**A Tale of Two Friends: The Potential Conflict Between Competition Law and The Geo-blocking Regulation**

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# Abstract

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Ever since the adoption of the Digital Single Market Strategy in 2015, and in response to the Commission’s finding in its E-commerce Sector Inquiry of 2015, the concerns about the restrictions on online trade that persist in the digital market have increased. Above all, geo-blocking practices regarding not only goods and services, but also digital content (such as movies, music, eBooks, or videogames) have become one of the main barriers to the achievement of a European Digital Single Market.

Over the past 5 years, the market has witnessed a series of developments towards the increase in cross-border availability of goods, services and digital content through the adoption of different legislative instruments at EU level. Among these instruments, the Geo-blocking Regulation represents the most important one. However, although ambitious from its outset, this piece of legislation has ended having quite a limited scope and impact on the Internal Market, being at odds with some fields of EU law, in particular with EU competition law.

The enforcement of EU competition law rules in certain recent cases has shown that its relationship with the Geo-blocking Regulation is not entirely clear. However, the revision of the content of the Regulation in March 2020 should not be overlooked. The need for a sound legal regime against territorial restrictions on online trade should be a priority for the Commission during such revision, making the necessary changes to certain provisions of the legal text in order for it to truly complement the already existing legal acquis in the field of competition law.

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Desde la adopción de la Estrategia Europea para un Mercado Único Digital de 2015, y a raíz de los resultados obtenidos a través de la Investigación Sectorial del Comercio Electrónico de 2015, las preocupaciones de la Comisión por las restricciones al comercio electrónico que todavía persisten en el mercado han aumentado. Entre esas restricciones, las prácticas de bloqueo geográfico en lo que respecta a no solo bienes y servicios, sino también contenidos digitales (tales como contenidos audiovisuales, música, libros electrónicos y videojuegos) representan la mayor amenaza al desarrollo de un Mercado Único Digital.

Durante los últimos 5 años, el mercado interior ha sido testigo del desarrollo de toda una serie de instrumentos a nivel comunitario con el objetivo de mejorar el acceso transfronterizo a bienes, servicios y contenido digital. Entre estos instrumentos destaca el Reglamento sobre el bloqueo geográfico injustificado de 2018. Sin embargo, a pesar de su ambición inicial, el impacto del Reglamento en el mercado interior ha resultado, por el momento, limitado, entrando incluso en conflicto con determinadas ramas del derecho de la UE, entre las cuales el derecho de la competencia destaca especialmente.

La aplicación del derecho de la competencia en ciertos casos recientes ha puesto de manifiesto la incertidumbre existente en lo que respecta a la relación de esta rama del derecho con el Reglamento. Sin embargo, la revisión de dicho Reglamento prevista para marzo de 2020 no debería ser pasada por alto. En este sentido, la necesidad de un sistema legal firme y consistente contra las restricciones territoriales al comercio electrónico debería ser una prioridad para la Comisión durante dicha revisión, a través de la cual los pertinentes cambios en el contenido del Reglamento deberían ser adoptados para garantizar su complementariedad con el derecho de competencia.

# Key Words

Competition law – Derecho de competencia

Digital Single Market – Mercado Único Digital

Digital Single Market Strategy – Estrategia Europea para un Mercado Único Digital

E-commerce – Comercio electrónico

Geo-blocking – Bloqueo Geográfico

Passive sales – Ventas pasivas

Dynamic pricing – Precios dinámicos

Price discrimination – Precios discriminatorios

# Abbreviations

DSM: Digital Single Market

EC: European Commission

ECJ: European Court of Justice

GBR: Geo-blocking Regulation

SME: Small and Medium-sized Enterprise

TFUE: Treaty on the Functioning of the European Union

TUE: Treaty of the European Union

VBER: Vertical Block Exemption Regulation

# I. Introduction

Nothing in this life remains invulnerable to the sands of time and modern technological advances. Since 1993, with the entry into force of the Treaty of Maastricht, the European Single Market has been moving forward. However, the increasing number of products and services that are offered online or that are becoming digital have revealed the necessity of making the Single Market fit for the digital age.[[1]](#footnote-0) The developments experienced by our society have revolutionised the way in which goods, services and content are produced, distributed and acquired. While businesses and individuals within the Single Market take part in economic activities (generally) under conditions of fair competition and high levels of consumer protection, barriers can still be found when such activities are carried out online, having the effect of reducing the incentives to engage in cross-border online trade in the European Union.[[2]](#footnote-1) Adapting the Single Market to these developments would allow the EU to properly benefit from all the opportunities that technology offers.

