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## EU Geo-blocking rules – need for action in Switzerland?

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Under certain conditions, the EU prohibits with its Geo-blocking Regulation that distributors impose different transaction conditions depending on the customers region of origin. The main objective is the abolition of obstacles in cross-border trade, but it also leads to overlaps with the general rules of EU competition law. The Regulation may also affect Swiss traders and customers. This contribution presents the main contents of the EU Geo-blocking Regulation, analyses its interaction with cartel law and investigates its implications for Switzerland de lege lata and de lege ferenda. (el)

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## 1. Introduction<sup>1</sup>

[1] The Internet is an ubiquitous medium, not necessarily prone to territorial segmentation. Nonetheless, companies are engaging in such «geo-blocking» measures. In a narrower sense, the term geo-blocking designates technological measures restricting access to Internet content (in particular region-specific interfaces) based on the restricted user's geographical location or region of establishment or origin. In a broader sense, geo-blocking encompasses conduct which does not necessarily refuse access to internet content altogether or operate by way of technological restrictions, but which nonetheless discriminates between users based on their location, place of establishment or origin, for instance by applying different (general) conditions to online transactions over goods or services.

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<sup>1</sup> This contribution is based on the author's article «The EU Geo-blocking Regulation from a Competition Law Perspective» (Common Market Law Review 2020, forthcoming). It has been slightly abbreviated and a part on the implications for Switzerland has been added.

[2] Barrier-free trade in the Union-internal markets has, from early on, been a key goal of European Union law. Nonetheless, cross-border B2C transactions are, at least according to the perception of the EU lawmaker, still at a relatively low level, even in the e-commerce sector<sup>2</sup> where geographic distance tends to matter less than for on-site transactions. Trade practices creating barriers between territories in the Union contribute to this situation. Against this background, the EU has recently enacted the so-called «Geo-blocking Regulation»,<sup>3</sup> applicable as of 3 December 2018.<sup>4</sup> For Switzerland, Geo-blocking is an issue as well, especially as part of perceived business strategies which aim at maintaining a price level considerably higher than the level in neighboring countries («*Hochpreisinsel Schweiz*»). The present contribution analyzes the main content of the Regulation and assesses, in particular, its interaction with (other parts of) EU competition law. Subsequently, it discusses whether and how Swiss law ought to react.

## 2. Overview: content of the Geo-blocking Regulation

### 2.1. Objective

[3] According to its Article 1, it is the GeoBR's purpose «to contribute to the proper functioning of the internal market by preventing unjustified geo-blocking and other forms of discrimination based, directly or indirectly, on the customers' nationality, place of residence or place of establishment». Such practices may, the GeoBR recognizes, be justified in some cases, but they also risk undermining the internal market and the free movement of goods and services within it, regardless of whether traders' unwillingness to engage in cross-border transaction with customers results from the legal and economic hurdles to overcome or from purposeful segmentation and discrimination.<sup>5</sup> As core interests involved, the GeoBR identifies, on the one hand, customer choice and access to goods and services, on the other hand traders' freedom to organize their commercial policy in accordance with Union and national law.<sup>6</sup> Although grasping important aspects, this description clearly remains incomplete as it omits all supra-individual interests, such as societies' interests in intense, effective competition and transactional activity. In fact, a ban on geo-blocking relates to several areas and purposes of the law, only part of which is grasped by the design of the GeoBR and the Regulation's language on its own purposes: Besides customer protection in an economic sense and cross-national trade, geo-blocking particularly affects competition (law) because it prevents competitive pressure to spread across borders. Imagine, for example, that fiercer competition in country A has driven prices to a lower or quality (in relation to price) to a higher level than in country B. If geo-blocking prevents customers in country

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<sup>2</sup> Recital (2) GeoBR.

<sup>3</sup> REGULATION (EU) COUNCIL of 2018/302 OF THE EUROPEAN PARLIAMENT AND OF THE 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2.3.2018, L1 60/1 (hereinafter: Geo-blocking Regulation/GeoBR).

<sup>4</sup> Art. 11(1) GeoBR, on the particular timeframe for Art. 6 GeoBR, see below 3.1.

<sup>5</sup> Recitals (1), (2) GeoBR. Potentially valid business justifications for Geo-Blocking, such as language barriers, the expense of cross-border delivery of goods, taxes and other formalities, lead some authors to oppose the Geo-blocking ban altogether; see, for instance, SCHMIDT-KESSEN, EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs And Benefits Of Partitioning EU's Internal Market, Copenhagen Business School Law Research Paper Series No. 19-05, 11, <https://ssrn.com/abstract=3311110>.

<sup>6</sup> Recital (5) GeoBR.

B to transact at the conditions available in country A, the market situation in country A stands a much smaller chance to exert competitive pressure on markets in country B. This pressure's potential to adjust conditions in B to those in A remains untapped. These concerns over intensity of competition belong, essentially, to the antitrust prong of competition law, viz. its rules on anticompetitive agreements and abuse of dominance. Nonetheless, some see unfair competition law in a good position to tackle geo-blocking absent more specific rules.<sup>7</sup> Indeed, the conduct may, in certain settings, be caught by a broad reading of unfair competition law rules against misleading practices – e.g. where the customer is not aware of being geo-blocked – or unfair general terms and conditions. Employing unfair competition law as the main tool against geo-blocking can, however, be quite fragmentary, for instance where business customers are affected by the conduct, but unfair competition law rules protect only consumers. Moreover, the approach risks to obscure the antitrust nature of anti-geo-blocking measures. As a major advantage, on the other hand, the application of unfair competition law requires neither market power nor an illicit agreement between several traders. As to the EU's present legal framework, the question seems solved by specific legislation, i.e. the GeoBR, but the balance of this contribution will show that GeoBR rules should be aligned more closely with general competition law.

## 2.2. Scope

[4] As its core, the GeoBR targets three aspects of trader-customer transactions, namely the customers' access to online interfaces,<sup>8</sup> the general conditions for «accessing» (i.e. mainly purchasing or otherwise obtaining) goods or services,<sup>9</sup> and the conditions for payment transactions.<sup>10</sup> The term «trader» encompasses all natural or legal persons, including publicly owned legal persons, which act for purposes relating to trade, business, craft or profession.<sup>11</sup> Traders are subject to the GeoBR when they operate within the EU, even if they are established in a third country.<sup>12</sup>

[5] «[C]ustomer means a consumer who is a national of, or has his or her place of residence in, a Member State, or an undertaking which has its place of establishment in a Member State, and receives a service or purchases a good, or seeks to do so, within the Union, for the sole purpose of end use».<sup>13</sup> «Consumer» is a «natural person who is acting for purposes which are outside his or her trade, business, craft or profession».<sup>14</sup> End-users protected by the Regulation are, thus, not only consumers but also undertakings, provided they act «as customers for the purposes of this Regulation».<sup>15</sup> Customers are no longer protected end-users, if they purchase a good or

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<sup>7</sup> Cf. the «Fair Price Initiative» in Switzerland which requests the application of unfair competition law against geo-blocking, Botschaft zur Volksinitiative «Stop der Hochpreisinsel – für faire Preise (Fair-Preis-Initiative)» und zum indirekten Gegenvorschlag (Änderung des Kartellgesetzes), 29. May 2019, p. 8, 38, 47, <https://www.seco.admin.ch/seco/de/home/wirtschaftslage—wirtschaftspolitik/wirtschaftspolitik/Wettbewerbspolitik/kartellgesetz/Fair-Preis-Initiative.html>.

<sup>8</sup> Art. 3 GeoBR.

<sup>9</sup> Art. 4 GeoBR.

