (2020)

### Product availability

Product/service availability in the transport sector is almost similar to the overall average (see section 2.2.1 above) in the two transport modes. Airlines and busses both score very high in terms of availability (93.2% and 94.7%), but ferry and train websites perform worse as a higher proportion of websites do not offer cross-border customers the same services (16.9% and 29.3%, respectively).

Figure 49 - Websites offering the same services to cross-border shoppers (transport modes) - mystery shopping survey 2019

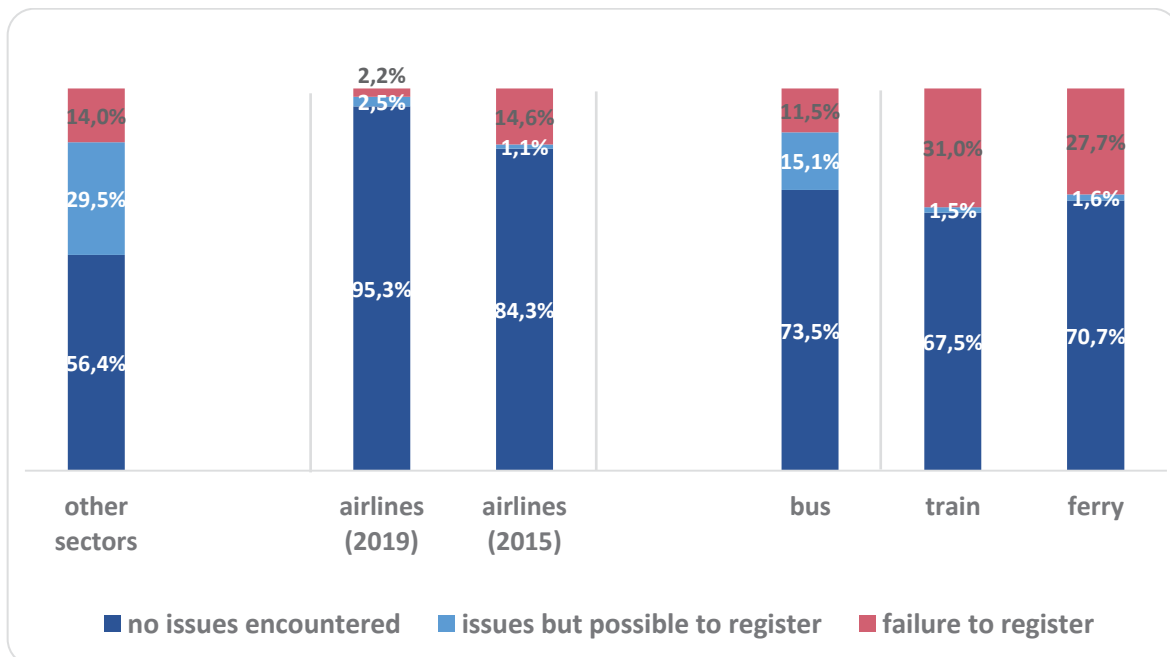


Source: Ipsos et al (2020)

### Registration

Geo-blocking in the registration phase often is aligned with the frequency reported in other sectors covered by the Regulation (actually lower for airlines and bus sectors). Also in this regard, however, train and ferry websites score worse.

Figure 50 - Failure to register, transport sectors (mystery shopping survey 2019)