Precisely under the framework of this need for adaptation the European Commission proposed the Digital Single Market Strategy for Europe in 2015. This text pursues the objective of overcoming the abovementioned barriers in order to achieve a fully functioning European Digital Single Market.[[3]](#footnote-2) Through different ambitious legislative initiatives, the DSM Strategy aimed to, among other objectives, provide enhanced better online access for consumers and businesses across Europe.[[4]](#footnote-3)

Many businesses and consumers in the EU know the frustration of being unable to access certain content or purchase certain goods or services online from a different Member State, especially within the no-barriers-based European Single Market.[[5]](#footnote-4) It is in this context where the term “geo-blocking” appears, understood as those “practices used for commercial reasons by online sellers that result in the denial of access to websites based in other Member States, or to the products or services sought for; or where different prices or conditions are automatically applied on the basis of geographic location”.[[6]](#footnote-5) The Commission identifies such practices as one of the main causes of fragmentation of the Internal Market, but at the same time it understands that some of them can be justified. Therefore, the DSM Strategy strives in particular to address those geo-blocking practices that are considered unjustified.[[7]](#footnote-6)

In order to do so, the Commission committed to make several legislative proposals with the objective of putting an end to such practices, thus reducing the differences in online cross-border access to goods and services throughout the EU.[[8]](#footnote-7) Among these legislative proposals can be found the recently adopted Geo-blocking Regulation, which prohibits unjustified geo-blocking practices and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the Internal Market.[[9]](#footnote-8)

Even though the general aim of this Regulation is a legitimate one, some of its provisions are at odds with certain rules governing the law of competition contained in the EU treaties, especially articles 101 and 102 TFEU. Therefore, this paper analyses the relationship of the Geo-blocking Regulation with EU competition law and the conflicts derived from this relationship, providing some recommendations for a future revision of the legal text in order to guarantee a peaceful interaction between both instruments.

# II. The Geo-blocking Regulation: Main Provisions

The GBR addresses the problem of customers within the EU being unable to engage in cross-border online transactions due to unjustified territorial restrictions.[[10]](#footnote-9) The Commission’s initial proposal focused its attention on those restrictions or limitations based on the nationality, place of residence or place of establishment of the customer.[[11]](#footnote-10) That being established, the GBR covers four main areas through 4 different provisions that are identified as its “prohibitions”.

In the first place, article 3 refers to the access to online interfaces, which in most cases will be the undertaking’s website.[[12]](#footnote-11) Through this provision, the Regulation prohibits limitations of customers’ access to an online interface based on its nationality, place of residence or place of establishment. Redirection is however allowed in certain cases (when the customer’s explicit consent is present and when it is necessary to comply with EU law), as long as the trader explains the reasons behind such limitation of access to the customer.[[13]](#footnote-12)

Secondly, article 4 establishes that discriminatory general conditions on the access to goods and services are prohibited.[[14]](#footnote-13) However, different general conditions for such access are allowed under certain circumstances, limiting the scope of this provision and, as will be explained, making it one of the most controversial provisions of the Regulation.[[15]](#footnote-14)

Thirdly, article 5 refers to the non-discrimination obligation for reasons related to payment. While traders are allowed to choose which means of payment they will accept, this article ensures that they do not apply different conditions of payment based not only on the nationality, residence or establishment of the customer, but also on “the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument within the Union”.[[16]](#footnote-15)

Finally, article 6 addresses agreements restricting passive sales.[[17]](#footnote-16) According to this provision, all agreements restricting passive sales in one of the ways described in the previous articles are automatically considered void.[[18]](#footnote-17) Nevertheless, this prohibition will not apply until 23 March 2020 for those agreements on passive sales that were signed before the entry into force of the Regulation.[[19]](#footnote-18)

The Regulation contains, furthermore, a review clause that allows its revision 2 years after its publication in the Official Journal of the EU, and every 5 years afterwards, providing the possibility of accompanying such review by amendments.[[20]](#footnote-19)

