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Geo-blocking in licence agreements

Whether agreements to block access to digital content infringe EU competition rules

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1 Introduction

1.1 The research question

This thesis concerns the cross-border provision of audiovisual services. The question that will be considered is whether the contractual obligation in licence agreements to geo-block customers restrict competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU), particularly when this obligation is imposed on audiovisual service providers.

Geo-blocking is the use of technology to limit access to webpages showing audiovisual content – like movies, TV-series and sporting events – based on the location of the consumer attempting to access the streaming service.[1] Online service providers can be commercial, such as Netflix, or publicly owned, like BBC iPlayer. Audiovisual services include a variety of services such as streaming, internet-based media platforms and video-on-demand.[2]

This topic concerns two separate areas of law. The question itself is one of competition law, however, the answer must be grounded in intellectual property law (IP law) as audiovisual works are protected by copyright.

Intellectual property rights (IPRs) are generally the product of, and protected by, national systems of law.[3] This is called the principle of territoriality.[4] As IPRs confer upon their owner an exclusive right, it is in the nature of IPRs to grant absolute territorial exclusivity. Competition law, on the other hand, strives to keep the markets open.[5] Therefore, there is tension between these two areas of law and policy.[6] It is the aim of both the EU institutions, national courts and practitioners of law to find a balance between intellectual property rights and competitive markets.[7]

1 Renda et al. (2015b) p. 6
2 Guibault and Quintais (2014) p. 9
3 Whish and Bailey (2012) p. 768
4 CEPS (2015)
5 Whish and Bailey (2012) p. 769
6 Waelde (2014) p. 871
7 l.c.

1.2 Relevance

Om March 18th 2016, the European Commission (the 'Commission') issued a paper on its preliminary findings on geo-blocking practices in the e-commerce sector.[8] The findings show that 68 percent of providers of digital content geo-block,[9] and that 59 percent of the content providers in the EU are contractually obliged to do so.[10]

This represents the context of the Commission's ongoing investigation into agreements between Sky UK and the big Hollywood movie studios (hereafter 'Sky UK-investigation).[11] On July 23rd 2015, the Commission issued its Statement of Objections, saying that it considered the licence agreement between Sky and these studios to restrict competition since Sky was obligated to geo-block their services, preventing access from consumers outside of the UK and Ireland.[12] This investigation culminated in commitments being proposed for one of the movie studios on the April 22nd 2016, although the investigation remains active for the other studios.[13]

The question of whether geo-blocking agreements can restrict competition must be seen in the light of the Court of Justice in the European Union's decision in *Murphy,*[14] where the Court held that an agreement granting territorial exclusivity to a Greek TV-broadcaster for showing Premier League matches while at the same time imposing on the broadcaster an obligation to prevent the sale of decoders outside Greece was contrary to Article 101(1) TFEU. This marked a departure from the earlier case law of the Court in the *Coditel*-cases.[15]

Since *Murphy*, questions have been raised as to whether agreements between right owners and providers of online audiovisual content that impose on the service provider and obligation to geo-block their customers, are contrary to Article 101 TFEU.[16]

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8 Geo-blocking practices in e-commerce, SWD(2016)70 final

9 Figure 24 p. 47

10 Figure 40 p. 60

11 European Commission (2015a)

12 l.c.

13 European Commission (2016)

14 Joined cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd., ECLI:EU:C:2011:631, see about the case 2.4

15 C-62/79 SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others, ECLI:EU:C:1980:84 and C-262/81 Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others, ECLI:EU:C:1982:334. See about the cases under 2.4

16 European Commission (2015a)

The question of whether agreements to geo-block can be an abuse of the dominant position the copyright owner might hold is a separate issue and, though interesting, will not be analysed here.

1.3 Sources and methodology

The legal basis for intervening into a contract is Article 101 TFEU, which prohibits agreements that restrict competition. Although the provision lists some examples of what agreements might restrict competition, this list is not exhaustive.

The question of online geo-blocking was not considered when the original EU treaties were drafted, and the wording of the Article has not changed since. Neither the block exemption for Vertical Agreements nor for Technology Transfer Agreements can be applied to copyright licence agreements.[17]

Copyright has been regulated through several directives, and although none of them consider geo-blocking specifically, some guidance can be found there. As the exercise of copyright is relevant when considering whether an agreement restricts competition, I will consider some of these directives, and in particular the Directive 2001/29/on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive).[18]

The answer to whether agreements imposing an obligation on service providers to geo-block consumer must for this reason be found in TFEU itself, and in the case law of the Court of Justice in the European Union (previously European Court of Justice, hence shortened to ECJ or the Court).[19] However, there is not much case law as regards to this question, and most of the cases are from before the internet.

This thesis mainly concerns how far the Court's ruling in *Murphy*, can be interpreted, and in particular to what degree its reasoning can be applied to online audiovisual content. There is no case law answering this question directly, therefore, this thesis presents the, sometimes conflicting, views on what is now the law. Further, there are other decisions of the Court that, together with *Murphy*, can provide some guidance on how the question of geo-blocking will be resolved in the future.

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17 See the Block Exemptions Commission Regulation (EU) No 330/2010 (Vertical Restraints) Article 2(3) and Regulation (EU) No 316/2014 (Technology Transfer Agreements) Article 1(1)(b)

18 Directive 2001/29/EC

19 Craig and De Búrca (2011) p. 58

1.4 Overview

I will in this paper consider whether geo-blocking provisions in licence agreements restrict competition by object by constituting an absolute territorial restriction prohibited under EU competition law (chapter 3). When deciding if an agreement restricts competition by object, it is necessary to take into account the economic and legal context in which such agreements are implemented (chapter 4). Thereafter, I will consider whether the agreements can restrict competition by effect, (Chapter 5) and if such agreements can be exempted under Article 101(3) TFEU (Chapter 6). I will finish with a short summary and a presentation of some possible consequences of declaring the contractual obligation to geo-block anti-competitive under Article 101 TFEU (chapter 7).

First, however, it is necessary to present some key concepts of the legal framework under which geo-blocking take place. This will allow for an understanding of why the relationship between IP and competition is fraught with tension, as well as how the Court has dealt with this tension, a tension that has now surfaced in the question of geo-blocking agreements. Therefore, I will start with a short introduction into agreements restricting competition and of copyright. This will help to understand the competition issues that arise regarding geo-blocking. I will present to what degree the ECJ has considered that intellectual property (IP) can restrict the competition and free movements of the internal marked, as well as the *Murphy*-case, without which the issue of geo-blocking would not have arisen. I will then provide an introduction to the concept of geo-blocking.

2 Key concepts

2.1 Restrictions of competition

Article 101(1) prohibits all agreements, decisions and consorted practices that have as their "object or effect the prevention, restriction or distortion of competition within the internal market."[20] This is not limited to legal contracts; Article 101 prohibits all cooperation.[21] The provision protects the structure of the market and competition 'as such'[22] It is not a requirement that consumers are deprived of advantages in form of price or supply,[23] rather, competition law is a way of furthering the single market integration.[24]

Object and effect are alternative conditions.[25] This means that only when there is no anti-competitive object is it necessary to look at the effects of the agreement.[26] The concept of object restriction must be understood restrictively, and can only be applied to certain types of coordination between undertakings, which reveal a "sufficient degree of harm".[27] Agreements restricting competition by object will be discussed in more detail under 3.1 and 3.2.

Article 101 TFEU applies to both agreements between competitors at the same level in the market – horizontal agreements – and between undertakings at different levels – vertical agreements.[28] Even so, vertical agreements are in general less likely to harm competition than horizontal ones, as they are not agreements between competitors.[29]

From the very beginning, the EU Courts and the Commission have been concerned about vertical agreements that lead to a division of the single market into national markets.[30] Agreements that include export prohibitions or other measures directly or indirectly leading to a

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20 Similar provisions can be found in Agreement on the European Economic Area (EEA Agreement) Article 53 and the Norwegian Competition Act § 10

21 Whish and Bailey (2012) p. 99

22 ibid. p. 118

23 Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services and Others v Commission and Others, ECLI:EU:C:2009:610 paragraph 63

24 ibid. paragraph 61

25 C-56/65 Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), ECLI:EU:C:1966:38

26 Jones and Sufrin (2011) p. 171

27 C-67/13 P Groupement des cartes bancaires (CB) v European Commission, ECLI:EU:C:2014:2204 paragraph 58

28 Whish and Bailey (2012) p. 3

29 Jones and Sufrin (2011) p. 204

30 Whish and Bailey (2012) p. 625

division of the market, are considered to be restrictive of competition by their very nature.[31] An agreement is considered to have the equivalent effect of an export prohibition when it is "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[32] The fact that the agreement concerns IPRs does not change this.[33] The ECJ has consistently held that limiting parallel trade is prohibited,[34] with the exception of cases where the limitation on parallel trade is necessary to preserve the 'specific subject matter' of the IPR, see more about this under 2.3.1.[35]

Competition can be restricted both between distributors that offer the same type of goods, but from different suppliers – inter-brand competition – and between distributors that sell the same goods from the same supplier – intra-brand competition.[36] Territorial exclusivity is a question of intra-brand competition,[37] for example, it prevents the same movie from being licensed to two different media service providers, therefore, there will be no competition on price for that movie. Article 101(1) has been applied to intra-brand competition in particular where there is a division of the single market.[38] I will discuss territorial exclusivity in more detail under 3.2.

Agreements found to restrict competition under Article 101(1) TFEU can be exempted if they fulfil the conditions listed in Article 101(3).[39] This will be discussed in chapter 6.

2.2 Copyright

Copyright protects aesthetic and artistic creations. Despite attempts at harmonising copyright in the EU, protection remains national and territorial in nature.[40] This is called the principle of territoriality.[41]

Copyright is granted as a way of promoting and rewarding creativity. Without the incentive of financial gain, certain types of work would not have been created.[42] By granting copyright

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31 Jones and Sufrin (2011) p. 654-656

32 C-8/74 Procureur du Roi v Benoît and Gustave Dassonville, ECLI:EU:C:1974:82 paragraph 5

33 Joined cases C-56/64 and C-58/64 Consten and Grundig, ECLI:EU:C:1966:41

34 E.g. C-501/06 P GlaxoSmithKline and C-258/78 Nungesser

35 Colomo (2015) p. 5

36 Whish and Bailey (2012) p. 624

37 ibid. p. 770

38 Whish and Bailey (2012) p. 770

39 ibid. p. 151

40 Hugenholtz (2015) p. 1

41 CEPS (2015)

protection, the right owner can protect the work from unauthorised acts of exploitation, while being able to exploit the work commercially and receive an economic return for his efforts.[43] There is also the moral imperative of rewarding those who enrich the cultural heritage; copyright protection is granted out of respect for the creators' own individual effort.[44]

Copyright consists of three main economic rights.[45] The right of reproduction and the right of distribution are copyright in its traditional sense: the exclusive right to make copies of the protected work in a material form and distribute them. These rights are harmonised in Article 2 and 4 of the InfoSoc Directive.[46] The third is the right of communication, that is, the right to perform the protected work in public.[47] This right has been codified in Article 3 of the InfoSoc Directive.[48]

The provision of online audiovisual services concerns the right of communication to the public.