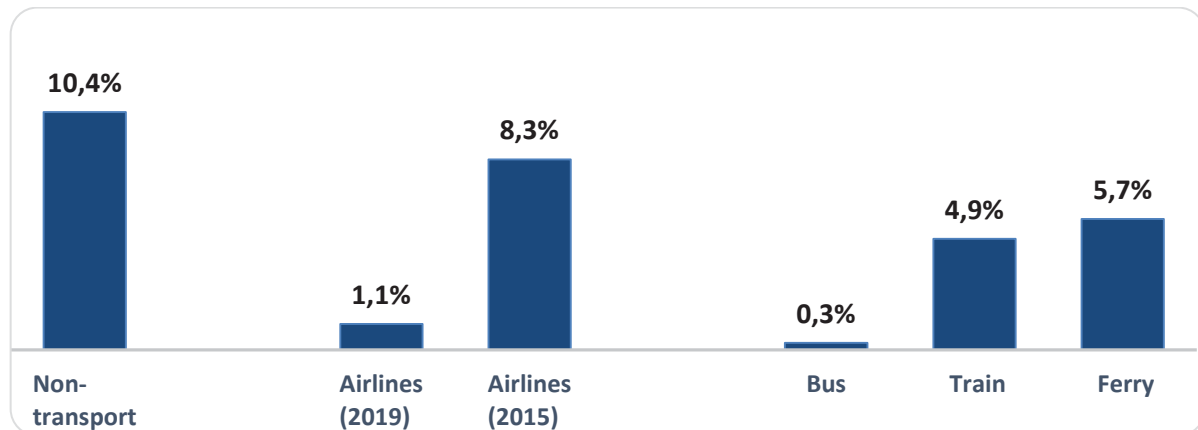


Source: Ipsos et al (2020)

## Payment

Geo-blocking at the payment stage for websites in the transport sector is rather rare and occurs less than in other industry sectors observed. When comparing different transport modes, the survey shows that in the bus sector, geo-blocking at the payment stage is extremely rare (less than 1%), however, it is a bit higher in ferry and train sectors.

Figure 51 - Payment restrictions (transport modes) mystery shopping survey 2019

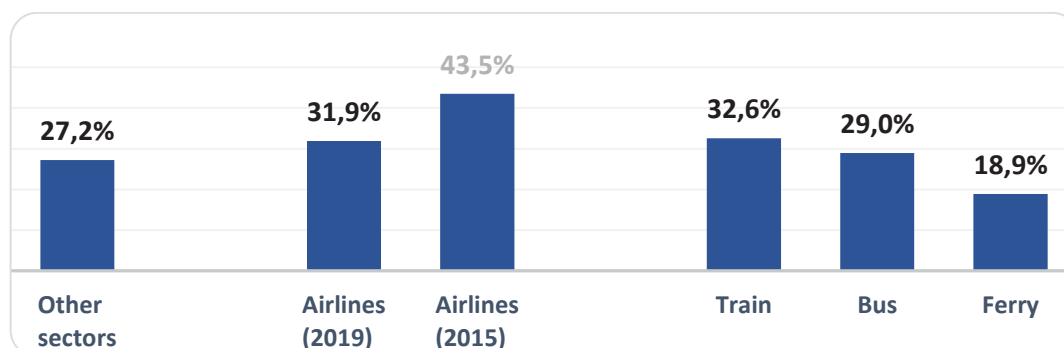


Source: Ipsos et al (2020)

## Price differences

The Study shows that airline, train and bus transport websites use different prices than in other non-transport sectors slightly more often. The practice of using different prices for cross-border shoppers is most common among train websites (32.6%) and airline websites (31.9%). For airline websites, this figure represents a decrease of 11.6 percentage points compared to 2015. Price differences are least common among ferry websites (18.9%).

Figure 52 - Websites with price differences (transport modes)



Source: Ipsos et al (2020)



### 3.2.3. Findings

- The 2019 Mystery Shopping Survey suggests that geo-blocking practices in all the separate transport modes observed – airlines, bus/coach, train and maritime – are relatively infrequent and often in line with the findings for other services covered by the Regulation, with some notable exceptions.
- Geo-blocking at the access (to the websites) stage is rather low but differs between transport modes (airlines scoring best, ferry and train, scoring less well).
- Geo-blocking as to product availability is slightly higher than overall average, but overall product/service availability is still high; again, in ferry and train services websites, the shoppers are more likely to face restrictions on services availability than in airlines and bus transport services.
- With regard to using different prices for cross-border shoppers, this happens slightly more often in airlines, train and bus transport modes, compared with overall average.
- Geo-blocking at the registration stage occurs less frequently than overall average for bus and airlines, but much more often for ferry and railways.
- Geo-blocking at the payment stage also occurs less frequently than overall average. It occurs very rarely in the bus and airlines transport mode.
- As to differences in the transport modes, the Survey results suggest that geo-blocking practices are occurring more in the train and ferry websites.
- Overall, Geo-blocking practices in all the transport modes observed – airlines, bus/coach, train and maritime – are rather low and score lower than the overall average, except as to the access to the websites (in bus, train and ferry transport modes), price differences (airlines, train and bus transport modes), registration (ferry and train transport modes) and the same product availability, where the geo-blocking score is somehow higher than overall average in other sectors. The more frequent incidence of Geo-blocking practices in the rail sector may be explained by the fact that current Rail Passenger Rights Regulation does not provide for explicit non-discrimination clause, which should change with adoption of the recast Regulation.
- In conclusion, the 2019 Mystery Shopping Survey has not reported widespread geo-blocking practices in the transport services field.
- Finally, rather low Geo-blocking practices in the transport sector and the ongoing recast of the Rail Passenger Rights Regulation does not justify opening of the Regulation at the moment to extend its scope to the transport services field, but would rather suggest increased monitoring of marketing practices of operators, often operating with a substantial position in the national market.