<sup>10</sup> Art. 5 GeoBR.

<sup>11</sup> Art. 2(18) GeoBR.

<sup>12</sup> Recital (17) GeoBR.

<sup>13</sup> Art. 2(13) GeoBR.

<sup>14</sup> Art. 2(12) GeoBR.

<sup>15</sup> Recital (16) GeoBR.

service for resale, transformation, processing, renting or subcontracting.<sup>16</sup> This distinction is very important from a competition law perspective as it aims to ensure that arrangements along the chain of production and distribution, including exclusive and selective distribution schemes, are not outlawed because they contain elements discriminatory in the sense of the GeoBR.<sup>17</sup> As the Regulation apparently considers the quantity a customer purchases as a valid indication for whether the customer is an end-user in this sense, it permits traders to implement practices – provided they are non-discriminatory – for «limiting transactions or repetitive transactions, in order to prevent undertakings from purchasing quantities exceeding their internal needs, taking due account of the size of the undertakings, with a view to identifying whether the purchase is for end use only».<sup>18</sup> Correctly determining a customer's «internal needs» and effectively limiting transaction to them may, however, be a challenging task for traders.

[6] Transaction conditions qualify as «general conditions of access» only if they are «regulating the access of customers to goods or services offered for sale by a trader», if they are «made available to the public at large» and if they «apply in the absence of an individually negotiated agreement».<sup>19</sup> This definition may give rise to intense controversy, for instance over when conditions have been individually negotiated,<sup>20</sup> and prove too narrow, for instance regarding for-payment-transactions other than genuine «sales». «Services» includes both electronically provided (e.g. cloud services, website hosting)<sup>21</sup> and non-electronical (e.g. hotel accommodation, car rental, events of all sorts)<sup>22</sup> services,<sup>23</sup> but the GeoBR does (at present, cf. below) not apply to electronically provided services «the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form».<sup>24</sup>

[7] Traders may offer bundles of services and/or goods to which the GeoBR applies only in part, for instance a combination of a car (GeoBR applicable) and financial services in the context of the car's purchase (GeoBR not applicable, depending on the nature of the services). For such cases, the GeoBR Recitals propose a rather extensive reading of the GeoBR's scope, stating that the trader «should either comply with the prohibitions set in this Regulation as regards the whole bundle, or at least offer, on an individual basis, services that fall within the scope of this Regulation, if those services are offered to customers by the same trader on an individual basis».<sup>25</sup>

[8] As a consequence of its focus on the Union-internal market, the Regulation «does not apply to purely internal situations, where all the relevant elements of the transaction are confined within one single Member State».<sup>26</sup> The Recital complement this rather demanding threshold by speci-

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<sup>16</sup> Recital (16) GeoBR.

<sup>17</sup> Cf. also Recital (16) GeoBR.

<sup>18</sup> Recital 8(16) GeoBR.

<sup>19</sup> Art. 2(14) GeoBR.

<sup>20</sup> On this point, rules on general terms and conditions outside the geo-blocking context may have an important impact, for instance the COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29, 21.4.1993.

<sup>21</sup> For further examples, see Recital (24) GeoBR.

<sup>22</sup> For further examples, see Recital (25) GeoBR.

<sup>23</sup> Cf. Art. 2(1), (17), Art. 4(b), (c) GeoBR.

<sup>24</sup> Art. 4(1)(b) GeoBR.

<sup>25</sup> Recital (10) GeoBR, also on the pricing for the individual offer.

<sup>26</sup> Art. 1(2) GeoBR.

fying that, for a situation to be «internal», «all the relevant elements of the transaction [must be] confined to a single Member State, in particular the nationality, the place of residence or the place of establishment of the customer or of the trader, the place of execution, the means of payment used in the transaction or the offer, as well as the use of an online interface».<sup>27</sup>

[9] The GeoBR generates and addresses a host of interactions with other elements of EU law which the present contribution, with its focus on competition law, cannot fully analyze. Suffice it, therefore, to list the following:<sup>28</sup>

- Directive 2006/123/EC (services in the internal market)
- Directive 2001/29/EC (Copyright/InfoSoc Directive)
- Regulation (EU) 2017/1128 (cross-border portability of online content services)
- Regulation (EC) No 593/2008 (Rome I – law applicable to contractual obligations), Regulation (EU) No 1215/2012 (Brussels Ia – jurisdiction, recognition and enforcement of judgments in civil and commercial matters)
- Regulation (EC) No 2006/2004, Regulation (EU) 2017/2394 (consumer protection cooperation)
- Directive 2009/22/EC (injunctions for the protection of consumers' interests), Regulation (EU) No 524/2013 (online dispute resolution for consumer disputes)
- Regulation (EU) 2019/1150 (online intermediation services – «Platform Regulation»)

## 2.3. Core prohibitions

### 2.3.1. Online interfaces

[10] Art. 3 GeoBR prohibits traders from blocking, by technological or other means, customer access to their online interfaces<sup>29</sup> and from redirecting a customer to other versions of such online interfaces than those the customer seeks access to, provided the blocking or redirecting is triggered by a customer's nationality, place of residence or place of establishment.<sup>30</sup> It is, hence, Art. 3 GeoBR which targets «geo-blocking» in the most common understanding of the term, described by the Recitals as a practice by which «traders operating in one Member State block or limit access to their online interfaces, such as websites and apps, by customers from other Member States wishing to engage in cross-border transactions».<sup>31</sup>

[11] Redirecting is lawful, though, in case the customer has explicitly consented to it and the interface version initially visited remains «easily accessible».<sup>32</sup> The Recitals explain that consent to every single transaction is not necessary as the consent regarding redirection to a particular version of the interface remains valid for subsequent visits of the interface until the customers

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<sup>27</sup> Recital (7) GeoBR.

<sup>28</sup> For further details, see Picht, The EU Geo-blocking Regulation from a Competition Law Perspective (Forthcoming 2019).

<sup>29</sup> For a definition of «online interface», see Art. 2(16); Recital (18) GeoBR explicitly includes «mobile applications».

<sup>30</sup> Art. 3(1), (2) GeoBR.

<sup>31</sup> Recital (1) GeoBR.

<sup>32</sup> Art. 3(2) GeoBR.

makes use of the right to withdraw his consent, a right that the trader must grant at any point in time.<sup>33</sup>

### 2.3.2. General conditions of access to goods or services

[12] Traders must not differentiate their general conditions of access – be it in an online or offline transaction<sup>34</sup> – to goods or services depending on customers' nationality, place of residence or place of establishment.<sup>35</sup> This is, however, not to mean that customers can force traders to offer their goods/services at equal conditions everywhere in the Union or that traders must limit their transaction conditions to a single set of general conditions of access for the entire Union. Instead, the GeoBR guarantees non-discriminatory access only where «accessed» goods are «delivered to a location in a Member State to which the trader offers delivery in the general conditions of access»,<sup>36</sup> where «goods are collected at a location agreed upon between the trader and the customer in a Member State in which the trader offers such an option in the general conditions of access»,<sup>37</sup> and where services are received either electronically<sup>38</sup> or «in a physical location within the territory of a Member State where the trader operates».<sup>39</sup> In consequence, a trader is not obliged to offer delivery to Non-Residents in all Member States. Instead, «foreign customers will have to pick up the goods in that Member State, or in a different Member State to which the trader delivers, or arrange, by their own private means, the cross-border delivery of the goods».<sup>40</sup> Furthermore, traders remain free to offer general conditions «which differ between Member States or within a Member State and which are offered to customers on a specific territory or to specific groups of customers on a non-discriminatory basis».<sup>41</sup>

[13] The GeoBR Recitals make an important amendment by distinguishing between direct discrimination and indirect discrimination and explaining that the GeoBR prohibits both.<sup>42</sup> Direct discrimination in this context uses a customer's nationality, place of residence or place of establishment as the distinguishing criteria, while indirect discrimination links unequal treatment to other distinguishing criteria which generate, however, the same outcome, such as the IP address, the delivery address, the language chosen by the transacting consumer or the Member State where the customer's payment instrument has been issued, or a technical design preventing customers from other Member States to easily transact.<sup>43</sup> Although the Recitals seem to focus, in these passages, on the access to goods or services in the sense of Art. 4 GeoBR, the underlying principle arguably applies to all practices within the scope of the GeoBR.