# III. An Overreaching Legal Instrument

As stated above, in 2015 the Commission launched an E-commerce Sector Inquiry with the purpose of identifying the barriers that persist in the online market, keeping an eye on their compatibility with EU competition law.[[21]](#footnote-20) In March 2016 the Commission published its initial findings, pointing out that around 63% of the websites in the EU did not allow consumers to buy from another Member State, thus preventing two thirds of consumers who wanted to shop online abroad from doing so.[[22]](#footnote-21) The Commission confirmed that geo-blocking practices had an important presence in the European Single Market, not only by means of contractual agreements between suppliers and distributors, but also through unilateral decisions by companies.[[23]](#footnote-22)

When a Member State adopts a measure that can be considered as a geo-blocking restriction, such conduct is most likely going to infringe the provisions on the free movement of goods or services of the Treaty of the European Union (unless it is objectively justified).[[24]](#footnote-23) Thus, the Geo-blocking Regulation is particularly concerned about those practices when they are carried out by private parties, something that has been traditionally assessed in the light of EU competition law.[[25]](#footnote-24) In this sense, although agreements or concerted practices between enterprises imposing online territorial restrictions are considered to fall within the scope of article 101 TFEU and are thus covered by EU competition law, unilateral conducts generally fall outside the scope of such provision.[[26]](#footnote-25) Unilateral conducts are most commonly addressed by EU competition law through article 102 TFEU, which requires the concerned undertaking to enjoy a dominant position in the relevant market. Therefore, the Geo-blocking Regulation intends to fill a regulatory gap, addressing those unilateral conducts restricting cross-border online sales that are carried out by undertakings which do not enjoy the required dominance.[[27]](#footnote-26) Since the scope of the GBR is not limited to this regulatory gap, as it also covers agreements between undertakings and unilateral conducts that fall under articles 101 and 102 TFEU respectively, it could be argued that there might be a conflict between these latter provisions and the GBR. Competition Authorities and undertakings are witnessing how conducts that were traditionally considered non-problematic under competition law rules will now be prohibited under this Regulation. Furthermore, conducts that were previously assessed under competition law will now be included within its scope.[[28]](#footnote-27)

From the content of the GBR it can be understood that the legislator was aware of the potential overlap that could take place between the former and EU competition law. Such awareness can be appreciated in certain provisions regulating the interaction between both instruments that have been introduced in the GBR.

Recital 16 could be an example of such provisions. It is important to note that the GBR addresses unjustified geo-blocking practices and other forms of discrimination based on customers’ nationality, place of residence or place of establishment. The GBR uses the term “customers” instead of “consumers”, comprising thus both consumers and businesses. However, according to recital 16, businesses are only going to be covered by the Regulation as long as the goods or services concerned are purchased for an end use.[[29]](#footnote-28) If a business purchases them in order to be resold, transformed, processed, rented or subcontracted, it will not be covered by the content of the Regulation.[[30]](#footnote-29) This only makes sense if it is considered, in the first place, that consumers and businesses (particularly SMEs) are often in a comparable position and, in second place, the possible harm that such extension of the concept of “customers” could have on certain distribution agreements between undertakings that are considered to lead to economic efficiencies and positive effects for final consumers.[[31]](#footnote-30) Certain traditional distribution models that by their very nature include some anti-competitive restrictions, such as selective or exclusive distribution systems, are generally considered to be beneficial for competition and consumers.[[32]](#footnote-31) However, including businesses that do not purchase goods or services for an end use within the scope of the GBR would discourage the use of such distribution systems, as they would be found *per se* illegal under the provisions of the Regulation.[[33]](#footnote-32)

The recent *Nike (Licensed Merchandise)* Case exemplifies such a situation foreseen by recital 16 GBR. In a nutshell, according to the Commission, Nike was breaching the rules of EU competition law by including several anti-competitive clauses in its licensing agreements. Among these, there were some direct and indirect measures imposed by Nike on licensees restricting out-of-territory sales to distributors.[[34]](#footnote-33) Even if there is a clear geo-blocking component in that practice, attention should be drawn to the fact that none of the concerned undertakings can be considered as end-users. Consequently, the Geo-blocking Regulation is not applicable.[[35]](#footnote-34) However, the fact that such situations are not included in its scope for the purpose of safeguarding traditional distribution schemes does not exclude the possibility of applying EU competition law when an anti-competitive object or effect can be found. In that sense, this case clearly shows how competition law is well placed to assess those anti-competitive agreements between undertakings that do not purchase the goods for an end use, thus prevailing over the rules of the Geo-blocking Regulation.