## 3.3. Financial services

### 3.3.1. Evidence on cross-border demand and geo-blocking practices

In March 2017 the European Commission published an action plan setting out a strategy to strengthen the EU single market for retail financial services, including a large range of



services such as bank accounts, payment cards, consumer and mortgage credit, insurance and long-term savings products<sup>147</sup>. Several actions of the plan triggered a range of ongoing in-depth assessment aiming at, *inter alia*, assessing the remaining obstacles to cross-border provision of services, taking also into account the specificities of these service and in particular the important regulatory objectives to be taken into account besides the single market objective (such as consumer protection, responsible lending, effective supervision). Accordingly, a range of on-going evaluation exercises are gathering data also on cross-border demand for these services as well as, to some extent, on the extent of geo-blocking practices.

First of all, with regard to consumer credit the on-going evaluation of the Consumer Credit Directive (CCD) shows a significant interest in looking for cross-border offers (29% in the consumer survey<sup>148</sup>). This however translates into a very low (and stagnant) amount of credit granted cross-border (0.9%), apparently due to legal obstacles for providers (such as regulatory divergences and objective difficulties in checking credit worthiness across borders<sup>149</sup>) as well as widespread limitations to cross-border access to offers of consumer credit<sup>150</sup>. This is coupled with reportedly low final demand to enter into a contract (also in view of lack of awareness, language or regulatory differences)<sup>151</sup>.

As regards distance sales of financial services more generally, data from 2016 finds that 92% of Europeans have never purchased a financial service in another Member State. When stating the reasons, refusal of providers accounted for 2% of replies, while other referred to other kind of obstacles. More recent findings carried out in the context of the DMFSD (Distance marketing of financial services Directive) evaluation, report a similar 4% figure where geo-blocking/discrimination was mentioned as a reason preventing purchase of a financial product at distance.

However, there seems to be more interest for cross-border trade in the field of distance sales of financial services, according to some figures. 15% of the respondents to the consumer survey carried out for that evaluation claimed to have purchased financial services from another Member States via distance means or tried to do so and 32% of those that had not tried it yet would do it to find better deals. Natural barriers seem the main matter of concern for consumers when considering cross-border purchases. The main reason indicated by respondents for not considering purchasing financial products at a distance from another EU country was uncertainty about their rights or where to turn to get redress in case of a problem (35%), followed by the fact that they are satisfied with the services offered in their country (27%), that they prefer face-to-face contact (23%), and finally due to language barriers

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<sup>147</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic And Social Committee and the Committee of the Regions Consumer Financial Services Action Plan: Better Products, More Choice COM/2017/0139 final, see notably actions 7, 9 and 11.

<sup>148</sup> Evaluation of Directive 2008/48/EC on credit agreements for consumers – ICF Final Report (2020) consumer survey.

<sup>149</sup> See case study 6 (Creditworthiness assessment) of ICF (2020).

<sup>150</sup> See case study 7 (Cross-border access to credit) of the abovementioned study for further details

<sup>151</sup> Evaluation of Directive 2008/48/EC on credit agreements for consumers – ICF Final Report, Sec. 3.4.1.