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<sup>33</sup> Recital (20) GeoBR.

<sup>34</sup> Recital (1) GeoBR.

<sup>35</sup> Art. 4(1) GeoBR.

<sup>36</sup> Art. 4(1)(a) GeoBR.

<sup>37</sup> Art. 4(1)(a) GeoBR.

<sup>38</sup> Art. 4(1)(b) GeoBR, for the exception regarding VAT-exempted traders, see Art. 4(4) GeoBR.

<sup>39</sup> Art. 4(1)(c) GeoBR.

<sup>40</sup> Recital (23) GeoBR.

<sup>41</sup> Art. 4(2) GeoBR; cf. also Recital (27) GeoBR.

<sup>42</sup> Recital (6) GeoBR.

<sup>43</sup> Recitals (6), (19) GeoBR.

### 2.3.3. Payment transaction conditions

[14] With regard to electronic payment transactions<sup>44</sup> for which the authentication requirements of Directive (EU) 2015/2366 are fulfilled,<sup>45</sup> traders are prohibited from differentiating their payment transaction conditions either based on the nationality, place of establishment or place of residence of the customers or based 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».<sup>46</sup> At the same time, traders remain entitled<sup>47</sup> to select the means of payment and the currencies they accept,<sup>48</sup> to withhold delivery until receipt of confirmation «that the payment transaction has been properly initiated»,<sup>49</sup> to request charges for card-based payments under certain conditions,<sup>50</sup> and – arguably – to differentiate conditions for payment instruments not issued within the Union.

### 2.4. General compliance justification and acceptable differentiations

[15] Besides the aforementioned, specific limitations to its prohibitions, the GeoBR accepts more general justifications as well. In particular, potentially discriminating practices are legitimate if necessary for complying with other parts of EU or Member State law.<sup>51</sup> The GeoBR explicitly states this principle only for the access to online interfaces and for the general conditions of access to goods and services, and only regarding online interfaces the Regulation requests the trader to «provide a clear and specific explanation to customers regarding the reasons why the blocking or limitation of access, or the redirection is necessary in order to ensure» compliance.<sup>52</sup> However, both the compliance justification and a context-specific explanation requirement should be available, *mutatis mutandis*, for all practices covered by the Regulation.

[16] The Recitals add a further carve-out by stating that «[n]othing in this Regulation is intended to restrict the freedom of expression and the freedom and pluralism of the media, including the freedom of press, as they are guaranteed in the Union and in the Member States, and in particular under Article 11 of the Charter of Fundamental Rights of the European Union (the Charter)».<sup>53</sup>

[17] The Recitals provide helpful guidance on the limits of the GeoBR prohibitions by spelling out ways in which a trader can still tailor its market activity to specific Member States or regions. In particular, the trader may

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<sup>44</sup> Art. 5(1)(a) GeoBR, also on details.

<sup>45</sup> Art. 5(1)(b) GeoBR.

<sup>46</sup> Art. 5(1) GeoBR.

<sup>47</sup> Cf., on the following, also Recitals (32), (33) GeoBR.

<sup>48</sup> Cf. Art. 5(1) GeoBR: «within the range of means of payment accepted by the trader»; Art. 5(1)(c) GeoBR: «in a currency that the trader accepts».

<sup>49</sup> Art. 5(2) GeoBR.

<sup>50</sup> For details, see Art. 5(3) GeoBR.

<sup>51</sup> See Art. 3(3) for online interfaces, Art. 4(5) GeoBR for access to goods or services, with a specific exception for the sale of books, Recitals (21), (31) GeoBR.

<sup>52</sup> Art. 3(3) GeoBR.

<sup>53</sup> Recital (21) GeoBR.



- differentiate access conditions based on criteria acceptable under the GeoBR, such as for instance «membership of a certain association or contributions made to the trader»;<sup>54</sup>
- differentiate conditions (including prices) between points of sale;<sup>55</sup>
- geographically or otherwise limit after-sales services;<sup>56</sup>
- contractually exclude cross-border delivery or the bearing of costs for postage, transport or (dis)assembly;<sup>57</sup>
- choose not to comply with non-contractual legal requirements of a customer's Member State relating to the offered goods or services (e.g. labelling), and/or choose not to inform customers about those requirements, as long as the trader is not obliged to comply with such requirements by other provisions than those of the GeoBR.<sup>58</sup>

## 2.5. Enforcement

[18] As to enforcement, Art. 7 GeoBR requests each Member State to «designate a body or bodies», such as courts or administrative authorities,<sup>59</sup> «responsible for adequate and effective enforcement». Furthermore, each Member State «shall designate a body or bodies», including the bodies set up under the Regulation on online dispute resolution for consumer disputes,<sup>60</sup> «responsible for providing practical assistance to consumers in the case of a dispute between a consumer and a trader arising from the application of this Regulation» (Art. 8 GeoBR). Importantly, the sanctions for violating the GeoBR are not exclusively laid out in the Regulation itself. Instead, Art. 7 GeoBR mandates Member State law to «lay down the rules setting out the measures applicable to infringements of the provisions of this Regulation and [...] ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive». We will revert to the enforcement regime below (cf. 3.2.3.).

## 2.6. Review

[19] As appropriate for pioneer legislation, the GeoBR is subject to Commission review – by March 2020 and every five years thereafter – and amendment, where necessary (Art. 9(1) GeoBR). As a main focus for the first of these evaluations (in 2020), Art. 9(2) GeoBR foresees the question whether the Regulation should be extended to «electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form, provided that the trader has the requisite rights for the relevant territories». It seems questionable whether the experience gathered during the short period since the GeoBR

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<sup>54</sup> Recital (27) GeoBR.

<sup>55</sup> Recital (27) GeoBR.

<sup>56</sup> Recital (28) GeoBR.

<sup>57</sup> Recital (28) GeoBR.

<sup>58</sup> Recital (29) GeoBR.

<sup>59</sup> Recital (35) GeoBR.

<sup>60</sup> Cf. Recital (36) GeoBR, referring to Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 1.

came into force will permit, by 2020, to assess whether these digital transactions over IP-protected matter<sup>61</sup> should be subjected to its rules as well.

### 3. Impact of the Geo-blocking Regulation on EU competition law

#### 3.1. Relevant provisions in the GeoBR

[20] Art. 6 GeoBR and Recital (34) GeoBR are the key elements for determining the relationship between the GeoBR and the general rules of EU competition law. Art. 6 GeoBR states that «[w]ithout prejudice to Regulation (EU) No 330/2010 and Article 101 TFEU, this Regulation shall not affect agreements restricting active sales within the meaning of Regulation (EU) No 330/2010 or agreements restricting passive sales within the meaning of Regulation (EU) No 330/2010 that concern transactions falling outside the scope of the prohibitions laid down in Articles 3, 4 and 5 of this Regulation».