2.3 The tension between intellectual property rights and competition law

There can be no doubt that there is a certain degree of tension between the territorial nature of intellectual property and the EU principles of free movement and competition.[49] IPRs confer upon their owner an exclusive right, while competition law strive to keep the markets open.[50] The exclusive rights granted by IP leave little room for product competition, and it is therefore easy to find that the grant of such rights distort competition.[51]

However, the two areas of law are also complementary. They both work towards the same goal: the promotion of consumer welfare.[52] IPRs work as an incentive to innovate, and technical progress is for the benefit of the consumer. At the same time, a strict competition policy and product market competition also works to promote innovation.[53] Innovation is an integral

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42 Keeling (2003) p. 266
43 Waelde (2014) p. 38
44 Keeling (2003) p. 266
45 Rosati (2015) p. 674
46 Directive 2001/29/EC
47 Keeling (2003) p. 271
48 Rosati (2015) p. 674
49 Jones and Sufrin (2011) p. 713
50 Whish and Bailey (2012) p. 769
51 l.c.
52 Peeperkorn (2003) p. 527
53 l.c

part of an open and competitive market, at the same time; competition puts pressure on undertakings to invest in innovation. The Commission is of the view that there is no inherent conflict between IP and competition.[54] Competition law can help complement IP laws is situations where the exercise of the IP might hinder consumer welfare rather than promote it.[55]

Even so, there is still a degree of tension between these to areas of law.[56] It is left to the courts to consider at what point the exercise of IPRs is so harmful to the internal market and consumer welfare that it is necessary to intervene through competition law, overriding the legal position granted by IP laws alone.[57]

2.3.1 'Specific subject matter'

One of the ways the ECJ has dealt with the tension between IPRs and competition law, and between IPRs and the free movement of goods and services, is through the development of the 'specific subject matter' of intellectual property.[58] In *Deutche Grammophon*[59], the Court held that restrictions on the free movements of the European market could only be justified to the degree such restrictions were imposed to safeguard the 'specific subject matter' of the intellectual property.[60] The same must be true when the exercise of IP leads to a restriction of competition; the exercise of IPRs will be permitted to the degree it falls within the 'specific subject matter' of the intellectual property.[61]

The 'specific subject matter' can in short be described as the opportunity to receive an economic compensation in return for the investment that led to the creation of the intellectual property.[62] In the *Centrafarm* cases[63], the Court held that the 'specific subject matter' of intellectual property is the opportunity for economic reward that can be obtained from exploitation of the IP.[64]

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54 Technology Transfer Guidelines, 2014/C 89/03 paragraph 7

55 Vestager (2015)

56 Waelde (2014) p. 871

57 Whish and Bailey (2012) p. 770

58 Jones and Sufrin (2011) p. 714

59 C-78/70 Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG., ECLI:EU:C:1971:59

60 Paragraph 11

61 Batchelor and Montani (2015) P. 597

62 Waelde (2014) p. 839

63 C-15/74 Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc., ECLI:EU:C:1974:114 paragraph 9 and C-16/74 Centrafarm BV and Adriaan de Peijper v Winthrop BV, ECLI:EU:C:1974:115 paragraph 8

64 Waelde (2014) p. 839

The 'specific subject matter' of copyright has not been explicitly defined; rather, the expression has been used to identify the essential functions of copyright.[65] In *Magill*[66], the Court held that the essential function of copyright was "to protect the moral rights in the work and ensure a reward for the creative effort".

I will come back to the scope of the 'specific subject matter' under 3.3.3.1.[67]

2.3.2 The exhaustion doctrine

The Court applied the concept of the 'specific subject matter' when it developed the doctrine of Community-wide exhaustion.[68] The exhaustion doctrine is the rule that, when goods protected by IPRs are placed on the market within the European Economic Area (EEA) by the right owner or with his consent, the right owner cannot object to any movement of the physical goods around in the Community.[69]

When the goods protected by copyright are placed on the market, the right owner has received an economic return for his investment, by that realising the 'specific subject matter' of copyright. The exhaustion doctrine was developed by the Court to prevent right owners from using national IPRs to prevent free movement and restrict competition within the EU.[70]

The right of distribution covers only the first sale of the goods protected by intellectual property, and the principle of exhaustion applies to the physical manifestation of copyright protected works, such as books and DVDs.[71] It does not, however, apply to the right of communication.[72] In *Coditel I*, the Court held that the right owner has the right to require a fee for every showing of a film, and this justified a different rule from that applying to tangible goods.[73] The exhaustion doctrine does not apply to the right to rent, to perform or to show a

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65 Keeling (2003) p. 67

66 Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities, ECLI:EU:C:1995:98

67 The test of the 'specific subject matter' has been criticised for being arbitrarily defined by the Court. For a more detailed discussion of this, see Keeling (2003) chapter 6

68 Keeling (2003) p. 72

69 Waelde (2014) p. 836. A similar rule can be found in US law called the 'right of first sale', see Batchelor and Montani (2015) p. 591

70 Whish and Bailey (2012) p. 768

71 Colomo (2015) p. 5

72 ibid. p. 4

73 C-62/79 Coditel I paragraph 12-13

copy of the work to the public, as the ‘specific subject matter’ of copyright grants the right of an economic return for each performance.[74] I will come back to this in 3.3.3.

2.4 The *Murphy*-case

The *Murphy*-case[75] concerned the showing of Premier League matches in British pubs by using decoders and decoding cards bought in Greece. The Greek broadcaster was in the licence agreement obligated to prevent the sale of decoder cards outside the licensed territory, in other words an export ban.[76] The question was raised whether the prohibition of sale in a licence agreement restricted competition under Article 101 TFEU. As the sale of decoders was ancillary to the showing of football matches, which is a service, the Court considered the case under the provisions regarding the free movement of services in the EU.[77]

The Court held that an export ban on decoders restricted the freedom to provide services in the EU as the restriction went beyond the ‘specific subject matter’ of copyright. This, together with the “additional obligation” imposed on the broadcaster not to sell decoding devices outside the licensed area, made the exclusivity granted absolute and thus contrary to Article 101 TFEU.[78]

The Court’s decision in *Murphy* marks a departure from the earlier *Coditel*-cases.[79] The Belgian television company Coditel had given its subscribers access to German TV-transmission. When a German TV-channel showed a movie, this could be watched in Belgium. However, this constituted an infringement of copyright in Belgium, as only a German licence had been acquired. In the first case before the ECJ, the Court held that the right to communicate a work to the public could not be exhausted, and therefore, there was no restriction on the freedom to provide services.[80] In the second case, the Court came to the conclusion that, because there was no exhaustion, granting absolute territorial exclusivity to a single distributor for the movie did not restrict competition by object.[81]

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[74] Waelde (2014) p. 864

[75] Joined cases C-403/08 C-429/08

[76] Waelde (2014) p. 864

[77] Paragraph 77-84

[78] Paragraph 139-141

[79] Batchelor and Jenkins (2012) p. 159

[80] Coditel I paragraph 18

[81] Coditel II paragraph 15

Since the Court's decision in *Murphy*, questions have been raised on what impact this ruling has beyond sporting events and TV-broadcasting, and especially to what degree its reasoning apply to online transmission of content.[82] This will be considered under 3.3.1 and 4.3.

2.5 Geo-blocking

Geo-blocking can be defined as "the use of technologies to limit the accessibility of a website from a certain location".[83] More specifically, access is limited or blocked for users either connecting to the internet from, or outside of, a certain territory that a licence is granted for.[84] It is a "technological measure that prevents online consumers from accessing online content based on geographic location".[85] The most common ways to geo-block is denial of access to a website or rerouting to national websites.[86]

In its sector enquiry into geo-blocking, the Commission also include refusal of delivery or payment based on location as a form of geo-blocking.[87] Although this also prevents cross-border sales and provision of services, it is not a technological measure. The definition used by the Commission is therefore construed more broadly than that commonly accepted.[88]

Since there are no borders on the internet, geo-blocking is the only way to establish and enforce territorial frontiers. This enables internet actors to meet contractual obligations and comply with a country's laws and regulations.[89] When it comes to the sale of physical goods, it allows for distributors to sell their goods only to Member States where they meet the legal standard, for example for electronic equipment. Another example more viable for online audiovisual services is that it enables service providers to comply with commercial regulations that vary between Member States, such as for alcohol commercials. Such geo-blocking will be considered justified.[90]

However, the Commission is of the view that in a majority of cases, online geo-blocking is not justified,[91] as it opens up for a partitioning of the market and price discrimination.[92] It has

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82 Batchelor and Montani (2015) p. 598
83 Colomo (2015) p. 2
84 Trimble (2014) p. 90
85 Renda et al. (2015b) p. 6
86 Geo-blocking practices in e-commerce, SWD(2016)70 final p. 17-18
87 l.c.
88 EMOTA (2016)
89 Trimble (2014) p. 90
90 ibid. p. 96
91 European Commission (2015c)

stated that when geo-blocking measures are adopted in the e-commerce of tangible goods, it will in the majority of cases be contrary to Article 101.[93] Such measures are often adopted to discriminate between customers in different Member States.[94]

Even so, there is a difference between geo-blocking access to tangible goods and online copyrighted content: for tangible, non-copyrighted goods and services, geo-blocking will for the most part be implemented because of commercial motivation.[95] Conversely, geo-blocking implemented for copyrighted services might also reflect the territorial scope of copyright as much as any commercial motivation.[96] Consequently, there are good reasons why these two situations should be treated differently.

2.6 The road ahead

The question raised in the following part of this paper is whether agreements to impose geo-blocking can be considered to restrict competition by object, more specifically, if the obligation to geo-block customers means that absolute territorial protection has been granted. This answer will depend on whether geo-blocking restricts the cross-border provision of services beyond that allowed for by the 'specific subject matter' of copyright.

If the answer to this is yes, the next question will then be whether there is anything in the economic and legal context in which geo-blocking is implemented justifying the restrictions. Particularly the question of whether the exhaustion doctrine applies can mean that the agreement will be incapable of restricting competition by object. Furthermore, the question of whether the difference in the legal context of broadcasting and streaming services can imply that licence agreements for these medias should be treated differently. In assessing this, it is necessary to look closely at the scope of copyright and the legal context in which licence agreements is entered into.

92 Stephan (2015)

93 Guidelines on Vertical Restraints, 2010/C 130/01 paragraph 52

94 Renda et al. (2015b) p. 6

95 l.c.

96 l.c.

3 Geo-blocking and absolute territorial exclusivity

Geo-blocking is a way of enforcing territorial exclusivity in licence agreements.[97] It is therefore important to ascertain when territorial licence agreements can be found to restrict competition under Article 101 TFEU, which will be considered under 3.2.

3.3 and 3.4 will concern whether geo-blocking agreements can be said to restrict competition by object. However, whether a licence agreement that includes an obligation to geo-block consumers is anti-competitive cannot be decided without looking at the legal context that the copyright regime forms in relation to online audiovisual services.[98]

Before reviewing at the context in which geo-blocking takes place, it is, however, necessary to ascertain what is meant by 'economic and legal context'.

3.1 Object restrictions: economic and legal context

That an agreement has to be viewed in the economic and legal context in which it is implemented has by some been understood to mean that an agreement must be proven to have restrictive effects, also when deciding if there is an object infringement.[99] In some decisions by the Court, it has been difficult to draw the distinction between the examination of the anti-competitive object in its context and the analysis of the effects on competition.[100] Especially the ECJ's judgement in *Allianz Hungária*[101] can be understood in this manner. The Court stated that an agreement would amount to a restriction by object when it is "likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements."[102] This can appear to indicate an effect analysis.