(15%)<sup>152</sup>. These reasons for the low volume of cross-border trade would seem to apply across the board and cover all financial services. However, other more significant regulatory and non-regulatory reasons exist (also depending on the specific type of financial services) justifying that low volume such as, tax rules, national solvency regimes, national markets features, national foreclosure rules, notary and residential real estate registration rules (for mortgage credit), etc. Furthermore, there may be some inconveniences, cost and risk when the currency in the Member State of the buyer is different than in the Member State of the seller (when one of the two is not member of the Eurozone).

Overall, it seems that there is however some unmet demand for specific services, such as consumer credit. For instance, about 15% of respondents to the consumer survey that tried to purchase financial services in another Member State. The most common experiences were that they were redirected to a website that was specific to the country where they live (29%) or they could not access the website (19%). Difficulties in accessing ‘foreign’ websites (e.g. because they are blocked or they redirect consumers to domestic or global website) or entering their residence<sup>153</sup> were also reported by consumers and a significant part of the mystery shoppers (more than 25%).

These findings would confirm the persistence of obstacles within the EU single market, which however go well beyond the aspects subject to harmonisation in the CCD and the DMFSD (though certain EU financial services legislation, such as the Payment Accounts Directive - PAD - or SEPA Regulation, already sanction access discrimination on the basis of the place of residence). On the other hand, certain inherent aspects of financial services (such as the important level of regulation as well as the complexity of the services at stake) may make them unsuitable to purely cross-border passive sales.

Further analysis is ongoing on the regulatory and other relevant elements affecting, *inter alia*, cross-border demand and provision of financial services.

In addition, there are ongoing studies that will inform the review of the Payment Accounts Directive and of the Mortgage Credit Directive. Finally, a study on retail investments is ongoing, which will look into, *inter alia*, pre-contractual information provided to retail investors prior to the purchase of an investment product.

### 3.3.2. Specificities of the sector

Financial services are tightly regulated. For reasons of public supervision, the EU legislative framework subjects financial service providers to a system of passporting, whereby a firm wishing to sell its products cross-border is subject to a notification procedure to the host Member State. Examples of such notification requirements are Article 33-39 Capital

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<sup>152</sup> These figures echo those of Eurobarometer 446.

<sup>153</sup> See consumer survey carried out in the context of the DMSFD evaluation and BEUC response to the Commission consultation on Green Paper on retail financial services. Available at: [https://www.beuc.eu/publications/beuc-x-2016-027\\_fal\\_beuc\\_position\\_green\\_paper\\_financial\\_services.pdf](https://www.beuc.eu/publications/beuc-x-2016-027_fal_beuc_position_green_paper_financial_services.pdf)

Requirements Directive (for banks)<sup>154</sup>, Article 34-35 Markets in Financial Services Directive (for investment firms)<sup>155</sup> and Article 4 Insurance Distribution Directive (for insurance distributors)<sup>156</sup>.

When a financial service provider exercises the freedom to provide services in another Member State it is, depending on the sector, subject to additional national legal requirements in the host Member State. In the insurance sector for example, providers have to comply with the rules of general good<sup>157</sup> of the host country (consumer protection, pre-contractual information, but also prohibition of certain clauses). For investment services wishing to sell Packaged Retail Investment and Insurance-Based Products (PRIIPs<sup>158</sup>), operators have to comply with rules on advertising and language requirements. In general, the consumer protection law of the host country is applicable, with specific rules applicable in particular for insurance contracts.

Because of the specific conditions to fulfil, a provider retains the choice whether to actively access a market or not.

With regard to passive sales, i.e. whereby a customer solicits a financial service or product from a financial firm located in another Member State, refusal to provide the service may occur. In these cases, the firm may be able to invoke legitimate reasons for refusing such a request, e.g. uncertainty as regards the need to notify the host authority and the applicable local law, or that it has not set up systems for Anti-Money Laundering (AML) and Counter-Terrorism Financing (CFT) checks for a customer in another country. It may indeed be costly to perform ad-hoc AML customer due diligence checks on an individual from another country<sup>159</sup>, as the Anti-Money Laundering Directive is a minimum harmonisation Directive and different rules may apply with respect to the type and form of checks to be conducted, and different requirements regarding verification of identity<sup>160</sup>. In addition to respecting national AML/CFT rules, the bank will also need to make its own AML/CFT assessment about a prospective customer, and in certain cases it may be up to the bank to decide on what should constitute a reliable verification.