[21] Recital (34) distinguishes, after setting out the principle that the GeoBR «should not affect the application of the rules on competition», three paradigmatic constellations: Where, first, a restriction on active sales by a distributor complies with the Vertical BER,<sup>62</sup> the GeoBR shall not render such a restricting agreement unlawful. Where, second, a restriction on passive sales by a distributor violates general EU competition law and is, therefore, void,<sup>63</sup> the GeoBR accepts this result since it is in line with the Regulation's purpose of ensuring Union-wide, non-discriminating access to distribution outlets. Regarding the third constellation, however, the GeoBR contradicts its own stipulation that general competition law shall not be affected by stating that the GeoBR voids restrictions on passive sales which do not fulfil the requirements of the GeoBR, even if they are lawful under general competition law, in particular under Art. 101 TFEU and the Vertical BER.

[22] These rules beg not only the question why the GeoBR formulates a principle – apparently in too generic a manner – only to violate it three sentences later, they also raise a couple of further issues.

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<sup>61</sup> On the discussion about geo-blocking in the realm of copyright, see SCHMIDT-KESSEN, EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs And Benefits Of Partitioning EU's Internal Market, Copenhagen Business School Law Research Paper Series No. 19-05, 10, 16 et seq., <https://ssrn.com/abstract=3311110>.

<sup>62</sup> Verordnung (EU) Nr. 330/2010 der Kommission vom 20. April 2010 über die Anwendung von Artikel 101 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union auf Gruppen von vertikalen Vereinbarungen und abgestimmten Verhaltensweisen, OJ L 102/1, 23. April 2010.

<sup>63</sup> The wording («cannot normally be exempted from the prohibition laid down in Article 101(1) TFEU») of Recital (34) is not very precise here. If and because a restriction on passive sales is caught by Art. 101 TFEU but not in line with, and therefore not covered by the safe harbor of, the Vertical BER, it can still be lawful if the conditions of Art. 101(3) TFEU are fulfilled, even though the respective undertakings then have to rebut a presumption that Art. 101 TFEU is violated. Only if Art. 101(3) TFEU fails to provide coverage as well, is the restriction void under competition law; cf. Guidelines on Vertical Restraints, OJ C 130/1, 19. May 2010 (Vertical Guidelines), para (47).

## **3.2. General issues at the intersection of the Geo-blocking regulation and general competition law**

### **3.2.1. Unclear dogmatic concept**

[23] As already described, Recital (34) GeoBR is contradictory on whether the GeoBR affects general competition law or not. The assessment of overlap scenarios between the GeoBR and general competition law will demonstrate that the GeoBR does, indeed, impact general competition law (cf. 3.3 below). Hence, Art. 6(1) GeoBR misleads in stating that the GeoBR shall apply «without prejudice» to general competition law. All in all, the lack of conceptual clarity regarding the delineation between general competition law and the GeoBR suggests, together with the fact that both sets of rules share a common goal, a stronger integration of the GeoBR into the broader realm of competition law.

### **3.2.2. Active/passive sales restrictions only?**

[24] The rules of EU general competition law, including the Vertical BER and the Vertical Guidelines, are perforce silent on their interaction with the GeoBR since they were enacted prior to it. Art. 6 and Recital (34) GeoBR may, however, also deceive market participants who interpret them as covering all major (potential) overlaps between the GeoBR and general competition law. Art. 6 GeoBR, in particular, addresses the parallel applicability of the GeoBR, the Vertical BER and Art. 101 TFEU to restrictions on active and passive sales in vertical agreements. Three examples show, however, that this scope does not exhaust the interaction between the GeoBR and general competition law: First, sales restrictions can also be contained in horizontal agreements between competitors and these restrictions may apply criteria discriminatory in the sense of the GeoBR. Second, the GeoBR targets not only agreements but also unilateral discriminatory behavior.<sup>64</sup> General competition law does the same but hinges its assessment very much on whether the discriminating market participant holds a dominant position in the market at issue (Art. 102 TFEU).<sup>65</sup> Third, active and passive sales restrictions are not the only elements in vertical distribution agreements that could – depending also on how the agreement is implemented – violate the GeoBR. A distributor may, for instance, be permitted to sell in two different regions but obliged to apply different sales conditions, and this obligation may or may not<sup>66</sup> be acceptable under the Vertical BER.

[25] What follows from Art. 6 and Recital (34) GeoBR regarding the application of the Regulation to overlaps with general competition law other than active and passive sales restrictions in vertical agreements? The language of the provisions is not very clear in this respect. Art. 6 GeoBR speaks only about active and passive sales restrictions, without however explicitly limiting the reaching out of GeoBR prohibitions into the realm of general competition law to these practices. While the wording «such an exemption» in the fourth sentence of Recital (34) refers back to the exemption of passive sales restrictions under general competition law described in the sentence before, the Recital goes on stating that «contractual restrictions» not covered by Article 101 TFEU

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<sup>64</sup> WOLF-POSCH, Anpassung der Vertikal-GVO an die Anforderungen des Online-Handels, NZKart 2019, 209, 213.

<sup>65</sup> TSAKANAKIS, Die Geoblocking-Verordnung und ihr Verhältnis zum EU-Wettbewerbsrecht, WuW2019, 235.

<sup>66</sup> An obligation to price at regionally different levels, for instance, may violate Art. 4(a) Vertical BER while different options for the home delivery of purchased goods may pass muster.

risk to circumvent the GeoBR. This formulation is broad enough to encompass other restrictions than those on passive sales, but it remains limited to restrictive contractual arrangements and does not include unilateral practices. The example given in the last sentence of Recital (34) is of no great help as it deals with a clear overlap case, namely a passive sales restriction which is – at least in its application – discriminatory in the sense of the GeoBR. Applying a functional analysis, general EU competition law and the GeoBR partly converge in their goal to foster Union-wide markets without barriers to effective competition. The GeoBR is more limited in the market conduct it targets and, generally speaking, more rigid in the prohibition of this conduct as EU lawmakers are positive it undermines said goal. General competition law, on the other hand, which must cover a vastly broader range of practices and constellations, needs more flexibility in assessing them. This reflection points towards a general rule of mutual complementarity in the sense that practices can violate and trigger sanctions by the GeoBR even though they comply with general competition law, and vice versa. For conduct that violates both the GeoBR and general competition law, the following section discusses how to handle sanctions.

### 3.2.3. Sanctions and enforcement

#### 3.2.3.1. Cumulation

[26] As to sanctions, the interaction between general competition law and the GeoBR presents two paramount issues. One of them is the possibility to cumulate GeoBR and general competition law sanctions where both sets of rules consider a conduct to be unlawful. Especially with regard to fines, the principle of *ne bis in idem* could prevent such a cumulation of sanctions.<sup>67</sup> Enshrined i.a. in Art. 4(1) of Protocol No. 7 to the ECHR and Art. 50 of the Charter of Fundamental Rights of the European Union, it precludes, in its competition law prong, «an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision».<sup>68</sup> However, *ne bis in idem* applies only «subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same».<sup>69</sup> Assuming that trader and trading context violating both the GeoBR and general competition law are the same, it becomes pivotal whether the two sets of rules protect the same «legal interest». TSAKANAKIS' early contribution on the GeoBR contends this is not the case because the GeoBR aims at fully realizing the internal market whereas EU competition law protects undistorted competition.<sup>70</sup> Even he admits, though, that both pieces of law share consumer welfare as an ultimate goal.<sup>71</sup> Moreover, the GeoBR's stipulation of Union-wide access to equal trading conditions is a mechanism directed towards intensifying competition. This contribution has already made the point that the Regulation aims at furthering the internal market by fostering competition without regional barriers (cf. 2.1. above). The «legal interest» protected by the GeoBR and general competition law respectively seems therefore homogeneous to a large

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<sup>67</sup> TSAKANAKIS, Die Geoblocking-Verordnung und ihr Verhältnis zum EU-Wettbewerbsrecht, WuW2019, 235, 238.