In *Cartes Bancaires,*[103] this was clarified. The Court held that, for there to be an object restriction, the type of coordination between the undertakings must be considered to have a "sufficient degree of harm to competition that it may be found that there is no need to examine their

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97 Trimble (2014) p. 90

98 Jones and Sufrin (2011) p. 210. See for illustration *Société Technique Minière* paragraph 8, *Murphy* paragraph 136 and *GlaxoSmithKline* paragraph 58

99 Colomo (2015) p. 6

100 Opinion of Advocate General Wahl in Cartes Bancaires paragraph 46, ECLI:EU:C:2014:195

101 C-32/11 Allianz Hungária Biztosító Zrt. And Others v Gazdasági Versenyhivatal, ECLI:EU:C:2013:160

102 Paragraph 48

103 C-67/13 P

effects".[104] To consider the potential effect of an agreement when deciding if an agreement restricts competition by object is wrong.[105] Only agreements that are harmful to competition by their very nature can restrict competition by object,[106] and this anti-competitive object must be clear from the form of content of the agreement.[107]

Said more clearly: consideration of the economic and legal context must be distinguished from the demonstration of anti-competitive effects.[108] The Advocate General in *Cartes Bancaires* was of the opinion that the economic and legal context could only reinforce or clear an agreement that has already been considered to fall under Article 101(1). It could not on its own justify why an agreement has an anti-competitive object.[109]

This method was followed by the ECJ in *Murphy*, where the Court held that, since the agreement restricted cross-border provision of services it was presumed to have as its object the restriction of competition, unless "other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition."[110]

Chapter 3.3 and 3.4 will address the question of whether geo-blocking *prima facie* can be considered to constitute an absolute territorial restriction, thereby restricting competition by object under Article 101 TFEU, while the economic and legal context will be considered under chapter 4.

3.2 Territorial exclusivity and restrictions of competition

A licence can be defined as an authorisation of a third party to carry out certain acts covered by right owner's economic rights, generally for a specific period of time, for a specific purpose and for a specific geographical area.[111]

In *Société Technique Minìere*[112], the Court held that granting of territorial exclusivity without an export ban was not in itself a restriction of competition; rather, this would depend on the

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[104] Paragraph 58
[105] Paragraph 82
[106] Killick and Jourdan (2014) p. 10
[107] ibid. p. 5. See also paragraph 135 in *Murphy*
[108] Opinion of AG Wahl in *Cartes Bancaires* paragraph 44, ECLI:EU:C:2014:195
[109] l.c.
[110] Paragraph 140
[111] WIPO (2005) p. 13
[112] C-56/65

effects the exclusivity would have on the market.[113] However, the *Consten and Grundig* case[114] shows that where a licence agreement granting territorial exclusivity goes further, by imposing export bans or limiting the possibility of parallel trade, the agreement is considered to have as its object the restriction of competition.[115]

It is therefore necessary to look closer at when a territorially exclusive licence will be found to restrict competition.

3.2.1 Territorial licences

Territorially restricted licenses are legal under EU competition law, and the mere grant of territorial exclusivity in a licence agreement does not infringe Article 101(1).[116] Absolute territorial exclusivity, however, is prohibited.[117] In *Consten and Grundig*, the Court held that, while territorial exclusivity as such was not contrary to Article 101 TFEU, an agreement would be considered to restrict competition if it tended to “restore the national divisions in trade between Member States”.[118] Where a licence agreement goes beyond the mere grant of territorial exclusivity, for example by imposing export bans or limiting the possibility of parallel trade, the agreement is considered having as its object the restriction of competition.[119] These kinds of agreements grant absolute territorial exclusivity and are considered anti-competitive.[120]

3.2.2 Exclusivity

Not all licences are exclusive and not all exclusivity is absolute. In a non-exclusive licence, the right owner licenses a third party to carry out the acts that are exclusively granted the copyright owner under intellectual property law.[121] The owner of the right– the licensor – is permitted to license the right to as many other people as he wishes.[122] In an exclusive licence, on the other hand, the owner cannot grant licences to other third parties.

113 Whish and Bailey (2012) p. 128
114 Joined cases C-56/64 and C-58/64
115 Whish and Bailey (2012) p. 771-2
116 l.c.
117 Colomo (2015) p. 5
118 Paragraph 8
119 Whish and Bailey (2012) p. 771-2
120 ibid p. 625
121 Waelde (2014) p. 907
122 l.c.

There are benefits to granting territorial exclusivity in licence agreements. The risks involved in the exploitation of the IPR may be high and require a level of capital investment that would not be worth it, unless the licensee is given a guarantee against competitors.[123] A licensee will usually take a greater risk than a mere distributor, since he will have to invest in production as well as distribution.[124] For example, a publishing company can have acquired the licence to a book, and is then responsible for both the printing and the distribution of that book in the territory, while a distributor is only responsible for the distribution. This involves a greater economic risk for the publishing company, who has to invest before there are any guarantees that the book will actually sell. This will be considered in more detail under 4.2.2 and 6.1.

3.2.3 Absolute territorial exclusivity

In *Consten and Grundig*, the Court held that, since the agreement in question conferred absolute territorial exclusivity upon the distributor, it restricted competition under Article 101(1).[125] This was elaborated upon in *Nungesser*,[126] where the Court distinguished between open and closed licenses. In an open exclusive licence, the "exclusivity of the licence relates solely to the owner of the right and the licensee, whereby the owner merely undertakes not to grant other licences in the same territory and not to compete with the licensee on that territory."[127] This is in contrast to the closed licences where the licensee is granted absolute territorial protection, in which the "parties to the contract propose, as regard the products and the territory in question, to eliminate all competition from third parties, such as parallel importer or licensees from other territories."[128] Such licences are considered to bestow absolute territorial exclusivity, and will be found to restrict competition under Article 101 TFEU.

In *Nungesser*, the ECJ held that, if an exclusive licence agreement affected third parties, such as parallel importers or licence holders in other territories,[129] the agreement had bestowed absolute territorial exclusivity and would therefore be contrary to Article 101.[130] An exclusive agreement will be found to affect third parties when it impedes parallel imports or if the licensee is prevented from selling to customers outside the licensed territory.[131]

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[123] Whish and Bailey (2012) p. 771

[124] l.c.

[125] ibid. p. 625

[126] C-258/78 L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities, ECLI:EU:C:1982:211

[127] Paragraph 53

[128] Paragraph 53

[129] Doukas (2012) p. 616

[130] Jones and Sufrin (2011) p. 723

[131] Whish and Bailey (2012) p. 775

The concept of open exclusive licences was elaborated upon when the Commission introduced the Block Exemptions.[132] In the Block Exemptions for Vertical Agreements[133] and Technology Transfer Agreements,[134] the Commission distinguish between active and passive sales, rather than using the phrase absolute territorial protection. Though neither Block Exemption applies to copyright licence agreements,[135] the distinction between active and passive sale can apply beyond these. Restrictions on active sales can fulfil the conditions of the Block Exemption, while restrictions on passive sales must be considered individually under Article 101 TFEU.[136]

A sale is by the Commission considered passive when it takes place after an unsolicited request from the customer.[137] Online sales will as a general rule be considered to be passive, even when the website can be accessed from outside the licensed territory; in other words that no geo-blocking takes place.[138] It is the lack of opportunity to responding to unsolicited requests that the Commission has found to restrict competition in the Sky UK-investigation,[139] and which has been corrected in the proposed commitments.[140]

In *Murphy*, the Court held that it was the additional obligation to the territorial exclusivity that led to absolute territorial protection; namely the obligation not to sell decoding devices outside the licensed territory.[141] Although the court does not explicitly state so, this is a restriction of passive sales, as the Greek licensee was not allowed to answer unsolicited requests. Thus, the Court came to the conclusion that agreement restricted cross-border provision of services. Since the territorial exclusivity was absolute, it restricted competition by object under Article 101 TFEU.[142]

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132 Keeling (2003) p. 335

133 Commission Regulation (EU) No 330/2010 Article 4(1)c(ii) (hence Block Exemption for Vertical Agreements)

134 Commission Regulation (EU) No 316/2014 Article 4(b)(i) (hence Block exemption for Technology Transfer Agreements)

135 See the Block Exemption for Vertical Restraints Article 2(3) and for Technology Transfer Agreements Article 1(1)(b)

136 Jones and Sufrin (2011) p. 255

137 Guidelines on vertical restraints, 2010/C 130/01 paragraph 51

138 Ibid. paragraph 52

139 European Commission (2015a)

140 European Commission (2016)

141 Paragraph 151

142 Paragraph 139-141

3.3 Does geo-blocking restrict cross-border provision of services?

By following the approach of *Murphy*, the questions will then be first, if geo-blocking restricts the cross-border provision of services beyond the scope of the 'specific subject matter' of copyright. If the answer to this is yes, the second question will be whether the licence agreements include any additional obligation making the exclusivity absolute, thereby restricting competition by object under Article 101(1) TFEU. It is however first necessary to consider to what degree *Murphy* can be applied beyond sporting events.

3.3.1 The applicability of *Murphy*

The decision of the ECJ in *OSA*[143] has by some been taken to indicate that *Murphy* bears no relevance beyond sports content.[144] In the decision, the Court held that the copyright of songs was an interest justifying restrictions on the freedom to provide services.[145] In doing so, the Court came to the opposite conclusion from *Murphy*, where it had held that the reasons put forward by FAPL were not enough to justify restrictions on the freedom to provide services and restrictions of competition.[146]

A key difference between the two cases is that *OSA* concerned songs protected by copyright, while the football matches in *Murphy* were not.[147] Rather, it is the production surrounding the sporting event that is protected by copyright, such as the intro and the live commentary. However, when sporting events and other similar kinds of productions, e.g. news and political debates, are included in a transmission, the production is protected by copyright and its neighbouring rights.[148] *Murphy* has been criticised for drawing an artificial distinction between football matches that do not qualify as 'work' and types of theatrical performances where there are no set script beforehand.[149] The traditional definition of a 'work' in the EU can create an artificial line between which performances are worthy of protection.[150]

In the Explanatory Memorandum to the newly proposed Regulation ensuring the cross-border portability of online content services in the internal market, the Commission expresses the

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143 C-351/12 OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s., ECLI:EU:C:2014:110

144 Batchelor and Montani (2015) p. 598

145 Paragraph 71

146 Murphy paragraph 122 ff.

147 Murphy paragraph 96

148 Proposed portability regulation, COM (2015) 627 final, 2015/0284 (COD) p. 3

149 Alexiadis and Wood (2012) p. 246

150 l.c.

view that, although sporting events, news and political debates are not as such protected by copyright, they enjoy other related rights.[151] This, together with the fact that there are usually elements protected by copyright included in the audiovisual transmission, means that there is no reason why such audiovisual content should be treated differently from other content.[152] This reasoning is applicable beyond the Portability Regulation.

The fact that copyright and its neighbouring rights protect both types of content means that the rules applicable to movies and TV-series should be treated the same way as sporting events. However, the disparity between the two situations indicates that there could be a difference in how far a right owner can go in protecting his intellectual property right, and this can make the individual assessment turn out differently depending of what content is protected.[153]

3.3.2 Competition and the internet

When looking at whether geo-blocking prevents the cross-border provision of services, it is necessary to look at how copyrighted works are licensed, and how this impacts the internal market.

The sector enquiry into geo-blocking in the e-commerce sector shows that 68% of online media service providers geo-block.[154] The Commission is of the opinion that geo-blocking prevents cross-border provision of services.[155]

Territorial licensing schemes impact the Internal Market for online copyrighted works in two ways: First, it limits cross-border portability of copyrighted works.[156] Consumers who subscribe to online audiovisual service in one Member State are often unable to access the service when they move or travel to other Member States, even temporarily.[157] This is called the portability issue.[158] Cross-border portability concerns both subscriptions to streaming services

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151 Proposed portability regulation, COM (2015) 627 final, 2015/0284 (COD) p. 3-4

152 l.c.

153 See the contrasting results of the Court in *OSA* paragraph 71 and *Murphy* paragraph 122 ff.

154 Geo-blocking practices in e-commerce, SWD(2016)70 final p. 47, see figure 24

155 European Commission (2016)

156 Renda et al. (2015b) p. 4-5

157 l.c.