Besides recital 16, recital 34 of the GBR specifically addresses the relationship between competition law (with special emphasis on articles 101 and 102 TFEU) and the Regulation, establishing the predominance of the former over the latter.[[36]](#footnote-35) The recital clearly states that agreements restricting active sales are not going to be affected by the provisions of the GBR.[[37]](#footnote-36) A recent decision from the Commission illustrates this situation.[[38]](#footnote-37) On 17 December 2018, the Commission found out that Guess was imposing on the members of its selective distribution system a series of restrictive clauses as part of an overall strategy to restrict intra-brand competition[[39]](#footnote-38) between distributors that had as an ultimate result the partitioning of the Single Market.[[40]](#footnote-39) The Commission was especially concerned about several clauses, among which restrictions on online sales and restrictions on cross-border sales to end-users outstand.[[41]](#footnote-40)

According to article 4(c) of the Regulation 330/2010, the restrictions on active and passive sales to end-users by members of a selective distribution system are to be considered as hard-core restrictions and are to be prohibited.[[42]](#footnote-41) In addition, paragraph 52 of the Commission’s Guidelines on Vertical Restraints establishes that having a website is considered as a form of passive selling.[[43]](#footnote-42) Thus, a restriction on the use of the online distribution channel can be regarded as a restriction of passive sales, prohibited not only by EU competition law but also by the Geo-blocking Regulation.[[44]](#footnote-43) However, the *Guess* Case was assessed in the light of EU competition rules and not under the GBR. It should be pointed out, in that regard, that the Geo-blocking Regulation does not prohibit restrictions on active sales, while EU competition law does.[[45]](#footnote-44) In addition, article 101 TFEU, altogether with the rules of the VBER, was enough to effectively address the restrictions on passive sales. Consequently, in the specific case EU competition law was applied consistently with the Geo-blocking Regulation, since its recital 34 clearly establishes that such restrictions will be addressed under the rules on EU competition law.

However, as will be explained in the forthcoming, certain provisions of the GBR are still at odds with the rules on competition in the EU, increasing the levels of legal uncertainty for undertakings that need to adapt their business models to comply with both instruments.

## III.I. The End of Restrictions on Passive Sales

The Commission’s Decision in *Guess* clearly shows that EU competition law is going to be applied over the rules of the Geo-blocking Regulation where restrictions on active and passive sales take place, as restrictions on active sales are only prohibited by EU competition law and thus the Geo-blocking Regulation is not well placed to fully address the specific situation.[[46]](#footnote-45) However, the text is unclear about which instrument is going to be applied if there is only a restriction on passive sales. It might be possible to think that in the same way as happens with restrictions on active sales, EU competition law also prevails over the GBR when it comes to restrictions on passive sales. However, the Regulation goes further than that, providing a rather disturbing answer to those situations where there is an agreement between undertakings to restrict passive sales to end-users.

As a matter of principle, restrictions on passive sales are considered to be hard-core restrictions under article 101(1) TFEU according to the VBER[[47]](#footnote-46), which means that they do not benefit from the exemption that the latter provides. Hard-core restrictions are also generally excluded from the scope of the *De Minimis* Notice[[48]](#footnote-47), a text that excludes the application of article 101(1) TFEU to certain situations in which the impact of the anti-competitive conduct is considered to be minimal.[[49]](#footnote-48) Nevertheless, the fact that an agreement restricting passive sales does not automatically benefit from the exemptions provided by the VBER and the *De Minimis* Notice does not mean that article 101(3) TFEU cannot be triggered to objectively justify such agreement.[[50]](#footnote-49)

However, what the Regulation seems to establish in its recital 34 is that the prohibition contained in the aforementioned article 6 GBR will be applied to those situations where restrictions of passive sales are either not covered by article 101 TFEU, or exempted from the application of article 101(1) through article 101(3) TFEU, as long as they are contrary to the provisions of the Geo-blocking Regulation.[[51]](#footnote-50) It could be argued that article 6 GBR is in this sense overreaching[[52]](#footnote-51), since it declares illegal *per se* some conducts that have already been considered legal under article 101(3) TFEU due to the exceptional circumstances of the case, thus decreasing the strength of this third paragraph of article 101 TFEU (if there is any strength left). The Commission’s Guidelines on Vertical Restraints foresee, as a matter of example, the legality of a restriction of passive sales when introducing a new brand or product on a new market for which there was no previous demand, during the first two years that the trader is selling the product in that territory.[[53]](#footnote-52) The recital 34 GBR (together with article 6 GBR) seems to be eliminating such possibility, turning article 101(3) TFEU into an empty shell when it comes to restrictions on passive sales to end-users.