<sup>68</sup> CJEU, 15. October 2002, C-238/99 P, ECLI:EU:C:2002:582, para. 59.

<sup>69</sup> CJEU, 14. February 2012, C-17/10, ECLI:EU:C:2012:72, para 94; CJEU, 07. January 2004, C-204/00 P et al., ECLI:EU:C:2004:6, para. 338 et seq.

<sup>70</sup> TSAKANAKIS, Die Geoblocking-Verordnung und ihr Verhältnis zum EU-Wettbewerbsrecht, WuW2019, 235, 238.

<sup>71</sup> TSAKANAKIS, Die Geoblocking-Verordnung und ihr Verhältnis zum EU-Wettbewerbsrecht, WuW2019, 235, 238.

extent. The absence of a provision (in the GeoBR) clearly stating that GeoBR sanctions are consumed in case a conduct has been sanctioned under general competition law, the fact that, in some Member States, different authorities enforce general competition rules and the GeoBR (cf. 3.2.3.2 below), as well as the traditional reticence of EU courts to apply *ne bis in idem* in competition cases make it probable that a cumulative sanctioning approach prevails. On a policy level, however, a subsidiarity of GeoBR sanctions vis-à-vis competition law sanctions (that have actually been imposed) seems more convincing and the EU lawmaker should introduce a provision to this effect into the GeoBR. This would by no means render stand-alone GeoBR enforcement irrelevant as general competition law enforcement usually focusses on a limited number of high-profile cases and as it can take a considerable amount of time for its sanctions to become final.<sup>72</sup> In cases in which GeoBR enforcement leaps ahead and general competition law sanctions are imposed afterwards, they should take into account the sanctions already due under the GeoBR, in particular by reducing competition law fines by the amount of the GeoBR fines.<sup>73</sup>

[27] Besides fines, the complete or partial nullity of infringing agreements constitutes an important part of the sanctioning regime. In this respect, the consequences of an illicit (passive sales) restriction depend on whether the restriction violates merely the GeoBR or the Vertical BER as well. Art. 6(2) GeoBR states that «[p]rovisions of agreements» violating the GeoBR «shall be automatically void» and Recital (34) GeoBR speaks of the «relevant provisions» of such agreements being void. Evidently, the GeoBR voids only the infringing clause(s) of the agreement at issue and leaves the rest of the agreement unaffected. If, however, the passive sales restriction violates Art. 4 Vertical BER as well, the Vertical BER no longer protects the agreement in its entirety, exposing all those parts of it to nullity (Art. 101(2) TFEU) which would have escaped this fate but for the Vertical BER's safe harbor.<sup>74</sup> In this scenario of combined application of the GeoBR and Art. 4 Vertical BER, the GeoBR and general competition law mutually aggravate their consequences: While Art. 6(2) GeoBR removes the chance that a passive sales restriction, although no longer protected by the Vertical BER, remains valid as justified under Art. 101(3) TFEU, Art. 4 Vertical BER exposes additional parts of the agreement to competition law-based nullity.

### 3.2.3.2. Comparative coherence

[28] The second issue at the overlap of GeoBR and general competition law sanctions is even more on a long-term, policy level as it concerns the comparative coherence of the two sanctioning regimes. Although they frequently give rise to legal disputes, rules on general EU competition law sanctions are Union-wide in their scope and relatively clear in their structure, with Art. 23 et seq. Regulation 1/2003<sup>75</sup> and the Fining Guidelines<sup>76</sup> as two major cornerstones. In contrast, the sanctioning of GeoBR violations is essentially left to the Member States. By obliging Mem-

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<sup>72</sup> Cf. Digital Competition Expert Panel, Unlocking digital competition March 2019, 6, 55, 103 et seq., [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

<sup>73</sup> Similar in this respect: TSAKANAKIS, Die Geoblocking-Verordnung und ihr Verhältnis zum EU-Wettbewerbsrecht, WuW2019, 235, 238.

<sup>74</sup> BECHTOLD/BOSCH/BRINKER, VO 330/2010, Art. 4 Rn. 1.

<sup>75</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4. January 2003.

<sup>76</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210/2, 1. September 2006.

ber States to establish an enforcement regime which is «effective, proportionate and dissuasive», Art. 6(2) GeoBR gives no more than high-level guidance and, in fact, the agencies in charge and the range of potential sanctions varies considerably across Member States.<sup>77</sup> Against the background of these differences, it seems even more striking that the Regulation does not specify which national regimes and agencies are supposed to handle a case. The «Questions and Answers on the Geo-blocking regulation» edited by the EU Commission state that «in addition to the requirements coming from the principle of sincere cooperation (Article 4(3) TEU), Chapter VI of the Services Directive contains certain general cooperation obligations. In addition, specific rules on enforcement of cross-border infringements by Member States authorities are provided for in the Consumer Protection Cooperation (CPC) legislation».<sup>78</sup> Based on these pieces of legislation, the Commission apparently envisages the agency in the country of establishment of the trader to be competent. If a consumer from another Member State is affected by the trader's conduct, the consumer may turn to his/her national authority which can then «seek help» from the authority in the Member State of the trader's establishment.<sup>79</sup> Apart from the fact that this enforcement concept appears somewhat roundabout and that it is not, as such, binding law but merely a Commission interpretation, it leaves open a number of questions. *Inter alia*, is the competence of the Member State of the trader's establishment an exclusive one? How can traders be prevented from racing their potentially problematic activities to the Member State with the weakest anti-Geo-Blocking enforcement system? Are non-consumer customers entitled to engage the agency in the Member State of the trader's establishment via their domestic authority as well? *Vis-à-vis* traders established in non-EU countries, the Commission proposes – notwithstanding the customers' option to enforce their rights before the competent courts – that «[d]epending on the circumstances of the case, such as the existence of international agreements with the non-EU countries concerned or the presence of assets or representatives of the trader in the EU, the competent enforcement authority in the Member State (or Member States) where the breach takes place may take measures to ensure that traders established in non-EU countries comply with the Regulation».<sup>80</sup> This part of the Commission's enforcement approach begs questions as well, including how the «place of breach» is to be determined, especially with regard to online interfaces,<sup>81</sup> and how exactly the «circumstances of the case» are supposed to play out.

[29] All in all, the evolving GeoBR enforcement landscape displays a considerable degree of heterogeneity. It causes coherence concerns regarding not only the different Member State enforcement regimes but also general competition law enforcement. Since the GeoBR and general competition share in their goals, the Regulation's heterogeneity of Member State-specific enforcement regimes and the impossibility to identify, from the GeoBR itself, the form and extent of sanctions for a particular violation, conflicts all the more with the relatively clear-cut regime of fines and other sanctions under general EU competition law rules. Furthermore, it has been rightly pointed

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<sup>77</sup> For details, see Picht, *The EU Geo-blocking Regulation from a Competition Law Perspective* (Forthcoming 2019).

<sup>78</sup> European Commission, *Questions & Answers on the Geo-blocking Regulation in the context of e-commerce*, Question 3.3, [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=55375](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=55375).

<sup>79</sup> European Commission, *Questions & Answers on the Geo-blocking Regulation in the context of e-commerce*, Question 3.3, [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=55375](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=55375).