158 The Commission has proposed a new Regulation on portability, which will open up for consumers that have subscribed to a service in their home Member State to access that service while travelling in the EU. The issue of accessibility has not been addressed in this regulation, see Proposed portability regulation, COM (2015) 627 final, 2015/0284 (COD)

and content that has been rented or purchased legally in one Member State, which consumers can no longer access when travelling.[159]

Second, territorial license schemes limit cross-border trade by not allowing consumers living in one Member State to access or subscribe to an online service available in another;[160] the accessibility issue.[161] For example, a Spanish citizen living in Finland cannot subscribe to a Spanish audiovisual content service that will allow her to watch the films and series she wants in her native language. Content services offered to consumers vary between Member States. In cases where the same service is offered in several Member States, consumers are only able to view what is offered in their state of residence, with prices and conditions specific to that country.[162] Restrictions on access have been accused of leading to price discrimination and artificial partitioning of the markets.[163]

There are some service providers that operate in more than one Member State, which allows for cross-border portability[164], such as Netflix and Spotify. This portability is not due to a EU-wide copyright framework, but is rather the result of the business ability of some companies that are able to acquire licences for more than one Member State, by that bypassing the obstacle of territorial licences.[165] Even so, the content available might vary from Member State to Member State, depending on the licences the service provider has been able to procure.[166]

Thus, there can be no doubt that that territorial licensing affects the cross-border provision of audiovisual services. Even so, the fact that copyright is ruled by the principle of territoriality, combined with the non-application of the exhaustion doctrine to online services, makes it perfectly legal to exploit the copyright online on a national basis.[167] This gives the right holder the right to prevent non-licensed parties from accessing the work within the territory, as well as preventing licensed parties from offering the work outside of the licensed territory.[168]

Because of this, providers of streaming services such as Netflix and HBO that are granted territorial exclusivity can unilaterally decide to geo-block, to avoid both copyright infringe-

159 Proposed portability regulation, COM (2015) 627 final, 2015/0284 (COD) p. 2
160 CEPS (2015)
161 Towards a modern, more European copyright framework, COM(2015)626 final p. 3-4
162 Gallo et al. (2011) p. 6
163 Guibault and Quintais (2014) p. 12
164 Renda et al. (2015b) p. 4
165 l.c.
166 Gallo et al. (2011) p. 6
167 CEPS (2015)
168 Renda et al. (2015b) p. 6

ment and breach of territorial licensing agreements.[169] However, the question here is whether agreements to geo-block restrict competition, specifically if they restrict the freedom to provide services across borders beyond the scope of the 'specific subject matter' of copyright.

3.3.3 Restrictions on the freedom to provide services

As stated under 2.2, there can be no doubt that there is a certain degree of conflict between the territorial nature of intellectual property and the EU principles of free movement.[170] One of the ways the ECJ dealt with this tension was by the development of the 'specific subject matter' see 2.3.1. This functions as a method of limiting the circumstances under which IP rights can justify restrictions on the free movements and on competition:[171] if a restriction falls within the 'specific subject matter' of the IP right, it will be considered reasonable and proportionate and therefore be permitted.[172]

Consequently, it is necessary to look at whether geo-blocking agreements go beyond the 'specific subject matter' of copyright. Only if it does so can it be considered to restrict the cross-border provision of services and constitute an absolute territorial restriction.

3.3.3.1 The limiting of the 'specific subject matter' of copyright

In *Murphy*, it was not the grant of territorial exclusivity that led to the agreement restricting the cross-border provision of services, but rather the fact that the remuneration paid in return for this exclusivity went beyond what was reasonable.[173] The ECJ held that the right owner, the Football Association Premier League, had received such a high licence fee that it led to an artificial price difference in the market.[174] This went beyond the 'specific subject matter' of the intellectual property right[175] and thereby constituted a restriction on the freedom to provide cross-border services and restricted competition by object.

This decision marks a departure from the earlier decisions of the ECJ in the *Coditel*-cases.[176]

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[169] Renda et al. (2015b) p. 6
[170] Jones and Sufrin (2011) p. 713
[171] Doukas (2012) p. 622
[172] Batchelor and Montani (2015) p. 597
[173] Paragraph 139
[174] Paragraph 114
[175] Paragraph 108
[176] Batchelor and Montani (2015) p. 597

In *Coditel I*, the Court stated that a copyright-owner's right to "require fees for any showing of a film is part of the essential function of copyright."[177] As there was no way of assessing the size of the audience and thus calculating an adequate remuneration, the copyright-holder retained the right to control each performance of the work to the public.[178]

In *Murphy*, the Court argued that the situation differed from that of the *Coditel*-cases, as it was possible to calculate appropriate remuneration.[179] Further, it held that the 'specific subject-matter' of copyright was the right to exploit the protected work "by the grant of licences in return for payment of remuneration."[180] This is in line with the earlier case law of the court.

However, by saying that the 'specific subject matter' does not include a right to extract an exclusivity premium, the Court in *Murphy* appears to re-write the legal position on the scope of the 'specific subject matter,'[181] and narrows down the core of copyright.[182] The 'specific subject matter' includes, as before, the right of remuneration. However, this right has been limited to "appropriate remuneration", a limitation that has never before been mentioned by the Court.

The 'specific subject matter' of copyright includes a right to receive remuneration for each country where the protected work is shown to the public.[183] This does not in itself prevent a licensee from paying a higher licence fee for territorial exclusivity.[184] However, when the licence fee for territorial exclusivity goes beyond what is an appropriate remuneration, and especially when it is in return for absolute territorial exclusivity, this might lead to an artificial price difference between different Member States of the EU.[185] The remuneration claimed in such circumstances goes beyond the 'specific subject matter of copyright', and the territorial exclusivity in such circumstances can constitute a restriction of competition and the provision of cross-border services.

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177 C-62/79 Coditel I paragraph 14
178 Batchelor and Jenkins (2012) p. 160
179 Murphy paragraph 113
180 Paragraph 107
181 Batchelor and Montani (2015) p. 597
182 Doukas (2012) p. 612
183 Batchelor and Montani (2015) s 597
184 Paragraph 114
185 Paragraph 115

3.3.3.2 What is an appropriate remuneration?

This leaves us with a question: how do we know whether the remuneration paid in return for territorial exclusivity is appropriate?

In *Murphy*, the Court placed emphasis on the fact that it was possible to calculate the precise number of audience of the broadcast, both inside and outside of Greece, based on the number of decoders sold.[186] Hence, there was no need to rely on territorial restrictions to guarantee appropriate remuneration.[187]

What level of remuneration is considered appropriate must be decided on a case-by-case basis, taking into account the actual and potential audience,[188] the language options[189] and other circumstances, such as the award of territorial exclusivity.[190] The actual and potential audience includes viewers both inside and outside the Member State the audiovisual service originates from.[191] If the audience is calculated correctly, the right holder will not be at risk of being under-remunerated,[192] even when he is not allowed to claim premium remuneration in return for absolute territorial exclusivity.[193]

The same logic must apply beyond broadcasts to online audiovisual content services, such as streaming.[194] It is possible to efficiently track and calculate the exact number of subscribers to a service across Europe, and the content provider has detailed records of what content has been streamed or downloaded.[195]

3.3.4 Summary

By saying that the 'specific subject matter' includes only a right to reasonable remuneration, rather than a right of maximum remuneration, the Court seems to narrow down the core of the

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[186] Batchelor and Jenkins (2012) p. 160
[187] l.c.
[188] Paragraph 110
[189] l.c.
[190] Doukas (2012) p. 610-611
[191] ibid. p. 611
[192] The reasoning of the Court in *Murphy* has been criticised for not taking into account the fact that the remuneration paid for a license for live football is decided upon before the match, while the actual and potential viewers can first be reliably determined after the match has been screened, see Doukas (2012) p. 611
[193] Batchelor and Montani (2015) p. 597
[194] l.c.
[195] Batchelor and Jenkins (2012) p. 160

copyright.[196] This allows them to avoid the question of exhaustion to audiovisual services.[197] I will come back to this under 0.

The Court in *Murphy* held that, when the remuneration paid for a licence in one Member State is so high that it leads to an unnatural division along borders, it will be considered to go beyond what is reasonable.[198] From this, it is possible to infer a rule that, as long as the remuneration paid does not lead to artificial price differences, it will be appropriate and within the 'specific subject matter' of copyright.[199]

For example, a right holder sells the right to his movie in both France and Italy. The competition for the right is higher in France, which leads to the remuneration paid for the right being higher there. Even though the remuneration in the countries is different, it will still be reasonable. However, if the French audiovisual service provider is willing to pay more in return for territorial exclusivity, while a similar provision in the Italian licence leads to the market price being lower, it will lead to an artificial price difference between these service providers.

Consequently, when the remuneration paid leads to an artificial price difference along national borders, agreements to impose geo-blocking can be found to constitute a restriction of cross-border services and by that infringing Article 101. It is therefore necessary to look at whether geo-blocking leads to absolute territorial exclusivity.

3.4 Is geo-blocking absolute territorial protection

Geo-blocking can restrict the provision of audiovisual services across borders. However, as stated under 3.2.3, it is only when the exclusivity is absolute that it will be found to restrict competition.

In *Murphy*, the Court found that clauses designed to ensure compliance with the territorial limitations of the licence, specifically the "obligation on the broadcasters not to supply decoding devices enabling access to the protected subject-matter with a view to their use outside the territory covered by the licence agreement,"[200] restricted competition, rather than the territorial exclusivity itself. These 'additional obligations' led to the territorial exclusivity being absolute – preventing the provision of the broadcasting services across the border and likely

196 Doukas (2012) p. 612
197 l.c.
198 C-403/08 and C-429/08 paragraph 115
199 Doukas (2012) p. 622
200 Paragraph 141

to eliminate all actual or potential competition.[201] This, together with the fact that provision restricted cross-border trade, led to the clauses being considered restrictions of competition by object, and therefore contrary to Article 101(1) TFEU by their very nature.[202]

This raises the question of whether a similar line of reasoning can be applied to provisions in licence agreements to geo-block consumers. If geo-blocking clauses are found to be "additional obligations" in the same way as the obligations imposed in *Murphy*, thereby making the territorial exclusivity absolute, it follows that they might also be considered restrictive of competition.

3.4.1 Is geo-blocking the same as limiting the sale of decoder cards?

Geo-blocking, as stated under 2.5, is defined as "a technological measure preventing consumers from accessing a website or from purchasing content based on location of access."[203] The effect of this is that consumers cannot subscribe to or access online audiovisual services.

Geo-blocking is a measure designed to limit access, and provisions to impose geo-blocking differ from the additional obligations in the *Murphy* case, which were the limiting of the sale of physical decoders to other Member States. However, these measures have the same effect; they prevent consumers from watching the movies, TV-series and sporting events they wish. As such, they both amount to a measure restricting passive sales across borders. Geo-blocking can be considered the technical equivalent to a satellite decoder card, and a contractual obligation to geo-block content is not that different from a contractual obligation not to sell decoder cards to customers outside a territory.[204] It is therefore not a great leap to extend the doctrine endorsed by the Court in *Murphy* to prohibit geo-blocking imposed by online content providers.[205] The Commission appears to base its opinion on this view in the Sky UK-investigation.[206]

Conversely, there is the argument that geo-blocking is an inherent component of territorial exclusive licences, rather than an additional obligation.[207] The principle of territoriality, combined with the fact that the exhaustion doctrine does not apply, makes it perfectly legal to ex-

201 Doukas (2012) p. 615
202 Colomo (2015) p. 6
203 CEPS (2015) p. 1
204 Alexiadis and Wood (2012) p. 248
205 l.c.
206 Colomo (2015) p. 6
207 Doukas (2012) p. 13

ploit copyright on a national basis.[208] Because of this, an audiovisual service provider can unilaterally decide to resort to geo-blocking, to avoid breach of licensing agreement or infringing copyright.[209] It is only agreements that impose a duty on the service provider to geo-block that are in question.

As stated under 2.5, geo-blocking is the only way to establish and enforce territorial borders online.[210] This suggests that geo-blocking must be understood as an inherent component to the territoriality of copyright.