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<sup>154</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms

<sup>155</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments

<sup>156</sup> Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution

<sup>157</sup> Cf. Article 11 IDD

<sup>158</sup> Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

<sup>159</sup> See more generally supply side barriers reported in SWD Evaluation of Directive 2002/65/EC concerning the distance marketing of consumer financial services (2020)

<sup>160</sup> In this regard, the minimum harmonisation of AMLD of e.g. Customer Due Diligence (CDD) requirements has resulted in different national rules and a fragmented approach – which in itself constitutes an obstacle to cross-border provision. In such cases, further harmonisation should be pursued, as has been recognised in the Commission “Action plan for a comprehensive Union policy on preventing money laundering and terrorism financing” adopted on 7 May 2020.

Specificities of the financial products/markets themselves can also explain the refusal of service cross-border.

Investment services and life insurance products for instance are designed according to national tax regimes. Therefore, they might not be compliant with tax requirements in another Member State, or may just not be interesting for customers from another Member State.

In non-life insurance contracts, the place of location of an insured risk determines the insurance premium. Available data and court rulings on damages differ between Member States and may justify objectively differences in treatment.

With regard to mortgage credit, the location of the collateral and diverse foreclosure rules creates difficulties in terms of cross-border recovery and non-harmonised creditworthiness assessment procedures and data also constitute barriers to cross border selling.

### *3.3.3. Description of existing sectoral EU legal framework*

When it comes to retail banking services, there are several products, for which there could potentially be demand or which could be provided cross-border. For instance, banks can offer payment accounts, saving accounts, consumer credit or mortgage credit. Anecdotal evidence<sup>161</sup> shows however that a relatively low number of consumers are interested in cross-border products offered by banks - mainly those who either live and work in border areas or who often travel to another Member State. The majority of consumers refrain from accessing cross-border financial services for practical reasons: language barrier, lack of trust towards foreign providers, physical distance to the branch, unfamiliarity with the provider's national legislation, inconvenience, cost and risk when the currency is different, etc.

For certain retail financial services however, there are specific laws at EU level, which regulate access to them, including in a cross-border context. For instance, the Payment Accounts Directive (PAD) allows for access to a payment account with basic features (hereinafter "basic payment account") for all consumers legally resident in the Union. Article 15 specifies that this right applies irrespective of the consumer's nationality or place of residence. However, the Directive allows some exceptions, in particular, if the bank considers that it would be in breach of the AML and/or counter-terrorism financing rules. The review of the PAD is currently on-going. Among other aspects, the review will aim to assess the demand as well as the obstacles for cross-border access to payment accounts.

The Mortgage Credit Directive (MCD) lays down the rules regarding the free provision of services by credit intermediaries (Article 32). Credit intermediaries have to notify the home competent authority when they intend to carry out business for the first time in one or more host Member States (either under the freedom to provide services or by establishing a branch). The home competent authority then has to notify the competent authority of the host Member State within one month. Before the credit intermediary commences its activities, the competent authorities of the host Member States shall prepare for the supervision of the new

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<sup>161</sup> Eurobarometer 2016 and consumers' complaints

entity in accordance with Article 34 of MCD. If necessary, they communicate to the credit intermediary the conditions under which, in areas not harmonised in Union law, it should operate in the host Member State.

The MCD more specifically lays down non-discrimination rules with regard to cross-border access to credit databases used for creditworthiness assessment purposes. However, different national conditions under which these databases operate, or their varied content, constitute an obstacle in accessing the information needed to conduct creditworthiness assessments. If the bank is unable to make an effective assessment because it cannot access such data, it has a justified reason to refuse a consumer the mortgage credit. Another impediment is related to the recovery of the credit from a foreign consumer in case he or she cannot repay it. Mortgage credit is guaranteed by a collateral that might be located in another country, which may make it more difficult and more onerous for the foreign bank to recover given the differences in national civil regulations. Other issues explaining the low number of cross-border mortgages under the freedom to provide services are the differences in real estate rules and tax regulations.

Different aspects of cross-border provision of the mortgage credit will be evaluated in the ongoing review of the Mortgage Credit Directive.