<sup>80</sup> European Commission, *Questions & Answers on the Geo-blocking Regulation in the context of e-commerce*, Question 3.4, [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=55375](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=55375).

<sup>81</sup> On the intricacies of determining the place of breach/violation in internet cases, cf. Picht, *Von eDate zu Wintersteiger – Die Ausformung des Art. 5 Nr. 3 EuGVVO für Internetdelikte durch die Rechtsprechung des EuGH*, GRUR Int 2013, 19; BeckOGK/Rühl Rom II-VO Art. 4 Rn. 72 et seq.

out that general competition law fines for illicit vertical distribution arrangements can exceed by several orders of magnitude the maximum fines for a GeoBR violation and that such disparities beg the question of proportionality.<sup>82</sup> The discrepancy seems most troubling where competition rules on vertical agreements and the GeoBR sanction (almost) identical conduct, such as the blocking or rerouting of internet customers.<sup>83</sup> Two elements of the law that have a joint goal, namely to ensure effective competition in a Union-wide internal market without unnecessary barriers, ought indeed to establish, between them, a sanctions regime that is coherent, effective and dissuasive, proportionate and efficient. For the lawmakers in charge, this principle is more an obligation than a solicitation since proportionality, the effective protection of undistorted competition, the coherence of the law, and the economical use of public resources are fundamental legal principles which bind the legislature in its forming out details of the legal framework. Again, future review of the GeoBR must take this obligation seriously. The fragmentation of competition law into a set of core provisions (such as Art. 101, Art. 102 TFEU or the Vertical BER) and a multitude of surrounding or intersecting legal acts risks, as such, to undermine coherence of the resulting overall enforcement regime. Hence, the sanctions perspective adds an argument for a better integration of the GeoBR into the broader realm of competition law. Hopefully, negative effects on legal certainty, effective enforcement (including resource-effective dispute resolution), and appropriate deterrence are mitigated at least by a timely convergence between the Member States' GeoBR-sanction regimes.

### 3.3. Important overlap scenarios

[30] Beyond structural policy issues, it is important that traders and their business partners in the vertical chain of production and distribution know how the interaction between general competition law and the GeoBR plays out in paradigmatic constellations. This is all the more so in view of the special applicability regime for Art. 6 GeoBR: According to Art. 11(2) GeoBR, Art. 6 GeoBR will, starting from 23 March 2020, apply not only to agreements concluded *after* the GeoBR entered into force, but also to agreements concluded *before* 2 March 2018. Together with their legal counsel, traders and their business partners should use the time remaining until March 2020 for a review and, where necessary, adaptation of their vertical distribution agreements. Although many facets of the GeoBR-competition law-interaction are, as yet, undiscussed, the following section tries to propose guidance for at least some of them.

#### 3.3.1. Non-violation of the GeoBR but violation of Art. 101, Art. 102 TFEU (including secondary law)

[31] If a trading practice steers clear of the GeoBR but violates general EU competition law, it follows from previous reflection (see 3.2.3.1 above) that the GeoBR has no shielding effect and general competition law sanctions apply. Examples may be Union-wide price fixing between competitors (violation of Art. 101 TFEU), an excessive non-compete obligation across all poten-

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<sup>82</sup> BERNHARD, Die Geoblocking-Verordnung in der Praxis, NJW 2019, 472, 474.

<sup>83</sup> For Art. 3 GeoBR, see above 2.3.1. The Vertical Guidelines consider agreements obliging a distributor to block, reroute, or terminate initiated transactions with customers accessing an internet website from outside the distributor's assigned distribution area a restriction on passive sales and, hence, a hardcore restriction in the sense of Art. 4 Vertical BER, see Vertical Guidelines para. (52).

tial customer groups (violation of Art. 5(1)(a) Vertical BER), or an anticompetitive, Union-wide rebate scheme established by a market dominant undertaking (violation of Art. 102 TFEU). As to potentially discriminating practices by a market dominant undertaking, however, a finding of non-discrimination in the sense of the GeoBR could have a certain indicative value for the assessment under Art. 102 TFEU.

### 3.3.2. Violation of the GeoBR, justification under general competition law

[32] Imagine a practice that violates the GeoBR and seems also problematic from a general competition law perspective. Ultimately, though, general competition law considers the practice justified because of the individual circumstances of the case. One important example is the protection of investments for genuine market entry described in para. 61 of the *Guidelines on Vertical Restraints*.<sup>84</sup> Another is the *de minimis* rule in EU competition law which essentially stipulates that agreements or practices which are not capable of appreciably affecting trade between Member States or effective competition are not caught by competition law prohibitions, in particular not by Art. 101(1).<sup>85</sup> Even agreements containing a hardcore restriction in the form of a limitation on passive sales can sometimes fall under the *de minimis* exemption.<sup>86</sup> The GeoBR, however, contains no *de minimis* threshold, be it based on market shares, turnover or other criteria.

[33] In such cases, the complementarity rule (cf. 3.2.2) permits the practice to be sanctioned under the GeoBR, which results in a tightening of the overall competition law control.<sup>87</sup> It seems questionable, though, whether the harm caused by practices violating the GeoBR is so severe that it justifies jettisoning the levers of flexibility built into general competition law even for material restrictions of competition. Efficient allocation of enforcement resources; doing justice to unforeseen constellations; accepting (temporary) setbacks to statically efficient, unrestricted trade and competition in the internal market in the interest of dynamically efficient innovation<sup>88</sup> – these and other considerations underlying general competition law exemptions can be valid for the GeoBR context as well. Future review should, therefore, introduce more flexibility here.

### 3.3.3. Justification under general competition law, justification under/non-applicability of the GeoBR

[34] Since both under general competition law<sup>89</sup> and under the GeoBR,<sup>90</sup> restrictions affecting competition and trade in the EU-internal market are justified if necessary for complying with EU-

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<sup>84</sup> European Commission, *Guidelines on Vertical Restraints*, OJ 19. May 2010, C 130/01; RAFSENDJANI, *Die europäische Geoblocking-Verordnung und ihre Auswirkung auf Vertriebsverträge*, ZVertriebsR 2018, 210, 216 et seq.

<sup>85</sup> European Commission, *Guidelines on Vertical Restraints*, OJ 19. May 2010, C 130/01, para. 8.

<sup>86</sup> Cf. European Commission, *Guidelines on Vertical Restraints*, OJ 19. May 2010, C 130/01, para. 10; European Commission, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*, OJ 30. August 2014, C 291/01, para. 4.

<sup>87</sup> Rafsendjani, *Die europäische Geoblocking-Verordnung und ihre Auswirkung auf Vertriebsverträge*, ZVertriebsR 2018, 210, 216 et seq.

<sup>88</sup> On the concepts of static and dynamic efficiency, see Drexel: *Intellectual Property and Antitrust Law*, IIC 2004, 788.

<sup>89</sup> See, for instance, European Commission, *Guidelines on Vertical Restraints*, OJ 19. May 2010, C 130/01, para. 60.

<sup>90</sup> Art. 3(3), Art. 4(5), Recital (21) GeoBR.



or Member State law, the two sets of rules converge in this respect.<sup>91</sup> Similar in result, though different in legal structure, are cases in which a practice does not come within the scope of the GeoBR while general competition law applies but considers the practice justified. As an example,<sup>92</sup> the Vertical BER permits the restriction of sales by members of a selective distribution system to unauthorized distributors,<sup>93</sup> as well as restrictions to sell components to customers who would use them to manufacture the same type of goods as those produced by the supplier.<sup>94</sup> In most cases at least, such restrictions fall outside the scope of the GeoBR as neither the «unauthorized distributors» nor the manufacturing customers in the sense of the Vertical BER qualify as «end customers» in the sense of Art. 2(13) GeoBR.<sup>95</sup> Restrictions on buyers operating at the wholesale level of trade to sell to end users, however, are permitted under the Vertical BER<sup>96</sup> while potentially conflicting with the GeoBR, if the restriction is limited to end users in a particular region or otherwise discriminatory in a GeoBR sense.<sup>97</sup> If so, section 3.3.2 above applies and GeoBR sanctions can be imposed.