Another side of this argument is the difficulties in distinguishing geo-blocking provisions from mere prohibitions of transmission.[211] It follows from *Coditel I* that the exhaustion doctrine does not apply to the showing of a movie to an audience, and therefore, the right owner has the right to control and authorise each such communication.[212] This also includes the right to prohibit communications and transmissions to the public.[213]

However, when a right owner grants a licence, he gives a permission to communicate the work to the public. This does not mean that the right holder has exhausted his right to control communication, but rather that he has transferred this right to the licensee for the duration of the licence.

3.4.2 Conclusion: absolute territorial exclusivity

Geo-blocking can be considered to restrict the cross-border provision of services beyond the scope of the 'specific subject matter' of copyright. Therefore, the contractual obligation to geo-block can be considered an additional obligation rather than an inherent component to the territoriality of copyright. As licensees in other territories are prevented from offering their services across borders, geo-blocking affect third parties. Thus, geo-blocking falls under the definition of absolute territorial protection formulated by the Court in *Nungesser*.[214]

Agreements to geo-block access from consumers, must therefore *prima facie* be presumed to restrict competition by object under Article 101(1) TFEU.

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208 Renda et al. (2015b) p. 5-6

209 ibid. p. 6

210 Trimble (2014) p. 90

211 Colomo (2015) p. 15

212 C-62/79 paragraph 16

213 Colomo (2015) p. 15

214 C-258/78 paragraph 53

4 The economic and legal context of geo-blocking

The next question raised is if the economic and legal context in which geo-blocking agreements are implemented neutralises the anti-competitive object of such agreements. This creates two separate issues. First: whether the exhaustion doctrine now applies to the right of communication, and if it does not, what are the consequences thereof. Second: whether the copyright framework indicates that the agreement cannot restrict competition as watching the content will constitute an infringement of copyright.

4.1 The right of communication and the exhaustion doctrine

As stated under 2.3.1, the ECJ has in several cases held that the reason for granting IPRs is the opportunity to obtain an economic return on the investment, thereby realising the 'specific subject matter' of copyright.[215] When the goods are placed on the market, the right owner has received this return; by this exhausted his right. However, in the *Coditel*-cases, the Court held that a right owner could require remuneration for each communication, of a work to the public.[216] Therefore, the situation differed from that of tangible goods and the exhaustion doctrine did not apply.[217]

It follows from Article 3.3 of the InfoSoc Directive that the right of communication of a work to the public "shall not be exhausted by any act of communication to the public or making available to the public".[218] The same is expressed in recital 29 of the directive: "The question of exhaustion does not arise in the case of services and on-line services in particular." The consequence of this is that, no matter how many times a work it showed to the public, the owner of the right retains his exclusive right to communicate the work.[219] Therefore, other broadcasters or content providers cannot simply pick up the signal and make it available to their own audience, without the consent of the right owner.

As a consequence of this, the exercise of the right of communication does not infringe the provisions regarding the freedom to provide services, even when it leads to a partitioning of

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215 See for illustration C-15/74 Centrafarm vs. Sterling Drugs and C-16/74 Centrafarm vs. Winthrop

216 Colomo (2015) p. 4

217 Batchelor and Jenkins (2012) p. 160

218 Directive 2001/29/EC Article 3.3

219 Batchelor and Montani (2015) p. 595

the marked.[220] It is therefore permitted to rely on territorial licences to prevent parallel import of copyrighted online content.[221]

The ECJ's decision in *Murphy* has, by some scholars, been taken to introduce something akin to the exhaustion doctrine for the right of communication of a work to the public.[222]

If the exhaustion doctrine now applies to the right of communication, this will mean that the right owner cannot control where and to whom his work will be shown after the first communication. If this is the case, there is nothing in the economic and legal context of geo-blocking that can justify such agreements having an anti-competitive object.

Consequently, it is necessary to look at whether the decisions of the ECJ in the recent years, especially the *Murphy* case, can be seen as to introduce something akin to the exhaustion doctrine to the right of communication to the public.[223]

4.1.1 The broad interpretation of *Murphy*

The right of communication has been considered to constitute a separate right for the rightholder, and not merely a right to receive remuneration.[224] When the ECJ in *Murphy* came to the conclusion that the right owner had received an appropriate remuneration, thus fulfilling the 'specific subject matter' of copyright, it did so without considering the non-application of the exhaustion doctrine to the right of communication. This has by some been taken to indicate that the Court in fact applies the exhaustion doctrine in *Murphy*.[225]

From this broad understanding of *Murphy*, one can infer that the right of communication has ceased to exist as an exclusive right to authorise or prohibit any communication to the public, but merely exists as a right to receive remuneration.[226] The distinction between the right of distribution and the right of communication will become irrelevant, at least in circumstances where the right holder can be guaranteed an appropriate remuneration from the entire EU.[227]

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220 Colomo (2015) p. 4

221 CEPS (2015) p. 2

222 Colomo (2015) p. 9

223 There has also been a discussion of whether the exhaustion doctrine can apply to digital copies, such as music files and e-books, see Rosati (2015)

224 Shapiro (2011) p. 33

225 Colomo (2015) p. 9

226 l.c.

227 Batchelor and Jenkins (2012) p. 160

Such an understanding would be in direct contrast to the view before *Murphy*[228] and would effectively undermine *Coditel I* and *Coditel II*.[229]

The opinion of the Advocate General in *Murphy* expressed the view that the non-application of the exhaustion doctrine constituted an unnecessary restriction on the freedom to provide services.[230] The 'specific subject matter', which she considered to be the right of commercial exploitation,[231] could be safeguarded even when applying the exhaustion doctrine. However, the Court in *Murphy* did not say anything explicitly to support this view.

By applying the exhaustion doctrine to the right of communication, a licensee can show the copyrighted content anywhere in the EU. Therefore, there will be no copyright infringement when the right owner is properly remunerated for viewers in all the Member States, and the audiovisual content provider has correctly purchased a licence in the Member State where the transmission originates.[232] The service provider will in this case only have to purchase a licence for one country and by that be allowed to show the country everywhere in the EU. Applying the exhaustion doctrine with these conditions will allow the right holder to receive the economic benefit that the copyright entails, while at the same time allowing for cross-border provision of audiovisual services. This, however, presumes that the 'country of origin' principle applies to online content, which is not without controversy. I will come back to this under 4.3.

4.1.2 The narrow interpretation of Murphy

Those who interpret *Murphy* narrowly hold that the Court did not apply the exhaustion doctrine. Rather, by limiting the scope of the 'specific subject matter' they were able to avoid the question of exhaustion entirely.[233]

The EU institutions appear as to interpret *Murphy* in this manner.[234] This can be seen by the fact that the Commission believes that to ensure cross-border accessibility and portability of broadcasts and online content, it is necessary to reform the copyright framework.[235]

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228 Shapiro (2011) p. 33

229 Batchelor and Jenkins (2012) p. 159

230 Opinion of Advocate General Kokott in joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:43 paragraph 199,

231 ibid. paragraph 190

232 Batchelor and Jenkins (2012) p. 160

233 Doukas (2012) p. 612

234 Colomo (2015) p. 10

235 Vestager (2015)

Those who hold this narrow view, does so on the basis that Article 3.3 of the InfoSoc Directive,[236] as stated above, excludes exhaustion of performance copyright.[237] If the Court had wanted to expand the protection granted to cross-border provision of audiovisual services, it could have used Article 56 TFEU, which prohibits restrictions on the freedom to provide services.[238] This way of expanding the exhaustion doctrine is the one the Advocate General seemed to indicate in her opinion.[239] The Court chose not to do so, and this suggests that the exhaustion doctrine has in fact not been extended to include the right of communication.

Furthermore, in *Murphy*, the Court held that the use foreign decoder devices to show matches in pubs and bars constituted copyright infringement.[240] Had the exhaustion doctrine applied, this showing of the work in public would no have longer been within the exclusive right of the copyright owner. Thus, the Court says that the right of communication has not been exhausted by sale for commercial use.[241]

It is therefore difficult to interpret *Murphy* so far as to introduce an exhaustion doctrine for the right of communication to the public.

This means that the right owner still has the right to control each communication to the public, including where these communications shall take place. The audiovisual service provider is therefore only allowed to show the content in the licensed territory. Under such an approach, geo-blocking is necessary to ensure that the licensed content is only viewed in the licensed territory.

4.2 Consequences of the non-application of the exhaustion doctrine

Since the exhaustion doctrine does not apply to the right of communication, that is, the right to show a work to an audience, the legal context of licence agreements regarding audiovisual content differs from that surrounding sale of physical goods. This is the reason why the Court in the *Coditel*-cases held that, when it came to the right of communication, absolute territorial protection could not be considered an object-restriction of competition.[242]

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236 Directive 2001/29/EC

237 Batchelor and Jenkins (2012) p. 160

238 l.c.

239 l.c.

240 Paragraph 206

241 Stothers (2012) p. 267

242 Alexiadis and Wood (2012) p. 245

This raises the question of whether licence agreements are capable of restricting competition even when the exhaustion doctrine does not apply. If the answer to this is no, the legal context in which geo-blocking takes place will justify that agreements to geo-block online content cannot be considered to restrict competition by object under Article 101 TFEU. In that case, absolute territorial protection will be legal and geo-blocking will be permitted.

4.2.1 *Javico* and its implications

The Court's decision in *Javico*[243] has by some been taken to indicate that, when the exhaustion doctrine does not apply, a licence agreement granting absolute territorial protection cannot restrict competition under Article 101 TFEU.[244] The case concerned the exportation of trademarked goods from the EU to non-member states, and the licence prohibited the distributor from both re-importing the goods into the EU and to sell to other country. Since the exhaustion doctrine is only applicable when goods are placed on the market in the EU[245] and therefore did not apply, the agreement could include provisions that would not otherwise have been allowed under EU competition law.[246]

However, this view does not take into account the fact that since the goods were sold outside the EU, the Court found that the restrictions on resale did not affect trade between the Member States, and therefore could not have as its object the restriction of competition.[247] This is a separate condition under Article 101 TFEU. The issue of exhaustion was not considered in *Javico*.

Therefore, taking the decision cited to say that an agreement cannot restrict competition when there is no exhaustion goes beyond what the ruling says. There can be no doubt that restrictions on the cross-border provision of services at the very least have the potential of affecting trade, with or without the application of the exhaustion doctrine.

Nevertheless, when the exhaustion doctrine does not apply, the right of communication remains exclusive to the rightholder, no matter how many times the work is communicated.[248] For example, the owner of a right to a movie can make the movie available online through the

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[243] C-306/96 Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP), ECLI:EU:C:1998:173

[244] Colomo (2015) p. 5

[245] Waelde (2014) p. 856

[246] Colomo (2015) p. 6

[247] C-306/96 Javico paragraph 15-20

[248] Batchelor and Montani (2015) p. 595

service of his choosing for as long as he likes. Other audiovisual services cannot make the same movie available through their own services on the argument that the consumers could have watched the movie anyway, even if remuneration is paid the right owner.

The Court in *Murphy* does not consider the question of exhaustion, but avoids it by narrowing down the 'specific subject matter' of copyright[249] and by finding that there was no infringement of copyright in the UK, where the content was watched.[250] This indicates that a licence agreement can restrict competition even when the exhaustion doctrine does not apply.

4.2.2 Would there be competition without the restrictive agreement?

It has been settled law since *Société Technique Minière*[251] that an agreement can only be prohibited under Article 101 TFEU when it restricts actual or potential competition.[252] It is not necessary to prove that the agreement has such an effect, which would mean an effect analysis, but that the agreement is capable of affecting competition.[253] In other words, where competition would not have taken place without the agreement, it cannot restrict competition.[254]

It is therefore necessary to consider whether competition between audiovisual service providers would take place without geo-blocking.