In this regard, both the Geo-blocking Regulation and the VBER are going to be reviewed in the following years.[[54]](#footnote-53) The Commission should shed some light on this issue and clarify what is the relationship between EU competition law and the Geo-blocking Regulation in those specific situations where the restriction of passive sale is considered to be legal and positive for the market, making sure that no provision of the Treaties is undermined. Consequently, the application of the GBR over the rules on competition in the EU should be limited to those restrictions on passive sales that do not fall under article 101 TFEU and thus are assessed in the light of EU competition law. Since both the GBR and competition law protect not only consumer welfare, but also facilitating and defending the single market, there is no need for both of them to cover the very same problem if one of them is already effective in that regard. Thus, the extension of the GBR to those restrictions on passive sales that are considered legal under article 101(3) TFEU should be removed.

## III.II. Article 4 GBR: A Price to Rule Them All?

A second potentially problematic interaction between the GBR and EU competition law may arise from article 4(1) of the former, which prohibits the application of different conditions of access to goods and services on the grounds of customers’ nationality, place of residence or place of establishment.[[55]](#footnote-54) It is important to note that according to recital 23 GBR, price is considered to be among these conditions of access. Consequently, the Regulation prohibits any price discrimination based on the aforementioned grounds[[56]](#footnote-55). However, geographic price discrimination is also prohibited under article 102 TFEU[[57]](#footnote-56), as the ECJ has pointed out in several cases such as *United Brands[[58]](#footnote-57)* and *Tetra Pack II[[59]](#footnote-58)*.

Although recital 34 GBR seems to be exclusively referring to restrictions on active and passive sales, it could be understood that EU competition law also prevails over the Regulation when it comes to infringements of article 102 TFEU. Consequently, those discriminatory pricing practices carried out by undertakings that enjoy a dominant position in the relevant market should be assessed under the rules of EU competition law. Thus the GBR would be applicable to any price discrimination based on customers’ nationality, place of residence or place of establishment as long as the concerned undertaking is not dominant in the relevant market, filling the aforementioned regulatory gap.

However, the question on what does the GBR specifically prohibit remains unanswered. While recent case law has understood that there are no *per se* rules under article 102 TFEU[[60]](#footnote-59), the GBR seems to be imposing a *per se* prohibition to price discriminate. Many authors have pointed out that price discrimination should not be prohibited *per se*, as that could lead to allocative inefficiencies by redistributing income from poorer consumers to richer ones.[[61]](#footnote-60) A prohibition of geographic price discrimination does not always lead to an increase in consumer welfare, as it could harm those countries with a lower income that would have to face higher prices.[[62]](#footnote-61) As a matter of example, AG Wahl has recently recognised in his opinion in *Meo – Serviços de Comunicações e Multimédia*[[63]](#footnote-62) that price discrimination is not necessarily detrimental to competition and therefore to consumers. In addition, a *per se* prohibition based on the abovementioned grounds does not always restrict the fundamental principle of freedom to conduct a business[[64]](#footnote-63) in a proportionate way, as it can lead to false positives, thus punishing undertakings that should not be punished.[[65]](#footnote-64) Furthermore, some authors argue that a product that is sold in a specific territory and the same product that is sold in a different one cannot be considered as the same economic objects[[66]](#footnote-65), as that product responds to different variables such as demand, purchasing power, income or levels of competition in the specific territory, not being perceived by customers in one territory in the same way as it can be perceived in another. Finally, there is usually a complex economic logic behind price discrimination practices that the Geo-blocking Regulation is not assessing at all, since it does not provide for a possibility to objectively justify the conduct through economic analysis.[[67]](#footnote-66)

Nevertheless, on top of all these statements against a *per se* prohibition of price discrimination, it has to be noted that the evolution of technology has made customers’ data an additional element to price discrimination, making it a lot easier through the use of algorithms that gather the data and provide individual (or collective) dynamic prices.[[68]](#footnote-67) In this regard, article 4(2) GBR establishes that traders are allowed to offer general conditions of access, including net sale prices (emphasis added), which differ among Member States, as long as it is done on a non-discriminatory basis.[[69]](#footnote-68) Such provision could thus be understood as a way out of the prohibition of price discrimination. What this article seems to be implying is that price discrimination is prohibited, but not price differentiation.[[70]](#footnote-69) It does not seem that one of the objectives of the Geo-blocking Regulation is the unification of prices, according to the wording of articles 4(1) and 4(2) GBR. However, the grounds on which undertakings can justify a price differentiation among Member States are not clear. It is also unclear whether the prohibition to price discriminate will apply to the use of algorithms to provide individualised prices, especially when these prices are not discriminatory on the grounds of the IP address of the purchaser, but on other kind of non-personal data, such as commercial preferences or previous purchases.