#### 3.3.4. Violation of both the GeoBR and general competition law

[35] Section 3.2.3.1 above has already discussed that the GeoBR and general competition law cumulatively apply to a practice that violates both sets of rules, resulting in cumulative sanctioning intricacies. Some internet distribution agreements provide a particularly conspicuous example for a double violation: The Vertical Guidelines consider agreements obliging a distributor to block, reroute, or terminate initiated transactions with customers accessing its internet website from outside the distributor's assigned distribution area a hardcore restriction on passive sales in the sense of Art. 4 Vertical BER.<sup>98</sup> Evidently, such practices are very likely to be prohibited by Art. 3 GeoBR as well.

[36] At least in Germany, the overlap between general competition law rules on market dominance and the GeoBR may even lead to their combined – as opposed to merely parallel – application: The German Bundeskartellamt has held, in its Facebook decision,<sup>99</sup> that – summarily speaking – contractual clauses constitute an abuse of dominance, if and because they violate the

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<sup>91</sup> RAFSENDJANI, Die europäische Geoblocking-Verordnung und ihre Auswirkung auf Vertriebsverträge, ZVertriebsR 2018, 210, 215 et seq.

<sup>92</sup> Cf. also RAFSENDJANI, Die europäische Geoblocking-Verordnung und ihre Auswirkung auf Vertriebsverträge, ZVertriebsR 2018, 210, 216.

<sup>93</sup> Art. 4(b)(iii) Vertical BER.

<sup>94</sup> Art. 4(b)(iv) Vertical BER.

<sup>95</sup> Similar RAFSENDJANI, Die europäische Geoblocking-Verordnung und ihre Auswirkung auf Vertriebsverträge, ZVertriebsR 2018, 210, 216.

<sup>96</sup> Art. 4(b)(ii) Vertical BER.

<sup>97</sup> RAFSENDJANI, Die europäische Geoblocking-Verordnung und ihre Auswirkung auf Vertriebsverträge, ZVertriebsR 2018, 210, 216, comes to a different result based on Art. 2(13) GeoBR, but the relevant market participant to which to apply the customer/end user criterion of this provision is the buyer/end user, not the wholesale retailer.

<sup>98</sup> See Vertical Guidelines para. (52); SCHMIDT-KESSEN, EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs And Benefits Of Partitioning EU's Internal Market, Copenhagen Business School Law Research Paper Series No. 19-05, 10, <https://ssrn.com/abstract=3311110>.

<sup>99</sup> Bundeskartellamt, 15. February 2019, B6-22/16 – Facebook, <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html>.

General Data Protection Regulation<sup>100</sup>. The same principle may apply where a dominant undertaking imposes contractual clauses violating the GeoBR.

## 4. Implications for Switzerland

### 4.1. Traders

[37] As seen, the GeoBR prohibitions apply to traders located outside the EU, as long as they transact with EU customers. Hence, Swiss undertakings trading with consumers or end-using firms in the Union may face sanctions or private enforcement litigation if they discriminate – in the sense of the GeoBR – against these customers. Business contacts sufficient to trigger GeoBR applicability can occur very easily and without much active contribution by the trader, for instance when an EU consumer unsolicitedly surfs to a Swiss trader's website. Furthermore, it can – as criticized before – pose great difficulties for a Swiss trader to determine whether the undertaking it is about to transact with qualifies as an end-user or not.

[38] In their wording, the prohibitions in Art. 3 et seq. GeoBR do not depend on which regional group of customers suffers or profits from a territorial discrimination. This could mean that a Swiss trader contravenes the Regulation by imposing different online interfaces or trading conditions on its EU and Swiss customers respectively, even if the interface/conditions for Switzerland are less favorable than those for EU customers. One might argue, however, over whether refusing EU customers access to conditions less attractive than those intended for them should – on a function and purpose level – really trigger sanctions under a Regulation intended to protect EU customers and EU-internal trade. Furthermore, a «customer» in the sense of Art. 2(13) GeoBR is one who seeks or receives goods or services «within the Union». It seems questionable whether this requirement is still taken seriously where an EU customer invokes differing (Swiss) trading conditions or online interfaces he/she could, even if territorial segmentation were torn down, access only by seeking goods/services *outside* the Union. Be this as it may, on the enforcement level at least it seems unlikely that such scenarios become a priority for EU agencies.

[39] In any case, for Swiss traders which cannot exclude EU business contacts and which are not willing to take the risk of GeoBR sanctions, it seems safest to refrain from territorial separation measures within the scope of the GeoBR.

### 4.2. Customers

[40] One man's sorrow is another man's joy – challenging as GeoBR compliance can be for Swiss traders, the Regulation may improve Swiss customers' access to favorable trading conditions. Swiss nationals resident in the EU, EU nationals resident in Switzerland, or Swiss undertakings having a branch established in the EU<sup>101</sup> are arguably entitled to invoke the GeoBR prohibitions directly by addressing themselves to a competent EU enforcement agency or – where possible – by

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<sup>100</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 4.5.2016, L 119/1.

<sup>101</sup> Cf. Art. 2(13) GeoBR.

suings a trader in court or taking other private enforcement measures. Swiss administration and customer protection entities may want to consider supporting Swiss customers in the attempt to enforce their rights under the GeoBR. But even Swiss customers lacking such a connection to the EU may have easier access to EU interfaces and trading conditions as some traders may give up territorial segmentation in general. Mind the reader that it can be risky for EU traders to continue discriminating – in the sense of the GeoBR – against customers they consider to be Swiss and, therefore, not protected by the GeoBR. How shall a trader know, for instance, whether a customer trying to transact from Switzerland is not an EU national?

### 4.3. Legislature

[41] Should the Swiss legislature enact law similar to the GeoBR? At least three parliamentary motions<sup>102</sup> have urged government to assess how to overcome trade barriers such as geo-blocking. The Fair Price Initiative (Fair-Preis-Initiative)<sup>103</sup> even requests the introduction of a new unfair competition law provision directed against online sales discrimination.<sup>104</sup> As said before (cf. 2.1.), geo-blocking may sometimes have a misleading component or be (partially) implemented through unfair general terms and conditions. Nonetheless, Art. 3(1)(b), Art. 8 of the Swiss Code against Unfair Competition (SCUC/UWG) cannot comprehensively tackle the entire range of problematic geo-blocking practices. It seems consistent, therefore, that neither the Fair Price Initiative nor the Official Communication on the Initiative and the Government Counterproposal<sup>105</sup> (hereinafter: *Faire Price Communication*) rely on these provisions. Whereas the Fair Price Initiative proposes an entirely new provision, the *Faire Price Communication* considers an application of Art. 2 SCUC, while remaining doubtful of the entire approach.<sup>106</sup> Since the elimination of cross-border competitive pressure by way of geo-blocking is, essentially, an antitrust issue (cf. 2.1.) and since the existing antitrust prong of Swiss competition law, namely Art. 5, Art. 7 of the Swiss Code on Cartels (KG), can be employed to tackle geo-blocking that involves an anti-competitive agreement or embodies an abuse of dominance, the two main arguments of the *Faire Price Communication*<sup>107</sup> are convincing. Nonetheless, Swiss competition law as it stands will fail

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<sup>102</sup> Motion 16.3499 «Task-Force digitaler Freihandel. Stopp dem Geoblocking», <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20163499> launched by Elisabeth Schneider-Schneiter (CVP); Motion 17.4227 «Geoblocking. Verpasst die Schweiz wieder den Anschluss? Task-Force zum digitalen Freihandel jetzt!», 15. December 2017, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20174227> launched by Elisabeth Schneider-Schneiter (CVP); Postulate 16.3375 «Den Parallelimport von Online-Inhalten zulassen», 02. June 2016, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20163375>, launched by Nantermod (FDP).