In its Guidelines on Vertical restraints, the Commission expresses the view that when a distributor tries to establish itself in a new market, absolute territorial exclusivity may be necessary for a period of time because of the risks involved with investments. In such cases, restrictions even on passive sales will generally fall outside the scope of Article 101(1) TFEU for the first two years, even though such restrictions are in general prohibited under Article 101(1).[255]

Although these Guidelines only express the Commissions priorities, they also convey how the Commission view the economic context of such agreements.[256] Without the agreement, there

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249 Doukas (2012) p. 612
250 Graf (2011)
251 C-56/65
252 Colomo (2015) p. 6
253 Jones and Sufrin (2011) p. 179
254 Colomo (2015) p. 6
255 Guidelines on vertical restraints paragraph 61
256 Jones and Sufrin (2011) p. 114-115

would be no sale at all. An agreement is not capable of restricting competition that would not have existed in the first place.

While the provision of audiovisual content services is not the same as establishing oneself in a new market, some of the rationale is the same. As stated under 3.2.1, a licensee often takes a greater risk than a distributor.[257] Creating audiovisual works is expensive and in many cases the rights are sold or licensed out even before the production has begun.[258] This allows for investment. In return for this investment, the broadcaster or content provider requires territorial exclusivity.[259] If he did not receive this in return, other broadcasters or content providers could buy the rights with no risk involved and show it to the customers, thereby taking customers from the investor, which will leave him with a loss. Therefore, a licensee requires the same level of protection, if not a higher one, than a mere distributor.[260]

For example: The Swedish broadcasting company TV 4 is producing a new crime show that is aimed at young people, but lacks the necessary funds. To raise these, they sell the TV rights to Norwegian broadcaster TV 2. If the series flops, TV 2 has lost all their investment. However, the series in question is a success. Netflix sees this, and requires a license to offer the series to consumers online. As young Norwegians (at least in this case) prefer to watch TV-series online when they want, this leads to them choosing Netflix over TV 2, which again leads to TV 2 loosing their investment.

This is called the 'free rider problem'. The content provider or broadcaster that has invested in something is entitled to protection from foreign content providers or broadcasters that have made no such investments.[261] Without the ability to offer or require territorial exclusivity, investments in audiovisual works would drop. Pay-TV and internet streaming providers often invest significant amounts of money into promoting movies and TV-series, many of which would not have been launched successfully without this investment.[262] Especially for niche programmes, this can become a problem, and therefore it might be necessary to grant those who contribute to such works and absolute territorial exclusivity to exploit the work.[263] Not doing so is likely to place smaller companies and new entrants to the audiovisual sector at a

[257] Whish and Bailey (2012) p. 771
[258] Langus, Neven, and Poukens (2014) p. 20-22
[259] Towards a modern, more European copyright framework, COM(2015)626 final p. 4
[260] Whish and Bailey (2012) p. 771
[261] Batchelor and Jenkins (2012) p. 9
[262] Stephan (2015)
[263] Batchelor and Jenkins (2012) p. 163

disadvantage.[264] In this respect, by preventing free-riders, territorial restrictions can be positive for cross-border trade and integration.

Does this mean that restrictions on passive sales of audiovisual services should, in line with the Commissions view in its Guidelines on vertical restraints, fall outside Article 101? Not necessarily. The need to avoid free riding could be a valid justification under Article 101(3)[265] however; absolute territorial exclusivity is unlikely to satisfy the criteria of the provision.[266]

Since an agreement cannot restrict competition where no competition would have existed without it, a distribution agreement cannot be anti-competitive under Article 101(1) if it would have been impossible for the supplier to enter the market in its absence.[267] However, in the case of copyright, the situation is different. The service providers are able to compete on a national level, but not able to offer the same content – there is inter-brand competition, but no intra-brand competition.

The Commission appears to hold this view, as can bee seen from the fact that in the Sky UK-investigation, they believe geo-blocking restrict competition by object.[268] In *Murphy*, there was no intra-brand competition – the rights had been licensed exclusively on a country-by-country basis, yet the Court also held that the agreement restricted competition by object.[269] For that reason, it is in my opinion not possible to say that no competition would have existed without the restrictive agreement.

A separate question is whether the legal framework that surrounds the exercise of copyright in audiovisual content would allow for cross-border provision of services even in the absence of geo-blocking. For cross-border provision of audiovisual services to take place, there can be no infringement of copyright in the country where the content is watched.

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264 Batchelor and Jenkins (2012) p. 163

265 C(2003) 5192: Commission Decision of 29/12/2003 relating to a proceeding under to Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/C.2-38.287 ñ Telenor / Canal+ / Canal Digital)

266 Whish and Bailey (2012) p. 771

267 Colomo (2015) p. 15

268 European Commission (2016)

269 Paragraph 144

4.3 Does the Court's reasoning in *Murphy* apply to online content?

Since the Court's ruling in *Murphy*, questions have been raised concerning to what degree the same reasoning can apply to the provision of online audiovisual services as was applied to broadcasts.[270]

The *Murphy* case concerned satellite broadcasting. Broadcasting and online media share many similarities: first and foremost that they are similar ways of communicating the same copyrighted works to the public. There is no difference to the copyright of the content communicated by broadcasts and online audiovisual services, and therefore there is only a small step to extend the reasoning behind *Murphy* beyond the restriction on sale of decoder card to also prohibit geo-blocking. Underlying the regulatory framework on electronic communications is the principle of 'technology neutrality'.[271] However, different frameworks regulate broadcasts and online media, and this creates different legal contexts. Broadcasts have been regulated in more detail by the Satellite Broadcasting and Cable Retransmission Directive (SatCab Directive),[272] while online media services fall under the more general InfoSoc Directive.[273]

The Commission appears to be of the view that the *Murphy* ruling can be applied to online content.[274] The Sky UK-investigation is on the idea that *Murphy* is relevant beyond the SatCab Directive,[275] and the commitments proposed by Paramount will concern both broadcasts and online content services.[276]

To answer whether *Murphy* can be applied to online audiovisual services, it is necessary to look at the differences in the legal context that allowed the ECJ in *Murphy* to reach a different result from that of *Coditel* (4.3.1), before looking at the differences in the legal context of broadcasting and online content services (4.3.2 and 4.3.3).

270 Batchelor and Jenkins (2012) p. 169
271 Alexiadis and Wood (2012) p. 248
272 Directive 93/83/EEC
273 Directive 2001/29/EC
274 Colomo (2015) p. 13
275 Directive 93/83/EEC
276 European Commission (2016)

4.3.1 The differences between *Murphy* and *Coditel*

It was the differences in legal context that allowed the Court to reach a different result in *Murphy* from what it did in the *Coditel*-cases.[277] Both *Coditel* and *Murphy* concerned the broadcasting of TV signals transmitted from one Member State (Germany and Greece respectively) where a licence correctly had been acquired. The TV-signal was picked up and the content watched in another Member State (Belgium and the UK) without a licence having been granted for that second territory. The Belgian court held that this infringed the copyright of the Belgian licensee, Cine Vogt. As copyright is territorial in nature, a Belgian licence was necessary. The ECJ held that this did not restrict the freedom to provide services in the internal market, even though absolute territorial exclusivity had been granted the Belgian distributor.

A similar logic *could* have been applied in *Murphy*. However, the legal context was different.[278] The SatCab Directive introduced a 'country of origin' principle, under which copyright only has to be cleared in the country where the signal is transmitted.[279] Since the broadcasted football matches originated in Greece, it was sufficient with a Greek licence – the fact that the signal reached British viewers did not amount to an infringement of copyright in the UK.[280] Instead, it was important that the right owner, FAPL, had received an appropriate remuneration based on the total number of viewers in the EU,[281] not just those in the licensed territory.[282] This is where the situation differs from Coditel; as there was no 'country of origin' principle, it was not sufficient with a German licence when the movie was shown in Belgium.

This suggests that, when the 'country of destination' principle does not apply, the provision of cross-border audiovisual services will only be legal when the service provider holds a licence in each country the content can be watched.[283] The Commission appears to acknowledge this.[284]

The question this raises is in which countries it is necessary to clear copyright for online audiovisual streaming services; more precisely, if the 'country of origin' principle can be ap-

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277 Graf (2011)

278 i.c.

279 Directive 93/83/EEC Article 1(2)(b), see also Batchelor and Jenkins (2012) p. 159

280 Doukas (2012) p. 612

281 Paragraph 111

282 Doukas (2012) p. 612

283 Colomo (2015) p. 14

284 Vestager (2015)

plied beyond the SatCab Directive. If so, the legal context of online streaming services will coincide with the situation in *Murphy* and absolute territorial protection will be illegal, making geo-blocking restrictive of competition under Article 101(1) TFEU. Conversely, if the 'country of origin' principle does not apply, the situation will be comparable to that of *Coditel* and absolute territorial protection will be permitted.

It is therefore necessary to look more closely at the legal context of TV broadcasts and streaming services, and in particular whether the 'country of origin' principle applies to online content.

4.3.2 Relevant Directives

Under the SatCab Directive, the principle of 'country of origin' applies.[285] This means that the service provider – a cable or satellite company such as Viasat – only needs to clear copyright in the country the signal is sent from. A satellite signal can be received over a larger territory than a single Member State. Yet, when the 'country of origin' principle applies, the work will not be considered having been made available in the transmitting state and therefore, no copyright infringement has taken place in the country of reception.[286] Thus, no licence is required there.[287] This licensing system is the same for the entire EU.[288]

Scholars have discussed to what extent the 'country of origin' principle can be applied to online content.[289] If this principle does not apply, rights have to be cleared in each country the copyrighted content is viewed. This is called the 'country of destination' or 'country of reception' principle.[290]

Copyright clearance is then required in each country of reception,[291] as well as in the country from where the service is provided.[292] A license fee therefore has to be paid in all countries where the protected content will be accessed.[293] A Danish streaming service available in Sweden must purchase a licence in both countries for the movies and TV-series made available through the service.

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285 Directive 93/83/EEC Article 1(2)(b)
286 Doukas (2012) p. 612
287 Batchelor and Jenkins (2012) p. 159
288 Batchelor and Montani (2015) s 598
289 Colomo (2015) p. 14
290 Depreeuw, Hubin, and Trialle (2014) p. 28
291 Batchelor and Montani (2015) p. 598
292 Batchelor and Jenkins (2012) p. 159
293 Doukas (2012) p. 625

The InfoSoc Directive[294] is silent on whether the 'country of origin' or 'country of destination' principle applies. However, recital 33 of the Audiovisual Media Services Directive[295] (hence AVMS Directive) states that the "country of origin principle should be regarded as the core of this Directive". The AVMS Directive is technology neutral and applies both to broadcasters and internet streaming providers such as Netflix.[296] Even so, this directive does not concern the clearing of rights or the essence of the rights themselves, but rather coordinates the national legislation of aspects such as advertising, protection of minors and the promotion of European works.[297] Therefore, the directive cannot be considered decisive for which principle applies under other directives.

4.3.3 Relevant case law

The question of applying the principle of the 'country of origin' or the 'country of destination' to online services was raised before the ECJ in the *Football Dataco* case.[298]

The case concerned the right of re-utilisation under the Database Directive,[299] which has been understood to constitute a 'making available' right for non-original databases.[300] The Database Directive, like the InfoSoc Directive, is silent as to which principle for right clearance applies, and the case can therefore bear influence on how the similar right under the InfoSoc Directive should be exercised. The German company Sportradar copied data concerning ongoing British football matches from the database belonging to Football Dataco, and offered them to internet uses, mainly British, from its server in Germany. Football Dataco sued Sportradar in Britain for violation of the re-utilization right. Sportradar claimed that it could only be sued in Germany as the server was there, by this applying the 'country of origin' principle. The Court rejected this.[301]

The Court held that applying a 'country of origin' principle to online services with the placement of the server as the starting point would create two problems. First, it can be difficult to localise the server with certainty.[302] A service provider that makes works available online

294 Directive 2001/29/EC
295 Directive 2010/13/EU
296 European Commission (2015b)
297 Roberts (2015) p. 197
298 C-173/11 Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG, ECLI:EU:C:2012:642
299 Directive 96/9/EC
300 Ginsburg (2014) p. 196
301 Paragraph 43
302 Paragraph 45

might use different servers in more than one country.[303] Second, having the 'making available' take place at the location of the server would allow the service provider to choose the territory with the most favourable legal framework in the EU, or placing them outside the EU altogether, thus evading the jurisdiction of the EU Courts.[304] These factors suggest that the work should be considered to having been made available in the 'country of destination'.