#### 3.3.4. Findings

- Financial services are offered cross-border on the basis of a passport, whereby firms have to comply with a number of requirements, such as notification to the host Member States, consumer protection rules etc. There may be limited cases of passive sales (reverse solicitation) where these requirements don't apply. However other sector requirements may apply, such as AML checks. Because there are specific regulatory conditions to fulfil, firms providing financial services retain the choice about whether to offer their services to customers in another market (contractual freedom). Beyond cases already regulated by specific EU sectoral legislation like PAD, imposing a new obligation to accept cross-border customers could create additional costs for service providers (e.g. AML checks of foreign IDs) as well as legal uncertainty vis-à-vis sector legislation.
- In general for financial services due consideration often needs to be given to some objective elements related to the recipient of the service affecting its risk profile, which may be more difficult to have access to, depending on his or her location (such as assessment of creditworthiness across borders). On the other hand, where such elements are less relevant, as for the basic payment account, EU legislation provides customers with a right to receive cross-border services (subject to certain conditions) as set out in the Payment Accounts Directive.
- In conclusion, in view of the specificities of financial services, the ongoing reviews and studies it does not seem justified to consider an extension of the scope of the Geo-blocking Regulation to this category of services.



### 3.4. Telecom Services

#### 3.4.1. Specificities of the sector and applicable legislation

Although not featuring prominently among the major sectors subject to discrimination<sup>162</sup>, there is anecdotal evidence of residence or proof of identity requirements occurring with regard to electronic communications.

In this regard the European Electronic Communications Code (Directive (EU) 2018/1972 – Code) contains a specific sectorial provision on non-discrimination (Article 99), which is relevant to these type of concerns, and is based on the similar clause enshrined in Article 20 of the Services Directive. In particular Article 99 of the Code stipulates the following: *“Providers of electronic communications networks or services shall not apply any different requirements or general conditions of access to, or use of, networks or services to end-users, for reasons related to the end-user’s nationality, place of residence or place of establishment, unless such different treatment is objectively justified.”*

According to this new provision, electronic communications providers could potentially ask for proof of residence or other documents to verify identity for example, but should subsequently not discriminate end-users by applying different requirements/conditions on the basis of nationality, place of residence or place of establishment, unless it is objectively justified. The burden of proof for justification is on the provider, which (see recital 256 of the Code) may apply different conditions *“on the basis of objectively justifiable differences in costs and risks, not limited to the measures provided for in Regulation (EU) No 531/2012 in respect of abusive or anomalous use of regulated retail roaming services”*.

Member States shall transpose and apply the Code by 21 December 2020, and, therefore, there is so far no practical experience on the application of this new sectorial provision on non-discrimination. Within this context the Commission is in contact with national authorities to address questions they may have in connection to Article 99 and other articles of the Code.

Whilst Article 99 of the Code applies overall to the provision of electronic communications networks and services, there is further specific EU legislation regarding mobile roaming services which allows providers to potentially envisage a differential treatment of their customers based, in particular, on residence or on stable links with a specific place. In particular, as regards roaming within the EU/EEA, it should be noted that the Code is without prejudice to *inter alia* the Roaming Regulation (Regulation 2015/2120), which mandated the end of retail roaming charges in the Union from 15 June 2017 and which includes two safeguards to ensure sustainability of the new roaming regime and prevent abuse: the fair use policy and the sustainability derogation.

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<sup>162</sup> For instance ECC reports of complaints do not report telecom services; lack of clarity on the application of Article 20 SD to telecom services was reported in earlier reports of ECC on the application of Article 20, see *Do Invisible Borders Still Restrict Consumer Access to Services in the EU? Analysis of Article 20.2 of the Services Directive related consumer complaints reported to ECC-Net between 2013 and 2015* (2016), although also in this case telecoms did not feature among the most concerned sectors.