<sup>103</sup> On the Initiative and its history, see <https://www.seco.admin.ch/seco/de/home/wirtschaftslage—wirtschaftspolitik/wirtschaftspolitik/Wettbewerbspolitik/kartellgesetz/Fair-Preis-Initiative.html>; <https://www.fair-preis-initiative.ch/aktuell/>.

<sup>104</sup> Cf. Art. 197 Ziff. 12 e. eBV: «Der diskriminierungsfreie Einkauf im Online-Handel ist grundsätzlich zu gewährleisten, insbesondere durch eine Bestimmung gegen unlauteren Wettbewerb».

<sup>105</sup> Botschaft zur Volksinitiative «Stop der Hochpreisinsel – für faire Preise (Fair-Preis-Initiative)» und zum indirekten Gegenvorschlag (Änderung des Kartellgesetzes), 29. May 2019, <https://www.seco.admin.ch/seco/de/home/wirtschaftslage—wirtschaftspolitik/wirtschaftspolitik/Wettbewerbspolitik/kartellgesetz/Fair-Preis-Initiative.html>.

<sup>106</sup> *Faire Price Communication*, p. 23: «Ob der Einsatz von Geoblocking durch Unternehmen allenfalls gemäss der lauterkeitsrechtlichen Generalklausel (Art. 2 UWG) unlauter und damit unzulässig sein könnte, ist sehr fraglich».

<sup>107</sup> *Faire Price Communication*, p. 23, 47 et seq.

to address all forms of geo-blocking, especially unilateral conduct implemented by traders without market dominance. If Swiss trade and competition policy is set on eliminating geo-blocking even in settings for which the GeoBR and its enforcement appear unlikely to do the job, it will arguably have to legislate. Concerns over the cross-border enforceability of such legislation<sup>108</sup> may partially be mitigated by mutual enforcement cooperation with the EU since the EU should have an interest in an EFTA-wide ban on geo-blocking. In the realm of general competition law, at least, such concerns have not prevented Swiss authorities from (successfully) applying Swiss competition law to foreign undertakings.<sup>109</sup> Indeed, barrier-free trade and intense competition is no less important to Switzerland than to the EU. Given, however, the problematic aspects of the GeoBR, as well as its likely effect of reducing territorial segmentation not only in the EU but, factually, also regarding transactions with a Swiss component, withholding legislative action for the moment may be preferable at least over copy/pasting the GeoBR into Swiss law. In the coming years, first evaluations of the GeoBR (enforcement) should yield more solid empirical grounds for deciding on whether the legislature should take additional measures.

## 5. Summary and Outlook

[42] Barrier-free trade and intense competition in the Union-internal market is a goal worthy of great effort. As rigid territorial segmentation of online and offline trading risks to thwart this goal, the GeoBR is, in principle, a thrust in the right direction. The Regulation does have its weaknesses, however. Two of them, which have surfaced in this contribution, are the rules' rigidity on traders of all sizes and their lack of coherence with general competition law. Both deficiencies suggest a critical discussion about potential remedies, especially during the review processes for both general EU competition law on vertical agreements and the GeoBR.

[43] As a result of the evaluation of the Vertical BER and the Vertical Guidelines which is underway,<sup>110</sup> the Vertical Guidelines should try to reduce the burdening complexity of cumulative compliance requirements for businesses in the Union. At the very least, they could make clear and detailed references to the GeoBR where they interact with the Regulation.<sup>111</sup> The Vertical BER or Guidelines could declare compliance with the GeoBR a safe harbor regarding general competition law rules against territorial segmentation based on nationality or place of residence/establishment, such as the ban on passive sales restrictions through website blocking or rerouting described in the Vertical Guidelines. Competition law fines could be reduced by the amount of monetary sanctions under the GeoBR.

[44] On the part of the GeoBR, further economic and empirical research should be directed towards the question whether the Regulation's prohibitions are too rigid. In particular, a *de minimis* threshold and a lenient application of the «internal needs»-based end-user criterion regarding business customers could help to reduce cumulative compliance burdens for SMEs. GeoBR sanctions should be consumed by imposed general competition law sanctions. Economic research on differential pricing may show that some forms of territorial distinctions in general trading

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<sup>108</sup> Fair Price Communication, p. 47, 49.

<sup>109</sup> Cf., for instance, the *BMW* case, BGer, 24 October 2017, 2C\_63/2016.

<sup>110</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation_en).

<sup>111</sup> WOLF-POSCH, Anpassung der Vertikal-GVO an die Anforderungen des Online-Handels, NZKart 2019, 209, 214.

conditions are beneficial after all.<sup>112</sup> The Regulation's enforcement regime should urgently be structured in a fashion that is clearer, more homogeneous across the Union, and better aligned with general competition law enforcement. Transferring enforcement responsibility to competition agencies and integrating GeoBR sanctions in the overall grid of competition law sanctions and their enforcement might be one way to improve things.

[45] On the long run, an integration of the GeoBR's substance into general EU competition law seems worth considering. Competition law provisions on website blocking, rerouting, and passive sales restrictions in general, as well as the *Murphy* case-law on technical geo-blocking,<sup>113</sup> indicate that general competition law could develop a workable grid of rules for tackling detrimental territorial segmentation. As a result of these two measures, rather specific general competition law rules could address the conduct most harmful to competition, namely geo-blocking based on anticompetitive agreements or in combination with market dominance. For unilateral geo-blocking by non-dominant undertakings, additional provisions may well remain necessary, but they should form a more integral part of competition law, including enforcement and limitations.

[46] In any case, the GeoBR alone will not be able to overcome all segmenting barriers to cross-border B2C transactions in the EU. As long as the framework for such transactions, for instance in the form of legal rules or technical standards, differs substantially between Member States,<sup>114</sup> such divergence can generate its own geo-blocking effect. Given that EU law obliges the Member States to foster a competitive internal market, they ought to assess options for a further alignment of their pertinent legal and technical frameworks.

[47] As to Switzerland, tearing down territorial segmentation in their transactions is probably the safest way for Swiss traders which neither can nor wish to effectively prevent customer business with the EU. Swiss customers should be aware of, and actively use, their rights under the GeoBR. The legislature may prefer to wait until some data on the consequences of GeoBR application accumulate. If, based on these experiences, Swiss legislation appears necessary to fight geo-blocking, a creative approach probably yields better results than a mere copy/pasting of the GeoBR.

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<sup>112</sup> With regard to copyright, SCHMIDT-KESSEN, EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs And Benefits Of Partitioning EU's Internal Market, Copenhagen Business School Law Research Paper Series No. 19-05, 17, <https://ssrn.com/abstract=3311110>.

<sup>113</sup> On this aspect, see SCHMIDT-KESSEN, EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs And Benefits Of Partitioning EU's Internal Market, Copenhagen Business School Law Research Paper Series No. 19-05, 15, <https://ssrn.com/abstract=3311110>.

<sup>114</sup> Recital (3) GeoBR.