The Court concluded that where "there is evidence, from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public"[305] in the Member State of destination, the act of making a work available to the public should be considered to having taken place in that Member State, thus applying the 'country of destination' principle. Whether there is evidence of such targeting is up to the national courts to assess.[306] Accordingly, the criterion for the act of communication to take place in the country of destination appears to be whether the online service provider targets the public in the Member State.

Football Dataco was decided by the ECJ after the AVMS Directive entered into force. However, as a database is not an audiovisual service, the Court did not consider the Directive.

Furthermore, the Court's reasoning in *Football Dataco* is not necessarily suitable in the case of online audiovisual services. The Court rejects using the placement of the server as the place the communication takes place, since the server sometimes is hard to locate.[307] For audiovisual services, rather than saying the content originates from the country the server is placed, the country of origin would be the country the service is offered. This is not necessarily the same country as the server. The Court's reasoning in *Football Dataco* is therefore not directly applicable. Even so, it will not always be easy to identify which country the service is offered either[308] For example, the subscription service Viaplay is offered in all the Scandinavian countries and targets customers within all three. All of these countries can therefore be considered the 'country of origin'.

There is also the argument that when it comes to audiovisual services, customers in other Member States have not necessarily been targeted. Quite to the contrary, the wide use of geo-blocking shows that online service providers go quite far in making sure that there is no tar-

303 Ginsburg (2014) p. 197
304 ibid. p. 197-198
305 Paragraph 47
306 Paragraph 47
307 Paragraph 45
308 Colomo (2015) p. 14

geting of customers outside the licensed territory.[309] If the criteria for the ‘country of destination’ principle entails that the specific market has been targeted, as suggested by the Court in *Football Dataco*, then this gives little guidance in the case of online audiovisual services

Nevertheless, there are good arguments why the ‘country of origin’ principle should not apply to online audiovisual services. As mentioned, there can be difficulties in deciding which country the content is originating from. Moreover, online audiovisual services are varied in nature and can include other acts that are part of the copyright owners monopoly, such as rental and reproduction, not only the act of making a work available to the public.[310] This distinguishes the copyright clearance of films and TV-series from that of databases.

4.3.4 Summary: The ‘country of origin’ and the ‘country of destination’

Although the AVMS Directive states that the ‘country of origin’ principle should apply, the Directive does not regard the clearing or exercise of copyright. This is regulated by the InfoSoc Directive, which is silent as to which principle should apply.

However, the main argument for saying that the ‘country of destination’ principle applies to online audiovisual services is that the ‘country of origin’ principle introduced in the SatCab Directive constitutes an exemption rather than the rule.[311] That copyright has to be cleared in any country where the work is exploited can be considered a natural understanding of the territoriality of copyright. This is the view that is most widely adjourned to.[312]

The Commission accepted that the ‘country of destination’ should apply to online services in its *IFPI Simulcasting* decision.[313] Even though this decision is from before the AVSM Directive, it must still be considered to relevant.[314]

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309 Geo-blocking practices in e-commerce, SWD(2016)70 final p. 47

310 See Colomo (2015) p. 14, Batchelor and Jenkins (2012) p. 161 and Graf (2011)

311 Graf (2011)

312 Langus, Neven, and Poukens (2014) p. 4

313 2003/300/EC: Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 — IFPI "Simulcasting") paragraph 24

314 Alexiadis and Wood (2012) p. 249

4.3.5 The target approach

Based on the Court's decisions in *Donner*[315] and *Football Dataco*, scholars have developed a so-called 'target approach' to when the 'country of destination' principle shall apply.[316] Under this, a content provider will only require a license for the Member States where the public is targeted.[317] The targeting of the market in one or more specific Member State justifies that the specific Member State has competence to regulate the act, and therefore that copyright should be cleared in that country.[318] When the public has not been targeted, it is not necessary to acquire a licence.

Donner concerned the sale of furniture replicas from Italy to Germany. These were protected by copyright in Germany as works of applied art, which could not be copyrighted in Italy. The Court held that, since the exporter has explicitly targeted German customers, the rights had to be cleared in Germany to avoid infringement. Even though copyright is territorial in its nature, and the infringing act – the reproduction – had taken place in a country where there was no infringement, EU law could be applied where commercial activity is "aimed at that territory" where the work is protected.[319]

This decision and its idea of targeting a market, was elaborated upon in the *Football Dataco*, where, as mentioned above, the Court held that rights had to be cleared in the Member State were the market was targeted.[320] This suggests that, for the 'country of destination' principle to apply, the public has to be targeted. However, both *Donner* and *Football Dataco* concern active sales and why the rights have to be cleared in the targeted country. The rationale does not necessarily go the other way around; it does not follow that where there is no targeting, the 'country of destination' principle cannot apply.

Nevertheless, the target approach can be considered a functionally good solution. It allows for the application of the 'country of destination' principle to online content services, in line with what must be considered the current state of the law, while at the same time opening for an exception in cases where consumers access a service without having been targeted. This will allow streaming services to respond to unsolicited request.

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315 C-5/11 Criminal proceedings against Titus Alexander Jochen Donner, ECLI:EU:C:2012:370

316 Depreeuw, Hubin, and Trialle (2014) p. 87

317 l.c.

318 Ginsburg (2014) p. 199

319 C-5/11 Donner paragraph 35

320 C-173/11 Football Dataco paragraph 47

For example, a French streaming service will most likely target the French-speaking population in France and Belgium. If someone speaking French in Germany wished to watch the content offered, the service will be able to make it available to the consumer in Germany. However, if the streaming service start advertising its service to the French population in Germany, then the public has been targeted and it is necessary to clear copyright in Germany. Where the work can be accessed from other Member States, but where there is no targeting of the public, the consent of the right holder is not required.[321]

4.4 Conclusion: the legal context

The exhaustion doctrine cannot be said to apply to the right of communication to the public; however, this is not necessary for agreements concerning this right to restrict competition. Nevertheless, for there to be legal cross-border provision of audiovisual services, there can be no infringement of copyright in the country where the content is watched. That copyright has to be cleared in the 'country of destination' seems to be the view most adjourned to.[322]

Based on the Court decisions in *Donner* and *Football Dataco*, a 'target approach' has been developed.[323] Although this inferential is not certain, it establishes a functional and nuanced rule for in which countries copyright must be cleared. When attempts to access or subscribe to an online audiovisual service are unsolicited, the public will not have been targeted. Therefore, in such situations, the 'country of origin' principle should apply.[324]

By applying the target approach, it is possible to create a legal context similar to that in *Murphy*, where it is only necessary to clear copyright in the country where the signal originates, a situation which differs from that of *Coditel*. In this legal context, it is possible for licence agreements bestowing absolute territorial exclusivity by imposing on the audiovisual streaming provider an obligation to geo-block, to have as its object the restriction of competition under Article 101(1) TFEU.

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[321] Depreeuw, Hubin, and Trialle (2014) p. 87

[322] See in that regard Graf (2011), Doukas (2012) p. 625 and Batchelor and Montani (2015) p. 598

[323] Colomo (2015) p. 14

[324] It is worth noting that the Commission does not express its view of whether the 'country of destination', 'country of origin' or target approach applies, yet they found that the licence agreements in the Sky UK-investigation restrict competition by object, see European Commission (2016)

5 Agreements having the effect the restriction of competition

The foregoing discussion shows that it is not certain that agreements to impose geo-blocking will be considered to restrict competition by object under Article 101(1) TFEU; both because the legal context can be considered to be different and because such agreements will only restrict competition when the remuneration paid goes beyond the 'specific subject matter' and leads to an artificial price difference between Member States.

An agreement can restrict competition either by object or effect; these are alternative conditions.[325] The question must then be asked as to whether geo-blocking agreements can be considered to have the effect of restricting competition. Restrictive effects must be assessed in the context of which the agreement is implemented.[326]

The following examination will build on the presumption that geo-blocking agreements cannot restrict competition by object and are therefore permitted except when they restrict competition by effect.

In *Coditel II,* the Courts stated that, although absolute territorial exclusivity did not restrict competition by object, it could be contrary to Article 101 TFEU when "there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition".[327] Primarily, territorial exclusivity can be found to restrict competition by effect when it creates artificial and unjustifiable barriers to the market, when the licence fees exceed what is a fair return on the investment or the duration of the exclusivity is disproportionate to the investment.[328] This must be considered in light of the specific characteristics of the market.[329]

For there to be potential cross-border competition without geo-blocking provisions in the field of streaming services, consumers must legally be allowed to access the content available in other Member States, or to access the content they have subscribed while travelling, i.e. there can be no infringement of copyright. In other words: lawful cross-border provision of audiovisual services must have existed without the obligation to geo-block.[330]

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325 C-56/65 Société Technique Minière
326 Colomo (2015) p. 6
327 C-262/81 paragraph 17
328 Paragraph 18
329 Paragraph 17
330 Colomo (2015) p. 15

Copyright is territorial in its nature, and the protection is offered in each Member State.[331] It is within the exclusive right of the copyright-owner to control each communication to the public. This means that he is entitled to license, or to not license, the work as he pleases. Even if geo-blocking provisions are removed, content providers may not lawfully offer their services to consumers, since doing so will be a breach of copyright in the country of destination.[332] As long as movies and other audiovisual works are licensed exclusively to one licensee in each Member State, which is perfectly legal,[333] then there will be no intra-brand competition, even if the licensees were not contractually obliged not to offer their services across borders.[334]

For example, Disney holds the copyright to the movie Cinderella. Anyone who wants to show Cinderella in Norway needs to purchase a licence for Norway, it is not sufficient to hold a licence in Sweden. Therefore, there is no competition between Swedish and Norwegian service providers. To the extent the 'country of origin' principle does not apply and copyright has to be cleared in each country it is watched, the provision of cross-border services will not be lawful, and geo-blocking must be considered a legitimate way of enforcing the territorial nature of copyright.[335]

In the market for audiovisual services, competition takes place 'for' the market rather than 'within' the market.[336] Broadcasters and online streaming services compete to acquire the rights to movies, TV-series and other content.[337] The services do not then compete by attracting customers to the same content at the best price, but rather by offering the best range of content at the best price.[338]

In the Statements of Objections in the Sky UK-investigation, the Commission argues that without the geo-blocking provisions in the licence agreements, Sky would be able to decide "on commercial grounds" whether to offer their services in other Member States.[339] The geo-blocking provisions in question not only imposed on Sky an obligation to block access from consumers outside the licensed territory, but also committed the film studios to include similar geo-blocking provisions in its license agreements with content providers in other Member

331 Hugenholtz (2015) p. 1
332 Colomo (2015) p. 13
333 Murphy paragraph 137
334 Colomo (2015) p. 15
335 ibid. p. 14
336 Alexiadis and Wood (2012) p. 247
337 Colomo (2014) p. 532
338 Alexiadis and Wood (2012) p. 247
339 European Commission (2015a)

States, thus ensuring that other licensees would not compete with Sky in the UK and Ireland.[340]

What the Commission means by "on commercial grounds" is not further elaborated upon. If Sky wishes to offer streaming services in other Member States, they must purchase licenses for that state, on equal grounds with other content providers. The opportunity of purchasing such licenses might be limited by territorial exclusivity in existing license agreements the producer have with other broadcasters or online service providers.