In particular, the fair use policy aims at ensuring that roaming at domestic price is used when periodically travelling in the EU/EEA (vs permanent roaming).<sup>163</sup> For this purpose, an operator may ask its customers for a proof of residence in, or other stable link with, the EU/EEA country where it provides services and issues the SIM card to be used at domestic price when travelling abroad (Article 4(1) Implementing Regulation (EU) 2016/2286). The residence/stable link requirement is justified by the objectives of the Roaming Regulation, and the fair use policy intends to prevent a potential distortion (arbitrage) of domestic markets, which are still national.<sup>164</sup>

This rather exceptional regime is justified by the objectively different costs for an operator operating in Member State A (where it has its own spectrum, network assets, etc.) to provide services in another Member State B, at Member State A retail prices. This is also reflected in the study “Assessment of the cost of providing mobile telecom services in the EU/EEA”<sup>165</sup>. The delivery of such retail services in Member State B would require the said operator to purchase wholesale roaming services from operators in Member State B. For operators in low cost countries, this will not be commercially viable and will inevitably lead to the (direct or indirect) increase of domestic and/or roaming prices.

An operator may also check that the SIM card is used more in its home Member State than abroad. If a customer has roaming consumption prevailing over domestic consumption or presence in other Member States of the Union prevailing on domestic presence for a sufficient time window (4 months), then the operator may apply small roaming surcharges, after alerting the customer and while this pattern continues.

In addition, in order to allow for the continuous development of the best data offers on domestic markets (e.g. unlimited data), an operator may apply a volume safeguard on roaming data consumed at domestic prices. Beyond that volume, the operator may apply a small roaming surcharge not exceeding the wholesale roaming price cap on data.

Both the fair use policy and the sustainability derogation have been subject to a review in June 2019 and in November 2019. Both the Staff Working Document on the findings of the review of the rules on roaming fair use policy and the sustainability derogation<sup>166</sup> and the

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<sup>163</sup> See Recital 22 of Regulation 2015/2120: “The ‘fair use policy’ is intended to prevent abusive or anomalous usage of regulated retail roaming services by roaming customers, such as the use of such services by roaming customers in a Member State other than that of their domestic provider for purposes other than periodic travel.”

<sup>164</sup> See recital 20 of Regulation 2015/2120: “The mobile communications market remains fragmented in the Union, with no mobile network covering all Member States. As a consequence, in order to provide mobile communications services to their domestic customers travelling within the Union, roaming providers have to purchase wholesale roaming services from, or exchange wholesale roaming services with, operators in a visited Member State.”

<sup>165</sup> Axon Consulting (2019) Assessment of the cost of providing mobile telecom services in the EU/EEA

<sup>166</sup> Commission Staff Working Document on the findings of the review of the rules on roaming fair use policy and the sustainability derogation laid down in the Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016, SWD(2019) 288 final, available [here](#).

Report on the review of the roaming market<sup>167</sup> concluded that the evidence available at the time would not support the conclusion that these rules would need to be changed.

### 3.4.2. Findings

- In conclusion, taking into account the recent introduction of a sector-specific non-discrimination provisions, still to be transposed by the Member States, as well as specific EU legislation allowing traders to envisage specific situations where a different treatment of customers without a close link with the provider's area may be justified in the context of mobile roaming services, it appears premature to envisage any extension of the Regulation to this sector.

## 3.5. Health services

### 3.5.1. Description of existing sectoral EU legal framework on non-discrimination and cross-border provision

Cross-border provision of health services in the EU is specifically regulated by Directive 2011/24/EU on the application of patients' rights in cross-border healthcare<sup>168</sup>. "Healthcare" is defined in the Directive as "*health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices*". The CJEU has held that the Treaty provisions on the freedom to provide services include the freedom for the recipients of healthcare, including persons in need of medical treatment, to go to another Member State in order to receive it there. The same should apply to recipients of healthcare seeking to receive healthcare provided in another Member State through other means, for example through eHealth services<sup>169</sup>.

The Directive provides for a non-discrimination principle of patients (Article 4(3))<sup>170</sup>. This provision applies to both private and publicly funded health services. Article 4(3) requires the Member State of treatment to apply the principle of non-discrimination with regard to nationality to patients from other Member States. However, it also allows the Member States,

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<sup>167</sup> Report on the review of the roaming market, COM(2019)616 final, available [here](#).

<sup>168</sup> OJ L 88, 4.4.2011, p. 45.