Consequently, in order to apply the GBR consistently with the rules on competition in the EU and with the economic theory of price discrimination, and in order to increase the levels of legal certainty for undertakings, it would be advisable for the EU legislator to clarify what kind of price discrimination is specifically prohibited and what the Regulation exactly means in article 4(2) when referring to the possibility to differentiate on a non-discriminatory basis.

## III.III. What Is Yet To Come

Although the interaction between the GBR and competition law (especially regarding restrictions on passive sales) is not entirely clear yet, an ongoing case might be useful for the Commission to further clarify this interaction. On 5 April 2019, the Commission sent a Statement of Objections to Valve (owner of “Steam”, the world’s largest PC video-game distribution platform) and five video-game publishers (Bandai, Namco, Capcom, Focus Home, Koch Media and ZeniMax) for preventing consumers from carrying out cross-border purchases of video-games.[[71]](#footnote-70) The Commission was concerned about a series of agreements between the publishers and Valve on the use of geo-blocking technologies in order to prevent the cross-border purchase of PC video-games.[[72]](#footnote-71)

Something interesting about this case is that it involves both video-games in physical (CDs and DVDs) and digital (downloads) format. While video-games in physical format are covered by the Geo-blocking Regulation, those in digital format are not.[[73]](#footnote-72) In any case, the agreements restricting cross-border access to video-games have triggered the application of article 101 TFEU, which covers agreements regarding both physical and digital content.[[74]](#footnote-73) However, from the above can be inferred that in case the agreements fall outside the scope of article 101 TFEU, or article 101(3) TFEU is applied, the prohibition of restrictions on passive sales contained in article 6 GBR will be still applicable.[[75]](#footnote-74) It will be necessary in this regard to check when these agreements were signed, as they will not be subject to the prohibition if they were signed before the entry into force of the GBR (22 March 2018). In case there are agreements signed after this date, it will be interesting to see how the Commission enforces article 6 together with recital 34 of the Regulation, and whether the undertakings will have to apply the very same prices to the products for all the Member States they sell to.

# IV. Conclusion

The Geo-blocking Regulation represents one of the most important developments towards the elimination of barriers on online trade in order to guarantee higher levels of consumer welfare and ultimately competition in the market. However, creating a horizontal set of rules covering several already partially-regulated fields of EU law has not been an easy task. Although the interaction of the Regulation with all these fields is interesting, the role of the text in the assessment of anti-competitive conducts raises thought-provoking questions. In particular, a debate has been created around the prohibition of restrictions on passive sales of article 6 GBR and the prohibition of price discrimination of article 4 GBR, as competition law has been addressing those for a long time. However, it should be noted that the GBR does not require the undertakings to be dominant in the relevant market or competition to be prevented, restricted or distorted. Thus, the GBR fills a regulatory gap that competition law does not, as the only requirement under the former is the existence of a cross-border element.

Consequently, the GBR should be rephrased in a way that eliminates any possibility of application over the rules on competition in the EU. This way, competition law and the GBR would complement each other guaranteeing high levels of consumer protection, competition in the single market and market integration. Several proposals have been made in this regard throughout this article. In the first place, the extension of the prohibition of article 6 GBR to those situations in which a restriction on passive sales is considered legal under article 101(3) TFEU should be removed. Furthermore, the content of article 4 GBR should be further developed in order to provide companies with legal certainty when reviewing their business policies (especially regarding their pricing policies). While there is extensive case-law on price discrimination conducts under article 102 TFEU, there is still much to be explained about the use of algorithms to provide individualised prices based on data gathered by companies, especially when this individualisation of prices is not entirely based on the IP address of the purchaser.

Although these recommendations are purely academic since the GBR has not been applied yet since its entry into force, they would ensure a peaceful interaction between the Regulation and EU competition, thus providing a sound legal regime towards the restrictions on online trade that (still) exist in the single market.

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