Besides the territorial aspect of copyright, there are other factors that prevent the cross-border provision of audiovisual services. The most prominent of these is the language barriers, though also cultural variations between Member States can affect the cross-border trade.[341] Consumer preferences diverge to a substantial degree across the EU.[342] Consumers prefer to watch content in their own language and are not likely to subscribe to services in other languages.

Because of these characteristics of the market for audiovisual media services; if geo-blocking agreements are presumed not to restrict competition by object, it is difficult to imagine that such agreements have the effect the restriction of competition

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[340] l.c.

[341] Doukas (2012) p. 625

[342] Renda et al. (2015a) p. 114

6 Exceptions under Article 101(3) TFEU

Article 101(3) TFEU provides an exception to Article 101(1). An agreement that is held to restrict competition can be redeemed when it satisfies four conditions stated in the provision: the agreement must create benefits, consumers must be allowed a fair share of these, and the restrictive agreement must be indispensible for the creation of the benefits. Lastly, the agreement cannot eliminate all competition.

In *Matra Hachette*,[343] the General Court held that no anti-competitive agreements "can exist which, whatever the extent of its effects on a given market, cannot be exempted" under Article 101(3). This means that even agreements having as its object the restriction of competition is in principle capable of satisfying the conditions of Article 1010(3).[344] Though agreements granting absolute territorial exclusivity rarely will fulfil the conditions,[345] the Commission is of the opinion that sometimes such restraints are objectively necessary to achieve efficiencies.[346]

Whether a licence agreement held to restrict competition should be exempted under Article 101(3), must be decided on a case-by-case basis. It is therefore necessary to examine whether the restrictive effects on competition are proportionate and inherent in the pursuit of the objectives of the agreements.[347]

It must be noted that where an agreement granting absolute territorial exclusivity is found to satisfy the conditions of Article 101(3), the geo-blocking that is agreed upon to comply with the exclusivity will as a general rule also be justified. Therefore, the question that must be answered is whether agreements granting absolute territorial exclusivity in the audiovisual sector create more benefits for consumers than negative effects on the market.

343 T-17/93 Matra Hachette SA v Commission of the European Communities, ECLI:EU:T:1994:89

344 Whish and Bailey (2012) p. 153

345 Jones and Sufrin (2011) p. 659

346 Guidelines on Vertical Restraints paragraph 60

347 Doukas (2012) p. 622

6.1 The benefits of licence agreements granting territorial exclusivity

The benefits produced must be of objective value, not just to the parties themselves,[348] thus compensating for the negative impact the agreement has on competition.[349] Only those listed in Article 101(3) are valid,[350] namely contribution to improvement in production or distribution, or the promotion of technical or economic progress.

6.1.1 Investment

One justification for granting territorial exclusive licences and geo-blocking of online audiovisual services is that it offers an incentive to invest in audiovisual productions. As stated under 4.2.2, licences to audiovisual content are often sold to broadcasters and content providers before production begins in order to finance the production.[351] At the same time, territorial exclusivity helps content provides deal to the 'free-rider' issue: that other online audiovisual services to use the investments made without the same high costs.[352]

The need to avoid free riding must be considered a valid justification under Article 101(3).[353] In its decision in *Telenor/Canal+/Canal Digital,* the Commission held that the need to avoid free riding created a valid justification in an exclusivity agreement, as it allowed the content provider to offer a wider ranger of content and be more competitive on prices.[354]

This raises the question of whether the need for investment in audiovisual content, such as movies and TV-series, satisfies the conditions set out in Article 101(3) TFEU.

Granting territorial exclusivity, including absolute exclusivity, in return for financing audiovisual works creates a benefit in production. The production could not take place without the investment. The consumer receives a fair share of this benefit; he gets the opportunity to watch movies that would not otherwise have been made. Further, the restrictive agreement is indispensible in creating this benefit.

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348 Whish and Bailey (2012) p. 155
349 Jones and Sufrin (2011) p. 242
350 Whish and Bailey (2012) p. 156
351 Impact assessment, SWD(2015)270 final p. 15
352 Batchelor and Jenkins (2012) p. 163
353 l.c.
354 C(2003) 5192: COMMISSION DECISION of 29/12/2003 relating to a proceeding under to Article 81 of the Treaty and Article 53 of the EEA Agreement (COMP/C.2-38.287 ñ Telenor / Canal+ / Canal Digital) paragraph 203

This leaves the question of whether absolute territorial exclusivity eliminates all competition. It is in the nature of territorial exclusivity that only one distributor has the right to distribute the specific movie or TV-series. This eliminates all intra-brand competition.

However, a characteristic of the audiovisual content market is that content providers compete 'for' the market rather than 'within' the market, see chapter 5.[355] Broadcasters and online streaming services compete to acquire the rights to movies, TV-series and other content.[356] They then compete to attract customers by offering the best content at the best price. The inter-brand competition will therefore not be eliminated, even when absolute territorial exclusivity has been granted.

6.1.2 Language options

Another legitimate reason for granting territorial exclusivity is the incentive to provide dubbing and subtitles to the audiovisual content. With an exclusive licence, the TV and online content providers can receive a bigger return on their investment, and this allows them to produce translations and other supplementary services in the viewer's native language, thus enhancing consumers viewing experience.[357] Such services can be quite costly, and without knowing if he will have a return for the effort, the service provider will have less incentive to make this investment.

Better language options must be considered a benefit in distribution, as it allows more consumers to watch the production. The Commission has expressed the view that the conditions of Article 101(3) will be satisfied when it allows more consumers to see a movie than it would have without the agreement, which will happen when a movie is shown in the local language.[358] As above, this directly benefits the consumers, and the restriction can be indispensible in creating this benefit.

However, the need for language options does not necessarily justify why licences should be territorial. Languages do not always follow the territorial borders.[359] An example is Belgium, where both Dutch and French are spoken. It would be more natural to split licences into languages, thereby producing a French version for France and Wallonia and a Dutch version for

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355 Alexiadis and Wood (2012) p. 247

356 Colomo (2014) p. 532

357 Stephan (2015)

358 89/536/EEC: Commission Decision of 15 September 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.734 - Film purchases by German television stations) paragraph 54

359 Keeling (2003) p. 322

the Netherlands and Flanders, rather than a licensee having to produce two separate language versions for Belgium.[360]

6.2 Pan-European licences

Without the possibility of agreeing on territorial exclusivity in license agreements, a large step would be taken towards a pan-European licence system. In its opening statement into the Sky UK-investigation, Commissioner Almunia explicitly said that the investigation was not an attempt to push towards such a licensing system.[361]

A pan-European licensing system is not necessarily something to yearn for from a consumer point of view. Though it might allow access to a wider range of content, it could also lead to higher prices for consumers in poorer Member States.[362] Licenses for bigger markets have traditionally cost more than licenses for smaller markets.[363] For consumers in the high-cost countries, such as France, a subscription to a European streaming service could become cheaper, while for residents in low-cost countries such as Romania, subscription to such a service would be expensive. Territorial licensing makes the content available to consumers also in poorer countries, with subscriptions priced at the market value in that country. This must be considered to be more beneficial to consumers as a whole in the EU than access to more content.

No research has been published showing that such 'positive' price discrimination indeed occurs.[364] Yet, Netflix is offered at different prices in Romania[365] and France.[366]

A pan-European licensing system can also lead to competitive distortions of the market, as few service providers will have the buying power to purchase licences for the entire EU.[367]

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360 Keeling (2003) p. 322
361 Almunia (2014)
362 Stephan (2015)
363 Doukas (2012) p. 623-624
364 Hugenholtz (2015) p. 14
365 Romania Insider (2016)
366 Roxborough (2015)
367 Alexiadis and Wood (2012) p. 248

7 Consequences

The research question for this thesis was whether the contractual obligation to geo-block access to online audiovisual could be considered to restrict competition under Article 101 TFEU.

As has been seen, there is no certain answer to this question. The case law regarding the issue *can* be interpreted to say that agreements to geo-block restrict competition, though it is not evident that it will be so. Especially the issue of whether the principle of the 'country of origin' or the 'country of destination' applies, leaves room for uncertainty, as the relevant Directives and case law of the Court is inconsistent and the legal basis for applying a 'target approach' is weak.

The Commission and the ECJ work to develop EU law.[368] As the ECJ's style of interpretation is dynamic, it is within their power to interpret *Murphy* in such a way that it prevents geo-blocking provisions in licence agreements.[369] As this will further the integration of the internal market in the EU, the Court might chose to do so, even if this means restricting the scope of copyright.[370]

What are then the consequences of saying that licence agreements imposing on service providers an obligation to geo-block restricts competition under Article 101 TFEU?

First, it is only agreements that impose an obligation to geo-block that are prohibited. Nothing prevents streaming services from unilaterally deciding to geo-block customers. This can for example be done in order to comply with national legislation or to avoid copyright infringement.

Second, that agreements to geo-block are prohibited does not necessarily mean that all content automatically becomes available in all Member States. Rather, it allows for a person residing in one Member State to subscribe to a service available in another. For example, a Spanish national living in Finland can subscribe to Spanish Netflix, allowing her to watch content in her native language. It does not follow that she, on the same subscription, can have access also to the Finish Netflix. By having to purchase two subscriptions, the right owners can be ensured correct royalties for each country.

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[368] Craig and De Búrca (2011) p. 37

[369] ibid. p. 64

[370] Batchelor and Montani (2015) P. 600

If *Murphy* can be interpreted to apply to online content services, and *if* geo-blocking can be considered an 'additional obligation' making the exclusivity granted absolute, then this might have the consequence that, even though territorial exclusive licence agreements are permitted, enforcing them is not. Geo-blocking is the only way of imposing territorial borders online.[371]

Without the contractual obligation to prevent access to content, service providers, both broadcasters and online content services will have little incentive to ensure that their users only watch the content available in their own country.[372] In its enquiry into geo-blocking practices in the e-commerce sector, the Commission found that only about ten percent of the audiovisual service providers that geo-block have unilaterally chosen to do.[373]

A consumer who subscribes to an online streaming service like Netflix will want to have access to as much content as possible, and to keep their customers pleased, Netflix will not try to block them unless so obliged.[374] The fact that territorial exclusivity itself does not infringe Article 101 therefore becomes irrelevant.[375]

A licensor, such as a movie production company, can legally appoint a single distributor in a Member State and grant that licensee territorial exclusivity, e.g. the British BBC grants a Belgian streaming service the exclusive right to show its TV-series online in Belgium. However, there is nothing the production company can do to protect the licensee from competition from licensees in neighbouring Member States; the BBC cannot prevent a French provider of online content from offering the same content to Belgian customers. This makes it easy to circumvent territorial exclusive licenses by distributors in other Member States who can offer competing services across the border.[376] The Court in *Murphy* seems to ignore the fact that without ways of enforcing absolute territorial exclusivity, such exclusive rights will become ineffective.[377]

371 Trimble (2014) p. 90

372 ibid. p. 95

373 Geo-blocking practices in e-commerce, SWD(2016)70 final, comparison of figures 24 and 40

374 Fullagar (2016)

375 Batchelor and Jenkins (2012) p. 162

376 Doukas (2012) p. 616

377 l.c.

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EEA Agreement	Agreement on the European Economic Area, Brussels 1992
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Directive 96/9/EC	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive)
Directive 2001/29/EC	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)
Directive 2010/13/EU	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)
Commission Regulation (EU) No 330/2010 Block Exemption for Vertical Agreements	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Block Exemption for Vertical Agreements)
Commission Regulation (EU) No 316/2014 Block exemption for Technology Transfer Agreements	Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (Block exemption for Technology Transfer Agreements)
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