<sup>169</sup> The Market Study on the Telemedicine (dating October 2018), commissioned by the European Commission *inter alia* describes the nature and characteristics of telemedicine market as well as potential obstacles to the widespread deployment of telemedicine services. The Study provides some data on the characteristics and size of market for on-line health services.

<sup>170</sup> 3. *The principle of non-discrimination with regard to nationality shall be applied to patients from other Member States. This shall be without prejudice to the possibility for the Member State of treatment, where it is justified by overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources, to adopt measures regarding access to treatment aimed at fulfilling its fundamental responsibility to ensure sufficient and permanent access to healthcare within its territory. Such measures shall be limited to what is necessary and proportionate and may not constitute a means of arbitrary discrimination and shall be made publicly available in advance.*



under certain circumstances, to adopt measures regarding access to treatment in order to fulfil their responsibility to ensure access to treatment within their territory. Such measures must be justified, proportionate and necessary; they must also be announced publicly in advance.

This clause essentially permits Member States to introduce certain safeguard measures to restrict access to healthcare on their territory in case cross-border patients would undermine sufficient and permanent access to healthcare for domestic patients. At the same time, the clause makes it clear that such restrictions must not be used arbitrarily or abusively.

The Commission services are collecting information on the use of this clause by the Member States on an annual basis. According to the most recent information for 2018, of the 25 Member States which replied, only few (including Denmark, Estonia, Romania) have implemented mechanisms that can be used to limit access to cross-border healthcare according to Article 4(3) of the Cross-border Healthcare Directive. However, these mechanisms have, as far as data are available, barely been used. In 2018, Denmark reported 10 cases of patients whose access to treatment had been limited on the grounds of overriding reasons of general interest.

A more general evaluation of the non-discrimination principle under the Cross-border Healthcare Directive might take place in 2022 as part of the evaluation of the Directive.

As regards the **sale of medicines over the internet** and the possibility to accept foreign drugs/medical appliances prescriptions by on- and off-line pharmacies, this is to a certain extent governed by the EU instruments.

In particular, the sale of medicines via the internet is covered by the EU pharmaceutical legislation, i.e. Directive [2001/83/EC](#) on the Community code relating to medicinal products for human use.

According to Directive [2001/83/EC](#), the Member States must allow the sales of OTC ('over-the-counter') medicines online. EU legislation allows Member States to prohibit the sale of prescription medicines online for public health reasons. The Member States also regulate the scope of drugs requiring prescription.

A patient can only buy a medicine over the internet if it is authorised on its territory. Thus, a patient should be allowed to buy the exact same medicines from an online pharmacy or a brick and mortar pharmacy. Member States may, however, impose additional conditions, justified on grounds of public health protection, for the retail supply of medicines online. Each Member State decides what are those additional provisions on online pharmacies.

Article 11 of the Cross-border Healthcare Directive ensures the recognition of prescriptions issued in all Member States and stipulates that the medical products are dispensed in accordance with national legislation.

The reimbursement of medicines in the "home" Member State for medicine bought from on-line pharmacies in another Member State using a prescription from own Member State (whether scanned paper pdf or e-prescription) depends on national rules.

Directive 2001/83/EC provides the rules for the online sales of medicines but does not regulate the procedure of public reimbursement. This means, for example, that if a Dutch online pharmacy supplies to a German patient a medicine the patient may then be reimbursed in Germany (Member State of affiliation). The reimbursement follows the general rules in the Member State of affiliation.

### 3.5.2. Findings

- In conclusion, as regards **healthcare services** under the scope of the Cross-border Healthcare Directive, there does not seem to be an added value of including those under the scope of the Regulation, also taking into account tailored EU sector-specific legislation already providing for non-discrimination of patients and, notably the possibility to restrict the principle of non-discrimination under the latter Directive. Furthermore, no specific issues have been reported to the Commission in this regard.
- As regards to cross border **on-line sales of medicines**, this is already possible under Directive 2001/83/EC, subject to several limitations that could be provided under national law. Therefore, it appears that extending the obligations under the Regulation to the on-line sales of medicines would have little impact without harmonisation of conditions that Member States are allowed to impose under the Directive, like conditions of public reimbursement of medicines bought cross-border online or range of drugs subject to prescription in the Member State and thus not available for free cross-border sale.

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